

1975

Jim Jensen, et al., Blanche Parsons, et al. v. Salt Lake County Board of Commissioners, et al. : Brief of Respondent

Utah Supreme Court

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D Kendall Perkins; Phil L Hansen; Attorneys for Plaintiffs and Respondents.

Carl J Nemelka; Salt Lake County Attorney; Richard S Shepherd; Deputy County Attorney; Attorneys for Defendants-Appellants .

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J. Reuben Clark Law School

JIM JENSEN, et al.,

Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD
OF COMMISSIONERS, et al.,

Defendants-Appellants,

BLANCHE PARSONS, et al.,

Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD
OF COMMISSIONERS, et al.,

Defendants-Appellants.

Case No.
13682

FILED
OCT 4 - 1974

Clk't. Supreme Court, Utah

BRIEF OF RESPONDENTS

JIM JENSEN, et al.

Appeal from Declaratory Judgment of the
District Court of Salt Lake County, State of Utah
Honorable Stewart M. Hanson

PHIL L. HANSEN
250 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorney for Plaintiffs-
Respondents Jim Jensen,
et al.

D. KENDALL PERKINS
Newhouse Building
Salt Lake City, Utah 84111

Attorney for Plaintiffs-
Respondents Blanche Parsons,
et al.

CARL J. NEMELKA
Salt Lake County Attorney

RICHARD S. SHEPHERD
Deputy County Attorney
C-220 Metropolitan Hall of
Justice
Salt Lake City, Utah 84111

Attorneys for Defendants-
Appellants

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I	
THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDINANCE IS PREEMPTED BY SECTION 58-1-1.1 OF UTAH CODE ANNOTATED (1953) ..	4
POINT II	
THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDIN- ANCE IS PREEMPTED BY THE CRIMINAL CODE WITH ITS ENUM- ERATED PROHIBITIONS AND PEN- ALTIES WITH REGARD TO SEX ACTS	10
POINT III	
THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDIN- ANCE ARBITRARY, UNCERTAIN, AND VAGUE	15
CONCLUSION	20

AUTHORITIES CITED Page

Cases

<i>Abbott v. City of Los Angeles</i> , 55 Cal.2d 74, 3 Cal. Rptr. 158, 349 P.2d 974 (1960)	7
<i>Blumenthal v. Board of Medical Examiners</i> , 18 Cal. Rptr. 501, 368 P.2d 101 (1963)	16, 17
<i>Corey v. City of Dallas</i> , 352 F. Supp. 977 (1972)	11, 12
<i>J.S.K. Enterprises v. City of Lacey</i> , 6 Wash. App. 43, 492 P.2d 600 (1971)	16, 18
<i>Lancaster v. Municipal Court for the Beverly Hills Judicial District of Los Angeles County</i> , 100 Cal. Rptr. 609, 494 P.2d 681 (1972)	11
<i>Snedeker v. Venmar, Ltd.</i> , 151 So.2d 439 (1963)	16, 19
<i>Whittle v. State Board of Examiners of Psychologists</i> , 483 P.2d 328 (1971)	16

Statutes

Utah Code Ann. §58-1-1.1 (1953)	4, 9, 10
Utah Code Ann. §58-24-5 (1953)	7
Utah Code Ann. §58-24-9 (1953)	8
Utah Code Ann. §§76-10-1301 thru -06 (1953)	14, 20

Ordinances

Revised Ordinances of Salt Lake County, 1966 §15-18-4 (5) as amended	2, 3, 4, 7, 10, 14, 15, 20
Revised Ordinances of Salt Lake County, 1966 §16-23-4 as amended	14, 20

IN THE SUPREME COURT OF THE STATE OF UTAH

JIM JENSEN, et al.,

Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD
OF COMMISSIONERS, et al.,

Defendants-Appellants,

BLANCHE PARSONS, et al.,

Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD
OF COMMISSIONERS, et al.,

Defendants-Appellants.

Case No.
13682

BRIEF OF RESPONDENTS

JIM JENSEN, et al.

