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West Gallery Corporation v. Salt Lake City Board of Commissioners et al : Brief of Defendant-Respondent

Utah Supreme Court

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John D. O'Connell; Attorney for Appellants;

Roger Cutler; Attorney for Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WEST GALLERY CORPORATION,)
a Utah corporation,)
 Plaintiff-Appellant,)
vs.)
SALT LAKE CITY BOARD OF)
COMMISSIONERS, et al.,)
 Defendants-Respondents.)

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from an Order of the Supreme Court
of Salt Lake County
The Honorable David J. ...

JOHN D. O'CONNELL
Twelve Exchange Place -
Salt Lake City, Utah 84101

Attorney for Plaintiff-Appellant

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SALT LAKE CITY BOARD OF)	
COMMISSIONERS, et al.,)	
)	
Defendants-Respondents.))	

BRIEF OF DEFENDANTS-RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

The Plaintiff-Appellant West Gallery Corporation applied for an Extraordinary Writ pursuant to Rule 65(b) of the Utah Rules of Civil Procedure. The Appellant alleged that the suspension of its theatre license by the Board of Salt Lake City Commissioners for a nine month period for the commercial exhibition of movies which had been judicially determined to be obscene was arbitrary and capricious.

DISPOSITION IN THE LOWER COURT

The parties stipulated that there were no facts in dispute. The District Court denied the Appellant's Motion for Summary Judgment and denied Appellant's application for an Extraordinary Writ holding that the license revocation

procedure of the City afforded the appellant due process and that the sanctions imposed by the Board of City Commissioners were not arbitrary and capricious.

RELIEF SOUGHT ON APPEAL

The Defendant-Respondents, Salt Lake City Board of Commissioners, et al., seek to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

The undisputed facts of this action reveal the following:

1. The Plaintiff-Appellant West Gallery Corporation, Inc., hereinafter Appellant-West Gallery, is a Utah corporation and the sole owner of the Gallery Theatres, Inc. which is located within the corporate limits of Salt Lake City at 575 South 600 West, Salt Lake City, Utah.

2. Appellant-West Gallery obtained Salt Lake City revenue and regulatory licenses issued in the name of the Gallery Theatre on or about October 30, 1974, under Certificate No. 8083 and 2585. Said licenses were renewed under Certificate No. 82, 70 and 71, for the calendar year 1976.

3. Salt Lake City Corporation is a municipal corporation of the State of Utah. Pursuant to enabling power under State law, it has passed regulatory ordinances which:

(a) Make it unlawful to operate a commercial enterprise within the corporate limits of Salt Lake City, without first obtaining a license. See, Section

20-3-3, Revised Ordinances of Salt Lake City, Utah, 1965, as amended.

(b) Require regulatory licenses for places of commercial public amusement, which establishments include movie theatres. See, Section 20-20-1, Revised Ordinances of Salt Lake City, Utah, 1965.

(c) Make it illegal to distribute or exhibit obscene materials, which prohibition is defined separately for adult and minor persons. See, Section 32-2-10 and cf. Section 32-7-7, Revised Ordinances of Salt Lake City, Utah, 1965.

(d) Provide that business revenue and regulatory licenses may be revoked or suspended by the City Commission, after an adversary hearing, if obscene materials are exhibited contrary to law. See Section 20-20-11, Revised Ordinances of Salt Lake City, Utah, 1965. Copies of the applicable ordinances are attached as Appendix "A".

4. The Salt Lake City procedure for license revocation hearings provides for a full adversary hearing, before the Board of Salt Lake City Commissioners. The hearing includes:

- (a) A verbatim record of the proceedings;
- (b) The right of the parties to be represented in person and by counsel;
- (c) A right to cross examine city witnesses;
- (d) The right to present evidence and witnesses;
- (e) Adequate prior notice, and a written complaint detailing the charged offense for which the license may be suspended or revoked; and
- (f) Written Findings of Fact, Conclusions of Law and a written Decision of the Commission, when any suspension or revocation of a license is made.

5. On or about the 5th day of January 1976, James D. Piepenburg, as manager and president of Appellant-West Gallery, dba the Gallery Theatre, was found guilty by a jury

in the City Court of Salt Lake City of showing an obscene movie, "Memories Within Miss Aggie", in violation of Section 32-2-10(3) of the Revised Ordinances of Salt Lake City, Utah, 1965. He subsequently appealed this conviction to the Third District Court of Utah and was afforded a trial de novo pursuant to and consistent with Utah law. On or about June 23, 1976 in said trial de novo, the movie "Memories Within Miss Aggie" was again judicially determined to be obscene and the defendant James D. Piepenburg was again found guilty by a jury of showing an obscene movie within the corporate limits of Salt Lake City. The said Piepenburg was sentenced to serve six months in jail and appealed the case to the Utah Supreme Court. The conviction and sentence of the District Court was upheld by the Supreme Court.

6. On or about the 25th day of August, 1976, the movie "Teenage Cover Girls", which was being exhibited by the Appellant-West Gallery, was judicially determined to be obscene by a jury in a criminal trial held in the City Court of Salt Lake City and the Appellant-West Gallery was found guilty of showing an obscene movie within the corporate limits of Salt Lake City in violation of Section 32-2-10, Revised Ordinances of Salt Lake City, Utah, 1965. (The film was subsequently judicially determined to be obscene in the District Court and is currently on appeal to this Court.)

7. On or about September 2, 1976, a petition was filed

before the Salt Lake City Commission requesting a hearing to consider revoking the business and revenue licenses of the Gallery Theatre, based on the two City Court convictions and the Third Judicial District Court convictions, above described.

8. The Appellant-West Gallery was properly served with a Petition of Charges and given notice of said hearing to consider the suspension or revocation of the licenses held by the plaintiff.

The hearing was held the 7th day of October, 1976 and the Board of Commissioners suspended the Appellant-West Gallery's license for a period of nine (9) months, pursuant to stipulation in a federal action concerning that same issue, the suspension was stayed pending State appellate proceedings.

ARGUMENT

POINT I

THE SOLE BASIS OF REVIEW BY THIS COURT OF THE ACTION TAKEN BY THE CITY COMMISSION IN SUSPENDING THE LICENSE OF THE PLAINTIFF IS WHETHER SUCH ACTION BY THE BOARD WAS ARBITRARY AND CAPRICIOUS.

