

OFFICE OF THE CITY ATTORNEY
FARGO, NORTH DAKOTA

ORDINANCE NO. 5330

AN ORDINANCE ENACTING ARTICLE 13-18 OF CHAPTER 13
OF THE FARGO MUNICIPAL CODE RELATING TO
MESSAGE THERAPY ESTABLISHMENTS

WHEREAS, the electorate of the city of Fargo has adopted a home rule charter in accordance with Chapter 40-05.1 of the North Dakota Century Code; and,

WHEREAS, Section 40-05.1-06 of the North Dakota Century Code provides that the City shall have the right to implement home rule powers by ordinance; and,

WHEREAS, Section 40-05.1-05 of the North Dakota Century Code provides that said home rule charter and any ordinances made pursuant thereto shall supersede state laws in conflict therewith and shall be liberally construed for such purposes; and,

WHEREAS, the Board of City Commissioners deems it necessary and appropriate to implement such authority by the adoption of this ordinance;

NOW, THEREFORE,

Be It Ordained by the Board of City Commissioners of the City of Fargo:

Section 1. Enactment.

Article 13-18 of Chapter 13 of the Fargo Municipal Code is hereby enacted as follows:

ARTICLE 13-18 – MESSAGE THERAPY ESTABLISHMENTS

Section 13-1801. Definitions.

As used in this ordinance, unless context otherwise indicates, the following definitions shall apply:

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1. “Massage” means the practice of massage therapy by the manual application of a system of structured touch to the soft tissues of the human body, including:
 - a. Assessment, evaluation, or treatment;
 - b. Pressure, friction, stroking, rocking, gliding, kneading, percussion, or vibration;
 - c. Active or passive stretching of the body within the normal anatomical range of movement;
 - d. Use of manual methods or mechanical or electrical devices or tools that mimic or enhance the action of human hands;
 - e. Use of topical applications such as lubricants, scrubs, or herbal preparations; and
 - f. Use of hot or cold applications.

Except as provided in this chapter, “massage” does not include diagnosis or other services that require a license to practice medicine or surgery, osteopathic medicine, chiropractic, occupational therapy, physical therapy, or podiatry and does not include services provided by professionals who act under their state-issued professional license, certification, or registration.

2. “Massage therapy establishment” means any person as defined in this article, holding itself out as providing massage therapy services to the public for a fee or other form of remuneration. The term shall not include the following activities:
 - a. Any individual who provides massage therapy in the dwelling unit in which the individual resides, provided that all of the following conditions are met:
 - i. no more than 25 percent of the floor area of the dwelling unit is used as a place of work;
 - ii. no employees of the resident come to the dwelling unit site;
 - iii. no more than four (4) customers per day or more than twelve (12) customers per week come to the dwelling unit site;
 - iv. massage therapy services are limited to hours of 7:00 a.m. to 9:00 p.m.; and
 - v. no more than one (1) customer is permitted on the dwelling unit site at any given time.
 - b. Schools that furnish massage services to their student athletes;

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- c. Any student of a school of massage who is practicing massage in the course of fulfilling a required massage therapy practicum under the direct supervision of a licensed massage therapist or in the course of participating in a school-supervised student massage clinic under the direct supervision of a licensed massage therapist, a school may charge a fee and students may accept tips under a policy set by the school. Students may practice homework unsupervised on other students, family or friends, but no fee or tip may be charged or accepted. These massages may only be performed at the school or at the residence of the student, family member, or friend;
 - d. Any individual who is engaged in a profession or occupation for which the individual is licensed by this state, as long as the individual's activities are performed in the course of a bona fide practice of the individual's profession or occupation and as long as the individual does not represent to the public that the individual is a massage therapist or is engaged in the practice of massage and does not perform massage while working in a massage therapy establishment;
 - e. A health spa or similar business to the extent the spa or business is performing superficial applications used for beautification or health of the skin, including salt glows and contouring;
 - f. Any individual instructor demonstrating massage techniques as a component of a board-approved seminar; and
 - g. Any individual practicing healing by manipulating the energy field or the flow of energy of the human body by means other than the manipulation of the soft tissues of the body, provided that the individual's services are not designated or implied to be massage or massage therapy. For purposes of this subsection, a light touch or tap is not a manipulation of the soft tissues of the human body.
- 3. "Person" means any individual, partnership, corporation or limited liability company or other lawful business entity.
 - 4. "Massage therapist" means an individual licensed to practice massage by the board.
 - 5. "Board" means the North Dakota Board of Massage Therapy.
 - 6. "Public health department" means Fargo Cass Public Health or any representative thereof.

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Section 13-1802. License to operate massage therapy establishment issued annually—fee; application.

No person shall operate a massage therapy establishment without first applying for and obtaining a license issued by the public health department. The license shall be subject to all the terms and conditions of this article and any other approved regulations as provided in this article. The initial application for a license shall extend from the date of issuance until year-end. Thereafter, the massage therapy establishment license may be renewed annually, January 1, by the director of public health. The fee for an initial license and any renewal thereof shall be as established by resolution of the board of city commissioners, and applicants shall complete an application form furnished by the public health department. A license shall apply only to the premises described in the application, and in the license issued thereon, and only one location shall be so described in each license.

Section 13-1803. Display of license—license non-transferable.

A license issued pursuant to this article shall be displayed in a conspicuous location in the massage therapy establishment for which the license is issued. A license issued pursuant to this article is non-transferable.

Section 13-1804. List of employees required.

