



Massage Regulation And Restoration Of Local Land Use Authority Under AB 1147

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By Natalie C. Karpeles

According to data collected in 2014, massage therapy is an 11.7 billion dollar industry¹ with an estimated 300,000 – 350,000 therapists and massage school students throughout the United States². The number of massage therapists in California alone is estimated to be around 41,645; the highest overall in the country³. With the projected number of massage therapists estimated to steadily increase⁴, the need for space within which to practice⁵ will necessarily increase as well; with this growing realization, many cities are grappling with the decisions surrounding lawful and effective means of regulation, while concerned that certain of these establishments can shelter criminal activity.

Enter AB 1147, a legislative victory on behalf of cities and counties throughout California that restores and reconfirms local land use authority to regulate massage establishments or operations while retaining the State’s role in certifying massage professionals and approving massage schools. However, beneath AB 1147’s exterior lays an important caveat: “abuse it and you may lose it.”

Below is a discussion of recently-enacted AB 1147, as well as suggestions for its implementation.

¹ IBISWorld, *IBISWorld Industry Report OD6028 Massage Services*, January 2014, on the Internet at https://d3qw6hv0dhy8ej.cloudfront.net/public/images/player_swf/player_pr304224_anim.swf (visited March 4, 2015).

² IBISWorld, *IBISWorld Industry Report OD6028 Massage Services*, January 2014, on the Internet at https://d3qw6hv0dhy8ej.cloudfront.net/public/images/player_swf/player_pr304224_anim.swf (visited March 4, 2015).

³ Associated Bodywork & Massage Professionals, *AMBP Releases New Data on Massage Therapist Population*, Posted on April 23, 2010, on the Internet at <http://www.abmp.com/news/abmp-releases-new-data-on-massage-therapist-population/> (visited March 4, 2015).

⁴ As reported by the U.S. Department of Labor in 2012, employment of massage therapists is expected to increase 23 percent from 2012 to 2022, faster than average for all occupations. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2014-15 Edition*, Massage Therapists, on the Internet at <http://www.bls.gov/ooh/healthcare/massage-therapists.htm> (visited March 4, 2015).

⁵ While massage therapists work in a variety of environments, 36 percent of all massage therapists work at their office, 25 percent in a health care setting, and 28 percent in a spa setting. American Massage Therapy Association, *Massage Profession Research Report 2014*, on the Internet at http://www.amtamassage.org/uploads/cms/documents/2014_mprr_schools_version.pdf (visited March 4, 2015).

I. A Brief History of Massage Regulation.

For years the Legislature has oscillated over how much local regulatory authority local governments should have to combat global issues (such as human trafficking) and more local enforcement issues (such as prostitution, nuisances, and other public safety issues) associated with the proliferation of massage businesses. Prior to 2009, the State of California did not uniformly regulate massage businesses or massage professionals; rather, local jurisdictions combatted illegitimate massage practices through the enactment and enforcement of vastly differing vice ordinances.⁶ Proponents of the massage industry felt that these ordinances were unnecessarily harsh, and in an effort to establish uniform state regulation, SB 731 was (eventually) born⁷.

SB 731 (Oropeza) (Chapter 384, Statutes of 2008) was the first in a series of enactments aimed at devising uniform state and local regulation of massage businesses and massage professionals. Otherwise known as the Massage Therapy Act, SB 731 created the Massage Therapy Organization⁸, and established limitations on the power of cities and counties to regulate massage professionals, such as exempting certified massage therapists from municipal requirements to obtain a license, permit, or authorization prior to practicing within local jurisdictions. Subsequent amendments to SB 731 cemented local inability to effectively regulate these establishments. For instance, in 2011 AB 619 provided that the only manner in which local government could exercise traditional land use restrictions on an individual certified by CAMTC or an establishment certifying CAMTC certified practitioners was if those same regulations were placed upon all other individuals and businesses providing “professional services” (as defined in *California Corporations Code* § 13401(a)).

In 2012, the Legislature passed SB 1238 (Price) (Chapter 655, Statutes of 2012). The new law expanded upon AB 619 by adding additional requirements to school credit hours and the examination and training requirements for purposes of certification; the grounds for suspension, denial or revocation of certification of the certificate holder; the sharing of information between local law enforcement and CAMTC; the responsibility of owner/operators of massage businesses for conduct of employees or their independent contractors and background checks of owner/operators; and the ability of local government to restrict the operation of massage businesses involved in prior criminal activity. Although the enactment of these laws served to achieve consistency in the application of rules and regulations with respect

⁶ See Cal. Gov't Code Section 51030 *et seq.*

⁷ As early as 1991, the California chapter of the American Massage Therapy Association (AMTA-CA) focused its efforts on proposing uniform statewide regulation; these efforts culminated in the proposition of AB 421 in 2005-2006. Despite the failure of SB 421, the AMTA-CA renewed its efforts by subsequently sponsoring AB 731 in 2008.

