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West Gallery Corporation v. Salt Lake City Board of Commissioners et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WEST GALLERY CORPORATION, :
a Utah corporation, dba :
GALLERY THEATERS, :

Plaintiff-Appellant, :

vs. : Case No. 15749

SALT LAKE CITY BOARD OF :
COMMISSIONERS, et. al., :

Defendants-Respondents. :
:

BRIEF OF APPELLANT

Appeal from an order denying Appellant's
motion for summary judgment and petition
for extraordinary relief rendered by the
Honorable David J. Dee, Judge of the Third
District Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WEST GALLERY CORPORATION,	:	
a Utah corporation, dba	:	
GALLERY THEATERS,	:	
Plaintiff-Appellant,	:	BRIEF OF APPELLANT
vs.	:	
SALT LAKE CITY BOARD OF	:	Case No. 15749
COMMISSIONERS, et. al.,	:	
Defendants-Respondents.	:	

STATEMENT OF THE NATURE OF THE CASE

This was an action brought pursuant to Rules 57 and 65 of Utah Rules of Civil Procedure to declare respondents' suspension of appellant's business, theater and soft drink licenses invalid and to arrest the implementation of the suspension.

DISPOSITION IN LOWER COURT

The matter came on for hearing before the District Court on appellant's motion for summary judgment. The District Court, with the concurrence of the parties, determined that no facts were in issue and entered an order denying appellant's motion and further denying appellant's petition for extraordinary relief.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the Order of the

District Court with direction to grant appellant extraordinary relief necessary to protect its rights under the First Amendment to the United States Constitution.

STATEMENT OF FACTS

On January 5, 1976, the then president of plaintiff corporation, James Piepenburg, was convicted in the District Court of exhibiting an obscene motion picture, "Memories Within Miss Aggie", in violation of §32-3-10 of the Revised Ordinances of Salt Lake City. On August 25, 1976, the plaintiff corporation was convicted in Salt Lake City Court of exhibiting an obscene motion picture, "Teenage Cover Girls", in violation of the same ordinance.

On September 2, 1976, the Mayor and the Board of Commissioners, acting through the Salt Lake City Attorney's Office, served notice upon the plaintiff to appear before the Board of Commissioners on October 7, 1976, in a matter termed "Order to Show Cause". This notice stated that the hearing was to be conducted pursuant to §20-3-9 and §20-20-11 of the Revised Ordinances of Salt Lake City, which purport to authorize the Board of Commissioners of Salt Lake City to revoke the business licenses of any persons whom the Commission finds has violated any ordinance of Salt Lake City or whom the Commission finds to have been convicted for any such violation.

The grounds for revocation were the aforementioned convictions.

A hearing was held on October 9, 1977, before the defendant Board of Commissioners and the Board entered Findings of Fact, Conclusions of Law, and a Decision suspending plaintiff's licenses for nine (9) months. The effect of the suspension has been stayed pursuant to an agreement of counsel and an Order of the United States District Court until such time as this case is resolved.

Plaintiff-appellant brought this action, at the suggestion of the U. S. District Court, seeking to have the suspension declared invalid and its implementation arrested. A number of grounds were alleged, however, the issues were narrowed in the District Court below to the single issue raised by this appeal.

ARGUMENT

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS A CITY FROM SUPPRESSING, BY MEANS OF LICENSE SUSPENSION, THE EXHIBITION OF FILMS WHICH ARE NOT OBSCENE BASED UPON CONVICTIONS OF THE EXHIBITOR OF EXHIBITING OTHER FILMS WHICH WERE FOUND TO BE OBSCENE.

The applicable sections of the Revised Ordinances of Salt Lake City provide:

\$20-20-1. Theater or hall operation. License required. It shall be unlawful for any person to operate any theater, motion picture show, concert hall, or other place of amusement not otherwise licensed by this Title without first obtaining a license to do so.

