



December 3, 2014

To: City and County Officials

From: Assembly Members Susan Bonilla, Jimmy Gomez and Chris Holden

Re: Implementation of AB 1147

As authors of AB 1147, we carried this legislation in order to return broad control over land use to local governments in regulating massage establishments in the best interests of the individual community.

While the bill does not go into effect until January 1, 2015, many jurisdictions are considering, or are in the process of updating their ordinances. There have been numerous questions regarding what AB 1147 authorizes and what it prohibits. As authors of this bill, we have worked together with the League of California Cities, the California State Association of Counties, the American Planning Association, California Chapter and the California Police Chiefs Association to help answer some of these questions.

The answers to these questions are presented for informational purposes only and do not constitute legal advice from the organizations involved with putting together this document. Each jurisdiction should consult with its city attorney/county counsel to gain a complete understanding of AB 1147, its impact on the existing ordinances, and its legal authority to regulate massage therapy businesses.

Sincerely,

The Honorable Susan Bonilla
Assembly Member, 14th District

The Honorable Jimmy Gomez
Assembly Member, 51st District

The Honorable Chris Holden
Assembly Member, 41st District



FAQs with Regards to Implementation of AB 1147

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1) Q: Is a massage business that only uses certified massage professionals exempt from local regulation?

A: No. Article XI, section 7 of the California Constitution as well as Business and Professions Code section 460(c), Government Code section 37101, Business and Professions Code 16000 and Government Code 51034 all recognize the authority of a city to regulate businesses that provide massage therapy services. Under AB 1147, cities and counties may regulate the business that provides the massage therapy services and California Massage Therapy Council (CAMTC) may regulate the individuals who apply for certification to provide massage therapy services. This division of authority and responsibility is reflected in the following statement of Legislative intent: "It is the intent of the Legislature that broad control over land use in regulating massage establishments be vested in local governments so that they may manage those establishments in the best interests of the individual community, and that the requirements and practice of the profession of massage remain a matter of statewide concern, regulation, and oversight" (Business & Professions Code 4600.5(b)).

2) Q. What limitations does AB 1147 impose on local regulation of certified massage professionals?

A. A local jurisdiction may not (1) prohibit a person of one sex from engaging in the massage of a person of the other sex; (2) define a massage establishment as an adult entertainment business, or otherwise regulate a massage establishment as adult entertainment; (3) require a massage establishment to have windows or walls that do not extend from the floor to ceiling or have other internal physical structures (such as windows) that interfere with a client's privacy; (4) impose client draping requirements or otherwise require clients to wear special clothing; (5) prohibit a massage establishment from locking its external doors if the business is owned by one individual with one or no employees; (6) require a massage establishment to post any notice in an area that may be viewed by clients that contain explicit sexual language; (7) require a person certified by CAMTC to take any test, medical examination, or background check; (8) require a person certified by CAMTC to get a license, permit, or other authorization to provide massage unless that person is a business owner; (9) impose a dress code stricter than that imposed by AB 1147; or (10) prohibit massage techniques permitted by CAMTC (Government Code 51034(c)).

3) Q: Can a jurisdiction require independent contractors, sole providers, and owners of a massage business to obtain a business license, massage permit, register with the police, or get a background check?

A: Yes. Under Government Code 51034(c)(8), a city may require a massage business owner, including a sole provider or independent contractor who is CAMTC certified, to obtain a business license, and/or massage permit or other entitlement to carry on the business of massage therapy. Independent contractors in the "business" of providing massage therapy can be regulated as a "business."

4) Q: As part of its regulation of massage therapy businesses, can a jurisdiction require the business owner to provide a current listing of its employees and independent contractors, their CAMTC certifications and other relevant information?

A: Yes. A jurisdiction's business regulation ordinance may require a business owner to submit a list of all of its employees and independent contractors, their certification status, and notify the local government when this information changes.

5) Q: Can a jurisdiction require a conditional use permit (CUP) for massage businesses?

A: Yes. Business and Professions Code 460(c) provides explicit authorization to adopt land use regulations pertaining to massage businesses. A jurisdiction may amend its zoning ordinance to require a CUP for a massage business. However, a jurisdiction may not impose conditions on the conditional use permit that would violate the provisions of Government Code 51034(c)(1)-(10) as described in Question No. 2. An application for a CUP for a massage business would be considered under the same procedures provided in the jurisdiction's zoning ordinances for other uses for which a CUP is required. Jurisdictions should review their zoning ordinances to determine whether a massage business in operation prior to January 1, 2015 is a lawful non-conforming use.

