

1980

# Larry Hollingsworth D/B/A the King'S Palace & Rusty Hanna, Et al., D/B/A the Society of Licensed Masseurs v. the City of South Salt Lake, a Municipal Corporation, Clint Balmforth, and the South Salt Lake Police Department : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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LARRY HOLLINGSWORTH  
d/b/a THE KING'S PALACE &  
RUSTY HANNA, et al.,  
d/b/a THE SOCIETY OF  
LICENSED MASSEURS,

Plaintiffs and  
Appellants,

vs.

THE CITY OF SOUTH SALT  
LAKE, a Municipal  
Corporation, CLINT  
BALMFORTH & THE SOUTH  
SALT LAKE POLICE DEPARTMENT,

Defendants and  
Respondents.

Case No. 16,831

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BRIEF OF APPELLANT

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Appeal From a Judgment Entered in the Third  
Judicial District Court in and for Salt Lake County,  
Dismissing Plaintiffs' Declaratory Judgment Action,  
Honorable Homer F. Wilkinson

---ooo0ooo---

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SALT LAKE POLICE DEPARTMENT,

Defendants and  
Respondents.

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

The Appellants Appeal from a Judgment entered against them in the Third Judicial District Court of Utah, dismissing their Complaint in this action, which Complaint seeks a Declaratory Judgment that Sections 3B-8-3,4,5,7 and 8 of the revised ordinances of South Salt Lake, 1974, as amended, are invalid, the action being brought pursuant to §78-33-1 et seq. U.C.A. (1953) as amended. Plaintiffs claim said ordinance sections are in conflict with the Fourteenth Amendment to the Constitution of the United States,

Article I; §2,7, and 18 and Article IV §1 of the Constitution of the State of Utah; and various statutes of the State of Utah.

#### DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, with Judge Homer F. Wilkinson presiding, ordered Plaintiffs' Complaint Dismissed, in a Brief Order of Dismissal, dated December 20, 1979. This Order of Dismissal was entered based on, and as a result of, an earlier Memorandum decision, in the case of Redwood Gym et al, vs. Salt Lake County Commission et al, which Memorandum decision declared a similar ordinance passed by the Salt Lake County Commission, to be valid in its entirety. Judge Wilkinson Dismissal was made pursuant to an agreement of the parties made in an effort to expedite Appeal, after oral arguments had been made on the continuation of a Restraining Order against the enforcement of the ordinance; and no proceedings have taken place on the record.

#### RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Order Dismissing their Complaint, and the matter remanded to the Third Judicial District Court with instructions to enter Judgment for Plaintiffs declaring the above mentioned sections of the revised ordinances of the City of void and of no effect. In the alternative, Appellants request this Court to remand this action to the Third Judicial

### STATEMENT OF FACTS

Plaintiffs have been operating a Massage Business and Health Studio at 60 East, 3300 South, in Salt Lake County, since 1975. On November 20, 1978, the Salt Lake County Commission passed an ordinance repealing Title XV, Chapter 18 of the revised ordinances of Salt Lake County, 1966, as amended, and enacting a new Title XV Chapter 18 of the revised ordinances of Salt Lake County, 1966, as amended. This ordinance purported to regulate the business of giving massages, and contained provisions for the issuance of licenses, determining whether the premises where massages were given were sanitary enough for that purpose, prohibiting certain acts by masseurs, and leveling civil and penal sanctions for violations of those provisions. On December 6, 1978, an action was filed by the owners of several massage businesses seeking a Declaratory Judgment that Sections 3,4,5,7 and 8 of the Massage Ordinance were invalid, and seeking injunctive relief against the enforcement of those sections. A temporary restraining order was issued against the enforcement of the ordinance as a whole, but was subsequently limited to sections 5 (1) and 5 (2) of the ordinance, prohibiting the County from enforcing only those sections having to do with the proscription of opposite sex massages and the consumption or storage of alcoholic beverages on the premises. This limiting of the restraining order

was by mutual agreement, as it was determined by both parties that this would be adequate to allow the businesses to continue functioning while the legal process determined the validity of the ordinance. On December 14, 1979, that case, Redwood Gym vs. Salt Lake County Commission, was decided by the Third Judicial District Court, Judge Homer F. Wilkinson presiding, in a short Memorandum decision pursuant to Motions for Summary Judgment made by both the business owners and the County. The Memorandum decision simply stated "Plaintiff's Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted." It then indicated that the Restraining Order would be set aside at 5:00 P.M. on December 19. An appeal of that decision was made shortly thereafter, and is now pending before this Court.

