



## CITY OF MILPITAS AGENDA REPORT (AR)

<b>Item Title:</b>	<b>Conduct a Public Hearing and Introduce Ordinance No. 38.839 Amending Milpitas Municipal Code Title XI (Zoning, Planning and Annexation), Chapter 10 (Zoning) Relating to Massage Establishments</b>
<b>Category:</b>	Public Hearings-Community Development
<b>Meeting Date:</b>	11/19/2019
<b>Staff Contact:</b>	<b>Rozalynne Thompson, Senior Planner, 408-586-3278</b>
<b>Recommendation:</b>	<ol style="list-style-type: none"> <li>1) Conduct a public hearing and move to close the hearing following comments.</li> <li>2) City Attorney shall read aloud title of Ordinance No. 38.839.</li> <li>3) Move to waive the first reading beyond the title and introduce Ordinance No. 38.839 amending Milpitas Municipal Code, Title XI (Zoning, Planning and Annexation), Chapter 10 (Zoning) relating to massage establishments</li> </ol>

### **Background:**

Jurisdictions throughout the state have been updating their massage ordinances to reflect the new State requirements of Assembly Bill (AB) 1147 and AB 2194 and to ensure that massage establishments are properly regulated. In Milpitas, amendments to the massage regulations in Title III, Chapter 6 (“Massage Establishments and Practitioners”) in the Milpitas Municipal Code (MMC) were adopted on September 19, 2019. Planning Department staff has drafted companion amendments to Title XI, Chapter 10 (“Zoning”) to ensure internal consistency within the Municipal Code and to comply with State law.

The amendments were introduced to the Planning Commission for their consideration and recommendation to City Council on October 23, 2019. The Planning Commission voted 6-0 (Commission Mandal absent) to pass a resolution to recommend that City Council adopt the amendments and suggested that staff add to the draft ordinance a parking requirement for massage businesses conducted in open areas, such as chair massage businesses. The parking requirement for massage businesses conducted in open areas has been included in the draft ordinance, which is Attachment A to this report.

### **Analysis:**

Considering the recent changes to State law and the update to Title III, Chapter 6 (“Massage Establishments and Practitioners”), Planning Division staff proposes the following changes to the Zoning Code to modify the regulations related to massage establishments.

### **Amend Definition of “Massage Establishment” and Add Definition of “Massage Establishment, Accessory” from Subsection XI-10-2.02 “General Definitions”**

Subsection XI-10-2.02 “General Definitions” of the Zoning Code lists and defines general terms and phrases of terms found throughout the zoning code. To ensure internal consistency between Title III, Chapter 6 (“Massage Establishments and Practitioners”) and the Zoning Code, the current definition of “Massage Establishment” has been amended to reflect the definition found in Subsection III-6-2(k) of the MMC. Given that “Massage Establishment, Accessory” has been added as new use classification, a definition has been added to Subsection XI-10-2.02 “Definitions.”

**Amend Use Tables in Section 5 (“Commercial Zones and Standards”), Section 6 (“Mixed Use Zones and Standards”), and Section 12 (“Overlay Districts and Standards”)**

Currently, massage establishments are listed in the land use tables in Section 5 (“Commercial Zones and Standards”), Section 6 (“Mixed Use Zones and Standards”), and Section 12 (“Overlay Districts and Standards”). Massage establishments are permitted in the C2, HS, TC, MXD, MXD2, MXD3 zoning districts, subject to a Conditional Use Permit granted by Planning Commission.

This zoning text amendment would amend the use tables by adding a new use classification, accessory massage establishments. It would confer review authority of massage establishments to the Zoning Administrator through a Minor Conditional Use Permit process instead of a Conditional Use Permit granted by the Planning Commission and grant review authority of accessory massage establishments, which are incidental in nature, to Planning Department staff through the Minor Conditional Use Permit process. Further, a footnote has been added to all tables to emphasize that regulations in the land use tables supplement those under Title III, Chapter 6 (“Massage Establishments and Practitioners”) and indicate that specific development standards for massage establishments can be found in Subsection XI-10-13.16 “Massage Establishments.”

