

2001

Midvale City Corporation v. John Haltom, and Doctor John's : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH

MIDVALE CITY CORPORATION,	:	
	:	REPLY BRIEF OF APPELLANTS
Plaintiff,	:	(Subject to Assignment
	:	to the Court of Appeals)
v.	:	
	:	Case No. 20010794-SC
JOHN HALTOM, an individual, and	:	
DOCTOR JOHN'S, INC. dba	:	
DOCTOR JOHN'S LINGERIE	:	
AND NOVELTY BOUTIQUE	:	
	:	
Defendants.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. LESLIE A. LEWIS

Oral Arguments and Published Opinion Requested

REPLY BRIEF OF APPELLANTS JOHN HALTOM, et al.

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UTAH SUPREME COURT

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PAT CARTHOLOMEW

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SUMMARY OF ARGUMENT

Plaintiff City contends that it failed to prove its case that the ordinance at issue is a valid content neutral regulation only because Defendants didn't tell them in advance that they would need to do so. This is the function of the Court, not of Defendants.

The arbitrary and capricious enforcement of this ordinance proves that the ordinance is not subject to a narrowing interpretation, and that it is too vague for average people to understand. The ordinance, because of the lack of guidelines directing the City as to what conduct is permitted and prohibited, allows censorship and prior restraint of protected speech. Defendants have standing to raise the expectations of privacy of their customers, who have the right to purchase and possess "marital aids" without the interference of the government.

The ordinance is also invalid as it doesn't include basic procedural safeguards for those

seeking regulatory licenses under its terms.

The State Constitutional issues have been sufficiently briefed for the Court to apply State Constitutional principles in sustaining the rights of Defendants. The Utah Constitutional protections on free speech and privacy are broader than the protections contained in the First and Fourteenth Amendments, and should be used to resolve any doubt that the actions of the City unduly interfered with the constitutional rights of Defendants and their customers.

ARGUMENT

POINT I

IT IS THE RESPONSIBILITY OF PLAINTIFFS TO PROVE THEIR CASE.

Appellee suggests, in Point III A of its brief, that Defendants did not give fair warning of their intention to require Plaintiff to prove that its ordinance was validly adopted as a reasonable time, place and manner regulation. In their closing argument, Defendants pointed out that Plaintiff (the moving party in this litigation) had not met a threshold requirement of demonstrating that the contested ordinance was validly adopted as a content-neutral time, place and manner restriction. Appellees allege that this was the first time Defendants mentioned this issue. In fact, Defendants argued this issue at the hearings held on the preliminary injunction, held in November, 2000. At that time, the Court agreed that this would be an issue, but indicated that proof on the point was not necessary at the preliminary injunction phase. Defendants did not previously order a transcript of the injunction proceedings, as they did not believe this would be an issue. Those transcripts have now been ordered; and Defendants will supplement this brief, pursuant to Rule 24(I), when those

transcripts have been received. Defendants pointed out the numerous decisions to the effect that there is a burden on a city to show that their ordinance was validly adopted, and is not merely a subterfuge to censor constitutionally protected expression. Now the City is complaining that Defendants didn't warn them that the City must meet this burden. This is not true; but this is not the job of Defendants. The City commenced this action, claiming that it had validly passed an ordinance which met all constitutional requirements, and asking for judicial assistance in its enforcement. The City is asking that the Court adopt the ordinance as its own and that the courts take over enforcement in the form of a broad injunction. The City has asked that the Courts interpret the ordinance in full as does the City, and that Defendants be enjoined from any action which the City deems a violation. This is strong medicine; and it is up to the City to show that such a remedy is reasonable and proper under the circumstances. If the City does not meet its burden, it should not get all of which it asks. It is sufficient that Defendants show, after the City has done its best, that the burden has not been met. That is what Defendants have done, both at the preliminary injunction hearing, and at trial. The mere existence of a preamble, provided in "canned form" by an outside special interest group, is not sufficient to show that the concerns of the City were valid when the ordinance was enacted. The main ordinance, which is included in Defendants' original brief as "Addendum A" has no preamble at all. The recent additions to the ordinance ("Addendum A" to Appellee's brief) contain a preamble which is a perfunctory attempt to show valid concerns, but which does not meet the conditions set forth by Court decisions. No attempt was made to set out the particular concerns over "negative secondary effects" or the causal relationship of adult businesses to those effects. The

failure of the City, as moving party in this legal action, to produce evidence that the regulations are in fact content neutral (and not censorial in nature) is fatal. In contrast, there is significant evidence that the ordinance is intended to be used as an arbitrary and capricious attempt at censorship by Mrs. Shreeve, who simply rejects any item that offends her sensibilities. To suggest that the sale of a single deck of playing cards, or a single tube of salaciously labeled cream creates negative secondary effects is to strain anyone's sense of the credulous. This Court will not decide any issue which was not first presented to the trial court for decision; but that requirement was met. Defendants pointed out the deficiencies with Plaintiff's case in chief, and the legal requirements that Plaintiffs failed to meet. That is all that is required for Defendants to do.