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a declaratory judgment entered by the Honorable Stewart M. Hanson, Judge of the Third Judicial District Court, declaring Section

15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, to be null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

DISPOSITION IN LOWER COURT

The captioned cases were consolidated for trial before the Honorable Stewart M. Hanson, Judge of the Third Judicial District Court. The cases came on regularly for hearing before Judge Hanson on March 18, 1974. After hearing, Judge Hanson issued a Memorandum Decision declaring Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, to be null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the lower court's judgment that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, is null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

STATEMENT OF FACTS

On May 23, 1973, the Salt Lake County Board of Commissioners approved and enacted into law an amendment to Section 15-18-4 of the Revised Ordi-

nances of Salt Lake County, 1966, as amended. Said amendment provided an additional subsection (5) to such ordinance, which required the filing by license applicants with the Salt Lake County License Director:

(5) A certificate showing that:

a) the applicant has practiced as a massage therapist for a period of at least five (5) years prior to the date of this amendment to the Massage Parlor Regulations; or

b) That the applicant is a graduate of a massage and therapy school approved by the American Massage and Therapy Association; or

c) is a fully accredited member, in good standing, of the American Massage and Therapy Association.

Subsequent to the enactment of the above ordinance by the Salt Lake County Board of Commissioners, the respondents, massage parlor owners and employees of massage parlors respectively, brought the captioned actions seeking a declaratory judgment that the ordinance was null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

The above cases were consolidated for hearing and came on regularly for such hearing before the Honorable Stewart M. Hanson, Judge of the Third Judicial District Court, on March 18, 1974. Upon hearing, Judge Hanson issued a Memorandum Decision declaring Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, to be null and void and

beyond the power of the Salt Lake County Board of Commissioners to enact. From that decision and judgment, defendants-appellants bring this appeal.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDINANCE IS PREEMPTED BY SECTION 58-1-1.1 OF UTAH CODE ANNOTATED (1953).

Appellants contend in the Point I portion of their brief that the trial court erred in ruling that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, is preempted by Section 58-1-1.1, Utah Code Annotated (1953). Appellants' contention clearly will not withstand careful scrutiny.

Section 58-1-1.1, Utah Code Annotated (1953) provides:

The right to engage in any lawful profession, trade or occupation is an inherent right and such right shall not be impaired through state regulation unless the interests of the people of the state generally, as distinguished from those of a particular class, require such regulation and state regulation is the most effective and equitable means of providing the necessary protection to the people of the state. It is further declared that the relative degree of hazard to the public health, safety or welfare which may result from an unregulated profession, trade or occupation

shall be supported by adequate experience and research. Such research shall include, among other things:

1. That the practitioner performs a service for individuals which may directly result in a detrimental effect upon the public health, safety or welfare.

2. The view of the appropriate department concerning the proposed legislation and the recommendations and criticisms submitted by the department.

3. The view of a substantial portion of the people who do not practice these particular professions, trades or occupations.

4. The number of states which have similar regulatory professions [provisions] as those proposed.

5. The view of those who shall be subject to the proposed regulation.

6. That there is sufficient demand for the service for which there is no substitute not likewise regulated and this service is required by a substantial portion of the population.

7. That the profession, trade or occupation requires high standards of public responsibility, character and performance of each individual engaged in such profession, trade or occupation and is so indicated by established and published codes of ethics.

8. That the profession, trade or occupation requires such skill that the public generally is not qualified to select competent practitioners without some visible assurance that he has met minimum qualifications.

9. That professional, trade or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession, trade or occupation.

10. That the services of the profession, trade or occupation must be assured the public as a paramount consideration, regardless of cost.

11. That those laws which pertain to public health, safety and welfare generally are ineffective or inadequate. The characteristics of the profession, trade or occupation make it impractical or impossible to prohibit those practices of the profession, trade or occupation which are detrimental to the public health, safety or welfare.

Even the most cursory reading of the above-cited statute discloses that such statute provides for a state policy of noninterference in and nonregulation of professions, trades, and occupations unless a clear showing is made that the interests of the people require such regulation. In the event that the interests of the people are shown to require such regulation, the statute enunciates the further standards that (a) such regulation should be provided by the state if state regulation is shown to be the most effective and equitable means of providing the necessary protection to the people of the state, and (b) such regulation should be provided for only subsequent to a research study gauging the degree of hazard to the public health, safety, or welfare that will result if such regulation is not provided for.

