

**LEGISLATIVE DIGEST**

(November 6, 2003)

[Repealing Article 27 of the Police Code and adding a new Article 29 to the Health Code, providing for the licensing and regulation of massage practitioners and businesses.]

**Ordinance amending the San Francisco Police Code by repealing Article 27 (Sections 2700 through 2737), and amending the San Francisco Health Code by adding a new Article 29 (Sections 1900 through 1931), both Articles providing for the licensing and regulation of massage practitioners and businesses, and establishing an operative date for the ordinance.**

**I. SUMMARY OF THE PROPOSED LEGISLATION**

The proposed new Article 29 of the Health Code would shift responsibility for regulating massage practitioners and massage businesses from the Police Department to the Department of Public Health.

**Massage Practitioners**

**Section 1901.** All massage practitioners would be required to obtain a permit from the Director of Public Health. The Department would issue permits for “general massage practitioners” and “advanced massage practitioners.”<sup>1</sup>

Permits would not be required for a health care practitioner, or a barber, manicurist, esthetician, or cosmetologist within the scope of any state law restrictions applicable to his or her profession. Non-profit organizations, and individuals practicing massage under the direction of a non-profit organization, would be required to obtain permits and licenses, but would be exempt from any fees.

**Section 1902.** The application for a massage practitioner permit would require basic background information, including a diploma from a recognized massage school, and payment of an application fee.

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<sup>1</sup> Under the proposed legislation, a “general massage practitioner” is a practitioner who has completed 100 hours of instruction at a recognized school for massage; an “advanced massage practitioner” is one who has completed 200 hours. (See proposed Section 1902(c).) Only an advanced massage practitioner would be allowed to operate a “solo practitioner massage establishment.” (See proposed Section 1900(l).))

**Section 1903.** The Director could hold a hearing on a massage practitioner permit application. The Director would be required to issue a written decision on the application.

No permit would be issued if the applicant lied on the application, did not meet the requirements of the Article, or had a massage-related permit revoked within the past 5 years. And no permit would be issued if the applicant had been convicted of a violent felony, misdemeanor sexual battery, an offense involving sexual misconduct with children, or an offense requiring registration as sex offender. The Director could still issue the permit, however, if he or she found that the offense was not violent, the conviction occurred at least 5 years ago, and the applicant had not been convicted since then of such an offense.

Applicants could appeal the denial of a permit application at a hearing before the Director.

**Section 1904.** The Director would issue permit applicants a temporary massage practitioner permit, good for up to 60 days, while their permit applications were being reviewed.

The Director could adopt rules and regulations for issuing trainee permits, good for up to 90 days, to persons who have completed an application for a massage practitioner permit and who currently are enrolled in a recognized massage school.

**Section 1905.** The Director would issue massage practitioners an identification card.

**Section 1906.** Massage practitioners would be required to pay an annual license fee.

**Section 1907.** The Director could revoke or suspend a massage practitioner permit if he or she found that the applicant violated the Article, lied in the application, had a massage-related permit revoked within the past 5 years, or violated a rule or regulation adopted by the Director. The permit-holder would be entitled to written notice of the charges and a public hearing. The Director could summarily suspend a practitioner's permit, pending a hearing, if there was an immediate threat to the public health or safety.

### **Massage Businesses**

**Section 1908.** All massage businesses would be required to obtain a permit from the Director of Public Health. The Department would issue permits for "massage establishments," "solo practitioner massage establishments," and "outcall massage services."<sup>2</sup>

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<sup>2</sup> Under the proposed legislation, a "massage establishment" is a fixed place of business where more than one person engages in or carries on the practice of massage. (See proposed Section 1900(e).)

