
STATE OF GEORGIA

CITY OF DULUTH

WHEREAS, the State of Georgia allows local regulation of massage therapy establishments pursuant to O.C.G.A. § 48-13-9(b)(17);

WHEREAS, the State of Georgia has preempted the regulation and licensure of massage therapists pursuant to O.C.G.A. §43-24A-1;

WHEREAS, testimony and evidence has been presented to the Mayor and Council of the City of Duluth regarding the continued problems the City is facing regarding unlicensed massage therapist performing massage in the City, regulatory problems associated with difficulty in identifying licensed massage therapists, and problems with license transfers following illegal activity at Massage Therapy Businesses and ;

WHEREAS, the health, safety, welfare and aesthetics of the citizens of the City of Duluth shall be improved and protected by the adoption and implementation of amendments to this Ordinance;

THE MAYOR AND COUNCIL OF THE CITY OF DULUTH, GEORGIA HEREBY ORDAIN that the City of Duluth Code of Ordinance is hereby amended by deleting in its entirety Article VIII of Chapter 7 and replacing this Article with a new Article VIII to Chapter 7, Sections 7-246 through 7-261 to read as follows

Sec. 7-246. - Purpose.

- (a) The purpose of this section is to provide for local licensing and regulation of massage therapy businesses, pursuant to the authority to regulate for the general health, safety and welfare as provided in the Duluth Charter section 1.13(12) and O.C.G.A. § 48-13-9(b)(17), and O.C.G.A. § 43-24A-1 et seq. as amended.
- (b) A license issued pursuant to this division is a privilege, not a right.

Sec. 7-247. - Definitions.

As used in this chapter, the following definitions apply:

Act means the Georgia Massage Therapy Practice Act, enacted by and defined in O.C.G.A. § 43-24A-1 et seq. as amended.

Board means the Georgia Board of Massage Therapy, enacted by the provisions of O.C.G.A. § 43-24A-4.

For hire means a reasonable expectation that the person to whom the massage is provided, or some third person on his or her behalf, will pay money, give other consideration, or provide any gratuity therefore.

Licensed massage therapist means a person who holds a valid, current, unrevoked, and unsuspended state license in the practice of massage therapy issued by the board pursuant to the Georgia Massage Therapy Practice Act.

Massage therapy means the application of a system of structured touch, pressure, movement, and holding to the soft tissue of the body in which the primary intent is to enhance or restore health and well-being. The term includes complementary methods, including without limitation the external application of water, superficial heat, superficial cold, lubricants, salt scrubs, or other topical preparations and the use of commercially available electromechanical devices which do not require the use of transcutaneous electrodes and which mimic or enhance the actions possible by the hands; the term also includes determining whether massage therapy is appropriate or contraindicated, or whether referral to another health care provider is appropriate. Massage therapy shall not include the use of ultrasound, fluidotherapy, laser, and other methods of deep thermal modalities. *Ga. Code Ann. § 43-24A-3 (West*

Massage therapy business means a business with a location in the city at which any person engages in or offers massage therapy, regardless of the name of the business or the words used to describe the business through signage or advertisement or in filings with the secretary of state. Massage therapy businesses are subject to regulation by a local government, pursuant to O.C.G.A. § 48-13-9(b)(17) and O.C.G.A. § 43-24A-22(a) as amended.

Massage therapist, masseuse, masseur, massage practitioner, or persons practicing massage means a person who performs or engages in the practice of massage.

Sexual or genital area means the genitals, pubic area, anus, perineum of any person, or the vulva or breast of a female.

State license means a license to practice massage therapy issued by the board, pursuant to the Act.

Sec. 7-248. - Requirements and application.

(a) *Requirements.*

(1) *State license.* No person other than a licensed massage therapist shall perform or offer to perform massage in a massage therapy business within the city.

(2) No license shall be issued to any massage therapy business within the city under this division unless every person who performs or offers to perform massage on its premises is a licensed massage therapist, and it shall be unlawful to operate as a massage therapy business unless all such persons are and remain licensed massage therapists. The city license of a massage therapy business that fails to meet this requirement is subject to revocation.

