

**CITY OF ALBANY
PLANNING AND ZONING AGENDA
STAFF REPORT**

Agenda date: February 8, 2011

Prepared by: JB

ITEM/ 6c

SUBJECT: Discussion of Review Standards for Professional Services Including Massage Establishments

Background

Table 1 (Section 20.12.040) of the Planning and Zoning Code sets out the details on whether a particular use is allowed in a particular zoning district. In addition, the table shows whether or not a use permit is required, and thus whether or not a project is brought before the Commission.

Recently staff has received feedback from applicants, business district representatives, and citizens regarding the review standards established in Table 1. In particular, there is an interest in the City exercising more stringent limitations on certain types of businesses that are already represented in the City. Nail salons and massage establishments are frequently noted.

Discussion

Massage Establishments

The review standards established in the Planning and Zoning Code Section 20.12.040 (Table 1 Permitted Land Uses) require a use permit for a massage establishment. Under a recent state law, however, a statewide certification program is available to applicants (Attachment 1 & 2). Under this program, if a person is certified by the state, the City cannot have land use and zoning requirements applicable to massage establishments that are not also applied to other professional or personal service businesses. Thus, in the past year, new establishments have not been brought before the Commission. For example, the new massage establishment at 919 San Pablo is a recent example of an application that did not go through the use permit process. (For your information, the signage was not approved by the City and will be subject to code enforcement if not promptly removed.)

It should be noted that there is a wide range of types of massage establishments. Some are clearly therapeutic in nature and ancillary to established medical services or spas/fitness establishments. Please also note attached January 20, 2011 correspondence from Kristen Conner.

To bring massage uses back into Commission use permit review, all other services also would require a use permit. This approach may be counter to other economic development objectives of streamlining the City's permitting process. In addition, if the CUP process is to be used to limit the number or location service establishments, it would be staff's recommendation that specific objective review criteria be approved by the City. The criteria could take time to prepare and could have unintended consequences for other service businesses.

As an alternative, simple design review guidelines could be prepared that ensures that service establishments will be an aesthetic addition to the business district. This approach would be procedurally easier, would avoid the risk of the City's review process violating the state pre-emption. High quality signage, visibility into the establishment, etc. could be considered.

**Excerpts from California Massage Therapy Council web page
(<http://www.camtc.org/Faq.aspx#7>)**

Local Government Agencies

**Legal Notice regarding FAQs: These FAQs are provided as a service to individuals and businesses interested in CAMTC certification. However, these FAQs are not intended as, nor a substitute for, legal advice. Individuals and businesses with questions regarding CAMTC's enabling statutes, California Business and Professions Code Section 4600 et seq. and/or the rules pertaining to various local jurisdictions should consult their own experienced legal counsel.*

Q: Why was CAMTC created?

Senate Bill 731 established the statewide standards for massage therapist certification. The bill was signed into law on September 27, 2008 by Governor Schwarzenegger and became effective January 1, 2009. The non-profit California Massage Therapy Council (CAMTC) was then created to provide California Statewide Voluntary Massage Certification no sooner than September 1, 2009.

Q: How does CAMTC check a massage professional's background?

CAMTC requires the submission of fingerprint images and related information to the Department of Justice and requests current and subsequent arrest notification services as provided under Section 11105.2 of the Penal Code. Based on the findings, CAMTC has the authority to deny an application for a certificate or to suspend and revoke a certificate for any violation of subdivision (b) of Section 647 of the Penal Code or any other offense described in subdivision (h) of Section 4603. CAMTC reserves the right to conduct additional background checks of individual applicants.

Q: How does the certificate affect a government agency's ability to regulate a massage professional?

California Business and Professions Code Section 4600 et seq. prohibits a city or county from regulating the practice of massage by a certificate holder. Some municipalities are enacting ordinances to require massage professionals providing services within their jurisdictions to obtain CAMTC certification. Sample ordinances can be viewed here.

Additional information can be found in our City Fact Sheet.

Q: How will I know if a certificate is official?

