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DATE: December 2, 2009

TO: Honorable Mayor and City Councilmembers

FROM: Police Department

SUBJECT: **ORDINANCE AMENDING CHAPTER 15, SECTION 15.21 OF THE OCEANSIDE CITY CODE REGARDING MASSAGE ESTABLISHMENT LICENSING**

**SYNOPSIS**

Staff and the Police and Fire Commission recommend that the City Council introduce an Ordinance of the City Council of the City of Oceanside amending Section 15.21 of Chapter 15 of the Oceanside City Code to add an exemption from the massage license requirements of Chapter 15 for certain massage therapists pursuant to Chapter 10.5 of the Business and Professions Code and to clarify exemptions for those individuals working under the direction of healing arts practitioners.

**BACKGROUND**

Senate Bill 731 ("SB731") added Chapter 10.5 to the Business & Professions Code, which prohibits cities from requiring a massage license from massage therapists who are certified by the Massage Therapy Organization. The proposed amendments to Chapter 15.21 were drafted to exempt such certified massage therapists from the City's massage licensing provisions. The proposed amendments further clarify that the existing exemption for persons working "under the direction" of persons licensed by the State to practice the healing arts is limited to those instances where the licensee is directly supervising and physically present at the premises where the massage is taking place. The amendments also clarify that the exemptions found in 15.21 do not apply to independent contractors working under the direction of persons licensed by the State to practice the healing arts.

Prior to passage of SB731 there had been no state regulation or oversight of the massage therapy profession. Instead, it had been left up to each city and county to adopt a local ordinance providing for the licensing and regulation of massage therapists and establishments pursuant to Government Code section 51030 et seq. On September 27, 2008, Governor Schwarzenegger signed into law SB 731. SB731 added Chapter 10.5 to the Business & Professions Code. Commencing on September 1, 2009, this bill provides for the voluntary certification of massage therapists and practitioners by the Massage Therapy Organization, a non-profit organization that is now known as the California Massage Therapy Council. The bill requires applicants for

certification to be at least 18 years of age, to meet certain educational and professional criteria, and to undergo a criminal history background check as a prerequisite to certification. The bill also allows the organization to take disciplinary action against the certificate holder if he or she has been arrested for, and charged with, certain sexually related crimes or drug offenses. Finally, SB 731 prohibits a city or county from requiring certificate holders and their employers to obtain a local license to practice massage therapy, although some local regulation is still allowed in the areas of physical facility and building code requirements, public health and safety, attire, and personal hygiene. By its terms, Chapter 10.5 is automatically repealed on January 1, 2016, unless otherwise extended or modified. Accordingly, with the passage of SB731, it is necessary to add an exemption to section 15.21 for massage therapists certified by the Massage Therapy Organization.

Section 15.21 currently exempts persons "persons working under the direction of any establishment or person... holding an unrevoked certificate to practice the healing arts under the laws of the State of California." Because "under the direction of" is not clarified, healing arts practitioners (such as chiropractors) have in some cases utilized this as a loophole to open massage establishments in their name and obtain an exemption from the massage license required by Chapter 15. Further, they then claim that all of the employees giving massages are working under his or her direction, and thus exempt from Chapter 15, even though the chiropractor is seldom, if ever, present to actually supervise the employees. OPD has conducted approximately 75 checks at massage establishments run by chiropractors in the last 5 years. Of these, on at least 50 occasions the chiropractor was not present while massages were being given by otherwise unlicensed individuals. OPD has conducted undercover operations at these types of establishments licensed in the name of absentee chiropractors, made various prostitution related arrests, and have found that this practice has resulted in the these types of establishments being fronts for prostitution. Further, the City Attorney was recently forced to bring a nuisance abatement action against one such establishment with an absentee chiropractor under the Red Light Abatement law. Accordingly, the proposed amendments further clarify that the existing exemption for persons working "under the direction" of persons licensed by the State to practice the healing arts is limited to those instances where the licensee is directly supervising and physically present at the premises where the massage is taking place.