The Plaintiffs in this action, while in similar circumstance to the Plaintiff's in the other action, did not become parties thereto, one reason being that the City of South Salt Lake was, at that time, involved in annexation proceedings to remove their business from the jurisdiction of the County. Early in 1979, the annexation was completed, and on March 14, 1979, an ordinance was passed by the South Salt Lake City Council duplicating the County ordinance, with only minor changes to allow for proper administration by the City, as opposed to the County. An oral agreement was tentatively made between the owners of several massage businesses now in the City of South Salt Lake, and the

authorities of that City, that the one section of the ordinance having to do with opposite sex massages would not be enforced until a decision was rendered in the Redwood Gym vs. Salt Lake County Commission case, thus allowing the businesses in South Salt Lake to remain open, as long as they abided by the rest of the ordinance. Late in 1979, that agreement broke down amidst charges of Police Harrassment, by the business owners, and Countercharges of wide spread violations of other sections of the ordinance, by the City. During October and November of 1979, six arrests were made of masseurs working in the business operated by Plaintiffs for violations of §5 (3) of the South Salt Lake ordinance, which prohibits the touching of the genitals of a customer by a masseur, and offering to touch. A review of the action brought by those massage business owners still operating in the County, showed that they had backed away from any challenge to that specific section of the County ordinance, and it was deemed necessary to make such a challenge immediately, in connection with the challenge made to the other portions of the City ordinance.

This action was filed on December 10, 1979, and a temporary restraining order against the enforcement of the contested sections of the City ordinance was issued that day; The Order to Show Cause why that temporary restraining order should not be made a preliminary injunction was set for hearing on December 18. At the Hearing on December 18, it was announced by Judge



Homer F. Wilkinson that a decision had been reached on the related County law suit, and that a summary judgment had been granted to Salt Lake County, allowing them to enforce the contested portions of their massage ordinance. Argument was made at the time on the additional issues presented by the instant case. Judge Wilkinson indicated that it was his feeling that there were no substantial differences in the law-suits, and that he was inclined to stand by his decision that the entire ordinance was valid. He indicated further that he would allow the temporary restraining order to remain in effect for the rest of the ten day period allowed such an order, and then allow it to dissolve by its own terms. Since such a decision meant that the City would shortly be allowed to enforce the entire ordinance, and since the City indicated that it intended to do so, Plaintiffs agreed to treat the oral arguments on the hearing for temporary relief as cross motions for summary judgment, thus allowing a Judgment to be entered, which could promptly be appealed. Therefore no proceedings were had on the record in this case, which was dismissed on December 20. An appeal was filed on December 21, and this Court issued its own temporary injunction against the enforcement of the opposite sex provisions of the same ordinance the same day. Further argument on the continuation of such injunction was set for, and made, January 7, at which time Court issued a further injunction against the enforcement of that provision of the ordinance, pending the outcome of this case.

The contested sections of the ordinance are fully set out below:

Sec. 3B-8-3. REQUIREMENTS FOR THE ISSUANCE OF A LICENSE. Each individual desiring a massage establishment license or masseur license shall:

- (1) Be an individual of at least 21 years of age.
- (2) Make application to the City Council through the City Recorder for a business license and provide the following material and information under oath:
  - (a) The street, building, and room number of the place where applicant proposes to give massages or maintain a massage establishment.
  - (b) Make written disclosures of all convictions of crimes involving moral turpitude within the past 5 years.
  - (c) Two duplicate photographs of the applicant, measuring two inches by two inches, that have been taken within one month from the date of the application.
- (3) A certificate from a licensed physician certifying that the applicant is free from communicable diseases.