The Utah Supreme Court established the standard for reviewing decisions of administrative bodies in Skelton v. Lees, 329 P.2d 389 (Utah, 1958). In that case a civil engineer instituted proceedings in the District Court to review and reverse the action of the Director of the Department of Registration who had refused to register and license a civil

engineer. The District Court entered judgment adverse to the director and others and they appealed to the Supreme Court. The Supreme Court reversed the District Court and upheld the decision of the Department of Registration. This Court held:

" . . . the District Court should be limited to a review of the record made before the Department, and is thus bound by established rules applicable to such reviews. The determination of the administrative agency should not be reversed merely because the court would have come to a different conclusion. It will interfere only if the Department has acted capriciously, arbitrarily or outside the scope of its authority." *Id.* at 392. (Emphasis added).

In the most recent Utah Supreme Court decision dealing with the issue involved the revocation of a massage parlor license by Salt Lake County. In Peatross v. Board of County Commissioners, 555 P.2d 281 (1976), the Supreme Court upheld the District Court's decision denying a trial de novo in the District Court and stated that the standard of review for an appeal from the County's license revocation to be:

"Where the lower tribunal, acting within the scope of its authority, has conducted a hearing and arrived at a decision, the reviewing court will examine only the certified records; and will not interfere with matters of discretion or upset the actions of the lower tribunal except upon a showing that the tribunal acted in excess of its authority or in a manner so clearly outside reason that its actions must be deemed capricious and arbitrary. *Id.* at 284. (Emphasis added).

In Sabes v. City of Minnesota, 120 N.W.2d 871 Minn. (1963), the City Council of the City of Minneapolis revoked licenses issued to the owner of a restaurant and bar for permitting prostitutes to solicit on the premises. The

Court held:

"No citizen has an inherent or vested right to sell intoxicating liquors, and municipal authorities have broad discretion within their geographical jurisdiction to determine the manner in which liquor licenses shall be issued, regulated, and revoked. Inherent in the right to control the sale of liquor is the power to regulate related activities on the licensed premises. Basically it is the council's duty to decide whether the licensee has been guilty of such unlawful conduct in the operation of his business that its continuance is detrimental to the public good. In reviewing the proceedings of the municipality it is not the court's function to pass on the wisdom of the revocation, but only to determine whether the council exercised an honest and reasonable discretion, or whether it acted capriciously, arbitrarily or oppressively. For us to assume greater responsibility would constitute an unconstitutional usurpation of non-judicial power." Id. at 875. (Emphasis added).

Further it should be pointed out that the burden is on the plaintiff to establish that the City has been arbitrary and capricious on its actions. See The Rogue v. Utah State Liquor Commission, 500 P.2d 509 (1972). This the Appellant-West Gallery clearly has not done nor can it do.

POINT II

THE POWER TO GRANT AND REVOKE BUSINESS REVENUE AND BUSINESS REGULATORY LICENSES FOR COMMERCIAL ESTABLISHMENTS OF PUBLIC AMUSEMENT IS WITHIN THE POLICE POWER OF THE STATE.

The Appellant-West Gallery in its brief has asserted that it is unlawful and inappropriate for the Board of Salt Lake City Commissioners to conduct an administrative hearing to determine if a violation of city law has occurred which would justify the revocation or suspension of a theatre's

business and revenue licenses. It has cited several cases; however, none of the authorities cited stand for the proposition asserted.

The cases of City of Seattle v. Bittner, Delevan v. Thomas, and Perrine v. Municipal Ct. East L.A. Jud. of L.A. Co., all involved a judicial review of a criminal conviction for operating a business premise without a license. Apparently, each of these parties took for granted that the appropriate governmental entity had the right to conduct a hearing concerning a license revocation; they did, however, take issue with the result of that revocation hearing, by alleging that it resulted in a "prior restraint," which conflicted with their First Amendment rights of free speech. None of the cases questioned the propriety of the bodies conducting such a license revocation hearing before a governmental body.

Likewise, Alexander v. City of St. Paul did not question the propriety of a hearing to revoke a movie theatre license; rather, that case challenged the validity of the underlying ordinance, which purported to allow the City to revoke a license when the premises were used for exhibiting obscene material. That Court specifically noted that:

"Defendant, City of St. Paul, has the authority to grant and rescind motion picture licenses within its boundaries." Alexander v. City of St. Paul, 227 N.W.2d 370, 371 (Minn. 1975) cited at p. 13 of Appellant's Brief.

The Supreme Court in Stanley v. Georgia, 394 U.S. 557 (1969) held that states have a legitimate interest in

regulating the exhibition and distribution of obscene matter to consenting adults. The Court went even further in upholding the right of a state to regulate the commercial exploitation of obscene material. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the court held:

"Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers that conduct depicted as 'wrong' or 'sinful'. The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.' [Citation.]" Id. at 68, 69.

Further, it has been correctly observed:

"While the business or occupation of conducting a theatre or public amusement is not, in a strictly legal sense, such a public utility or so charged with a public interest as to deprive the owner or proprietor of his legal right to control and operate it as a private business, the right of the State either directly or through the public subdivision, usually a municipal corporation, to regulate, control and supervise places of public amusement of the police power of the state is universally recognized. Indeed, greater discretion is permissible in the regulation of public amusement than in the case of ordinary or useful trades and occupations, both because they are liable to degenerate into nuisances and because they require more police surveillance than police service. Further, these tendencies may justify a greater degree of control in regulating certain particular public amusements and exhibitions than others; certain places of public amusement because of their tendency to promote idleness, disorder, or immorality, or otherwise subvert the public welfare, are commonly regarded

by the courts peculiarly within the power of the state or its duly empowered subdivision to suppress or prohibit." 4 Am.Jur.2d "Amusement and Exhibits", Sec. 13 at p. 132, 133. (Emphasis added).

As previously noted, even the cases cited by the Appellate West Gallery universally recognize the power of the local governmental bodies to license and regulate places of public amusement, including theatres, so long as First Amendment guaranteed privileges are not violated. Specifically, Utah law provides:

"They [Utah municipalities] may license, tax and regulate . . . music halls, theatres, theatrical and other exhibitions, shows and amusements and businesses conducted by ticket scalpers, . . ." Sec. 10-8-39, Utah Code Ann. (1953 as amended).

Pursuant to the powers of regulation vested in the City by State statute, it has passed a number of regulatory requirements for business licensing; these deal with building requirements, safety, zoning limitations and other related items that are not in question before the Court. The issue before the Court, however, does involve a City requirement that if licensed premises are used for unlawful activities, the license may be revoked. These legal prohibitions detailed by the City include the exhibition of obscene productions. See, Section 20-20-11, Revised Ordinances of Salt Lake City, Utah, 1965.