6) Q: Can a jurisdiction impose a restriction on the location of a massage business? i.e. 300 feet from a school, park etc.

A: AB 1147 gives local governments broad authority to use its Constitutional police power to select zoning districts that are most appropriate for massage. However, a jurisdiction may not define or otherwise regulate a massage establishment as "adult entertainment." A zoning ordinance that imposes a restriction on the location of a massage establishment such as 300 feet from a school or park will be reviewed under a "reasonable and not arbitrary" standard.

7) Q. Can a jurisdiction require individual massage therapists (who operate as employees) to obtain a business license, massage permit, register with the police, or get a background check?

A. No. A jurisdiction may not require an individual massage therapist who holds a certificate from CAMTC and operates as an employee to obtain any kind of license or permit or meet any other educational requirements, or to register with the police or submit to a background investigation (Government Code 51034(c)(8)).

8) Q: What is the best way to make sure that only CAMTC-certified massage professionals work in my jurisdiction?

A. AB 1147 separates the certification of massage therapists from the regulation of massage businesses. The certification of massage therapists is the responsibility of the CAMTC. The regulation of massage businesses is the responsibility of local jurisdictions. Therefore, the best way to make sure that only CAMTC-certified massage professionals work in a jurisdiction is to adopt an ordinance that requires massage businesses to use CAMTC-certified massage professionals only. Another way is to adopt an ordinance that prohibits a person from working in the jurisdiction as a massage therapist without a certificate issued by CAMTC. Because it's possible that the latter way might be interpreted as conflicting with the CAMTC's role in certifying massage therapists, we believe that imposing the restriction on the business is preferable.

9) Q: Can jurisdictions regulate the hours of operation of a massage business?

A: Yes. Jurisdictions can specify hours of operation based upon such factors as a commercial use in a residential neighborhood or other reasonable requirements.

10) Q: Can a jurisdiction prohibit a massage professional from working out of his or her home?

A: A jurisdiction can impose restrictions on massage professionals working out of their homes in the same manner that a jurisdiction regulates other professionals or business owners operating out of their homes. Some local governments regulate business owners operating from their homes through a home occupation permit.

11) Q: Can a jurisdiction limit the number of massage establishments in its jurisdiction?

A: A jurisdiction may limit the number of massage establishments in its jurisdiction if the jurisdiction is able to articulate a reasonable basis for the cap.

12) Q: Is a jurisdiction prohibited from requiring physical improvements, such as transparent exterior windows?

A: No. However, a list of physical improvements that may not be required is described in the answer to Question #2.

13) Q: Can a jurisdiction adopt regulations to prohibit a massage business from opening in the same location as a previous business with illegal activity?

A: Yes, if there is a reasonable basis for this regulation.

14) Q: Can a jurisdiction adopt regulations holding the owner accountable for the actions of its employees and independent contractors?

A: Yes. An ordinance regulating massage businesses may include a provision holding the business owner responsible for how the business is conducted by its employees or independent contractors. In addition, Business and Professions Code section 4607 provides that CAMTC may discipline an owner or operator of a massage business or establishment who is CAMTC-certified for the conduct of all individuals providing massage for compensation on the business premises.

15) Q: May a jurisdiction impose land use regulations on massage businesses that are different than those imposed on other professional services?

A: Yes. This is one of the most significant changes to the law made by AB 1147. Prior to AB 1147, jurisdictions were allowed to regulate businesses using certified massage professionals only to the extent that the jurisdiction uniformly applied those regulations to all other business professionals. This is no longer the law.

16) Q: Can a jurisdiction enter massage establishments and make reasonable inspections?

A: Yes. Jurisdictions can conduct reasonable inspections as part of its ordinance requirements as well as recover the reasonable costs of these inspections and other regulatory requirements.

17) Q: Is a conditional use permit fee of \$20,000-\$30,000 legal?

A: It depends. Fees, charges and rates are generally imposed in return for a specific benefit conferred or privilege granted. A local government has the authority to impose fees, charges and rates under its police power through California Constitution Article XI, §7. A fee may not exceed the estimated reasonable cost of providing the service or regulatory act for which the fee is charged. A fee that does exceed such cost may be considered a special tax. In addition, fees, charges and rates must be reasonable, fair and equitable in nature and proportionately representative of the costs incurred by the regulatory agency. AB 1147 includes the following statement of Legislative intent: "It is the intent of the Legislature that local governments impose and enforce only reasonable and necessary fees...."

