



MILPITAS PLANNING COMMISSION AGENDA REPORT

NEW BUSINESS

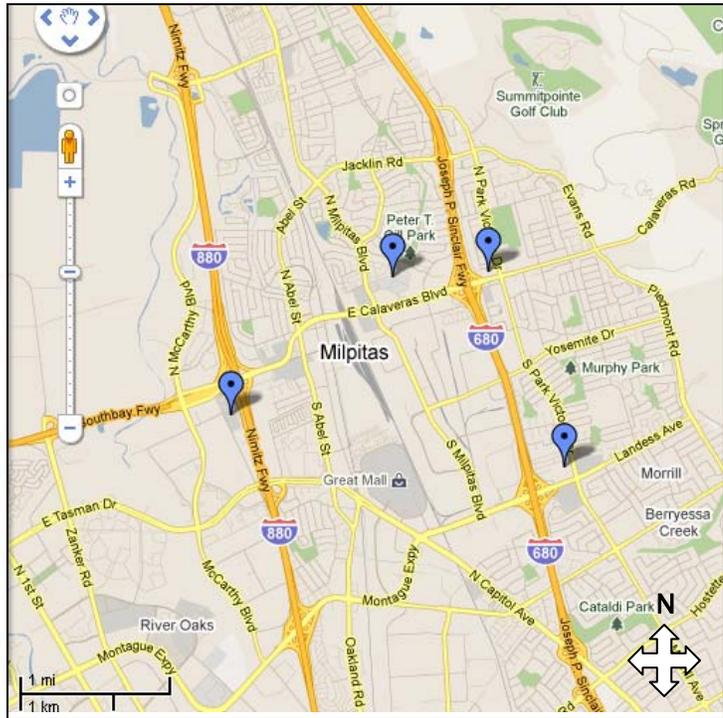
Meeting Date: April 27, 2011

- PRESENTATION:** **Massage Establishment Approval Process**
- SUMMARY:** Review the approval process for new massage establishments within Milpitas.
- RECOMMENDATION:** **Staff recommends that the Planning Commission: Note, Receipt, and File**
- PROJECT DATA:**
- Zoning Designation: N/A
- Related Permits: N/A
- PLANNER:** Tiffany Brown, Junior Planner
- ATTACHMENTS:** A. Massage Ordinance

LOCATION MAP

Active Massage Businesses

- [Foot and Body Massage](#)
1535 Landess Ave Conditional Use Permit No. UP11-0001
- [Massage Envy](#)
581 E. Calaveras Blvd. Conditional Use Permit No. UP08-0012
- [Foot Massage Reflexology](#)
448 Barber Lane. Conditional Use Permit No. UP10-0026
- [Milpitas Day Spa](#)
1215 E Calaveras Blvd Conditional Use Permit No. UP10-0025



BACKGROUND

At the February 23rd meeting the Planning Commission requested staff to report back with an overview of the Massage Ordinance, the entire permitting process for new massage establishments, and how many massage facilities are currently operating within Milpitas.

HISTORY AND APPLICABLE PERMIT(S) REQUIREMENTS

The practice of massage can be regulated by cities by two means: (1) local licensing and background investigation of practitioners and (2) zoning (land use) approval of specific massage establishments.

Zoning Regulations

In 1986, the City established the requirement to obtain approval of a Conditional Use Permit (CUP) for all new massage establishments in the General Commercial (C2) Zoning District. In 1996 the City limited locations for new establishments to only the Highway Services zoning district with a CUP.. The available locations for new establishments were later expanded in 2008 to include the Highways Services, General Commercial and Town Center zoning districts.

The zoning ordinance defines a massage establishment as an establishment having a fixed place of business, including but not limited to any establishment in which massage, acupuncture or similar services are made available (except those which are exempt by Government Code Section 51033 as amended from time to time), in which the teaching, practice, or the giving of massage, acupuncture or similar procedure is conducted.

Massage Ordinance

In 1994, the City adopted an ordinance for the local licensing of massage establishments. The purpose and intent of the Massage Ordinance is to provide a non-zoning means of protecting the public health, safety, and welfare by requiring the operation of massage establishments, off-premises massage services, and persons offering massage to follow certain performance standards and receive approval from the Police Department. The City recognized massage as a valid professional service offering the public health and therapeutic benefits. However, the City also found that prior regulations did not satisfactorily address serious crime problems such as prostitution within the City.

The Massage Ordinance has a section for establishments and off-premises massage service operating requirements (Section III-6-7) and a section for massage establishment facilities regulations (Section III-6-8). Every massage establishment and off-premises massage practitioner is required to follow the rules and regulations. Such rules include hours of operation limitations, provide a list of all available services and the cost of each service, keep a written record of the date and hour of each service provided, etc. The Massage Ordinance requires all massage businesses and individual practitioners to be issued a permit prior to operation. Such permit requires a background check on the applicant along with fingerprinting and photo taken for the file. Permits are valid for 12 months, or one year, from the date of issuance unless revoked or suspended and shall be renewed annually. For more details on the rules and regulations, see Attachment A.