The case law has been virtually unanimous that a licensee accepts a business license on the conditions under which it is granted and that a license is not a vested right. It

be revoked by the municipality, for cause, if the fundamental due process is afforded before a revocation, the condition for license retention are reasonably related to a legitimate public interest, and are legal. A good summary is made by the California Supreme Court as follows:

"A license granted herein was a mere privilege. It did not constitute a contract or property or vested right. One who accepts the acts under a license on the condition that it may be revoked at discretion, whether such condition is imposed by statute, ordinance or the license itself, thereby assents to said condition and is estopped to question that right to revoke, . . ." Carol v. California Horse Racing Board, 93 P.2d 266 (1939).

In addition to the case at bar, the Second Judicial District Court of Weber County in Ogden City v. Hansen upheld the right of Ogden City to revoke the license of a theatre for showing films which had subsequently been determined to be judicially obscene. A copy of Judge Walquist's opinion is attached as Appendix "B" and clearly establishes that upon the proper procedural safeguards, such as those afforded the Appellant-West Gallery, a municipality may revoke a business license for past obscenity violations.

The most recent Utah Supreme Court case affirming this principle is West Gallery Corp. v. Salt Lake City, 537 P.2d 1027 (Utah, 1975). In this case the Court affirmed the Utah Third District Court's holding, which required the City to follow administrative procedures set forth in City ordinances, now repealed. However, the Court affirmed the City Commission's right to simultaneously conduct license revocation hearings

while criminal charges were being prosecuted for the same offense, in State court. The Court noted:

"If it be any comfort to the city, wherein its second point on appeal is asserted, to which we subscribe, that:

"The District Court has no power to review the action of the 'Commissioners until after their final action has been taken' . . .

"We think that except under the circumstances of this case, [the City electing not to employ an ordinance passed prior to Miller v. California which was deemed constitutionally defective], no one justifiably could say the City could not pursue a course of conduct designed to examine facts justifying the granting of, the continuation of or the revocation of a business license for cause, and at the same time pursue an action against someone for an alleged infraction of the law." Id. at 1029. (Emphasis added).

For an excellent discussion of license revocation proceedings for permitting cities to revoke licenses when the owners permitted the premises to be used for illegal purposes, see, Sabes v. City of Minneapolis, 120 N.W.2d 871 (Minn., 1964). See also, 9 McQuillin Municipal Corporations, "Municipal Licenses and Permits", Section 26.80 et seq., commencing at p. 191; See also, Lorance v. Colorado State Board of Examiners of Architects, 505 P.2d 47 (Colo., 1972); 106 Forsyth Corp. v. Bishop, 361 F.Supp. 1389 (1972); aff'd (CA 5) 482 F.2d 281 (1973), cert. den., 422 U.S. 1044; Hornsly v. Allen, 326 F.2d 605, 608 (CA 5) (1964).

In short, cases are legion which state that a municipality has the power, right and, in fact, the obligation to regulate and control businesses, including places of public

amusement within its jurisdiction. The licenses for the regulation of such businesses may be revoked for cause in hearings before those bodies, if (a) the hearings for revocation meet the minimum standards of due process of law, and (b) the underlying governmental requirements reasonably relate to a legitimate governmental interest and do not unconstitutionally infringe on other superior rights of the licensees.

The Appellant-West Gallery has presented no case refuting these points, and its assertion that the City Commission cannot hold such a factual hearing for the purpose of determining if a license issued by them should be suspended or revoked, is in error.

POINT III

THE CLOSURE OF A COMMERCIAL OPERATION
FOR KNOWINGLY AND INTENTIONALLY EXHIBITING
OBSCENE EXHIBITIONS IS NOT AN UNCONSTITUTIONAL
PRIOR RESTRAINT ON FIRST AMENDMENT
RIGHTS.

The Supreme Court of the United States has never specifically ruled on whether it is constitutional to close a commercial establishment for knowingly and intentionally exhibiting or distributing obscene materials. This fact is true despite two opportunities to do so. The Fifth Circuit Court of Appeals clearly upheld the power of a municipality to revoke a business license for an establishment exhibiting obscene materials and the Supreme Court denied certiorari. See, 106 Forsyth Corporation v. Bishop, 362 F.Supp. 138 (1972), 482 F.2d 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 45 L.Ed.2d 696 (1975).

Later, in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), the Court reversed a three judge Federal District Court panel decision which enjoined such a license revocation as violating constitutional prohibitions against "prior restraint"; here, the Supreme Court held that the Lower Court should have abstained from interfering with State civil court proceedings and studiously avoided the issue of "prior restraint" presented in that case.

The Appellant-West Gallery in its brief has cited several State decisions which have addressed this problem of prior restraint, and has attempted to distinguish or has ignored contrary decisions. However, in truth, the issue is in a state of complete uncertainty, with the courts split on a philosophical issue and question of such a business closure on First Amendment rights. Stripped of the procedural elements, this issue is: May a State close a commercial business for knowingly violating a condition precedent to retain the right to do business by commercially exhibiting obscene material?

At the threshold of a consideration of this issue, it is important to note that, contrary to the thrust of Appellant arguments, "prior restraint" is not per se an illegal infringement of First Amendment rights. The Appellant-West Gallery has cited Near v. Minnesota, 283 U.S. 697 (1931) in support of its general argument that prior restraints in the area of First Amendment speech and press have been universally condemned by the judiciary throughout this nation.

However, the Near decision specifically stated that not all "prior restraints" were unconstitutional; in fact, it listed the area of obscene publications as an exception to the general prohibition against prior restraints in the area of First Amendment rights. Subsequent decisions noted of the Near opinion:

"It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid . . . In addition, the Court [Near v. Minn.] said that the primary requirements of decency may be enforced against obscene publications' and the 'security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.'" Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

In Times, supra, the court then noted that in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1951), the Near, supra, decision was interpreted to reserve areas of governmental control.

Concerning the Near decision, the Court stated:

"We took notice that Near left no doubts that 'liberty of speech, and the press, is not an absolute right . . . the protection even as to previous restraint is not absolutely unlimited." Times at 48.

The Court in Times then noted:

"(T)he phrase prior restraint is not a self-wielding sworn. Nor can it serve as a talismanic test. Even as recently as our last term we again observed the principle, albeit in an allied area, the State possesses some measure of power 'to prevent the distribution of obscene matter. (Citations omitted)

"The petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, (citation

omitted) and then only after a transgression power. But this position as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment -- a claim without sanction in our cases." Id. at 49 (Emphasis added).

