

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2005 JAN 13 PM 8:20

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Office of Councilmember Danny Wan
DATE: January 13, 2005

RE: An Ordinance Enacting a 45-Day Moratorium, Pursuant to California Code Section 65858, Prohibiting the Issuance of Conditional Use Permits for Massage Establishments and Massage Therapists Under OMC Ch. 17.102.170, Pending Review of Both OMC 17.102170 and OMC 5.36.

SUMMARY

This ordinance will enact a 45-day moratorium on the granting of any Conditional Use Permits for Massage Establishments and Massage Therapists in the City of Oakland. Staff will use the 45-day moratorium to continue reviewing permitting requirements for such businesses and to finalize recommendations for policy changes.

FISCAL IMPACT

This is a policy and regulatory matter with no direct fiscal impact. Long-term effect of a reduction in massage establishments and therapist permits could be a savings to the City resulting from fewer resources spent on monitoring and enforcement of massage establishments despite lower revenue from permit fees.

BACKGROUND

Since 2001, the District 2 Council office has received many complaints about massage establishments in District 2 that have had a record of soliciting prostitution to clients and establishments that are located in close proximity to schools. In November 2004, there were 18 massage permit applications to the City Administrator's office that far exceeded the normal number of 3-4 applicants per quarter and represented a 350% increase in applications from the previous quarter. Notably, fifteen of the eighteen applicants had Asian surnames and reflect the demographic makeup of young women that have been victims of sexual slavery.

The District 2 office has been working with the Hearing Officer, the issuer of the massage establishments and therapist permits in the City Administrator's Office, the Oakland Police Department, and local anti-human trafficking community based organizations to identify weaknesses in current policies and enforcement practices. The surge in applications for massage therapist permits and evidence that the number of actual massage establishments in Oakland

exceeds the official count of eight massage establishments with permits city-wide makes it important for the City to re-evaluate and reform its permitting process for these activities.

In October of 2003, Councilmember Jane Brunner sponsored an ordinance (NO. 12551 C.M.S) enacting a 45-day moratorium that was intended to provide the City with an opportunity to review and make recommendations to change the policy governing massage establishments and therapist permits while refraining from issuing new permits. Since the expiration of the 45-day moratorium sponsored by Councilmember Brunner, Councilmember Wan's office has been made aware of questionable activities taking place at massage establishments and is working with key City staff, including the City Administrator's Office, the Police Department, and Planning, to identify weaknesses in the current ordinance and draft a new ordinance.

The Oakland Police Department has received a \$450,000 grant from the Federal government to help fight human trafficking in the Bay Area. OPD will use the funds to train other regional law enforcement agencies under an effort to curtail the human trafficking industry, estimated at \$13 billion. Federal authorities consider Northern California to be a prime destination for illegally trafficked individuals; many victims of human trafficking have been funneled through massage establishments.

A 45-day moratorium will provide the City Administrator with a legally defensible rationale to deny permit applications for massage establishments and therapists while a new ordinance is being drafted. Without the moratorium, the City would continue to increase the enforcement burdens of the Police Department. By adopting the moratorium, the City will be able to narrow its focus primarily on permitted massage establishments and prevent new establishments from applying for permits.

The District 2 office is in the midst of drafting a new ordinance regulating massage establishments and therapists in collaboration with the City Administrator's Office, Police Department, CEDA, and other public agencies. The new ordinance is intended to protect legitimate massage establishments and therapists and increase the difficulty of trafficking individuals through the massage industry in Oakland by raising certification standards and providing stronger punitive measures against noncompliant massage establishments and therapists.

KEY ISSUES AND IMPACTS

Oakland's regulations pertaining to Massage Establishments and Massage Therapists are inadequate to safeguard against disreputable operations, illegal activity, and exploitation of workers.

I. OVERCONCENTRATION OF MASSAGE ESTABLISHMENTS

The City defines the Chinatown neighborhood, part of downtown, to be from Broadway to Oak Street between 6th Street and 12th Street. Chinatown is home to over 10 churches, 2 elementary schools, 4 childcare centers, and 4 senior housing facilities. A densely-populated working class

neighborhood of 2,734 people (21,000 people/square mile), Chinatown is a culturally vibrant commercial neighborhood in the midst of urban renewal. The City recently received a \$2.2 million grant for pedestrian and street improvements in the core of Chinatown.