POINT II

THE TRIAL COURT AND MIDVALE CITY HAVE ERRED IN DEFENDING THE ORDINANCE AGAINST CLAIMS OF UNCONSTITUTIONAL VAGUENESS

Midvale City, in Point IV of its brief defends the trial court's finding that the ordinance at issue is not unconstitutionally vague. The City first claims:

The record below establishes that Mr. HALTOM was put on notice that he was in violation of the ordinance, (*See* Addendum "C"), [actually Addendum "D"] and that the items he sold (i.e. The Picture Book of Sensual Love, hundreds of dildos and "pocket pussies," anal beads and cock rings) were not on the periphery of the ordinance, but at its core. *See* Trial Transcript, page 120, lines 7-25.

Addendum D is a letter from Susan Shreeve, the Midvale business license administrator, to Defendant John Haltom, dated June 28, 2000. That letter, of course, does not mention "hundreds of dildos and 'pocket pussies,'" as none of those items had been observed at that time. Addendum D refers to one picture book, one package of lubricant, one package of "Mr. Prolong" and one deck

of nude playing cards. The prohibition on sales by the City has nothing to do with “hundreds” of anything. As detailed in Defendant’s main brief, all attempts to quantify the prohibitions on sales have been rebuffed by Mrs. Shreeve and her attorneys (Aplt. Br. 7-14). The City claims that the activities of Defendants in attempting to sell certain items at their store are “squarely within the ‘hard core’ of the statute’s proscriptions”. See Broadrick v. Oklahoma, 413 U.S. 601 (1972). Thus, they claim, Defendants cannot be heard to claim that the ordinance is overbroad as to others. It was the four items referred to in Addendum D which initially resulted in a denial of a business license to Defendants. That is hardly "hard core" activity of any kind. Perhaps, theoretically, a narrowing interpretation can be rendered of this ordinance, which could save its constitutionality. The District Court, of course, ruled that such a narrowing interpretation was not necessary. The District Court agreed with the City’s position that any sales of certain items was within the definition of “principal purpose” of the business. The Court then backed up the City’s refusal to even discuss the limits of what could and could not be sold. It ruled that such a discussion was “hypothetical” in nature and not relevant to the issues at hand. Determining where that limit may be, is essential to a determination as to whether this statute is overbroad or, in the alternative, whether it is subject to a limiting interpretation.

The statute at issue in the Broadrick case was found “not substantially overbroad and is not, therefore unconstitutional on its face.” 413 U.S. at 618. In other words, while the Court found that there might be some amount of constitutionally protected speech affected by the statute, the great bulk of activity prohibited by the statute, including all of the activity at issue in the legal action, was

within the power of the State. Contrast the case decided by this Court in Provo City Corp. v. Willden, 768 P.2d 455 (Utah 1989). Defendant in that action was convicted of soliciting sexual conduct in a public place in violation of a Provo City Ordinance which made it “unlawful for any person, in public or in a public place, to exhibit or expose his or her genitals, or to engage in, or to solicit another to engage in, any sexual conduct as defined herein.” Defendant was convicted on evidence that he had left notes in a public restroom soliciting other men to call him for sexual conduct. Provo City argued, as does Midvale here, that the conduct of Defendant was within the “hard core” of the acts prohibited, and that Defendant thus had no standing to argue a facial overbreadth challenge. This Court first ruled that it is not bound by federal rules of standing regarding such facial challenges (768 P.2d at 456). This Court went on to say:

While we are not bound to adhere strictly to the warp and woof of federal standing rules the federal courts have developed “useful principles” from which we can profitably borrow in fashioning rules suited to the needs of the courts of this state. One aspect of general standing doctrine we share with the federal courts is the basic requirement that the complainant show “some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute.” There is no question that Willden meets this standing test. He has been convicted and sentenced under the ordinance he challenges. He indisputably has standing to challenge the ordinance at least as it has been applied to him.

However, Willden’s challenge is more sweeping. He contends that the ordinance as written sweeps so broadly in its prohibitions that it criminalizes behavior protected by the first amendment and, therefore, should be struck down as being invalid on its face, even if his particular conduct could properly be criminalized. (internal citations omitted)(emphasis added) 768 P.2d at 457.

This Court went on to review the standing of a party to bring an overbreadth challenge under the First Amendment, and once again referred to federal rules regarding such challenges:

However, an interest in comity and a concern for federalism have prompted the federal courts

to limit this broadened standing to cases where a statute's deterrent effect on protected speech is real and substantial and the challenged statute is not "readily subject to a narrowing construction by the state's courts." Id.

