

**CITY OF OAKLAND**  
**AGENDA REPORT**

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND  
2005 MAR -3 PM 5:08

TO: Office of the City Administrator  
ATTN: Deborah Edgerly  
FROM: Council President Ignacio De La Fuente  
DATE: For March 15, 2005 City Council Meeting

RE: AN URGENCY MEASURE, PURSUANT TO GOVERNMENT CODE SECTION 65858, EXTENDING FOR 90 DAYS A MORATORIUM ON MASSAGE SERVICE ACTIVITIES WHICH WAS ADOPTED ON FEBRUARY 1, 2005 (ORDINANCE NO. 12647)

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**SUMMARY**

On February 1, 2005, the City Council passed Ordinance NO. 12647, pursuant to California Code 65858, to impose a 45-Day moratorium on the issuance of new permits for Massage Services Activities. The moratorium prohibited the issuance of conditional use permits and all other permits for new massage establishments and massage therapists. Since the passage of the 45-Day moratorium, staff has made administrative improvements to massage permitting processes, started drafting changes to current massage ordinances, scheduled meetings with key stakeholders, and scheduled an advisory to be reviewed by the Planning Commission on April 6, 2005.

The extension of this moratorium for 90 days would enable staff to continue crafting the permanent changes to both the Planning Code (Section 17.102.170) and the Municipal Code (Section 5.36). The major difference between the 90-day extension and the original 45-day moratorium is the addition of section 12, which empowers the City Administrator to make an exception during the moratorium for individual therapists who work at establishments or as sole practitioners only on a case by case hardship-determination basis. Staff recommends that the Council extend for 90 days this modified version of the 45-day moratorium. The 90 days will provide sufficient time for staff to complete a proposal for permanent changes for the Council's consideration and approval.

**BACKGROUND**

The City Council passed the 45-Day moratorium ordinance pursuant to California Code 65858 to improve public safety and protect community development. Under the Code, the City Council could extend the moratorium up to 10 months and 15 days followed by a year if the circumstances of urgency persisted. The Code requires that the legislative body issue a report "describing the measures taken to alleviate the condition which led to the adoption of the ordinance" ten days prior to the expiration of the moratorium. This staff report, that describes the measures that the City has taken since the passage of the 45-day moratorium, is being issued

at least 10 days before the expiration of the 45-day moratorium and meets the requirements of the State Code.

The current codes that regulate massage activities do not address hours of operation or proximity to schools and recreation centers. The codes also do not require thorough background checks of all employees at massage establishments or verification of the accreditation status of massage training schools.

In addition to the inadequate regulatory powers of the current massage codes that were enumerated in the staff report for the 45-Day moratorium on massage services activities, the massage provisions of the Municipal Code and the Planning Code are confusing and have resulted in conflicting regulations.

The City of Oakland currently regulates massage services activities, including massage therapists and massage establishments, using two separate code sections that do not interact with one another in a straightforward or clear fashion. Oakland Municipal Code Chapter 5.36, "Massage Establishments and Massage Therapists", does not make reference to Oakland Planning Code Chapter 17.102.170, "Special regulations applying to massage service activities", while the Planning Code only makes refers to the Municipal Code in its definition of "massage service activity". As a result, the City has not had a coherent and consistent permitting method. This has led to confusion between and conflicting actions taken by different City departments.

To address all of the shortcomings of the existing ordinance, staff is drafting a permanent ordinance for the Council's approval before the 90-day moratorium expires on June 10 (please see timeline on page 5). The new ordinance would make OMC Chapter 5.36 more stringent and would consider the removal of the minor conditional use permit requirement under OPC Chapter 17.102.170 to end the City's granting of property rights to operate massage establishments in perpetuity and move all of the City's permitting oversight to the City Administrator's Office.

This 90-day moratorium includes minor modifications to allow exceptions for massage therapists on a case-by-case basis as determined by the City Administrator. This process has been included to protect individuals and businesses from substantial economic hardship that such a moratorium may cause.

