

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
NASHVILLE, TENNESSEE 37202

July 16, 2001

Opinion No. 01-114

Memphis City Ordinance

QUESTION

Does Chapter 19, Article II, Section 19-16, Memphis Code violate existing general law, *i.e.*, the Massage Licensure Act of 1995, Tenn. Code Ann. §§ 63-18-201, *et seq.*?

OPINION

Chapter 19, Article II, Section 19-16, Memphis Code, which requires that massage operators or bathers obtain a permit before conducting a massage institute, bathhouse, or similar business in the City of Memphis, does not apply to persons or establishments required to be licensed under the Massage Licensure Act of 1995 or who are otherwise regulated by law. Therefore, the ordinance does not violate the Massage Licensure Act.

ANALYSIS

You have provided us with a copy of a letter dated March 2, 2001, addressed “To All Massage Institutes” by the Permit/License Coordinator, City Treasurer, City of Memphis, and have asked for our opinion as to whether the ordinance section referred to in the letter, Chapter 19, Article II, Section 19-16, Memphis Code, violates general law.¹ While your opinion request did not include

¹We note that paragraph 2 of the March 2, 2001, letter describes certain specific requirements for the issuance of a city permit which are not contained in the ordinance itself. Paragraph 2 states: “Permits issued as of July 1, 1998 requires (*sic*): (1) 500 hours of study from a state authorized school, (2) applicant must be at least 18 years of age, and (3) no charges of sexual misconduct.” We are unaware of any amendments to the ordinance effective July 1, 1998, and surmise that the above requirements reflect the Permit/ License Coordinator’s understanding of Tenn. Code Ann. §§ 63-18-205 (b) (1), (b) (2), and (b) (3) (A), which provide: “ No person or establishment shall be issued a license until the applicant and each person engaged in massage at such massage establishment has provided evidence satisfactory to the Board that: (1) The applicant is eighteen (18) years of age or older; (2) The applicant has not *been convicted* of the offense of prostitution or sexual misconduct, or felony under the laws of this state; (3) The applicant has either: (A) Successfully completed the curriculum or curriculums of one (1) or more post secondary, academic institutions for massage, bodywork, and/or somatic therapy as defined by board regulations totaling five hundred (500) hours or more, such institutions being approved by the Tennessee higher education commission or its equivalent in other states;” (*Id.*,

a copy of the ordinance, we have obtained a copy. In pertinent part, it provides:

Sec. 19-16. Required.

No person shall act as a massage operator or bather or conduct a massage institute or bathhouse or other similar business establishment in the city without first obtaining a permit as provided in this article from the city treasurer, or his designee. (Ord. No. 2027, § 1, Art. II, 12-1, 4-23-74; Code 1967, § 21 ½ -15; Ord. No. 4352, § 2, 8-15-95).

The Massage Registration Act of 1979 (repealed effective October 1, 1995) authorized only county governments, rather than city governments, to establish massage registration boards. Such former massage registration boards were established after first obtaining local approval, either upon the contingency of a two-thirds vote of the county legislative body or upon the contingency of the majority of the voters casting votes in any election held for the purpose of approving the Massage Registration Act. Tenn Code Ann. §§ 63-18-101, *et seq.* (repealed October 15, 1995). It appears that Chapter 19, Article II, Section 19-16 was re-enacted on August 15, 1995, prior to the October 15, 1995 effective date of Acts 1995, ch. 480, which both repealed the Massage Registration Act and enacted the Massage Licensure Act. However, since the Massage Registration Act conferred no authority on city governments to regulate massage or massage establishments, authority for the ordinance necessarily lies elsewhere. Provision for “regulating the business of massage institutes and operators” is found in Private Acts, 1961, Chapter 234, House Bill No. 598, amending the Charter of the City of Memphis. The ordinance in question appears to have been enacted pursuant to either the 1961 charter amendment or a subsequent charter amendment. The ordinance itself appears to have been enacted initially in 1967 and amended subsequently on April 23, 1974 and August 15, 1995.

In 1996, we issued an opinion in which we discussed the effect of the 1995 repeal of the Massage Registration Act upon prior city or county ordinances enacted pursuant to that Act. Tenn. Op. Atty. Gen. No. 96-028 (2/28/96) (copy attached). We noted that the Legislature deleted the 1979 Act in its entirety

emphasis added).

