

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

05 MAY 12 PM 3:41

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Council President Ignacio De La Fuente
DATE: For May 24, 2005

RE: ADOPT AN ORDINANCE AMENDING THE OAKLAND PLANNING CODE SECTIONS 17.09.040 AND 17.102.170 AND AMENDMING OAKLAND MUNICIPAL CODE 5.36, "MASSAGE ESTABLISHMENTS AND MASSAGE THERAPISTS", TO IMPOSE NEW PERMITTING REQUIREMENTS INCLUDING, BUT NOT LIMITED TO, CRIMINAL BACKGROUND CHECKS FOR APPLICANTS AND EMPLOYEES, AND AMENDING OAKLAND PLANNING CODE 17.102.170, "SPECIAL REGULATIONS APPLYING TO MASSAGE SERVICE ACTIVITIES", TO ELIMINATE THE CONDITIONAL USE PERMIT (CUP) REQUIREMENT AND ADD A REFERENCE TO MASSAGE PERMIT REGULATIONS IN OMC 5.36 (05-0203)

SUMMARY

The proposed ordinance seeks to affirm the practice of legitimate therapeutic massage as a healing art and to discourage performance of unregulated massage services. The proposed ordinance would amend Chapter 5.36 of the Oakland Municipal Code, "Massage Establishments and Massage Therapists", to increase the permitting requirements for both massage establishments and massage therapists. Incorporating best practices from other municipalities, the changes to OMC Chapter 5.36 require stricter permitting and operating requirements and provide stronger enforcement mechanisms to deter illegal activities associated with illicit massage, including prostitution, labor exploitation, and human trafficking.

The proposed ordinance would remove the permitting of massage service activities from the Oakland Planning Code to centralize the permitting of massage establishments and therapists in the City Administrator's office. The removal of permitting from the Planning Code would terminate the granting of permanent property rights to operate a massage establishment at a particular location that is accorded by the issuance of conditional use permits.

In addition to simplifying and strengthening the permitting process, the new ordinance would prevent further over-concentration of massage establishments in neighborhoods and in proximity to community facilities, such as schools and recreation centers. The new ordinance would raise standards for therapists and establishments, distinguish between massage establishments and therapists, increase the responsibility of owners and operators for illegal activity in establishments, expand background check requirements to include all employees, and increase penalties for ordinance violations.

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FISCAL IMPACT

A) Change in Initial and Renewal Permit Fees

Under the proposed ordinance, the massage establishment permit fee would remain unchanged at \$400 and renewals would remain at \$280. The initial startup permit fees for massage establishments will decrease by \$1,609 (-70%) because the City would not grant of the permanent property rights under the minor Conditional Use Permit. The decrease in startup costs will be recouped by the increase in permits for massage establishments due to the broader definition of “massage establishment” under the proposed ordinance. (See Attachment A.)

B) Administration and Enforcement

No additional staff will be needed to administer the permits because this is already a function of the City Administrative Hearing Officer. The cost of enforcement depends on the level and intensity of enforcement. In October 2004, the Oakland Police Department received a \$450,000 grant to combat human trafficking. These funds will offset any additional expenses associated with increased enforcement. This ordinance will reduce the cost by reducing the number of unregulated and noncompliant massage establishments. Total revenues may increase based on a conservative estimate of the number of businesses that would be required to obtain massage establishment permits.

BACKGROUND

The proposed ordinance follows two moratoria on massage service activities that were passed as urgency measures following a surge of applications and illegal activity related to massage service activities citywide. On February 1, 2005 the City Council passed unanimously the 45-day moratorium on massage service activities (Ordinance No. 12647). On March 15, 2005, the City Council passed unanimously the 90-day moratorium on massage service activities (Ordinance No. 12652).

A combination of factors led to the consideration of legislative changes to the permitting and enforcement of massage establishments and massage therapists. Between 2003 and 2004, the number of massage therapist applicants increased from 153 to 209, representing an increase of 36.7%, with Asian female applicants accounting for 71.3% of new applicants and 60.9% of renewal applicants. During the preceding year, the number of applicants increased by a mere 2.7%. The increase in applicants occurred at the same time that the Oakland Police Department intensified efforts to investigate massage establishments for illegal activity, including possible trafficking of women through massage establishments.

Since 2004, the Vice Crimes Unit has conducted six undercover operations that resulted in seven (7) arrests and forty-two (42) citations for ordinance violations. The Vice Crimes Unit made four arrests for prostitution. Common ordinance violations include practicing massage without a valid permit and operating massage establishments without a permit. Of the seven arrests, five (71.4%) took place at permitted establishments and two (28.6%) took place at illegal

establishments. The Vice Unit issued nineteen (19 or 42.2%) of the forty-two citations at permitted establishments and twenty-six (26 or 57.8%) at illegal establishments.

Currently, the city permits eight (8) massage establishments and has exempted thirty-one (31) businesses that offer massage as an “incidental service”. A survey of massage establishments registered with the City revealed a concentration of establishments in and around the Chinatown neighborhood. Five (62.5%) of the permitted establishments are located within a 0.2 mile radius of Chinatown and seven (22.5%) of the businesses that offer massage as an incidental service are located within a 0.3 mile radius of Chinatown. Half of the permitted establishments have had arrests or citations since 2004. This confirms the City’s need for stricter permitting requirements to deter illegal businesses and stronger enforcement strategies to shut down massage establishments that perpetuate illegal activity.

During the two moratoria, staff from the City Administrator’s office, CEDA, Police Department, City Attorney’s Office, and City Council analyzed current permitting policies and researched the permitting and enforcement strategies utilized by other municipalities to formulate amendments to the Municipal Code and Planning Code. Jointly, the City Administrator’s office and District 2 Council office conducted three stakeholder focus groups to ascertain the concerns and insights of massage establishments, massage therapists, and concerned community members.

Proposed Changes to the Planning Code

Currently, massage establishments must obtain a minor Conditional Use Permit issued by Planning Department staff and a massage establishment permit issued by the City Administrator’s office. The proposed ordinance would eliminate the conditional use permit requirement to simplify permitting and enforcement and to halt the City’s practice of granting permanent property right for a massage establishment at a particular location. Illegal activities associated with massage establishments relate more to public health and safety than to land use and would be best regulated by the Municipal Code rather than the Planning Code. Hours of operation, distances from sensitive uses, and protection from over-concentration can be regulated through the Municipal Code as minimum requirements for approval of a permit.

On April 6, 2005, the Planning Commission heard and recommended unanimously the removal of the permitting of massage service activities from the Oakland Planning Code (OPC). If approved, the definition of “massage service activity” would be removed from the OPC and OPC 17.102.170, “Special regulations applying to massage service activities” would be renamed “Special regulations applying to massage establishments” and would reference the Municipal Code permitting regulations in OMC 5.36, “Massage Establishments and Massage Therapists”.

Historically, the dual agency permitting process has been fraught with difficulty and inconsistency partially because neither code sections referred explicitly to one another. Consequently, minor conditional use permits were issued irrespective of the business permitting process and certain establishments that were exempt from obtaining business permits were required to obtain conditional use permits.

The permitting of massage establishments and massage therapists through the business permitting section of the Municipal Code will simplify the permitting process for both staff and applicants. Moreover, the City would cease to grant permanent property rights to operate a massage establishment at a particular location; this right granted through the conditional use permit (CUP) has been difficult to revoke. The removal of the CUP process means that properties will not have a vested right that runs with the land to operate a massage establishment and the City will be able to change uses at properties that have a history of nuisance activity.

Elimination of the Conditional Use Permit process will:

1. Allow the City to maintain review of massage activities under OMC Section 5.36.
2. Allow continued review of land-use related issues through the City Administrator's review process.
3. Allow Design Review of external changes through the normal procedure.
4. Reduce the number of review processes for staff, applicants, and interested residents.
5. Reduce the review period by reducing the number of review processes.
6. Continue to allow for public hearings through the City Administrator's permitting process.
7. Reduce layers of regulations with which the applicant must comply.
8. Reduce layers of conditions for staff to monitor and enforce.
9. Eliminate conflicting regulations that are issued to massage establishment permittees that arise from a dual agency permitting process.
10. Allow a single permit revocation process for problematic establishments.
11. Reduce initial application fees.

KEY ISSUES AND IMPACTS

The proposed legislative changes to the Planning Code and Municipal Code will simplify the application process by consolidating permitting functions in the City Administrator's Office. Simultaneously, the amendments will raise permitting and operating requirements for massage therapists and massage establishments and strengthen the City's authority to revoke and deny permits and penalize violators.

The new ordinance reorganizes the current ordinance for easier navigation and includes new sections, performance requirements, and enforcement mechanisms to deter illegal activities and terminate illegal operations.

Key Problems & Solutions

This report highlights some of the key problems with current ordinance and proposed solutions in the amendments to the ordinance. The problems fall into four categories: 1) Dual Agency Permitting, 2) Massage Establishment Permitting, 3) Massage Therapist Permitting, and 4) Enforcement.

1) Dual Agency Permitting

Lack of coordination between City codes.

Neither Municipal Code Chapter 5.36 nor Planning Code Chapter 17.102.170 reference one another explicitly, leaving unclear which Chapter supersedes the other and whether the issuance of one permit is contingent on the issuance of the other.

Solution: Move all of the permitting functions to the Municipal Code.