§20-20-11. Obscene Films Prohibited. It shall be unlawful for any person to hold, conduct, or carry on or permit to be held, conducted, or carried on any motion picture, exhibition, or entertainment of any sort which violates Chapter 2, Section 10, or Chapter 7, Section 7 of Title 32, or Chapter 20, Section 18.1 of Title 20 of the Revised Ordinances of Salt Lake City, Utah, 1965, as amended. Upon a finding by the Board of Salt Lake City Commissioners of a violation after hearing, or upon a conviction of any person of the aforesaid violations occurring in or on premises licensed under Chapter 20 of this Title, the Board of Commissioners of Salt Lake City may revoke or suspend the license or licenses covering businesses conducted on such premises, regardless of the license ownership thereof.

It is respectfully submitted that the defendants are acting under the color of the above City Ordinances of Salt Lake City to "lock up" and restrain a constitutionally guaranteed right, i.e., freedom of speech and expression. It must be noted that defendants are not limiting their curtailment of plaintiff's right to exhibit films to those films which are "obscene", but are attempting to prohibit plaintiff from exhibiting any film. Clearly, films which have been judicially determined to be obscene are not protected by the First Amendment. The issue here is whether the defendants can block the exhibition of material which is protected by the First Amendment because plaintiff has been convicted of exhibiting films which were not protected. The overwhelming weight of authority is clearly that such action is unconstitutional.

The courts of this nation have universally condemned prior restraint of speech and press, save in the most extraordinary of circumstances. In the leading United States Supreme Court case of Near v. Minnesota, 238 U.S. 697, 51 S. Ct. 625 (1931), the Court struck down a prior restraint very similar to that involved in the present case. The Near case involved a situation where a Minnesota statute provided for the prospective abatement of publications found to be either obscene or libelous,¹ based on the theory that such publications were enjoined as nuisances. The lower courts believed that the defendant in that case had made libelous accusations against members of the local government, and thus had engaged in conduct unprotected by the First Amendment. Accordingly, they felt no impropriety existed in enjoining the

1 Chapter 285 of the Session Laws of Minnesota, 1925, declared:

"Section 1. Any person...engaged in...producing, publishing or circulating, having in possession, selling or giving away

(a) an obscene, lewd and lascivious newspaper, magazine or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical; is guilty of nuisance..."

Section 2 provided an injunction to abate any nuisance found in Section 1.

defendant from all future publications, since he had abused his First Amendment rights in the past. The United States Supreme Court reversed, characterizing the state's conduct as unconstitutional prior restraint on protected First Amendment rights. The Court stated:

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon the charge of conducting a business of publishing scandalous and defamatory matter... and [unless innocence is proven] his newspaper or periodical is suppressed and further publication is made punishable as contempt. This is the essence of censorship. 238 U.S. at 713, 51 S. Ct. at 630, L.Ed. at 1366.

The Court then added:

[T]his decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. 238 U.S. at 723, 51 S. Ct. at 633, 75 L.Ed. at 1371.

Thus, the Court made it clear that even if the defendant in the case had been formally convicted of abusing his First Amendment rights by making libelous statements, this would not justify that state in prospectively denying his right to freely express himself in the future.

Finally, the Near Court also pointed out that commercial entities are equally entitled to First Amendment protections

as non-commercial entities:

Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. 283 U.S. at 720.

While the Near decision dealt with prospective restraints upon a newspaper publisher allegedly engaging in libel, more recent decisions have dealt specifically with the abatement of adult theaters as nuisances. With apparent unanimity, the state courts have found the doctrine of prior restraints to be entirely applicable to prevent the padlocking of adult theaters as nuisances after specific films were adjudged obscene: People ex. rel. Busch v. Projection Room Theater, ____ C.3d ____, 130 Cal. Rptr. 328, 550 P.2d 600 (June 1, 1976); General Corp. v. Sweeton, 320 So.2d 668 (Ala. 1975), cert.denied, ____ U.S. ____, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); Kansas v. A Motion Picture Entitled "The Bet", 547 P.2d 760 (Kan. 1976); Gulf States Theaters of Louisiana v. Richardson, 287 So.2d 480 (La. 1974); Society to Oppose Pornography, Inc., vs. Thevis, 255 So.2d 876 (La. App. 1972); Giarrusso v. D'Iberville Gallery, 295 So.2d 891 (La. App. 1974); New Riviera Arts Theater v. Davis, 219 Tenn. 652, 412 S.W.2d 890 (1967). Similarly, the doctrine of prior restraints has been held to preclude a state from closing down a bookstore as a nuisance after a finding that it had