Clearly, the language contained in paragraph 2 of the March 2, 2001, letter prohibiting issuance of a permit to applicants with *charges* of sexual misconduct (articulated solely in the letter and not in the ordinance itself) conflicts with the language of Tenn. Code Ann. § 63-18-205 (b) (2), which prohibits issuance of a license to applicants *convicted* of the offense of prostitution or sexual misconduct, or felony under the laws of this state. Moreover, the requirement articulated in the letter conflicts with the language contained in the ordinance itself, which states: “The director of police services shall issue a permit under this article when he finds: . . . (2) That the applicant has never *been convicted* of a felony or any crime involving sexual misbehavior” and that “All employees of any person having or applying for a permit under this article shall meet the requirements of *never having been convicted* of any felony or any crime involving sexual misbehavior.” Chapter 19, Article II, Section 19-19 (2), Section 19-24, Code of Ordinances, City of Memphis (emphasis added). However, since the requirement in the March 2, 2001 letter concerning “no charges of sexual misconduct” is not contained in the ordinance, we do not address it.

and substituted in its stead the Massage Licensure Act of 1995 (codified at Tenn. Code Ann. §§ 63-18-201, *et seq.*). The 1995 Act placed regulation of massage therapists and massage establishments under the authority of a statewide Tennessee Massage Licensure Board, which is one of the Health Related Boards established under Title 63. Tenn. Code Ann. §§ 63-18-202, 63-18-203, 63-18-204. We opined that any local ordinances created under the repealed 1979 Act are no longer enforceable, and that under the Massage Licensure Act, city or county governments may establish ordinances related to massage practitioners only to the extent that they have express or implied authority to do so and such ordinances do not conflict with the Act or with any implementing rules and regulations. Our opinion recognized that while substantial authority is vested in the Tennessee Massage Licensure Board, with the exception contained in Tenn. Code Ann. § 63-18-213 prohibiting “local tax regulations not also imposed upon other medically therapeutic activities,” the General Assembly did not expressly preempt local regulation and the language in Tenn. Code Ann. § 63-18-213 impliedly recognizes that some local ordinances may lawfully apply to massage.

Since Chapter 19, Article II, Sec. 19-16, Memphis Code clearly was not created under the repealed 1979 Act, it therefore was not pretermitted by the Massage Licensure Act of 1995. Further, it appears that the city of Memphis had express or implied authority to enact the ordinance, either under authority of its charter or pursuant to its general police powers. However, since the ordinance excepts all persons or establishments otherwise regulated by law, we conclude that the ordinance does not apply to persons or establishments required to be licensed under the Act. Moreover, it is our opinion that the ordinance also does not apply to persons exempted from the Act under Tenn. Code Ann. § 63-18-210, since all such exempt categories also are “otherwise regulated by law.” The only exception is “the practice of reflexology,” which under Tenn. Code Ann. § 63-18-204 (d) is not subject to the licensure requirements of the Act, and which is not “otherwise regulated by law.”

The Massage Licensure Act of 1995 requires that “persons or massage establishments engaged in massage for compensation shall be licensed by the massage licensure board.” Tenn. Code Ann. § 63-18-204 provides:

- (a) Persons or massage establishments engaged in massage for compensation shall be licensed by the massage licensure board.
- (b) Any person who has applied to take the national certification examination in therapeutic massage and bodywork, or an equivalent certification, and whose application to take such examination has been accepted, may receive a provisional license by the board not to exceed six (6) weeks beyond the examination date.
- (c) Any person or establishment who advertises or engages in message for compensation without a current valid license from the massage licensure board commits a class B misdemeanor. It is unlawful to use the

word “massage” or any other term that implies massage technique or method when advertising a service by a person who is not licensed under this part or another chapter of state law.

(d) The practice of reflexology shall not be subject to the licensure requirements of this chapter. For the purposes of this chapter, “reflexology” means the application of specific pressures to reflex points in the hands and feet only.

The Act specifically exempts certain persons from its licensure requirements. Tenn. Code Ann. § 63-18-210 provides:

(a) Any person granted an exemption under this part is effective only to the extent that the bona fide practice of the profession or business that is licensed, certified, or registered under the laws of this state overlaps into the field comprehended by this chapter, and exemptions under this chapter are only for those activities which are performed in the course of the bona fide practice of the business or profession of the person exempted.