The proposed ordinance would delete “massage service activities” from Planning Code Chapter 17.09.040, “Definitions”, and amend Planning Code Chapter 17.102.170, “Special regulations applying to massage service activities,” to reflect that massage establishments and massage therapists will be regulated through business permitting regulations in the Municipal Code. The existing language that requires a conditional use permit and prohibits the location of massage service activities in residential or C-10 zones (local commercial retail) will be replaced with a reference to regulations contained in Municipal Code Chapter 5.36. This legislative change will clarify that the Municipal Code, not the Planning Code, regulates the permitting of massage establishments and massage therapists.

OMC Chapter 5.36, “Massage Establishments and Massage Therapists”, will require establishments to locate in commercial, manufacturing or industrial zones.

2) Massage Establishment Permitting

A. Minor CUP grants property rights in perpetuity.

The granting of a minor conditional use permit in Planning Code Chapter 17.102.170 provides a property with rights in perpetuity for use as a massage establishment irrespective of a change of ownership or use. Once granted, the CUP authorizes current and future owners to resume the use of a property as a massage establishment even after a new use occupies the property. The Planning Department does not monitor establishments that are granted CUP’s and the City’s only recourse to revoke a CUP requires extensive evidence of criminal activity that requires significant staff resources and evidence. Consequently, once granted, few CUP’s are revoked.

In its evaluation of applications for minor conditional use permits for massage service activities, the Planning Department does not take into consideration any of the business permitting requirements for massage establishments specified in the Municipal Code that regulate massage establishments, including criminal background checks. Thus, as long as the proposed establishment is located in the proper zone and the appropriate payment is made, an applicant is likely, under current law, to receive a conditional use permit regardless of applicant’s personal or criminal background.

Despite the ease with which applicants can receive CUP’s, historically, other City agencies have viewed the possession of a conditional use permits as providing additional legitimacy for a

different land uses. The use for which a CUP is issued is likely to persist even after illegal activity occurs because of the difficulty of accumulating sufficient evidence and documentation of illegal activity to revoke a CUP.

Solution: Rights to operate massage establishment run with the permit, not with the land.

The proposed ordinance will end the City’s practice of requiring and granting minor conditional use permits for the operation of massage establishments. By requiring establishments to locate in commercial, manufacturing or industrial zones and implementing minimum distance requirements for the granting of massage establishment permits through the Municipal Code, the City would be able to regulate land use without issuing a Conditional Use Permit.

Under the proposed ordinance, no applicant would have permanent property rights to operate a massage establishment at a particular location because the right to operate a massage establishment vests with the applicant, not the property, and any right granted ceases to exist as soon as the permit expires or is revoked. The massage establishment permit must be renewed annually, in contrast with the CUP that exists in perpetuity unless it is revoked. The proposed ordinance would not change the vested property right of massage establishments with CUPs to operate as massage establishments.

Increased permitting and operating requirements will enable the City to revoke massage establishment permits more easily.

B. No restrictions on concentration and proximity to sensitive uses.

Planning Code Chapter 17.102.170 allows massage establishments to locate anywhere except for residential and C-10 zones. Unlike restrictions for other adult businesses with a potential for nuisance, such as liquor stores, cannabis dispensaries, and adult book shops, current codes do not prevent massage establishments from locating in close proximity to one another or to sensitive uses, such as schools, community centers, and parks. The lack of restrictions on concentration and proximity has enabled at least twelve businesses to offer massage within a 0.3 mile radius of Chinatown, which covers twelve blocks.

Solution: Implement distance and concentration requirements.

The proposed ordinance would regulate the location of new massage establishments by prohibiting them from locating within one thousand (1000) feet of a public or private school, public library, youth center, city park, park and recreation facility or massage establishment. These regulations would prevent massage establishments from locating next to or in close proximity to one another to prevent the over-concentration of such businesses. The new ordinance would preserve the existing prohibition of massage establishments in residential or C-10 zones, though there is an exemption for “Home Occupation Solo Practitioners” as defined in the proposed ordinance.

The City Administrator would reserve the right to suspend the requirements and issue a permit if significant findings could be made that issuance of the permit would not have an impact on public safety or neighborhood quality of life. The distance requirements in the proposed ordinance also would not apply to existing massage establishments.

C. No restrictions on hours of operation.

The lack of municipal code and planning code language has led to late hours of operation. Currently, most permitted establishments in Oakland close at 11pm, an hour later than in many other cities. One permitted establishment in Oakland stays open until 2am, the latest advertised time in the Bay Area.

Solution: Restrict hours of operation.

If approved, the ordinance would restrict the provision of massage services at massage establishments and by out-call or home occupation massage therapists to the hours of 7am to 10pm.

D. No record of services rendered to clients or list of establishment employees.

Presently, the City does not require massage establishments to record the names of their clients, the dates of their visits, and services rendered.

Solution: Client log and personnel log requirements.

It is not uncommon for certified massage therapists to record the services rendered to patrons in a systematic manner in order to track their patrons' progress and specific treatment plans. By tracking patron information, permitted establishments may discourage customers looking to purchase non-massage services, who would do so only under a cloak of anonymity.

The new ordinance would also require owners and operators of massage establishments to maintain an employee log that includes the names, permit numbers, and job functions of each of the massage therapists, massage therapist trainees, and non-massage employees. Any changes in employment would also have to be reported to the City. The increased monitoring of employees would help the City to identify unusual employment patterns, such as frequent turnover of massage employees, that might suggest illegal activities, such as human trafficking.

E. Suggestive advertisements.

Popular weekly periodicals, such as the East Bay Express and the SF Bay Guardian, and Chinese language newspapers feature a plethora of advertisements for massage establishments that display provocative images of scantily clad young women.

Solution: Restrict advertising to professional nonsexual nature of the business.

The new ordinance would prevent establishments from publishing or distributing any advertising matter that would suggest that services other than massage are available. The restrictions on advertisements would not apply to businesses that offer massage as an incidental service.

F. Inadequate background checks.

Under the current ordinance, the City was not required to ask the applicant for important background information that would help the City Administrator determine whether or not the applicant would be qualified to manage and operate a massage establishment. The information requested also only focused on one individual applicant, whereas it is not uncommon for businesses to operate as partnerships, corporations, or other business entities.

Solution: More extensive permit application.

The proposed ordinance would ask for more personal information and documentation, including:

- Two previous home addresses
- Official government issued identification
- Applicant's height, weight, eye color, hair color, and sex
- If the applicant is an entity, such as a corporation, the name, address, and telephone number of each officer, director, and stockholder, etc.
- All criminal convictions, plea bargains, plea of nolo contendere, forfeitures, except for minor traffic violations; all pending criminal matters; and all actual or pending tax judgments of the applicant(s).
- If the applicant does not own the property, the applicant must provide a copy of the lease, letter of intent to lease or rental agreement for the property

Furthermore, the applicant shall sign and date a form that certifies that he or she has received a copy of Municipal Code Chapter 5.36, "Massage establishments and massage therapists", understands its contents, and understands and accepts the duties and responsibilities provided by the chapter.

G. No restrictions on use of "early warning" devices.

There are no restrictions on "early warning" devices used by operators of illicit massage businesses to alert operators of law enforcement.

Solution: Prohibition of "early warning" devices.

The new ordinance would prohibit the installation of equipment that has been used to help illicit massage operators warn staff and patrons of law enforcement activities. These devices include, but are not limited to, light or music dimmers, electronic detection devices, external or internal video equipment and alarm systems. Safety systems used for fire and security would still be allowable.

H. Limited regulation of non-massage employees.

The current codes require massage therapists and owners of massage establishments to undergo background checks, but non-massage employees are not required to undergo background checks. Thus, the City would not know, prior to the issuance of a permit, whether or not a non-massage employee has a criminal record.

Solution: Background check requirement for all employees and therapists.

The new ordinance will require background checks off all non-massage employees in addition to massage therapists and massage therapist trainees. The new ordinance also expands the list of disqualifying offenses to include more portions of the California Penal Code that pertain to sexual offenses. The background check requirement for all employees will not apply to businesses that offer massage as an incidental service.

3. Massage Therapist Permitting

A. Weak certification requirements.

Ordinance does not define adequately “recognized school” of massage and allows the City Administrator to waive education requirements for therapists on the basis of having attended not less than seventy (70) hours of classroom instruction. This provides a significant loophole for applicants that do not meet the standard requirement of three-hundred (300) hours of classroom instruction.

Solution: Broaden certification requirements and eliminate exemptions.

The new permitting requirements for massage therapists provide applicants with different options for them to enable them to demonstrate their qualifications and fulfillment of training requirements. Under the new ordinance, applicants would have to provide the City Administrator with evidence that they possess at least two of the three requirements that would certify competency in massage practice:

1. An original copy of a diploma, certificate, or academic transcript that demonstrates completion of a 300 hours of in-class instruction at a recognized school of massage
2. Satisfactory passage of the National Certification Exam for Therapeutic Massage and Bodywork (NCETMB)
3. Membership in good standing in a national professional massage organization or association that requires members to have substantiation of at least 100 hours of massage training or education, possession of liability insurance coverage, adherence to a code of ethics, and renewal of membership at a minimum of once every two years.