⁸ In 2011, AB 619 (Halderman) (Chapter 162, Statutes of 2011) renamed the Massage Therapy Organization the California Massage Therapy Council (CAMTC).

to businesses and individuals involved in the massage therapy field, they also served to help shield the illegitimate manipulation of this industry from local regulation and control.

As early as 2010, many cities and counties throughout the State reported a substantial increase in the number of massage establishments within their respective jurisdictions, while law enforcement agencies reported increased complaints concerning prostitution and human trafficking. Incidentally, local communities reported other problems, such as:

- Reports of incomplete and inaccurate employee databases;
- Establishments that untruthfully promoted themselves as only hiring certified practitioners in an attempt to forestall local regulation;
- Establishments that hid behind their certified employees' indiscretions⁹ (thereby continuing to operate while the individual masseur or masseuse may or may not have been reprimanded);
- Communication issues between the CAMTC and local law enforcement;
- Complaints that the CAMTC appeared to be more focused on protecting the interests of the industry than on proper regulation of the massage industry¹⁰; and
- Impediments to local enforcement since cities and counties were compelled to treat massage businesses and professionals the same as every other professional business, regardless of fact that most professional businesses are significantly dissimilar to the massage industry.

In anticipation of the sunset of SB 731, the Senate Business, Professions and Economic Development Committee, along with the Assembly Business, Professions and Consumer Protection Committees, documented the problems and recommendations associated with the regulation of the massage industry; these were discussed at a joint oversight hearing in March of 2014. This report and hearing led to the introduction of AB 1147.

II. AB 1147 – Back to the Future?

AB 1147 went into effect on January 1, 2015. Generally, by dividing responsibility for massage regulation between the State (regulating the certification of massage professionals¹¹

⁹ Sting operations cost law enforcement overtime and yield little benefit; after following cases through the legal system most arrests for prostitution were plead down to minor misdemeanor offenses such as disorderly conduct (a conviction for which CAMTC will not revoke a practitioner's license).

¹⁰ At the time, the CAMTC board consisted almost entirely of massage practitioners, massage association representatives, and representatives from massage schools.

¹¹ Note that pre and post-AB 1147 there is no distinction in the rights and privileges afforded to Certified Massage Technicians, Certified Massage Practitioners or Conditionally Certified Massage Practitioners; all are certificate holders and subject to protections in *California Business & Professions Code* §§ 460, and 4600-4621, and *California Government Code* § 51034.

though the CAMTC) and local governments (regulating massage businesses through their regulatory and land-use authority), AB 1147 closed the gap in existing law.

In essence AB 1147:

- Reconstitutes the CAMTC board of directors with a broader representation of stakeholders; including adding a representative from the California Police Chiefs Association, a member from an anti-human trafficking organization, a city attorney, and a public health official (*see California Business and Professions Code § 4602*). The new board will become effective on September 15, 2015;
- Discontinues the issuance of new massage practitioner certificates after January 1, 2015, except as provided, but authorizes the renewal of massage practitioner certificates issued prior to January 1, 2015 (*see Bus. & Prof. Code § 4604.1*); said certificates will be renewable every 2 years (*see Bus. & Prof. Code § 4605*);
- Sets new education requirements in order to obtain CAMTC certification (*see Bus. & Prof. Code §§ 4604 and 4604.2*) and permits CAMTC to investigate schools offering massage degrees (*see Bus. & Prof. Code § 4615*);
- Allows CAMTC to regulate individuals within the massage industry by performing background checks on applicants (*see Bus. & Prof. Code § 4606*) and disciplining an owner of a business for the unlawful conduct of his or her employees (*see Bus. & Prof. Code § 4607*);
- Returns local land use authority to cities and counties by authorizing local governments to require conditional use permits, regulate hours of operation and more; cities and counties may now adopt or enforce local ordinances that govern zoning, business licensing, or reasonable health and safety requirements for establishments or businesses (*see Bus. & Prof. Code §§ 460, 4600.5, & 4612¹²*);
- Requires the revocation of certificates for registered sex offenders and the denial of a certificate for registered sex offenders or persons who engage in unprofessional conduct, including, but not limited to “engaging in sexually suggestive advertising related to massage services and engaging in sexual activity while providing massage services for compensation” (*see Bus. & Prof. Code §§ 4603, 4609, and 4610*); and
- Allows the court to issue an injunction or provide any other relief it deems appropriate for a violation of the provisions outlined in Business and Professions Code sections 4600, et seq. (*see Bus. & Prof. Code § 4617*).

