

**CITY OF OAKLAND
AGENDA REPORT**

OFFICE OF THE CITY CLERK
2006 JUN 15 PM 6:00

TO: Office of the City Administrator
ATTN: Ms. Deborah Edgerly
FROM: Administrative Hearing Officer
DATE: June 27, 2006

RE: A Public Hearing on the Appeal of the Administrative Hearing Officer's Decision to Deny the Application of Ms. Kim Ngo to Operate a Massage Establishment, New Beginnings Center at 4107 Broadway, and Adopting a Resolution Affirming Hearing Officer's Denial of the Massage Establishment Application

SUMMARY

On October 19, 2005 Ms. Kim Ngo applied to the Office of the City Administrator for a permit to operate a massage establishment, under the name New Beginnings Center, at 4107 Broadway. A public hearing on the application was conducted on December 1, 2005. No one appeared in opposition to the permit, but it was not issued at the time, as Ms. Ngo had not received the approval of the Building Inspector.

On February 2 and February 8, 2006, as part of an undercover investigation, Oakland Police Department (OPD) Officers reported being solicited for sex by two different New Beginnings massage therapists. On the basis of this investigation, OPD requested denial of the application.

A public hearing was scheduled for March 20, 2006. Based upon the preponderance of the evidence and the requirements of Oakland Municipal Code (OMC) Chapters 5.02 and 5.36 Ms. Ngo's application was denied. The Findings and Decision of Hearing Officer, which includes a summary of the hearing testimony, is provided as Exhibit A.

Pursuant to OMC section 5.02.100, any person excepting to the denial of a permit may, within 14 days of notification, submit a written appeal to the City Council. Ms. Ngo submitted a timely written appeal. The appeal is provided as Exhibit B.

FISCAL IMPACT

There is no fiscal impact to revoking this permit, other than the annual permit renewal fee of \$400.

Item: _____
City Council
June 27, 2006

BACKGROUND

As the Finding and Decision of Hearing Officer (Exhibit A) explains, a Conditional Use Permit (CUP) to operate a massage establishment at this location was denied in 1992. The decision was appealed and the staff report for Council indicated that there were a steady stream of crime reports involving prostitution since the inception of the business. The City Council upheld the Planning Commission's decision.

In 1999, Ms. Ngo took over the business and obtained a waiver of the requirement for a massage establishment permit, based upon a 'healing arts' exemption that existed at that time in OMC Chapter 5.36. That exemption was eliminated in amendments, enacted by the City Council in 2005, which required establishments operating under the exemption to apply for a massage establishment permit.

Special Activity Business permits, in general, are regulated by OMC Chapter 5.02. In prescribing the application process, section 5.02.060 directs that the City Administrator "shall consider the character of the applicant as respects morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public." The Hearing Officer found that Ms. Ngo's operation of the business encouraged the illegal activity that occurred on her premises. Ms. Ngo also believed that she could not, in some instances, and should not, in other instances, control this illegal activity. Ms. Ngo's actions and beliefs did not advance her character in respect to morality or integrity, and the results of her actions and beliefs were negative impacts on the health, safety, and general welfare of the neighborhood.

Massage Establishment permits are specifically regulated by OMC Chapter 5.36. In June of 2005, Chapter 5.36 was amended in response to community concerns that Oakland's permitting process should be a vehicle for validating legitimate practitioners of massage and not for authorizing prostitution or human trafficking. The amendments stress the responsibility of the business owner for establishing and maintaining a legitimate, crime-free massage establishment.

Section 5.36.010, Statement of legislative policy, states, "It is also the intent of the City Council that the person, business or entity holding a massage establishment permit be responsible for all activity that occurs on the establishment's premises whether the activity is offered or conducted by the business, the business owner(s), an employee, an independent contractor, an assistant, a sole practitioner, a lessee, sub-lessee or a separate business."

Section 5.36.150, Responsibility of owner(s) states, "Any violation of this chapter by a massage therapist, massage therapist trainee, operator, manager or employee on the premises of a massage establishment shall be considered also as a violation by the owner."

KEY ISSUES AND IMPACTS

Ms. Ngo's appeal lists 14 grounds on which the appeal is based. The grounds, as stated on her appeal are in bold typeface.

1. A Healing Arts Practice Exemption should still apply as Betty Sheppard who practices at New Beginnings does Reiki, hypo-therapy and metaphysical healing techniques.

Prior to 2005, OMC Chapter 5.36, the ordinance regulating massage establishments, provided an exemption for "persons holding an unrevoked certificate to practice the healing arts under the laws of the state. . . Healing arts shall include holders of medical degrees, such as chiropractors and medical doctors." New Beginnings obtained a massage establishment permit exemption under this provision. Because the exemption was eliminated by the June 2005 amendments to the chapter (Ordinance No. 12675 C.M.S.), it is not necessary to decide whether reiki, hpyo-therapy, and metaphysical healing techniques qualify as healing arts, whether state certification is provided for these techniques, or whether an exemption issued to one person would exempt others who did not practice these techniques. The exemption no longer exists, so it can no longer apply to New Beginnings.

2. Despite multiple requests for information that would be produced at the hearing we were only allowed access to police reports. No community complaints, citizen complaints or witnesses were provided to us. We, therefore, were not prepared for their complaints and testimony.

When OPD requested the denial of Ms. Ngo's application, they submitted information obtained from the internet site myredbook.com as well as police reports. These were also provided to Ms. Ngo. It is the nature and intent of a public hearing to invite and gather information from members of the community, without those members having to do anything more than just attend the hearing. At the hearing, both the Hearing Officer and Ms. Ngo heard, for the first time, the community's concern that prostitutes, who are not New Beginnings Massage therapists, utilize New Beginnings hot tubs for their illegal activity.

Pursuant to OMC section 5.02.090:

In such hearings, investigations, and inquiries by the City Manager or a Hearing Officer, he or she shall not be bound in the conduct thereof by the common law or statutory rules of evidence and procedure but inquiry shall be made in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the public parties and carry out justly the spirit and provisions of this chapter.

Residents are encouraged to attend the hearing and testify as to their experience, without providing prior notice to either the City or the applicant. Their testimony assists the Hearing Officer in fulfilling the mandate of OMC section 5.02.060, which mandates

consideration of “all pertinent acts which may concern the health, safety, and general welfare of the public.”

3. There were discrepancies in the officer’s testimony – differing from the police reports regarding rejections of solicitations; funds; and words of solicited acts.

Although Ms. Ngo does not give specific instances of testimony, at the hearing, Ms. Ngo was represented by counsel, Mr. Harry Traback, who questioned some of the evidence and testimony in these areas.

Regarding rejected solicitations, the police reports document that one of three therapists flatly rejected the Officer’s encouragement of ‘extra’ services. When asked by Mr. Traback whether therapist Ledra Smith used an excuse to not have sex by her February 2, 2006 statement to “come back next week”, OPD Officer Mario Bermudez replied, “I guess so.” However, on Feb. 10, therapist Smith not only told OPD Officer R. Taya to pay her \$60 for sex, but also signed a statement that, for nine years, she had been performing sex acts with customers for money.

Mr. Traback questioned why the amounts of marked money recovered from New Beginnings did not match the amount taken there minus the amounts paid for the services. Officer Bermudez explained that any number of things could have happened to part of the money, from providing change to someone else to buying a soft drink.

Mr. Traback objected to the fact that, in his police report, OPD Officer James Beere wrote that therapist Huyen Nguyen said “I will suck your dick, “ but in his testimony he said that therapist Nguyen said she would give him a blow job for \$100. Officer Beere responded that they are the same thing.

4. Solicitations for sex by the officers were, in fact, refused by masseuses.

As explained above, one of three therapists refused an officer and one said to come back in a week, at which time she offered sex for \$60 and later provided a signed statement that she has had sex with customers for money for nine years. Ms. Ngo’s appeal ignores the fact that the officers were led to New Beginnings and specifically to therapists Smith and Nguyen by reports of their performance from an internet site. The site allows customers of ‘massage establishments’ to describe and rate their experiences. Seven therapists from New Beginnings were listed on the site, with entries from 2001 to 2005. Two of the therapists listed on the site were “Candy” and “Michelle.” When the officers called New Beginnings they asked for appointments with Candy and Michelle, who were later identified as Ledra Smith and Huyen Nguyen. Officer Taya, who received the rejection from a therapist named Linda, had scheduled an appointment with Candy, but Candy was not available when he arrived. It was after his experience with Linda that Candy told him she would have sex with him for \$60.