A "solo practitioner massage establishment" is a fixed place of business where an advanced massage practitioner engages in the practice of massage. (See proposed Section 1900(l).) Two to four advanced massage practitioners, or two to four advanced massage practitioners and one or more healing arts practitioners, may share a premises licensed as a solo practitioner massage establishment. (*Ibid.*) The facility and operating requirements for massage establishments are somewhat stricter than those for solo practitioner massage

Permits would not be required for health care facilities, or where the massage services are being provided by a health care practitioner, or a barber, manicurist, esthetician, or cosmetologist. A non-profit organization would be exempt from permit and license fees.

**Section 1909.** The application for a massage establishment permit would require basic background information, including a description of the proposed business and business premises, and payment of an application fee.

**Section 1910.** The business premises for a proposed massage establishment would be required to meet various construction standards and provide particular facilities, relating to showers, toilets, ventilation, and electrical systems.

**Section 1911.** The business premises for a proposed solo practitioner massage establishment would be required to meet other, less exacting standards for construction and facilities.

**Section 1912.** The Director would refer a massage establishment or solo massage practitioner establishment permit application to the Building Inspection, Police, Fire and Planning Departments for their review. The Director would notify the Police Department of all approved permits.

**Section 1913.** The Director could hold a hearing on a massage establishment, solo massage practitioner establishment, or outcall massage service permit application. The Director would be required to issue a written decision on the application.

No permit would be issued if the applicant lied on the application, if the operation of the proposed establishment would violate City Codes or the Article, or if the applicant had a massage-related permit revoked within the past 5 years. And no permit would be issued if the applicant or any person who would be directly engaged in the operation of the proposed establishment had been convicted of a violent felony, misdemeanor sexual battery, an offense involving sexual misconduct with children, pimping or pandering, or an offense requiring registration as sex offender. The Director could still issue the permit, however, if he or she found that the offense was not violent, the conviction occurred at least 5 years ago, and the applicant had not been convicted since then of such an offense. The Director could deny a permit where, in his or her opinion, there were reasonable grounds to conclude that the premises or business would be managed or conducted in such a manner as to endanger the health or safety of the employees or patrons of the business or to coerce any employee to engage in any illegal conduct.

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establishments. (See proposed Sections 1910, 1914 [massage establishments] and 1911 [solo practitioner massage establishments].)

An "outcall massage service" is a business providing massage services at a location designated by the customer. (See proposed Section 1900(h).)

The Director could issue a solo practitioner massage establishment permit authorizing more than four solo massage practitioners to operate out of the same place of business, if the Director found that good cause existed and the operation of the establishment would not have a negative impact on the neighborhood.

Applicants could appeal the denial of a permit application at a hearing before the Director.

**Section 1914.** A massage establishment would be required to meet specified operating standards relating to hygiene and sanitation.

**Section 1915.** Any person holding a permit for a massage business would be responsible for ensuring that any person working for the business as a massage practitioner possessed the appropriate permit.

**Section 1916.** The operator of a massage business would be required to maintain a register of all persons employed as massage practitioners and their permit numbers.

**Section 1917.** It would be unlawful for any person holding a massage business permit to employ any person who is not at least 18 years of age.

**Section 1918.** Every massage establishment or solo practitioner massage establishment would be required to display its permit in a conspicuous place on the premises; an outcall massage service would be required to make its permit available for inspection by the Department of Public Health. No massage business would be allowed to operate between midnight and 7:00 a.m.

**Section 1919.** The Department of Public Health would be authorized to inspect any massage establishment or solo practitioner massage establishment to determine compliance with the Article, or to provide health and safety information to the employees.

The Director would be required to adopt regulations governing the use of double doors or other structural devices that interfere with reasonable inspections and do not have legitimate safety or security purposes.

Nothing in the Section would limit or restrict the authority of a police officer to enter premises licensed under the Article (i) pursuant to a search warrant; (ii) without a warrant in the case of an emergency or other exigent circumstances, or (iii) as part of any other lawful entry in connection with a criminal investigation or enforcement action.