¹² However, see also Government Code § 51034, which recognizes the following grants of authority to cities and counties: (a) Land use and business regulations adopted pursuant to “police power” (Article XI, section 7 of Constitution); (b) Local business regulations (*Gov. Code § 37100*); (c) Local business regulations (*Bus. & Prof. Code §§ 16000 & 16100*); and (d) Land use and business regulations (*Bus. & Prof. Code § 460(b)*).

The following table should help demonstrate some of the benefits cities can now expect to take advantage of under AB 1147:

AB 1147
Cities may now require a business owner (including independent contractors and sole providers) to submit a list of all employees and independent contractors, their certification status, and to notify the local government if and when this information changes.
Cities may set a reasonable cap on establishments and may also use zoning regulations to restrict the location of massage businesses; these regulations may include the prohibition of a massage business from opening in the same location as a previous massage business with illegal activity (so long as there is a reasonable basis for this regulation), and prohibition of a massage business from transferring owners without notice and consent from the local government. ¹³
In order to regulate businesses that provide massage services, cities may require owners (including independent contractors and sole providers) to provide a current listing of their employees, their CAMTC certification, and other relevant information; note that AB 1147 does not affect the authority of a city to regulate massage therapists who do not have CAMTC certificates, or massage businesses that employ therapists who do not have CAMTC certificates.
Cities may impose land use regulations on massage businesses that are different than those imposed on other professional services; this includes, but is not limited to, regulating hours of operation, prohibiting contraceptives on the premises, and holding inspections.
Establishes a new CAMTC board of directors so that it more fairly represents stakeholders; including adding a representative from the California Police Chiefs Association and a representative from an anti-human trafficking organization, a city attorney, and a public health official (<i>see</i> B & P 4602).

¹³ See generally the FAQs on AB 1147 Implementation, League of California Cities, available at <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>.

As earlier indicated, a city's local land-use authority under AB 1147 is not without limitation. Specifically, local governments may not:

- Prohibit a person of one sex from engaging in the massage of a person of the other sex (*see California Government Code § 51034(c)(1)*);
- Define a massage establishment as an adult entertainment business, or otherwise regulate a massage establishment as adult entertainment (*see Gov. Code § 51034(c)(2)*);
- Require a massage establishment to have windows or walls that do not extend from floor to ceiling or have other internal physical structures (such as windows) that interfere with a client's privacy (*see Gov. Code § 51034(c)(3)*)¹⁴ ;
- Impose client draping requirements or otherwise require clients to wear special clothing (*see Gov. Code § 51034(c)(4)*);
- Prohibit a massage establishment from locking its external doors if the business is owned by one individual **with one or no employees** (*see Gov. Code § 51034(c)(5)*, emphasis added)¹⁵ ;
- Require a massage establishment to post any notice in an area that may be viewed by clients that contains explicit sexual language (*see Gov. Code § 51034(c)(6)*);
- Require a person certified by the CAMTC to take any test, medical examination or background check (*see Gov. Code § 51034(c)(7)*)¹⁶;
- Require a person certified by the CAMTC to get a license, permit, or other authorization to provide massage, **unless that person is a business owner** (*see Gov. Code § 51034(c)(8)*, emphasis added)¹⁷;

¹⁴ Note, however, that local governments may require these establishments to maintain certain physical improvements, such as transparent exterior windows. A complete list of physical improvements that may not be required are specified in *Gov. Code § 51034*.

¹⁵ What this means is that a massage establishment with more than one employee can be prohibited from locking their doors during business hours; the thought process behind this provision is that the business should be able to protect itself from crime or unwanted activity when only one masseur is on the premises and otherwise engaged in performing massage therapy.