Table 1
Required Permit(s) for Massage

Massage Uses	Required Permit(s)
Massage Establishment	Conditional Use Permit, Massage Establishment Permit, and Business License
Off-Premises Massage Service	Off-Premises Massage Service Permit, Business License
Massage Practitioner	Massage Practitioner Permit

Massage Ordinance Exemptions

The provisions from the Massage Ordinance shall not apply to the following establishments for classes of individuals who perform massage while employed in their professional capacities:

- a) Physicians, surgeons, chiropractors, osteopaths, nurses, physical therapists, or acupuncturists, who are duly licensed to practice their respective professions in the State of California and persons working directly under the supervision of such licensed persons. "Working directly under the supervision" means that the person is an employee of the licensed person, is working at the same location as the licensed person, has his or her work supervised by the licensed person, and that the licensed person is present when the employee is performing massage. This exemption shall not apply if the business performs massage on persons for whom the licensed person does not provide professional services.
- b) Barbers, beauticians, cosmetologists, and other persons licensed to practice any healing art under the provisions of Division 2 (commencing with Section 500) of the California Business and Professions Code while engaging in practices within the scope of their licenses, and who perform massage only on the neck, face and/or scalp of the customers.
- c) Personal fitness training centers, gymnasiums, athletic facilities or health clubs, when the giving of massage for compensation is not a principal function of such businesses. The determination of whether massage constitutes a principal or incidental function of personal fitness training centers, gymnasiums, athletic facilities or health clubs shall be made by the Chief of Police, based upon consideration of the percent of income that the business derives from massages, the amount of floor space devoted to and the number of employees assigned to massage services, as well as the manner in which the business advertises and holds itself out to the public. The decision of the Chief of Police regarding whether a particular business is entitled to this exemption shall be final.
- d) Hospitals, nursing homes, sanitariums, or any other healthcare facilities duly licensed by the State of California.
- e) Accredited high schools, junior colleges, and colleges or universities whose coaches and trainers are acting within the scope of their employment.

- f) Trainers of amateur, semi-professional or professional athletes or athletic teams, while engaging in their training responsibilities for and with athletes; and trainers working in conjunction with a specific athletic event such as an outdoor road or bike race
- g) Massage practitioners that have a valid certificate issued by the Massage Therapy Organization (also known as the California Massage Therapy Council), pursuant to Business and Professions Code Chapter 10.5 of Division 2, commencing with Section 4600, and who are practicing consistent with the qualifications established by such certificate. Notwithstanding the foregoing, this provision shall not exempt such certified massage practitioners from the requirements of Sections III-6-4, III-6-8, except for subsections 6-8(d), 6-8(h) and 6-8(i), III-6-9, III-6-11, and III-6-20 of this Chapter and local building, health and safety, zoning and other requirements, as permitted by state law.

California Massage Therapy Council

The California Massage Therapy Council (CAMTC) was created by the California Legislature through the enactment of California Business and Professions Code Section 4600 et seq. The mission of this Council is to protect the public by certifying qualified massage professionals in California by creating a voluntary certification system for the massage therapy profession. In order for a massage practitioner to become certified, the must first fill out the proper forms and apply for the license which includes fingerprinting and taking a passport photo. Then the CAMTC will complete a background check and verify that the practitioner has completed enough training to conduct massage for consumers and issue the Therapist with a certified identification card. This process is very similar to the Police Department process for each new massage establishment/practitioner and therefore enables the practitioner to be exempt from certain sections of the City Massage Ordinance.

Certified therapists are not exempt entirely from the Massage Ordinance, just the sections that are repeated through the CAMTC certification. For example, they will not have to obtain an annual permit from the Police Department, be fingerprinted or have a photo on the file because the practitioners file is already available through CAMTC. However, all massage establishments, off-premise massage services, and practitioners must still comply with the operating, safety, and public nuisance regulations in the Massage Ordinance.

Attachments:

- A. Massage Ordinance

Chapter 6 - MASSAGE ESTABLISHMENTS AND PRACTITIONERS

Sections:

III-6-1 - Purpose and Intent.

III-6-2 - Definitions

III-6-3 - Permit Required—Massage Establishment; Off-Premises Service; Massage Practitioner

III-6-4 - Business License Requirement

III-6-5 - Exemptions

III-6-6 - Massage Establishment, and Off-Premises Massage Service Permit Application

III-6-7 - Massage Establishment and Off-Premises Massage Service Operating Requirements

III-6-8 - Massage Establishment Facilities Regulations.

III-6-9 - Inspection by Officials

III-6-10 - Permits Nonassignable.

III-6-11 - Change of Location or Name

III-6-12 - Massage Practitioner Permit

III-6-13 - New Massage Practitioners—Notification

III-6-14 - Renewal of permits—Massage Establishment, Off-Premises Massage Service, Massage Practitioner

III-6-15 - Application of Regulations to Existing Massage Establishments, Off-Premises Massage Services, and Massage Practitioners

III-6-16 - Prohibited Conduct

III-6-17 - Permit Suspension or Revocation

III-6-18 - Appeal Procedures

III-6-19 - Burden of Proof

III-6-20 - Public Nuisance

III-6-21 - Severability

III-6-1 - Purpose and Intent.

The purpose and intent of this Chapter is to protect the public health, safety and welfare by regulating the operation of massage establishments, off-premises massage services, and persons offering massage. The city council recognizes massage as a valid professional service offering the public health and therapeutic benefits. The city council, however, finds that prior regulations have not satisfactorily addressed serious crime problems.

The purpose of this Chapter is to ensure that persons offering massage services conduct their work in a lawful and professional manner; that they possess the minimum necessary qualifications and training; and that they comply with minimum building sanitation and health standards.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-2 - Definitions

Unless a particular provision or its context otherwise requires, the definitions and provisions contained in this Section shall govern the construction, meaning, and application of words and phrases used in this Chapter:

(a)

"Applicant" means the permit applicant and each of the following persons: the managing officer/employee, a general partner, a limited partner who owns or controls twenty percent (20%) or more of the business, a shareholder who owns or controls twenty percent (20%) or more of the shares.

(b)

"Employee" means any person, other than a massage practitioner, employed by a massage establishment who may render any service to the permittee, who receives compensation from the massage establishment and who has no

physical contact with the customers or clients. The term "employee" shall include independent contractors who are regularly employed by the massage establishment.