5. Discrepancies in the amount of money supposedly transferred to masseuses were unexplained since the officers were surveilling the establishment the whole time.

At the hearing OPD Officer Mario Bermudez explained that it is common to lose marked money during an operation. The two possibilities mentioned above, change provided to another customer or money used for a soft drink would not have been detected by the officers, as their surveillance did not include hindering the comings and goings of customers or other therapists until the undercover officers had completed their assignments and exited the establishment.

6. Internet evidence was introduced from three to four to five years ago – well beyond the statute of limitations of misdemeanor conduct. There was also no explanation as to why this information wasn't investigated in 2001, 2002, or 2003. It is also unreliable hearsay without any identifiable source.

The internet evidence was not used to file charges against any therapist for the conduct described on the internet. During the hearing Officer Bermudez stated that he did not know why New Beginnings was not investigated earlier because he was not attached to the unit at that time. The internet evidence is clearly unreliable hearsay. However, it was not used as proof of any actions that were described in its content, but rather to provide the OPD officers with the inside 'code names' of therapists, so that they could obtain appointments. In that regard it proved to be reliable information. Although the last entry about 'Candy' (Smith) was made in 2001, she agreed to sex for money on May 10, 2006 and arguably on May 2, 2006, and admitted to having sex for money with customers for nine years. The entries describing 'Michelle' (Nguyen), the therapist who solicited Officer Beere on May 10, ranged from 2003 through 2005. The denial of Ms. Ngo's permit was not based upon past, unproven actions of her massage therapists, but was based, in part, upon the current actions of employees. The fact that the current actions validated the website information does not invalidate those current actions.

7. There was no evidence that Ms. Ngo, the owner participated in any way in the illegal activity or had knowledge of illegal activity.

Two types of illegal activity were discussed at the hearing. The most obvious activity and the one with the most negative impact on the residents is the use of the New Beginnings hot tubs by prostitutes and their clients. Although no one has accused Ms. Ngo of being a direct participant in illegal activity, her facilitation of this use could be considered aiding and abetting a crime.

It strains credulity to claim that Ms. Ngo had no knowledge of illegal activity. In response to the question of whether the same women were regular hot tub customers with different men, Ms. Ngo said that she did not see the same woman more than once a day. When asked whether she kept a record of customers, Ms. Ngo said that people don't always use their real names. Both responses indicate Ms. Ngo's awareness of activity that would cause a reasonable business owner to be suspicious and to take steps to ensure that the activity was not illegal activity. After hearing the testimony of the residents, Ms. Ngo's counsel agreed that 'any person with good sense' would conclude that the women are prostitutes or people engaged in sex with their male

companions. Ms. Ngo did nothing to discourage this use and, in fact, provided a safe, private environment for illegal activity.

The second type of illegal activity, and the one upon which the hearing was originally convened is the prostitution activity of Ms. Ngo's massage therapists. Ms. Ngo may not have prostituted herself, but, as the police reports indicated, her massage therapists felt free to offer sexual services for money. That Ms. Ngo turned a blind eye to the illegal activities of her therapists is evidenced by the fact that one therapist admitted to conducting prostitution activities for nine years at New Beginnings. Despite Conditions of Employment that specified sexual solicitation as grounds for termination, therapists could conduct their illegal activities without fear of exposure or reprisal, as Ms. Ngo, by her own admission, took no proactive measures to ensure that her therapists were not engaged in sexual solicitation.

Ms. Ngo should have known that the business at this location would require close monitoring to prevent illegal activity, due to its history. The prior owner's application for a CUP for a massage establishment was denied, according to the staff report, due to a steady stream of crime reports involving prostitution and prostitution arrests. These documents are a matter of public record, and would have been seen by Ms. Ngo if she did her due diligence when purchasing the business. A resident testified at the hearing that Ms. Ngo had retained the phone number from the prior business, 653-7822 or 653-RUBB, indicating no desire to change the image of the business.

When Chapter 5.36 of the OMC was amended in 2005, the importance of the owner's role was stressed in section 5.36.010, Statement of legislative policy.

It is the intent of the City Council that the person . . . holding a Massage establishment permit be responsible for all activity that occurs on the establishment's premises whether the activity is offered or conducted by the business, the business Owner(s), an Employee, an independent contractor, an assistant, a sole practitioner, a lessee, sub-lessee or a separate business.

8. Ms. Ngo – now aware of the complaints is willing to more actively participate in the business to curtail activities that are the subject of citizen complaints.

The extent and openness of the illegal activity that was the subject of resident testimony obviated the need for complaints to make Ms. Ngo aware of it. Ms. Ngo knew or should have known that what was occurring on her premises was, in all probability, illegal and taken steps to abate it sometime during her seven years of her ownership. That she did not call her character into question and provides no basis for believing that she would be proactive and aggressive in dealing with recurring or additional illegal or nuisance activity occurring at her business.

9. The hearing seemed to cater to the complaints of white people from Piedmont Avenue who complained about young black women dressed provocatively entering the premises with silver haired men.

A resident provided the above description as an example of a situation she witnessed first hand. The testimony is summarized at paragraph 31 of the attached Hearing Decision. All others who attended the hearing were afforded an opportunity to speak, and three other community members did so. None made the same reference described above. The hearing notice sent to Ms. Ngo explained that she could testify and provide evidence why her application should be approved and that she could bring others to testify on her behalf. She chose to have no one testify at the hearing.

10. The owner, Ms. Ngo, was never advised or warned previously about activities which could result in suspension or non renewal of her license.

Ms. Ngo holds a current massage therapist permit from the City of Oakland. That permit remains in force and is not the subject of this hearing. Nor has there been any request to conduct a hearing to revoke or suspend it. In regard to a Massage Establishment permit, Ms. Ngo has never obtained one for New Beginnings. Instead, she applied for and obtained a healing arts exemption. She applied for a Massage Establishment permit only when the healing arts exemption was eliminated. Therefore, she has no Massage Establishment permit to suspend or renew.

Ms. Ngo contends that she was not previously advised or warned about activities that could result in suspension or non-renewal of a permit, once issued. Since OMC Chapter 5.36 was amended in 2005, the Administrative Hearing Officer has made a point of explaining to every Massage Establishment permit applicant the responsibility that they have for all activity occurring on their premises, pointing out that OPD is working actively to ensure that Oakland's Massage Establishments are neither fronts for prostitution nor covers for human trafficking, and citing a 2005 Massage Establishment permit revocation based on the prostitution activity of two non-owner therapists. When this information was relayed to Ms. Ngo at her December 1, 2005 hearing, she replied that she tried but that you can't always control what happens.

Additionally, since the 2005 amendments, all applicants receive a copy of the ordinance and sign a statement that they understand and accept the duties and responsibilities. Ms. Ngo signed this statement on October 19, 2005.

11. Mr. Huajardo's testimony seemed less than credible. As each issue became a subject of discussion he would add a comment regarding that issue. His testimony was too convenient and contrived to be given credence.

Mr. Huajardo's main testimony, paragraphs 21 through 23 of the Hearing Decision related his own experiences of being solicited by prostitutes whom he would

subsequently see enter New Beginnings with someone else. The only other reference to Mr. Huajardo's testimony in the Hearing Decision is paragraph 58 in which he relays his wife's comments. The Hearing Officer found Mr. Huajardo's testimony credible.

12. Continued operation of the hot tubs was and is necessary to pay the rent. If massage is not allowed without the hot tubs New Beginnings would just be a building.

Only Ms. Ngo's application for a Massage Establishment permit is subject to the decision of this appeal. However, due to the public testimony regarding the hot tubs, the City's Nuisance Abatement Division served the property owner, Marilyn Grande,¹ a 30-Day Notice to Abate. The notice included the illegal activity and acts of prostitution occurring in the hot tub rooms. As of the writing of this report, Ms. Grande has responded and is in communication with the Nuisance Abatement Division. It is unknown whether either Ms. Grande or Ms. Ngo have taken steps to abate the illegal activity associated with the hot tub rooms.

13. To date there have been no arrests or charges much less convictions for anything listed as a disqualifying offense in Oakland Ordinance 5.36.020. The disqualifying offenses to be "committed" must show a conviction in a court of law otherwise they are mere allegations.