Sec. 3B-8-4. SANITARY PREMISES. All applications for a massage establishment license shall be referred to the Salt Lake City Board of Health for investigation and a license shall be granted only after a finding by the Salt Lake City-County Board of Health that the proposed premises are sanitary enough to conduct business therein without jeopardizing the public health.

Sec. 3B-8-5. PROHIBITED ACTS. The following acts are prohibited:

- (1) It shall be unlawful for a masseur to administer, for hire, to any person of the opposite sex, a massage, a fomentation, or a bath. It shall be unlawful for any massage establishment licensee to cause or permit in or about his place of business or in connection with his business, an employee to administer a massage upon any person of the opposite sex. This section shall not apply to any treatment administered by any person licensed to practice a healing art or profession under the provisions of Utah Code Annotated, 1953, or of any other law of this State. Machine-generated OCR, may contain errors.

- (2) It shall be unlawful to serve, to store, or allow to be served, or allow to be consumed, any alcoholic beverages on the licensed premises of a massage establishment.
- (3) It shall be unlawful for a masseur to touch or offer to touch or massage the genitalia of customers.

Sec. 3B-8-7. CIVIL SANCTIONS. Any unlawful conduct, whether the omission to perform an act required by this ordinance, or the performance of an act prohibited by this ordinance, shall be cause for revocation or suspension of a massage establishment's license or masseur's license. The holder of a massage establishment license may have his or her license revoked or suspended for any and all violations of the provisions of this ordinance committed by his or her employees.

Sec. 3B-8-8. PENALTIES. The person convicted of violations of this chapter of the Revised Ordinances of South Salt Lake may be fined not to exceed \$299.00, imprisoned in the Salt Lake County Jail not to exceed six months, or both.

## ARGUMENT

### POINT I

§5(1) OF THE SOUTH SALT LAKE MASSAGE ORDINANCE IS VOID AS BEING AN IMPROPER EXERCISE OF THE POLICE POWER.

This section prohibits a masseur from massaging a person of the opposite sex, and also prohibits the owner of a massage establishment from allowing such conduct. It has been agreed by all parties that most massage business is by women on men, and that this ordinance would eliminate that business. Since the ordinance in question here is basically identical to the County ordinance passed four months earlier, it is useful to look at the minutes of the Public Hearing held by the Board of Commissioners of Salt Lake County on November 20, 1978,



before passing their ordinance. The Memorandum filed by the Salt Lake County Attorney in the Lower Court Proceeding on the Redwood Gym vs. Salt Lake County Commission case shows clearly the reasoning behind the ordinance:

The major advocates for the adoption of the ordinance were Mr. Curtis Oberhansly, Chief Deputy County Attorney and Mr. Nick Morgan, a Captain over the Vice Squad for many years in the Salt Lake County Sheriff's Office. They each testified that the circumstances in the unincorporated area of Salt Lake County required the adoption of the ordinance. Mr. Oberhansly testified that in many cases massage parlors are fronts for prostitution and that during the preceding six years the Salt Lake County Sheriff has tried to control prostitution in massage parlors by enforcing existing state laws, by enacting and enforcing new county ordinances and by enforcing other laws, but it has been ineffective. Defendant's Memorandum, page 3.

Quoting from the official Minutes of the Hearing, the County Attorney quotes Mr. Morgan as stating the frustrations of his Office in combatting the problem:

Rarely is the jail sentence imposed. The fine is of such a nature that it could be classified as the cost of doing business. You talk about prostitution and the type of money that is generated from that type of activity. The fines that are levied in regards to the misdemeanor violations are a mere pittance in comparison to what is made, so could adequately be classified as a cost of doing business. So obviously the State Law and the situation related to massage parlors specifically is not adequate because it allows a bridge or a situation that takes much more time as far as an investigation is concerned that is justified by the outcome as evidenced by the tremendous growth in massage parlors merely in the last six months.

