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IN THE SUPREME COURT OF THE STATE OF UTAH

HART HEALTH STUDIO, et al.,	)	
Plaintiff-Appellants,	)	
-v-	)	No. 15164
SALT LAKE COUNTY, et al.,	)	
Defendants-Respondents.	)	

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-appellants initiated this action in the lower court to obtain declaratory and injunctive relief from the enforcement of various provisions of Chapter 18, Title 15 of the Revised Ordinances of Salt Lake County, 1966, as amended, entitled "Massages".

DISPOSITION IN THE LOWER COURT

On the 1st day of April, 1977, the Honorable Dean E. Conder, Judge of the District Court of Salt Lake County, State of Utah, granted in part defendants' motion for summary judgment, finding that all of Chapter 18, Title 15 of the Revised Ordinances of Salt Lake County, 1966, as amended, being Ordinance 589 entitled "Massages" was valid, constitutional, and enforceable, except Section 15-18-3(d), which requires a license fee of $5,000 for

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any massage parlor operating at the same location wherein
massage parlor business had previously operated and whose
license had been revoked within the past twelve months.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the part of the lo
court's decision which held the majority of Chapter 18, T
15 of the Revised Ordinances of Salt Lake County, 1966, as
amended, entitled "Massages", valid, constitutional and e
forceable.

STATEMENT OF FACTS

After the court suggested general guidelines for a va
massage parlor licensing ordinance in the <u>Terri Anne Peatr</u>
<u>dba Heidi's Massage vs. Board of Commissioners of Salt La</u>
<u>County, et al</u>. case 555 P.2d 281 (1976), the Board of Coun
Commissioners of Salt Lake County held a public hearing on
November 4, 1976, regarding a newly proposed massage parlo
ordinance, which would regulate sole practitioners providi
therapeutic type massages during the day, and massage parl
providing pleasure type massages mainly during the evening
night. Based on the evidence presented at the public hear
from various sole practitioners and massage parlor license
the Board of County Commissioners of Salt Lake County revi
the proposed ordinance and enacted the following ordinance
January 24, 1977:

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"Chapter 18

MASSAGES

Sections:

15-18-1	Definitions
15-18-2	License Required
15-18-3	License Fees
15-18-4	Application for a License
15-18-5	Investigation of Applicants
15-18-6	Unlawful Conduct
15-18-7	Health Standards
15-18-8	Issuance
15-18-9	Display of License
15-18-11	Revocation or Suspension of License
15-18-12	Penalties
15-18-13	Severability

Sec. 15-18-1. Definitions

(1) The word "massage" means a manual or mechanical manipulation of the parts of the body, as by rubbing, kneading, slapping or the like used to promote circulation, relax muscles, and so on, as in deep muscle therapy and/or by the use of turkish, russian, swedish, vapor, electric, salt, mineral, magnetic, hydro or other kind or character of baths.

(2) A "masseur" is any person, not otherwise duly licensed by the department of registration of the State of Utah to practice those treatments referred to above, who is employed by a massage parlor to engage in, conduct, or carry on the giving of treatments to another person by the application of manual and/or mechanical manipulation or massage, fomentation, bath, or electric massage procedure, heat, light, exercise, or other similar procedures, for a fee.

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(3) A "massage parlor" is a public or private establishment where two or more licensed masseurs are hired, individually, or act as an association, firm, or corporati which engage in, conduct, carry on, or permit to be carri on, the business of giving massages.

(4) A "sole practitioner" is any self employed indi utilizing a private home, office, building, or structure, wherein no other masseur or sole practitioner is operatin for the purpose of engaging in, conducting, carrying on, c mitting to be carried on, the business of giving massages.

Sec. 15-18-2. License Required. It shall be unlawf any person to operate, conduct, carry on, or maintain a parlor or to work as a masseur or sole practitioner in Sal County without first obtaining a business license.