You can verify the status of a certificate by using the online form or by contacting CAMTC. You can view a sample certificate and a sample ID card. You can also view a sample of the employer verification document, which CMTs and CMPs can provide to their employers while waiting to receive their official certificates.

Q: How can we stay informed on CAMTC activities and certifications issued to massage therapists practicing in our area?

If you are directly involved with enforcing massage regulations in your area, you should contact CAMTC, your City Manager or Police Chief (depending on the area) and set up a designated contact to receive information about those who are applying for, or who have received, certification in your area. You will be given access to all pertinent data and receive updates from CAMTC about new applicants. You will also be able to contact us directly with questions or concerns you may have about an applicant.

Q: We are working on revising our city codes regarding massage professionals. Have any other cities shared their code changes with you?

Yes. You can view sample ordinances [here](#).

Q: We are planning to honor CAMTC certification as qualification for massage permits in our city. Can we stop issuing permits?

That is certainly possible. However, please keep in mind that CAMTC only began issuing certifications on September 1, 2009, and not all applications have been processed due to heavy demand. Several cities have already stopped issuing permits, but are allowing massage professionals to continue to work while in the process of gaining their CAMTC certification. Massage professionals will greatly appreciate your allowing some overlap while they are in the application review process. CAMTC will make available lists of individuals who have submitted their applications and are in the process of certification.

Q: Can we still require massage professionals to obtain city licenses and permits?

CAMTC does not issue licenses or permits per se in the various cities and counties, but CAMTC certification constitutes a permit to work throughout California as defined in the [California Business and Professions Code Section 4600 et seq.](#)

The Certified Massage Therapist or Certified Massage Practitioner is exempt from needing a city-issued massage permit. However, other local requirements such as a business license may still be required.

Q: Now that this process is in place, how will local agencies benefit?

CAMTC is handling the certification process. The CAMTC's review of presented credentials for Certified Massage Therapist (CMT) and Certified Massage Practitioner (CMP) will give local jurisdictions the benefit of our professional evaluation of training, education and experience, and will make the titles of CMT and CMP consistent throughout the state. CAMTC is also working with law enforcement to ensure that adequate background investigations and arrest monitoring takes place.

Q: What about massage professionals who do not have CAMTC certification?

Massage professionals who choose not to apply (or who do not qualify) for our certification cannot be prohibited from practicing in California, as what we offer is, by law, a voluntary certification. However, most massage professionals will find that being able to operate with a single massage certification statewide is preferable.

Employers and Massage Business Owners

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Q: Will a city be able to require various permits (other than a city business license) for CMTs or CMPs who want to start their own business and hire/contract with therapists if ALL of the therapists have certification from CAMTC?

According to [California Business and Professions Code Section 4600 et seq.](#), a city cannot require a massage establishment permit (other than a business license) if all the massage professionals employed by the establishment are certified by CAMTC. A city can require up-to-date proof that all staff providing massages are currently certified. As

for new businesses, cities may resist exempting the business from all provisions of the local massage ordinance until they see that it meets the qualifications for exemption. We are working with city officials on how to handle this.

However, if the business obtains a business license on the basis of being exempt from the establishment requirements (other than reasonable zoning and health and safety regulations per California Business and Professions Code Section 4612) and if the business subsequently does not demonstrate that it qualifies for exemption, the city has the right to take action against the business or to revoke the exemption from a required massage establishment permit. *Cities might still retain the right to investigate the owner if the owner is not a Certified Massage Therapist.*

Please be sure to contact your city offices about specific licensing and zoning requirements.

SB 731 FACT SHEET

SB 731 MEETS STANDARDS CURRENTLY ESTABLISHED BY CITIES AND COUNTIES AND WILL ALSO BENEFIT CITIES AND COUNTIES:

I. SB 731 Meets Standards Established by Cities and Counties:

- Applicants for state certification will undergo criminal background checks including fingerprints. (Section 4601.3(a)). The CAMTC is mandated to request subsequent arrest notification service from the Department of Justice for all applicants for licensure for whom fingerprints are submitted. (Section 4601.3(d)).
- The CAMTC will be authorized to investigate the certificate of completion of questionable schools and reject those it determines to be fraudulent. (Section 4601(g)(1) and (2)).
- The CAMTC will be authorized to discipline certificate holders through probation, suspension, revocation, or other means it deems proper. (Section 4601(a)).
- The CAMTC will be required to permanently revoke the certificate of anyone violating subdivision (b) of Section 647 of the Penal Code of any offense described in subdivision (h) of Section 4603. The law requires the CAMTC to immediately suspend the certificate, notify the certificate holder and any business employing the certificate holder of such suspension. Upon notice that the charges have resulted in a conviction, the CAMTC has authority to revoke the certificate. (Section 4602(c)).
- The CAMTC will be authorized to deny or revoke certificates for unprofessional conduct, including, but not limited to, denial of licensure, revocation, suspension, restriction, or any other disciplinary action against a certificate holder by another state or territory of the United States, by any other government agency, or by another California health care professional licensing board. A certified copy of the decision, order, or judgment shall be conclusive evidence of these actions. (Section 4603(a)).
- The CAMTC may also deny or revoke a certificate for the following: procuring a certificate by fraud, misrepresentation, or mistake; violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision or term of this chapter or any rule or bylaw adopted by the organization; conviction of any felony, or conviction of a misdemeanor that is substantially related to the qualifications or duties of a certificate holder, in which event the record of the conviction shall be conclusive evidence of the crime; impersonating an applicant or acting as a proxy for an applicant in any examination referred to under this chapter for the issuance of a certificate; impersonating a certified practitioner or therapist, or permitting or allowing an uncertified person to use a certificate; committing any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications or duties of a certificate holder; committing any act punishable as a sexually related crime. (Section 4603(a)-(h)).

- It is an unfair business practice to state that one is certified, registered or licensed by a governmental agency (the CAMTC will be a private not-for-profit with legislative oversight) as a massage therapist or practitioner. (Section 4605).
- It is an unfair business practice for any person to hold oneself out or use the title of "certified massage therapist" or "certified massage practitioner" or any other term, such as "licensed," "registered," or "CMT," that implies or suggests that the person is certified as a massage therapist or practitioner without meeting the requirements of the law. (Section 4606).

II. SB 731 Allows Cities and Counties to Know Who is Practicing in Their Jurisdiction:

- SB 731 gives the CAMTC broad authority to share information with local authorities. The CAMTC is authorized to provide to local authorities information concerning a certificate holder, including but not limited to, the current status of the certificate holder, address of the certificate holder (home and work), history of disciplinary actions against the certificate holder (including revocation), and any other information necessary to verify facts relevant to administering a local ordinance (Section 4602.5(a)).
- The CAMTC must also accept information provided by local authorities, and has a responsibility to review information received and take action warranted by that information. (Section 4602.5(b)).
- The CAMTC is required to request subsequent arrest notification service from the Department of Justice for all applicants for licensure. (Section 4601.3(d)). The CAMTC can share this information with local authorities, as stated above.

III. Important Authority Retained by Cities and Counties under SB 731

- Cities and counties retain authority over any person not certified pursuant to SB 731. (Section 4613(a)).
- SB 731 specifies that the superior court in and for the county in which any person acts as a massage practitioner or massage therapist in violation of the provisions of this chapter, may, upon a petition by any person, issue an injunction or other appropriate order restraining the conduct. The proceedings under this paragraph shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure. (Section 4607).
- A city or county may adopt reasonable health and safety requirements with respect to massage establishments or businesses, including, but not limited to:
 - ✓ Cleanliness of rooms
 - ✓ Cleanliness of towels and linens
 - ✓ Reasonable attire and personal hygiene requirements
 (Section 4612(b)(6)).
- A city or county may require an applicant for a business license to operate a massage establishment to fill out an application providing relevant information and make reasonable investigation into the information provided. (Section 4612(b)(7)).
- Local authorities can deny or restrict a business license if the applicant has provided materially false information (Section 4612(b)(7)).