This is not the first attempt on the part of Salt Lake County to combat the problems of prostitution by eliminating or severely restricting massage parlors. In the case of

Jensen vs. Salt Lake County Board of Commissioners, 530 P2d. 3 (Utah 1974), this Court dealt with a Salt Lake County Ordinance which required that masseurs or massage parlor operators must have practised as massage therapists for at least five years, be graduates of a massage and/or therapy school approved by the American Massage and Therapy Association, or be a fully accredited member of that association. The Court, in finding the ordinance invalid, stated:

At the Trial in the court below a county commissioner and a member of the county sheriff's office testified that prostitution was the major concern in the adoption of the ordinance in question. It is the County's contention that it is a valid exercise of police power to regulate massage establishments and to control prostitution. We are of the opinion that the County does have the power to deal with those matters directly. However, the Ordinance under consideration does neither, but rather it attempts to set standards and qualifications of those persons who intend to engage in a legitimate occupation or trade. This is not a proper exercise of the police power. At page 4.

The decision arrived at in that case was unanimous, and the opinion was joined in by four of the five Justices of this Court. Justice Ellett, concurring in the result, stated:

I concur in the result. The requirements of the ordinance in my opinion are too severe to be considered a reasonable requirement for a license to operate as a masseuse. There surely are masseuses who are moral women. At page 4.

Apparently not convinced that this Court would not approve an ordinance directed at prostitution, but penalizing those not engaged in prostitution who are attempting to engage in a legitimate business, Salt Lake County passed a further ordinance requiring large licensing fees and attempting to establish classes of massage operators "intended to make

a distinction between theraputic massages and 'pleasure-type' massages." Hart Health Studio vs. Salt Lake County, 577 P2d. 116 (Utah 1978), at 119. While the Court invalidated this ordinance on the basis that the classes were arbitrary and unreasonable, the Court made some comments which are very much on point in the instant case. §15-18-3 of the Salt Lake County Ordinance, at that time, read, in part, as follows:

Effective January 1, 1977, the following annual license fees shall be charged:

(e) for any massage parlor employing any of the masseurs who worked at any massage parlor business whose massage parlor license had been revoked within the past twelve months., by the Board of County Commissioners: \$5,000.00. At page 117.

The Court, in addressing this section of the ordinance, stated as follows:

§15-18-3 (e) imposes an annual license fee of \$5,000 on a licensee, whose annual fee but for this section would be \$250.

The imposition of this \$5,000 license fee is related neither to the violation of a county ordinance by the licensee who must pay the fee, nor to a violation by the employee -- masseur but instead is based on a violation of an ordinance by a former employer of the employee. This class of employees and employers is discriminated against and without reasonable relationship to eliminating immorality.

We also believe this section of the ordinance is somewhat like the old bills of pains and penalties (special acts of a legislature which inflict punishment on persons without any conviction by the ordinary course of judicial proceedings), prohibited by the Utah and U.S. Constitutions. The Ordinance clearly penalizes the masseur and his employer without a trial or conviction, and thus is clearly invalid and unenforceable under the constitutional provisions cited. At 118.

Amont the other sections of the ordinance struck down by

this decision, were sections dealing with the posting of a performance or cash bond by any massage parlor intending to allow massage of the opposite sex, in order that the massage parlor would, by so doing, guarantee its compliance with the general laws of the county. The Court did not reach the contention of the massage parlor owner that this was an invalid use of the police power, but instead ruled that the classification scheme of which it was a part, was illegal, and so the ordinance could not stand. Plaintiffs contend, however, that the opposite sex provisions of the new ordinance is as was the previous part already cited, "somewhat like the old bills of pains and penalties," prohibited by both the Fourteenth Amendment to the United States Constitution and Article I, §2 of the Constitution of Utah. Section 15-8-6(3), standing by itself, is very similar to the present §3B-8-5(1) which is contested here, but is not as harsh. While that section would have allowed a massage parlor to stay in business, although at some inconvenience, this present ordinance is assured of putting most, if not all, massage operations out of business.