**Section 1920.** Every person holding a permit for a massage establishment, a solo practitioner massage establishment, or an outcall massage service would be required to pay an annual license fee to cover the costs of enforcing the Article. If the permitholder was over 60 years old, had no employees, and had gross receipts of less than \$1,000 from the business for the previous year, the license fee would be \$10.

**Section 1921.** The Director could revoke or suspend a permit for a massage business if he or she found that the permittee violated the Article, violated a rule or regulation promulgated by the Director, or refused to allow an inspection by the Health Department. A permit for a solo practitioner massage establishment could be suspended or revoked if the permittee no longer held an advanced massage practitioner permit.

A permit for a massage business could be suspended or revoked if the permittee engaged in any conduct in connection with the operation of the business that violated any state or local laws. A permit for a massage establishment or an outcall massage service could be suspended or revoked if an employee of the permittee engaged in any conduct on the permitted premises in connection with the operation of the business that violated any state or local laws, if the permittee knew or reasonably should have known about the illegal conduct.

And a permit for a massage business could be suspended or revoked if the Director found, by clear and convincing evidence, that the business was being conducted without regard for public health or the health of customers and employees.

The permit-holder would be entitled to written notice of the charges and a public hearing.

The Director could summarily suspend a massage business permit, pending a hearing, if there was an immediate threat to the public health or safety.

### **General**

**Section 1922.** The Director could set hearings on permit applications.

**Section 1923.** Permits issued under the Article would be non-transferable.

**Section 1924.** Any person currently holding a City permit for a massage establishment, outcall massage service, or massage practitioner would have 90 days to surrender the old permit and obtain a new one, at no cost, under the Article. Persons practicing massage or operating a massage business without a permit prior to the adoption of the Article would be eligible to obtain a permit under the new Article if they met the relevant requirements.

**Section 1925.** The Director and the Tax Collector would provide permittees with information and referrals regarding business registration and zoning requirements at the time the permits were issued or renewed.

The Director also would provide all persons receiving a massage practitioner permit with educational materials regarding their rights and informing them of available resources such as health services and victim assistance, as well as emergency numbers and hotlines to call for information and assistance.

**Section 1926.** The Director would be authorized to adopt rules and regulations after a noticed public meeting. Violations of those rules could be grounds for suspension or revocation of a permit, but the Director would, whenever possible, give the permittee a reasonable opportunity to correct the violation before seeking penalties.

The Director would also be required to maintain a phone line for inquiries and complaints regarding massage businesses and practitioners.

**Section 1927.** The application fee for a massage practitioner permit would be \$100; the annual license fee would be \$75.

The application fee for a massage establishment permit would be \$240; the annual license fee would be \$600.

The application fee for a solo practitioner massage establishment permit would be \$240; the annual license fee would be \$400.

The application fee for an outcall massage service permit would be \$240; the annual license fee would be \$200.

An advanced massage practitioner holding a solo practitioner massage establishment permit would not be required to pay any additional permit or annual license fee for an outcall massage service permit.

**Section 1928.** Violations of the Article or of the Director's rules and regulations would be punishable by administrative fines as follows:

- Not to exceed \$1,000 for the first violation of a rule or regulation in a twelve-month period,
- Not to exceed \$2,500 for the second violation of the same rule or regulation in a twelve-month period, and
- Not to exceed \$5,000 for the third and subsequent violations of the same rule or regulation in a twelve-month period.

A special, lower schedule of fines would apply to licensed massage practitioners who violated the Article or the Director's rules and regulations:

- Not to exceed \$250 for the first violation of a rule or regulation in a twelve-month period,
- Not to exceed \$500 for the second violation of the same rule or regulation in a twelve-month period, and

- Not to exceed \$1,000 for the third and subsequent violations of the same rule or regulation in a twelve-month period.

A permittee who allowed an unlicensed individual to work as a massage practitioner on the premises could be punished by administrative fines as follows:

- Not to exceed \$1,000 for the first violation in a twelve-month period,
- Not to exceed \$2,500 for the second violation in a twelve-month period, and
- Not to exceed \$5,000 for the third and subsequent violations in a twelve-month period.

