

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. **12652** 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.

**MAR 15 2005**

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

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE - 7

NOES- 0  
ABSENT- 0  
ABSTENTION- 0

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