In accordance with concerns expressed at the City Council meeting on February 1, the City will invite stakeholders affected by this issue to provide input concerning existing and potential regulatory methods employed by the City of Oakland and other local governments across the United States. During the 90-Day moratorium, staff will, to the extent possible, meet with stakeholders including business owners of massage establishments, neighborhood groups, community organizations, and professional massage organizations to solicit input on issues of concern regarding massage establishments and therapists.

## Actions Taken Since Passage of 45-Day Moratorium

### *I. Administrative Changes*

Since the passage of the first moratorium, the City Administrative Hearing Officer responsible for the issuance of permits for massage establishments and therapists has implemented improvements to the application and permitting processes.

Improvements in massage establishment application process:

- application inquires about whether or not the business owners have been convicted of any felonies
- application requires applicants to submit a list of massage therapists employed by the owner or operator
- increased communication between Zoning and the City Administrator's Office to ensure that no conditional use permits are issued until an establishment has been cleared by the City Administrator to prevent inconsistent permitting

Improvements in massage therapist application process:

- application requires applicants to provide more information about applicants' work histories and present a photo identification card issued by the State of California.
- renewal applicants required to appear in person with a photo ID at the public hearing
- provision of language interpretation for applicants to allow them to speak for themselves

### *II. Preview of Potential Legislative Changes*

The Council President's office and the District 2 office are in the process of drafting the permanent changes to the Oakland Municipal Code and the Oakland Planning Code, which the Council will consider before the expiration of the 90-day moratorium extension.

During the 45-day moratorium, staff has investigated the city codes that regulate massage service activities and has formulated a recommendation to centralize permitting and regulation through the City Administrator based on discovering weaknesses in the current process. Currently, two regulatory agencies, the City Administrator's Office and CEDA, oversee the licensing of massage establishments and therapists. The City Administrator issues special business permits and the Planning Department issues conditional use permits to operate massage establishments.

A recent Planning Department approval granting permission for a massage establishment to operate until 2 a.m. made at the staff level, despite the fact that the permit issued by the City Administrator's Office specifically required the facility to close by 10 p.m., illustrates the lack of coordination between the City Administrator's office and the Planning Department and suggests that the centralization of regulatory functions could help the City maintain control of massage establishments. Planning staff granted permission for a massage establishment to operate until 2 a.m. despite the City Administrator's and the Police Department's concerns about prostitution

and the potential for human trafficking at massage establishments partly because the Planning Department is not responsible for regulating massage establishments and does not communicate regularly with the Oakland Police Department concerning illegal activity at massage establishments.

Upon reviewing the original conditional use permit issued by the Planning Department, the City Administrator's office discovered that the massage establishment had been granted a permit to open until 11 p.m. Thus, even before the granting of the 2 a.m. close time, the City Administrator's Office and the Planning Department had already given the massage establishment two conflicting restrictions on operating hours.

*OMC 5.36 "Massage Establishments and Massage Therapists"*

Changes to the current OMC chapter could include bifurcating massage establishments from massage therapists and clarifying the requirements that each of them must meet before receiving special business permits to operate. Legislative changes could also restrict hours of operation, tighten training requirements for therapists, increase the thoroughness of background checks, prevent over-concentration in commercial neighborhoods, and require a certain distance from sensitive uses such as schools and youth centers. A final proposal will take into consideration comments from stakeholder meetings.

*OPC 17.102.170 "Special regulations applying to massage service activities"*

The City of Oakland currently requires a minor conditional use permit for the operation of a massage establishment and prohibits massage establishments from operating in residential or C-10 zones. A conditional use permit places conditions for approval upon the granting of a land use right to a property. A minor conditional use permit is granted at the staff level without the review of the Planning Commission and cannot be appealed to the City Council.

Currently, the issuance of a conditional use permit gives the current and future property owner a right to operate a massage establishment in perpetuity upon the issuance of a City business permit until such time as the City undergoes a revocation process. This means that if a reputable operator sells his or her business, the new owner would automatically inherit the property rights to operate a massage establishment without going through another public or administrative process. While in theory the conditional use permit revocation process safeguards against the right of disreputable business operators to possess conditional use permits, in reality the revocation process rarely takes place because it requires incontrovertible evidence that is difficult and time-consuming to obtain.