The amendments also clarify that the exemptions found in 15.21 do not apply to independent contractors working under the direction of persons licensed by the State to practice the healing arts. In the 2002-2003 legislative session, California Government Code section 51033 was amended following the passage of Assembly Bill 15. The amendment added chiropractors to the list of trades protected from municipal regulation of massage, but clarified that local governments may continue to regulate independent contractors. According to a press release from the office of then-Governor Davis, the purpose of AB15 was to "stop massage services that are a front for prostitution, by authorizing local governments to require a business license for independent contractors who are employed by State licensed cosmetologists and health care professionals (primarily chiropractors)." This amendment is therefore proposed pursuant to the

express authority of Government Code section 51033 allowing cities to regulate independent contractors to healing arts practitioners.

**ANALYSIS**

SB731 sets up a voluntary certification scheme where by massage therapists who are certified by the Massage Therapy Organization. These massage therapists are exempt from local massage regulations, such as Chapter 15. The proposed amendments set forth in section 15.21, subsection 4, are reflective of State law. However, should SB731 be repealed, this exemption will no longer apply.

**FISCAL IMPACT**

The exemption for persons certified by the Massage Therapy Organization might result in slightly decreased revenue if massage therapists elect to become certified by the MTO. However, the clarification of working “under the direction of” may result in cost savings to the City in the form of decreased responses by OPD and less staff time for the City Attorney’s Office in bringing nuisance abatement actions. At the present time, there are three establishments currently operating within the city.

**COMMISSION OR COMMITTEE REPORT**

The Police and Fire Commission reviewed this matter at its regular monthly meeting on September 17, 2009, and recommended City Council approval of staff recommendations.

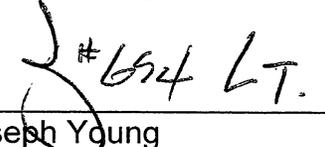
**CITY ATTORNEY’S ANALYSIS**

The referenced documents have been reviewed and approved by the City Attorney as to form.

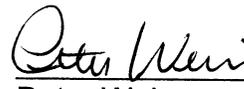
**RECOMMENDATION**

Staff and the Police and Fire Commission recommend that the City Council introduce an Ordinance of the City Council of the City of Oceanside amending Section 15.21 of Chapter 15 of the Oceanside City Code to add an exemption from the massage license requirements of Chapter 15 for certain massage therapists pursuant to Chapter 10.5 of the Business and Professions Code and to clarify exemptions for those individuals working under the direction of healing arts practitioners.

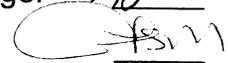
PREPARED BY:

  
\_\_\_\_\_  
Joseph Young  
Police Lieutenant

SUBMITTED BY:

  
\_\_\_\_\_  
Peter Weiss  
City Manager

REVIEWED BY:

Michelle Skaggs-Lawrence, Deputy City Manager   
Frank S. McCoy, Chief of Police 



1 WHEREAS, the City Council finds that the health, safety and welfare of the citizens of  
2 Oceanside is negatively impacted by allowing unlicensed individuals to give unsupervised  
3 massages;

4 WHEREAS, the City Council desires to amend section 15.21 to ensure that the existing  
5 exemption for persons working “under the direction” of persons licensed by the State to practice  
6 the healing arts is limited to those instances where the licensee is directly supervising and  
7 physically present at the premises where the massage is taking place;

8 WHEREAS, the City Council finds that in the 2002-2003 legislative session, California  
9 Government Code section 51033 was amended following the passage of Assembly Bill 15. The  
10 amendment clarified that local governments may continue to regulate independent contractors.  
11 According to a press release from the office of then-Governor Davis, the purpose of AB15 was  
12 to “stop massage services that are a front for prostitution, by authorizing local governments to  
13 require a business license for independent contractors who are employed by State licensed  
14 cosmetologists and health care professionals (primarily chiropractors)”;

15 WHEREAS, pursuant to the express authority of Government Code section 51033  
16 allowing cities to regulate independent contractors to healing arts practitioners, the City Council  
17 desires to amend section 15.21 to exclude independent contractors from those individuals who  
18 are exempt from the licensing provisions of Chapter 15.21.

19 NOW, THEREFORE, the City Council of the City of Oceanside does ordain as follows:

20 SECTION 1. Section 15.21 of Chapter 15 of the Oceanside City Code is amended to  
21 read as follows:

22 Sec. 15.21. Exemptions.

23 The permits and licenses required by this article shall not apply to the following:

24 (1) Hospitals, nursing homes, sanitarium, or persons holding an unrevoked certificate to  
25 practice the healing arts under the laws of the State of California.