Convictions for disqualifying offenses are only one of the grounds for denial, suspension, and revocation of Massage Establishment permits. OMC section 5.36.290 prohibits any Massage Therapist from touching any patron's erogenous area before, during, or after any massage service. Ms. Smith admitted to nine years of performing this violation. OMC section 5.36.300 specifies that violations of the permitting or operating requirements and violations of permit conditions are grounds for revocation. Section 5.36.150 specifies that a violation of the chapter by a therapist is also considered a violation by the Owner.

To operate her business in a way that would result in revocation of a permit disqualifies Ms. Ngo as an applicant when the Hearing Officer considers "all pertinent acts which may concern the health, safety, and general welfare of the public." (OMC section 5.02.060.)

¹ Ms. Grande is also the owner of the former business, which was denied a CUP, as described in the response to appeal grounds number 8 above.

14. Ms. Ngo had done everything required to obtain a valid permit (5.36.080). She paid her fees and made application appropriately (5.36.090) Her employees were properly trained and screened (5.36.260) All physical requirements were satisfied (5.36.100)

As the Hearing Decision explained:

Decisions on Special Activity permits issued by the City Administrator's Office are based on more than lack of criminal convictions and completion of the paperwork and building inspections. Pursuant to OMC section 5.02.060, 'In granting or denying [a] permit . . . the City Manager . . . shall consider the character of the applicant as respects morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public.'

The evidence shows that Ms. Ngo has either failed to notice or failed to take action on obvious illegal activity that has been conducted on her premises and that has had significant negative effects on the health, safety and welfare of the residents and businesses of that neighborhood. In doing so, she has also established an environment in which massage therapists in her employ have been free, for many years, to engage with customers in sexual activity for money. Her efforts to eliminate this activity have been minimal, both prior to and following the February 8th police action. By her own admission, Ms. Ngo actually believes she should not, in some instances, and cannot, in other instances, control this activity. This is exactly the type of activity that Oakland's Massage ordinance was enacted to eliminate. If Ms. Ngo is not willing or able to control such activity, she should not be operating this kind of business at this location.

15. The search warrant was constitutionally defective relying on prospective criminal activity for its issuance. Evidence produced from its service should not have been considered.

As the Hearing Officer explained to Ms. Ngo, public hearings are not criminal trials. If Ms. Ngo were to be indicted for criminal activity in this case, she could make the above argument in criminal court.

The solicitation of undercover officers by Ms. Ngo's therapists provided evidence of illegal activity and a basis for denial of her application. No search warrant was needed for the officers to make appointments with the therapists.

As explained in the Hearing Decision, another basis for denial of Ms. Ngo's application is her long-term failure to take action regarding activity that was visible to the casual observer. No search warrant was needed. That failure not only negatively affected the quality of life in the surrounding neighborhood, but also set a climate in which prostitution by both employees and customers was ignored. Her facilitation of customer prostitution and turning a blind eye

to employee prostitution reflect on her character as respects morality and integrity. They are acts and omissions that concern the health, safety, and general welfare of the public. They are grounds for denial of a permit application.

16. The hearing was rife with untrustworthy hearsay evidence and opinions and conclusions without foundation.

Pursuant to OMC section 5.02.090, no decision shall be invalidated because of the admission into the record of any evidence not admissible under the statutory rules of evidence and procedure. Although the hearings are not bound by the rules of evidence, the most persuasive evidence was the personal experience and first hand testimony of Officer Beere and the three residents.

SUSTAINABLE OPPORTUNITIES

Economic

The denial of this permit impacts the revenues gained by the City through the payment of the operation's business taxes.

Environmental

There are no environmental impacts of denying this permit.

Social Equity

New Beginnings is located in a mixed commercial and residential neighborhood where many small children reside and where numerous school-age children walk to the three neighborhood public schools or wait for the buses that take them to school. Even Ms. Ngo's counsel admitted that the illegal activity described by credible resident testimony did not provide "the most wholesome environment." One of the responsibilities of government is the protection of children in the "most wholesome environment" feasible. Denial of the permit will improve the environment in which the neighborhood children conduct their daily activities.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no disability or senior citizen access issues involved in the denial of this permit.

RECOMMENDATION AND RATIONALE

The Administrative Hearing Officer recommends that the City Council uphold the denial of Ms. Ngo's application for a permit to operate a massage establishment at 4107 Broadway. Ms. Ngo has been operating the business in a way that encourages the illegal activity conducted by both the massage therapists whom she employs and the customers who frequent her hot tubs.

Credible testimony was given by several residents regarding the ongoing solicitations for prostitution that occur in the neighborhood because New Beginnings provides private hot tubs

Item: _____
City Council
June 27, 2006

where the prostitutes can take their clients. Ms. Ngo has actively facilitated this activity, which residents say has worsened in the past few years.

Internet information regarding sexual services offered by the employees spans the years of 2001 through 2005, with comments and ratings provided on seven of Ms. Ngo's therapists. The two police solicitations in 2006 testify to its continuance. Ms. Ngo has been the operator of the establishment this entire time and either knew or should have known of the activity. At a minimum, she knew that her facilitation of the private hot tub use established a permissive environment in which the therapists could expect their illegal behavior to be ignored. Ms. Ngo confirmed their expectations, by never taking any action to monitor her therapists.

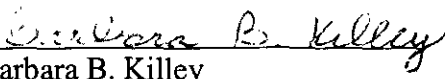
The amendments to OMC Chapter 5.36, passed by the City Council in June 2005, were intended to validate professional massage and to eliminate establishments, such as New Beginnings, that use massage as a cover for illegal activity. As the owner of the business, Ms. Ngo was responsible for operating in a manner in which her employees knew that illegal activity would not be tolerated and street prostitutes knew that they could not expect privacy and coverage for their illegal activities. Assuming from the record of the prior business that illegal activity was the norm, Ms. Ngo had at least six years to change the operation, and she failed to do so.

Had Ms. Ngo been the holder of a massage establishment permit, her operation of the business and the actions of her employees would have been grounds for revocation of the permit. As an applicant, Ms. Ngo should be denied on the basis of her character, as respects morality and integrity, as well as actions that concern the health, safety, and general welfare of the public. (OMC section 5.02.060)

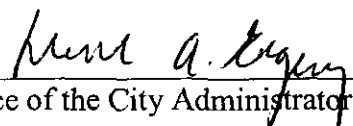
ACTION REQUESTED OF THE CITY COUNCIL

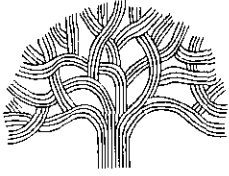
The Administrative Hearing Officer requests that the City Council adopt the resolution affirming the Hearing Officer's decision and upholding the denial of Ms. Ngo's application for a permit to operate a massage establishment, New Beginnings, at 4107 Broadway.

Respectfully submitted,


Barbara B. Killey
Administrative Hearing Officer
Office of the City Administrator

APPROVED AND FORWARDED TO THE
CITY COUNCIL


Office of the City Administrator



CITY OF OAKLAND

1 FRANK H. OGAWA PLAZA – OAKLAND, CALIFORNIA 94612

Office of the City Administrator
Barbara B. Killey
Administrative Hearing Officer

(510) 238-2257
FAX: (510) 238-7084

April 17, 2006

**FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT
APPLICATION OF NEW BEGINNINGS CENTER, 4107 BROADWAY**

INTRODUCTION

In 1992, Marilyn Grande, owner of the Sunshine Spa massage business at 4107 Broadway, applied for a Conditional Use Permit (CUP), as was required by Oakland's zoning regulations between the years of 1976 and 2005. The record from the CUP proceedings indicates that the business had existed since 1974 and that Ms. Grande had taken over the business in 1979. The Planning Commission denied the CUP application and Ms. Grande appealed the decision to the City Council. The staff report prepared for the Council indicated that, since the inception of the business, there had been a steady stream of crime reports involving prostitution and prostitution arrests, the most recent of which were unlawful massages given to undercover officers on two separate occasions in November of 1992. The City Council upheld the Planning Commission's decision.

Until 2005, Oakland Municipal Code (OMC) Chapter 5.36, Oakland's ordinance regulating massage establishments, provided for several exemptions from the requirement for an establishment to obtain a Massage Establishment business activity permit. One of these exemptions was for holders of unrevoked certificates to practice healing arts under the laws of California. Some time after the CUP denial, the City's Administrative Hearing Officer granted a healing arts practice exemption to Bettye Sheppard, for a business named New Beginnings Center at 4107 Broadway. When an exemption from the Massage Establishment business activity permit was granted, the CUP requirement no longer applied.