(c)

"Massage" means any method of treating the external parts of the body, usually with the hands, so as to stimulate circulation and make muscles or joints supple, or relieve tension, for remedial, or health purposes offered in return for any form of consideration. In addition to accepting other forms of compensation, a person may be deemed to have received consideration for performing a massage when the massage is offered as part of a membership, as part of a package of services or as incidental to the purchase of a product. Methods of massage include, but are not limited to stroking, kneading, rubbing, tapping, pounding, or stimulating the external parts of the body with or without the aid of any mechanical or electrical apparatus or appliances; or with or without supplementary aids, such as rubbing alcohol, liniments, antiseptics, oils, powders, creams, lotions, ointments, or other similar preparations commonly used in this practice; or by baths, including but not limited to Turkish, Russian, Swedish, Japanese, vapor, shower, electric tub, sponge, mineral, fomentation, or any other type of bath.

(d)

"Massage establishment" means any establishment having a fixed place of business where any person, firm, association, partnership, or corporation engages in, conducts, or carries on, or permits to be engaged in, conducted or carried on, any massage.

(e)

"Massage practitioner," "massage trainee," "masseur," and "masseuse" means any person who administers massage to another person, for any form of consideration.

(f)

"Off-premises massage service" means any business where a function of such business is to engage in or carry on massage, not at a fixed location but at a location designated by the customer, massage practitioner, or other person.

(g)

"Permit," as used in this Chapter, shall mean a massage establishment permit, off-premises massage service permit or massage practitioner permit and shall not be used to refer to business licenses issued by the Finance Department or to use permits issued by the Planning Commission pursuant to Milpitas Municipal Code Title XI, Chapter 10. (h) "Permittee," as used in this chapter, means any and all applicants who have been issued a massage establishment permit, off-premises massage service permit, or massage practitioner permit.

(i)

"Recognized school of massage" means any school or institution of learning which teaches the theory, ethics, practice, profession, or work of massage, and which has been approved pursuant to the California Education Code. Schools offering a correspondence course not requiring attendance shall not be deemed a recognized school of Massage. The City of Milpitas shall have the right to confirm that the applicant has actually attended class in a recognized school of massage.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-3 - Permit Required—Massage Establishment; Off-Premises Service; Massage Practitioner

It shall be unlawful for any person, association, partnership or corporation to engage in, conduct or carry on, or permit to be engaged in, conducted or carried on, in or upon any premises within the City of Milpitas, the operation of a massage establishment or off-premises massage service or the function of a massage practitioner without first having obtained a permit issued by the City of Milpitas pursuant to the provisions set forth in this Chapter. Such permit shall be valid for twelve (12) months from the date of issuance unless revoked or suspended, and shall be renewed annually as required by Section III-6-14 of this Chapter.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-4 - Business License Requirement

At the time of application for a permit to operate, the applicant shall also apply for and furnish the information necessary to obtain a business license as required by Title III, Chapter 1 of this code. No business license shall be issued until the investigation is completed and the permit to operate is approved. The business license shall be issued upon approval of the permit to operate and upon payment of the business license fee as provided in Title III, Chapter 1.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-5 - Exemptions

The provisions of this chapter shall not apply to the following establishments or classes of individuals who perform massage while employed in their professional capacities:

(a)

Physicians, surgeons, chiropractors, osteopaths, nurses, physical therapists, or acupuncturists, who are duly licensed to practice their respective professions in the State of California and persons working directly under the supervision of such licensed persons. "Working directly under the supervision" means that the person is an employee of the licensed person, is working at the same location as the licensed person, has his or her work supervised by the licensed person, and that the licensed person is present when the employee is performing massage. This exemption shall not apply if the business performs massage on persons for whom the licensed person does not provide professional services.

(b)

ATTACHMENT A.

Barbers, beauticians, cosmetologists, and other persons licensed to practice any healing art under the provisions of Division 2 (commencing with Section 500) of the California Business and Professions Code while engaging in practices within the scope of their licenses, and who perform massage only on the neck, face and/or scalp of the customers.

- (c) Personal fitness training centers, gymnasiums, athletic facilities or health clubs, when the giving of massage for compensation is not a principal function of such businesses. The determination of whether massage constitutes a principal or incidental function of personal fitness training centers, gymnasiums, athletic facilities or health clubs shall be made by the Chief of Police, based upon consideration of the percent of income that the business derives from massages, the amount of floor space devoted to and the number of employees assigned to massage services, as well as the manner in which the business advertises and holds itself out to the public. The decision of the Chief of Police regarding whether a particular business is entitled to this exemption shall be final.
- (d) Hospitals, nursing homes, sanitariums, or any other healthcare facilities duly licensed by the State of California.
- (e) Accredited high schools, junior colleges, and colleges or universities whose coaches and trainers are acting within the scope of their employment.
- (f) Trainers of amateur, semi-professional or professional athletes or athletic teams, while engaging in their training responsibilities for and with athletes; and trainers working in conjunction with a specific athletic event such as an outdoor road or bike race.

- (g) Massage practitioners that have a valid certificate issued by the Massage Therapy Organization (also known as the California Massage Therapy Council), pursuant to Business and Professions Code Chapter 10.5 of Division 2, commencing with Section 4600, and who are practicing consistent with the qualifications established by such certificate. Notwithstanding the foregoing, this provision shall not exempt such certified massage practitioners from the requirements of Sections III-6-4, III-6-8, except for subsections 6-8(d), 6-8(h) and 6-8(i), III-6-9, III-6-11, and III-6-20 of this Chapter and local building, health and safety, zoning and other requirements, as permitted by state law.

