



CITY OF

NEWPORT BEACH

City Council Staff Report

November 30, 2021
Agenda Item No. 25

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

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TITLE: Ordinance No. 2021-27: A Code Amendment Related to Tattoo Establishments (PA2020-030)

ABSTRACT:

For the City Council's consideration are the proposed code amendments to Titles 20 (Planning and Zoning) and 21 (Local Coastal Program Implementation Plan) of the Newport Beach Municipal Code (NBMC) updating development standards related to tattoo establishments. The purpose of the code update is to ensure the NBMC is consistent with both state and case law as it pertains to tattoo establishments. If the City Council approves the update, the changes will be forwarded to the California Coastal Commission for its consideration.

RECOMMENDATION:

- a) Conduct a public hearing;
- b) Find this project categorically exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3), the general rule that CEQA applies only to projects, which have the potential for causing a significant effect on the environment and pursuant to Section 15265(a)(1), which exempts local governments from the requirements of CEQA in connection with the adoption of a Local Coastal Program;
- c) Waive full reading, direct the City Clerk to read by title only, introduce Ordinance No. 2021-27, *An Ordinance of the City Council of the City of Newport Beach, California, Adopting Zoning Code Amendment No. CA2020-002 to Amend Title 20 (Planning and Zoning) of the Newport Beach Municipal Code Related to Tattoo Establishment Development Standards (PA2020-030)* and pass to second reading on December 14, 2021; and

- d) Adopt Resolution No. 2021-127, *A Resolution of the City Council of the City of Newport Beach, California, to Authorize Submittal of Local Coastal Program Amendment No. LC2020-002 to the California Coastal Commission to Amend Title 21 (Local Coastal Program Implementation Plan) of the Newport Beach Municipal Code Related to the Tattoo Establishment Development Standards (PA2020-030)*

DISCUSSION:

Over the past decade, cities have seen a rapid increase in the number of tattoo establishments given the rise in popularity of tattooing. In 2011, then Governor Jerry Brown signed into law, the Safe Board Art Act, which sets uniform standards for the body art industry, including tattooing. These regulations are codified in California Health and Safety Code Section 119300 *et seq.* requiring body art practitioners to complete a registration process, obtain annual bloodborne pathogen training, provide documentation of vaccination status, and obtain relevant health information and informed consent from clients.

Many cities have adopted zoning ordinances related to the use ranging from an all-out ban to requiring a conditional use permit with conditions to mitigate impacts associated with the use. In Newport Beach's case, Titles 20 (Planning and Zoning) and 21 (Local Coastal Program Implementation Plan) of the NBMC classify tattoo businesses as a Restricted Personal Service, which is permitted in all office zones, commercial zones (except the CM zone) and mixed-use zones, subject to a minor use permit (MUP). An MUP is a discretionary permit requiring a public hearing and is appealable to the Planning Commission and ultimately to the City Council.

Over time, prospective operators have challenged cities' zoning codes applicable to tattoo establishments on the basis that tattooing is protected speech under the First Amendment of the United States Constitution (First Amendment).

In Anderson v. City of Hermosa, (9th Cir. 2010) 621 F.3d 1051, a prospective operator challenged Hermosa Beach's ban on tattoo parlors. The city justified the ban based upon the risk of infection and the possibility of diseases. At the time, the county health official responsible for inspecting tattoo establishments testified to being overwhelmed by the number of inspections required. On appeal, the 9th Circuit overturned the district court's decision and held that tattoos are purely expressive activity protected under the First Amendment. The court took a rather expansive view as to what aspects of tattooing were protected by the First Amendment to include the tattoo itself, the process of tattooing, and the business of tattooing.

Seven years later, a suit was brought against the City of Long Beach's tattoo ordinance that required a conditional use permit; separation requirements from adult entertainment, arcade, fortunetelling, tattoo parlors and taverns; and hours of operation between 7 a.m. and 10 p.m.