In effectuating these statements, the U.S. Supreme Court has also upheld the view that due to the unique nature of the motion picture industry, a film may be found to be obscene and exceed any protective bounds of the First Amendment, before a written description of the same subject matter. Landau v. Fording, 245 Cal.App.2d 820, affirmed 388 U.S. 4 (1966). It has further held, in several recent cases, that obscenity is not constitutionally protected speech and, therefore, enjoys no immunity from State regulation. Miller v. California, 413 U.S. 15 (1973); United States v. Reidel, 402 U.S. 351 (1971); Roth v. United States, 354 U.S. 476 (1957).

As above noted, the U.S. Supreme Court has held that prior restraints on motion pictures were not necessarily unconstitutional, under all circumstances. In so holding the Court has upheld the rights of States to select its own remedies to control obscenity. The Court has stated:

"It is not for this court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. (citation omitted) We, of course, are not holding that the city officials may be granted the power to prevent the showing of any motion pictures they deem unworthy of a license." (citation omitted) Times at 50.

In determining constitutional issues, the federal court

are the final and highest authority. The highest federal court to rule directly on the issue currently before this Court, upheld the right of a municipality to revoke a theatre license for the showing of obscene movies.

Of all the cases cited by the plaintiffs or discovered by the defendants in this action, the most authoritative case, the case directly in point, is 106 Forsyth Corporation v. Bishop, supra. In this case, the Board of Aldermen of the City of Athens proposed to conduct a hearing to determine whether the plaintiffs' license to operate a theatre should be revoked; the grounds for such a hearing were that the licensee had shown obscene motion pictures within the city limits.

The plaintiff, Forsyth Corporation, had been served with written notice of the charges and informed as to the time and place of the proposed hearing, together with information of its right to defend against the charges. The City had also stipulated that no action of final closure of the business would be taken until the plaintiff had exhausted all of its judicial State appellate remedies.

The Federal District Court held that such a proposed hearing, and the prospect of such a license revocation did not constitute a "prior restraint" of First Amendment rights; it stated:

"No violation of the constitutional right against prior restraint is threatened. The films complained of have been exhibited without any prior censor-

ship. A major question at the hearing will be whether the films already shown were obscene. The landmark previous restraint case, Near v. Minnesota, supra, recognizes that a publisher cannot be restrained by a prior order from publishing what he desires to publish, but in no sense exonerates the publisher from liability for what he has published.

"The purpose of the proposed hearing is not to place upon plaintiff any previous restraint with respect to any films it may plan to show, but to call plaintiff to account and to hold the plaintiff responsible for its alleged past abuses of its unquestioned right of immunity from previous restraint. Of course, if its license is revoked for twelve months (the maximum period of revocation authorized by the city ordinance) the result will be that it cannot do business in the City of Athens during such revocation period. The non-exhibition of films obscene or non-obscene during said period would not be the result direct or indirect of previous restraint, but would result incidentally from past abuses of immunity from previous restraint just as a person convicted and imprisoned for criminal libel might be incidentally and indirectly prevented and thus practically restrained from any and all publications during the period of incarceration." 106 Forsyth Corporation v. Bishop, 362 F.Supp. 1389, 1396 (1972) (Emphasis added).

It is obvious that incarcerated individuals suffer a loss of liberty and have severe limits placed upon constitutional rights which are enjoyed by others. This is true even in First Amendment areas. The Courts have been very hesitant to intervene in the operation of or the regulations imposed by prisons and, thus, have upheld the state's right to restrict prisoner's rights, for example: (a) Access to the press, Stroud v. U.S., 251 U.S. 150 (1919); Adams v. Ellis, 197 F.2d 483 5th Cir. (1952); Corby v. Conboy, 457 F.2d 251 (2nd Cir. 1972); (b) The right of the state to censor mail received by

prisoners, Theriahult v. Blackwell, 437 F.2d 76 (5th Cir. 1971), cert. den. U.S. 953 (1971); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); and (c) In some cases, courts have even denied prisoners the right to see counsel on a limited basis and have authorized searches which have intruded into the privacy of individuals, Huitt v. Vitek, 361 F.Supp. 1238 (DC N.H., 1973).

It should be noted, however, that the holding of Forsyth is based, not on the fact that prisoners rights are curtailed, but is grounded on the sound principle that it is for proven past abuses that these individuals suffer any restrictions or constrains on previously enjoyed freedoms. It is only after these individuals have been accorded full right of due process, are any restraints imposed.

The Court in Forsyth made it clear that its decision was based on the fact that due process had been guaranteed the defendant in that case at all appellate levels and that there was no issue of prior restraint whatsoever.

The Court in Forsyth commented on the Near holding regarding prior restraint as follows:

"The landmark previous restraint case, Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), recognizes that a publisher cannot be restrained by a prior order from publishing what he desires to publish, but in no sense exonerates the publisher from liability for what he had published."

The case quotes Blackstone as follows:

"The liberty of the press is indeed essential to the nature of a free state; but this consists

in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity, and quotes further Chief Justice Parker in Comm. v. Blanding 3 Pick, 304, 313, 15 Am.Dec. 214, as follows:

"Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." Id. at 1396 (Emphasis added).

In upholding the constitutionality of the municipal ordinance authorizing, after notice and hearing, the revocation of a business license, the District Court further held that the hearing proposed by the Athens Board of Aldermen constituted a prior adversary hearing. It stated:

"The notice served upon the plaintiff shows that the proposed hearing will in all respects conform to the requirements of the City Charter and of the Constitution of the United States. Specific notice of the particular charges is given. A 'full hearing' is promised with 'full opportunity to present any legal evidence' with the aid of plaintiff's counsel. If, as is indicated in Gable v. Jenkins, supra, a hearing before a Justice of the Peace, who may not be, and frequently is not, an attorney, in connection with an application for a search warrant constitutes a prior judicial hearing required, there appears no reason why such a hearing cannot be held before the Mayor and ten Aldermen, each of whom is, by the City Charter, constituted an 'ex officio . . . Justice of the Peace so far as to enable any one of them to issue warrants

for offenses committed within the corporate limits of the City of Athens, . . . Any doubt as to this is laid to rest by Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964) holding that a municipal governing body in granting or denying a business license 'acts as a judicial body.'" 106 Forsyth Corporation v. Bishop, 362 F.Supp. 1389, 1395 (1972).

The 5th Circuit Court of Appeals upheld this decision and, in ruling that the license revocation did not constitute a prior restraint, stated:

"In affirming the court below we hold that premising the revocation of a movie house license upon a violation of a valid state law or city ordinance forbidding the exhibition of sexually explicit material does not violate the right of free speech vouchsafed under the First Amendment.

