



City of Sunnyvale

Agenda Item-No Attachments (PDF)

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REPORT TO COUNCIL

SUBJECT

Reintroduce Ordinance Amending Chapter 9.41 (Massage Establishments and Massage Therapists) and Title 19 (Zoning) of the Sunnyvale Municipal Code and Adopt Revised Resolution Amending Fees, Rates and Charges Related to Massage Establishment Permits, Section 7.06 of the FY2015/16 Fee Schedule

BACKGROUND

On September 29, 2015 City Council introduced an Ordinance Amending Chapters 9.41 (Massage Establishments and Massage Therapists) and Title 19 (Zoning) of the Sunnyvale Municipal Code (SMC), which was in response to regulatory changes in California that took effect on January 1, 2015, with the passage of the Massage Therapy Act of 2014. At the same time, the Council also adopted a resolution amending fees, rates, and charges related to massage establishment permits to correspond to changes in the new ordinance.

Following the meeting on September 29, the City continued to receive numerous comments and questions about the new ordinance from Councilmembers, the public and local massage professionals. In responding to those comments and questions, staff determined that several modifications to the proposed ordinance, as well as a revision to the fee schedule to recognize the need for an additional, lower fee classification for massage businesses that provide outcall only massage services, should be recommended to Council.

EXISTING POLICY

Council Policy 7.1.1 Fiscal - Long Range Goals and Financial Policies

7.1B.5.4 - User fees should be established at levels which reflect the full cost of providing those services

California Government Code Section 66016(a). Prior to levying a new fee or service charge, or prior to approving an increase in an existing fee or service charge, a local agency shall hold at least one open and public meeting, at which oral and written presentations can be made, as part of a regularly scheduled meeting.

ENVIRONMENTAL REVIEW

At the meeting on September 29, Council found that this ordinance and associated fee changes do not require environmental review because it can be seen with certainty that there is no possibility that these actions will have a significant effect on the environment (CEQA Guidelines Section 15061(b) (3).)

DISCUSSION

Following the September 29 meeting, staff received extensive feedback about the proposed

massage ordinance and associated fees and is recommending the revisions discussed in sections A and B below to respond to several of those concerns. A full summary of issues and responses is included in section C.

A. Revisions to Proposed Ordinance

In response to some of the comments discussed below, the proposed ordinance has been revised to reflect the following clarifications (Attachment 1):

- (1) The definition of “Sole Proprietorship” in SMC section 9.41.020(o) and 9.41.140(b)(1) has been revised to clarify that sole proprietors may have one or no other employees. This definition is consistent with State of California law for massage professionals. Under section 9.41.140(b)(1), businesses meeting this definition, including home-based massage businesses meeting the same criteria, are exempt from the requirement to keep their main entry door unlocked during business hours.
- (2) Sections 9.41.140(c)(8) and 9.41.170(j) regarding draping and permissible areas for touching has been revised to mirror language in the Massage Therapy Act. The prior language was retained from the former ordinance. However, given the concerns expressed, staff recommends this change to modernize the language and make clear that it is consistent with the State requirements. The revised language states that a patron’s genitals and female breasts must be draped at all times and that there may be no contact with genitals, anal region, or female breasts (absent physician referral) during a massage.

B. Amendment to Fee Schedule to Add Lower Fee for Outcall-Only Massage Businesses

As part of the process of updating the City’s massage ordinance, the fee schedule for implementing and enforcing the ordinance was also revised. Reaction to the revised fees prompted staff to review the practice and processes for issuing massage establishment permits to sole proprietors and home based businesses whose sole practice is to provide outcall (off-premise) massage treatments.

The fees presented on September 29 represent full cost recovery for staff time to issue massage establishment permits, including inspections of business premises. Although outreach meetings occurred prior to the September 29 meeting, staff was not aware of concerns from sole practitioners and other members of the public that this fee might be inappropriate for a business model of outcall only massage. Under that model, a professional does not maintain an establishment or perform work in a fixed location. Rather, the certified massage professional travels to customer locations to perform work. Because there are no business premises to inspect in these cases, staff agrees that lower fees are appropriate and proposes adding new fees for outcall only massage businesses of \$81 for a California Massage Therapy Council (CAMTC) certified owner and \$142 for a non-CAMTC certified owner. These fees are based on the same cost recovery structure, but are lower because they exclude the amount attributable to inspection of premises. (Attachment 2)

C. Summary of Key Questions and Issues Related to Massage Ordinance

1. FEES. The fees for establishment permits seem too high. The fees for CAMTC certified owners were lower in FY 2011/12. Why are the fees so much higher now? Why is the City charging for two Public Safety Officers (PSOs) to conduct inspections? Other cities charge lower or no fees.