A letter notifying the City of changed circumstances was sent by Ms. Sheppard and Ms. Hoang Kim Ngo, reporting that Ms. Ngo had operated the business since 1999 and that Ms. Sheppard only works there about 40 hours per month. By letter dated February 24, 2004, the Hearing Officer gave notice that a hearing would be scheduled to determine whether, in view of the changed circumstances, the healing arts exemption was still valid. There is no indication that a

EXHIBIT A

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

hearing was conducted, but a March 22, 2004 letter from the Hearing Officer to Ms. Ngo extended the exemption to Ms. Ngo on the basis that Ms. Sheppard “has trained all therapists in Reiki, hypno-therapy, and metaphysical healing techniques.”

In June of 2005, OMC Chapter 5.36 was amended in response to community concerns that Oakland’s permitting process should be a vehicle for validating legitimate practitioners of massage and not for authorizing prostitution or human trafficking. The healing arts exemption was eliminated. Concurrent with the amendment of Chapter 5.36, the Zoning Code was amended to eliminate the CUP requirement for massage establishments.

Ms. Ngo applied for a massage establishment permit on October 19, 2005. On the application Ms. Ngo states that she has owned New Beginnings since August 1, 1996. She also states that the owner of the property is Marilyn Grande.

A public hearing on the application was conducted on December 1, 2005. No members of the public appeared to testify either in favor of or against the application. No decision on the permit was made at the hearing due to the lack of approval by the building inspector. As with all applicants, the Hearing Officer counseled Ms. Ngo on the intent of the amendments to Oakland’s ordinance and the diligence she must exercise to ensure that her business is not used as a front for prostitution or human trafficking. The Hearing Officer explained that the ordinance holds owners responsible for the activities that occur on their premises and that the Oakland Police Department is actively enforcing this ordinance.

In a letter to the Hearing Officer dated December 28, 2005, the Piedmont Avenue Neighborhood Improvement League (PANIL), explained that, because notice of business activity permit hearings are posted only in the Oakland Tribune and the City Clerk’s bulletin board, neighboring businesses and residents were unaware of the December 1 hearing. PANIL objected to the issuance of the massage establishment permit on the grounds that the sexual services activity, for which the CUP had been denied, has continued through the ownership changes and was ongoing. The letter noted that, although the business has changed hands, the building is still owned by Ms. Grande, who remains an active presence at the business, and that employees of the Sunshine Spa continued to be employees of New Beginnings.

On February 2, 2006, and February 8, 2006, as part of an Oakland Police Department (OPD) investigation of New Beginnings, undercover officers scheduled massages at New Beginnings. Two of the three officers reported being solicited for sex by the two different New Beginnings Massage therapists.

On the basis of the two February crime reports, the Oakland Police requested the denial of Ms. Ngo’s application. In addition to the crime reports, OPD submitted to the Hearing Officer reports from a website, myredbook.com, in support of their request. A public hearing was scheduled for February 23, 2006. Ms. Ngo’s counsel, had a conflicting commitment on February 23, and the hearing was rescheduled to March 20, 2006. Present at the hearing were Kim Ngo, owner of New Beginnings; and Harry Traback, counsel for Ms. Ngo. Representing the City were Officers Mario Bermudez and James Beere of the Oakland Police Department. Paul Brekke-Meinsner, Neighborhood Services Coordinator, was present from as City of

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

Oakland staff. Representing the community were David Huajardo, Leslie Wood, Valerie Winemiller, and Anna Schooley.

HEARING TESTIMONY

1. Officer Mario Bermudez testified as follows in paragraphs 1 through 10. He has been assigned to the Vice Crimes Team for the last 3 year. During that time he received numerous complaints about New Beginnings Massage Parlor, alleging possible prostitution.
2. On Feb. 2, 2006 he organized an operation in which an undercover officer went to New Beginnings to attempt to solicit sexual services. Officer Rodney Taya paid for a half hour massage and was subsequently solicited for a sex act in exchange for money. No one was arrested because the investigation was ongoing, but, based upon the incident, he was able to obtain a search warrant for New Beginnings.
3. On February 8, 2006, undercover officers Beere and Taya were sent to New Beginnings. The therapist who solicited Officer Taya for sex on Feb. 2 was not there when they arrived. Huyen Nguyen solicited Officer Beere to have a sex act in exchange for money.
4. Numerous amounts of evidence including money, condoms, videotapes, and some sexually explicit clothes were recovered. It is part of police procedure in such operations to clear all of the rooms. In one of the hot tub rooms, which was closed but not locked, they observed a couple in the hot tubs engaged in sex. One of the persons engaged in sex in the hot tub also had ecstasy pills.
5. No one was arrested, but Ms. Nguyen was cited for prostitution and a warrant has subsequently been issued for her arrest. Ms. Nguyen was not arrested at the time because she was pregnant, and the officers did not think it fit to incarcerate a pregnant woman.
6. On March 16, 2006, Ms. Ngo's counsel, Mr. Harry Traback, submitted a letter to the Hearing Officer, outlining several areas of concern, including the amounts of marked money recovered not matching the amount given Ms. Nguyen. In response to this concern, Officer Bermudez stated that both Officer Beere and Officer Taya went in with marked money. He does not know how all of the recovered money ended up in Ms. Nguyen's purse, but it did.
7. In response to Mr. Traback's question whether all the condoms were recovered from public areas, Officer Bermudez responded that one unused condom was recovered in the women's bathroom, but two were recovered from the kitchen hallway, which is not a public area. There were also a lot of used condoms in the trash can, which were photographed but not recovered.
8. In response to Mr. Traback's question whether Ms. Smith used an excuse to not have sex by her statement on Feb. 2 to "come back next week", Officer Bermudez replied, "I guess so."
9. In response to Mr. Traback's question of why there was only \$200 recovered when \$220 was given to the two therapists, Officer Bermudez explained that any number of things could have happened to part of the money, from providing change to someone else to buying a soft drink; that in any business there are transactions that can remove money from the premises.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

10. In response to Mr. Traback's question about how the money is marked, Officer Bermudez replied that the pictures of the money are taken before the operation, so all serial numbers are known. When money is recovered it is matched to the photographed money, but it is not uncommon that all of the money is not recovered.
11. Officer James Beere testified as follows in paragraphs 11 through 15. He is an Oakland Police Officer assigned to the Special Victims Unit. He recently received an assignment as an undercover officer for the Vice Crimes Unit. On Feb. 8, 2006, at approximately 6:30 p.m. he was working for Officer Bermudez who had briefed him and told him to make an appointment with "Michelle", whose real name is Huyen Nguyen. He made the appointment. When he arrived, he rang the doorbell. There was a security screen and the door behind that was open. A female Asian who looked like the woman sitting in the back of the Hearing Room (Officer Beere indicated Ms. Ngo) answered the door. She asked what he wanted and, when he told her he had an appointment with Michelle, she escorted him down the hall to the last massage room on the left. He paid her \$45.00 in 3 \$20.00 bills, for the half hour massage. She gave him a \$10.00 bill and a \$5.00 bill in change.
12. After about 15 min. a female Asian came in and introduced herself as Michelle. He recognized her as "Michelle" from the picture shown him by Officer Bermudez. She said that she didn't know him and asked how he came to know of her. He told her he had been referred by Robert, with whom he worked at a construction company. She asked a couple other leading questions, which is very common when he is working narcotics or vice. She then told him that she had to take a shower, and she left the room.
13. Michelle came back from her shower and they made small talk about how she had come from Vietnam, didn't work anywhere else, and liked it at New Beginnings. She gave him his massage, and got on top of his back and cracked it.
14. She then asked in a low tone, "What do you want?" She motioned to his penis and pointed to her mouth in a way that made Officer Beere believe she was offering a blow job and that it was a pretty common practice. He said that he wanted sex, and she said that she couldn't have sex at that point. He asked how much for the blow job, and she answered "\$100.00". She told him that for \$100.00 she would give him a blow job and do 69 on him. He said "Sure", walked back to his pants, got the money, and gave it to her. She asked him to get back on the table. He asked her to undress. As he was getting on the table, she was completely naked. As she began to get on the table, he told her he couldn't do it. She asked why and he said that she was pregnant and his wife was pregnant, he felt really guilty, and it wasn't going to work. He got his clothes on and, as he was exiting the room, she was giggling and told him, she wasn't going to have sex with him, just a blow job. He said "no, I can't do any of that stuff."
15. He left the massage parlor and signaled Officer Bermudez and gave him the go-ahead signal, but the team did not immediately enter the establishment because Officer Taya was still there.
16. Mr. Traback pointed out that Officer Beere's testimony was a little different than the police report. In the police report, Officer Beere states that Michelle said, "I will suck your dick," and he did not mention that in his testimony. Officer Beere responded that a "blow job" is the same as "sucking your dick".