This Court then ruled that "standing to challenge the ordinance on its face hinges upon whether the ordinance is susceptible to such a narrowing construction." 768 P.2d at 458. Likewise, Midvale City claims that its own ordinance is susceptible to a narrowing construction which renders it constitutional. This contention is apparently made as a fall-back position to its contention that the ordinance is plainly constitutional on its face. The trial court made no attempt at such a narrowing construction. In Willden, the Court summed up the situation thusly:

No matter how we strain, we cannot find a legitimate construction of the ordinance's clear and explicit language that will bring it within constitutional limits. The ordinance plainly is one that involves substantial overbreadth and is invalid on its face under the New York v. Ferber rationale. It also follows that since the ordinance cannot be given a limiting construction that will apply only to unprotected activity, Willden has standing to attack it facially. (internal citations omitted) Id.

The argument that Mr. Willden's conduct was within the "hard core", and the constitutional part, of the statute did not save Provo City. Such an argument is also unavailing to Midvale City. See also Ashcroft v. Free Speech Coalition, ___ U.S. ___ (April 16, 2002) where the Supreme Court found the Child Pornography Prevention Act of 1996 unconstitutionally overbroad. The Court noted that such recent hit films, such as "Traffic" (nominated for Best Picture in 2000) and "American Beauty" (Best Picture in 1999) would be criminal to even possess under the terms of the Act. This despite the fact that the entity challenging the Act in Court, the Free Speech Coalition, is the trade group for the hard core pornography industry in the United States. Certainly none of their films or videos are likely to be nominated for Academy Awards; but they were given standing to defend the

works of those who are. The Court said:

With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of expression. (WL, p. 5)

While it might be possible to impose a narrowing construction on the Midvale ordinance, it would certainly not be possible to do so and obtain the same result achieved in the Court below. The trial court Judge clearly left all decisions on what could be sold, and in what amounts and proportions, to the Midvale City administration. Such a construction obviously makes the ordinance constitutionally overbroad. Only by restricting the power of the City over the types and amounts of materials sold, could this ordinance possibly be saved. Defendants suggest that the Court would have to do violence to the language of the ordinance in order to restrict it to constitutional limits. It would be more intellectually honest to strike the vague language and instruct the City to come up with an ordinance with explicit guidelines within its text.

Appellee points to Young v. American Mini Theaters, 427 U.S. 50 (1976), which upheld, against a claim of unconstitutional vagueness, a description of movies "characterized by an emphasis" on "specified sexual activities" or "specified anatomical areas." 427 U.S. at 58. Like Defendants in this matter, the theater owners in Young claimed "that they cannot determine how much of the described activity may be permissible before an exhibition is 'characterized by an emphasis' on such matter". Id. The Court, however, found:

We find it unnecessary to consider the validity of either of these arguments in the abstract.

For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters proposed to offer adult fair on a regular basis. 427 at 58-59.

A footnote to that statement noted: “neither respondent has indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances.” Id.

The situation in Young is not similar to the one in Midvale. At no time did these Defendants ever dedicate more than 15 percent of their floor space to the sale of controversial items. The store in Midvale continues to operate, and to sell many items acceptable to the City. What the Supreme Court in Young refused to deal with “in the abstract” is at the core of this legal action. The Supreme Court noted further that the ordinances at issue there appeared “readily subject to a narrowing construction by the state courts.” While that Court could pass that task to others, this Court must answer it in a manner that protects the constitutional rights of Defendants. To do so in this context, the Court will end up rewriting the ordinance. That task is up to the City Council, not this Court.

POINT III

IT IS ERROR TO DETERMINE THAT DEFENDANTS’ BUSINESS MUST OBTAIN AN SOB LICENSE BECAUSE DEFENDANTS HOLD IT OUT TO BE SUCH.

Appellee argues that the trial court correctly found that Defendants’ business in Midvale is a sexually oriented business because it holds itself out to be such. Appellee first suggests that an SOB license is required because Defendants exclude minors from the premises. (Aplee Br. 40-41). Then Appellee correctly points out that the attempt by counsel for Appellee, in his closing argument, to rely on this fact was successfully objected to, and even notes: “The district was correct in sustaining the objection.” It is not clear, however, from the text of Appellee’s brief, exactly what

objection was sustained. The statement was made by Mr. Hathaway, in closing arguments (referring to the ordinance of another city in Salt Lake County):

It doesn't talk about the square footage on which the material is stocked, it's the percentage of square footage from which minors are excluded.

Mr. Haltom was asked on the stand, "in fact, Mr. Haltom, you exclude the minors from your premises entirely, correct?" "Yes --" (Tr. 369).

It was to this statement that Defendants objected, and were sustained. As noted in Defendants' previous brief, that policy continues to this day, without objection, and without suggestion by the City that the policy itself requires the issuance of an SOB license.