(3) *City license.* No person shall operate a massage therapy business without a valid, current, unrevoked, and unsuspended license from the city, pursuant to this division.

(4) *Conviction of a crime.* No license under this section shall be issued or renewed to any person who himself or who has a co-owner, partner or manager who has been convicted or shall have entered a plea of nolo contendere for any felony within ten (10) years, or two (2) misdemeanors within five (5) years, other than traffic violations, immediately prior to the filing of the application. The term "conviction" shall include an adjudication of guilty or plea of guilty or nolo contendere or the forfeiture of a bond in part or in whole when charged with a crime. Licenses granted to persons who fail to meet this requirement at any time shall be subject to revocation.

(5) *Age of licensee; education.* No person under the age of eighteen (18) shall be issued a license to operate a massage therapy business.

(6) *Personal residency; agent.* All applicants for licenses under this chapter and all actual owners of therapy businesses for which licenses are sought shall be bona fide residents of the city or county at the time of the filing of the applications and shall remain bona fide residents of the city or county during all times that the licenses and renewals thereof are in effect, or shall name one (1) or more residents in the city or county as the agent or representative of the licensee, who shall be responsible for any matter relating to such license and who, at all such times, shall be a bona fide resident of the city or county and shall be granted the express authority to accept service of process on behalf of the business.

(7) *Corporate residency.* All applications for licenses under this chapter by a corporation or other business entity shall name in the application one (1) or more residents in the city or county as the agent and representative of the corporation to receive all communications, notices, services of process, or other papers or documents on behalf of the corporation in connection with any matter arising out of or connected with the issuance, holding, suspension, revocation, or other action with respect to any license issued pursuant to this division. The application shall

give the mailing address of the person, and the mailing to any such person at such address of any notice required to be given under this chapter or any other law shall be sufficient notice to the corporation. If any such person shall cease to be a resident of the city or county, another person shall immediately be appointed, in writing, in his place, and written notice shall be given the city clerk, stating the name and address of the new agent.

(8) *Annual regulatory license fee and occupational tax certificate required.*
An annual regulatory license fee and occupational tax certificate shall be required for each person, firm, corporation or other entity operating a massage establishment.

The annual regulatory license fee shall be One Thousand Dollars (\$1,000) per massage therapy business and in addition the occupational tax shall be paid annually and calculated on annual gross receipts of the business.

(b) *Application for license.*

(1) To operate a massage therapy business within the boundaries of the city, the applicant must first make application to the city clerk on a form provided by the city clerk or her designee, and submit to a criminal background check of the applicant along with any co-owners, partners and non-massage therapists who will act as a manager at the business. The applicant after having fully and truthfully completed such form and paying the prescribed fees and having received a license, shall maintain and operate such business pursuant to the ordinances of the city and the laws of the state.

(2) Upon applying for a license with the city clerk, each applicant shall provide a true and correct copy or original of the state license for each and every massage practitioner, performing or anticipated to perform massage at its location, for inspection and copying. The applicant shall also supply a set of fingerprints taken by the Duluth Police Department for each licensed massage therapist employed by the applicant and two forms of photo identification. Failure of any massage therapy business to provide state licenses or fingerprints of its employees shall automatically result in the denial of the issuance of a city license to the applicant.

(3) Subsequent to the city license being issued, the licensee shall, in person, furnish to the city clerk a true and correct copy or original of the state license, fingerprints taken by the Duluth Police Department and two forms of photo identification for each new massage practitioner at the licensee's massage therapy

business prior to such person's commencing to perform or offering to perform massage at such massage therapy business. When any massage practitioner discontinues performing massage at a massage therapy business, the licensee shall make the departure known in writing to the city clerk within thirty (30) days of such departure.

(4) Each applicant for a license shall make his or her affidavit before the city clerk, on a form provided by the clerk, upon oath, swearing or affirming that all persons practicing massage on the premises of his or her massage therapy business are licensed massage therapists and that all requirements of this division for a license have been met.