Despite its economic progress, Chinatown risks becoming Oakland's veritable "red light district" with the proliferation of massage activities. Of the eight permitted massage establishments in Oakland, five (62.5%) are located in or within a 0.2 mile radius of Chinatown. Furthermore, three of the massage parlors are located within a block of Lincoln Elementary School and Lighthouse Charter School, Chinatown's two elementary schools. Within two blocks of Hong Fook Senior Center and Hotel Oakland, home to hundreds of Asian seniors, five locations offer massage services. Of the 31 facilities exempted from massage establishment requirements due to classification as "healing arts" establishments or for offering massage as an "incidental service", seven (22.6%) are located within a 0.3 mile radius of Chinatown.

A simple internet search for "Asian Massage Parlor Oakland" returns astonishing results and links to websites that document the unsavory activities that take place in Oakland. Many of these activities take place in Chinatown. If adult websites that feature reviews of massage establishments and therapists are any indication, downtown and Chinatown are the places to visit for prostitution and sexual services in Oakland.

In order to facilitate economic development that reflects the wants and needs of the Chinatown neighborhood, the City ought to prohibit new massage activities to prevent further over-concentration and threats to economic development and neighborhood safety.

II. PROBLEMS WITH CURRENT POLICY REGARDING PERMITTING AND ENFORCEMENT

Confusing Regulations

The staff report authored by Councilmember Jane Brunner for the Public Safety Committee in October 28, 2003 noted that massage establishments are regulated by two distinct sections of the municipal code. Two sections of the Oakland Municipal regulate massage activity without referencing one another. Chapter 17.102.170 of the Oakland Municipal Code requires conditional use permits for massage service activities and forbids them in any residential or C-10 zone. Chapter 5.36 of the Oakland Municipal Code requires massage establishments to obtain a special activity permit in order to operate. Presently, it is unclear whether either of the code sections supercedes the other or whether receiving approval under one of the codes is required in order to receive approval under the other.

Inadequate Background Check Requirements

Current city regulations do not provide thorough background check requirements for massage establishment owners and massage therapists.

Establishments

The current policy requires the applicant for a massage therapist license to furnish the address of the proposed establishment, current use of the structure, applicable zoning, number of fire escapes, fingerprints and a photograph of applicant, and certification under penalty of perjury that the applicant has not been convicted of or entered into a plea bargain pertaining to certain violations and is not required to register under provisions of section 290 of the Penal Code.

Additional information may prove helpful to provide a thorough analysis on the background of an applicant. This information may include the applicant's physical characteristics, immigration documents, State of California identification card, names of all members of a corporation party to the business, all criminal convictions and all pending criminal matters, and the photographs and fingerprints of all employees in the massage establishment. (OMC 5.36.050) Presently, the applicant is not required to list employee information in its application. This would have proven to be helpful in the case of one District 2 massage establishment that hired a "towel boy" that happened to have an extensive criminal record, including convictions for pimping. Upon discovering this in 2003, the City accosted the owner of the establishment who then fired the employee immediately.

Therapists

The current ordinance requires massage therapist permit applicants to furnish their name and current residence address, social security number or driver's license number, written evidence that applicant is at least 18 years of age, and the name of a recognized school at which the applicant completed training. However, the policy does not delve into the employment history of massage therapy applicants; applicants' employment history might help separate legitimate therapists that have operated in one location over the course of many years from therapists that have worked in multiple cities or states over the course of a few years. Furthermore, the current ordinance does not designate a recognized list of schools of training.

Currently, the City issues paper identification cards that can be easily duplicated, counterfeited, and shared between therapists that move from parlor to parlor within the City. The City ought to consider implementing new standards for identification cards.

Client Register

Presently, the City does not require massage establishments to record the names of their clients in a client register. Certain health spas located within hotels require clients to schedule appointments and record their names into a client register. Such a requirement would deter the solicitation of prostitution and other illegal activities that plague numerous massage establishments.

Lacks Identified Certifying Agency for Massage Therapists

At present, the State of California does not regulate massage establishments or the practice of therapeutic massage. According to the American Massage Therapy Association, 33 states and the District of Columbia have state boards administering massage practice laws. The State of California has relegated the duties of lawmaking and oversight regarding massage activity to cities and unincorporated areas (California Code Section 51030). However, many cities, like the City of Oakland, have not identified an authoritative source for determining the legitimacy of massage training institutes to verify the authenticity of training certificates for massage therapists.