Likewise, the finding by the Court below that "Dr. John's clearly held itself out as a sexually oriented business, starting with the large provocative sign" (R.918) is irrelevant. It is not the sign (which also remains) which necessitated the SOB license in the mind of Mrs. Shreeve. The trial court also noted (R.918) that the material now prohibited from being sold had a higher profit margin than other items sold at the store. Suggesting that a higher profit margin makes sales of such items a "principal purpose" does nothing to bolster the City's position. How much of a higher profit margin would be necessary to require an SOB license? Does that give the City power to decide pricing? Could Defendants solve the problem simply by lowering their prices? All are, like the questions as to what items could be sold, hypothetical questions, without answers. The City has made it clear from the beginning that it is the items sold which are objectionable, not the advertising message used. The Court's decision cannot be sustained on the bases of the sign or of the profit margin on certain items. Such measures of whether a store is an SOB are too vague by their terms

to be the deciding factor in whether a store is and SOB: and the City has never actually used these factors in its own decision. These findings and examples only show further that the ordinance is unconstitutionally vague and subject to unbridled discretion in its enforcement. If, after showing no interest in the sign outside Defendants' business for two years, the City were to now claim that Defendants were in contempt of the trial court's Injunction, the language of the injunction appears broad enough to prohibit it. Allowing such arbitrary and capricious enforcement, however, is exactly what the Courts have prohibited as unconstitutional prior restraint.

POINT IV

THE QUESTION OF WHAT CAN BE SOLD, AND IN WHAT AMOUNTS, MUST BE SUBJECT TO CLEAR GUIDELINES AND NOT LEFT TO THE DISCRETION OF MIDVALE CITY.

In its brief, Midvale City invites the courts to continue to defer to City decisions, made without clear guidelines, as to what can be sold, and in what amounts. Rather than allowing the courts to construe the ordinance, the City suggests:

In areas where there might be dispute the ordinance is readily subject to a narrowing construction of the administrative body [sic] as provided for in the ordinance (Emphasis added) (Aplee. Br. 34).

Appellee, however, fails to explain how this might work, or what guidelines might be used. The City complains that the failure by Defendants to apply for an SOB license prohibited that system from working properly. That argument is disingenuous. Defendants have always contended that they do not fall within the provisions of the SOB ordinance, and need not apply for, or obtain, such a license. The City appears to argue that only by applying for an SOB license could Defendants properly ask the question of what could be sold, and in what amounts, without the necessity of

obtaining such a license. That seems to make little sense in the context of this dispute. The City has never offered any answer as to what could be sold, other than to rely exclusively on the opinions of Susan Shreeve. The City (Aplee. Br. 36) refers to the portion of the ordinance which allows an appeal of a denial of a business license. The City equates this procedure with some sort of general dispute resolution procedure. The City seems to suggest that any dispute over what could be sold, and in what amount, could be submitted for review through an established administrative process. The City specifically refers to § 5.04.050 of the Midvale City Code which allows someone denied a license to “file an appeal with the business license administrator.” The City fails to note that Mrs. Shreeve is that very same business license administrator. It is Mrs. Shreeve’s arbitrary and capricious decisions that are at the base of this law suit. There is no process in the City Code which provides for any administrative appeal of Mrs. Shreeve’s decision on what can be sold without an SOB license. The City states “the statute should not be stricken down [sic] if an administrative process is in place that could clarify its meaning”. Id. There is no such administrative procedure in place, nor would such an administrative procedure be constitutionally adequate. The United States Supreme Court, and numerous other courts, have required firm standards for a determination of what might be permitted and what might be prohibited. See Freedman v. Maryland, 380 U.S. 51 (1965) and FW/PBS v. Dallas, 393 U.S. 215 (1990). An otherwise vague or unconstitutionally overbroad statute might indeed be saved by a narrowing construction by State courts, as suggested in Young. The City of Midvale, however, states:

In the case at bar, Midvale makes no claim that the statute needs to be narrowed through its uniformly applied practice. It stands by the clear language of the statute as sufficient to

withstand constitutional scrutiny. (Aplee. Br. 38).

The City then criticizes Defendants for citing the case of Wil-Car, Inc. v. Village of Germantown, 153 F.Supp. 682 (E.D.Wis. 2001). Defendants cited that case as an example of a similar situation in which a federal court found that “the ordinance is substantially overbroad because it does not lend itself to the easy identification of a range of constitutionally proscribable conduct.” 153 F.Supp. 993. In response to that, The City states:

Further, Dr. Johns’ citation of Wil-Car is misplaced because it fails to recognize that the evidence being sought by the court in Wil-Car was concrete (how the ordinance had been applied in the past), whereas Dr. John’s wanted to present evidence under the guise of a hypothetical, or how it would be applied in the future (how would you apply the ordinance if you saw this?). The Court was correct in denying this attempt to be drawn into hypothetical application of the law. Id.