(Ord. 172.40 (part), 6/17/03; Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

(Ord. No. 172.5, § 2, 10-20-2009)

III-6-6 - Massage Establishment, and Off-Premises Massage Service Permit Application

- (a) Any person, corporation, or partnership desiring to obtain a permit to operate a massage establishment or off-premises massage service shall make application to the Chief of Police or his or her authorized representative. Prior to submitting such application, a non-refundable fee shall be paid in the amount of two hundred dollars (\$200.00) for each applicant listed on the application up to a maximum of one thousand dollars (\$1,000.00) or such sum as set forth in the City Fee Schedule. An applicant for an off-premises massage service permit who has a valid massage practitioner permit and who will be the sole practitioner for the off-premises massage service, shall pay a fee of one hundred dollars (\$100.00) or such sum as set forth in the City Fee Schedule. Such fees shall be used, in part, to defray the cost of the investigation required by this Chapter. A copy of the receipt for payment shall accompany each application.
- (b) The application and fee required under this Section shall be in addition to any license, permit or fee required under any other Chapter of this code or any other regulation of the City of Milpitas.
- (c) The application for a massage establishment or off-premises massage service permit does not authorize a massage establishment or off-premises massage service to operate until such permit has been issued.
- (d) Each applicant for a permit shall submit the following information under penalty of perjury:
 - (1) The full true name under which the business will be conducted.
 - (2) The present or proposed address where the business is to be conducted.
 - (3) The applicant's full, true name, other names used, date of birth, California driver's license number or California identification number, social security number (unless prohibited by law), present home address and home telephone number.

[Text continues on page 143]

(4)

The sex, height, weight, color of hair, and color of eyes.

(5)

Such other identification and information as required by the Chief of Police or his or her representative, necessary to discover the truth of the responses provided in the application.

(6)

ATTACHMENT A.

The previous two (2) residences of the applicant and the inclusive dates at each address.

(7)

The applicant's business, occupation, and employment history for ten (10) years preceding the date of application, and the inclusive dates of same.

(8)

The massage permit history of the applicant, whether such person has ever had any such permit or license issued by any agency, board, city, county, territory, or state; the date of issuance of such a permit or license, whether the permit or license was revoked or suspended; or if a vocational or professional license or permit was issued, revoked, or suspended and the reason therefor.

(9)

All convictions for any crime involving conduct which requires registration under California Penal Code Section 290, convictions under California Penal Code Sections 266i, 314, 315, 316, 318, 647(a), 647(b), or 415 as a result of an arrest for 647(b) (as now written or as amended), or convictions of crimes designated in Government Code Section 51032(b) (as now written or as amended), including any felony involving the sale of a controlled substance specified in Sections 11054-11058 of the California Health and Safety Code (as now written or as amended), or convictions of any crime involving dishonesty, fraud, deceit, violence or moral turpitude.

(10)

All convictions for crimes under the laws of any other state or country which proscribe the same conduct or similar conduct as the California crimes designated in Section 6(d)(9). Convictions that have been expunged must be reported.

(11)

All injunctions that have been issued against the applicant for nuisances under California Penal Code Section 11225 or for nuisances issued under similar laws of other states.

(12)

A complete description of all services to be provided.

(13)

The name, address, date of birth, California driver's license number or California identification number, social security number (unless prohibited by law), of each massage practitioner or employee who is or will be employed in the massage establishment or off-premises massage service.

(14)

The name and address of any massage business or other like establishment owned or operated by any person whose name is required to be given pursuant to this section.

(15)

Acceptable written proof that the applicant is at least eighteen (18) years of age.

(16)

If the applicant is a corporation, the name of the corporation shall be set forth exactly as shown in its articles of incorporation or charter, together with the state and date of incorporation and the names and home addresses of each of its current officers and directors, and of each stockholder holding more than twenty percent (20%) of the stock of that corporation.

(17)

If the applicant is a partnership, the application shall set forth the name and home address(es) of each of the partners, including limited partners. If the applicant is a limited partnership, it shall furnish a copy of its certificate of limited partnership as filed with the County Clerk. If one or more of the partners is a corporation, the provisions of this subsection pertaining to corporate applicants shall apply to the corporate partner as well.

(18)

The name of the officer, general partner or employee designated by the applicant, corporation or partnership who shall act as the managing officer/employee. Such person shall complete and sign all application forms required of an individual applicant under this Chapter. The corporation's or partnership's managing officer/employee must, at all times, meet all of the requirements set for permittees by this Chapter or the corporation or partnership permit shall be suspended until a managing officer/employee who meets such requirements is designated. If no such person is designated within ninety (90) days, the corporation or partnership permit is deemed canceled and a new application for permit must be filed.

(19)

Fingerprints to be furnished at a place designated by the Chief of Police. Such fingerprints shall be used for the purpose of establishing identification. Fingerprinting will be taken at a place designated by the Chief of Police. Any fee required for fingerprinting fee will be the responsibility of the applicant.

(20)

Two (2) photographs of the applicant and managing officer/employee to be taken by the police department.

(21)

A description of any other business to be operated on the same premises, or on adjoining premises, owned or controlled by the applicant.

(22)

The name and address of the owner and lessor of the real property upon or in which the business is to be conducted. In the event the applicant is not the legal owner of the property, the application must be accompanied by a copy of the lease and a notarized acknowledgment from the owner of the property that a massage establishment will be located

on his or her property.

(23)

Authorization for the City of Milpitas, its agents and employees, to seek information and conduct an investigation into the truth of the statements set forth in the application and into the background of the applicant and the managing officer/employee.

(24)

Proof of massage malpractice insurance in the sum of not less than one hundred thousand dollars (\$100,000.00) per licensed massage practitioner or massage technician employed at the massage establishment up to a maximum of five hundred thousand dollars (\$500,000.00). This requirement may be satisfied by malpractice insurance being provided in the name of individual massage practitioners.

(25)

The applicant shall notify the Chief of Police of any change of address or fact which may occur during the process of applying for a massage establishment permit.

(e)

The Chief of Police or his or her authorized representative shall have up to sixty (60) days after submission of all required information, including the required certificate of occupancy, to investigate the application and the background of the applicant, provided said sixty (60) days may be extended for such period as may be necessary to obtain fingerprint records from the appropriate state agency. Upon the completion of the investigation, the Chief of Police shall grant the permit, with or without conditions, if the Chief of Police finds in the exercise of his or her discretion all of the following:

(1)

The required fee has been paid.