The current ordinance requires massage therapist permit applicants to furnish “Name and address of the recognized school that the applicant attended showing that the applicant has completed not less than five hundred (500) hours of instruction.” (5.36.070) However, the ordinance provides no definition for “recognized school”. While there is no agency that accredits schools of massage therapy in California, the Commission on Massage Therapy Accreditation accredits massage therapy training programs and the National Certification Board for Massage Therapy and Bodywork certifies individual massage therapists at the national level. A new ordinance may specify a national organization as the certifying agency that legitimates the massage training received by the applicants.

Lacks Comprehensive Performance Requirements

Physical Requirements

Operating requirements included in current massage establishment requirements pertain mainly to health and safety (5.36.060). The chapter specifies the need for clean linens, sanitary premises, hand washing, cleanliness of washrooms, and massage tables. New legislation might address other physical aspects of t as limiting operations of massage therapy to rooms or cubicles that are no locked or fitting rooms that house massage activities with windows that e observe activities therein.

Item _____
Public Safety Committee
January 25, 2005

Requirements of Therapists

The only stated requirement of massage therapists and trainees is for them to wear clean outer garments and display identification badges. Other counties and cities have specified attire requirements for therapists to abide by. Other jurisdictions have limited the types of services offered in massage establishments to services that have been posted.

Responsibility for Illegal Activities

Under current regulations, massage establishment owners are not directly accountable for the actions of their employees. Currently, establishment owners that repeatedly hire employees who

engage in illegal activities on the premises of the establishment are not legally responsible for the actions of their employees.

Allows Late Hours of Operation

The current ordinance allows establishments to operate between the hours of seven a.m. and eleven p.m. Late hours of operation for massage establishments mean that the Police Department must monitor the activities at these businesses for longer than usual and increases the ease with which illegal activities take place. Recipients of legitimate massage services would still be able to receive adequate services even if the Council reduced hours of operation.

Drains Police Resources

The Police Department's vice unit, currently staffed with two sworn officers, is responsible for investigating crimes against children, domestic violence, and regulating massage activities. Despite its breadth of responsibility, the Vice Crime Unit exhausts an inordinate amount of staff resources to monitor and enforce the Oakland Municipal Code concerning massage activity.

Currently, one vice officer monitors massage activity. This officer can spend at least three to four hours a day conducting background checks on massage therapy permit applicants, depending on the volume of applications. The background checking process can take months because most of the applicants for massage permits are immigrants or out of state residents.

The Vice Crimes Unit also conducts undercover prostitution operations to ensure that permitted establishments do not engage in illegal activity. This year alone, the Unit has conducted five undercover operations that have resulted in arrests for Solicitation of Prostitution and the identification of numerous illegal aliens and unlicensed therapists. These operations are time consuming because the Vice unit coordinates with community-based organizations, such as SAGE (Standing Against Global Exploitation) to investigate evidence of human trafficking and sexual exploitation of massage therapists. Any given prostitution operation can last anywhere between 10 to 15 hours and involves numerous police officers that have to be taken from other assignments.

The undercover sting operations have allowed the Police to tell establishment owners to close down. However, the Police Department does not currently have the legal right to physically shut down and board up a massage establishment even after determining that it is being operated illegally or after issuing citations for violations that are not corrected. Consequently, massage operations that have been told to close down can simply open up upon the departure of law enforcement. It is likely that the Police Department's inability to physically shut down massage establishments encourages non-compliant business owners and operators to re-open their businesses, knowing that the Police Department does not have the time and resources to monitor their businesses regularly.

In addition to monitoring licensed massage establishments, the Police Department investigates

and cites unpermitted massage establishments. Because of limited resources and a historical lack of interdepartmental coordination, the City has not conducted a survey of businesses to determine the number of unpermitted massage establishments. A moratorium on massage activity permits would allow the City to focus its resources on the existing permitted establishments.

CONCLUSION

The ordinance will enact a 45-day moratorium on the granting of any Conditional Use Permits for Massage Establishments and Massage Therapists in the City of Oakland. Staff will use the 45-day moratorium to review all permitting requirements and enforcement procedures pertaining to such businesses and to recommend changes. Before the expiration of the 45-day moratorium, staff will ask the council to extend the moratorium up to ten months to provide ample time for reviewing current policies and enforce against incompliant establishments.