It should be noted that the state statute on its face effectively preempts the area of regulation of profes-

sions, trades, and occupations by its declaration that the right to engage in a profession, trade, or occupation is an "inherent right" and by its clear proviso that "state regulation is the most effective and equitable means of providing the necessary protection to the people of the state" should regulation be found necessary. Thus, the county commission, by merely enacting Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, has improperly intruded into an area of regulation foreclosed from county regulation by the state statute. [See *Abbott v. City of Los Angeles*, 55 Cal.2d 74, 3 Cal. Rptr. 158, 349 P.2d 974 (1960).]

Secondly, it is manifest in the instant case that the state has already provided for indirect regulation of the practice of administering massage. In point of fact, two sections of Utah's Physical Therapy Practice Act contain provisions relating to the practice of administering massage.

Section 58-24-5, Utah Code Annotated (1953) provides:

(1) One year from the effective date of this act, no person shall practice or hold himself out as being able to practice physical therapy for compensation received or expected, in this state, unless he is licensed in accordance with the provisions of this act; provided, however, that nothing in this act shall prohibit:

(a) Any person licensed under the laws of this state from engaging in the practice for which he is licensed.

(b) *A person not licensed under this act from administering massage, external baths, or normal exercise, provided such person does not in any way represent himself to be a physical therapist.*

(c) Any person employed by an agency, bureau or division of the government of the United States from performing the duties for which he is employed while he is performing the duties of such employment. (Emphasis added.)

Section 58-24-9, Utah Code Annotated (1953) provides:

(1) The department and the committee shall issue a license as a physical therapist to each person who meets the following qualifications:

(a) Is a resident of the state of Utah at the time of the passage of this act.

(b) Complies with the provisions of section 58-24-6 (1), (2) and (3).

(c) Makes application within six months after the effective date of this act.

(d) Was practicing physical therapy:

(1) In the state of Utah at the time of passage of this act, or

(2) For at least three years during the past seven years, including at least one year of practice in this state.

(e) Pays a licensing fee of \$5.

(2) The department and the committee may, in their discretion, issue a license as a phy-

sical therapist to a person who meets the following qualifications:

(a) Qualifies under section 58-1-19, Utah Code Annotated 1953.

(b) Is a resident of the state of Utah.

(c) Complies with the provisions of section 58-24-6 (1), (2), (3) and (6).

For the purposes of this section, a person merely administering massages, external baths or normal exercise shall not be deemed to be a physical therapist or entitled to licensure under this section. (Emphasis added.)

The above statutes clearly indicate that the Legislature has reviewed the practice of administering massage in connection with the enactment of the Physical Therapy Practice Act and has concluded that the practice of massage is not a profession, trade, or occupation so affecting the public interest as to require state regulation. Since the State Legislature has apparently made that determination, the county ordinance constitutes an unwarranted and improper intrusion by the county into an area of regulation preempted by the State Legislature.

Finally, even if we assume, *arguendo*, that the county could properly regulate the practice of administering massage, it would still be necessary for the county, in enacting such a regulatory ordinance, to conform to the procedural requirements established by Section 58-1-1.1, Utah Code Annotated (1953) relating to necessary "research" gauging the degree of hazard

to the public safety, health, or welfare that will result if such regulation is not provided for. In the instant case, no such "research" was conducted precedent to the enactment of the ordinance and therefore the ordinance for that reason does not conform to the requirements of Section 58-1-1.1.

From the above it should be abundantly clear that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County is preempted by Section 58-1-1.1, Utah Code Annotated (1953). For that reason, this court should affirm the decision of the trial court that the county ordinance is null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

POINT II

THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDINANCE IS PREEMPTED BY THE CRIMINAL CODE WITH ITS ENUMERATED PROHIBITIONS AND PENALTIES WITH REGARD TO SEX ACTS.

Appellants contend in the Point II portion of their brief that the trial court erred in ruling that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, is preempted by the Utah Criminal Code with its enumerated prohibitions and penalties with regard to sex acts. This argument also will not bear careful examination.