The FY 2011/12 fees for CAMTC Certified owners were lower, \$367 compared to \$890 for a non-CAMTC owner. The difference between the two fees is in the amount calculated for review and inspection. In preparing for changes in the ordinance, staff conducted an updated review of actual time and practices by staff for processing a permit application or renewing a permit and found that the FY 2011/12 fees did not represent full cost recovery of the total actual time required to process a permit for the CAMTC fee. Staff determined that the practice of conducting massage establishment inspections is the same for new and renewal permits, regardless of whether the owner is CAMTC certified or Non-CAMTC certified; the only difference between processing an application for a CAMTC certified owner versus a Non-CAMTC certified owner is the cost of fingerprinting..

The operational standard in Sunnyvale for any investigatory activity where enforcement may be required is two PSOs. The permitting process involves two PSOs (the operational standard) performing an initial one hour review of the establishment premises and two follow-up inspections at one-half hour each for a total of four PSO hours. The FY 2011/12 fees did not represent full cost recovery of the total actual time required to process a permit for the CAMTC fee.

Whether to pursue full cost recovery for permitting services is a policy decision. Sunnyvale has chosen to pursue full cost recovery as a broad policy matter, while other cities may choose to subsidize those costs. In this case, the proposed fee assessed to each massage establishment represents the actual cost of processing a permit application and performing inspections for that establishment only.

2. FEES FOR SOLE PROPRIETERS. Providers who share space or sole practitioners who practice “outcall only” massage are small businesses disproportionately impacted by the amount of the proposed fees.

Although the City may not require that an individual obtain a permit, license, certification or other authorization to provide massage, AB 1147 *Massage Therapy* specifically states that cities may require licenses or permits for massage businesses or establishments. Because sole practitioners run businesses in Sunnyvale, the City may require them to obtain permits for those businesses. Staff has reviewed the proposed fee structure with regard to providers doing only outcall massage work (no fixed location where they perform work) and is recommending an addition to the fee schedule to accurately reflect the actual cost to the City of providing permits to sole proprietors, which is lower because there is no place of business for the City to inspect.

For providers that share space, the City would not necessarily consider each individual a unique establishment; it would depend on the ownership situation and how the therapists chose to submit the application. For example, the owner or primary tenant of the space could apply, or the group of tenants could apply as co-owners, such that the entire group in a single space will be considered one establishment.

3. VISITORS. Why are visitors in massage establishments a concern? Other cities don't limit visitors. Limiting visitors seems unreasonable and unnecessary.

Visitors, defined as individuals not retained or employed by the massage establishment and not receiving or waiting to receive massage therapy, are not allowed for the safety of the client and to maintain a professional atmosphere. Past enforcement activities in Sunnyvale and other jurisdictions have revealed that in establishments where illegal activity is taking place or suspected, there is a

common practice of non-certified individuals being present in the massage rooms in addition to the CAMTC certified therapist. When officers ask who these individuals are, they are told that the person is not an employee of the establishment but simply a "visitor" who does not do any massage. Thus, the establishments effectively use the presence of the CAMTC therapist to legitimize and disclaim illegal activity by blaming the "visitor." Officers are unable to act on suspicions related to these individuals unless they actually observe an illegal act. The prohibition on visitors provides a means to take enforcement action and prohibit illegal activity by restricting who is allowed during a massage. Several southern California cities include such a prohibition. Locally, Union City recently approved provisions nearly identical to those proposed for Sunnyvale.

Couples massage is not considered a violation of the "no visitors" rule because both persons are patrons and as such would be allowed in the massage room. There are also several key exceptions allowing visitors: (a) the parents or guardians of a patron who is a minor, (b) the minor child of a patron when it is necessary for the supervision of the child and (c) the conservator, aid, or other caretaker of a patron who is elderly or disabled.

CAMTC stated that it does not have a formal position on the issue of visitors, but acknowledges that it is an issue at illegitimate massage establishments and recognizes that visitor prohibitions can be a reasonable way to address this concern. CAMTC suggested that the City might develop some way to regulate visitors through a registry for spouses, friends or others who might want to be present in the massage room. However, based on enforcement experience, staff feels that businesses would easily find loopholes in such an approach (for example, by requiring customers to acknowledge "visitors" as "friends" on the registry), and that the exceptions described above are reasonable to address necessary and legitimate needs for visitors.

4. NOTICE. Was multi-lingual notice of the hearing provided? Why didn't the City coordinate its efforts on the ordinance with the American Massage Therapy Association or De Anza College or National Holistic Institute (massage schools)?