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MESSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

17. In response to a question from Neighborhood Services Coordinator, Paul Brekke-Meisner, Officer Bermudez testified that there is no public access to the trash cans where the condoms were found.
18. Officer Bermudez testified that OPD took a statement from Ledra Smith, in which she admits that, throughout the nine years of her employment with New Beginnings, she has been having sex with customers in exchange for money. She stated that she charged \$60.00 to \$80.00 for sex, \$40.00 for a hand job and \$60.00 for a blow job.
19. In response to a question from Mr. Traback why something had not been done in 2001 or 2003, the years of the entries regarding "Candy" from myredbook.com, Officer Bermudez testified that he was not in the unit at that time and could not answer for the rest of the department. In response to a follow-up question from Mr. Traback regarding how that site is paid for, Officer Bermudez testified that it is paid for by customers of the site.
20. In response to a question from Mr. Traback whether Ms. Smith indicated Ms. Ngo ever had any knowledge of what she was doing, Officer Bermudez said that Ms. Smith did not say Ms. Ngo had knowledge of it.
21. David Huajardo testified as follows: He has lived right across the street from New Beginnings for 4 ½ years, and almost every weekend he is solicited for sex by prostitutes. He does not want this in his neighborhood. He has a hard time believing that they are a legitimate business, because his wife is a massage therapist, and she's never worn scantily clad outfits or hit the streets to get customers. Last Saturday, he was doing his laundry at the Laundromat, which is also across the street from New Beginnings, around 8:00 at night. A woman asked him if he wanted some "fresh meat," which is one of the street descriptions for prostitution. Mr. Huajardo believes that New Beginnings attracts a bad element to their neighborhood.
22. In response to a question from the Hearing Officer about whether he had seen the women who solicit him go into New Beginnings, Mr. Huajardo replied, "Yes, I have."
23. Mr. Traback asked what kind of nexus there was that Mr. Huajardo thought could be controlled by Ms. Ngo. Mr. Huajardo testified that the women are scantily clad, as though it is summer all year, that they go into New Beginnings with a man who they picked up on the street, after a brief conversation with that man. He also sees countless construction workers and men from Southern Pacific Railroad go into New Beginnings alone. Mr. Huajardo said "It doesn't take too much to put it all together. When people come out of that place they are arguing and making loud noises late at night."
24. Leslie Wood testified as follows in paragraphs 24 through 25: Since 1983, she has had a sign-making business a couple of doors up from New Beginnings at 4119 Broadway. While she has a cordial relationship with Ms. Ngo, her sign business customers are asking her if New Beginnings is a legitimate business, and they are voicing discomfort. She has not had a complaint until the last couple of years. There has been a huge increase in the number of men there with women that don't seem like a fit. The men are construction workers or men dressed very well with Jaguars or other very expensive cars with women who don't look to be their partners. She has noticed that the women are largely African American and scantily dressed.
25. This activity is very common on Friday evenings. One particular evening, a man jumped another man coming out of New Beginnings and beat him in front of Ms. Wood's shop. She asked the man who was doing the beating what was going on and he

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

said "He didn't pay her, indicating a woman sitting in front of New Beginnings who had just been with him in there. Ms. Wood took the man who was beaten into her shop and cleaned him up. They called 911, but he refused to press charges. This was a real eye opener for Ms. Wood, who is concerned for both her customers and herself. Ms. Wood talked with Ms. Ngo, who said she also had been attacked at the establishment several months earlier. Ms. Ngo voiced a concern to Ms. Wood that she could not control who came there from other parts of the area.

26. In response to a question from Officer Beere whether, when Ms. Wood went to New Beginnings to talk with Ms. Ngo, the security screen was always locked and whether she had to be buzzed in, Ms. Wood answered in the affirmative. Officer Beere commented that it looked like Ms. Ngo had control over who she admitted.
27. Valerie Winemiller testified as follows in paragraphs 27 through 32: She is with the PANIL Steering Committee and has done her laundry at the Laundromat across the street for 25 years. There are 2 other members of PANIL who are at the hearing in support of the police but are not going to speak.
28. She had been involved in public response to the 1992 CUP application of the previous owner. Ms. Grande's permit was denied, which forced her to sell the business. Although the City denied the permit to Ms. Grande because of prostitution activity, when New Beginnings took over the business, they kept the same phone number, which spells out RUBB, which does not project a professional therapeutic massage image. At the 1992 hearing, an employee of the Lafayette location of the Sunshine Spa testified very graphically regarding what customers who had previously been to the Oakland location expected the employees to perform.
29. Ms. Winemiller stated that the current business owner should have understood what was going on there, why they were able to buy that business and that, "If you don't want that to continue, you make it harder for people to find you – you don't just change your name, you change your phone number."
30. Ms. Winemiller testified that perhaps OPD had not known about the myredbook.com reports prior to this application. She had the reports and had just kept them in a file, until the current application came up, at which point she sent them to OPD. There was a great deal of frustration in the neighborhood about the inability to stop the massage activity, and Ms. Winemiller didn't feel there was a venue for bringing the information forward until this application came up. Many of the people who know most about this situation are unwilling to testify for a number of reasons, including feeling vulnerable and not being willing to risk retribution. In the course of talking to people about this hearing, several employees and business people described the regular parade of women who arrive in vehicles with men, pull into the 7-11 or laundromat parking lot, money exchanges hands, and the woman crosses the street and rings the doorbell at New Beginnings. When she is buzzed in, she signals the man, who leaves the parking lot, presumably to park in the neighborhood, because shortly thereafter he is seen going into the business.
31. A couple of months ago when doing her laundry, Ms. Winemiller saw a young African American in mini-skirt and spiked heels with a silver-haired, well dressed man. The woman rang the bell, and they waited for the door to be answered, the man shifted on his feet and looked around nervously.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

32. PANIL fully supports the police recommendation to shut this business down. They are concerned about the people from the outside who come in to use the hot tubs. It is a completely different set of pairings than the people you see going into Piedmont Springs, which has clear glass windows, that discourage the type of activity being talked about today.
33. Anna Schooley testified that she is a teacher who has lived in the neighborhood since August, 2005. She came to support OPD. She has friends who are trained as legitimate massage therapists, and part of their training is how to reject sexual advances while giving massage. She doesn't want this establishment in her neighborhood.
34. Harry Traback testified on behalf of Kim Ngo as follows in paragraphs 34 through 43. He was a DA for 10 years and has been a private criminal defense attorney for 25 years. This is the first time he has appeared at an administrative hearing.
35. He has known Kim for a number of years, not in a criminal defense capacity. She has owned businesses in Oakland for 23 years and has never had this kind of trouble. She has not been arrested, and all of her employees have been background checked, as required by the Oakland ordinance.
36. If some of these things had been brought to her attention 3 or 4 years ago, she could have addressed it. Ledra Smith's employment has been terminated because of this, and Ledra indicated to Officer Bermudez that Kim did not know what was going on.
37. The hot tubs seem to be the primary source of concern of the neighborhood, with provocatively dressed African American women bringing silver-haired men to New Beginnings, apparently to use the hot tubs. That they are prostitutes or people who are engaged in sex with these men seems to be a conclusion that any person with good common sense would derive.
38. Mr. Traback asked several questions: Should a motel owner in the same position reject a couple who is attempting to obtain a room? If the couple goes into a hot tub room that is private, how is New Beginnings supposed to regulate that? Aren't they supposed to rent a hot tub room to people who present the image the neighbors are talking about?
39. Ms. Ngo has done everything in a correct manner, including obtaining the proper licenses and having the therapists properly permitted.
40. Mr. Traback hired an investigator to talk with many people in the neighborhood. The investigator's report, submitted under penalty of perjury, listed only one complaint about New Beginnings, indicating lack of support for the anonymous complaints mentioned by Officer Bermudez.
41. The people who are soliciting the neighbors are not employees of New Beginnings. OPD, if they know about this problem, can resolve this by doing a street operation.
42. From the point of view of a criminal defense attorney, Mr. Traback is concerned about the legitimacy of things that don't match up, such as the amounts of money and how Officer Beere described his experience in the police report compared to how he described it in his testimony. Evidence like myredbook.com is difficult to identify, to know whether it is valid and whether it should be given any credence. There is no link between the things in redbook and Ms. Ngo's application.
43. Ms. Ngo has been a responsible hard-working citizen, with no previous history of criminal involvement, that she operated another massage parlor in the City of Oakland, the Spa, and it never had any problems. She has done everything she is supposed to do.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

If she is given some kind of guidance as to how to control what is going on outside of her business, she would address that.