¹⁶ This provision requires some clarification; when read in conjunction with *Gov. Code § 51034(c)(8)*, these provisions indicate that a city may require a massage business owner, including a sole provider or independent contractor, who is certified by the CAMTC to undergo a background check in order to obtain a business license, permit, or other authorization to provide massage. Said another way, business owners must comply with the local business and land use requirements of the jurisdiction where they choose to operate. These requirements may include providing fingerprints and submitting to a background check, regardless of certification with the CAMTC. Understandably, the CAMTC takes issue with this interpretation. Bear in mind that in order to obtain certification with the CAMTC an applicant's fingerprints are submitted to the Department of Justice and the Federal Bureau of Investigation; this information is then cross-referenced against the organizations' database and notification related to any state and federal criminal offenses is provided to the CAMTC. (*See Bus. & Prof. Code § 4606*.) For this reason, rather than attempting to duplicate this stringent process, it may be more economical to simply require every practitioner certified by the CAMTC to provide proof of certification and proof that a CAMTC background check has been completed in order to obtain a local business license.

¹⁷ See footnote 16.

- Impose a dress code *stricter* than that imposed by AB 1147 (*see Gov. Code § 51034(c)(9)*, emphasis added); or
- Prohibit massage techniques permitted by the CAMTC (*see Gov. Code § 51034(c)(10)*).

III. An Examination of the Practical Applications of AB 1147.

In the wake of AB 1147, local governments have begun to evaluate and consider clear, legally consistent, and uniform regulations pertaining to the establishment, operation, and location of massage businesses. For instance, many cities and counties have adopted urgency ordinances enacting moratoriums¹⁸ on massage establishments in order to provide local governments with enough time to evaluate local enforcement concerns with AB 1147's newly conferred authority. Of these municipalities, a small number of cities have actually refined and updated their existing massage ordinances; an examination of some practical applications of AB 1147 is provided below, with particular attention paid to the City of Lomita's recently amended massage ordinance¹⁹.

A. Proposed Business License Restrictions:

In general, Lomita's ordinance focuses on expanding and clarifying the procedural, operating, inspection and interest requirements for new and existing massage businesses under its business license ordinance.

i. Procedural Requirements:

First and foremost, massage establishments cannot operate within Lomita without a "City Registration Certificate" and proof that employees are state-certified massage practitioners. Like other cities, Lomita has included a stringent application process that requires, among other things, a business owner's contact information; massage license, registration and employment history; proof of certification with the CAMTC or, if uncertified, a fingerprint sample; and a current list of employees, their contact information, and proof of certification with the CAMTC. Specifically, Lomita also requires the applicant to provide proof of current and valid Workers' Compensation insurance. Cities such as Pleasant Hill and Escondido have included within their application process a requirement that applicants register with local law enforcement²⁰ and even place the final decision on whether a permit should be issued in the hands of the Police Chief²¹.

¹⁸ See Cal. Government Code Section 65858.

¹⁹ The complete text of Title VI, Chapter 8, of the City of Lomita's Municipal Code dealing with Massage Businesses and Practitioners, which can be found under the Ordinances tab on the League's website at <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>.

²⁰ See Ordinance number 885 of the City of Pleasant Hill amending Pleasant Hill Municipal Code Chapter 6.30, Massage Establishments and Therapists, which can be found under the Ordinances tab on the League's website at <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>. Also see Ordinance number 2015-01R of

These requirements are meant to facilitate complete and accurate employee databases; they also create a mechanism for Lomita to ensure that only individuals certified with the CAMTC are practicing within the City. Lastly, the requirement that business owners maintain Workers' Compensation insurance serves a dual purpose. For one thing, it ensures that employees are properly cared for; for another, the high cost of obtaining and maintaining valid Workers' Compensation is costly and therefore may help to discourage illegitimate establishments from incorporating within the City.

In addition to other cities, Lomita has shortened the duration within which a City Registration Certificate is valid (one year), and has set specific circumstances under which an application may be denied, such as the existence of outstanding fines or citations; if the applicant makes misrepresentations on the application; engages in disqualifying criminal conduct; or has had a massage license revoked in the past. Specifically, if Lomita denies or revokes a City Registration Certificate, the businesses shall immediately cease operation and the City's community development director may order that no other massage business operate at that same location for one year. Likewise, if an application is denied due to criminal activity, the City will not accept reapplication for a massage business at the same location for one year.

ii. Operating Requirements:

Lomita has, among other things, established acceptable operating hours for massage businesses; mandated that the owner shall be responsible for violations committed by employees, including independent contractors; reaffirmed employee dress-code and client-draping requirements; prohibited establishments from both locking their external doors during hours of operation (subject to exception), and blocking or shading external windows; and has prescribed strict record-keeping requirements related to services provided to patrons of the business as well as employee shift information. These requirements are similar to the requirements adopted by other cities in light of AB 1147.

iii. Inspection Requirements:

The City of Lomita requires that an inspection of the premises be conducted before the City Registration Certificate is issued; this is meant to ensure that the business meets all operating, facility and existing zoning requirements prior to certification. Additionally, establishments within the City are required to provide notice to consumers that City-inspections may be conducted at any time in order to ensure compliance.

the City of Escondido repealing and replacing, among other things, Escondido Municipal Code Chapter 16A, which can be found under the Ordinances tab on the League's website at <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>.