sold obscene books or magazines: State ex. rel. Blee v. Mohoney Enterprises, 289 N.E.2d 519 (Ind. App. 1973); Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); State ex. rel. Field v. Hess, 540 P.2d 1165 (Okla. 1975); Commonwealth ex. rel. Davis v. Van Emberg, 847 A2d 712 (Pa. 1975). The rationale underlying all these cases was perhaps best summarized in General Corporation v. Sweeton, supra. There the Alabama Supreme Court stated:

The decree of the trial court included an order closing the Fox Theater for any purpose for one year. This is not a liquor nuisance nor a prostitution nuisance; rather, a movie house charged with showing certain obscene motion pictures. Evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment...The padlocking of appellant's operation for one year constitutes prior restraint at its worst and is patently unconstitutional. 320 So.2d at 675. (Emphasis added.)

The Alabama Law on Obscenity...provides criminal penalties for conduct such as appellant's if retributive punishment is sought, those sanctions, not abatement, are the only proper ones authorized by the legislature...[E]ven if one is guilty of maintaining an obscenity nuisance, it is not constitutionally permissible to deprive him prospectively of his First Amendment rights. 320 So.2d at 676. (Emphasis added.)

The Court went on to point out that states could constitutionally enjoin the future showing of specific individual films found to be obscene (assuming proper procedures were used), but reaffirmed that they could not blanketly close down theaters based on past violations of the obscenity laws.

The doctrine that past abuses of the First Amendment do not justify the suppression, via a nuisance action, of future distribution of materials which may or may not be obscene, was applied recently by the District Court of Weber County in Ogden City, et. al., v. Eagle Books, et. al. A copy of the Memorandum Decision rendered in that case by the Honorable Ronald O. Hyde is attached as Appendix A and clearly establishes that while an injunction can issue restraining the distribution of specific works which have been found obscene, it would be unconstitutional to restrain distribution of all future material because the distributor had been found guilty of distributing obscene material in the past.

In Speight v. Slaton, 415 U.S. 333, 94 S.Ct. 1098, 39 L.Ed.2d 367 (1974), the United States Supreme Court clearly implied that it would be impermissible to close down a bookstore merely because a bookstore owner had been found to have sold obscene materials in violation of state law. The Speight case originated in a three judge federal district court in Georgia. The District Court had been asked to declare Georgia's obscenity nuisance abatement statute (which mandated the closure of businesses found to have violated the obscenity laws) an unconstitutional prior restraint on the sale of other books which may or may not be obscene. The district court abstained pursuant to the doctrine of Younger v. Harris, 401

U.S. 37. On appeal, the United States Supreme Court noted with approval that the Georgia Supreme Court had held this nuisance statute to constitute an impermissible prior restraint in the case of Sanders v. State, supra, which was decided Speight was being appealed. Consequently, the Court pointed out that a proper remedy was clearly available in Georgia's state courts and approved the District Court's decision to abstain. The Supreme Court characterized the Sanders case in this manner:

As we understand the Georgia court's decision, the operation of a bookstore could not be enjoined merely because some of its merchandise had been judicially determined to be obscene...

We therefore vacate the judgment below and remand to the District Court for reconsideration in light of the decision of the Georgia Supreme Court in Sanders v. State, supra, 415 U.S. at 334-35.