The new requirements would identify reliable certification standards, whereas the current ordinance does not define adequately what constitutes state approval. Nationwide, thirty-three states currently regulate the practice of massage through the National Certification Exam for Therapeutic Massage and Bodywork (NCETMB). One advantage of NCETMB certification is that the test is standardized and methodical and covers the scientific, theoretical, and practical aspects of massage coursework.

For those disinclined to take standardized exams, however, the option of completing three hundred hours of in-class coursework at a recognized school may be more appealing. The extensive process for becoming a recognized school, one that is approved by the State of California Bureau for Private and Post-secondary Education, would help to ensure that schools are operating in a professional manner. Presently, schools can be approved by the State of California for a maximum of four years before they have to be re-approved. The approval process involves a site visit and curriculum analysis.

Nationally, there are primarily two reputable professional organizations that fulfill the requirements in the new ordinance. The American Massage Therapy Association (AMTA) offers yearlong professional and student memberships for \$235 and \$79 respectively. To obtain membership, applicants must provide proof of education or successful passage of the NCETMB examination. The cost of membership provides the member \$2 million per incident insurance coverage. Associated Bodywork & Massage Professionals (ABMP) provides four types of membership for massage professionals, ranging from student level to certified level. All four levels provide members with \$2 million per incident insurance coverage and cost between \$49 to \$229 annually.

Raising certification standards for massage therapists will reduce the number of illegitimate massage therapists in the City.

B. Current ordinance does not address home occupation.

Under the current ordinance, the Planning Department and the City Administrator's office have adopted confusing inconsistent policies to regulate massage therapists that operate from and within their home. In part, inconsistency results from the absence of provisions for "home occupation" in the current ordinance.

Proposed solution: Create new category of "Home Occupation Solo Practitioner"

The amended ordinance introduces a new category of massage called "Home Occupation Solo Practitioner" that includes no more than two individuals that provide massage services from their residence. The home occupation practitioners cannot hire any employees and must not have an adverse impact on the neighborhood.

4. Enforcement

A. Violations are charged as infractions.

The current ordinance authorizes law enforcement officers to cite violators of the massage ordinance with an infraction much like minor traffic infractions and do not appear on an individual's criminal record. Thus, repeated offenses of the massage ordinance may go undetected in background checks. Consequently, applicants may not be deterred from violating provisions of the code.

Solution: Violations may be charged as misdemeanors.

The amendments to the ordinance give the City Attorney or the District Attorney the power and opportunity to charge those that violate the massage ordinance with a misdemeanor. In addition to bearing more severe penalties, such as higher fines or imprisonment, the misdemeanor becomes a part of an individual's criminal record and may help Law Enforcement officers identify individuals that may pose a threat to neighborhood public safety.

B. Limited responsibility of owner or operator.

The current ordinance states that it is the responsibility of the owner or operator to ensure that individuals practicing massage are duly permitted. In the event that therapists are found to be operating without a permit, the therapists in violation and the owner or operator may be cited for an infraction. These infractions do not have a deterrent effect on businesses, per se, because the infractions do not become a part of the operators' records, nor do citations for allowing a massage therapist to practice massage without a permit threaten the establishment owner's permit to operate.

Solution: Broaden responsibility of the owner.

The proposed ordinance would hold the owner responsible for any violation of this Chapter that his or her employees, massage therapists, and massage therapist trainees commit. In addition to providing grounds for the revocation of the owner's massage establishment permit, the violations of a massage establishment's employees could provide grounds for charging the establishment owner criminally. If the owner or operator could have reasonably anticipated a violation, but did not act to prevent the violation or put an end to an ongoing problem, the owner could be charged with an infraction or a misdemeanor.

Appeals

Permit applicants may appeal denials, suspensions, or revocations in writing to the City Administrator's office. If sustained by the City Administrator, the appeal may be heard by the City Council in the manner that appeals for other business permits, such as cabaret permits and taxi permits are also heard, pursuant to OMC Section 5.02.

Applicability to Existing Massage Establishments

Massage establishments that are currently permitted will have at least sixty (60) days from the

day of the passage of the ordinance to comply with the ordinance requirements. Existing establishments permitted under the current ordinance are not subject to the distance or concentration requirements. Under the proposed ordinance, currently permitted businesses must cease to offer massage services by 10pm.

The advertisement restrictions and requirement for photos and background checks for non-massage employees shall not apply to businesses that offer massage as an incidental service.

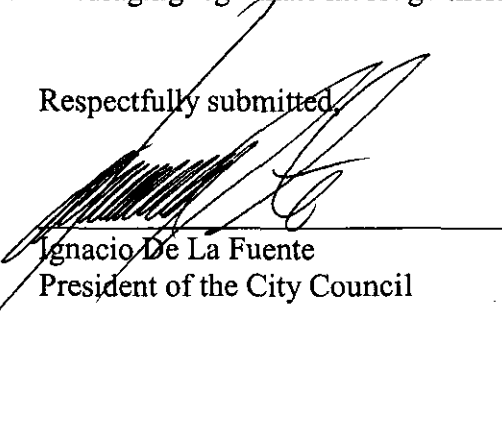
Applicability to Existing Massage Therapists and Massage Therapist Trainees

Duly permitted massage therapists and massage therapist trainees will be considered to have met the minimum requirements of the amendments to the ordinance unless the therapist permit has been revoked or suspended.

RECOMMENDATION

- 1) Accept the staff report.
- 2) Adopt the ordinance to amend existing massage ordinance (OMC 5.36 and OPC 17.102.170) to provide the City with regulations and tools to deter illegal massage activities throughout Oakland while encouraging legitimate massage therapy businesses.

Respectfully submitted,



Ignacio De La Fuente
President of the City Council

Reviewed by: Alex Pedersen
Legislative Aide,
Council President De La Fuente's Office

Prepared by: Christopher Tom
Legislative Aide
District 2

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PUBLIC SAFETY CMTE.

Attachment A. Change in Initial and Renewal Permit Fees

Permit Applicant	Current Ordinance	Proposed Ordinance	Difference
Massage Establishment (New)	Minor CUP- \$,1586 Establishment permit- \$400 Inspections: Building- \$68 Plumbing- \$68 Electrical- \$68 Background- \$47 Publication Fee- \$40 Zoning Clearance- \$23	Establishment permit- \$400 Inspections: Building- \$68 Plumbing- \$68 Electrical- \$68 Background- \$47 Publication Fee- \$40	Decrease in startup costs for new establishments
Total	\$2,300	\$691	-\$1609 (-70%)
Massage Establishment (Renewal)	Establishment permit- \$280 Inspections: Building- \$68 Plumbing- \$68 Electrical- \$68 Publication Fee- \$40	Establishment permit- \$280 Inspections: Building- \$68 Plumbing- \$68 Electrical- \$68 Publication Fee- \$40	None
Total	\$524	\$524	\$0
Massage Therapist (New)	Therapist Permit- \$200 Background Check- \$47 Publication Fee- \$40	Therapist Permit- \$200 Background Check- \$47 Publication Fee- \$40	None
Total	\$287	\$287	\$0
Massage Therapist (Renewal)	Therapist Permit- \$100 Publication Fee- \$40	Therapist Permit- \$100 Publication Fee- \$40	None
Total	\$140	\$140	\$0

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PUBLIC SAFETY CMTE.

MAY 24 2005

FILED
OFFICE OF THE CITY CLERK
OAKLAND

05 MAY 12 PM 3:40

APPROVED AS TO FORM AND LEGALITY

Aly Pelton DEPUTY CITY ATTORNEY

INTRODUCED BY COUNCIL PRESIDENT IGNACIO DE LA FUENTE

ORDINANCE NO. _____ C.M.S.

ADOPT AN ORDINANCE AMENDING THE OAKLAND PLANNING CODE SECTIONS 17.09.040 AND 17.102.170 AND AMENDING OAKLAND MUNICIPAL CODE 5.36, "MASSAGE ESTABLISHMENTS AND MASSAGE THERAPISTS", TO IMPOSE NEW PERMITTING REQUIREMENTS INCLUDING, BUT NOT LIMITED TO, CRIMINAL BACKGROUND CHECKS FOR APPLICANTS AND EMPLOYEES, AND AMENDING OAKLAND PLANNING CODE 17.102.170, "SPECIAL REGULATIONS APPLYING TO MASSAGE SERVICE ACTIVITIES", TO ELIMINATE THE CONDITIONAL USE PERMIT (CUP) REQUIREMENT AND ADD A REFERENCE TO MASSAGE PERMIT REGULATIONS IN OMC 5.36 (05-0203)

WHEREAS, the City Council passed two urgency measures to impose moratoria on Massage Service Activities, on February 1, 2005 and March 15, 2005, initially for 45 days, followed by 90 days, 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 taken action to alleviate the conditions by making administrative improvements to permitting and application procedures, researching "best practices" utilized by other local municipalities, and coordinating between departments; and

WHEREAS, the City of Oakland currently regulates Massage Establishments using two separate regulatory schemes, Oakland Municipal Code 5.36, "Massage Establishments and Massage Therapists", and Oakland Planning Code 17.102.170, "Special regulations applying to massage service activities"; and

WHEREAS, adverse impacts caused by massage establishments tend to be illegal activities and not land use impacts and as such, these activities are best regulated by the Municipal Code, rather than the Planning Code; and

WHEREAS, the reasons for this approach were enumerated in reports presented to the City Council on February 1, 2005 and March 15, 2005; and