(5) Each application under this section shall include but shall not be limited to the following information:

- a. A list of services to be provided.
- b. The location, mailing address and all telephone numbers where the business is to be conducted.
- c. The name and residence of each applicant and any agent as required by this chapter.
- d. Proof that the applicant is at least eighteen (18) years of age.
- e. Copy of two forms of photo identification for each applicant such as driver's license or official identification card.
- f. The name and a copy of the state license of each massage therapist that will be employed by the applicant.
- g. Copy of two forms of photo identification for each massage therapist that will be employed by the applicant.
- h. A list of any and all criminal convictions of the applicant other than misdemeanor traffic violations, including the dates of conviction, description of the offense and the court where the conviction was received.
- i. Authorization for the city, its agents and employees to seek information and conduct an investigation into the truth of the statements

set forth in the application and the qualifications of the applicant(s) for the permit.

j. Any other state required affidavits or forms, including local benefit receipt affidavits.

k. Applicants must be at least eighteen (18) years of age, employ one (1) (which may include him/herself) or more massage therapists licensed in accordance with subsection (a) above, and if a corporation, is an officer of the corporation which is organized and authorized to do business pursuant to the laws of the state. The applicant to operate a massage establishment must be the owner of the premises wherein the business will be conducted or the holder of a lease thereon for the period to be covered by the certificate.

l. A set of fingerprints taken by the Duluth Police Department for each massage therapist employed by the applicant.

m. A set of fingerprints taken by the Duluth Police Department for each owner, partner, and manager of each massage business.

Sec. 7-249. - Distance regulation.

(a) After July 1, 2012, there shall be no more than four (4) massage therapy businesses per ten thousand (10,000) persons living within the City limits based on the most current U.S. Census. Further, there shall be a one hundred fifty-foot buffer from any massage therapy business to any residentially zoned property from the front door of the structure where massage business occurs to the nearest parcel boundary line of any residentially zoned property as measured by a straight line on the ground.

(b) No application for a massage therapy business license shall be granted unless the business is located in the C-2 zoning district

(c) Upon application for a massage license and/or occupation tax placard, the applicant will provide to the City Clerk a survey showing the distances to each residentially zoned property within a one hundred fifty-foot radius of the massage business.

(d) The City Council recognizes that upon the adoption and effective date of this section, there appear to be active massage therapy businesses with physical facilities in existence in the

City limits. Without waiving any illegality of such physically existing structures based on zoning or other laws and without de facto or specifically granting any "grandfathered," "vested," or "legal non-conforming" (as those terms are defined in state zoning law) status by virtue of adoption of this purely regulatory section, it is the intention of the City Council to allow the continued operation of the existing massage therapy businesses provided the same apply for and are granted conditional use permits and otherwise comply with all other applicable laws and regulations of the City and state.

(e) Any licensed massage therapy businesses legally operating prior to June 1, 2012 shall be exempt from the distance and population cap regulations of this section until the licensee of such massage therapy business or a new licensee to whom the license is legally transferred as provided for by Section 7-260 no longer holds a valid massage therapy license from the City of Duluth.

Sec. 7-250. - License renewal.

Licenses for massage therapy businesses may be renewed on a calendar year basis, provided that the licensee(s) continue to meet the requirements set out in this division and the requirements of the Act.

Sec. 7-251 - Registry.

A registry shall be kept of all persons practicing massage on the premises of such massage therapy business, which shall be available for inspection by an authorized agent of the city including but not limited to the city clerk, the authorized designee of the city clerk and city police officers. The registry required by this section shall be made available for inspection during normal hours of business and must provide the following information:

- (1) Legal name and any other name(s) the massage practitioner has been or is known as or by;
- (2) Current address including street and city;
- (3) State or country of birth; date of birth;
- (4) Number and expiration date of state license;
- (5) Position with the massage therapy business or business entity; and
- (6) Two copies of photo identification for the massage therapist.

Sec. 7-252. - Posting licenses and rates.