Persons facing administrative fines would be entitled to notice of the charges against them and an opportunity to be heard.

Persons violating state laws would remain subject to civil or criminal prosecution.

**Section 1929.** The Director of Public Health would work with the Chief of Police on issues of common concern affecting the massage industry, such as protections against violence in massage establishments, crimes against massage practitioners, forced labor, or trafficking.

During the six-month period between adoption of this Article and its effective date, the Director of Public Health would work with the Chief of Police to develop procedures to verify that permit applicants do not have prior criminal convictions that would disqualify the applicants from receiving a permit under this Article.

**Sections 1930, 1931.** It would be the Board of Supervisors' intent in adopting the Article only to promote the general welfare, and not to create any duty on the part of the City to any individual that could be the basis for a suit for damages. It would be the Board's intent in adopting the Article that even if part of the ordinance, or its application to particular persons, were found to be invalid, the Board would still want the remaining portions of the ordinance, and its application to other persons, to remain in full force and effect.

**Effective Date.** The ordinance would take effect six months after the Mayor signed the ordinance, or the ordinance became law without the Mayor's signature.

## II. COMPARISON WITH EXISTING LAW.

There are some differences, of varying degrees of significance, between the current Police Code provisions regulating massage and the proposed Health Code regulations. Here are some of the more important differences:

**General.** The primary difference is that regulatory authority would be shifted from the Chief of Police to the Department of Public Health.

The Health Code would also provide for a second, more highly-trained, class of practitioners who would be known as "advanced massage practitioners." (Advanced massage practitioners would be authorized to operate a new, additional class of licensed massage establishments, subject to less restrictive conditions, which would be known as "solo practitioner massage establishments.")

**Practitioner's Permit; Applications.** Under the Police Code, there is a mandatory public hearing on the practitioner's permit application. Under the Health Code, the hearing would be optional. The Health Code would add deadlines for written action on the permit application and establish a process for appeals by the applicant to the department.

Both the Police Code and the Health Code provide that convictions of certain crimes disqualify an applicant from receiving a permit to practice massage. And the Health Code clarifies that out-of-state convictions for the same offenses will count for licensing purposes. But the Police Code includes as disqualifying events a number of offenses not included in the Health Code's list, such as: lewd or dissolute conduct in public (Penal Code § 647(a)); annoying or molesting a person attending night school (Penal Code § 647b); keeping a house of ill-fame (Penal Code § 315); keeping a disorderly house (Penal Code § 316); and prevailing upon a person to visit a place for prostitution or gambling (Penal Code § 318).

Under the Police Code, the Chief of Police may still issue the permit if the offenses occurred at least 5 years before the date of the application and the applicant had no subsequent felony convictions of any nature or subsequent misdemeanor convictions for the crimes listed in the Code. Under the Health Code, the Director of Public Health could issue the permit if the offense was not violent, it occurred at least 5 years prior to the date of the application, and the applicant has not been convicted subsequently of one of the enumerated offenses.

**Temporary Permits.** The Health Code would add a new provision authorizing the Director to issue temporary permits after the filing of a practitioner's application and fees, good for up to 60 days while the Director processed the application.

**Trainee Permits.** The Police Code makes specific provision for the issuance of trainee permits. These permits may not be renewed except for delays due to accidents or other valid reason. Trainees must have a written offer of employment during the life of the permit from a licensed massage establishment. Trainees may not do outcall massage. The Health Code would allow (but not require) the Director of Public Health to adopt rules for

trainee permits, good for up to 90 days, to persons who have completed an application for a massage practitioner permit and who currently are enrolled in massage school. These permits would not necessarily be subject to the same restrictions as currently provided in the Police Code.