WHEREAS, the interests of prospective entrepreneurs and the health and safety of the general public would be served by eliminating the current requirement for a minor Conditional Use

Permit from the Planning Code under Section 17.102.170, and changing the definition section under Section 17.09.040 to reflect the changes being made in Municipal Code Section 5.36, and making substantial changes to Section 5.36 to increase permitting requirements for massage establishments and massage therapists; and

WHEREAS, on April 6, 2005, the Oakland Planning Commission held a noticed Public Hearing to discuss the changes described above and made a recommendation that the Oakland City Council adopt the proposed changes to the Planning Code that would eliminate requirements to seek land use entitlements for massage establishments and massage therapists and substitute other permitting requirements; and,

WHEREAS, the massage establishments that serve as fronts for illegal activity 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 Council recognizes that massage is a viable professional field that offers the public valuable health and therapeutic services; and

WHEREAS, the Council recognizes that regulating massage and the operation of Massage Establishments reduces the potential for unlawful activities and exploitation that may threaten individuals practicing massage and the quality of life in the City's neighborhoods; and

WHEREAS, false or misleading advertisement of massage services may encourage or promote solicitation of illegal activities; and,

WHEREAS, requiring applicants for Massage Establishment, Massage Therapist and Massage Therapist Trainee permits to be fingerprinted reduces fraud and misrepresentation thereby protecting public health, safety and welfare; and,

WHEREAS, employees of Massage Establishments often work closely with massage patrons and should have a higher level of trustworthiness and responsibility to protect public health, safety and welfare; and,

WHEREAS, human trafficking is a growing problem in the United States and in Northern California and massage establishments, especially unregulated and unmonitored massage establishments, can provide a place or front for these illegal activities; and,

WHEREAS, a purpose and intent in revising the requirements is to provide minimum fire, sanitation, health and safety standards for massage establishments and to ensure that persons employed as massage therapists meet minimum training standards and are protected from being exploited to perform non-massage services; 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 the “Whereas” clauses above taken together constitute the City Council’s statement of the reasons for this policy.

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

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

SECTION 2. The City Council finds and determines, that the adoption of this Ordinance is exempt from CEQA under Sections 15061(b)(3) of the State CEQA Guidelines and authorizes the filing of a Notice of Exemption with the Alameda County Clerk.

SECTION 3. Oakland Planning Code Sections 17.09.040 and 17.102.170 are amended to read as follows:

17.09.040 Definitions.

~~"Massage service activity" means any commercial activity which primarily involves the provision of massage, as defined by the Oakland Municipal Code, to individuals. "Massage service activity" means any commercial activity which primarily involves the provision of massage, as defined by the Oakland Municipal Code, to individuals.~~

17.102.170 Special regulations applying to massage service activities.

Massage activities as defined in the Oakland Municipal Code shall be subject to the regulations contained in the Oakland Municipal Code Section 5.36 as may be amended by the Oakland City Council.

~~Conditional Use Permit Requirement. Massage service activities are not permitted in any zone except upon the granting of a conditional use permit pursuant to the conditional use permit procedure in Chapter 17.134.~~

~~B. Location. No massage service activity shall be located in any residential zone or in the C-10 zone.~~

~~C. Discontinuance of Nonconforming Activities. See Section 17.114.090.~~

SECTION 4. Oakland Municipal Code section 5.36 is amended to read as follows:

Chapter 5.36 MESSAGE ESTABLISHMENTS AND MESSAGE THERAPISTS

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- 5.36.220 Applicability to existing Massage therapist permits.
- 5.36.230 Contents of permits – Massage Therapists and Massage Therapist Trainees.
- 5.36.240 Duration and renewal of permits -- Massage Therapists and Massage Therapist Trainees.
- 5.36.250 Operating requirements – Massage Therapists and Massage Therapist Trainees.
- 5.36.260 Application review process.
- 5.36.270 Permit issuance and conditions.
- 5.36.280 Violations.
- 5.36.290 Prohibited Massage areas.
- 5.36.300 Process and grounds for revocation and suspension
- 5.36.310 Appeals.

5.36.010 Statement of legislative policy.

In enacting this chapter the Oakland City Council recognizes that Massage is a viable professional field that offers the public valuable health and therapeutic services. The Council further recognizes that regulating Massage and the operation of Massage establishments reduces the potential for unlawful activities and exploitation that may threaten individuals practicing Massage and the quality of life in our neighborhoods.

It is the purpose and intent of this Chapter to provide minimum fire, sanitation, health and safety standards for Massage establishments in the City, and to ensure that persons employed as Massage therapists meet minimum training standards and are protected from being exploited to perform non-Massage services.

It is the intent of the City Council that this Chapter apply to any business, location or individual

that provides Massage services regardless of the business name or individual's title or position. 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.

5.36.020 Definitions.

As used in this chapter:

“Applicant” is the individual or individuals applying for the Massage Establishment, Massage Therapist or Massage Therapist Trainee permit. Only an Owner or Owners of a Massage establishment may apply for a Massage Establishment permit.

“Disqualifying Offense” means any offense which disqualifies an Applicant from obtaining a permit pursuant to this Chapter or which mandates revocation of the permit if the offender already holds a permit. Disqualifying Offenses are:

- (1) Conviction, plea of nolo contendere, plea bargain, or forfeiture on a charge of violating Section 243.4, 266, 266(a) – 266(k), 314, 315, 316, 318 or Section 647(B) of the Penal Code of the State of California;
- (2) Requirement to register under the provisions of Section 290 of the Penal Code of the State of California;
- (3) Conviction, plea of nolo contendere, plea bargain, or forfeiture pertaining to any felony offense involving the sale of a controlled substance specified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code of the State of California;
- (4) Conviction, plea of nolo contendere, plea bargain, or forfeiture on a charge of violating any provision of this Chapter, or on a charge of violating a similar law in any other jurisdiction, within the past five (5) years; or
- (5) Conviction, plea of nolo contendere, plea bargain, or forfeiture on a charge of committing a violent crime or a crime of dishonesty, fraud or deceit with an intent to substantially injure another; or
- (6) Conviction, plea of nolo contender, plea bargain, or forfeiture on a charge of human trafficking in violation of United States Code Title 18, Chapter 77, Sections 1590, 1591 or 1592; or
- (7) Making a false statement on a permit application.

“Employee” means anyone other than the Owner or Owners of a Massage Establishment or the Massage Therapists or Massage Therapist Trainees that renders service to the permittee and receives direct compensation from that permittee but who does not provide Massage services.

“Erogenous areas” means the genitals, the nipples, the areolas, and/or the anus.

“Home Occupation Solo Practitioner” means a Massage Therapist that practices massage within his or her own residence or on an out-call Massage basis. All Home Occupation Solo Practitioners are

subject to the requirements for home occupation businesses under Section 5.36.070 and no more than two Massage Therapists may operate as Home Occupation Solo Practitioners in any single residence.

“Human Trafficking” means all human trafficking activities defined under the Trafficking Victims Protection Act of 2000 and any activities that are defined as violations under United States Code Title 18, Chapter 77 sections 1590, 1591 and 1592.

“Manager” or “Operator” means the individual or individuals appointed by the Owner or Owners of a Massage Establishment that are clearly designated in the Employee register as having authority and responsibility to supervise Employee(s), Massage Therapists or Massage Therapist Trainees.

“Massage” means any method of pressure on or friction against the soft parts of the human body, whether clothed or unclothed, including but not limited to stroking, kneading, rubbing, tapping, pounding, vibrating, or stimulating with hands or with the aid of a mechanical electrical apparatus or appliance, with or without supplementary aids such as rubbing alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar preparations commonly used in Massage practice. Types of Massage may include, but are not limited to activities commonly known as Massage therapy, bodywork, acupressure, reflexology, deep tissue touch, and shiatsu release.

"Massage Establishment(s)" means any establishment having a fixed place of business where any person, firm, association, or corporation engages in, permits to be engaged in or carries on any of the activities mentioned in this Chapter. Any establishment engaged in, permitted to be engaged in or carrying on any combination of Massage and bath house or other activity mentioned in this Chapter shall be deemed a Massage Establishment.

"Massage Therapist" means any person who, for any consideration whatsoever, engages in the practice of Massage, as herein defined, whether in a Massage Establishment within the city, in their residence or on an out-call basis anywhere within the city.

"Massage Therapist Trainee" means any person enrolled in a "Recognized School" that has not completed three-hundred (300) hours of coursework at a Recognized School.

“Out-Call Massage Service” means any business that provides, refers or otherwise facilitates Massage for any consideration at a non-fixed location. Any such business is not required to obtain a permit as a Massage Establishment under the provisions of this Chapter.

“Owner” of a Massage Establishment, or an Out-Call Massage Service, means any person, firm, association, corporation, limited partnership, Limited Liability Company or any other entity that operates, maintains, or permits a Massage Establishment or Out-Call Massage Service. To the extent the “Owner” is any type of association, partnership, corporation or other entity, “Owner” includes all publicly named or registered persons, officers, directors, Managers and shareholders within those entities. Where the “Owner” is one or more persons, each such person is jointly and severally liable for compliance with this Chapter. Only the “Owner” of a Massage Establishment can hold the Massage Establishment permit.

“Patron” means any individual who pays or gives any consideration in exchange for Massage services.

“Permitee” means the holder of the Massage Establishment, Massage Therapist, or Massage Therapist Trainee permit.