It is well established as a matter of law that a county or municipal ordinance is invalid if it attempts to impose additional prohibitions or requirements in an area already occupied by the state, or is in conflict with or duplicates state law in an area where the state has already legislated. *Lancaster v. Municipal Court for the Beverly Hills Judicial District of Los Angeles County*, 100 Cal. Rptr. 609, 494 P.2d 681 (1972); *Corey v. City of Dallas*, 352 F. Supp. 977 (1972).

In *Lancaster v. Municipal Court for the Beverly Hills Judicial District of Los Angeles County*, *supra*, the California Supreme Court held that a county ordinance which prohibited the massage of a person by a member of the opposite sex constituted a regulation of sexual conduct and was therefore invalid because the state had preempted the regulation of criminal aspects of sexual activity to the exclusion of local regulation. The court found that although it was argued that the ordinance should be viewed as a regulation of the massage parlor business and not as a regulation of sexual conduct, the underlying purpose of the ordinance was to make the task of the police department easier in their fight against prostitution and lewd conduct, and therefore the ordinance was a regulation of sexual conduct and must be held invalid because the state had preempted the regulation of the criminal aspects of sexual activity. In its decision, the court said:

There has been no suggestion of any reasonable purpose to the ordinance before us other than to limit sexual activity. Although it has been

urged that the ordinance should be viewed as a regulation of the business of administering massages and not a sexual regulation, the only specification of any actual or potential evil is the sexual activity which may follow in the wake of the massage.

* * *

At oral argument the district attorney admitted that the ordinance was a sexual regulation when he stated, "The purpose of the prohibition . . . is to regulate a source of licentiousness . . . this ordinance regulates nude exposure." This admission clearly indicates that the purpose of the ordinance in question was not to regulate the operation of massage parlors but was aimed at making the task of the police department and sheriff's office easier in their fight against prostitution and lewd conduct. We are satisfied that the ordinance is a regulation of the criminal aspects of sexual conduct. . . .

* * *

We conclude that the Los Angeles ordinance which is a regulation of sexual conduct must be held invalid because the state has preempted the criminal aspects of sexual activity. (494 P.2d at 683-684.)

Similarly, in *Corey v. City of Dallas*, *supra*, the United States District Court for the Northern Division of Texas, in overturning a city ordinance prohibiting massage upon persons of the opposite sex, held that the ordinance was repugnant to the Fourteenth Amendment since there were alternative methods which the city could employ to achieve the ordinance's explicit purpose of prohibiting illegal sexual conduct.

In its decision the court found that the underlying purpose of the ordinance was to prohibit illegal sexual conduct, and since the ordinance affected the fundamental right to work, the interest of the City of Dallas in enforcing the ordinance must be based on a compelling governmental interest. The court concluded that such compelling governmental interest was lacking in the case because there were alternative methods which the city could employ to achieve the objectives of the ordinance without affecting the rights of persons to carry on a legitimate business since there were other city ordinances and state statutes which prohibited lewd and immoral conduct. In its decision, the court said:

The evidence in this case shows that the underlying purposes of Section 25A-15 are the prohibition of illegal sexual conduct between persons of the opposite sex under the guise of administering massages and the formulation of agreements between males and females to commit such acts at other places.

The court feels such an interest is lacking in this case because there are alternative methods which the City of Dallas may employ to achieve the objective of the ordinance. . . . There are . . . other city ordinances and state statutes which prohibit lewd and immoral conduct. Since alternative remedies are available to the City of Dallas, the objectives of Section 25A-15 are not superior to the fundamental rights of those who may be adversely affected by the enforcement of that provision of the ordinance. (352 F. Supp. at 981-982.)

Applying the above-cited cases and authority to the facts in the instant case, it is clear that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, is invalid in that it attempts to impose additional prohibitions or requirements in an area already occupied by the state.

Evidence adduced at trial in this matter established clearly and beyond dispute that the underlying purpose of subsection (5) of Section 15-18-4 of the Revised Ordinances is not to regulate the operation of massage parlors or to set standards for massagists, but to assist Salt Lake County Sheriff's officers in combating illegal sexual activities allegedly associated with local massage parlors. [See in this regard the testimony of Commissioner Pete Kutulas, Tr. 111-112, and the testimony of Nicholas G. Morgan, Ill, Tr. 117-119.]