26 (2) Persons, other than independent contractors, employed by and while working at  
27 any establishment referenced in subsection (1).

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1 (3) Persons, other than independent contractors or employees of persons listed under  
2 subsection (4), employed by and working under the immediate and direct supervision of a  
3 person holding an unrevoked certificate to practice the healing arts referenced in subsection (1)  
4 while the certificate holder is physically present at the premises where the massage is taking  
5 place.

6 (4) Persons who are licensed by the Massage Therapist Organization or the California  
7 Massage Therapy Council pursuant to Chapter 10.5 (commencing with section 4600) of  
8 Division 2 of the Business and Professions Code, provided however, that such persons shall not  
9 be exempted from the provisions of this article if Chapter 10.5 is repealed.

10 (5) Establishments or businesses that employ or use only persons who are licensed by  
11 the Massage Therapist Organization or the California Massage Therapy Council pursuant to  
12 Chapter 10.5 (commencing with section 4600) of Division 2 of the Business and Professions  
13 Code to perform massage, provided however, that such establishments or businesses shall not  
14 be exempted from the provisions of this article if Chapter 10.5 is repealed.

15 (6) Nothing in this section shall relieve any person, establishment or business from  
16 the business license requirements of article I of this chapter. Any person, establishment or  
17 business claiming exemption from the provisions of this article under subsection (4) and or (5)  
18 of this section shall file a copy of the applicable license(s) issued by the Massage Therapist  
19 Organization or the California Massage Therapy Council with the business license division  
20 prior to performing any massage.

21 SECTION 2. Severability.

22 If any section, sentence, clause or phrase of this Ordinance is for any reason held to be  
23 invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision  
24 shall not affect the validity of the remaining portions of this Ordinance. The City Council  
25 hereby declares that it would have passed this ordinance and adopted this Ordinance and each  
26 section, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections,  
27 subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

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1 SECTION 3. The City Clerk of the City of Oceanside is hereby directed to publish this  
2 ordinance, or the title hereof as a summary, pursuant to state statute, once within fifteen (15)  
3 days after its passage in the North County Times, a newspaper of general circulation published  
4 in the City of Oceanside.

5 SECTION 4. This ordinance shall take effect and be in force on the thirtieth (30<sup>th</sup>) day  
6 from and after its final passage.

7 INTRODUCED at a regular meeting of the City Council of the City of Oceanside,  
8 California, held on the \_\_\_ day of \_\_\_\_\_, 2009, and, thereafter,

9 PASSED AND ADOPTED at a regular meeting of the City Council of the City of  
10 Oceanside, California, held on the \_\_\_ day of \_\_\_\_\_, 2009, by the following vote:

11 AYES:

12 NAYS:

13 ABSENT:

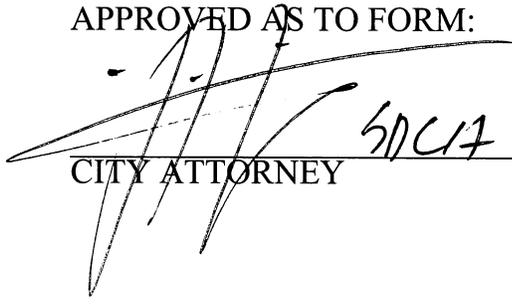
14 ABSTAIN:

15 MAYOR OF THE CITY OF OCEANSIDE

16  
17 ATTEST:

APPROVED AS TO FORM:

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19 \_\_\_\_\_  
20 CITY CLERK

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\_\_\_\_\_  
CITY ATTORNEY

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OCEANSIDE AMENDING SECTION 15.21 OF  
CHAPTER 15 OF THE OCEANSIDE CITY CODE TO ADD AN EXEMPTION FROM THE MASSAGE LICENSE  
REQUIREMENTS OF CHAPTER 15 FOR CERTAIN MASSAGE THERAPISTS PURSUANT TO CHAPTER 10.5  
OF THE BUSINESS AND PROFESSIONS CODE AND TO CLARIFY EXEMPTIONS FOR THOSE  
INDIVIDUALS WORKING UNDER THE DIRECTION OF HEALING ARTS PRACTITIONERS.