**Delete “Accessory Uses” in Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code**

Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code allow “massage services” as accessory uses to any permitted or conditionally permitted medical office, medical clinic, chiropractor practice, acupuncture practice, physical therapist, fitness and athletic facility, health care facility, and accredited schools, colleges, and universities. Moreover, Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code allow permitted or conditionally permitted beauty salons, barbershops, or and healing art practices to perform massages limited to the head, neck, shoulders, hands, and feet.

Staff recommends deleting Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code for several reasons. First, the term “massage services” is not defined in the Zoning Code. Second, the exemption is only found in Subsection XI-10-6.02(A)(2) Section 6 “Mixed Use Zones and Standards” and Section 13 “Special Uses” and not in other sections of the Zoning Code, which implies that the exemption only applies to facilities located in mixed-use districts and not located in commercial or overlay districts. Moreover, Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code do not clearly distinguish between an exemption for facilities with a “massage services” accessory use and an exemption for the performance of massage by beauty salons, barbershops or healing arts practices. Finally, massage establishments incidental to a primary use are not clearly excluded from the exemptions in Subsection XI-10-6.02(A)(2) and Subsection XI-10-13.03 of the Zoning Code.

For clarification, staff has defined and introduced an “accessory massage establishment” use classification to Section 5 (“Commercial Zones and Standards”), Section 6 (“Mixed Use Zones and Standards”), and Section 12 (“Overlay Districts and Standards”). Further, staff has enumerated the specific facilities and professions exempted from the massage establishment regulations in the added Subsection XI-10-13.16(C)(3). The exemptions are consistent with those found in Title III, Chapter 6 (“Massage Establishments and Practitioners”). As explained above, “accessory massage establishment”, a use operated by a massage technician incidental to a primary use, would be subject to the Minor Conditional Use Permit process, while massage performed by the facilities and professions enumerated in Subsection XI-10-13.16(C)(3) of the Zoning Code would be exempted from the massage regulations.

**Amend Section 13 (“Special Uses”) to Include “Massage Establishments” as a Prohibited Use in Subsection XI-10-13.05(B)(9) “Home Occupations” and Amend Subsection XI-10-13.12(E)(1)(d) “Live-Work**

Subsection XI-10-13.05(B)(9) “Home Occupations” lists certain uses as prohibited home-based business because such uses would potentially change the residential character of a residential use. Given that in-home massage establishments would require client visits akin to medical offices, which are already prohibited by Subsection XI-10-13.05(B)(9), and could be a subterfuge for illicit conduct, such as prostitution and human trafficking, staff proposes to add “massage establishments” to those uses prohibited as home occupations. Staff also proposes to amend Subsection XI-10-13.12(E)(1)(d) “Live-Work” to add the word “establishments” to “massage” for clarification.

## **Amend Section 13 (“Special Uses”) to Add Subsection XI-10-13.16 “Massage Establishments”**

Currently, the land use regulations related to massage establishments are found in various sections throughout the Zoning Code. As part of this Zoning Text Amendment, staff proposes to create a new Subsection “Massage Establishments” to specify zoning standards for massage establishments in a centralized location in the Zoning Code. Subsection XI-10-13.16 lists and defines terms material to the implementation of the Subsection. The Subsection also enumerates the facilities and classes of individuals exempted from the massage establishment regulations. Furthermore, the proposed ordinance requires massage establishments to obtain Massage Establishment Permits from the Police Department under Title III, Chapter 6 (“Massage Establishments”) prior to approval of a Minor Conditional Use Permit issued by the Zoning Administrator, or, in the case of an accessory massage establishment, a Minor Conditional Use Permit from staff. It also limits operating hours from 7:00 a.m. to 10:30 p.m., requires one parking space per massage technician plus one parking space per treatment room, limits the location of off-premises massage services, and outlines the application procedures for massage establishments and accessory massage establishments.