Community Outreach meetings were held on May 26 and 27 where staff discussed the proposed changes and invited feedback and comment. The notice was sent in English, but the City offered translation services at the meetings. Staff received several requests for Chinese translation, and a department translator was present at both meetings and conducted a simultaneous bi-lingual session, answering questions and clarifying comments when needed. Staff also asked the CAMTC, which is the only entity that has purview over licensing of massage therapists in California, to review the proposed ordinance, and a representative of CAMTC attended one of the outreach meetings. The massage schools referenced in this question are not located in Sunnyvale; if there were massage schools in the City, they would not be subject to regulation under this ordinance.

5. SCOPE OF REGULATION. Is foot massage covered? Why is the growth of massage establishments viewed as a negative trend? Why do we need so much detail in the regulations?

Foot massage is covered under the ordinance. Neither AB 1147 nor the proposed Ordinance differentiates or excludes foot massage. Nine of the currently licensed massage establishments in Sunnyvale have business names that include the words "foot massage" or "foot and body massage."

The Department of Public Safety (DPS) does not consider the growth of massage

establishments as a negative trend in concept. However, there has been a corresponding increase in the number of unprofessional establishments engaged in illegal activities and the associated public safety enforcement needs. This is a broad trend; cities throughout the state are struggling to address the negative community and safety impacts of those illicit establishments. Although the regulations seem detailed, they are designed to establish practices that protect the health and safety of massage customers and employees of massage establishments. Staff experience is that legitimate massage establishments typically already follow the practices described in the ordinance as a matter of standard operation, while officers responding to complaints about inappropriate sexual activity regularly find extremely poor health and sanitation standards.

6. EXEMPTION. The exemption not requiring CAMTC certification for therapists working in chiropractic or acupuncture offices seems to undermine the certification process and quality assurance of certification.

This exemption was included based on feedback provided at the public meeting from a longstanding practitioner. It will only last for one year (sunsets in 2017) and only applies if a therapist is continuing existing work. The requirements for obtaining the exemption are sufficient to guarantee for this limited period that exempted therapists are educated, experienced, and well qualified.

7. APPAREL REQUIREMENTS. The Massage Therapy Act and the Constitution prohibit the City from setting dress standards in massage establishments that prohibit transparent, see through and similar attire that exposes undergarments or private body parts.

California courts have repeatedly upheld the authority of cities to impose a variety of reasonable regulations on massage businesses. As the Court of Appeal noted in *Owens v. City of Signal Hill* (1984) 154 Cal. App. 3d 123, 128, “legislators may take into account the nature of the business to be regulated, and the reasonableness of the regulation depends on the nature of the business and the ease with which it can be diverted in whole or part to an unlawful business. Discouraging prostitution is a valid state interest.” The massage ordinance falls under the City’s police power to regulate the health, safety and welfare of the community. Police power regulations are subject to the standard of whether the means used bears a rational relationship to the goals sought to be achieved.

This restriction simply prohibits attire that substantially exposes undergarments or private parts, and is reasonable to address the concerns and demonstrated tie to criminal activity. The Massage Therapy Act includes the same dress requirements for massage practitioners that the City’s ordinance imposes. (Business & Prof. Code §4609(A)(10)). Both are designed to discourage sex acts performed under the guise of massage. Like the visitor presence issue, officers have observed that “visitors” passing time at illicit massage establishments are frequently scantily clad and present for the purpose of serving customers. The establishments, however, again use the “visitor” excuse to disclaim responsibility for any illegal activity.

FISCAL IMPACT

New associated massage establishment permit fees represent full cost recovery: therefore the fiscal impact would be negligible. A proposed resolution amending Section 7.06 (Massage Establishments) of the City’s FY2015/16 Fee Schedule is attached (Attachment 1), with additions as follows:

E. Massage Establishment License - Outcall Only*

Owner (non-CAMTC Certified)	\$ 142.00
additional Owner (each)	\$ 71.00
Sole Proprietor or owner (CAMTC Certified)	\$ 81.00
additional Owner (each)	\$ 10.00
Additional Massage Therapists (each) must be CAMTC Certified	\$ 30.00
Non-Compliance Penalty	\$ 250.00

** for businesses engaged solely in Outcall Massage - no on premise services or treatment of clients*

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's website.

RECOMMENDATION

Reintroduce Ordinance Amending Chapter 9.41 (Massage Establishments and Massage Therapists) and Title 19 (Zoning) of the Sunnyvale Municipal Code and Adopt Revised Resolution Amending the City's Fees, Rates and Charges Resolution Pertaining to Adult Entertainment and Massage Establishment Licensing and Permitting Fees, and Superseding Resolution No. 717-15.

Prepared by: Elaine Ketell, Management Analyst

Reviewed by: Chief Frank J. Grgurina, Director, Department of Public Safety

Approved by: Kent Steffens, Assistant City Manager
for Deanna J. Santana, City Manager

ATTACHMENTS

1. Revised Ordinance
2. Revised Resolution Amending Section 7.06 of FY2015/16 Fee Schedule