**Revocation of Practitioner's Permit.** Under the Police Code, a practitioner's permit may be revoked or suspended if the Chief of Police finds after a public hearing that:

- the practitioner has violated any provision of the Article,
- been convicted of any crime requiring registration as a sex offender, or
- been convicted of production, distribution, or exhibition of obscene matter (Penal Code § 311), disorderly conduct, including prostitution or public intoxication (Penal Code § 647), annoying or molesting children (Penal Code § 647a), annoying or molesting a person attending night school (Penal Code § 647b), injury to property or people, endangering public peace, outraging public decency (Penal Code § 650-1/2), keeping a house of ill-fame (Penal Code § 315), keeping a disorderly house (Penal Code § 316), or prevailing upon a person to visit a place for prostitution or gambling (Penal Code § 318).

Under the Health Code, a practitioner's permit may be revoked or suspended if the Chief of Police finds after a public hearing that:

- the practitioner has willfully violated any provision of the Article,
- provided materially false documents or testimony,
- had any license or permit related to the practice of massage revoked within the past 5 years, or
- violated a rule or regulation adopted by the Director of Public Health.

The Health Code would specify that the practitioner receive written notice of the charges against him or her, require disclosure of evidence and an opportunity to respond, and set a timeline for the process.

The Health Code would also authorize the Director to summarily suspend a practitioner's permit, pending a hearing, if there was an immediate threat to the public health or safety.

**Issuance of Massage Establishment Permit.** Under the Police Code, the Chief of Police may grant a permit within fourteen days after the hearing on the permit application. The Health Code would provide that the Health Director must either grant or deny a permit within sixty days after the application was filed (and within fourteen days after a hearing on

the permit application). If the Director did not act within the time period, the permit would be deemed granted.

The Health Code would add a specific provision directing the Health Director to deny the permit if the applicant provided materially false documents or testimony as part of the application. The Health Code would also add a provision directing the Health Director to deny the permit if the applicant had had any license or permit related to the practice of massage revoked during the past five years.

The Health Code would add a requirement that a permit be denied to any applicant convicted of misdemeanor sexual battery, but would not carry forward the Police Code requirement that a massage establishment permit application be denied to an applicant convicted of production, distribution, or exhibition of obscene matter (Penal Code § 311), disorderly conduct, including prostitution or public intoxication (Penal Code § 647), annoying or molesting children (Penal Code § 647a), annoying or molesting a person attending night school (Penal Code § 647b), keeping a house of ill-fame (Penal Code § 315), keeping a disorderly house (Penal Code § 316), or prevailing upon a person to visit a place for prostitution or gambling (Penal Code § 318).

Both the current Police Code and the proposed Health Code provisions state that a permit may be denied if the applicant had been convicted a violent felony, sexual misconduct with children, or an offense requiring registration as a sex offender. Under the Police Code, the Chief of Police may still issue the permit if the offense occurred more than five years ago, the applicant has no subsequent felony convictions, and no misdemeanor convictions for the offenses specified in the Code. Under the Health Code, the Health Director would still be able to issue the permit if the offense occurred more than five years ago, was not violent, and the applicant has no subsequent convictions, either felony or misdemeanor, for the offenses specified in the Code; an unrelated felony conviction would no longer disqualify an applicant from receiving a permit under the Director's discretionary authority.

Under the Police Code, the Chief of Police may deny a permit "if it shall appear that the character of the business is not a proper or suitable place in which to conduct or maintain such business or calling or the applicant requesting such permit does not warrant the issuance thereof." Under the Health Code, the Health Director could deny the permit "where there is reasonable grounds to determine that the premises or the business will be or are being managed, conducted or maintained in such a manner as to endanger the health or safety of the employees or patrons thereof or to coerce any employee to engage in any illegal conduct." The broad "character" grounds for denial of a permit under the Police Code would be narrowed under the Health Code to health and safety grounds, or criminal coercion.<sup>3</sup> (Both

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<sup>3</sup> Section 26(a) of the Business and Tax Regulations Code would still provide that "in the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked."

the Police Code and the Health Code authorize revocation or suspension of a permit on additional grounds.)