Such a moratorium will not have substantial impact on business activity in the City, while it will provide an opportunity to review a matter of enormous import to Chinatown and other business districts in the City of Oakland.

RECOMMENDATIONS

This report recommends that the Council approve the moratorium and provide direction to supplement ongoing efforts to draft new regulations.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Danny Wan", with a long horizontal flourish extending to the right.

Danny Wan
City Councilmember, District 2

(DRAFT)

FILED
OFFICE OF THE CITY CLERK
4/5 VOTE REQUIRED FOR PASSAGE

2005 JAN 13 PM 8:20
APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER DANNY WAN

CITY ATTORNEY

ORDINANCE NO. _____ C.M.S.

**AN URGENCY MEASURE ADOPTING AN INTERIM ORDINANCE,
PERSUANT TO GOVERNMENT CODE SECTION 65858, IMPOSING A
MORATORIUM ON MASSAGE SERVICE ACTIVITIES**

WHEREAS, due to a history of association with prostitution and other illegal activities, Massage Service Activities present unique challenges for local government; and

WHEREAS, Massage Service Activities that serve as fronts for illegal activities require significantly higher commitment of police resources and neighborhood scrutiny; and

WHEREAS, currently, a high concentration of Massage Services Activities in the Chinatown neighborhood, part of the broader downtown area, threatens efforts to revitalize and attract new businesses into Chinatown; and

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

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

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

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

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

WHEREAS, the City has initiated a review of the regulatory schemes it uses to regulate massage establishments and massage service activities with the goal of adopting needed changes to the current regulations, including changes to the Planning Code, Municipal Code, and General Plan to protect the public health, safety, and welfare from the negative effects of

Massage Service Activities that serve as fronts for illegal activity and during the period of time that it undertakes this task, the City is concerned that absent the adoption of an emergency moratorium, massage establishments that conflict with the contemplated changes to the City's regulatory schemes could be established in the City of Oakland, conducting an update of the Oakland Planning Code to comply with the Land Use and Transportation Element and Estuary Policy Plan; and

WHEREAS, the City is investigating modifications of the Planning Code, Municipal Code, and General Plan to protect the public health, safety, and welfare from the negative effects of Massage Service Activities that serve as fronts for illegal activity; and

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

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

WHEREAS, pursuant to Government Code Section 65858 a city, including a charter city, may adopt an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan or zoning proposal that the legislative body is considering or intends to study within a reasonable time; and

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

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

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

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

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

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

- a) "Massage Service Activity" is as defined in OPC Ch 17.09.040

SECTION 5. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of 45 days from the date of its adoption. This 45-day period may be extended by the City Council in accordance with the provisions of California Government Code 65858.

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

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

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

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

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

SECTION 11. The City, on a case by case basis, shall have the authority upon showing of good cause by an applicant, to waive the interim controls imposed by this Ordinance and to allow for the granting of permits to said applicant pursuant to the Major Variance provisions of the Oakland Planning Code. Good cause shall mean a factual and evidentiary showing by the applicant that the interim controls, if not waived, will deprive the applicant of substantially all reasonable use of his/her property. All such applications for waiver shall be filed with the City Planning Department. Said applications shall be reviewed and decided by the City Planning Commission. Within 10 calendar days after the date of a decision by the City Planning Commission, an appeal from said decision may be taken to the City Council by the applicant, the permit holder, or another interested party. In event the last date of appeal falls on a weekend or holiday when City offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by

the Commission and shall be filed with the City Clerk. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record. Upon receipt of the appeal, the Council shall set the date for consideration thereof. The City Clerk shall notify the Secretary of the City Planning Commission of the receipt of said appeal and of the date set for consideration thereof; and said Secretary shall, not less than ten days prior thereto, give written notice to: the applicant, the appellant in those cases where the applicant is not the applicant; adverse party or parties, or the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as the Secretary deems appropriate, of the date and place of the hearing on the appeal. The decision of the City Council shall be made by resolution and shall be final. The City Council shall vote on the appeal within thirty (30) days after its first hearing of the appeal. If the Council is unable to decide the appeal at that meeting, it shall appear for a vote on each regular meeting of the Council thereafter until decided. Fees for waiver applications and associated appeals shall be the same as those charged for Major Variance.

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

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

NOTES-
ABSENT-
ABSTENTION-

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

Item _____
Public Safety Committee
January 25, 2005