Sec. 15-18-3. License Fees. Effective January 1, 1 the following annual license fees shall be charged:

(a) For a massage parlor: $250.00
(b) For a sole practitioner: $25.00
(c) For a masseur: $25.00
(d) For any massage parlor operating at the s location wherein a massage parlor busines had been previously operated, and whose l had been revoked, within the past 12 mont period by the Board of County Commissione $5,000.00, and
(e) For any massage parlor employing any of th masseurs who worked at any massage parlor business whose massage parlor license ha revoked within the past 12 months period, the Board of County Commissioners: $5,0

Sec. 15-18-4. Application for a License. Every pers

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desiring a masseur, sole practitioner, or massage parlor license shall apply to the director of the Salt Lake County License Department, and shall file with the said application the following:

(1) A statement under oath showing the street, building, and room number of the place where he proposes to conduct, operate, carry on or maintain such massage parlor or engage in the pursuits of a masseur, or sole practitioner.

(2) A statement setting forth the exact nature of the business or pursuits to be conducted, maintained or carried on in said massage parlor or by said masseur or sole practitioner.

(3) A certificate signed by at least three reputable residents of Salt Lake County testifying as to the moral character of the applicant.

(4) A certificate from a licensed physician certifying that each applicant, is free from communicable disease.

Sec. 15-18-5. Investigation of Applicants. Applicants for licensing as a massage parlor, sole practitioner, or as a masseur shall be referred to the Sheriff and the Salt Lake City-County Board of Health for investigation and recommendation as to the moral character of the applicant and the sanitary conditions of the premises to be used. These findings shall be delivered to the license director for referral to the Salt Lake County Commissioners.

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Sec. 15-18-6. Unlawful Conduct. The following acts prohibited from being performed by masseurs, massage parl licensees, or sole practitioners.

(1) The performance of sexual acts prohibited the Utah State Criminal Code as found in Title 76, Utah C Annotated, 1953, as amended.

(2) The performance of a massage in a locked r locked enclosure.

(3) The allowance of masseurs to massage perso the opposite sex, unless a performance or cash bond, paya Salt Lake County, in the amount of $5,000 is first posted massage parlor licensee to insure his masseurs' complianc all of the provisions of this ordinance.

(4) The massage of persons of the opposite sex massage parlor licensee, unless a performance or cash bon to Salt Lake County, in the amount of $5,000 is first pos the massage parlor licensee to insure his compliance with provisions of this ordinance.

(5) The massage of persons of the opposite sex sole practitioner between the hours of 7:00 p.m. and 7:00 a.m.

(6) The soliciting of customers from the doors windows of the licensed premises, or from off the street.

(7) The failure to change with every customer

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linen and towels used as part of the customer's massage.

(8) The allowance by a massage parlor licensee of his masseurs to model or pose for photographs, films, television, moving pictures, or drawings on his premises.

(9) The serving, or allowing to be consumed, of alcoholic beverages on the premises of a massage parlor's or sole practitioner's business premises.

(10) The operation of a massage parlor between the hours of 1:00 o'clock a.m. and 7:00 o'clock a.m. of any date, except that, during the calendar period of May 1 through October 31 of any year, both dates inclusive, the hours of unlawful operation shall be between the hours of 2:00 o'clock a.m. and 7:00 o'clock a.m. of any day.

Sec. 15-18-7. Health Standards. When the Salt Lake City-County Board of Health has probable cause to believe that the examination of a masseur, massage parlor licensee, or sole practitioner for communicable diseases is necessary for health and safety of the masseur or the public, it may require them to submit to a physical examination of a type to be determined by said Board of Health. All licensed premises must meet the Salt Lake-City County Board of Health regulations.

Sec. 15-18-8. Issuance. Upon receipt of the reports and recommendations from the Sheriff, Board of Health, and Director of the County License Department as to the moral character of the applicant, sanitary conditions of the premises used, fees,

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character reference certificates, and physical certificat of the applicant's health, the Board of Commissioners sha issue a license. Provided, no license shall be granted t applicant who has been convicted of a crime involving mor turpitude or having a communicable disease.