(b) Persons exempt under subsection (a) include, but are not limited to: any branch of medicine, nursing, osteopathy, chiropractic, podiatry, and also barbers, cosmetologists, athletic trainers, physical and occupational therapists; and any student of a Tennessee higher education commission authorized massage school or public school of this state; provided, that the student does not hold out as a licensed massage therapist and does not receive compensation for massage.

(c) Nothing in this part shall apply to massage therapists licensed in other states or countries or meeting standards set forward in § 63-18-205 when providing educational programs or services for a period of time not to exceed thirty (30) days within a calendar year.

Further, the Act provides that “the practice of reflexology shall not be subject to the licensure requirements of this chapter...”. Tenn. Code Ann. § 63-18-204 (d).

The Act regulates massage activities which are “medically therapeutic in nature.”² Tenn. Code Ann.

²We note that the Massage Registration Act, Tenn. Code Ann. §§ 63-18-101, *et seq.* (repealed) did not regulate therapeutic massage. We opined previously, before the repeal of the Massage Registration Act and the enactment of the Massage Licensure Act, that the Massage Registration Act then in effect regulated non-therapeutic massage. Tenn. Op. Atty. Gen. No. 95-033 (April 6, 1995).

§ 63-18-213 provides that “notwithstanding any provisions of law to the contrary, the act of a duly licensed massage therapist in performing a massage shall be deemed to be medically therapeutic in nature....”. It defines “massage/ bodywork/ somatic” as “the manipulation of soft tissues of the body with the intention of positively affecting the health and well being of the client.” Tenn Code Ann. § 63-18-202 (3). The Act further defines “massage therapist” as “a person who practices massage for compensation and is licensed by the board.” Tenn. Code Ann. § 63-18-202 (5). Moreover, any person required to be licensed under Title 63 falls within the definition of “health care provider” found in Tenn. Code Ann. § 63-2-101 (c), regarding medical records requirements. However, the Act mandates that massage therapists are not ever to be referred to as primary care providers, nor be permitted to use such designation. Tenn. Code Ann. § 63-18-214.

By contrast, although the ordinance alludes to massage as “treatment,”³ it never defines the term “massage.” The ordinance does, however, define “massage operator” as “a person who applies manual or mechanical massage or similar treatment to the human body, *but shall not include a doctor or a nurse or any type of person who is otherwise regulated by law.*” Chapter 19, Article I, Section 19-1, Code of Ordinances, City of Memphis (emphasis added). Likewise the ordinance defines a “massage institute” as “any place in which massage operators are employed to give treatment, *but shall not include a hospital or sanitarium or any establishment which is otherwise regulated by law.*” *Id.* (emphasis added). The ordinance refers further to an additional category which is not found in the Act: “bath,” “bather,” and “bathhouse.”⁴ Although arguably the latter category might be considered an activity which is tangentially related to massage, the ordinance specifically excludes from its definition of “bather” “*a doctor, nurse, or any other person who is otherwise regulated by law,*” and further excludes from the definition of “bathhouse” “*a hospital, sanitarium, or any establishment which is otherwise regulated by law.*” *Id.* (emphasis added). Therefore, it is our opinion that, since the Act requires that “[p]ersons or massage establishments engaged in massage for compensation *shall be licensed by the massage licensure board,*” Tenn. Code Ann. § 63-18-204 (a) (emphasis added), and the ordinance, in turn, does not apply to persons or establishments otherwise regulated by law, the ordinance simply does not apply to those licensed under

³Webster’s New International Dictionary of the English Language, Second Edition, Unabridged, defines an obsolete meaning of the verb “to treat” as: “to handle; manipulate; touch.” Hence the word “treatment,” as used in the ordinance, may fall within the ambit of this obsolete definition of the term.