Since the underlying purpose of subsection (5) of Section 15-18-4 of the Revised Ordinances is not to regulate the operation of massage parlors or to set standards for massagists, but to assist Salt Lake County Sheriff's officers in combating and regulating illicit sexual activity, subsection (5) directly supplements and conflicts with existing state (Utah Code Annotated Sections 76-10-1301 thru -06 (1953) and county (Section 16-23-4) criminal legislation under the guise of regulating massagists. For that reason, subsection (5) constitutes an unwarranted and improper intrusion by the county into an area of regulation preempted by the State Legislature. Thus, the trial court properly struck down

the ordinance as null and void and beyond the power of the Salt Lake County Board of Commissioners to enact.

POINT III

THE TRIAL COURT DID NOT ERR IN RULING THE COUNTY ORDINANCE ARBITRARY, UNCERTAIN, AND VAGUE.

Appellants contend in the Point III portion of their brief that the trial court erred in ruling that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, was arbitrary, uncertain, and vague. This argument also is misconceived and will not withstand close analysis.

Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County is clearly an arbitrary and unreasonable exercise of police power because it arbitrarily discriminates between persons who can qualify under the ordinance and persons who, regardless of their qualifications, do not meet the prescribed standards and consequently cannot qualify. It requires that an applicant for a license either have five years' prior experience as a massage therapist or be a graduate of an approved school of massage therapy or be an accredited member of the American Massage and Therapy Association. It contains no provision for alternative procedures for qualification for individuals who have an established practice as a massagist, but fail to have the required five years' experience or education or membership to be able to demonstrate their qualifications. Nor does it

provide for an apprentice-type program for individuals presently employed within the profession so they can acquire the necessary experience. Consequently, the effect of subsection (5) is to prohibit those individuals from practicing their chosen occupation, not because they are incompetent or unethical or engage in immoral activities, but because they not do have the good fortune to meet the standards that are arbitrarily established and required.

Other courts have held similar legislative attempts to regulate individuals practicing in the healing arts to be unconstitutionally arbitrary and unreasonable so as to constitute a denial of equal protection under the Fourteenth Amendment. *Whittle v. State Board of Examiners of Psychologists*, 483 P.2d 328 (1971); *Blumenthal v. Board of Medical Examiners*, 18 Cal. Rptr. 501, 368 P.2d 101 (1963); *J.S.K. Enterprises v. City of Lacey*, 6 Wash. App. 43, 492 P.2d 600 (1971); *Snedeker v. Venmar, Ltd.*, 151 So.2d 439 (1963).

In *Whittle v. State Board of Examiners of Psychologists*, *supra*, the Oklahoma Supreme Court held unreasonable a state statute similar to the county ordinance challenged in the instant case. The statute required that a psychologist, if he did not have a doctor's degree, have five years' experience under approved supervision in order to be licensed, but made no provision for an alternate way for him to establish or demonstrate his qualifications or competence. In its decision, striking down the statute, the court said:

Since Plaintiffs-in-Error had established a successful practice as psychologists in Oklahoma at a time when it was lawful to do so in this State without licensing, that practice must be viewed as a vested property right, subject only to such subsequent regulation as might be reasonably and rationally related to safeguarding the public health and welfare We feel that under the circumstances, the Board should have established some reasonable alternative procedure for allowing the applicant to demonstrate his competence. We hold that since the applicant was not statutorily entitled to take the examination to demonstrate his competence, the administrative rule herein resulting in the denial of a license without a suitable alternative procedure to demonstrate such competence was unreasonable. (483 P.2d at 329-330.)

Similarly, in *Blumenthal v. Board of Medical Examiners, supra*, the California Supreme Court held that a licensing statute for an optician was invalid in that it prescribed that the necessary five years' experience could be obtained in only two ways, neither of which was arguably superior to many other ways of obtaining experience.

In its decision, the court concluded that the necessary expertise could be obtained in ways other than that outlined in the statute, and that there was an absence of any relationship between the requirements imposed and the object of the legislation. In its decision, the court held:

There is a complete absence of any relationship between the experience requirements sought

to be imposed and the legislative effort to correct ethical abuses in the profession. The Legislature has taken direct action against these abuses and may take such further action as it deems necessary, but it cannot reasonably be concluded that the legislation in question bears any relation to these problems. (368 P.2d at 104.)