- The owner/operator of a massage establishment is responsible for the conduct of all employees or independent contractors working on the premises. Local authorities can still suspend, revoke or otherwise restrict the license issued to a massage establishment for violations of SB 731 or local ordinances. (Section 4612(c)).
- Local authorities may have and enforce an ordinance that is applicable to massage businesses or establishments that provides duly authorized officials of the city or county the right to conduct reasonable inspections during regular business hours, to ensure compliance with this chapter, the local ordinance, or other applicable fire and health and safety requirements. Such ordinances may require an owner or operator to notify the city or county of any intention to rename, change management, or convey the business to another person. (Section 4612(d)).
- Local authorities may require a massage establishment to maintain on its premises for review evidence demonstrating that all persons providing massage services are certified. A local authority may require a business to file copies or provide other evidence of the certificates held by persons providing massage services at the business. Section 4612(b)(2)(A)-(B).
- Cities and counties may adopt land use and zoning requirements applicable to massage establishments provided that the requirements are no different than those uniformly applied to other professional or personal services businesses. (Section 4612(b)(4)).

IV. Restrictions on Local Authorities

- Local authorities cannot have land use and zoning requirements applicable to massage establishments that are not also applied to other professional or personal service businesses. (Section 4612(b)(4)).
- Local building code or physical facility requirements applicable to massage establishments cannot:
 - ✓ Require additional restrooms, showers or other facilities that are not uniformly applicable to other professional or service businesses
 - ✓ Require unlocked doors when there is no staff available to assure security for clients and staff behind closed doors
 - ✓ Require windows that provide a view into massage rooms
 (Section 4612(b)(5)).
- Local authorities cannot adopt ordinances that impose additional qualifications, such as medical examinations, background checks or other criteria, upon anyone certified by the CAMTC.



January 20, 2011

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To Whom It May Concern:

I am writing to encourage the City of Albany to expand its zoning with regards to use by massage therapists, granting them the same access to professional office space as that of other healthcare professionals – such as doctors, dentists, chiropractors, psychologists and acupuncturists.

The City of Albany has chosen to recognize, in its language regulating the practice of massage, the intrinsic healthcare value of skilled, professional massage therapy, yet it does not allow massage therapists to practice in buildings zoned for professional use; rather, the City restricts massage therapists to commercially zoned areas.

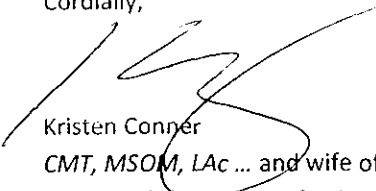
While there is the potential for illicit activities to happen under the front of legitimate massage therapy businesses, I submit that the same concern extends to other healthcare professionals, as well. Read the quarterly disciplinary action notices of any California professional board and you will see an astonishing number of people caught using their licenses as fronts for prostitution and drug dealing, often as a result of intimidation and coercion by outside criminal forces.

If you take a closer look at the businesses involved in these dealings, however, one thing is often quite striking: most are located in high-traffic, high-density commercial locations where they can hide in plain sight, and not in quiet professional offices.

If you wish to ensure that Albany's massage therapists behave in a professional manner, encourage them to practice in professional office buildings, closely surrounded by other healthcare professionals – the majority of whom are upstanding citizens and likely to report suspicious activity. Continuing to push massage therapists to the margins of commercial space, where problems are more likely to happen and are harder to spot, invites more problems than it prevents.

Thank you for your consideration with regards to this matter.

Cordially,



Kristen Conner

CMT, MSOM, LAc ... and wife of a massage therapist who would like very much to practice under his own business license in her quiet, professional acupuncture office in Albany during her days off – but can't under current policy.

Cc: Farid Javandel, Mayor
Marge Atkinson, Vice Mayor
Joanne Wile, Councilmember
Robert Lieber, Councilmember
Peggy Thomsen, Councilmember
Mike McQuiston, Chief of Police
Beth Pollard, City Manager
Leo Panian, Planning & Zoning Commissioner
Peter Maass, Planning & Zoning Commissioner
David Arkin, Planning & Zoning Commissioner
Andrea Gardner, Planning & Zoning Commissioner
Phillip Moss, Planning & Zoning Commissioner

ATTACHMENT 3

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