"Moreover, we find no constitutional infirmity in the revocation procedures under the circumstances of this case." 106 Forsyth Corporation v. Bishop, 482 F.2d 281 (1973).

Adhering to the holdings of Forsyth and West Gallery, supra, the District Court below found that the appellant had been afforded due process at all stages of the revocation proceeding and further held that there was no prior restraint in the City's action. The lower court held:

"The legal problem raised in the brief to this Court of a local ordinance imposing a "prior restraint" on future showing, in the mind of this Court, does not come into question under the facts of this case. Here there has been a prior judicial determination that a particular movie is below the community standards and is adjudged by this fact finder to be pornographic and thus after this factual determination, it is the Court's opinion, that the administrative procedure provided by the Salt Lake City ordinance is enforceable and the license of the exhibitor may be revoked and such revocation is not a violation of any of the constitutional

safeguards mentioned in the cases heretofore cited or in other cases hereinafter identified.

"Where there has been a prior judicial proceedings and the fact finder (jury in this case) has determined the film to be pornographic the revocation of the license is not a violation of free speech under the First Amendment and such revocation by the local authority (Salt Lake City) is permitted." Memorandum Decision of Judge Dee.

It is respectfully submitted that the Appellant was afforded due process at all stages of the City's administrative proceeding and that the suspension of the Appellant's theatre license by the Board of City Commissioners did not constitute a prior restraint in violation of the Appellant's First Amendment freedoms.

CONCLUSION

The focal issue of this case is the impact of a license revocation on First Amendment rights. Clearly a license revocation has impact on the ability of a given theatre location to present movies. However, such a revocation certainly has less impact on those rights than if a given individual were incarcerated for six months for exhibiting an obscene movie. In fact, in Salt Lake City, only the business premises are licensed and license revocation would not affect other speech at other appropriate and licensed locations.

A business license revocation for knowingly exhibiting an obscene film for economic gain is a natural consequence of that illegal activity; as such, it is not an illegal prior restraint of First Amendment rights. Rather, it is legitimate.

mate exercise of the police power employed to protect the societal values, which values include protection of the public morality, the tone of commerce in commercial districts, property values and public safety.

The highest federal court to directly consider the constitutional issues of prior restraint and the revocation of a theatre license for past convictions of showing obscene films has upheld the constitutionality of a municipality in taking such action. The Utah Supreme Court has also upheld the right of a municipality to revoke a theatre license while at the same time proceeding criminally for showing obscene films.

Based upon these two decisions and the ruling of the court below, it is respectfully submitted that the City's action of suspending the plaintiff's license was not arbitrary and capricious, but solidly founded on federal case law and state case law, as promulgated by the Utah Supreme Court. Therefore, the ruling of the lower court, denying Appellant's Motion for Summary Judgment and its Application for an Extraotdinary Writ, should be affirmed.

Respectfully submitted,

ROGER F. CUTLER
City Attorney

PAUL G. MAUGHAN
Assistant City Attorney
Attorney for Defendants-Respondents
101 City & County Building
Salt Lake City, Utah 84111

AN ORDINANCE

AMENDING Chapter 20 of Title 20 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to theatres and concerts; AMENDING Chapter 2 of Title 51 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to zoning definitions; by ADDING Sections 51-2-4, 51-2-4.1 and Ordinances of Salt Lake City, Utah, 1965, relating to business "B-3" District, by AMENDING Sections 51-2-1(11) and (12); and AMENDING Chapter 24 of Title 51 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to Commercial "C-3" District, by AMENDING Section 51-24-1(74).

Be it ordained by the Board of Commissioners of Salt Lake City, Utah:

SECTION 1. That Chapter 20 of Title 20 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to theatres and concerts, be, and the same hereby is, amended as follows:

Chapter 20
THEATRES AND CONCERTS

Sections:

- 20-20-1. Theatre or hall operation. License required.
- 20-20-2. Theatre license classification.
- 20-20-3. License fee.
- 20-20-4. Application for license.
- 20-20-5. Referral by the city license assessor.
- 20-20-6. Investigations required by city departments.
- 20-20-7. Location limitations for certain licensees.
- 20-20-8. Issuance of a license.
- 20-20-9. Investigation by the board of commissioners.
- 20-20-10. Obscene films prohibited.
- 20-20-11. Revocation or suspension.
- 20-20-12. Procedure for suspension or revocation of a license.
- 20-20-13. Id. New license application.
- 20-20-14. Appointment of inspectors for the purpose of enforcement of this chapter.
- 20-20-15. Prohibited advertising.
- 20-20-16. Specified sexual activities or sexual anatomical areas defined.
- 20-20-17. Forfeiture of license.
- 20-20-18. Film exchange. License required.
- 20-20-19. Id. License fee.
- 20-20-20. Severability clause.

Sec. 20-20-1. Theater or hall operation. License required. It shall be unlawful for any person to operate any theatre, motion picture house or concert hall or other place of amusement required to be licensed by this title without first obtaining an appropriately classified license to do so.

Sec. 20-20-2. Theatre license classification. License for motion picture theatres and live theatres shall be classified into the following types which shall carry the privileges and responsibilities hereinafter set forth in these ordinances. No motion picture theatre or live theatre shall be issued or entitled to more than one classified theatre license.

(1) Class "A" — "adult motion picture" theatre licenses. Premises used for presenting for observation by patrons theatre motion pictures or material including dramatizations distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified sexual anatomical areas" as defined in section 20-20-16. Notwithstanding the above, nothing herein shall be deemed to allow or permit the showing of any matter which is contrary to the provisions of sections 32-2-10 or 32-7-7 Revised Ordinances of Salt Lake City.

(2) Class "B" general theatre license. Premises used for presenting motion pictures or materials not distinguished or characterized by an emphasis on matters depicting, describing or relating to "specified sexual activities" and "specified sexual anatomical areas" as defined in section 20-20-16.

Sec. 20-20-3. License fee. The license fee shall be \$250 per year for each theatre, concert hall, motion picture house or other place of amusement, provided, however, that a daily license may be purchased for a fee of \$50 per day or any part thereof.

Sec. 20-20-4. Application for license. Every application for a theatre, concert hall, motion picture house or other place of amusement shall be verified and filed with the license assessor and collector of Salt Lake City, addressed to the board of commissioners and shall contain the following information under oath:

- (1) The address and seating capacity of said establishment;
- (2) The type and nature of the activity desired to be licensed and shall state whether the type of activity desired shall require the total exclusion of minors from said premises;
- (3) The name of the license applicant, together with the applicant's address and phone number;
- (4) A verified statement that the license applicant is the real party in interest and that said theatre is to be operated for and on behalf of the applicant and not as an agent or for some other person, organization or entity;
- (5) If the applicant is a co-partnership, the names and addresses of all partners, and if a corporation, the names and addresses of all officers and directors must be stated. If the business is to be operated by a person other than the applicant, said operator must join in the application and file the same information required of the applicant.
- (6) If the application is for a motion picture or live theatre the applicant shall specify which classified theatre license the applicant is seeking.