“Public nuisance” shall be defined by State law.

“Recognized School” means a school of Massage, recognized by the State of California which: (i) teaches the theory, ethics, practice, profession and work of Massage; and (ii) requires a residence course of study to be given and completed before the student is furnished with a diploma or certificate of learning or completion; and (iii) has been approved by the State of California Consumer Affairs Bureau pursuant to Section 94915 of the Education Code, or, if said school is not located in California, has complied with the standards commensurate with those specified in said Section 94915, or a school of equal or greater training that is approved by the corresponding agency in another state, or accredited by an agency recognized by the United States Department of Education.

“Unrecognized School” means any school of Massage that does not meet the definition of “Recognized School” but teaches or purports to teach the theory, ethics, practice, profession or work of Massage.

5.36.030 Exemptions.

A. Massage establishments

Massage Establishment permits required by this Chapter shall not apply to or include the following:

1. Licensed hospitals, nursing homes, and sanitariums; or
2. Recognized Schools of Massage; or
3. Duly licensed athletic facilities; or
4. Medical facilities in which Massage is performed as prescribed treatment only on patients of the medical facility; or
5. Residences of Home Occupation Solo Practitioners; or
6. Barbershops and beauty shops provided that any Massage services performed or provided are incidental or accessory and within the scope of any barber’s or beautician’s State of California license.

B. Massage therapists

Individuals that conduct Massage in facilities exempt from Massage Establishment permit requirements are required to have Massage Therapist permits, except as provided below:

1. Persons holding a valid certificate to practice the healing arts under the laws of the State of California, including, but not limited to holders of medical degrees such as physicians, surgeons, chiropractors, osteopaths, naturopaths, podiatrists, acupuncturists, physical therapists,

registered nurses and vocational nurses; or

2. Students in training at a Recognized School of Massage where the student performs Massage only under the direct personal supervision of an instructor certified by the California Department of Consumer Affairs Bureau for private post secondary and vocational education; or

3. Barbers and beauticians licensed under the laws of the State of California to provide Massages to the neck, face, scalp, feet (up to the ankle), or hands (up to the wrists) while engaging in practices within the scope of their licenses.

C. Massage As An Incidental or Accessory Activity

Businesses that offer Massage as an incidental or accessory service to their primary business services offered, as determined by the City Administrator, shall be required to comply with all provisions of this Chapter, except that they shall be exempt from any requirements under this Chapter that applies to Employees.

5.36.040 Fees.

A fee shall be payable to the City, as set forth in the Master Fee Schedule, for any permit issued, or renewed under this Chapter. A fee shall also be payable to the City, as set forth in the Master Fee Schedule for any inspections, reinspections, investigations, and reinvestigations required pursuant to this Chapter.

5.36.050 Not Transferable.

All permits under this Chapter are not transferable or assignable. Any Massage Establishment permit issued under this Chapter shall not apply to any premises other than those originally specified in the Massage Therapist Establishment permit.

5.36.060 Schools of Massage.

Massage Establishments shall not be permitted to use the facilities or premises of a Recognized School or Unrecognized of Massage in connection with the operation of a Massage Establishment.

Students training at a Recognized School or Unrecognized School of Massage may perform a Massage on a member of the general public on school premises if each of the following conditions is satisfied:

1. The school is approved by the California Department of Consumer Affairs Bureau for private post secondary and vocational education;

2. The school offers a Massage curriculum requiring at least 125 hours of classroom instruction; and
3. The student performs the Massage only under the direct supervision of an instructor certified by the California Department of Consumer Affairs Bureau for private post secondary and vocational education.

5.36.070 Home Occupation Solo Practitioners

A. Massage Therapist permit required.

All Home Occupation Solo Practitioners must obtain a Massage Therapist permit before providing any Massage services within his or her own residence or on an out-call Massage basis. A Massage Therapist Trainee permit is not a valid permit for Home Occupation Solo Practitioners.

B. Limitations on number of Home Occupation Solo Practitioners per residence.

No more than two Massage Therapists may operate as Home Occupation Solo Practitioners in any single residence.

C. Requirements.

Home Occupation Solo Practitioners shall be regulated under this Chapter and shall not be subject to the requirements of Chapter 17.112, "Home Occupation Regulations". All Home Occupation Solo Practitioners must comply with each of the following requirements:

1. **Location.** Other than on an out-call Massage service basis, Home Occupation Solo Practitioners shall only operate within their residence, or within a garage which is attached to, and reserved for, such a living unit. When Massage services are conducted within a garage, the doors thereof shall be closed.
2. **Employees.** No person other than the Massage Therapist shall be employed in the conduct of the Home Occupation Solo Practitioner.
3. **Vehicular Storage.** No commercial or passenger vehicle advertising or otherwise identifying the home occupation shall be parked on any portion of the lot containing the home occupation where it is visible by the average person at or beyond any lot line of the lot containing the home occupation.
4. **Traffic Generation.** The home occupation shall not generate pedestrian or vehicular traffic substantially greater than that normally generated by Residential Activities in the surrounding area.
5. **Nuisances.** The home occupation shall be conducted so as not to be a public nuisance, as defined by state law, to the average person at or beyond any lot line of the lot containing the home occupation.

D. Application process

Home Occupation Solo Practitioners must obtain Massage Therapist permits pursuant to Section 5.36.210.

5.36.080 Permits required--Massage Establishments

A. Valid permit required

It is unlawful and in violation of this Chapter for any person, firm, association, corporation, limited partnership, Limited Liability Company or other entity to own, operate, engage in, conduct, permit, or carry on in any way, a Massage Establishment without a valid permit granted in compliance with the provisions of this Chapter.

B. Single permit for each location.

Only one Massage Establishment permit shall be granted for each fixed location where any of the activities in this Chapter occur. The Owner of the Massage Establishment, as defined in this Chapter, shall hold the Massage Establishment permit.

C. Permits not issued if Disqualifying Offenses Committed.

A Massage Establishment permit shall not be issued to any Massage Establishment where any Owner(s), Operator(s), Employee(s), Massage Therapist, Massage Therapist Trainee or any other individual associated with the Massage Establishment has committed a Disqualifying Offense as defined in 5.36.020.

5.36.090 Application Contents-- Massage Establishment.

All Massage Establishment permit applications shall describe the exact nature of any Massage that may be administered at the Massage Establishment and shall set forth the following information

1. A full identification of the Applicant and all persons to be directly or indirectly interested in the permit if granted;
2. Official Government issued identification that proves the Applicant is at least eighteen (18) years of age;
3. The residence and business address and the citizenship of the Applicant and if the Applicant is any type of association, partnership, corporation or other entity, the residence and business address and the citizenship of all publicly named or registered persons, officers, directors, Managers and shareholders within those entities;
4. If the Applicant is an entity, such as a corporation, the name of the entity as shown in its articles of incorporation or other formation documents;
5. Any criminal convictions, except minor traffic violations, all pending criminal matters, any plea bargains, pleas of nolo contendere, forfeitures on charges and all actual or pending tax judgments of Applicant(s);
6. The location of the proposed Massage Establishment, and the name of the Owner and the present use of such premises;
7. The applicable zoning;
8. The name under which the Massage Establishment is to be operated;
9. The past experience of the Applicant in owning, operating, managing or working in Massage Establishments; and the name, address, and past experience of the person(s) who will be in charge of, manage or operate the Massage Establishment;
10. If applicable, information on any previous permit revocations including the circumstances of such revocation in any jurisdiction;

11. The number of persons currently employed or intended to be employed therein as Massage Therapists, Massage Therapist Trainees and Employees, the names and residence addresses of all persons currently or intended to be employed, regardless of the nature of the employment and for Employees, the nature of the work performed or to be performed and recent passport-sized photograph of each employee or intended employee;
12. Evidence that all Employees have been screened and background checks have been conducted to ensure that no Employee has committed a Disqualifying Offense;
13. A written statement that neither the Applicant nor any persons to be directly or indirectly interested in the permit if granted have knowingly made any false, misleading, or fraudulent statement of facts in the application for the permit or in any other document required by the City of Oakland in conjunction therewith.
14. The number of fire escapes;
15. Such further or other information as may be required by the Fire Marshall, the Chief of Police, the Building Code and Housing Inspectors in connection with their determination as to compliance with applicable codes and laws;
16. The fingerprints and photographs of the Applicant(s);
17. Certification under penalty of perjury that the Applicant has not committed a Disqualifying Offense as defined by Chapter 5.36.020;
18. In the event that the Applicant is not the legal Owner of the property where the Massage Establishment is proposed to be located, the application must be accompanied by a copy of the lease, a letter of intent to lease or a rental agreement for the property;
19. Such further information as the City Administrator, or such official of the City to whom the application may be referred, may require; and,
20. The Applicant(s) shall review, sign, and date a form provided by the City Administrator, certifying that he or she: (a) has received a copy of this chapter; (b) understands its contents; and (c) understands and accepts duties and responsibilities provided in this Chapter.

The City Administrator must have this information in a completed application form on file before considering issuing or renewing a Massage Establishment permit.

5.36.100 Minimum requirements--Massage Establishment permit.

Massage Establishments must comply with all the following requirements before a permit may be issued.

A. Distance requirements.

The proposed location of the Massage Establishment is not within one thousand (1000) feet of a public or private school or a public library or youth center (serving youth 18 and under), or City park, park and recreation facility or another Massage Establishment.