For constitutional purposes, the closing of a theater as a nuisance is no different from the revocation or suspension of the theater's license for having shown an obscene film. In both cases the ultimate result is that the theater will be prohibited from showing films in the future that are presumptively protected merely because one of its past films was adjudicated to be obscene. This is prior restraint at its worst.

A number of recent cases in lower courts have dealt

with the precise question of whether a business license can be revoked or refused on the basis of a past violation of obscenity laws. With only one exception, the courts have unanimously rejected this approach as an unconstitutional prior restraint.

In Perrine v. Municipal Court, 5 C.3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), certiorari denied, 404 U.S. 1038, 92 S.Ct. 710, 30 L.Ed.3d 729, the California Supreme Court, sitting en banc, recently held that the First Amendment prohibits the denial of a license to operate a bookstore to a man previously convicted of violating the obscenity law. In the Court's own words:

[I]t is constitutionally impermissible to deny an applicant a license to operate a bookstore solely upon the ground that he has suffered a prior criminal conviction. 5 C3d, 659, 97 Cal. Rptr. at 321, 488 P.2d at 649.

The Court's reasoning, in relevant portions, is set forth below:

[S]ince a denial of a license would prohibit petitioner from engaging in an activity protected by the First Amendment, it could only be justified, even under a narrowly drawn ordinance, if permitting a person who had been convicted of a crime involving obscenity to operate a bookstore constituted a clear and present danger of a serious substantive evil. [Citations omitted.] No such clear and present danger appears...

The penalty for violating section 311.2 [selling, distributing, or exhibiting obscene matter] does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture

of those rights on the theory that past violators are unfit to operate bookstores. 5 C.3d at 664-65, 97 Cal. Rptr. at 325, 488 P.2d at 653. (Emphasis added.)

In City of Seattle v. Bittner, 81 Wash.2d 747, 505 P.2d 126 (1973), the City had denied a renewal application for motion picture theater license due to its finding that the applicant's officers had been convicted of exhibiting obscene films. The Supreme Court of Washington held that the licensing ordinances constituted an impermissible prior restraint to the extent that they prohibited the showing of any film in the future, notwithstanding the prior obscenity conviction. The Court stated:

[W]e are convinced that the constitution does not permit a licensing agency to deny to any citizen the right to exercise one of his fundamental freedoms on the ground that he has abused that freedom in the past. No case is cited which supports such a proposition and our research has revealed none. 81 Wash.2d at 756, 505 P.2d at 131.

In City of Delevan v. Thomas, 31 Ill.App.3d 630, 334 NE2d 190 (1975), the defendant was convicted of operating a business without a license after his license had been revoked for showing an obscene motion picture. The court reversed the conviction as constituting an unconstitutional prior restraint on protected First Amendment freedoms. In that case, the court found not only that premising a revocation on a past conviction was impermissible, but it also found

that in any event, a procedure whereby the mayor of the city could make his own determination of obscenity violated constitutionally protected procedural safeguards as well. The court summarized the inherent evil in this situation as follows:

The licensing regulation in the case before us is an obvious attempt to prevent defendant from showing all future films, whether obscene or not, by means of a license revocation predicated on an administrative determination that one obscene film was shown... This scheme is...fatally defective as an attempt at censorship...334 NE2d at 193.

In Avon 42nd Street Corporation v. Myerson, 352 F.Supp. 994 (S.D. N.Y. 1972), a federal district court struck down a city licensing ordinance which permitted revocation of a theater license upon a conviction for showing an obscene motion picture. The court held:

To permit the suspension of a theater on the basis of a prior conviction even for obscenity, amounts to an unconstitutional suppression of protected freedom of expression. 352 F.Supp. at 998.