Sec. 20-20-5. Referral by the city license assessor. The city license assessor shall, within three working days of receipt of an application for a license required by this chapter, submit the application or a copy thereof to the zoning, building and housing services, fire, and health departments for the purpose of determining the applicant's conformance to the applicable city ordinances and regulations pertaining to said application. It shall be the duty of the license applicant to cooperate with the licensing authority and its agents in carrying out the investigations required by this chapter.

Sec. 20-20-6. Investigations required by city departments. Upon receipt of a license application from the license assessor, as required by this chapter, the health, fire, zoning and building and housing services departments shall commence investigations as to whether the proposed structure is in conformance with the

current ordinances, codes and regulations of the city pertaining to each of the respective departments enumerated above. Each department shall submit a report in writing to the city license assessor within ten (10) days of receiving a license application and state whether the proposed structure designated by the applicant for licensing is in compliance with said ordinances, codes and regulations. It shall further be the duty of each respective department should a license subsequently be granted to the applicant to continually examine and inspect such place licensed in regard to the ordinances, codes and regulations hereinbefore stated.

Sec. 20-20-7. Location limitations for certain licenses.

(1) All sites for class "A" adult motion picture theatres must be located within commercial "C-3" use districts or less restrictive zoning use districts and specific sites shall meet the geographical proximity requirements based upon the criteria set forth in section 51-24-1(74)(b).

(2) Exception. A class "A" adult motion picture theatre may be allowed upon locations other than those outlined above, upon receiving approval from the board of commissioners. Such approval shall be given only after:

(a) The board of city commissioners has received recommendations from the planning and zoning commission of Salt Lake City and the Salt Lake City police department; and

(b) A public hearing has been held, with notice having been given, by at least one publication in a daily paper of general circulation in Salt Lake City at least ten (10) days prior to the hearing stating the purpose, time, date and location of said hearing. Written notice of said hearing shall also be sent, where applicable at least ten (10) days prior to the hearing, to the following groups or individuals within a three (3) block radius of the proposed location: the park superintendent, school superintendent, churches and their authorized representatives, and residents thereof. Notwithstanding the above notice requirement, failure of residents to receive said notice of hearing shall not affect the validity of said hearing or its proceedings; and

(c) A finding by the board of city commissioners that the proposed location will not: (1) materially interfere with the activities and functions of said parks, schools, or interfere with church worship or church-related activities or the neighborhood quality of residential districts; (2) create an undue concentration of adult businesses; (3) materially interfere with the free flow of pedestrian or vehicular traffic; (4) create an undue burden in controlling and policing illegal activities in the vicinity; (5) create a nuisance to the community; or (6) adversely affect the health, safety and morals of the residents of Salt Lake City. A school, church, park or residential building shall be considered to be within close proximity if it is within a three (3) block radius of the proposed location and an adult business shall be considered to be within close proximity if it is within a 1,000 foot radius of the proposed location.

(3) Prior location. The provisions of this section shall in no way affect the rights of the present theatre licensees to continue their operation as long as their licenses remain in good standing, and continue to have their licenses reissued as provided by law until revoked or terminated for any reason. However, once an existing operation obtains a classified license, any subsequent change in classification shall be treated as a new use and must qualify under the provisions of this chapter.

(4) Location for class "B" motion picture theatre. The permissible locations of establishments licensed with a class "B" theatre license must be located within use district zones of a "B-3" or less restrictive classification as provided in title 51.

Sec. 20-20-8. Issuance of a license. When the license assessor has received a report and recommendation from each of the departments designated in this chapter and not later than twenty (20) days from the filing of said application, the license assessor shall submit the original application and reports of said departments to the board of city commissioners for filing on the agenda and for commission action. The board of commissioners shall act upon the application at the next regularly scheduled commission meeting after submission and filing of the application by the city license assessor. If each of the above departments has determined that the proposed application for a theater, motion picture house or concert hall license is in conformance with all the applicable ordinances of the city, and if it appears that there have been no material false statements or material misrepresentations of fact or fraud in the application, the board of commissioners shall grant a license to the applicant.

Sec. 20-20-9. Investigation by the board of commissioners. The board of city commissioners may, prior to the issuance of any license required by this chapter, investigate any applicant for a license under this chapter if it has reasonable cause to believe that said applicant has, or is attempting to perpetrate a fraud or material misrepresentation upon said board, or may compel the production of documents and witnesses in order to investigate said fraud or misrepresentation. Upon a finding by the board of commissioners that a material misrepresentation or fraud has been perpetrated or attempted in the license application, said application may be denied by the commission.

Sec. 20-20-10. 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 of the Revised Ordinances of Salt Lake City, Utah, 1965, as amended.

Sec. 20-20-11. Revocation or suspension of a license. The licensee shall be responsible for the operation of the licensed premises in conformance with the ordinances of Salt Lake City Corporation. Upon a finding by the board of Salt Lake City Commissioners of a violation, after hearing before said board, or upon conviction of the licensee, operator, agent, or any person of the following violations occurring in or on the premises licensed pursuant to this chapter, the board of commissioners of Salt Lake City may revoke or suspend the license or licenses covering the businesses conducted on such premises, regardless of the ownership thereof, for a period of time up to and including one year:

(a) A violation or conviction of sections 32-2-10 or section 32-7-7, Revised Ordinances of Salt Lake City.

(b) A violation of any provision set forth in this chapter.

(c) A violation or conviction of any ordinance referred to in sections 20-20.5, or 20-20.6, or a violation or conviction of sections 32-2.5, 32-2.6 or 20-34.6, Revised Ordinances of Salt Lake City, Utah, 1965.

(d) Violations or convictions of any material misrepresentation or for any fraud perpetrated on or on the licensing authority through application or operation of said business.

(e) A violation of any law of the State of Utah or ordinance of Salt Lake City which affects the health, welfare and safety of its residents and which violation occurred as a part of the main business activity licensed under this chapter and not incidental thereto.

(f) A violation or conviction of showing motion pictures for which the establishment is not properly licensed as required by this chapter.