The argument is nonsense. It is the position of the City, supported by the trial judge, that any attempt to determine whether certain material might be sold, or in what amount, is “hypothetical”, and thus cannot be answered. Since there is an injunction in place, and since any request for guidelines is denounced as “hypothetical”, the only remaining avenue to determine the limits on what can be sold in Defendants’ store is to put the item on the shelves and litigate it through the contempt process. Given the propensity of the trial court to refer back to the City (and Mrs. Shreeve) all decisions in this regard, that avenue is simply unacceptable. This situation is the basis for the claim that Defendants have been subjected to prior restraint. Not only are Defendants prohibited from the sale of innocuous items found offensive by Mrs. Shreeve, they are put in the position of having to guess, under penalty of a contempt citation, what other items Mrs. Shreeve has not yet seen, but might object to. This is the essence of prior restraint; and it is an unconstitutional burden

on Defendants expressive rights.

POINT V

MIDVALE'S LICENSING ORDINANCE IS VOID FOR FAILING TO PROVIDE FOR PROMPT JUDICIAL REVIEW

Appellee, in Point V. 2. of its brief makes the statement that "Midvale's SOB ordinance provides for prompt judicial review of a license denial" (Aplee. Br 49). Despite the fact that this statement appears as the title of a section, the subject is never mentioned again. Nowhere under this section heading does Appellee refer, even tangentially, to the existence of judicial review, as none is mentioned in the ordinance. The ordinance does provide for an administrative appeal of a license denial in Section 5.56.030. This section (included in Appellee's Brief as part of Addendum A) provides for a hearing board to hear an appeal of a license denial. The board makes a recommendation to the City Administrator, who makes the final decision. There ends the reference to a review of the license denial, well short of the independent judicial review required by Federal Court decisions.

While this appeal has been pending, the Tenth Circuit Court of Appeals has spoken authoritatively on the need for a prompt judicial review. In the case of Essence, Inc. v. City of Federal Heights, ___ F.3d ___, 2002 WL 519855 (10th Cir. April 8, 2002), the ordinance there was similar to the one here. The licensing provisions were stricken in their entirety for failure to meet the required procedural safeguards:

In the adult business licensing context, at least two procedural safeguards are essential: (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period, (2) there must be opportunity for prompt judicial review of the denial

of a license. *See FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596; *Freedman*, 380 U.S. at 58-60, 85 S.Ct. 734. Plaintiffs contend that section 12-12-10 does not contain these protections. Because section 12-12-10 does not provide for any judicial review following an employee license denial, this court need not address the promptness of administrative and judicial procedures.

Section 12-12-10 provides that an employee license shall issue unless the City Administrator finds one of several grounds of denial. Unlike sections 12-12-6 and 12-12-9, the sections dealing with denial, suspension, and revocation of business licenses, section 12-12-10 lacks any mechanism for review of the City Administrator's decision. There is no provision for a public hearing before the City Council following a license denial. *Compare* Federal Heights Mun. Code ch. XII, art. XII, §§12-12-6, -9. In addition, there is no authorization to appeal the decision to a Colorado court. Section 12-12-10 thus fails to provide any opportunity for judicial review and is facially invalid. Part V of opinion, ___ P.3d at ___.

The licensing ordinance at issue in this action is invalid on its face, and must be stricken until it is rewritten to grant procedural safeguards. If the ordinance is invalid, it may not be enforced in any manner, and the injunction must therefore be immediately vacated.

POINT VI

DEFENDANTS HAVE ADEQUATELY BRIEFED THE STATE CONSTITUTIONAL ISSUES, AND DEFENDANTS ARE ENTITLED TO THE PROTECTIONS OF THE UTAH CONSTITUTION.

Appellees contend that Defendants have not made a case for the use of the Constitution of Utah as the source of added protection for freedom of expression or the right to privacy. Defendants have, to the contrary, pointed out that Utah's Constitution uses broader wording in defense of free expression, and that this Court has ruled that the Constitution of Utah contains independent protections for free expression. Defendants have also pointed out instances where this Court, using similar language to that in the Federal Bill of Rights, has expanded on those rights for Utah citizens, as a matter of sound public policy.

The Utah Constitution gives greater protection to expressive and associational rights than the United States Constitution. The breadth of Utah State's free speech constitutional considerations are significant when the expanded protection against prior restraint contained in the Utah Constitution is considered. The First Amendment of the Federal Constitution provides: "Congress shall make no law . . . abridging the freedom of speech" U.S. Const. Art. I. The Utah Constitution in its most parallel provision provides: "No law shall be passed to abridge or restrain the freedom of speech" (emphasis added). Utah State Const. Art. I, Section 15. A footnote in Provo City v. Willden, 768 P.2d 455, 456 (Utah 1989) says: "We leave for another day the question of how we might treat the merits of a challenge to the ordinance under article I, section 15, which by its terms is somewhat broader than the federal clause." (Emphasis added). Additionally, the Utah Constitution in Article I, Section 1, in listing "Inherent and inalienable" rights, includes the right of the people to "communicate freely their thoughts and opinions" The additional language that the framers of the Utah Constitution inserted to protect the rights of expression support the position that the Utah Constitution gives a higher level of protection to the rights of expression and association than does the United States Constitution.