B. Commercial zone.

The proposed Massage Establishment must be located in a commercial, industrial or manufacturing zone, or its equivalent as may be amended.

C. Health and safety codes.

The proposed Massage Establishment premises must comply with all applicable building, fire safety, health, electrical, plumbing, mechanical, heating and ventilating, sanitation, and other laws applicable to said premises.

D. Physical requirements.

The proposed Massage Establishment(s) must comply with all the following requirements:

1. All Massage Establishments shall provide on the premises at least one toilet room and at least one toilet room for each sex located if the establishment serves both sexes simultaneously. All toilet rooms shall be equipped with a self-closing door.

2. All Massage Establishments shall provide wash basins in each toilet room, or vestibule, and in each massage room or cubicle. Each wash basin shall be equipped with hot and cold running water, soap in a dispenser and sanitary towels.

3. Physical requirements for toilet rooms or rooms containing bathtubs or shower areas.
Toilet rooms or rooms containing bathtubs or shower areas in Massage Establishments shall meet the following requirements:

A. Floors shall have a smooth, hard, nonabsorbent surface such as Portland cement, concrete, ceramic tile, or other approved material which extends upwards onto the walls at least five inches.

B. Walls of water closet compartments or rooms containing bathtubs shall be finished as specified under subsection (4)(A) of this section to a height of not less than four feet.

C. Shower areas shall be finished as specified in subsection (4) (A) of this section to a height of not less than six feet.

4. Massage Establishment steam rooms shall meet the following requirements:

A. Steam rooms shall have floors, walls and ceilings finished with a smooth, hard, nonabsorbent surface such as Portland cement, concrete, ceramic tile, or other approved material.

B. Floors of wet and dry heat rooms shall be adequately pitched to one or more floor drains properly connected to the sanitary sewer.

C. Hot water shall be available within the immediate vicinity of the wet and dry heat rooms to facilitate cleaning.

5. All Massage Establishments shall have a utility room on the premises equipped with a utility sink and a storage facility for cleaning compounds and equipment.

6. All Massage Establishments shall have a reception area within ten (10) feet of the front door that directly serves Massage service rooms, steam rooms, offices, or group of offices as an extension of the activities in those rooms. All reception areas shall have a window.

7. The walls of a massage establishment shall be clean and painted with an approved washable mold-resistant paint in all rooms where water or steam baths are given.

8. Adequate light and ventilation shall be provided by means of windows or skylights with an area of not less than one-eighth of the total floor area or by means of artificial light and a mechanical operating ventilating system. When windows or skylights are used for ventilation, at least one-half of total window area shall be capable of being opened. The height of partitions in rooms and areas serviced directly by a required window, skylight, or mechanical system of ventilation, shall not exceed three-fourths of the height of the room in which they are placed.

9. Room or cubicle where Massage is administered shall have lighting equivalent to a minimum of ten foot-candles as measured at surface of the massage table, at all times of occupancy.

10. Massage Establishment permits shall be displayed in a conspicuous place on the premises, together with the permits of each Massage Therapist and Trainee performing service on said premises.

E. Exceptions

A Massage Establishment permit may be issued to Applicants that do not meet the requirements of this Section if the City Administrator makes written findings that:

1. The Massage Establishment was granted a conditional use permit (CUP) for operating a Massage Establishment; or
2. The Massage Establishment will not have an impact on public safety or neighborhood quality of life.

5.36.110 Applicability to existing Massage Establishments.

The provisions of this Chapter, with the exception of the distance requirements in 5.36.100, shall apply to any existing establishment having a fixed place of business where any person, firm, association, or corporation engages in, permits to be engaged in or carries on any of the activities mentioned in this Chapter, including any combination of Massage and bath house. Existing establishments must comply with the terms of this Chapter within one hundred and twenty (120) days or for previously permitted Massage Establishment, upon renewal of their Massage Establishment permits or within sixty (60) days, whichever is later. Any Massage Establishment not in compliance within one year of the effective date of the ordinance will be declared in violation of this Chapter.

5.36.120 Permit contents – Massage establishments.

Massage Establishment permits shall contain a description of the exact nature of any Massage authorized to be administered at the Massage Establishment, the name of the Massage

Establishment, the name of the Owner(s) of the Massage Establishment, the location of Massage Establishment authorized by the permit, any conditions imposed on the permit, the date the permit was issued, and the date the permit expires.

5.36.130 Permit to be exhibited – Massage Establishment.

Any Massage Establishment permit required under the provisions of this Chapter shall be exhibited in a conspicuous place where the public has access on the premises where the permit applies.

5.36.140 Duration and renewal of permits – Massage Establishment.

All Massage Establishment permits shall be valid for one year from the date of issuance and must be renewed annually. The Applicant is responsible for initiating and completing the renewal process. The Applicant and the City Administrator in renewing a permit shall be governed by the same provisions as are applicable to issuance of new permits.

5.36.150 Responsibility of Owner(s)

It shall be the responsibility of the Owner(s) of any Massage Establishment to ensure that each person employed as Massage Therapist shall have in his or her possession a valid Massage Therapist permit as set forth in this Chapter.

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.

5.36.160 Operating requirements-- Massage establishments.

All Massage Establishments must comply with the following operating requirements:

A. Hours of Operation

Massage Establishments shall only offer Massage services between the hours of 7:00 a.m. and 10:00 p.m. and no Patrons for Massage services shall be allowed on the premises after 10:00 p.m. or before 7:00 a.m. Pacific Standard Time.

B. Massage Therapists and Trainees

Massage Therapists and Trainees shall be required to wash their hands before administering a massage. All Massage Therapists and Trainees working on the premises shall be free of any communicable disease. Instruments for Massage shall be sanitized before each use by approved sanitization methods.

Massage Therapists and Trainees shall wear clean outer garments whose use is restricted to the Massage Establishment at all times while on the premises. All Employees and other persons working on the premises shall be fully clothed at all times. All outer garments and other clothing required under this section shall be of a fully opaque, non-transparent material and provide

complete covering from at least the mid thigh to two (2) inches below the collarbone. The midriff may not be exposed.

All Massage Therapists and Trainees shall wear prominently displayed on their outer garments an identification badge with their name, photograph, permit number, and expiration date thereof. The City shall issue such badges to Permittees.

C. Personnel Register and Daily Log

Owners of Massage Establishments shall maintain a personnel register, approved as to form by the City Administrator, that contains the names and permit numbers of the Massage Therapists and Massage Therapist Trainees performing Massages on the premises, along with a description of the services performed and the names any other Employee or person retained or working on the premises.

Owners of Massage Establishments shall maintain a daily log, approved as to form by the City Administrator that includes the names of the Massage Therapist(s) or Massage Therapist Trainee(s) performing Massage on the premises for that day, the hours they worked during that day, and a list of services they performed that day. The daily log shall also include the name and job title of every other Employee or person retained or working on the premises that day and the services they performed that were performed. The daily log shall be completed by the close of business every day.

The personnel register shall identify clearly the Manager(s) and/or Operator(s) of the Massage Establishment, as designated by the Owner(s), and the daily log shall identify clearly which Manager(s) and/or Operator(s) is responsible for the Massage Establishment on each day.

The personnel register and daily log shall be available for inspection by the City of Oakland at all times during regular business hours and shall be kept on file for one year. Failure to maintain either the personnel register or log in accordance with this Section shall be a violation of this Chapter.

D. Hiring New Employees

Permittees shall provide the City of Oakland with written notice, including the names, addresses and photographs, of any new Massage Therapists, Massage Therapist Trainees, Employees or other persons working or performing services on the Massage Establishment premises. The notice shall be provided to the City before the first day of employment and the City shall be allowed, to require a background check of anyone listed in the notification for identification purposes.

E. Client Register.

Every Massage Establishment shall keep a client register, approved as to form by the City Administrator, that lists all Patrons, their names, addresses, dates and times of Massages including their arrival and departure time, the name of the Patron's Massage Therapist or Massage Therapist Trainee, the type of service obtained, including the room or cubicle where it was performed and the fee paid. The client register shall be updated by the close of business every day. The client register shall be available for inspection by the City of Oakland at all times during regular business hours. This record shall be considered confidential, not for public review, and may be inspected by the

City of Oakland only as part of a criminal investigation or during proceedings to suspend or revoke a permit under this Chapter. This record shall be kept on file for one year.

F. Sanitation.

All Massage Establishments shall be provided with clean, laundered sheets and towels, in sufficient quantity, which shall be laundered after each use, and stored in a sanitary manner on the premises. Heavy white paper may be substituted for linen. Linen substitute cannot be used more than once.

All portions of the Massage Establishment premises shall be kept in a clean and sanitary condition.

No towel or sheet shall be laundered or dried in any Massage Establishment unless such establishment is provided with approved laundry facilities for laundering and drying. The Massage Establishment Permittee shall provide approved receptacles for the storage of soiled linens and approved refuse containers for the disposal of paper towels and other waste material.

Wet and dry heat rooms, shower compartments, and toilet rooms, shall be disinfected at least once each business day. Bathtubs shall be disinfected after each use.

Pads on Massage tables shall be made of durable, waterproof material.

G. Prohibition of door locks for Massage rooms

No Massage activity may occur in any cubicle, room, booth or area that is fitted with a door capable of being locked.