44. In response to the Hearing Officers question why the girls are known as different names, Mr. Traback said he believed the Vietnamese girls do it because their names are hard to pronounce, but he had no idea why Ledra Smith would call herself Candy.
45. In response to the Hearing Officer's question whether New Beginnings should make any judgments about what the customers are coming to do, Mr. Traback stated that it would be very difficult for a business owner, particularly in a diverse city like Oakland, to make that judgment on racial characteristics or age. In regard to the other characteristics, such as provocative dress, Mr. Traback said he did think businesses have some responsibility but not in regard to dress or who customers are with.
46. In response to whether Ms. Ngo was seeing the same women as regular customers, Ms. Ngo relayed to Mr. Traback that she did not see the same woman more than once a day. Mr. Traback relayed the Hearing Officer's question whether Ms. Ngo kept a record of customers, Ms. Ngo said that people don't always use their real names.
47. In response to the Hearing Officer's question whether healing arts were still being practiced there, Ms. Ngo stated that Ms. Sheppard still came in as a contract employee to do this, but that the other therapists do not.
48. In response to the Hearing Officer's question whether Ms. Ngo is taking any proactive steps to help ensure that prostitution not occur, Mr. Traback stated that, after Ms. Wood brought the beating to her attention, Ms. Ngo installed cameras so that New Beginnings could see what was going on outside. There is no screening of customers but there are Conditions of Employment for employees. She has no control over people bringing in drugs and no control over what goes on in private rooms.
49. In response to the Hearing Officer's question whether Ms. Ngo does anything to monitor the therapists, no answer was given. Ms Ngo suggested she could record in the rooms. Mr. Traback originally opined that it would be illegal, but then said that maybe it would be ok if the recording was disclosed to the customers.
50. In response to Officer Beere's question whether New Beginnings was in a residential area, Mr. Traback responded that it appeared to be mainly commercial, with only a few apartment buildings. Officer Beere asked how it compared to the location of The Spa. Mr. Traback said The Spa was in a completely commercial area.
51. In response to a question regarding the investigator's methods, Mr. Traback said the investigator is a former police officer, who did his report under penalty of perjury and put in whatever negatives he found. Mr. Traback conducted this investigation in response to the charge of numerous complaints, and they were unable to get any more specifics on the complaints.
52. In response to Mr. Brekke Meisner's question whether this was the kind of place that should be near several schools and where hundreds of children take the bus, Mr. Traback said, if there is apparent prostitution going on, it is probably not the most wholesome environment for anyone, but he had not heard anyone suggest it was a problem.
53. In response to the Hearing Officer's question regarding the status of Ms. Nguyen, Mr. Traback stated that he would have asked Ms. Nguyen to testify, but she has just had her baby, and that Ms. Ngo is considering her status. She is not currently working due to having the baby.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

54. In response to the Hearing Officer's question why Ms. Ngo tried to leave when the OPD team went in, Ms. Ngo replied through Mr. Traback that it was her day off. She had just stopped in momentarily, approximately 5 minutes, to pick up information about her building inspections for the massage establishment application and was just on her way out when the police came in.
55. Ms Winemiller testified that she was concerned about the representation being made that businesses questioned by Mr. Traback's investigator had no problem with New Beginnings being in the neighborhood. The neighborhood had experienced the same thing during the proceedings with the Sunshine Spa, and when questioned by the neighborhood organization, businesses indicated that they remembered being approached by the investigator and that, while they may not have called the police, that did not mean that they supported New Beginnings being in the neighborhood. Ms. Winemiller asked if she could have a copy of the list, so that she could have an opportunity to confirm the validity of the responses.
56. Officer Beere testified that, in contradiction to Ms. Ngo's statement that she had only come in for 5 minutes to pick something up, she was the person who granted him access to the building, escorted him to the massage room, took the money for the massage, and, when he left, some 45 minutes later, she was still there.
57. Officer Bermudez testified that Ms. Ngo was running out the side door, not walking, and one of the officers grabbed her.
58. Mr. Huajardo testified that, his wife is at home all day, and although she cannot be here tonight because she is watching their children, she has told him that the type of activity that indicates a "place of ill repute" is going on all day from the time that New Beginnings opens, not just at night.

ADDITIONAL EVIDENCE

Prior to the hearing the Hearing Officer received the following submissions:

1. The Piedmont Avenue Neighborhood Improvement League submitted a letter of objection to the current application and copies of the record from Sunshine Spa's 1993 application for a Conditional Use Permit and the League's objection to it.
2. Harry Traback submitted a letter raising several issues in regard to the application including that: (summarized)

No employee has been convicted of any of the alleged offenses.

Ms. Ngo has done everything required to obtain a valid permit.

The business is in a commercial area with no schools, libraries, or youth centers nearby.

Conviction of a disqualifying offense should be the standard for denial.

The complaints alleged by the police are anonymous and unsubstantiated.

His investigator found no neighboring businesses or residents with a complaint.

The evidence obtained on Feb. 8 does not implicate Ms. Ngo.

Ms. Nguyen denies agreement to any sex.

The money recovered does not match the transactions listed in the police report.

The drugs found on a hot tub customer are not the responsibility of Ms. Ngo.

Ms. Smith has been a responsible employee, and she is adamant that Ms. Ngo knew nothing of her activities and did not share in the profits.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

Mr. Traback also submitted a sworn statement from a private investigator listing 12 businesses and 2 residents with whom he spoke, who had seen no problems with New Beginnings. One business described problems they had seen and stated their objection to New Beginnings being in the neighborhood.

3. The Oakland Tech High School PTSA submitted a letter supporting OPD's request for denial of New Beginnings permit on the basis of allegations of sexual solicitation at an establishment that is two blocks from the school and that many of their students, as well as students of Carter Middle School and Emerson Elementary School pass by each day.
4. Archway School, a private K-8 school "around the corner" from New Beginnings, sent an email recommending denial of the permit on the grounds that "it has been a long-term source of nuisance activity."
5. Emails from 3 residents, C. Vierra, B. Naiditch, and L. Bell, supported denial of the permit on the basis of history of prostitution and drugs and proximity of schools and residential neighborhoods.

Following the hearing the Hearing Officer received the following submissions:

1. An email from a resident, R. Lahti, who had attended the hearing but not spoken, supported denial of the permit. She was concerned that, when asked if she had sign in sheets that she could check for names of questionable customers, Ms. Ngo replied, "They always use different names." The resident queried "Wouldn't that indicate she knows there are problems?"
2. A letter of support and character reference for Ms. Ngo from a long-time friend, M. McLorin.
3. A letter of support for Ms. Ngo from a long term customer, G. Koniaris, who uses New Beginnings massage services and hot tubs to relieve recurring back and knee problems. Mr. Koniaris stated he had never been asked for extra money or solicited for any type of illegal activity.
4. A petition circulated by New Beginnings, asking for support to the maintenance of Ms. Ngo's licensure. The petition was signed by 8 individuals.
5. A letter from the Piedmont Avenue Neighborhood Improvement League accompanied by a petition signed by 34 residents opposing the massage establishment permit and two letters from businesses that had been listed as having no problems by Mr. Traback's investigator. One indicated that they did not feel the presence of New Beginnings was good for other businesses on Broadway. The other indicated that the person interviewed by Mr. Traback's investigator was not comfortable discussing controversial issues with an unknown person and that the activities at New Beginnings are not generally visible from their business.

The letter from PANIL also stated that several business owners did not want to sign anything due to fear of retaliation. PANIL is also concerned about the use of the hot tub facilities by prostitutes. Their letter closed by stating, "The testimony from the owner at the hearing was striking: she know that people are not giving their real names on the sign-in sheet, but makes no effort to check ID or use any other method of screening customers for legitimacy."