## **Amend Section 53 (“Off-Street Parking Regulations”) to Include Parking Requirements for Massage Establishments**

Currently, the Zoning Code is silent with respect to parking requirement for massage establishments. Based on a survey of cities with parking requirements for massage establishments, staff recommends that the parking requirements for massage establishments is two parking spaces per treatment room. In the instances where there is no treatment room, the number of parking spaces is one space for every two massage chairs or tables. Staff also recommends amending Table 53.09-1 “Number of Parking Spaces Required” of the MMC is to include the parking requirement.

## **Nonconforming Massage Establishments in the C1 Zoning District**

In 2008, the State legislature enacted Senate Bill 731 (SB 731), also known as the Massage Therapy Act. While SB 731 established a voluntary certification process through the California Massage Therapy Council (CAMTC) for massage practitioners, it also restricted local land use control over massage establishments. Enacted in 2011, Assembly Bill 619 (AB 619) further limited local land use control by classifying massage establishments that only employed CAMTC-certified massage therapists as professional service businesses and precluding local governments from imposing stricter restrictions on massage establishments than other professional service businesses in the same zoning district. AB 1147, adopted in 2015, restored local regulatory authority, including land use controls, over massage establishments.

In Milpitas, massage-related businesses are not allowed in the Neighborhood Commercial (C1) zone based on compatibility issues. However, as a result of SB 731 and AB 619, the City permitted massage establishments to locate in C1 zones between 2011 and 2015 because state law at the time precluded the City from imposing stricter standards on massage establishments than other professional service businesses in the same zone. After the state restored local regulatory authority to local governments in 2015, the City reinstated local zoning regulations on massage establishments and, therefore, massage establishments operating in districts where they were once prohibited were rendered nonconforming uses. Staff has identified six (6) massage establishments that were permitted in the Neighborhood Commercial (C1) zoning district between 2011 and 2015 but have since been rendered nonconforming with the reinstatement of local land use authority by AB 1147.

Through a separate follow-up action, staff will explore mechanisms to address the nonconforming massage establishments located in C1 zones and will conduct outreach to these affected businesses to discuss zoning options. Staff will present a recommendation for consideration by the Planning Commission and City Council at a future date once those mechanisms have been identified.

### **Policy Alternatives:**

Alternative 1: Do not amend regulations in Title XI, Chapter 10 (“Zoning”) related to massage establishments.

Pros: Maintains the status quo.

Cons: Internal inconsistency in Municipal Code, outdated definitions and language.

Reason not recommended: Zoning Code regulations related to massage establishments would not reflect the changes in the updated Title III, Chapter 6 (“Massage Establishments and Practitioners”), which could be noncompliant with State law and present enforcement challenges. Further, not amending the Zoning Code retains outdated definitions and unclear provisions, therefore making implementation of the zoning regulations related to massage establishments more difficult.

**Fiscal Impact:**

No fiscal impact.

**California Environmental Quality Act:**

Based on its review of the entire record, including the staff report, public comments and testimony presented to the Planning Commission and City Council, and the facts outlined below, the City Council hereby finds and determines that the proposed Ordinance is categorically exempt from CEQA review pursuant to Section 15061(b)(3) of the California Code of Regulations (CEQA Guidelines). Introduction and adoption of this Ordinance is not subject to review under CEQA, pursuant to the “common sense exemption” that CEQA only applies to projects that have the potential for causing a significant effect on the environment, and where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA (CEQA Guidelines, § 15061(b)(3)). A “significant effect on the environment” means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project (CEQA Guidelines, § 15382). Adoption of the proposed Ordinance would not be an activity with potential to cause significant effect on the environment because it amends existing massage establishment regulations and does not alter where such businesses are allowed or conditionally allowed to be located, and therefore is exempt from CEQA.

**Recommendation:**

- 1) Conduct a public hearing and move to close the hearing following comments.
- 2) City Attorney shall read aloud title of Ordinance No. 38.839.
- 3) Move to waive the first reading beyond the title and introduce Ordinance No. 38.839 amending Milpitas Municipal Code Title XI (Zoning, Planning and Annexation), Chapter 10 (Zoning) relating to massage establishments.

**Attachments:**

- A. Draft Ordinance No. 38.839 for introduction
- B. Planning Commission Resolution No. 19-033