Sec. 15-18-9. Display of License. Every massage pa or sole practitioner licensed under this ordinance shall and every masseur licensed under this chapter shall displ licenses in a conspicuous place on the licensed premises with a notice listing all persons employed on the premises notice shall be at least in size 8 type.

Sec. 15-18-11. Revocation or Suspension of License. unlawful conduct whether the omission to perform an act re this ordinance, or the performance of an act prohibited by ordinance, shall be cause for revocation or suspension of massage parlor licensee's, sole practitioner's or masseur's The holder of a massage parlor license may have his licens or suspended for any and all violations of the provisions ordinance committed by his employees.

Sec. 15-18-12. Penalties. A person convicted of vio sub-sections 2, 6, 9 and 10 of Chapter 18, Title 15 of the Ordinances of Salt Lake County shall be fined not to excee $299.00, imprisoned in the Salt Lake County Jail not to ex six months, or both.

Sec. 15-18-13. Severability. In the event that any

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vision of this ordinance is declared invalid for any reason, the remaining provisions shall remain in effect."

The above ordinance was a compromise solution between Salt Lake City's outright ban of intersex massages, and Murray City's $5,000 massage parlor license fee.

On February 14, 1977, seven of the eleven massage parlor licensees operating in Salt Lake County and none of the eleven sole practitioners operating in Salt Lake County initiated a declaratory judgment action challenging the constitutionality of the above Section 15-18-3 (d) and (e) and Section 15-18-6(3) (4), (5), and (10) of the Revised Ordinances of Salt Lake County, 1966, as amended, entitled "Massages". The lower court, the Honorable Dean E. Conder presiding, partially granted defendants-respondants motion for summary judgment on March 10, 1977, ruling that all of the contested sections of the ordinance were valid, constitutional and enforceable, except Section 15-18-3(d), which was discriminatory and unlawful, and hence unenforceable.

Plaintiffs-appellants then filed an appeal seeking a reversal of the lower courts ruling upholding the validity of Section 15-18-3(e) and 15-18-6(3), (4), (5), and (10).

ARGUMENT

Point I

PLAINTIFFS-APPELLANTS HAVE NO CONSTITUTIONAL RIGHT TO A BUSINESS LICENSE TO PROVIDE BISEXUAL MASSAGES

The lower court did not err in holding, consistent with

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other jurisdictions, that Salt Lake County, as a municipal could regulate massage parlors and prohibit bisexual mass see Kisley vs. The City of Falls Church, 212 Va. 693, 187 3d 168, cert. den. for want to a substantial federal ques in 409 U. S. 907 (1972). Therefore, where the dismissal appeal by the U.S. Supreme Court for want of a substantial federal question is an adjudication on the merits, Hicks Miranda, 43 U.S.L.W. 4857, 95 S.Ct. 2281, 45 L.Ed.2d 223 Colorado Springs Amusements Ltd. vs. Rizzo, et. al., 524 571 (1975); plaintiffs-appellants have no federal constit right to a business license for the provision of bisexual Respondents may therefore regulate intersex massages by

Under state law, this court has consistently held th parlors and the activities therein may be regulated, see Ann Peatross dba Heidi's Massage vs. Salt Lake County Boa County Commissioners, et. al., supra. Respondents may the classify and regulate establishments administering massage businesses operating within the county limits. Nor is it of equal protection or due process for respondents to clas and prescribe different standards of operation for massage licensees utilizing employee masseurs, from those standar required of sole practitioners, see State vs. Samuel S. 541 P.2d 1124 (1975) and the federal and state cases cit therein. Therefore, as long as the massage parlor ordina

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provisions limiting hours of operations are applied uniformly and consistently to members of each class, there is no denial of equal protection, also see Saxe vs. Brier, 350 F. Supp 635 (1974) upholding the validity of hour limits on massage parlor operations. The fact that different hours of operations are specified for sole practitioners and massage parlor licensees is not relevent, since the enforcement problems in policing the acts of employees are entirely different.