(2)

The application conforms in all respects to the provisions of this Chapter and to all other laws.

(3)

The applicant has not made a material misrepresentation in the application.

(4)

The applicant, if an individual; or any of the stockholders of the corporation; or any officer or director; if the applicant is a corporation; or a partner if the applicant is a partnership; or the managing officer/employee has not, within ten (10) years preceding the submission of the application, been convicted of, or pleaded guilty or no contest to, an offense involving conduct which requires registration under California Penal Code Section 290, or of conduct which is a violation of the provisions of California Penal Code Sections 266i, 314, 315, 316, 318, 647(a), 647(b) or 415 as a result of an arrest for 647(b) (as now written or as amended), or of any crime designated in California Government Code Section 51032(b) (as now written or as amended), including any felony involving the sale of a controlled substance specified in Sections 11054—11058 of the California Health and Safety Code (as now written or as amended), or of any other crime involving dishonesty, fraud, deceit, violence or moral turpitude, or has not been enjoined under California Penal Code Section 11225 (as now written or as amended). Convictions under the laws of other states or countries which proscribe the same or similar conduct as the California crimes stated above shall also be considered.

(5)

Within five (5) years preceding application, the applicant or managing officer/employee has not had a massage establishment permit, off-premises massage service permit, massage practitioner permit, or other similar permit or license revoked or suspended by the City of Milpitas, or any other state or local agency; or engaged in conduct or operated a massage or similar establishment in a manner that would be grounds for revocation of a permit under this Chapter; or owned or managed a massage establishment or similar establishment where persons required to be licensed were allowed to work without the required licenses.

(6)

The applicant is at least eighteen (18) years of age.

(7)

The permit as requested by the applicant would comply with all applicable laws, including, but not limited to, health, zoning, fire and safety requirements and standards.

(8)

The applicant has not surrendered, or had revoked, a massage permit issued by any other jurisdiction due to a violation of that jurisdiction's applicable ordinance or regulations.

(f)

If the Chief of Police or authorized representative, following investigation of the applicant, fails to make the findings stated in Section III-6-6(e), the Chief shall deny said application by written notice to the applicant. The Chief of Police may delay issuance of the permit if the applicant is being prosecuted for a violation of any of the Penal Code sections specified in Section III-6-6(e)(4) for an additional period of up to one hundred and eighty (180) days. If, during this period of delay, the applicant pleads guilty, pleads no contest, or is found guilty, the Chief of Police shall deny the application.

(Ord. 172.40 (part), 6/17/03; Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-7 - Massage Establishment and Off-Premises Massage Service Operating Requirements

No person shall engage in, conduct, carry on, or permit to be engaged in, conducted, or carried on, any massage establishment or off-premises massage service unless each and all of the following requirements are met:

ATTACHMENT A.

- (a) Each person employed or acting as a massage practitioner shall have a valid massage practitioner permit issued by the Chief of Police which shall be clearly visible on the massage practitioner's person during working hours. It shall be unlawful for any owner, manager, operator, managing officer/employee, or permittee to employ or permit a person to act as a massage practitioner who is not listed on the massage establishment permit application or off-premises massage service permit application and who is not in possession of a valid massage practitioner permit issued pursuant to this Chapter.
- (b) The possession of a valid massage establishment permit or off-premises massage service permit does not authorize the possessor of the permit or any other person to perform work for which a massage practitioner permit is required.
- (c) Massage shall be provided or given only between the hours of 7:00 a.m. and 10:00 p.m. No massage establishment shall be open and no customer shall be in such massage establishment between the hours of 10:30 p.m. and 7:00 a.m. No off-premises massage shall be provided or given between the hours of 10:00 p.m. and 7:00 a.m.
- (d) A list of services available, and the cost of such services, shall be posted in an open public place within the premises and shall be described in readily understandable language. No owner, manager, operator, managing officer/employee, or permittee shall permit, and no massage practitioner shall offer or perform, any service other than those posted.
- (e) Any massage practitioner who provides massage at any hotel or motel, shall first notify the owner, manager, or person in charge thereof that such permittee intends to provide massage to a person or persons registered at the hotel or motel and give such owner, manager, or person in charge the name on his or her massage practitioner permit.
- (f) The massage establishment permit, and a copy of the permit of each and every massage practitioner employed by a massage establishment shall be displayed in an open and conspicuous place on the premises.
- (g) Every massage establishment and off-premises massage service shall keep a written record of the date and hour of each service provided, the name and address of each patron and the service received, and the name of the massage practitioner administering the service. Such records shall be open to inspection only by City officials, including the Police Department and the City Attorney, charged with enforcement of this chapter. These records may not be used for any other purpose than as records of services provided and may not be provided to other parties by the massage establishment or off-premises massage service unless otherwise required by law. Such records shall be retained on the premises of the massage establishment or at the off-premises massage service business office for a period of two (2) years.
- (h) Massage establishments shall at all times be equipped with an adequate supply of clean sanitary towels, table coverings and linens. Clean towels, coverings and linens shall be stored in enclosed cabinets. Towels and linens shall not be used on more than one (1) patron, unless they have first been laundered and disinfected. Disposable towels and coverings shall not be used on more than one (1) patron. Soiled linens and paper towels shall be deposited in separate, approved receptacles.
- (i) Wet and dry heat rooms, steam or vapor rooms or cabinets, toilet rooms, shower and bath rooms, tanning booths, whirlpool baths and pools, shall be thoroughly cleaned and disinfected as needed, and at least once each day the premises are open, with an approved disinfectant. Bathtubs shall be thoroughly cleaned with an approved disinfectant after each use. All walls, ceilings, floors, and other physical facilities for the establishment must be in good repair and maintained in a clean and sanitary condition.
- (j) Instruments utilized in performing massage shall not be used on more than one (1) patron unless they have been sterilized using approved sterilization methods.
- (k) All employees, and massage practitioners, shall perform their work fully clothed, be clean and wear clean outer garments which are used and worn only at the establishment (i.e., a smock).
- (l) Doors to dressing rooms may not be locked. Draw drapes, curtain enclosures, or accordion-pleated closures are acceptable on all inner dressing and treatment rooms in lieu of doors.
- (m) No person shall enter, be, or remain in any part of a massage establishment while in possession of an open container of alcohol, or while consuming or using any alcoholic beverage or drugs, except pursuant to a prescription for such drugs. The owner, operator, managing officer/employee, manager, or permittee shall not permit any such person to enter or remain upon such premises.
- (n) No massage establishment or off-premises massage service shall operate as a school of massage, or use the same facilities as that of a school of massage.
- (o) No massage establishment or off-premises massage service which has been granted a permit under the provisions of