⁴In *Garachi v. City of Memphis, et al.*, 379 F. Supp. 1393 (W.D. Tenn. 1974), owners of a bathhouse brought an action seeking injunctive relief as well as a declaratory judgment, alleging that certain Memphis City Charter provisions or ordinances, as well as state statutes, were unconstitutional. The plaintiffs, who proposed to do business or who were doing business in Memphis as the Gaisha Bath House, anticipated enforcement against them pursuant to the nuisance laws of the State, as well as pursuant to a provision of the Memphis Charter requiring a “massage operator” and a “massage institute” to obtain a permit, should they operate without obtaining a permit. Noting that while plaintiffs had secured a business license, “Nowhere do plaintiffs assert that the Gaisha Bath House is intended or has been intended to operate as a massage parlor or a massage institute....[t]he City Charter and ordinances do not specifically deal with ‘bath houses’ as they do with ‘massage houses’....” *Id.* However, shortly after the *Garachi* decision was announced on April 19, 1974, apparently the ordinance was re-enacted on April 23, 1974, to include the terms “bath,” “bather,” and “bathhouse.”

the Act.

Persons or establishments licensed under the Act, including persons granted a provisional license pursuant to Tenn. Code Ann. § 63-18-204 (b), clearly are “otherwise regulated by law” and not subject to the ordinance. In addition, all categories of persons or disciplines exempted under Tenn. Code Ann. § 63-18-210 are “otherwise regulated by law,” either through separate licensure or certification requirements or by virtue of qualifiers imposed on them through exercise of the exemption itself. “Any branch of medicine” is regulated under Tenn. Code Ann. §§ 63-6-101, *et seq.* (medicine and surgery), while “nursing” is regulated under Tenn. Code Ann. §§ 63-7-101, *et seq.*, and 63-7-201, *et seq.*, and “osteopathy” under Tenn. Code Ann. §§ 63-9-101, *et seq.* (osteopathic physicians). “Chiropractic” is regulated under Tenn. Code Ann. §§ 63-4-101, *et seq.*, “podiatry” under Tenn. Code Ann. §§ 63-3-101, *et seq.*, and “physical and occupational therapy” under Tenn. Code Ann. §§ 63-13-101, *et seq.*, 63-13-201, *et seq.*, and 63-13-301, *et seq.* “Athletic trainers” are regulated under Tenn. Code Ann. §§ 63-24-101, *et seq.*, and “barbers” and “cosmetologists” by Tenn. Code Ann. §§ 62-3-101, *et seq.* and 62-4-101, *et seq.*, respectively. Moreover, students exempted under Tenn. Code Ann. § 63-18-210 (b), as well as massage therapists who are not licensed in Tennessee but who are exempted by Tenn. Code Ann. § 63-18-210 (c), also are “otherwise regulated by law,” insofar as each must comply with certain statutory restrictions in order to take advantage of the exemption. An exempted student may not hold out as a licensed massage therapist or receive compensation for massage. Tenn. Code Ann. § 63-18-210 (b). Exempted massage therapists licensed in other states or countries, or who meet standards set forth in the Act, when providing educational programs or services may do so only for a period of time not to exceed thirty (30) days within a calendar year. Tenn. Code Ann. § 63-18-210 (c). Clearly, even those persons who are exempt under Tenn. Code Ann. § 63-18-210 but who are not also specifically licensed or certified as set forth above, nevertheless, are “otherwise regulated by law” so as to render the ordinance inapplicable to them. One remaining category, however, which is not made exempt under Tenn. Code Ann. § 63-18-210, but which nevertheless is not subject to the licensure requirements of the Act, is “the practice of reflexology.” Tenn. Code Ann. § 63-18-204 (d). Since there are no statutory restrictions placed on “the practice of reflexology,” either through any licensure or certification requirements or through any restrictions required to be complied with in order to qualify for an exemption, it cannot be said that “the practice of reflexology” is “otherwise regulated by law.”

For the above reasons, it is our opinion that Chapter 19, Article II, Section 19-16, Memphis Code, which excepts persons or establishments otherwise regulated by law, does not apply to persons or establishments required to be licensed under the Massage Licensure Act of 1995 or who are otherwise regulated by law. Therefore, we conclude that the ordinance does not violate the Massage Licensure Act of 1995, Tenn. Code Ann. §§ 63-18-201, *et seq.*

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

SARA E. SEDGWICK
Assistant Attorney General

Requested by:

Honorable Carol Chumney
State Representative
25 Legislative Plaza
Nashville, TN 37243