18) Q: Can a jurisdiction prohibit condoms on the premises?

A: Yes. A jurisdiction can prohibit condoms on the premises of a massage establishment as a standard in its ordinance if there is a reasonable basis for this requirement.

19) Q: How can a jurisdiction handle a massage business that (after a police sting and surrender of the business license) transfers the business to another individual?

A: A jurisdiction may include in its ordinance a requirement that prohibits a massage business permit from being transferred without notice to and consent of the local government.

20) Q: Can a jurisdiction adopt and enforce a dress code for massage therapists?

A: Yes. AB 1147 includes certain restrictions on how certified massage therapists may dress. A jurisdiction may include those restrictions in its ordinance. Be aware, however, that a jurisdiction may not include stricter requirements for certified therapists. If dress code restrictions are included in a jurisdiction's ordinance, and an employee violates those restrictions, then the jurisdiction may enforce those provisions of its ordinance against the business as it determines appropriate. Violations of a municipal code may be enforced civilly, criminally, or through administrative enforcement. A jurisdiction is also encouraged to use the procedure outlined in question no. 23 to notify CAMTC of a violation.

21) Q: What impact will AB 1147 have on existing massage businesses?

A: Each jurisdiction should carefully review the provisions of its municipal code regarding non-conforming uses of land and imposing new regulations on existing businesses.

22) Q: Can a jurisdiction impose a temporary moratorium on approval of massage businesses?

A: Yes. AB 1147 takes effect on January 1, 2015. State law allows a city to adopt an interim ordinance that prohibits otherwise allowed uses when those uses conflict with a pending land use study. Such a measure requires a 4/5 vote of the jurisdiction; must contain a finding that there is a current and immediate threat to the public health, safety or welfare; and may be adopted without following the notice and adoption procedures required for other ordinances. The measure has an initial duration of 45 days and may be extended as specified by Government Code 65858. Jurisdictions should exercise caution before imposing a temporary moratorium if they have previously adopted a moratorium on the approval of massage businesses.

23) Q: Is there a process for a jurisdiction to follow if it wishes to inform CAMTC that it believes that a certified massage therapist is in violation of state or local law?

A: Yes. A city is encouraged to report that information to CAMTC by going to CAMTC's homepage (www.camtc.org) and clicking on the link to "File a Complaint Against a CAMTC Certificate Holder."

24) Q: If a massage therapist with a CAMTC certificate is arrested for prostitution or violating the Sex Offender Registration Act, will his or her certificate be revoked?

A: If CAMTC receives notice that a certificate holder has been arrested and charges have been filed alleging prostitution or a violation of the Sex Offender Registration Act, the council is required to immediately suspend the certificate and notify the city or county in which the certificate holder lives or works of the suspension. If the person is convicted, the certificate is permanently revoked. If a certificate holder commits a different act that is punishable as a sexually related crime or otherwise violates provisions of AB 1147, CAMTC may (but is not required to) take disciplinary action including, for some violations, suspending the certificate.

25) Q: Who should jurisdictions report violations to?

A: Violations of local ordinances should be prosecuted administratively, civilly, or criminally in accordance with the provisions of the jurisdiction's municipal code. If a jurisdiction believes that a CAMTC certified massage therapist is violating state law, then the jurisdiction is additionally encouraged to inform CAMTC as described under question no.23.

26) Q. What prompts the inspection/investigation of a massage therapy school that could change the status to "unapproved"?

A: CAMTC explains that when it receives credible information alleging that the massage therapy school has violated one of the provisions of its Procedures for Un-Approval of Schools (available at www.camtc.org/Schools.aspx); this information prompts the investigation of a school. CAMTC also looks for anomalies or changing patterns in applications and transcripts that may warrant investigation.

27) How does CAMTC obtain the actual certificate of those persons whose certification has been suspended or revoked?

A: CAMTC explains that it requests that revoked certificate holders return their certificates and ID cards to CAMTC. In order to check whether a specific person has an active and valid CAMTC certificate, local jurisdictions can check the "Verify Certification" link on CAMTC's website.

28) Q. Does AB 1147 apply to massage therapists who do not have a CAMTC certificate?

A. No. AB 1147 only applies to massage therapists who have a CAMTC certificate. AB 1147 does not affect the authority of a city to regulate massage therapists who do not have CAMTC certificates or massage businesses who employ massage therapists who do not have CAMTC certificates.