Justice Maughan in his dissenting opinion in State v. Phillips, 540 P.2d 936 (Utah 1975) discussed the implications of the Utah Constitution's protection of speech where he stated that "caution and circumspection are mandatory guides in the construction of legislation designed to define proscribed conduct; where, in doing so, it necessarily tinkers in an area embracing an inherent and inalienable right."

This Court in the case of State v. Lorocco, 794 P.2d 460 (Utah 1990) held that even though there was a strong similarity between Article I, Section 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution that the provisions would not be given equal interpretation. This Court held that while it had not in the past drawn any distinctions between the protections respectfully afforded by each Constitution, it would now give a different construction to the Utah Constitution and grant greater protection to the citizens of the State of Utah under the State Constitution than that given under the United States Constitution.

The Court in Lorocco gives a history of recent state movement towards giving greater constitutional protection under the State Constitutions than under the Federal Constitution because of the increasingly restrictive interpretations given the United States Constitution by the United States Supreme Court. The Court then holds that the strong considerations to be given the right of privacy mandate greater protection for citizens of the State of Utah.

West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994) is another case where this Court held that the Utah State Constitution protects expression. There the Court analyzed when and under what circumstances the courts should base decisions on their own constitutions where there are related or similar federal constitutional provisions. Id. at 1005. The Court held that it should look first to state constitutional principles in analyzing freedom of expression claims under the First Amendment before looking to the federal system. Id. at 1006. The Court referred to the doctrine of fully exhausting state law before resorting to the Federal Constitution as “the primacy model.” Id. at 1006. Using the primacy model the Court held that the First Amendment creates a broad,

uniform “floor” or minimum level of protection that state law must respect. However above this floor, states may balance the needs before the court of those who are attempting to restrict expression to the guarantees of free expression given in the State Constitution, thereby accounting for the unique history, needs and experiences of the residents of Utah. Id. at 1007.

West v. Thomson Newspapers was a case where the plaintiff claimed defamation by the defendant. The Court made its decision in the context of defamation law. The Court upheld the trial court’s decision which dismissed the claims against the defendants on the grounds that the statements could not sustain a defamatory meaning and were protected by the provisions of Article I section 15 of the Utah Constitution which provides in part, “no law shall be passed to abridge or restrain the freedom of speech or of the press.” Id. at 1012. The Court concluded that the Utah Constitution provides an independent source of protection for expressions of opinion and noted that their conclusion was supported by decisions of sibling states considering similar constitutional provisions. Id. at 1013.

The Court in West noted that Utah’s history is characterized by a proliferation of newspapers and heated editorial exchanges containing many different points of view which began in approximately 1850 and continued throughout the early years of the territory and statehood. Id. at 1013-14. The Court noted the “. . . period of uninhibited journalistic expression; of studied insult, of subtle and course humor; of venomous denunciation; and all-around bad manners” Id. at 1014. The Court also discussed the record of the proceedings of the constitutional convention where liberties of the press were discussed. The constitution’s drafters had a positive attitude toward a free

and uninhibited press. Id. at 1014. The Court also pointed to the opening provision of the Utah Constitution which provides, “All men have the inherent and inalienable right . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right.” Utah Constitution Article I, section 1. The final holding of the Court in West was that expressions of opinion are protected by the Utah Constitution separately and independently from the protection given by the First Amendment. Id. at 1016.

While West was dealing with expressions of opinion in a journalistic context, the fundamental concept that freedom of expression is given special protection by the Utah Constitution over and above that granted by the United States Constitution is directly applicable to the arguments of the plaintiffs in this case. The Lorocco and West cases stand for the proposition that the Utah Constitution protects the actions of the plaintiffs more than the protection granted by the United States Supreme Court.

Article 1, Section 8 of the Oregon Constitution states that “no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; that every person shall be responsible for the abuse of this right.” Although the Oregon Court agreed that the State’s obscenity law was constitutional under the United States Constitution, it held that the additional language in the Oregon Constitution provision mandated a greater protection of speech by the State, in Oregon v. Henry, 732 P.2d 9; 302 Or. 510 (Or. 1987). The Court in Henry undertook an extensive and interesting historical review of the law of obscenity. It pointed out that in early American history there was no obscenity law and the first reported obscenity

case did not occur until 1815. *Id.* The Court quotes Justice Douglas in his dissent in the 1973 case of United States v. Twelve Thousand Two Hundred Foot Reels of Film, 413 U.S. 123, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973) as follows:

There is not the slightest evidence that the framers intended to put the newly created Federal regime into the role of ombudsman over literature distributed in interstate commerce or into foreign commerce, which would have been an easy way for a government of delegated powers to impair the liberty of expression. It was to bar such suppressions that we have the First Amendment. I dare say Jefferson and Madison would be appalled at what the Court espouses today. . .the First Amendment was the product of a robust, not a prudish age. *Id.* at 132.