Finally, in Alexander v. City of St. Paul, 227 NW2d 370 (Minn. 1975), the Minnesota Supreme Court struck down a city ordinance permitting the revocation of a theater license based on a conviction of exhibiting obscene materials. The court's opinion reflected a comprehensive analysis and some of its rationale is set forth below:

It has been suggested that the power of

the city to grant or deny a license to operate a motion picture theater is coextensive with the power of the city to grant or deny a license to operate any other legitimate business. Proponents of this argument point to the fact that the city may deny a license to sell liquor or to operate a massage parlor to an applicant who has been convicted of a crime bearing a reasonable relationship to the business for which the license is sought. They argue by analogy that the city may also deny a license to operate a motion picture theater to an applicant who has been convicted of a crime relating to obscenity. However, when the city licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result, the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor. 227 NW2d at 372-73 (Emphasis added.)

The court went on to hold that the city's license revocation ordinance was an unconstitutional prior restraint. The court cited a long list of cases in support of its holding and for only one case holding to the contrary, that being Forsyth Corp. v. Bishop, 362 F.Supp. 1389 (M.D. Ga. 1972), aff, 182 F.2d 280 (4 Cir. 1973), cert. den. 422 U.S. 1044, the case relied upon by Salt Lake City and the District Court below in the present case. It is respectfully submitted that the Forsyth case is an aberration and violated the principles enunciated in the United States Supreme Court in the cases of Near v. Minnesota, supra, and Shuttlesworth v. City of Birmingham, supra, and additionally is out of line with the great weight of authority holding that both nuisance abate-

ments and license revocations based on prior obscenity violations are unconstitutional as prior restraints. The reasoning of Forsyth is based on the theory that since persons convicted of violating obscenity ordinances can be imprisoned with incidental infringement of First Amendment rights, licenses can be revoked with the "incidental" loss of First Amendment rights. This argument misconstrues the law of prisoner rights and the meaning of "incidental". It is clear that even convicted felons have First Amendment rights which may only be curtailed to the extent necessary to protect a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration. E.g., Fortune Society v. McGinnis, 319 F.Supp 901 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970). Therefore, even if an individual were imprisoned for an obscenity violation, he could not be prevented from continuing to operate a theater on the outside.

A more glaring error by the court in Forsyth was to denominate the revocation of a license, to conduct a business presumptively protected by the First Amendment, as an "incidental" loss of rights. The curtailment of rights of prisoners may be incidental to an overriding necessity to protect prison security, for example. If the purpose was simply to stifle

the expression of the prisoner as part of the punishment, would not be "incidental" to a legitimate purpose but a direct attack on the prisoner's First Amendment rights. The shutting down of the Gallery Theater is the direct obje of the City's action complained of here. It is not merely incidental to some other overriding legitimate purpose.

In closing, this admonition from the Supreme Court in the case of Southeastern Promotions, Ltd. vs. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed. 448 (1975) should be remembered:

[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. 420 U.S. at 559, 95 S. Ct. 1239, 1246; 43 L.Ed.2d at 459 (1975).


The defendants may punish plaintiff and its agents by fines and imprisonment for abusing their First Amendment rights. The defendants may also prevent the exhibition of specific films which are obscene and hence outside the protection of the First Amendment. However, the First Amendment clearly prohibits the total suppression of the exhibition of all films whether this suppression is attempted by licen

suspension, restraining order, "nuisance abatement" or otherwise.

CONCLUSION

For the reasons stated, the District Court below erred in granting respondents' motion for summary judgment and denying appellant's petition for extraordinary relief and it is respectfully submitted that this Court should reverse the Order and direct the District Court to grant appellant relief necessary to protect its rights under the First Amendment to the United States Constitution.

Respectfully submitted,


JOHN D. O'CONNELL
Attorney for Appellant

CERTIFICATE

I hereby certify that I delivered two (2) copies of the foregoing upon the attorney for the respondents, Roger Cutler, by leaving same at the Salt Lake City Attorney's Office, 101 City & County Building, Salt Lake City, Utah, on the _____ day of May, 1978.