Conditional use permits restrict establishments from locating in certain zones, require design review, and require public noticing. The City can restrict the location of establishments, require design review, and require public noticing and a public hearing without granting property rights in perpetuity by removing the minor conditional use permit requirement and adding more stringent requirements into the Oakland Municipal Code.

Staff believes that removing the minor conditional use permit rights from the Planning Code and centralizing all permitting responsibilities in the City Administrator’s office will make the permitting process more user-friendly for applicants and coherent for City staff.

New Provisions for Waivers During 90-Day Moratorium

During the 90-day moratorium, the City Administrator would have the authority to consider waiving the moratorium requirements for massage therapists who work at permitted or exempted establishments and individual massage practitioners only on a case-by-case basis. “Good cause” for the granting of a waiver would be defined as factual and evidentiary showing that the interim controls, if not waived, would cause substantial financial hardship to the applicant.

IV. 90-Day Moratorium Action Plan

The following timeline illustrates the actions that staff will take in order to complete the permanent ordinance for the City Council’s consideration and approval before the 90-day moratorium expires effectively on June 10, 2005.

Date	Action
March 1, 2005 – April 1, 2005	Staff meets with key stakeholders
March 15, 2005	City Council considers approval of 90-Day extended Moratorium on Massage Services Activities
March 16, 2005 - April 18, 2005	Permanent ordinance drafted
March 17, 2005	Rules Committee schedules request for permanent ordinance
April 6, 2005 (already scheduled)	Planning Commission hears staff advisory on removal of Conditional Use Permit rights from OPC 17.102.170 and makes recommendation to the Council.
May 10, 2005	Council committees review proposed new ordinance (changes to OMC 5.36 and OPC 17.102.170)
May 17, 2005	City Council reviews proposed permanent ordinance (1 <sup>st</sup> Reading)
June 7, 2005	City Council reviews proposed permanent ordinance (2 <sup>nd</sup> Reading)
June 10, 2005	90-day moratorium expires

**RECOMMENDATION**

Adopt the ordinance to extend for 90 days a moratorium on Massage Services Activities.

Prepared by:

Christopher Tom  
Legislative Aide  
District 2 City Council Office

Item \_\_\_\_\_  
City Council  
March 15, 2005

INTRODUCED BY COUNCIL PRESIDENT IGNACIO DE LA FUENTE

2005 MAR -3 PM 5: 08

APPROVED AS TO FORM AND LEGALITY

*Farimah Faiz*  
CITY ATTORNEY

ORDINANCE NO. \_\_\_\_\_ C.M.S.

**AN URGENCY MEASURE, PURSUANT TO GOVERNMENT CODE SECTION 65858, EXTENDING FOR 90 DAYS A MORATORIUM ON MASSAGE SERVICE ACTIVITIES WHICH WAS ADOPTED ON FEBRUARY 1, 2005 (ORDINANCE NO. 12647)**

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WHEREAS, on February 1, 2005, the City Council passed a 45-day urgency measure to impose a moratorium on Massage Services Activities pursuant to Government Code section 65858 to allow the City to begin addressing conditions of urgency, such as the need to protect the health, safety, and welfare of Oakland citizens threatened by criminal activities at massage establishments that have proliferated in the absence of adequate regulatory mechanisms; and

WHEREAS, staff has begun to take action to alleviate the conditions by making administrative improvements to permitting and application procedures, researching other city regulations, and coordinating between departments; and

WHEREAS, the conditions of urgency that led to the passage of the initial 45-day moratorium persist and the initial moratorium is scheduled to expire on March 17, 2005; and

WHEREAS, the City of Oakland currently regulates Massage Establishments using two separate regulatory schemes, one found at Chapter 5.36 of the OMC entitled "Massage Establishments and Massage Therapists" and the other at section 17.102.170 of the OPC, entitled "Special regulations applying to massage service activities"; and

WHEREAS, on April 6, 2005, the Planning Commission is scheduled to review proposed changes to the Planning Code that would remove the permanent property rights conferred by the minor conditional use permit for new massage establishments and will make a recommendation to the City Council prior to the introduction of a new ordinance to regulate massage establishments and massage therapists; and