ATTACHMENT A.

this Chapter shall place, publish or distribute or cause to be placed, published or distributed any advertising matter that depicts any portion of the human body that would reasonably suggest to prospective customers that any service is available other than those services described in Section 6-2(c) of this Chapter. No massage establishment or off-premises massage service shall employ language in the text of such advertising that would reasonably suggest to a prospective patron that any service is available other than those services as described in Section 6-2(c) of this Chapter.

- (p) At least one entrance door, allowing access to the massage establishment and any building it may be located in, shall remain unlocked during business hours. The premises and facilities shall meet all code requirements of the city as to the safety of the structure and the adequacy of the plumbing, heating, ventilation and waterproofing of rooms where showers or water or steam baths are given.
- (q) A massage shall not be given unless the patron's genitals are fully covered.
- (r) No massage establishment shall be open for business without at least one massage practitioner on the premises at all times who is in possession of a valid permit.
- (s) Only a massage table shall be used for massage. No pads or mattresses shall be placed on the floor.
- (t) No condoms shall be kept in the Massage establishment unless they are the personal property of persons on-site and for the individual's personal off-site use.
- (u) Any change with respect to the information contained in the permittee's application shall be reported to the Chief of Police within ten (10) days of such change.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-8 - Massage Establishment Facilities Regulations.

Every massage establishment shall maintain facilities which meet the following requirements:

- (a) Any signs posted on the premises shall conform in all respects with all applicable laws and regulations of the City of Milpitas.
- (b) Minimum lighting shall be provided in accordance with Article 220 of the Uniform Electrical Code and, in addition, at least one artificial light of not less than forty (40) watts shall be provided in each room or enclosure where massage services are performed on patrons.
- (c) Minimum ventilation shall be provided in accordance with the Uniform Building Code.
- (d) Treatment room doors shall remain unlocked at all times.
- (e) Adequate equipment for disinfecting and sterilizing instruments used in performing the acts of massage shall be available.
- (f) Hot and cold running water shall be available at all times.
- (g) Closed cabinets shall be available for storage of clean linens.
- (h) Separate dressing room and locker facilities shall be provided for persons of each gender. One locker shall be provided for each treatment room and at least one toilet facility shall be located within the massage establishment.
- (i) A minimum of one wash basin for massage practitioners shall be provided at all times. Such basin shall be located within, or as near as practicable to, the treatment area devoted to the performing of massage. Sanitary towels shall also be provided at each basin.
- (j) Pads used on massage tables shall be covered with approved material.
- (k) Proof of compliance with all applicable provisions of the City of Milpitas Municipal Code shall be provided prior to the issuance of any permit.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-9 - Inspection by Officials

The investigating and enforcing officials of the City of Milpitas, or their designees, shall have the right to enter the premises of any massage establishment during regular business hours for the purpose of making reasonable inspections to observe and

enforce compliance with building, fire, electrical, plumbing or health regulations, and to enforce compliance with the applicable regulations, laws, and provisions of this Chapter.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-10 - Permits Nonassignable.

No massage establishment or off-premises massage service permit may be sold, transferred or assigned by the permittee, or by operation of law, to any other person or persons. Any such sale, transfer or assignment, or attempted sale, transfer or assignment, shall be deemed to constitute a voluntary surrender of such permit and such permit shall thereafter be deemed terminated and void. Except, however, if the permittee is a partnership and one or more of the partners should die, one or more of the surviving partners may acquire, by purchase or otherwise, the interest of the deceased partner or partners without affecting a surrender or termination of such permit and in each case the permittee shall thereafter be deemed to be the surviving partner(s). If the permit is issued to a corporation, stock may be sold, transferred, issued, or assigned to stockholders who have been named on the application. If any stock is sold, transferred, issued, or assigned to a person not listed on the application as a stockholder, the permit shall be deemed terminated and void unless the identities of the new stockholders are reported to the Chief of Police within ten (10) days of transfer and they meet all requirements under this Chapter for applicants.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-11 - Change of Location or Name

- (a) A change in the location of a massage establishment must be submitted for approval by the Chief of Police, the Director of Community Development, and the Fire Chief, or their designated representatives. Approval shall be granted for the change provided that all laws and regulations of the City of Milpitas are complied with including, but not limited to, the provisions of Milpitas Municipal Code Title XI, Chapter 10.
- (b) No permittee shall operate under any name, nor conduct any massage establishment or off-premises massage service under any designation, not specified in the approved permit.
- (c) Any application for the expansion of a building or other place of business which houses a massage establishment shall require compliance with this Chapter. Expansion of a non-conforming location shall not be permitted.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-12 - Massage Practitioner Permit