Sec. 20-20-12. Procedure for suspension or revocation of a license. Any suspension or revocation of a license pursuant to this section shall not be had until a hearing is first held before the city commission. Reasonable notice of the time and place of such hearing, together with notice of the nature of charges or complaint against the licensee or its premises sufficient to reasonably inform the licensee and enable him to answer such charges and complaint, shall be served upon the licensee as provided by the Utah Rules of Civil Procedure. The licensee shall have the right to appear at said hearing in person or by counsel or both, present evidence, cross-examine witnesses and in all proper ways defend licensee's position. The board of city commissioners shall make a ruling and decision based on the evidence presented to it at the hearing so held; thereafter it shall enter a written findings of fact and conclusions of law and enter a written order of decision.

If a violation is found by the board of commissioners or a conviction is obtained under subsection (a) of section 20-20-11, said revocation or suspension shall not take effect until the license holder or individual found in violation or convicted thereunder has had opportunity to exhaust all his administrative and appellate remedies.

Sec. 20-20-13. Id. New license application. It shall be unlawful for any person, firm, corporation or any agent, manager or operator of any person, corporation or firm who has had a license suspended, revoked or denied under the provisions of this chapter to apply, reapply for, or obtain a license required by this chapter during the time said license has been revoked, suspended or denied, or for a period of one year, whichever time is less.

Sec. 20-20-14. Appointment of inspectors for the purpose of enforcement of this chapter. The departments of fire, health, zoning, building and housing services and the police department shall designate members of their departments to act as inspectors of establishments required to be licensed by this chapter. Said establishments shall be open to inspection to the inspectors of each of the above departments for the purpose of investigation and enforcement of the applicable ordinances of Salt Lake City and the laws of the State of Utah.

Sec. 20-20-15. Prohibited advertising. It shall be unlawful for any licensee under chapter 20 of title 20 of these ordinances or any operator, agent or employee of such licensee, to advertise through or on any poster, billboard, marquee or ad of any nature or description which is displayed to public view in Salt Lake City and which presents to public view any of the sexual activities or sexual anatomical areas as defined in Section 20-20-16. The advertising or display or such activity or area is hereby declared to be devoid of any social value or importance.

Sec. 20-20-16. Specified sexual activities or sexual anatomical areas defined. "Specified sexual activities" or "specified sexual anatomical areas" are defined to include the following:

(1) The covered or uncovered male genitals in a discernible turgid state.

(2) The human male or female genitals with less than a fully opaque covering.

(3) Acts of simulated or actual:

- (a) Masturbation;
- (b) Human sexual intercourse;
- (c) Sexual copulation between a man and a beast;
- (d) Fellation;
- (e) Cunnilingus;
- (f) Bestiality;
- (g) Pederasty;
- (h) Buggery; or
- (i) Any anal copulation between a human male and another human male, human female, or beast.

(4) The simulated or actual manipulating, caressing or fondling by any person of:

- (a) The genitals of a human;
- (b) The covered or uncovered pubic area of a human; or
- (c) The covered or uncovered human female breast; provided, however, that this subsection shall not be interpreted to include within the scope of its prohibition the nursing of an infant child.

(5) Flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of the one so clothed.

(6) The human male or female pubic area or buttocks with less than a full opaque covering, or the human female breast from the beginning of the areola, papilla or nipple to the end thereof with less than full opaque covering.

Sec. 20-20-17. Forfeiture of license. If any licensee, licensed to do business under the provisions of this chapter, sells his place of business, together with the entire assets of said business, his license shall expire and be forfeited.

Sec. 20-20-18. Film exchange. License required. It shall be unlawful for any person to conduct, manage or carry on any film exchange or to conduct, manage or carry on the business of selling, exchanging, renting, leasing or distributing motion picture films in Salt Lake City without first obtaining a license to do so.

Sec. 20-20-19. Id. License fee. The license fee for a film exchange license shall be \$100 per annum or any part thereof.

Sec. 20-20-20. Severability clause. If any part of this section or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be unconstitutional or invalid, such judgment shall not affect,

impair or invalidate the remainder of this law or the application thereof to other persons and circumstances, but shall be covered in its operation to the section, subdivision, sentence or part of the section and the persons and the circumstances directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the board of city commissioners that this section would have been adopted if such invalid section, provisions, subdivision, sentence or part of the section or application had not been included.

SECTION 2. That Chapter 2 of Title 51 of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to zoning definitions be, and the same hereby is, amended by ADDING sections 51-2-4, 51-2-4.1 and 51-2-4.2 as follows:

Sec. 51-2-4. Adult bookstore. An "adult bookstore" shall mean any bookstore which has:

(1) A substantial or significant portion of its stock in trade, books, magazines, and other periodicals or matter distinguished or characterized by an emphasis depicting, describing or relating to "specified sexual activities" or "specified sexual anatomical areas" as defined in section 20-20-16 or has any segment or section of its premises devoted to the sale or display of such above described matter from which minors are excluded.

Sec. 51-2-4.1. Adult business. An "adult business" shall mean any shop or retail business or theatre, store, drugstore or other premise where otherwise permitted to do business or any portion thereof that caters exclusively to adult persons to the advertised or unadvertised exclusion of persons under the age of 18 years of age. Adult business shall include the term, "adult bookstore" and "adult theatre" as defined in this chapter.

Sec. 51-2-4.2. Adult theatre. "Adult theatre" shall mean any class "A" adult motion picture theatre or live theatre establishment presenting material as defined in section 20-20-2 Revised Ordinances of Salt Lake City.

SECTION 3. That sections 51-21-1(11) and 51-21-1(12) of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to Business "B-3" District, be, and the same hereby is amended as follows:

Sec. 51-2-1. ***

(11) Class "B" theatre licensed pursuant to chapter 20 of title 20 of these revised ordinances.

(12) Provided, however, the foregoing notwithstanding no shop or retail business, store, drugstore or other premises permitted within this district may be located within said district if said business establishment or any portion thereof caters exclusively to adults to the exclusion of persons under the age of 18 years or is a class "B" non-profit club licensed under the provisions of chapter 20 of title 20 of the Revised Ordinances of Salt Lake City.

SECTION 4. That Section 51-24-1(74) of the Revised Ordinances of Salt Lake City, Utah, 1965, relating to Commercial "C-3" District, be, and the same hereby is amended as follows:

Sec. 51-24-1. ***

(74) (a) In the development and adoption of this ordinance, it is recognized that there are some business uses which because of their very nature are and have been recognized as having serious objectionable operational characteristics, particularly wherever more than one such business is concentrated within an area of close proximity, having a serious deleterious effect upon these surrounding areas. It has been well recognized by cities and communities across the nation that state and local governmental entities have a special concern in regulating the operation of such businesses within their jurisdictions to insure that such adverse affects will not contribute to the blighting or downgrading of surrounding neighborhoods or to the harming of youth in their communities. These special regulations are set forth in subsections (b) and (c) below. The primary control or regulation of these establishments is for the purpose of preventing a concentration of these uses in any one area and for the preservation of neighborhoods in adjacent areas in which these locations may be permitted.