The Health Code would define “solo practitioner massage establishment” as a fixed place of business where the practice of massage is carried on by up to four advanced massage practitioners, or up to four advanced massage practitioners and one or more health or healing arts practitioners. Notwithstanding this definition, the Health Director could issue a solo practitioner massage establishment permit covering more than four practitioners, if good cause exists and operation of the establishment would not have a negative impact on the neighborhood.

Under the Police Code, a public hearing on a massage establishment permit application is mandatory; until the Health Code, the hearing would be optional at the Health Director’s discretion. The Health Code would add specific provisions for appeals to the Health Director from the denial of a permit, including deadlines and procedures.

**Operating Requirements.** The Health Code would drop the Police Code requirement that massage establishment personnel (in addition to appliances and apparatus) “be kept clean and operated in a sanitary condition.” The Health Code would also drop the Police Code requirement that employees shall be clean and wear clean outer garments whose use is restricted to the massage establishments, and the requirement that a separate dressing room for each sex be available on the premises with individual lockers for each employee.

The Health Code would drop the existing prohibition on suggestive advertising by massage establishments, and the requirement that an outcall massage service notify the hotel manager before visiting a guest, including a notation of the outcall practitioner’s registration number on the guest’s hotel registration. The Health Code would drop the prohibition on providing massage services in any area of a permitted establishment which is fitted with a locking door.

The Health Code would not set any specific operating requirements for solo practitioner massage establishments.

**ID Cards.** Under the Police Code, the practitioner’s identification card must be worn on the front of the outermost garment at all times during hours of operation. Under the Health Code, the card must be presented upon request to any City health inspector.

**Register of Employees.** The Health Code would provide that only Health Department inspectors could examine the employee register to be maintained by a massage establishment, solo practitioner massage establishment, or outcall massage service.

**Daily Register of Patrons.** The Health Code would eliminate the existing Police Code requirement that massage establishments and outcall massage services keep a daily register including of the names and addresses of all customers.

**Inspection.** Under the Police Code, the Police Department and the Department of Public Health may inspect massage establishments to monitor compliance with the Code; inspections may occur from time to time, but at least twice a year. Under the Health Code, the Department of Public Health could inspect massage establishments to monitor compliance with the Code, or to provide health and safety information to employees.

**Revocation or Suspension of Massage Establishment Permit.** The Health Code would eliminate the Police Code provision that a permit may be revoked or suspended for “good cause” in general. The Health Code would add a provision that disciplinary action based on health threats be supported by “clear and convincing” evidence, rather than by a simple preponderance of the evidence. The Health Code would also add timeframes and procedures for suspension and revocation hearings.

The Health Code would also authorize the Director to summarily suspend a massage business' permit, pending a hearing, if there was an immediate threat to the public health or safety.

**Non-Transferability of Permits.** Under the Police Code, permits may be transferred with the written consent of the Chief of Police and the approval of the Department of Public Health. Under the Health Code, permits would not be transferable.

**Information.** The Health Code would add a new provision directing the Health Director and the Tax Collector to provide permit-holders with information on registering businesses for business tax purposes and on zoning restrictions.

The Health Code would also add a new provision requiring the Director to provide new massage practitioners with educational materials regarding their rights and informing them of available resources such as health services and victim assistance, as well as emergency numbers and hotlines to call for information and assistance.

The Health Code would also add a requirement that the Director maintain a phone line for inquiries and complaints regarding massage businesses and practitioners.

**Rules and Regulations.** The Health Code would add a new provision requiring the Health Director to give permit-holders a reasonable opportunity to cure a violation of the Director's rules and regulations before imposing discipline for such violation.

**Violations and Penalties.** The Health Code would change the penalties for violation of the ordinance from misdemeanor criminal penalties to a graduated series of administrative penalties.