²¹ See Pleasant Hill's ordinance.

iv. Ownership Requirements:

The massage business must operate under the name listed on the registration certificate; if a massage business changes its name, ownership or location, the owner must report such changes to the City and in some instances, apply for a new City Registration Certificate. Additionally, the City of Lomita requires investigation and approval of any new owner receiving an interest in a massage establishment as a result of sale or transfer before either may be effectuated.

B. Proposed Land-Use Restrictions²²:

To further combat the issue of proliferation of massage establishments, a number of cities have subjected new or existing massage establishments to Conditional Use Permit (CUP) requirements, distance requirements, and boundary requirements. For instance, in the Cities of Stanton and Escondido, massage establishments are limited to operating within the General Commercial zone and are prohibited from operating in every other zone²³. Further, Stanton requires existing, nonconforming massage establishments within other zones to be subjected to an amortization period of two years, upon the conclusion of which, the nonconforming establishment must cease all business operations²⁴.

These requirements are meant to preserve the character of surrounding neighborhoods, to ensure that the proposed use is in context with surrounding areas, to ensure any known or anticipated impacts caused by the land use would be appropriately conditioned, and to prevent the increase or overconcentration of these establishments within certain specified areas of the city.

Finally, cities should consider the proper response to lawful non-conforming uses that were established during the period in which cities did not have the authority to regulate massage businesses.

²² The City of Lomita's existing zoning code only permits massage establishments within the Light-Manufacturing-Commercial zone and located no closer than 1,000 feet between each other; meaning that all establishments which do not meet these location requirements are considered legal non-conforming, thereby slowing the proliferation of new establishments throughout the City. As this provision existed in the City's zoning ordinance prior to any modifications made related to massage, the City was not required to change the language of its zoning ordinance.

²³ See Urgency Ordinance number 1031 of the City of Stanton amending Chapter 5.16 of the Stanton Municipal Code, which can be found under the Ordinances tab on the League's website at <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>. Also see Escondido's ordinance.

²⁴ See Stanton's ordinance.

C. Proposed Reasonable Health and Safety Requirements:

Unsanitary facilities, illegal and unpermitted building modifications, and use of the establishment as a residence are some of the health and safety issues cities and local law enforcement have uncovered while conducting stings and inspections of illegitimate massage businesses. In order to address these issues, a number of cities, including Lomita, have adopted certain health and safety requirements, some of which are related to where massage services are to be provided; minimum lighting requirements; proper sanitation and disposal requirements; and adequate shower, dressing, locker and toilet facilities.

IV. Remember, “If You Abuse It, you will Lose It.”

As of January 1, 2017, AB 1147 will sunset; as nightfall sets, local governments may have to defend the regulatory decisions they have made following enactment of the statute. Cities and counties should therefore choose their enforcement mechanisms wisely. Blanket moratoriums and low caps without proper findings, or unsupported business license requirements, should be avoided. In other words, local regulation should be judiciously applied and mindful of legitimate massage businesses. For more information on this issue, see the League’s “Hot Issues” webpage on massage regulation (including the League’s FAQs on AB 1147 implementation and recently adopted city ordinances that are posted there) at: <http://www.cacities.org/Policy-Advocacy/Hot-Issues/Massage-Regulation>.

If a city wishes to inform the CAMTC that a certified massage therapist is in violation of state or local law the city should report that information to the CAMTC by going to: www.camtc.org and clicking on the link for “File a Complaint Against a CAMTC Certificate Holder.” Any alleged violations of state law or the California Business and Professions Code by CAMTC applicants or certificate holders should be reported to CAMTC in addition to the city taking any administrative, criminal or civil action under its municipal code. To this end, the CAMTC will provide information upon request about applicants and certificate holders, including current status of an application or certificate; history of disciplinary actions; home and work addresses; length of suspension; and any other information needed to verify facts relevant to administering a local ordinance.

Take note that a complaint alone, without evidence supporting an alleged violation of the law (i.e. certified evidence of administrative decisions; civil orders or decisions related to violations of municipal code sections; administrative citations; declarations from law enforcement) is not sufficient for CAMTC to take action.

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