H. Requirements for entry doors

Secondary security doors at the entrance of the business shall remain unlocked during business hours.

I. Massage services posted.

Every service offered by a Massage Establishment, including the price and minimum length of time to perform the service, shall be posted in a conspicuous place where the public has access. No services shall be performed and no consideration shall be given for any service(s) not posted. Only services that are legitimate recognized Massage functions shall be performed, offered to be performed, solicited or in any other way made available.

K. Advertisements.

All advertisements for Massage Establishments shall reflect the professional nonsexual nature of the business. No Massage Establishment shall place, publish or distribute or cause to be placed, published or distributed any advertising matter that would reasonably suggest to prospective Patrons that any service is available other than keep services described in this Chapter.

L. Payments and tips.

All Massage services shall be paid for in the reception area, and all tips, if any, shall be paid in the reception area.

M. Prohibition against residence.

No person(s) shall reside on or within the premises of a Massage Establishment

N. Prohibition against warning devices.

Massage Establishments are prohibited from having any device that can be utilized as an early warning system to alert persons present at the Massage Establishment to the presence of law enforcement officers, City authorities, or county authorities on the premises. Said devices include, but are not limited to, light or music dimmers, electronic detection devices, external or internal video equipment and alarm systems other than those used for fire and security alarms.

5.36.170 Enforcement—Inspection of Massage Establishment.

City or county Employees charged with the enforcement of this Chapter may enter the premises of any Massage Establishment during regular business hours as may be necessary in performance of their duties. If the Owner, Operator, Manager or any person in charge of the Massage Establishment refuses voluntarily to consent to the entry of any such Employee or inspection, an inspectional warrant as authorized by state law shall be utilized.

5.36.180 Permit required-- Massage therapists.

A. Valid permit required.

It is unlawful and in violation of this Chapter for any person to conduct, perform, carry out, engage in or give a Massage without a valid Massage Therapist Permit granted in compliance with the provisions of this Chapter. This includes individuals that conduct Massage in facilities exempt from Massage Establishment permit requirements pursuant to section 5.36.030 of this Chapter.

B. Permits not issued if Disqualifying Offenses Committed.

A Massage Therapist permit may not be issued to any person who has committed a Disqualifying Offense as defined in 5.36.020.

C. Prohibition from applying for or obtaining permits.

Any individual conducting, performing, carrying out, engaging in or giving a Massage without a valid Massage Therapist permit shall be prohibited from applying for or obtaining any permit under this Chapter for five (5) years from the date of violation(s).

5.36.190 Minimum requirements-- Massage therapist permit.

Massage Therapist Applicants must provide the City Administrator with evidence that they possess at least two (2) of the following minimum qualifications before a permit may be issued:

1. An original copy of a diploma, certificate or academic transcript that demonstrates completion of 300 hours of in-class instruction from a Recognized School;
2. Satisfactory passage of the National Certification Exam for Therapeutic Massage or Bodywork;
3. Membership in good standing in a National Professional Massage Organization or Association that requires its member to have the following:

- A. Substantiation of at least 100 hours of Massage training or education;
- B. Participation in continuing education classes for Massage;
- C. Possession of practitioner's liability insurance coverage in the minimum amount of \$1,000,000.00 per event;
- D. Adherence to a code of ethics; and
- E. Renewal of membership at a minimum of once every two years.

5.36.200 Massage therapist trainee permits.

A. Eligibility.

Any person currently enrolled in a Recognized School, as defined in this Chapter, may after successfully completing one hundred (100) hours of instruction at a Recognized School or combination of Recognized Schools, be issued a Massage Therapist Trainee permit. This permit allows Massage Therapist Trainees to perform Massage services under the direct supervision of a Massage Therapist Permittee.

B. Application.

Applicants for a Massage Therapist Trainee permit must complete the application form for Massage Therapist permit and abide by the Massage Therapist operating requirements in Section 5.36.250. Applicants must also submit a letter signed by the director or administrator of the Recognized School showing the date the Applicant started school and the Applicant's estimated date of graduation.

C. Expiration.

Massage Therapist Trainee permits expire one hundred and twenty (120) days after issuance and are not renewable.

D. Permits not issued if Disqualifying Offenses Committed.

A Massage Therapist Trainee permit may not be issued to any person who has committed a Disqualifying Offense as described in Section 5.36.020.

E. Prohibition from applying for or obtaining permits.

Any Massage Therapist Trainee Permittee that violates any provision in this Chapter shall be prohibited from applying for or obtaining any permit under this Chapter for five (5) years from the date of violation(s).

5.36.210 Permit application contents-- Massage Therapists, Massage Therapist Trainees and Home Occupation Solo Practitioners.

The application for Massage Therapist and Massage Therapist Trainee permit shall contain the following information:

1. If the Applicant is a U.S. citizen, his or her social security number, driver's license number, birth certificate, and U.S. passport with the accompanying original documents to be verified and copied by the City Administrator;

2. If the Applicant is not a U.S. citizen, his or her original INS documents, passport, and all other immigration documents to be verified and copied by the City Administrator;
3. First, middle, and last name(s) of the Applicant and current residence address;
4. The Applicant's places of residence for the five (5) preceding years of the date of application;
5. *The Applicant's personal characteristics, such as height, weight, eye color, hair color, and sex;*
6. Written evidence that Applicant is at least eighteen (18) years of age;
7. The names, addresses and contact information of the Applicant's current employer or if self-employed the name of the business, the type of services or products provided and the names, addresses and contact information of at least three business references;
8. The names, address and contact information of the Applicant's employers for the five years immediately preceding the date of application or if self-employed name(s) of the business, the type of services of products provided and the names, addresses and contact information of at least three businesses references for each of the previous five (5) years;
9. Original documents to demonstrate the fulfillment of the minimum requirements for Massage Therapist permits described in Chapter 5.36.190;
10. If the Applicant holds or has held any permit or license to offer or administer Massages in California or any other state, the license or permit number, the identity of the issuing authority, and information whether such license or permit was ever revoked or suspended and the reason therefore;
11. The fingerprints and photograph of the Applicant;
12. Certification under penalty of perjury that the Applicant has not committed any Disqualifying Offenses described in 5.36.020;
13. Such further information as the City Administrator, or such official of the City to whom the application may be referred, may require; and,
14. The Applicant(s) shall review, sign, and date a form provided by the City Administrator, certifying that he or she: (a) has received a copy of this chapter; (b) understands its contents; and (c) understands and accepts duties and responsibilities provided in this Chapter.

Any Massage Therapist conducting, performing, engaging in or giving Massages at their residence or on an out-call Massage service basis is deemed a Home Occupation Solo Practitioner and must indicate on the form provided by the City Administrator his or her intent to operate as such and must also comply with the following requirement:

1. **Client Register.** Home Occupation Solo Practitioner shall keep a client register, approved as to form by the City Administrator, that lists all Patrons, their names, addresses, dates and times of Massages including their arrival and departure time, the type of service obtained and the fee paid. The client register shall be updated by the close of business every day. The client register shall be available for inspection by the City of Oakland at all times during regular business hours. This record shall be considered confidential, not for public review, and may be inspected by the City of Oakland only as part of a criminal investigation or during proceedings to suspend or revoke a permit under this Chapter. This record shall be kept on file for one year.

5.36.220 Applicability to existing Massage therapist permits.

The provisions of this Chapter shall apply to any person(s) conducting, performing, carrying out, engaging in or giving Massages whether the activities were established before or after the effective date of this ordinance. Massage Therapists permitted under the previous requirements of Chapter 5.36 must comply with the requirements of this Chapter, upon renewal of their Massage Therapist permits, or within sixty (60) days, whichever is later but are not required to demonstrate that they possess the minimum qualifications for a Massage Therapist permit pursuant to Section 5.36.190. This recognition of possessing the minimum qualifications shall extend to each subsequent renewal of the Massage Therapist Permit provided the permit is not revoked, suspended or expired. Any Massage Therapist not in compliance within one year of the effective date of the ordinance will be declared in violation of this Chapter.

5.36.230 Contents of permits – Massage Therapists and Massage Therapist Trainees.

Massage Therapist and Massage Therapist Trainee permits shall contain a description of the any activities he or she is licensed, trained or authorized to perform, his or her name and residential address, any conditions imposed upon the permit, and the date the permit was issued and expires.

5.36.240 Duration and renewal of permits – Massage Therapists and Massage Therapist Trainees.

All Massage Therapist permits shall be valid for one year from the date of issuance and must be renewed annually. The Applicant is responsible for initiating and completing the renewal process. The Applicant and the City Administrator in renewing a permit shall be governed by the same provisions as are applicable to issuance of new permits.

Massage Therapist Trainee permits shall be valid for one hundred and twenty (120) days from issuance and shall not be renewed.

5.36.250 Operating requirements-- Massage Therapist and Massage Therapist Trainees.

A. Identification card.

All Massage Therapists and Massage Therapist Trainees shall carry on his or her person at all times during business operations and be able to produce upon request an identification badge with their name, photograph, and permit number and expiration date thereof. The City shall issue such badges to Permittees.

B. Cleanliness.

All Massage therapists and trainees shall wash their hands before administering a Massage. All Massage therapists and trainees shall be free of any communicable disease. Instruments for Massage shall be sanitized before each use by approved sanitization methods.