DISCUSSION

Pursuant to Oakland Municipal Code Chapter 5.36, the City of Oakland requires massage establishment operators to obtain special activity permits in order to operate their business. The permitting process involves an application, background check, premise inspections, and a public hearing. The purpose of this process is to protect the citizens and neighborhoods of Oakland by ensuring that only law-abiding businesses that meet the prescribed standards will be permitted in Oakland.

On February 2, 2006, acting upon reports of sexual activity and website information regarding specific therapists at New Beginnings, Oakland Police Officer Mario Bermudez set up an operation in which an undercover officer confirmed that sexual services were being offered for money by at least one massage therapist employed by New Beginnings. Although the officer did not testify, the sworn statement of the therapist, Ledra Smith aka Candy, was submitted as evidence. Less than a week later, on February 8, 2006, under Officer Bermudez instruction, Officer Beere made an appointment with another New Beginnings therapist, Huyen Nguyen, aka Michelle, described on the same website. Officer Beere presented credible testimony regarding his encounter with Michelle and the solicitation of sex for money.

Ms. Ngo claims to know nothing of sexual services provided by her therapists. She claims to obtain no money from these services, and her Conditions of Employment prohibit therapists from soliciting customer "for any kind of act of sex whatsoever." Ms. Ngo terminated Ms. Smith's employment after Ms. Smith admitted to nine years of sex acts with customers at New Beginnings. Ms. Nguyen is not currently working, due to her recent child delivery. Linda, the therapist that Officer Taya met with on Feb. 8, rejected his request to "do anything extra." Ms. Ngo also ran another massage establishment in Oakland without incident.

The testimony of neighborhood residents focused on the customers that use the hot tubs and the drugs and violence it brings to their neighborhood, as well as the negative impact it has on residents, especially children, and other businesses. Even Mr. Traback admitted that "any person would good common sense would conclude that the hot tub users were prostitutes or people engaged in sex."

The testimony and evidence presented paint a picture of a business owner who appears to turn a blind eye to what is occurring in her business, thereby encouraging the perpetuation of illegal activity. No one accuses Ms. Ngo herself of direct participation in illegal activity, and, based upon Linda's rejection of Officer Taya, not all of her therapists participate in illegal activity. But Ms. Ngo's omissions, as well as her activities, create an environment in which illegal activity is not surprising and which, in two out of three cases, Oakland Police Officers were solicited for sexual services by Ms. Ngo's therapists. These actions and omissions include the following:

- Ms. Ngo retained the phone number of the Sunshine Spa, despite its association with prostitution. The logical main reason for a new business to retain a former business phone number would be to retain the former business's customers.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

- Ms. Ngo has her therapists sign Conditions of Employment that prohibit sex acts, but takes no proactive measures to monitor that they are abiding by their agreements.
- Ms. Ngo knows that her hot tubs are used for sex because of the condoms that are regularly found there.
- Ms. Ngo knows that people sign her business register using false names, but does nothing to check identification
- Ms. Ngo knows that the same women return to the hot tubs with different men, just not on the same day.
- When questioned at this hearing about measures she could take, Ms. Ngo came up with the idea of taping what goes on in the massage rooms. However, since owning the business, she took no proactive steps to ensure that the activities attributed to Sunshine Spa did not occur at New Beginnings, even after being warned of the serious consequences at her December 1, 2005 hearing.
- Ms. Ngo does not believe that she can exercise control over who comes to her establishment or what they do when they are there, even if she knows they are prostitutes.

While Mr. Traback is correct that customers should not be denied on the basis of race or age, there are numerous ways that legitimate massage businesses discourage illegitimate activity, from the physical appearance of the building including open facades with windows, to not having closed hot tub rooms, to daily practices such as checking customer ID. The only measures Ms. Ngo's counsel indicated she had taken were focused on employee and customer security; a security screen and cameras outside the building.

Ms. Ngo's Conditions of Employment lists practices that the City expects of legitimate massage therapists. The problem is that everyday Ms. Ngo's therapists are working in a facility where prostitution by the hot tub clients is a known and accepted part of the activity. The therapists, especially the long-term employees, also know that Ms. Ngo does nothing to enforce the Conditions or monitor their activities in any way. Ms. Ngo cannot be surprised that her therapists would conclude she has no real objection to this activity. They are obviously aware that the money made in prostitution can exceed that made by legitimate massage, and, without *any serious discouragement by Ms. Ngo, the temptation is irresistible to some.*

Although the hot tub activity is not subject to the decision on this application, it is relevant in two ways: First, the obvious and admitted knowledge of prostitution in the hot tubs sets a climate of expectations, both for customers and massage therapists, that this is a place where sexual activity is condoned. Second, the reputation of the hot tubs and their clientele would make it difficult for the massage business to establish a different reputation.

Mr. Huajardo is solicited almost every weekend by women whom he sees going into New Beginnings with other men. While Ms. Ngo is not responsible for his being solicited, the testimony indicates that, without New Beginnings, the solicitations would not be happening with such frequency in that neighborhood.

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

When the hearing date of February 20, 2006, was postponed to March 20, 2006, Ms. Ngo was ordered to cease and desist massage services, as she did not have a massage establishment permit. Neighboring residents reported that the hot tub business continued to operate after this time. Assuming, for the sake of argument, that February 8, 2006, was the first time Ms. Ngo was aware that, at least some of her therapists were engaged in illegal activity, one must question why she continued to operate the hot tub business. In light of the acknowledgement of prostitution activity, the continued operation of the hot tubs is further indication that Ms. Ngo feels she has no responsibility to do whatever she can to discourage illegal activity.

It is a long-standing principle of 'red light' and drug nuisance abatement laws, that, once a property has established a reputation as a place where one may conduct illegal activity, the only solution may be closure of that property. The continuation of the hot tub activity in Ms. Ngo's business, after the February 8 police action indicate either an inability or unwillingness on her part to eliminate the activity.

Accepting as true, all of the positive statements made by Ms. Ngo's supporters, she has been an exceptionally poor owner of a business that needed a firm hand and strong measures to rid itself of its reputation for illegal activity. Instead of implementing such measures, Ms. Ngo seems to have established a "don't ask, don't tell" policy, with the result that the activity associated with Sunshine Spa has continued, and, according to Ms. Wood has become worse in the past few years.

Ms. Ngo may be a perfectly law abiding citizen in her own personal life. However, either by active decision or failure to act, she has conducted her business in a way that has resulted in substantial nuisance affects to the neighborhood and has signaled to her employees that illegal activity is part of that business. The evidence shows that Ms. Ngo has operated her massage establishment and hot tub business in a manner that has maintained its reputation as a place where men can go for sexual services. She has failed to educate herself on the laws governing her type of business. The minimal measures she has taken to prevent such activity have been largely passive or reactive.

With the reputation that has been established, customers will continue to come to New Beginnings for illegal sexual services. Since it is financially lucrative for the therapists to break the law by offering sexual services, it is difficult to imagine that such activity will cease. Recordings in the rooms will not stop it if no one is checking them, and Ms. Ngo has demonstrated an ongoing lack of vigilance.

DECISION

Decisions on Special Activity permits issued by the City Administrator's Office are based on more than lack of criminal convictions and completion of the paperwork and building inspections. Pursuant to OMC section 5.02.060, "In granting or denying [a] permit . . . the City Manager . . . shall consider the character of the applicant as respects morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public."

FINDINGS AND DECISION OF HEARING OFFICER
ON HEARING REGARDING MASSAGE ESTABLISHMENT PERMIT APPLICATION OF NEW
BEGINNINGS CENTER, 4107 BROADWAY

The evidence shows that Ms. Ngo has either failed to notice or failed to take action on obvious illegal activity that has been conducted on her premises and that has had significant negative effects on the health, safety and welfare of the residents and businesses of that neighborhood. In doing so, she has also established an environment in which massage therapists in her employ have been free, for many years, to engage with customers in sexual activity for money. Her efforts to eliminate this activity have been minimal, both prior to and following the February 8 police action. By her own admission, Ms. Ngo actually believes she should not, in some instances, and cannot, in other instances, control this activity. This is exactly the type of activity that Oakland's Massage ordinance was enacted to eliminate, and, if Ms. Ngo is not capable of controlling it, she should not be operating this kind of business at this location.