WHEREAS, an updated Land Use and Transportation Element of the Oakland General Plan was adopted by the Oakland City Council in March 1998 to guide future land use and development in the city; and

WHEREAS, the Land Use and Transportation Element and the Estuary Policy Plan contain goals, objectives, and policies that promote: maintaining and enhancing the vitality of existing neighborhood areas (Policy I/C3.4; Policy T2.,3, Objective I/C1.1; Objective N1); and

WHEREAS, the establishment of Massage Service Activities that serve as fronts for illegal activity may have negative impacts on commercial areas by creating an uninviting and potentially dangerous environment; and

WHEREAS, such potential impacts may conflict with some of the policies and objectives of the Land Use and Transportation Element of the General Plan; and

WHEREAS, the City has initiated a review of the regulatory schemes it uses to regulate massage establishments and massage service activities with the goal of adopting needed changes to the current regulations, including changes to the Planning Code, Municipal Code, and General Plan to protect the public health, safety, and welfare from the negative effects of Massage Service Activities that serve as fronts for illegal activity and during the time that it undertakes this task, the City is concerned that absent the adoption of an emergency moratorium, massage establishments that conflict with the contemplated changes to the City's regulatory schemes could be established in the City of Oakland.

WHEREAS, until such time that the City concludes its review and adopts and institutes new permitting and enforcement procedures over such Massage Service Activities, the community is in jeopardy that such Massage establishments could be instituted, modified, or expanded prior to the imposition of new controls necessary for the protection of public health, safety, and welfare; and

WHEREAS, issuance or approval of any building and planning permit or business permit for such uses (newly instituted, modified, or expanded) prior to the City's completion of such investigation would result in a current and immediate threat to the public health, safety or welfare; and

WHEREAS, the Council recognizes the importance of allowing registered massage establishments that are permitted or have been exempted from having to acquire massage establishment permits to conduct legitimate business during the duration of the permit; and

WHEREAS, under the 90-day moratorium extension, the City would allow such businesses to continue to hire new massage therapists and individual practitioners to apply for massage therapist permits as allowed in section 12 below; and

WHEREAS, pursuant to Government Code Section 65858 a city, including a charter city, may adopt an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan or zoning proposal that the legislative body is considering or intends to study within a reasonable time and extend that moratorium for up to 10 months and 15 days, followed by an additional year if necessary; and

WHEREAS, for the reasons set forth above, this ordinance is declared by the Council to be necessary for preserving the public peace, health, or safety and to avoid a current, immediate and direct threat to the health, safety, or welfare of the community, and the "Whereas" clauses above taken together constitute the City Council's statement of the reasons constituting such necessity and urgency.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND does ordain as follows:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this ordinance.

SECTION 2. The City Council finds and determines, for the reasons stated in the recitals, the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), and 15307 of the State CEQA guidelines.

SECTION 3. Until such time as the City concludes the reviews described above, and adopts new land use controls pertaining to Massage Service Activities, the City of Oakland hereby extends a moratorium on the permitting or approval of any new, modified, or expanded Massage Service Activities.

SECTION 4. For the purposes of this Ordinance, the following definitions shall apply:

- a) "Massage Service Activity" is as defined in OPC Ch 17.09.040
- b) "Massage" is as defined in OMC Ch 5.36.020
- c) "Massage Establishment" is as defined in OMC 5.36.020
- d) "Massage Therapist" is as defined in OMC 5.36.020

SECTION 5. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of 90-days from the date of its adoption. This 90-day period may be extended by the City Council in accordance with the provisions of California Government Code 65858.

SECTION 6. During the term of this ordinance as set forth in Section 5 hereof, no use permit, building, zoning or other permit that has been issued for any Massage Service Activity development project, facility, or activity, for which rights to proceed with the Massage Service Activity development, facility or activity have not vested pursuant to the provisions of State law shall proceed, and no use permit, building, zoning or other permit for any Massage Service Activity development project, facility or activity, shall be issued by any department, agency, employee or agent of the City of Oakland to allow for any Massage Service Activity development, facility or activity. Only Massage Service Activity use permits, development projects, facilities, or other activities which have vested, pursuant to the provisions of the State law, prior to the date of this Ordinance shall proceed in violation of the provisions of this Ordinance.