The framers at the Oregon Constitutional Convention in 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views and morality of free expression of others. Henry at 16. The framers present at the Utah Constitutional Convention were fleeing religious persecution and additionally believed members of a free society to have the right to an unfettered exchange of ideas and a high level of individual liberty.

The Henry Court commented that "it is difficult to see how language or material dealing with love, loss and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence and revolution." *Id.* at 16. The Court pointed out the finding of the report of the Attorney General's Commission on Pornography at 927 which states that a 1985 Newsweek Gallup survey disclosed that only 21% of the population would ban material showing adults having sexual relations. Given the inclination towards sexual repression which sometimes rears its ugly head in society, and given the occasions of public support for the banning of nudity,

perhaps it is under the regulation of sexual expression that the safeguards of our courts are most important. Certainly the Oregon Court agreed with the importance of the rights involved when it concluded that “in this State any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered ‘obscene.’”

The California Supreme Court in the case of Morris v. Municipal Court for San Jose-Milipitas, 652 P.2d 51 (Cal. 1982) held that nudity in dancing was constitutionally protected under both the United States and the California State Constitutions. While the majority decision upheld the constitutionality of nudity in entertainment without specifying whether such nudity was protected under the California Constitution independent of the United States Constitution, the concurrence specifically pointed out that such nudity was so protected under the California Constitution independently of the Federal Constitution and even went so far as to hold that “obscenity” was also protected expression under the California Constitution because of the difficulties of attempting to differentiate obscene expression from non-obscene expression.

In People ex rel. Arcadia v. Cloud Books, 510 N.Y.S.2d 844 (N.Y. 1986), the New York Court of Appeals, having received the case on remand from the United States Supreme Court, decided to look at the New York Constitution. It looked at language that stated “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press” Id. at 845. The New York Court of Appeals found that this broader language required a broader

application and thus on independent State grounds, reversed the order closing a bookstore which had been previously issued by the United States Supreme Court.

In State v. Kam, 748 P.2d 372 (Hawaii 1988), the Hawaii Supreme Court declared the State obscenity law an unconstitutional violation of privacy rights guaranteed by the State Constitution and departed from the federal standards.

The Pennsylvania Court in Commonwealth v. Schaeffer, 536 A.2d 354 (Pa. 1987) held that the Pennsylvania Constitution's right to privacy was greater than that granted by the United States Constitution. The recent United States Supreme Court ruling in City of Erie v. Pap's A.M., 529 U.S. 277 (2000) was remanded to the Pennsylvania Supreme Court for further action. The Pennsylvania Court asked for further briefing on the question as to whether the law upheld against First Amendment claims by the United State Supreme Court, violates similar protections of the Pennsylvania Constitution. A copy of that Order is submitted as Addendum A to this brief. There has so far been no ruling; but two concurring judges in the Court's first decision, believed that the nude dancing statute at issue there should be stricken on State Constitutional grounds, rather than Federal. See Pap's A.M. v. The City of Erie, 719 A.2d 273, 281 (Pa. 1998).

In State v. Boland, 800 P.2d 1112 (Wash. 1990) the Supreme Court of the State of Washington held that the Washington Constitution's right to privacy was greater than that granted by the United States Constitution. Likewise with Georgia in Powell v. State, 510 SE.2d 18 (Ga. 1998). That case was significant because of the effect of overruling Bowers v. Hardwick, 478 U.S. 186 (1986), a case which had originated in Georgia, and in which the United States Supreme Court

had ruled that the right to engage in private, consensual homosexual sexual relations was not within the Federal right to privacy. The Georgia Supreme Court, referring to previous State cases on a right to privacy, found the right to privacy was contained within the constitutional right not to be denied liberty without due process of law, and said:

Today, we are faced with whether the constitutional right of privacy screens from governmental interference a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act. While Pavasich and its progeny do not set out the full scope of the right of privacy in connection with sexual behavior, it is clear that unforced sexual behavior conducted in private between adults is covered by the principles espoused in Pavasich since such behavior between adults in private is recognized by “[a]ny person whose intellect is in a normal condition. . . .” Pavasich, supra, at 194. Adults who “withdraw from the public gaze” (id., at 196) to engage in private unforced sexual behavior are exercising a right “embraced within the right of personal liberty.” Id. We cannot think of any other activity that reasonable persons would rank as more private and deserving of protection from governmental interference than unforced, private, adult, sexual activity. We conclude that such activity is at the heart of the Georgia Constitution’s protection of the right of privacy. (Internal citations omitted) 510 SE.2d at 23-24.