- (a) Each massage therapy business shall post a legible copy of its license obtained pursuant to this division, along with copies of the state license of each massage therapist operating on the premises of such therapy business, in a conspicuous place in the licensee's place of business and shall keep such licenses there at all times.
- (b) Price rates for all massage therapy services shall be prominently posted in the reception area or other conspicuous location available for all prospective customers. No service shall be allowed or permitted that is not prominently posted with its fees in such location.

Sec. 7-253. - Record of patrons receiving services.

Each massage therapy business shall maintain a list of patrons who received massage therapy services at the business. The list shall include the patron's name, address, telephone number and time and date of service. Entries required under this section shall be maintained for one year.

Sec. 7-254. - Escort services and adult entertainment prohibited.

No massage therapy business shall act as an escort or dating service or conduct any adult business as that term is defined in Duluth Code section 7-602.

Sec. 7-255. - Alcoholic beverages prohibited.

No alcoholic beverages shall be sold, served, given, dispensed, provided, consumed, or caused or allowed to be sold, served, given, dispensed, provided, consumed by or to any person on the premises of a massage therapy business or kept thereon. Alcoholic beverages mean and include all types and kinds of alcohol as defined in Chapter Three of this Code of Ordinances.

Sec. 7-256. - Hours of operation; inspection; right of entry.

- (a) Massage therapy businesses shall be open for business only between the hours of 6 a.m. and 10 p.m., inclusive.
- (b) Any business holding a license issued under this division shall, at any time that the premises are open for business, be open to inspection by an officer of the police department or a duly authorized agent of the city clerk. It shall be unlawful for any person holding a massage facility business license or an employee of such licensee to refuse such inspection officer immediate access to the premises or to hinder such officer

in any manner; such refusal or hindrance on the part of any license holder or employee shall be grounds for the immediate revocation or suspension of a massage facility license.

(c) As a condition of maintaining a massage business license issued under this division, at any time that the premises are open for business the massage therapy business will require massage therapists in their employment to submit to reasonable verification efforts by authorized City Officials to confirm the identity of the massage therapist and to confirm state certification. Verification methods may include, but are not limited to a review of photo identification and/or fingerprinting of the massage therapist.

1. The refusal of any massage therapist to submit to reasonable verification efforts as provided herein shall be cause for suspension or revocation of the massage therapy business license, but shall not result in any citation or adverse consequence for the massage therapist.

2. The scope of any investigation performed under this subsection should be limited to verification of the identity and state certification of a massage therapist and should only take place in common areas open to the public during normal business hours.

Sec. 7-257. - Name; place of business; sale, transfer, or change of location.

No person or business entity granted a location license pursuant to this division shall operate the business under a name not specified in the license nor conduct business at any location or place not specified in the license. No license shall be transferable. Upon the sale or relocation of a massage therapy business, the license thereof shall be null and void.

Sec. 7-258. - Restrictions on minor's presence.

It shall be unlawful for any person or persons operating a massage therapy business to permit persons under eighteen (18) years of age to enter any area or room where massage therapy is performed unless such minor is accompanied by a parent, legal guardian or other adult with lawful custody or control of the minor or has a written prescription from a physician, surgeon, osteopath, or podiatrist who has a valid current license, issued pursuant to state law.

Sec. 7-259. - Operating requirements.

(a) Every portion of the premises of, and all equipment and supplies of, the massage therapy business shall be kept clean and shall be operated in a sanitary condition.

(b) It shall be the responsibility of the massage therapy business, licensed under this article to ensure that any employees involved in any way with massage therapy services or who will be present during massage therapy services are dressed in clean, opaque attire that does not expose to view any sexual or genital areas and covers all areas from the top of the breast line to an area no higher than four (4) inches above the knee line.

(c) Laundry. All sheets and towels provided patrons in massage facilities shall be clean and laundered after each use and stored in a sanitary manner.

(d) Locked doors. It shall be prohibited for any massage facility business to lock main entrance doors to the business or any door(s) to rooms where massage therapy is being performed.