SECTION 7. The City Clerk shall certify to the passage and adoption of this Ordinance causing it to be posted, as required by the law, and it shall thereafter be in full force and effect. This Ordinance shall become effective immediately as an interim urgency ordinance, in order to protect the public health, safety, and welfare.

SECTION 8. For the term of this ordinance, as set forth in Section 5 hereof, the provisions of this ordinance shall govern, to the extent there is any conflict between the provisions of this ordinance and the provisions of any other City code, ordinance, resolution or policy, and all such conflicting provisions shall be suspended.

SECTION 9. This Ordinance is enacted pursuant to the City of Oakland's general police powers: Section 106 of the Charter of the City of Oakland, Article XI of the California Constitution and Government Code section 65868.

SECTION 10. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause or phrase be declared invalid.

SECTION 11. The City, on a case by case basis, shall have the authority upon showing of good cause by a massage establishment applicant, to waive the interim controls imposed by this Ordinance and to allow for the granting of permits to said applicant pursuant to the Major Variance provisions of the Oakland Planning Code. Good cause shall mean a factual and evidentiary showing by the applicant that the interim controls, if not waived, will deprive the applicant of substantially all reasonable use of his/her property. Examples of such evidence include, but are not limited to, evidence of recent substantial tenant improvements, a signed lease of the property dating from prior to this moratorium's taking effect, or evidence of substantial investment in the property, all for the purpose of establishing a massage establishment on the premises. All such applications for waiver shall be filed with the City Planning Department. Said applications shall be reviewed and decided by the City Planning Commission. Within 10 calendar days after the date of a decision by the City Planning Commission, an appeal from said decision may be taken to the City Council by the applicant, the permit holder, or another interested party. In event the last date of appeal falls on a weekend or holiday when City offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by the Commission and shall be filed with the City Clerk. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record. Upon receipt of the appeal, the City Council shall set the date for consideration thereof. The City Clerk shall notify the Secretary of the City Planning Commission of the receipt of said appeal and of the date set for consideration thereof; and said Secretary shall, not less than ten days prior thereto, give written notice to: the applicant, the appellant in those cases where the applicant is not the applicant; adverse party or parties, or the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as the Secretary deems appropriate, of the date and place of the hearing on the appeal. The decision of the City Council shall be made by resolution and shall be final. The City Council shall vote on the appeal within thirty (30) days after its first hearing of the appeal. If the Council is unable to decide the appeal at that meeting, it shall appear for a vote on each regular meeting of the Council thereafter until decided. Fees for waiver applications and associated appeals shall be the same as those charged for Major Variance.

SECTION 12. Notwithstanding the other provisions of this ordinance, the City Administrator, on a case by case basis, shall have the authority upon showing of good cause by a massage therapist applicant, to waive the interim controls imposed by this Ordinance and to allow for the granting of permits to said applicant. Good cause shall mean a factual and evidentiary showing by (a) the applicant that the interim controls, if not waived, will cause the applicant substantial financial hardship, as evidenced by 1) the applicant's written statement of his/her status as self-supporting or as a major contributor to his/her family's income or 2) the applicant's written statement of indebtedness for which there is no other viable source of repayment or (b) the permitted or exempt establishment at which the applicant will be working that the interim controls, if not waived, will result in substantial financial hardship for establishments, as evidenced by documented loss of massage therapist staff and the associated workforce hours and revenues. All such applications for waiver shall be filed with the City Administrator's Office.

Said applications shall be reviewed and decided by the City Administrator's Office. The decision of the City Administrator's Office is final. The City Administrator will not charge a fee to the applicant for this process.

In Council, Oakland, California, \_\_\_\_\_, 2005, Passed By The Following Vote:

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

NOTES-  
ABSENT-  
ABSTENTION-

ATTEST: \_\_\_\_\_  
LaTonda Simmons  
City Clerk and Clerk of the Council  
Of the City of Oakland, California