Further, even to the extent that the language in some portions of the Utah Constitution may appear similar to that of the Federal Constitution, it should not be interpreted based upon a parallel types of approach. The Federal Constitution already existed at the time that the State Constitution was created. There was no necessity for the founders of the State Constitution to repeat and reiterate those rights and protections already embodied within the Federal Constitution. The speech component of the Utah Constitution owes nothing to the First Amendment of the Constitution of the United States. See Tate v. Akers, 409 F. Supp. 978 (D.C. Wyo. 1976). Its protections should be judged independently.

The above cases stand for the proposition that where the interests are significant, a state should be free to depart from the increasingly restrictive interpretation put upon the United States Constitution by the present United States Supreme Court.

Appellee contends that the Right of Privacy is not really at issue, as this is just a business license dispute. The courts have never held, so says the Appellee, that the right of privacy extends to the sale of goods without a business license. Certainly Defendants are not contending that they have such a right. Defendants's customers, however, have a right of privacy that includes private sexual conduct (even when enhanced with marital aids); and Defendants have standing here to advocate that right in behalf of their customers. If that is true, the arbitrary actions of Appellee in interfering with those rights without a compelling State interest, are actionable here. Appellee cites Bowers v. Hardwick, supra, in an attempt to limit that privacy right to an area so narrow that the City Council of Midvale cannot disagree. Defendants submit that Bowers is not good law, and stands discredited by Powell and much other case law. It is more than of passing interest that there is little modern litigation over the right to sexual privacy in Utah. The reason is simple. No Utah prosecutors have made any attempt to criminalize private sexual conduct in many years. One recent case from this Court, State v. Roberts, 2002 UT 30, 443 Utah Adv. Rep. 27 (2002), supports the holding of the Georgia Supreme Court that adults who "withdraw from the public gaze" are entitled to privacy in their sexual behavior. Can such a right be meaningful if sales of such innocuous materials as those at issue here are government-regulated to the degree that one business license official has complete control over what is sold (and even at what price)? Defendants believe the

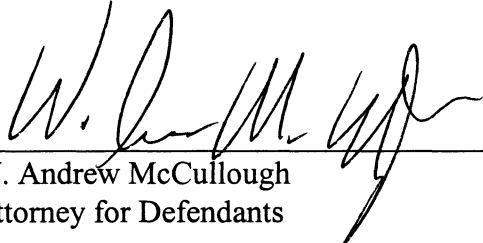
answer is obvious and negative and that this Court must find the ordinance, both on its face, and as applied, to be unconstitutional.

CONCLUSION

The ordinance which has been construed to require regulatory licensing for Defendants' business, and to allow the City a veto over every item sold by Defendants is both overbroad and void for vagueness. It does not contain guidelines for its application or procedural safeguards required for such enactments. It should be stricken both as facially invalid and invalid as applied to these Defendants. This matter should then be remanded to the trial court for the calculation of damages for the unlawful prior restraint to which these Defendants have been subjected since the business first opened in August 2000.

RESPECTFULLY SUBMITTED this 16th day of May, 2002.

MCCULLOUGH & ASSOCIATES, L.L.C.



W. Andrew McCullough
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of May, 2002, I did mail two true and correct copies of the foregoing Reply Brief of Appellants, postage prepaid, to Corbin Gordon, Attorney for Plaintiff, 215 South State Street, Suite 1150, Salt Lake City, Utah, 84111.

Chelsea Travis

ADDENDUM

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S a.m., t/d/b/a KANDYLAND,)	Nos. 16 and 17 W.D. Appeal Docket 1997
)	
Appellant.)	On remand from the Order of the United
)	States Supreme Court. No. 98-1161,
v.)	dated March 29, 2000
)	
THE CITY OF ERIE, JOYCE A.)	
SAVOCCHIO, CHRIS E. MARAS,)	
MARIO S. BAGNONI. ROBERT C.)	
BRABENDER. DENISE ROBINSON, and)	
JAMES N. THOMPSON, in their official)	
capacities,)	
)	
Appellees.)	

ORDER

PER CURIAM:

AND NOW, this 19th day of May, 2000, the parties are hereby directed to brief the following issues:

- 1) Whether this matter is moot.
- 2) Whether City of Erie's ordinance 75-1994 ("Ordinance") violates Article 1. §7 of the Pennsylvania Constitution.
- 3) Whether the Ordinance is unconstitutionally overbroad.

This matter shall be submitted on the briefs.

A True Copy Shelly A. Carrara
as of May 19, 2000

Attest: _____
Depury Prothonotary
Supreme Court of Pennsylvania