(e) It is unlawful for any person in a massage establishment to place his or her hands upon, to touch with any part of his/her body, to fondle in any manner, or to massage a sexual or genital area, as defined by this ordinance, of any person or to act in a manner intended to arouse, appeal to or gratify the lust or passions or sexual desires.

(f) Conduct on premises. All persons holding a massage facility business license shall at all times be responsible for the conduct of business on the licensed premises, and for any act or conduct of any massage therapist utilizing the facility which constitutes a violation of the provisions in this chapter. Any violation of city, state or federal laws committed on the licensed premises by any such holder of a massage facility business license, holder of a massage therapist business license, or employee of the facility that affects the eligibility or suitability of such person to hold a license, may be grounds for suspension or revocation of the city license.

Sec. 7-260. - Restriction upon transfers.

(a) Licenses issued under this Chapter shall not be transferable except as otherwise provided for in this section.

(b) In case of the death of any person owning a license, or any interest greater than ten (10) percent therein, the license may, with the approval of the city clerk and subject to the terms of this article, be transferred to the administrator, executor or personal representative of the deceased person, or the lawful heirs of the deceased person, if such heirs make application and meet all of the other qualifications contained herein. The license of such deceased person shall be held by the administrator, executor or personal representative of such deceased person only for the time necessary to complete execution of his estate and dispose of the license or his interest therein, but in no event to exceed eight (8) months. In the event of the bankruptcy or in

the event that any applicant shall have a receiver appointed by any court of competent jurisdiction, such license shall be transferable to such receiver or trustee in bankruptcy for such period of time as may be granted by the city clerk for the proper liquidation of such assets and stock and goods.

(c) Nothing in this section, however, shall prohibit one (1) or more of the partners in a partnership holding a license to withdraw from the partnership and to assign his/her interest in such partnership to one (1) or more of the partners who were partners at the time of the issuance of the license. Such a withdrawal shall not, however, serve to bring any new ownership into the partnership, unless all provisions of this article are fully complied with, and then only upon the approval of the city clerk. This section shall not prohibit transfer of stock to persons who held more than ten (10) percent of any class of stock in the corporate owner at the time of issuance of the license.

(d) A licensee may take in partners or additional stockholders where it is determined that additional capital furnished is to be used exclusively for additional inventory or expanding the facilities of the business or for building new facilities and where it appears that the licensee himself will directly receive none of the additional capital investment. Under this section an additional partner or new stockholder must be approved by the city clerk. This subsection only applies to corporations when the new stockholder obtains ten (10) percent or more of the common stock or financial interest in the business entity.

(e) Should a transfer of the license be approved, there shall be no prorated return of any license fee and the new licensee shall meet all requirements for a new license to be issued hereunder, except payment of license fees.

(f) Except as provided above, any change in the ownership of any entity owning a licensed establishment shall be cause for immediate suspension of any license issued hereunder pending a revocation hearing as provided for under this article.

Sec. 7-261 - Revocation, suspensions, violations, and penalties.

Upon notice the City Clerk may for good cause, revoke or suspend or place on probation the license of any massage therapy business:

(a) That commits or allows any violations of the provisions of this division of the City Code;

- (b) That allows any massage therapist, working on the massage therapy business's premises, to commit or offer to commit a sexual crime under O.C.G.A. title 16, chapter 6;
- (c) That allows any person to perform or offer massage on the premises who is not a licensed massage therapist;
- (d) Where the applicant for the massage therapy business's city license gave false information on the application, in his or her affidavit, or in the massage therapy business's registry as required in this division, or fails to update information related to the license to the city clerk as required by this division; or
- (e) Where the licensee fails at any time to meet the requirements for licensure under this division.
- (f) Penalties: In addition to revocation or suspension of the massage therapy license, any person who violates any provision of this article may, upon conviction, be punished in accordance with section 1-6 of the City of Duluth Code. Each day during which said offenses occur shall constitute a separate offense, as shall each separate act constitute a violation.

Sec. 7-262. - Notice of intent to deny, revoke or suspend license.