C. Appropriate attire.

Massage Therapists and Massage Therapist Trainees shall be fully closed at all times and shall wear clean outer garments that are of a fully opaque, non-transparent material that provides complete covering from at least the mid thigh to two (2) inches below the collarbone. The midriff may not be exposed.

D. Hours of Operation.

Massage Therapist and Massage Therapist Trainees shall only offer Massage services between the hours of 7:00 a.m. and 10:00 p.m. Pacific Standard Time.

5.36.260 Application review process

A. Application filing.

All applications for permits issued pursuant to this Chapter, including renewals, shall be filed in the Office of the City Administrator. The City Administrator shall receive any fee required for the application, ensure that the application is complete, and refer the application to the Chief of Police for investigation, review and recommendation.

B. Procedures on applications.

Immediately on the filing of any application under this Chapter, the City Administrator shall make a copy of such application available for public review and shall refer one copy to Chief of Police, who shall be the investigating official.

C. Investigation.

The City Administrator shall refer the application to the Chief of Police who shall conduct background investigations on all Applicants requesting permits under this Chapter. Where the Applicant(s) is any type of association, partnership, corporation or other entity, background investigations of all publicly named or registered persons, officers, directors, Managers and shareholders within those entities shall be conducted as appropriate. Where the application is for a Massage Establishment permit, background investigations of all non-Massage Employees shall be conducted as appropriate. The Applicant shall be fingerprinted and photographed and consideration shall be given to their criminal record, if any. For Massage Establishment permits, all Owners shall be fingerprinted and photographed, consideration shall be given to their criminal record, if any, and to the character and business responsibility of the Owner and all persons to be directly or indirectly interested in the permit if granted. After reviewing the information obtained, the Chief of Police shall transmit in writing any recommendation or findings from the investigation to the City Administrator and shall give particular consideration to the safety and general welfare of the public, and for Massage Establishment permits, shall make a determination whether operating the Massage Establishment would create an unreasonable risk to the health, safety, or general welfare of the public.

The City Administrator shall also refer the application to other City and County agencies as appropriate and warranted to ensure compliance with existing state, county and local laws.

D. Hearing.

A hearing date shall be set on the application not less than five (5) days and no more than sixty (60) days from the date the application is filed. All persons interested in the application shall be entitled to file objections, protests or recommendations at the hearing. The City Administrator may continue the hearing over from time to time as circumstances may require.

E. Personal interview.

The City Administrator may conduct a personal interview of an Applicant to demonstrate and verify individual's qualifications. A written summary of the interview shall be prepared and included as part of the file or record for the application.

F. Hearing Officer.

The City Administrator may designate the power to hear, inquire and make recommendations on any permit issued pursuant to this Chapter to a member of the City Administrator's staff. The person designated shall be deemed the "Hearing Officer." The City Administrator and the Hearing Officer shall not be bound by the common law or statutory rules of evidence and procedure, but any hearing or inquiry conducted shall be designed to best ascertain the substantial rights of the public parties and carry out the intent and provisions of this Chapter. The informality of any proceeding, the manner of taking testimony and the admission of evidence into the record that is not admissible under the common law or statutory rules of evidence and procedure shall not invalidate any other decision, award or rule made pursuant to this Chapter.

G. Notice of hearing.

The City Administrator shall notify the Applicant of the time and place of any hearing on the application at least five (5) business days before the hearing. The City Administrator shall publish notice of the hearing in the official newspaper of the City at least five (5) days before the hearing date, shall post a notice of the hearing on the bulletin board near the Council Chambers and, where applicable, post a notice of the hearing on the premises to be primarily affected by the granting of the permit. The notice shall set forth the fact that such application has been filed, the name of the Applicant, the nature permit requested and the time and place of the application hearing.

H. Written Decision

Any hearing on an application shall be recorded and following the hearing, within sixty (60) days of making a determination, the City Administrator shall provide the Applicant with a written decision on the application.

I. City Clerk to be notified of actions on permits.

The City Administrator shall notify the City Clerk of any action taken on a permit application under this Chapter and shall make copies of all communications, findings and records that pertain to such applications and permits available for public review.

5.36.270 Permit issuance and conditions.

A. Issuance.

Within sixty (60) days of completing the background investigation and receipt of information from the Chief of Police, the Hearing Officer shall issue a permit under this Chapter unless the City Administrator finds and states in writing that:

1. The Applicant failed to provide information in connection with the application requested by the City Administrator as a basis for enabling the City Administrator to make his or her determination; or

2. Any statement made in the application or any information submitted supplementary thereto is incorrect or untrue; or

3. The Applicant, Owner(s) or any persons to be directly or indirectly interested in the permit if granted have committed a Disqualifying Offense or has violated any of the provisions of sections 5.36.100, 5.36.160, 5.36.190 or 5.36.250 and the City Administrator concludes that by reason of the crime or act the Applicant, Owner(s) or any persons to be directly or indirectly interested in the permit if granted would not conduct the enterprise in a law abiding manner or in a manner which does not subject Patrons of the enterprise to risk of harm or criminal, deceitful, or otherwise unethical practices.

B. Conditions.

The City Administrator may impose specific conditions of operation on any permit issued pursuant to this Chapter to protect the safety and general welfare of the public, to reduce the incidence of, detect the commission of, or identify perpetrators of crime, or to enforce the provisions of this chapter . Any condition imposed pursuant to the provisions of this Section shall be stated in writing, together with the reasons therefore, and served upon the Applicant or Permittee.

If conditions are imposed pursuant to this Section during the permit term, the condition(s) shall become effective fifteen (15) days following the date of service of the notice thereof.

5.36.280 Violations.

A. Misdemeanor.

Any person who intentionally or willfully violates any provision of this Chapter or recklessly disregards the provisions of this Chapter, and that violation threatens the public health, safety or welfare, is guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Chapter shall be punishable by imprisonment in the county jail not exceeding six month or by fine not exceeding one thousand (\$1,000) or by both. For purposes of this Section the term person means any firm, association, corporation, limited partnership, Limited Liability Company or other business or corporate entity.

B. Separate Offenses for Each Day.

Any person in violation of this Chapter shall be liable and guilty of a separate offense for each day a violation occurs, continues or is permitted.

C. Public Nuisance.

Violation of sections 5.36.100, 5.36.160, 5.36.190 or 5.36.250 is declared to be a public nuisance and may be summarily abated by the City as such.

D. Civil Penalties

Any violation under this Chapter is subject to civil penalties and administrative citations pursuant to Sections 1.08 and 1.12 of the Oakland Municipal Code.

E. Liability for Expenses.

Violators of this Chapter shall be liable for such costs, expenses, and disbursements paid or incurred by the City or any of its contractors in correction, abatement, and prosecution of the violation(s). Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the holder of the Massage Establishment permit. Fees shall be in the amount specified in the City's master fee schedule. The inspection official shall give the Massage Establishment Owner(s), Massage Therapist(s) or Massage Therapist Trainee(s) written notice showing the itemized cost of such chargeable service and request payment thereof. If the bill is not paid within the time specified, the charges shall be placed as a lien against the property, if applicable, and must be paid in full before a Massage Establishment permit, Massage Therapist permit or Massage Therapist Trainee permit is issued or renewed.

F. Prohibition from applying for or obtaining permits

Any person, firm, association, corporation, limited partnership, Limited Liability Company or other entity that violates, or causes or permits another to violate, any provision of this Chapter or that commits a Disqualifying Offense is prohibited from applying for or obtaining any permit under this Chapter for five (5) years from the date of the violation(s).

5.36.290 Prohibited Massage areas.

It is unlawful for any Massage Therapist, Massage Therapist Trainee, Manager, Employee, Operator, Owner or any other person to touch, with any part of his or her body or with any object, a Patron's clothed or unclothed Erogenous area before, after or during any Massage service.

5.36.300 Process and grounds for revocation and suspension.

Any permit granted pursuant to this Chapter may be revoked or suspended by the City Administrator pursuant to the procedures set forth in Section 5.02.080 upon a finding by the City Administrator that any one of the following conditions exists:

1. That any of the requirements for the issuance of such permit do not exist; or
2. That a violation of any of the permitting or operating requirements, including a violation of a permit condition, has occurred; or
3. That any Massage Establishment Permittee has allowed a Massage Therapist who does not have a valid permit to perform services on the premises; or
4. That any Massage Therapist or Massage Therapist Trainee performed a Massage without a valid permit or in violation of this Chapter; or
5. That any Permittee has committed a Disqualifying Offense, as defined in Section 5.36.020; or
6. That more than two persons working as Home Occupation Solo Practitioners engaged in, performed or gave Massage in one residence; or
7. That issuance of a permit under this Chapter has resulted in a public nuisance.

5.36.310 Appeals.

Any person may appeal the denial, revocation or suspension of a permit under this Chapter pursuant to the procedures and requirements of Chapter 5.02.100 of the Oakland Municipal Code.

SECTION 5. If any section, subsection, phrase, word or provision of this ordinance or the application thereof to any person or circumstances is held invalid, the remainder of this ordinance and the application of such provisions to other persons or circumstances shall not be affected thereby.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2005
PASSED BY THE FOLLOWING VOTE:

AYES-

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
LATONDA SIMMONS
Acting City Clerk and Clerk of the Council
of the City of Oakland, California

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PUBLIC SAFETY CMTE

MAY 24 2005