(b) No shop, retail business, store, drug store, adult business, or other premise or any portion thereof which caters exclusively to adults to the advertised or unadvertised exclusion of persons under the age of 18 years may be located within a three block radius of the following:

(i) Any school, park or church;

(ii) Within 1000 feet of any other similar establishment or adult business.

For the purposes of applying the above criteria in determining a three (3) block radius a block shall include a standard city grid block face of 660 linear feet together with a street of 8 rods or a total of 792 linear feet per block. Said radius shall be determined from the perimeters of the property lines of schools and parks and from the point of a church or other building closest to the proposed location.

(c) Exceptions.

(i) The regulations in subsection (b) above shall not apply to premises licensed to sell beer, which licenses shall be governed by the provisions of titles 19 and 20 of these revised ordinances.

(ii) Any adult business other than those licensed to sell alcoholic beverages may be allowed upon locations other than those outlined above, upon receiving special approval of the board of commissioners as provided in the procedure established in section 20-20-7(2) of these revised ordinances.

SECTION 5. In the opinion of the Board of Commissioners of Salt Lake City, it is necessary to the peace, health and welfare of the inhabitants of Salt Lake City that this ordinance become effective immediately.

SECTION 6. This Ordinance shall take effect upon its first publication.

Passed by the Board of Commissioners of Salt Lake City, Utah, this 29th day of December, 1977.

JENNINGS PHILLIPS, JR.
Temporary Chairman

MILDRED V. HIGHAM

City Recorder

(SEAL)

BILL NO. 222 of 1977

Published January 3, 1978

(A-31)

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

OGDEN CITY,	:	
Plaintiff,	:	MEMORANDUM DECISION
-vs-	:	
TERRY DEAN HANSEN and Others,	:	Case No. 12703 A-B-C
Defendants.	:	

Each of the defendants, corporation and individuals, have been charged in a number of Complaints with the offense of engaging in business without a license. All of the Complaints involve the license of the so-called Ogden Adult Book Store. Each of the defendants in each of the Complaints made a Motion to Dismiss in the lower Court. Each of the motions were predicated on the contentions: First, that the obscenity statutes of the State of Utah are unconstitutional; and second, that the ordinance providing for the revocation of the business license in question is unconstitutional; and third, that the license in question has never been properly revoked and therefore continued in operation as a matter of law. The lower Court denied each of these motions. Each of the defendants were convicted of the offense charged. Each defendant has now appealed and the matter is now proceeding under the "trial de novo" provisions governing appeal.

Each of the defendants, corporation as well as individuals, now renew the motion made in the Court below for a dismissal.

The Court has reviewed the many authorities cited by both the plaintiff and defendant. The Court has concluded that the authorities are divided. The United States Supreme Court has not ruled directed upon the point. The

Utah Supreme Court has not ruled directly upon the point. There are Federal Circuit Court decisions supporting the views of each party. The Third District Court for Salt Lake County apparently sustains such ordinance when theaters are involved. At first, the Court was under the impression that the overwhelming weight of authority was that such an ordinance was unconstitutional, but upon review and careful reading of the authorities cited by the defendants, the Court has concluded that the City Attorney's contention is correct that the vast majority of these cases go off under procedural considerations. The vast majority of these decisions cited go off on the grounds that there has not been a proper due process hearing before the revocation of the license and/or there was not a definite standard concerning when the license could be revoked, or there was no provision that the revocation last for only a reasonable period.

The Court believes that the better reasoned authorities will support an ordinance if it has the following characteristics: First; there must be a hearing by an impartial body such as a trial in a court on the issue of whether or not the holder of the license is guilty of criminal misconduct in violation of the obscenity statutes. (The parties agree that the defendant license as in question has now been convicted in excess of 30 times of such a violation). Second, an ordinance would require that the proceeding take place before the license is revoked. (There is no question that this has been done in this case in excess of 30 times). Third, the body conducting the hearing (in this case the City Council) would have to hold a hearing and exercise reasonable discretion. Considerations in such a hearing would involve such subjects as whether or not the criminal violation was an isolated, accidental, or a planned repeated course of conduct. The hearing would undoubtedly also involve the question of whether or

not the license was being used chiefly as an instrumentality for the commission of the crime, or whether such an act or acts was a pure incident and not carry a reasonably foreseeable threat of an immediate danger of repetitions of past offenses. Also for consideration would have to be the issue of whether or not the license in question was a license being used for the exercise of the First Amendment Rights or whether or not the prime purpose of the license was for violations of the obscenity statute, and the degree to which it might possibly be both. Also would be involved the consideration of the length of time which the license was revoked for. Clearly, the license could not be revoked for an unreasonable time, but might possibly be revoked for a sufficient period so as to disrupt clientele which might be built, or patronage accumulated, through past breaches of the obscenity statutes, and the degree to which such an act would be rationale under the circumstances has a destruction of the license for criminal purposes as opposed to a possible preservation of the license if possible for the sale or distribution of legally protected publications and/or motion pictures.

Inasmuch as the parties in their oral argument conceded that this book store and motion picture place has undergone 30 or more judicial proceedings in which individuals have, and the corporation has, been convicted of distribution of pornography, there is no question that implication of an existing clientele and the use of the license for legitimate sales would be matters presented before the City Council. The Court cannot conclusively presume that the City Council acted irrationally or improperly.

The Court here notes that the Utah Supreme Court has now ruled that the State statutes in question concerning obscenity are constitutional and the United States Supreme Court has denied certiorari. The Court considers

this issue now to be closed. Second, the Court here rules that the ordinance requires: A. That the business itself, either the holder of the license or an employee operating within the terms of his employment, be convicted of violation of the State obscenity statutes. B. The ordinance requires that a hearing be held by the City Council and the City Council exercising proper discretion hear the matter and then make a proper ruling. C. That the revocation of the license be for a definite stated reasonable period, not to exceed one year.

The Court therefore rules upon the state of the record as it exists now in each case, the Motion to Dismiss is denied.

Clerk of the Court is directed to make a Minute Entry reflecting the Court's denial of the Motion to Dismiss now pending before it in each of the cases pending, and set trial dates.

DATED this 19th day of April, 1978.

/s/

JOHN F. WAHLQUIST, JUDGE