Nor have appellants alleged that they are unable to post a cash or performance bond, or that the cost of posting either bond is prohibitive. Indeed, where four massage parlor licensees, not involved in this suit, have posted bonds and are operating pursuant to the ordinance provisions, there is no evidence that the posting of these performance bonds is a violation of due process or equal protection, see Rogers vs. Miller, 401 F. Supp. 826 (1975) upholding the validity of a municipality charging an annual $5,000 license fee to defer the costs of regulation.

Consequently, the requirement of a $5,000 performance bond to be posted by massage parlor licensees to insure that they self police the acts of their employee masseuses administering intersex massages is not an unreasonable regulation where it uniformly applies to all those massage parlors within the legislative class. The lower court should therefore be sustained in upholding the validity of Section 15-18-6(3),(4), and (5) of

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the Revised Ordinances of Salt Lake County, 1966, as amend
requiring the posting of performance bond by a massage par
licensee to insure the compliance of his masseur employees
the standards of conduct outlined in the ordinance.

Point II

THE LOWER COURT DID NOT ERR IN HOLDING THAT UTAH'S ANTIDISCRIMINATION AND CIVIL RIGHTS STATUTES ARE NOT VIOLATED BY COMPLIANCE WITH SALT LAKE COUNTY'S MASSAGE PARLOR ORDINANCE

Under Utah's Antidiscrimination Act, See. 34-34-3(5), U.C.A., 1953, as amended, an "employer", under the terms of act, must employ 25 or more employees before the provisions the act apply. None of the appellants employ more than 25 employees to have standing to raise this issue before the and therefore the lower court properly dismissed their chal to the massage parlor ordinance based on the Antidiscrimin Act.

Even if the Antidiscrimination Act did apply, an empl is not guilty of a discriminatory or unfair employment prac where he preferentially hires an individual on the basis of in those certain instances where sex is a bona fide occupat qualification reasonably necessary to the normal operation that particular business or enterprise, See Sec. 34-35-6, 1953, as amended. Therefore, where the intersex massage pr tion is a valid exercise of respondent's regulatory powers,

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massage parlor electing not to post a bond, and hiring employees to comply with municipal ordinances is not a violation of the Antidiscrimination Act.

Indeed, appellants are attempting to reverse the order of analysis of the statutes in question to claim a violation of both the Antidiscrimination Act, and the Civil Rights Act, by failing to first determine whether the ordinance is a valid exercise of respondent's regulatory powers. The Utah Civil Rights Act, Sec. 13-7-3, U.C.A., 1953, as amended, specifically states:

> "... Nothing in this act shall be construed to deny any person the right to regulate the operation of a business establishment or place of public accomodation or an enterprise regulated by the state in a manner which applies uniformly to all persons without regard to race, color, sex, religion, ancestry, or national origin..."

Consequently, where respondent applies its ordinance uniformly to all massage parlors, without regard to the sex of their clientele, the ordinance is not discriminatory, favoring the hiring of one sex over another sex, so that the ordinance in question conforms with Utah Civil Rights Act standards, see Smith vs. Keator, 285 N.C. 530,206 S.E.2d 203 (1974).

In summary, the lower court was correct in its ruling that Utah's Antidiscrimination Act and Civil Rights Act was not violated by compliance with respondent's massage parlor ordinance.

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Point III

THE ORDINANCE PROVISIONS REQUIRING A $5,000 MASSAGE PARLOR LICENSE FEE OF THOSE PERSONS CONTINUING THE BUSINESS OF A REVOKED MASSAGE PARLOR ARE VALID

Section 15-18-3(e) of the Revised Ordinances of Salt County, 1966, as amended, requiring a $5,000 license fee massage parlor licensees utilizing employees who have pre worked in a massage parlor whose license has been revoked violative of due process or equal protection requirements Rogers vs. Miller, supra. However, since respondents did file a cross-appeal challenging the lower courts ruling b the performance bond provisions were upheld, this point i properly before the court.

CONCLUSION

The lower court did not err in partially granting de respondents motion for summary judgment because all of th tested sections of the ordinance are valid, constitutiona enforceable. The lower court's decision should therefore affirmed on appeal.

Respectfully submitted,

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