In *J.S.K. Enterprises v. City of Lacey*, *supra*, the Washington Supreme Court struck down a city massage parlor ordinance prohibiting massages upon persons by members of the opposite sex. The court held that the ordinance constituted an unreasonable exercise of police power in that (a) it went beyond the objective of protecting the public from lewd acts in massage parlors, (b) was unduly oppressive to massagists and their patients, and (c) constituted discrimination on the basis of sex.

In its decision, the court recognized that the massage business was a potential setting for lewd and immoral acts. Further, it acknowledged that a city, in the exercise of its police power, could regulate massagists on the grounds of public health, safety, or welfare. But the court stressed that, as in any other exercise of the police power, the means adopted must be reasonably necessary and appropriate to accomplish the objective sought, and must not be unduly oppressive upon individuals. Applying these criteria, the court found that the ordinance was an unreasonable and arbitrary exercise of police power because it went beyond the means necessary and appropriate to accomplish its objective

and was unduly oppressive to massagists and their patients.

Finally, in *Snedeker v. Venmar, Ltd., supra*, a suit for declaratory judgment was brought to determine the constitutionality of a statute regulating masseurs which required (a) that such persons be graduates of an accredited massage school, or (b) that such persons submit proof of like experience or education. The question raised was whether or not the provision was reasonably related to public interests which may be protected by the exercise of police power. In its decision, the Florida court held that there was no reasonable relationship between the statutory requirement and public safety or welfare because the course of technical training required (600 hours' schooling or like experience) would not make the masseurs any more competent in their particular occupation or enable them to perform those functions better, and was therefore not an interest in behalf of which the police power could be properly exercised.

Applying the rationale of the above-cited cases to the facts in the instant case, there is no indication that the requirements imposed by subsection (5) bear any rational relationship to the experience or training necessary to become a competent massagist. The ordinance simply overlooks the fact that there are other ways to become a qualified massagist. It attempts to place massagists in the category of physical therapists, and it is unreasonable to impose or correlate the educational

requirements and experience required to be a physical therapist with the experience and training to become a massagist. Because the experience or educational requirements are disproportionate to actual training and experience necessary to become a competent massagist, and because there is no provision for massagists who do not meet those requirements to demonstrate their competence, the ordinance is an arbitrary and unreasonable exercise of police power.

Secondly, even though admittedly there are undeniable abuses within the massage profession, both the state (Utah Code Annotated Sections 76-10-1301 thru -06 (1953) and the county (Section 16-23-4) have legislation directed against any such abuses, and can therefore take direct action against such abuses. The requirements imposed by subsection (5) bear no reasonable relationship to either abuses within the profession or regulation of massagists. Since the requirements imposed by subsection (5) have no reasonable relationship to abuses within the profession or regulation of massagists, and since the ordinance effectively acts as an outright prohibition of the right of individuals to work in their chosen occupation, the ordinance is an arbitrary and unreasonable exercise of the power to regulate.

CONCLUSION

The trial court did not err in ruling that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake

County, 1966, as amended, is preempted by Section 58-1-1.1 of the Utah Code Annotated (1953). Moreover, the trial court did not err in ruling that said county ordinance is preempted by the Utah Criminal Code's enumerated prohibitions and penalties with regard to sex acts. Finally, the trial court did not err in ruling that such ordinance was uncertain, arbitrary, and vague on its face. This court should affirm the trial court's ruling that Section 15-18-4 (5) of the Revised Ordinances of Salt Lake County, 1966, as amended, is null, void, and beyond the power of the Salt Lake County Board of Commissioners to enact.

Respectfully submitted,

PHIL L. HANSEN
250 East Broadway, Suite 100
Salt Lake City, Utah 84111

Attorney for Plaintiffs-
Respondents Jim Jensen, et al.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondents Jim Jensen, et al. was served on counsel for the appellants, Carl J. Nemelka and Richard S. Shepherd, C-220 Metropolitan Hall of Justice, Salt Lake City, Utah 84111, and counsel for respondents Blanche Parsons, et al., D. Kendall Perkins, Newhouse Building, Salt Lake City, Utah 84111, by mailing three copies thereof in a postage prepaid envelope on the 3 day of October, 1974.

W. Dennis Hall