Similar to conditional use permit findings in other jurisdictions, the Long Beach Municipal Code included a finding that the proposed use will not be detrimental to the surrounding community including public health, safety or general welfare, environmental quality or quality of life, Real v. City of Long Beach, (9th Cir. 2017) 852 F.3d 929. While the City of Long Beach argued that the petitioner lacked standing to sue (because they had not applied for a conditional use permit) and that the ordinance did not restrict speech, but rather, placed reasonable time, place and manner restrictions on the use. The court ultimately disagreed. With respect to the standing argument, the court held that when a licensing ordinance vests unbridled discretion in a government official over whether to permit or deny expressive activity, a prospective operator has standing to challenge the ordinance in spite of never having applied for a conditional use permit. With respect to the City of Long Beach's argument that the ordinance did not unduly restrict expressive activity, but rather, consisted of time, place and manner restrictions, the court reasoned that the ordinance was not narrowly tailored to serve a significant governmental interest and allow ample alternative channels for expression.

These two decisions by the courts serve as a guide to the City of Newport Beach in updating its zoning provisions related to tattoo establishments.

Summary of City's Current Regulations

Sections 20.70.020 and 21.70.020 of the NBMC define tattoo services as a Restricted Personal Service use which is broadly permitted in all office zones, commercial zones (except the CM zone) and mixed-use zones subject to MUP. This use classification is intended for personal service establishments that may need to be dispersed from other similar uses to minimize adverse impacts. Other personal service uses classified under this category include day spas, healing arts and tanning salons. In order to approve the MUP, the Zoning Administrator must find:

1. The use is consistent with the General Plan and any applicable specific plan;
2. The use is allowed within the applicable zoning district and complies with all other applicable provisions of this Zoning Code and the Municipal Code;
3. The design, location, size and operating characteristics of the use are compatible with the allowed uses in the vicinity;
4. The site is physically suitable in terms of design, location, shape, size, operating characteristics, and the provision of public and emergency vehicle (e.g., fire and medical) access and public services and utilities; and
5. Operation of the use at the location proposed would not be detrimental to the harmonious and orderly growth of the city, nor endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, safety, or general welfare of persons residing or working in the neighborhood of the proposed use.

The above criteria required for approving a tattoo establishment are subjective in nature and raise concerns that a court would find these standards vest unbridled discretion in granting a permit to operate and whether they are narrowly tailored to serve a significant governmental interest and allow ample alternative channels for expression in accordance with the *Long Beach* decision.

Proposed Amendment

The proposed code amendment would allow ministerial approval of tattoo establishments in commercial zones of the City subject to separate requirements and other development and operational standards delineated below. The proposed code amendment would serve the objectives of creating reasonable time, place and manner restrictions as required by the First Amendment while also ensuring tattoo establishments are compatible with the surrounding area, do not result in an overconcentration, and maintain the quality and character of the community.

Definition and Table Revision

The proposed code amendment defines tattoo establishments as its own use type (Attachment A) separate and distinct from other Restricted Personal Service Use types and modifies relevant tables demonstrating the zoning districts where tattoo establishments are permitted.

Development Standards

The proposed code amendment incorporates development standards for the operation of a tattoo establishment including zones where the use is allowed, site and floor plan requirements to ensure the operation is fully contained within the building and does not spillover to the outdoors, parking requirements, signage requirements as well as separation requirements. With respect to the zones where the use would be allowed, tattoo establishments would be authorized only in the following specific zones: CG (Commercial General), OG (Office General), and OR (Office Regional).

With respect to the separation requirements, a tattoo establishment could not operate within 1,000 feet of another tattoo establishment, 500 feet of sensitive uses such as schools or playgrounds, and 500 feet from residential. The proposed zoning districts, along with the separate requirement, ensures ample locations for tattoo establishments to locate while preventing overconcentration, ensuring compatibility with surrounding uses, and mitigating secondary effects. Staff analyzed the proposed locational requirements and found that in addition to the five existing tattoo establishments currently operating in the City, there are approximately 150-200 potentially available sites for the establishment of new tattoo business when factoring in the locational requirements under the proposed code amendment and the number of existing suites/offices provided at these locations.

It is important to note that the proposed 1,000-foot separation requirement between tattoo establishments will diminish the availability of sites as new tattoo businesses are opened.

Operating Standards

The proposed ordinance would establish hours of operation, ensure the operation and the area within its vicinity are properly maintained, require the operation to be in compliance with Chapter 10.26 (Community Noise Control) noise requirements, require security cameras and screening, as well as limiting the consumption of alcohol or marijuana on the premises.

Finally, tattoo establishments and artists operating within the establishment are required to comply with all other applicable license and permitting requirements.