- (a) No person shall engage in the business of massage or act as a massage practitioner unless such person holds a valid massage practitioner permit issued by the City of Milpitas. Each massage practitioner permit holder shall be issued a photo identification badge which will serve as a massage practitioner permit. The permit holder shall display the massage practitioner permit on his or her person during business hours.
- (b) Each applicant for a massage practitioner permit shall make application to the Chief of Police, or his or her authorized representative. Prior to submitting an application, the applicant shall pay a non-refundable fee of two hundred dollars (\$200.00) or such sum as set forth in the City Fee Schedule. Such fee shall be used, in part, to defray the cost of the investigation required by this Chapter. A copy of the receipt for payment shall accompany each application.
- (c) Permit fees required under this section shall be in addition to any license, permit or fee requirements under any other Chapter of this code or by any other regulation of the City of Milpitas.
- (d) An application for permit does not authorize the applicant to provide massage until such permit has been issued.
- (e) Each applicant for a massage practitioner permit shall submit the following information under penalty of perjury:
 - (1) All information required by Section 6-6(d)(3) through (12), (15), (19), (20), (23), and (24).
 - (2) The applicant must furnish a diploma or certificate of graduation from a two hundred (200) hour resident course of instruction from either:
 - (i) A recognized school of massage as defined in Section III-6-2(i) of this Chapter; or
 - (ii) An existing school or institution of learning outside the State of California together with a certified transcript of the applicant's school records showing date of enrollment, hours of instruction and graduation from a course having at least a minimum requirement prescribed by Title 5, Division 21, of the California Administrative Code; wherein the theory, method, profession and work of massage is taught, and a copy of the school's approval by its State Board of Education.
 - (3)

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The massage establishment's full name, address and telephone number if the massage practitioner will be employed at a fixed place of business. In the event the applicant seeks to conduct off-premises massage services not related to the massage establishment, an additional application must be submitted unless the applications are submitted contemporaneously.

(4)

Such other identification and information as the Police Department may require in order to substantiate the applicant's claims asserted in the application.

(5)

A certificate from a medical doctor licensed to practice in the State of California stating that the applicant, within thirty (30) days immediately preceding the date of application, has been examined and found to be free of any contagious or communicable disease. Pursuant to Health and Safety Code Section 199.20, and unless otherwise required by state or federal law, nothing in this Chapter shall require testing or disclosure as to whether an applicant is infected with the Human Immunodeficiency Virus (HIV).

(6)

Written proof that the applicant has successfully completed both a written test and practical performance examination administered by a medical practitioner approved by the City of Milpitas. Successful examinees shall demonstrate a basic knowledge of anatomy, physiology, hygiene, and massage. The massage practitioner applicant shall be required to pass the examination. No applicant may take the test more than two times in a twelve (12) month period. Any costs associated with the examination shall be the responsibility of the applicant and paid directly to the medical practitioner.

(7)

A current certification in cardiopulmonary resuscitation and first aid from the American Heart Association or the American Red Cross.

(f)

The Chief of Police, or his or her authorized representative, shall have up to sixty (60) days after submission of all required information, including the required certificates to investigate the application and the background of the applicant provided said sixty (60) days may be extended for such period as may be necessary to obtain fingerprint records from the appropriate state agency. Upon completion of the investigation, the Chief of Police shall grant the permit, with or without conditions if, in the exercise of discretion, he or she finds the applicant to be in compliance with the requirements of Section 6-12(b) through (e).

(g)

If, following investigation of the applicant, the Chief of Police, or his or her authorized representative finds that the applicant has failed to meet the requirements as set forth in Subsection 6-12(f) above, the application shall be denied and the applicant shall be notified of such denial in writing.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-13 - New Massage Practitioners—Notification

The holder of the massage establishment or off-premises massage service permit shall notify the Chief of Police, in writing, of the name and address of each person employed as a massage practitioner at such massage establishment within five (5) days of the person's employment. The requirements of this section are in addition to the other provisions of this Chapter and nothing contained herein shall relieve the permittee of the responsibility of ascertaining, prior to employment, that such new employee has a valid massage practitioner permit.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-14 - Renewal of permits—Massage Establishment, Off-Premises Massage Service, Massage Practitioner

Each massage establishment, off-premises massage service, and massage practitioner permit shall expire on the anniversary date of the issuance of the permit unless suspended or revoked. Permittees shall have thirty (30) days from the date of expiration to renew their permits and may apply for such renewal thirty (30) days prior to expiration. If, upon the thirty-first (31st) day after its expiration an application of renewal has not been received, the permit shall be deemed suspended until such time as the renewal application has been received. No privilege to provide massage shall exist until an application for renewal has been submitted for review. If a renewal application and all required information for the renewal is not received within sixty (60) days after expiration, the permit shall be deemed expired and no privilege to provide massage shall exist.

Permittees shall submit an application for renewal each year in the same manner as required for an original application. To be eligible to renew his or her permit, the permittee must demonstrate that he or she has completed in the twelve (12) month period prior to the submission of the renewal application at least four (4) hours of continuing massage education from a recognized school of massage or any organization recognized by the State of California or the National Massage Certification Board.

(Ord. 172.40 (part), 6/17/03; Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-15 - Application of Regulations to Existing Massage Establishments, Off-Premises Massage Services, and Massage Practitioners

The provisions of this Chapter shall be applicable to all persons and businesses, whether the business was established before or after November 18, 1994. Massage establishments or off-premises massage services legally in business prior to November 18, 1994 shall have sixty (60) days to file for a massage establishment or off-premises massage service permit and to comply with the provisions of this Chapter. Massage Practitioners who have valid massage technician permits shall have one

hundred and eighty (180) days (six (6) months) from November 18, 1994 to apply for a massage practitioner permit under the terms of this Chapter but shall otherwise comply with the regulations set forth herein by December 18, 1994.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-16 - Prohibited Conduct