APPENDIX A

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

OGDEN CITY and WEBER COUNTY, /
Plaintiffs, / MEMORANDUM DECISION
vs. /
EAGLE BOOKS, et. al., / Civil No. 67644
Defendants. /

This matter is presented to the Court on Motions for Summary Judgment on the part of plaintiffs and defendants. The Complaint in this action is a two-cause complaint; the first cause of action alleging that the defendants have committed the crime of distribution of pornographic materials and is therefore a public nuisance, with a prayer that they be permanently enjoined from further maintaining the nuisance and that the defendants be enjoined to surrender to the Sheriff of Weber County any material which is subject to this action to be destroyed by the Sheriff, and that an accounting be made of all monies and other considerations paid as admission to view any materials determined to create a public nuisance and that said monies be paid to the general fund of Weber County. The second cause of action requests that the defendants be permanently restrained from doing business without a license within Ogden City, Weber County,

Utah. Defendants claim that the license revocation and nuisance action are unconstitutional.

Constitutional provision in question is the First Amendment which states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment to the Constitution of the United States in part states "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

The First Amendment has been ruled to apply to the states through the Fourteenth Amendment.

Section 76-10-803, Utah Code Annotated, defines public nuisance as follows: "(1) A public nuisance is a crime against the order and economy of the State and consists in unlawfully doing any act or omitting to perform any duty, which act or omission either:...(b) offends public decency." Section 76-10-1210(3) states: "The commission of a crime under this part shall be deemed to offend public decency (this part *"

mean Chapter 12 which covers the sale of pornography).

Pornography is not protected by the First Amendment. There has been approximately 30 sales which has been determined by the courts to be pornographic material. As to each of those sales under the Utah Code, each sale could be determined to offend public decency. Each sale therefore under the definition of the Statute could be construed to be a public nuisance. As to each of the volumes adjudicated to be pornographic, the relief requested by the City could be granted; that is each of the volumes ruled to be pornographic could be enjoined from further sale and the additional volumes of that particular book found to be pornographic could be ordered surrendered to the Sheriff and the receipts forfeited. If this were the relief requested by plaintiffs, it could possibly be constitutionally permissible because pornographic material is not protected by the First Amendment. However, the relief requested by plaintiffs is that because defendants have made a sale or sales of books determined to be pornographic that they be enjoined from any and all further sales and that they be enjoined to surrender to the Sheriff of Weber County any material which is subject to this action which would be their total inventory, so that their total inventory could be destroyed and that an accounting be made of all monies and other considerations paid as admission to view the materials be for-

feited to the general fund of Weber County.

I do not interpret the Statute in question to be that broad. After having studied the briefs of the parties and cases cited therein, I rule as follows in regard to injunction and public nuisance: the injunction provisions of 76-10-80 is limited to enjoining distribution of specific pieces of material which have been ruled to be pornographic and therefore not protected by the First Amendment. The statutory provision cannot be used to enjoin the operation of a bookstore per se. Such injunctive relief would be a prior restraint of material not judged to be pornographic. This is the essence of censorship and book-burning. The injunctive relief as requested by the City would not be constitutionally permissible under the First Amendment. It would be an unconstitutional prior restraint which must be distinguished from constitutional restraint of materials which have been judged to be pornographic under the standards established by the Supreme Court. Therefore as to the plaintiffs' first cause of action, defendants are granted summary judgment.

As to plaintiffs' second cause of action in regard to enjoining defendants from doing business without a license, defendants contend that the revocation of their license is also prior restraint and therefore unconstitutional.

Plaintiffs' request an injunction but cite no authority.

statutory or case law which would authorize such relief. The ordinance carries its own sanctions for violation - a daily misdemeanor. There is no authority for a restraining order and there does not appear to be a need. The sanctions of the ordinance are greater than the sanctions of contempt. The injunctive relief requested in plaintiffs' second cause of action is denied and defendants are granted summary judgment.

The question of constitutionality of the ordinance does not appear to be properly before this Court in this case. It is not necessary to the decision and a ruling thereon would at best be advisory only.

DATED this 20th day of October, 1977.

/s/
RONALD O. HYDE, JUDGE

[Emphasis Added]