Existing Tattoo Establishments

There are five existing tattoo establishments within the City that are legally permitted to operate under the City's current zoning regulations. These five establishments would become legal non-conforming uses as a result of adopting the proposed code amendment based upon the zoning district in which they are located or the locational/separation requirements of the proposed ordinance. As non-conforming uses, these establishments would be able to continue operating but would be required to obtain a conditional use permit in order to expand or intensify their use in accordance with Section 20.38.050 (Nonconforming Uses) of the NBMC. Non-conforming rights to operate would cease in the event the tattoo establishment use is discontinued for 180 consecutive days.

General Plan Consistency

The proposed code amendment does not introduce any new Zoning Districts or General Plan Land Use Plan Categories in which tattoo establishments would be permitted. The General Commercial and Regional Commercial Office are the two General Plan Land Use Categories under which tattoo establishments would continue to be allowed. These two designations allow for a range of uses and are consistent with the proposed Zoning Code amendment.

Local Coastal Plan

Similar to Title 20 (Planning and Zoning), Title 21 (Local Coastal Program Implementation Plan) currently regulates tattoo establishments. Therefore, subsequent to City Council adoption of this Zoning Code Amendment, staff will submit corresponding amendments (Attachment B) to the LCP for review and approval of the California Coastal Commission.

Planning Commission Recommendation

The proposed code amendment was initially presented to the Planning Commission on May 6, 2021.

After receiving a presentation from staff and discussing the item, the Planning Commission voted (7-0) to continue the item to allow staff additional time to research and respond to the Commission's questions such as exploring smoking limitations and hours of operations (Attachment D). At the July 22, 2021, Planning Commission meeting, staff provided feedback to the commission in response to questions from the previous meeting as well as suggested modifications to the ordinance to limit the hours of operation to appointment only and a provision that would prohibit clients, guests or staff from smoking within 20 feet of the tattoo establishment. At the conclusion of the public hearing and after deliberations, the Planning Commission adopted Resolution Nos. PC2020-018 and PC2020-019 by a vote of 5-0 (2 members absent); thereby recommending the City Council adopt the zoning ordinance and local coastal program amendment (Attachments F & G). It should be noted that staff incorporated one clarification to the proposed amendment to make clear separation requirements from existing legal non-conforming properties within the Santa Ana Heights Specific Plan are excluded from residential separation requirements. A small number of legal non-conforming properties remain in proximity to areas in which tattoo establishments would be permitted under the proposed ordinance; however, the overall intent of the zoning in this area is to support business park uses. The small number of legacy residential uses that currently remain are expected to transition to office or commercial uses over time.

FISCAL IMPACT:

There is no fiscal impact related to this item.

ENVIRONMENTAL REVIEW:

The Code Amendment is categorically exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3), the general rule that CEQA applies only to projects, which have the potential for causing a significant effect on the environment. While this amendment would allow tattoo establishments as a permitted use within the City, it does not authorize new development that would directly result in physical changes to the environment. There is no evidence that amending the regulations for tattoo establishments would result in any new effects on the environment. Additionally, pursuant to CEQA Guidelines Section 15265(a)(1), local governments are exempt from the requirements of CEQA in connection with the adoption of a Local Coastal Program.

NOTICING:

Pursuant to Section 13515 of the California Code of Regulations, a review draft of the LCP amendment was made available and a Notice of Availability was distributed on September 28, 2021.

Notice of the proposed amendments was published in the *Daily Pilot* as an eighth-page advertisement, consistent with the provisions of the NBMC. The item also appears on the agenda for this meeting, which was posted at City Hall and on the City Website. Finally, notice was mailed to all property and business owners for properties and/or businesses that were previously identified as having a nonconforming sign; as well as, emailed to all persons that submitted written correspondence regarding this item.

ATTACHMENTS:

- Attachment A – Zoning Ordinance No. 2021-27
- Attachment B – City Council Resolution No. 2021-127
- Attachment C – Planning Commission Staff Report July 22, 2021
- Attachment D – May 6, 2021 Planning Commission Minutes Except
- Attachment E – July 22, 2021 Planning Commission Minutes Except
- Attachment F – Planning Commission Resolution No. PC2020-018
- Attachment G – Planning Commission Resolution No. PC2020-019
- Attachment H – Strike Out Redline