- (a) Whenever, in the opinion of the clerk there is cause to deny an initial application or renewal, or to revoke or suspend the license of a massage therapy business, a written notice of intention to revoke or suspend shall be furnished to the holder thereof. Such written notice shall list the grounds upon which revocation or suspension is sought and shall set forth the licensee's appeal rights.
- (b) For the purpose of this section, notice shall be deemed delivered when personally served or when served by registered or certified mail, return receipt requested, within three (3) days after the date of deposit in the United States mail.

Sec. 7-263. –Appeal Hearings

- (a) No license shall be denied, suspended or revoked without the opportunity for a hearing as hereinafter provided.
- (b) The City Clerk or the Clerk's designee shall provide written notice of the decision to deny, revoke or suspend a massage therapy business license. Any applicant or licensee

adversely affected by the decision of the City Clerk may have a review thereof by appeal to the Mayor and Council or their designated hearing officer.

(c) Appeals shall be made by written petition filed in the office of the City Clerk within fifteen (15) days of the final decision or action of the City Clerk.

(d) In order to defray administrative costs all appeals under this section must be accompanied by a filing fee of five hundred dollars (\$500.00). The Mayor and Council or their designated hearing officer may at the request of the appellant refund the filing fee by a majority vote.

(e) A hearing shall be conducted before Mayor and Council or their designated hearing officer on each properly filed appeal within thirty (30) days of the filing of the appeal with the City Clerk's office unless a continuance is agreed upon by the appellant and the City Clerk.

(1) The appellant at such a hearing shall have the right to be represented by an attorney at the expense of the appellant, and to present evidence and cross examine witnesses. All testimony shall be sworn.

(f) The City Clerk shall bear the burden of proof by a preponderance of the evidence standard. The determination and findings by the City Clerk shall not be set aside unless Mayor and Council or their designated hearing officer finds them to be:

(1) Contrary to law or ordinance;

(2) Unsupported by substantial evidence on the record as a whole; or

(3) Unreasonable.

(g) The written findings of Mayor and Council or their designated hearing officer shall be forwarded to the City Clerk by after conclusion of the hearing and it shall be the duty of the City Clerk to notify the appellant of the decision.

(h) The findings and decision of the Mayor and Council or their designated hearing officer shall be final unless appealed within thirty (30) days of the date of said findings by certiorari to the superior court of the county.

Sec. 7-264 Exemptions.

(a) The requirements of this division shall have no application to or effect upon the following persons acting within the scope of their professions:

(1) Medical doctors and osteopaths, chiropractors, physical and occupational therapists, podiatrists, acupuncturists, registered or licensed practical nurses.

(2) Cosmetologists duly licensed to practice in this state pursuant to state law except that this exemption shall apply solely to massaging the head, neck, face, scalp and hair of the patron.

(3) Employees of duly licensed nursing and convalescent homes and hospitals;

(4) Athletic directors or trainers who are affiliated with an accredited educational institution or a bona fide sports team and whose work is limited to athletic team members.

(b) Massage therapists licensed by the state may perform massage therapy services in the home of a client, provided that the massage therapy business the therapist is associated with is properly licensed under this article and complies with section 7-248 (application) and section 7-250 (renewal).

(1) Massage therapy businesses providing client home services shall not be subject to the provisions of this article regulating the physical locations where massage therapy shall be performed, but shall comply with section 7-259(e) (prohibiting massage of sexual or genital area, or to act in a manner intended to arouse, appeal to or gratify the lust or passions or sexual desires); section 256(a) (regulating hours of operation) and section 7-254 (prohibiting escort services and adult entertainment).

(c) Requirements for licensure under the act, shall not apply to persons excluded from state licensure pursuant to O.C.G.A. § 43-24A-19, acting within the scope of their professions.

Secs. 7-266—7-320. - Reserved.

IT IS SO ORDAINED this 14th day of May, 2012.

Mayor Nancy Harris

Those councilmembers voting in favor:

Greg Whitlock

Kelly Kelkenberg

Jim Dugan

Billy Jones

Marsha A. Bomar

Those councilmembers voting in opposition:

ATTEST _____
Teresa S. Lynn, City Clerk