The licensee shall maintain a written list of names and current addresses of all employees and to supply the public health department with said list. Said list shall be shown to the public health department or its designee, upon request. The licensee shall provide updated such list on at least a monthly basis to keep the public health department apprised of any changes in the list of current employees.

Section 13-1805. Regulation, inspection and enforcement.

In order to provide for the public health and safety, the public health department may promulgate regulations creating minimum standards for massage therapy establishments, which regulations may be enforced by the director of public health, chief of police, or any officer of the health or police department. Said regulations shall be approved by resolution of the board of city commissioners.

The director of public health, chief of police, or any officer of the health or police department may, at any time, enter upon any licensed premises for the purpose of a health inspection or to determine whether the licensed premises are in compliance with any and

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all ordinances of the city. This section shall not restrict or limit the right of entry vested in any law enforcement agency. In the event of a failure to comply with the provisions of this article, after due notice thereof, the public health department shall have the power to abate or cause a suspension of the use of the massage therapy establishment license until such

time as the same is, in the opinion of the director of public health, no longer a hazard to public health or safety.

Section 13-1806. Licenses—non-renewal, suspension, or revocation of license.

All licenses issued under the provisions of this article, unless otherwise specifically provided, shall terminate on December 31 following the date of issuance; provided, however, that any license issued under the provisions of this article may, under certain circumstances, be suspended, revoked, or not renewed by the director of public health.

- A. The director of public health may suspend, revoke, or not renew a massage therapy establishment license for any of the following reasons:
1. A violation related to fraud, misrepresentation, or false statement contained in a license application or a renewal application;
 2. A violation related to fraud, misrepresentation, or false statement made in the course of carrying on the licensed occupation or business;
 3. The licensee has been convicted of a felony under the laws of the United States or any state;
 4. Conducting the licensed business or occupation in an unlawful manner or in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety, or general welfare of the community;
 5. If the owner, manager, lessee or any of the employees are found to be in control or in possession of an alcoholic beverage, a narcotic drug or controlled substance on the premises, other than drugs which may be purchased over the counter without a prescription or those for which the individual has a prescription;
 6. If the licensee fails to maintain with the issued authority a current list of all employees of such licensed premises or fails to produce the list upon request;
 7. If the licensee refuses or restricts access to the massage therapy establishment

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for purposes of an inspection; or

8. If the licensee employs anyone other than a duly-licensed massage therapist to administer one or more massages on the licensed premises.
- B. The grounds enumerated in this section shall not be deemed to be exclusive, and any license issued under the provisions of this article may be suspended or revoked for any other reason deemed to be sufficient in order to promote and protect the public health, safety, morals and general welfare of the people of the city of Fargo.
- C. No license under the provisions of this article shall be suspended or revoked for cause by the director of public health without a public hearing. In the event that the director of public health intends to consider the suspension or revocation of any license for cause, it shall notify the licensee of its intention to consider the same. The notice shall specify the time and place of the suspension or revocation hearing and shall be served upon the licensee or its managing agent in the same manner as provided by law for the service of a summons in a civil action. No suspension or revocation hearing shall be held before the expiration of 10 days after the date of the service of the notice upon the licensee.
- If, upon such hearing, it appears to the director of public health that sufficient cause exists for the suspension or revocation of a license issued pursuant to the provisions of this article, the director of public health shall make its order suspending or revoking said license.
- D. An order suspending or revoking a license pursuant to the provisions of this article may be appealed to the board of city commissioners. The licensee must give written notice of its intent to appeal the order of suspension or revocation to the board of city commissioners no later than 10 days of the date of the decision. The board of city commissioners shall consider the appealed decision as a new matter in a public hearing and, at the close of the public hearing, shall act to affirm or reverse the original decision.
- E. The director of public health or its designee may immediately suspend a license, if the licensee, or any person working on behalf of the licensee, is determined to be conducting business in an unlawful manner, any manner that constitutes a substantial hazard to the health, safety, or general welfare of the public, or after repeated complaints received regarding unlawful conduct of the business practices or method of solicitation. The licensee will be given notice of the immediate suspension on site, and the suspension will take place immediately. The licensee

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may request a hearing within 10 days of notice of the suspension and the hearing procedure will be the same as set forth in Subsection D, aforementioned.

Section 13-1807. Operation of a massage therapy establishment—violations.

It shall be a violation of this ordinance for any person to:

1. Operate as a massage therapy establishment in the city of Fargo without a license issued by the public health department;
2. Employ, as a massage therapy establishment, anyone other than a duly-licensed massage therapist to administer one or more massages on the licensed premises;
3. Fail or refuse to a request by the public health department or its designee of the massage therapy establishment's list of names and current addresses of all employees;
4. Fail or refuse to grant access for purposes of inspection of the massage therapy establishment upon lawful request by the director of public health, chief of police, or any officer of the health or police department; or
5. Provide false information on a license or renewal application, knowing or having reason to believe that such information is false.

Section 2. Penalty.

A person who willfully violates this ordinance is guilty of an infraction. Every person, firm or corporation violating an ordinance which is punishable as an infraction shall be punished by a fine not to exceed \$1,000; the court to have power to suspend said sentence and to revoke the suspension thereof.

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Section 3. Effective Date.

This ordinance shall be in full force and effect from and after its passage, approval, and publication.

/s/
Timothy J. Mahoney, M.D., Mayor

Attest:

/s/
Steven Sprague, City Auditor

First Reading: 11-29-21
Second Reading: 12-13-21
Final Passage: 12-13-21
Publication: 12-22-21