- (a) It shall be unlawful for any massage practitioner or other person to massage or offer to massage the genital area of any patron, or the breasts of any female patron, or for any operator of a massage establishment to allow or permit such massage.
- (b) It shall be unlawful for any massage practitioner to be other than fully clothed in non-transparent clothing at all times that shall not expose their genitals, pubic area, buttocks or chest or for any operator of a massage establishment to allow or permit such manner of dress by their employees or massage practitioners.
- (c) It shall be unlawful for a massage practitioner to perform any massage services at any location other than that location specified on the massage practitioner permit. If any changes occur to the information contained in the massage practitioner permit, the massage practitioner must notify the Chief of Police, in writing, within ten (10) days of the change. If the massage practitioner changes location where massage is performed, the massage practitioner shall obtain a revised permit prior to performing massage at the new location. If off-premises massage services are to be performed, the massage practitioner permit must indicate approval for off-premises massage services.
- (d) It shall be unlawful for any massage establishment, off-premises massage service, or massage practitioner to provide a massage between the hours of 10:00 p.m. and 7:00 a.m.
- (e) It shall be unlawful for any massage establishment or off-premises massage service or any permittee, owner, operator or managing officer/employee to violate any of the mandatory requirements of this Chapter applicable to massage establishments or off-premises massage services. Furthermore, it shall be unlawful for any massage establishment or off-premises massage service or any permittee, owner, operator, or managing officer/employee of any massage establishment or off-premises massage service to allow any massage practitioner to violate any of the mandatory requirements of this Chapter applicable to massage practitioners.
- (f) It shall be unlawful for any massage practitioner to violate any of the mandatory requirements of this Chapter applicable to massage practitioners.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-17 - Permit Suspension or Revocation

The Chief of Police or authorized representative may revoke or suspend a massage establishment permit, off-premises massage service permit or massage practitioner permit (or existing massage technician permit) if the permittee:

- (a) Does not possess the qualifications for the permit as required by this Chapter; or
- (b) Has been convicted of any violation of the provisions of this Chapter or of any offense involving conduct which requires registration under California Penal Code Section 290, or has been found to be in violation of the provisions of California Penal Code Sections 266i, 314, 315, 316, 318, 647(a), 647(b) or 415 as a result of an arrest for 647(b) (as now written or as amended), or has been convicted of any crime designated in California Government Code Section 51032(b) (as now written or as amended), including any felony involving the sale of a controlled substance specified in Sections 11054—11058 of the California Health and Safety Code (as now written or as amended), or of any other crime involving dishonesty, fraud, deceit, violence, or moral turpitude or has been enjoined under California Penal Code Section 11225 (as now written or as amended); or
- (c) Has made a material misrepresentation on the permit application or renewal; or
- (d) Has operated the massage establishment or off-premises massage service or has engaged in conduct as a massage practitioner in a manner which violates any of the mandatory provisions of this Chapter, any condition of the permit, or any of the laws which would have been grounds for denial of the permit.

The permittee(s) shall be responsible for those acts of its or their employees and massage practitioners which are done in the course and scope of their employment.

Notice of suspension or revocation shall be given by personal service or certified mail to the address shown on the last application or renewal. If reasonable attempts to otherwise serve such notice are not successful, service may be provided by first class mail.

Service shall be deemed complete when personal service is made, when the certified letter is delivered, or when the decision is mailed by first class mail.

(Ord. 172.40 (part), 6/17/03; Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-18 - Appeal Procedures

(a)

Appeal to City Manager. The permittee or applicant, not later than fifteen (15) calendar days after service of notice of revocation, suspension, denial of application or renewal or approval with conditions, may file an appeal by filing a written statement of such appeal, including the grounds for the appeal and the asserted errors in the decision, with the City Clerk.

The City Manager or designee shall review the record below and shall allow oral argument not to exceed fifteen (15) minutes per side. Notice of the time for hearing on the appeal before the City Manager or designee shall be given by personal service or certified mail to the address shown on the last application or renewal. If reasonable attempts to otherwise serve such notice are not successful, service may be provided by first class mail.

After the hearing, the City Manager or designee shall render a written decision within fifteen (15) calendar days from the date of the hearing. The decision shall set forth the Manager's reason(s) for his or her decision. The decision shall be served upon the permittee by any of the methods acceptable for notification of the hearing. The decision shall be considered final upon service.

Service shall be deemed complete when personal service is made, when the certified letter is delivered, or when the notice is mailed by first class mail.

(b)

Appeal of City Manager's Decision to City Council. The permittee or the applicant may appeal the final decision of the City Manager or designee to the City Council within ten (10) calendar days of service of the final decision. The appeal shall be filed with the City Clerk and shall state in writing the grounds for appeal and asserted errors in the City Manager's decision. The appeal shall be made in accordance with the provisions of the Milpitas Municipal Code Title I, Chapter 20.

The City Manager shall cause a hearing to be set before the City Council within sixty (60) calendar days of the filing of the appeal. The City Council shall render a decision within thirty (30) calendar days of the Council's hearing. Notice of such decision shall be made pursuant to the notice by mail provisions contained in Title I, Chapter 20 of the Milpitas Municipal Code. The Council's decision shall set forth the reason(s) for its decision. The decision shall be considered final upon service made pursuant to the service by mail provisions set forth in Title I, Chapter 20 of the Milpitas Municipal Code.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-19 - Burden of Proof

Unless otherwise specifically prohibited by law, the burden of proof is on the permittee/applicant in any hearing or other matter under this Chapter.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-20 - Public Nuisance

Any massage establishment operated, conducted, or maintained contrary to the provisions of this Chapter shall be unlawful and a public nuisance, and the City Attorney may pursue any and all remedies available under the law.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)

III-6-21 - Severability

If any Section, subsection, sentence, clause, phrase, or portion of this Chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such provision shall not effect the validity of the remaining portion thereof.

(Ord. 172.3 (part), 4/18/95; Ord. 172.2 (part), 10/18/94)