Based upon the preponderance of the evidence, and in accordance with the requirements of OMC chapters 5.02 and 5.36, Kim Ngo's application for a permit to operate a massage establishment at 4107 Broadway, is hereby denied. This matter is also being referred to Oakland's Nuisance Abatement Division for consideration of whether action is warranted in regard to the hot tub activity at 4107 Broadway.

Barbara B. Killey
BARBARA B. KILLEY, HEARING OFFICER

9/17/06
DATE

Enclosures:

Proof of Service
Appeal Information

Mailing List

Mr. Harry J. Traback, Esq., 5674 Stoneridge Drive, Suite 201, Pleasanton, CA 94588

cc: by email

Mayor Jerry Brown
Ms. Jane Brunner, City Councilmember District 1
Ms. Deborah Edgerly, City Administrator
Ms. Joyce M. Hicks, Esq., CPRB
Ms. Izetta Jackson, Deputy City Attorney
Mr. Paul Brekke-Meisner, Neighborhood Services Coordinator
Chief Wayne Tucker, OPD
Officer Mario Bermudez, OPD
Mr. Arturo Sanchez, Nuisance Abatement Unit

cc:
CAO File

CITY OF OAKLAND

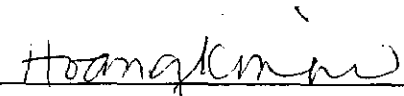
APPEAL FROM DECISION OF HEARING OFFICER
REGARDING MASSAGE PERMIT-NEW BEGINNINGS CENTER
4107 BROADWAY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. A Healing Arts Practice Exemption should still apply as Betty Sheppard who practices at New Beginnings does. Reiki, hypo-therapy, and metaphysical healing techniques.
2. Despite Multiple Requests for information that would be produced at the hearing we were only allowed access to police reports. No community complaints, citizen complaints or witnesses were provided to us. We, therefore, were not prepared for their complaints and testimony.
3. There were discrepancies in the officer's testimony -differing from the police reports regarding rejections of solicitations; funds; and words of solicited acts.
4. Solicitations for sex by the officer's were, in fact, refused by masseuses.
5. Discrepancies in the amount of money supposedly transferred to masseuses were unexplained since the officers were surveilling the establishment the whole time.
6. Internet evidence was introduced from three to four to five years ago - well beyond the statute of limitations of misdemeanor conduct. There was also no explanation as to why this information wasn't investigated in 2001, 2002, or 2003. It is also unreliable hearsay without any identifiable source.
7. There was no evidence that Ms. Ngo, the owner participated in any way in illegal activity or had knowledge of illegal activity.
8. Ms. Ngo - now aware of the complaints is willing to more actively participate in the business to curtail activities that are the subject of citizen complaints.
9. The hearing seemed to cater to the complaints of white people from Piedmont Avenue who complained about young black women dressed provocatively entering the premises with silver haired men.

- 1 10. The owner, Ms Ngo, was never advised or warned previously about
2 activities which could result in suspension or non renewal of her license.
- 3 11. Mr. Huajardo's testimony seemed less than credible. As each issue became
4 a subject of discussion he would add a comment regarding that issue. His
5 testimony was too convenient and contrived to be given credence.
- 6 12. Continued operation of the hot tubs was and is necessary to pay the rent. If
7 massage is not allowed without the hot tubs New Beginnings would just be
8 a building.
- 9 13. To date there have been no arrests or charges much less convictions for
10 anything listed as a disqualifying offense in Oakland Ordinance 5.36.020.
11 The disqualifying offenses to be "committed" must show a conviction in a
12 court of law otherwise they are mere allegations.
- 13 14. Ms. Ngo had done everything required to obtain a valid permit (5.36.080).
14 She paid her fees and made application appropriately (5.36.090) Her
15 employees were properly trained and screened(5.36.260) All physical
16 requirements were satisfied (5.36.100)
- 17 15. The search warrant was constitutionally defective relying on prospective
18 criminal activity for its issuance. Evidence produced from its service should
19 not have been considered.
- 20 16. The hearing was rife with untrustworthy hearsay evidence and opinions and
21 conclusions without foundation.

22 **Dated: April 27, 2006**

23 
24 _____
25 Ms Hoang Kim Ngo
26 Submitted in propria persona
27
28

2006 JUN 15 PM 5:55


Oakland City Attorney's Office

OAKLAND CITY COUNCIL

Resolution No. _____ C.M.S.

**RESOLUTION DENYING THE APPEAL FILED BY KIM NGO
AGAINST THE ADMINISTRATIVE HEARING OFFICER'S
DECISION TO DENY A MESSAGE ESTABLISHMENT PERMIT FOR
NEW BEGINNINGS CENTER, LOCATED AT 4107 BROADWAY,
OAKLAND CALIFORNIA**

WHEREAS, pursuant to Oakland Municipal Code section 5.36.080A, it is unlawful to operate a Massage Establishment without a valid permit granted by the City of Oakland and;

WHEREAS, pursuant to Oakland Municipal Code section 5.02.060, in granting or denying business permits, the City official acting thereon shall consider the character of the applicant as respects morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public; and

WHEREAS, since 1999, Kim Ngo operated the New Beginnings Center Massage Establishment, located at 4107 Broadway, under a healing arts exemption; and

WHEREAS, the healing arts exemption was eliminated by Ordinance No. 12675 C.M.S., amending Oakland Municipal Code Chapter 5.36, and adopted by the City Council on June 21, 2005; and

WHEREAS, Ms. Ngo applied for a Massage Establishment permit on October 19, 2005; and

WHEREAS, on February 2 and February 8, 2006, undercover Oakland police officers were solicited for sex by two different New Beginnings massage therapists, whose sexual performance had been noted by entries posted on an internet site from 2001 through 2005; and

WHEREAS, one of the therapists submitted a statement that she has been having sex with customers for money at New Beginnings for nine years; and

WHEREAS, the Oakland Police Department submitted police reports, RD06-013042 dated February 2, 2006 and RD06-014733 dated February 8, 2006, documenting sexual solicitations of undercover police officers by two of Ms. Ngo's therapists; and

WHEREAS, a public hearing was conducted on March 20, 2006, regarding Ms. Ngo's application; and

WHEREAS, at the hearing, in addition to credible testimony by Oakland Police Department officers regarding illegal activity by Ms. Ngo's massage therapists, residents provided substantial credible testimony that the use of New Beginnings hot tubs by prostitutes has adversely affected the health, safety, and general welfare of the neighborhood for many years; and

WHEREAS, Ms. Ngo knew, or should have known, that illegal activity was blatantly taking place at her Massage Establishment for many years, did nothing to curb or discourage illegal activity and, in fact, by her acceptance, encouraged the activity; and

WHEREAS, pursuant to Oakland Municipal Code section 5.36.150, any violation of this [Massage Establishments and Massage Therapists] Chapter by any employee of the massage establishment shall be considered also as a violation by the Owner; and

WHEREAS, pursuant to Oakland Municipal Code section 5.02.060, the City official acting on a permit application "shall consider the character of the applicant as respects morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public"; and

WHEREAS, on April 17, 2006, the City's Administrative Hearing Officer denied the permit application, based upon the preponderance of the evidence and the requirements of Oakland Municipal Code Chapters 5.02 and 5.36; and

WHEREAS, Ms. Ngo submitted a timely appeal, listing sixteen grounds for the appeal; and

WHEREAS, none of the grounds submitted by Ms. Ngo rebut the grounds upon which her application was denied; her responsibility for the illegal activity conducted at her Massage Establishment and that activity's adverse affects on the health, safety, and general welfare of the public; now therefore be it

RESOLVED, that the City Council finds and determines that the Administrative Hearing Officer's decision was made in accordance with the requirements of Oakland Municipal Code Chapters 5.02 and 5.36; and be it

FURTHER RESOLVED, that Ms. Ngo has failed to refute that illegal activity has been conducted over an extensive period of time by both her employees and customers or to establish that she does not bear the responsibility for this activity; and be it

FURTHER RESOLVED, that the Administrative Hearing Officer's April 17, 2006 decision to deny Ms. Ngo's application for a Massage Establishment permit for New Beginnings Center, located at 4107 Broadway, is hereby affirmed.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2006

PASSED BY THE FOLLOWING VOTE:

AYES - BRUNNER, KERNIGHAN, NADEL, QUAN, BROOKS, REID, CHANG, AND
PRESIDENT DE LA FUENTE

NOES -

ABSENT -

ABSTENTION -

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California