Both the county and the city do have power to regulate businesses in their jurisdictions, although §17-5-27 U.C.A. (1953) appears to be broader in giving grants of authority to counties than is §10-8-39 U.C.A. (1953) in giving such grants to cities. The ability to license and regulate, however, does not include the ability to prohibit. (See



Combined Communications Corporation vs. City and County of Denver, 542 P2d. 79 (Colo. 1975)). Nor does it, of course, include the right to make unreasonable and arbitrary regulations, as can be easily seen by the two Utah cases previously cited (see also Winther vs. Village of Weippe, 430 P2d. 689 (Idaho 1967)). The city and county ordinances at issue in the two cases under advisement here come before this court as the result of a simple inability on the part of the county commission and city council to believe what the court has told them clearly twice before: You must not punish someone for what they might do, and if you desire to stop prostitution, stop it directly, not by prohibiting businesses in which the opportunity for such acts might present itself, if the business operator is unscrupulous.

## POINT II

§3B-8-5(1) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS INVALID AS EXCEEDING THE DELEGATED AUTHORITY GIVEN TO CITIES BY THE LEGISLATURE.

This Court, of course, has ruled in Salt Lake City vs. Sutter, 61 U. 533, 216 P. 234 (Utah 1923) that all powers of municipalities are derived from the legislature. Those powers and duties are found in Title 10 Chapter 8 U.C.A. (1953) as amended. §10-8-41 U.C.A. states that cities:

. . . may suppress and prohibit the keeping of disorderly houses, houses of ill fame or assignation, or houses kept by, maintained for, or resorted to or used by,

one or more persons for acts of perversion, lewdness or prostitution within the limits of the city and within three miles of the outer boundaries thereof, and may prohibit resorting thereto for any of the purposes aforesaid; they may also make it unlawful for any person to commit or offer or agree to commit an act of sexual intercourse for hire, lewdness or moral perversion within the city, or for any person to secure, induce, procure, offer or transport to any place within the city any person for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to receive or offer or agree to receive or direct any person into any place or building within the city for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to aid, abet or participate in the commission of any of the foregoing; and they may also suppress and prohibit gambling houses and gambling, lotteries and all fraudulent devices and practices, and all kinds of gaming, playing at dice or cards, and other games of chance, and the sale, distribution or exhibition of obscene or lewd publications, prints, pictures or illustrations.

§10-8-51 gives the City further powers in the area of prostitution, as follows:

They may provide for the punishment of tramps, street beggars, prostitutes, habitual disturbers of the peace, pickpockets, gamblers and thieves, or persons who practice any game, trick or device with intent to swindle.

As stated by this Court in the Jensen case previously cited, the City is not without power to directly prohibit and punish prostitution or lewd and perverse conduct in fact, if it can be shown that all massage establishments are "disorderly houses or houses of ill fame" or are "kept by, maintained for, or resorted to or used by, one or more persons for acts of perversion, lewdness or prostitution," they may in fact prohibit them. That, of course, the city cannot do.

What the city can do, however, is prohibit, by the withdrawal of business license, those specific massage establishments which are used for illegal purposes. In fact, both the city and the county have successfully terminated business licenses of massage parlors where there has been illegal conduct, while these actions have been proceeding. The City of South Salt Lake has terminated two business licenses, and is in the process of terminating at least one more, pursuant to the rights of Due Process guaranteed the operators by the State and Federal Constitutions. Allowing the city to simply prohibit this type of business because of what might happen, short circuits the entire Due Process guarantee and just assumes that anyone involved in that kind of business must be doing something improper, and should be suppressed. Plaintiffs realize that allowing the City to do this would make things easy for city authorities, but basic rights of the people may not be abridged for the sake of convenience of the governing authority.

In addition to the two statutes cited, the city claims authority for this ordinance under §10-8-84 U.C.A. (1953).

This statute states:

They may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good

order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than \$300.00 or by imprisonment not to exceed six months, or by both such fine and imprisonment.

These same three statutes were cited by the City of Salt Lake as authority for passing the ordinance at issue in the case of Salt Lake City vs. Allred, 19 Utah 2d. 254, 430 P2d. 371 (Utah 1967). Defendant in that case was convicted of violation of a city ordinance of "aiding and abetting in the commission of a crime in that the Defendant directed a police officer to a certain apartment to obtain sexual intercourse for hire." At 372.

There as here, the ordinance was attacked as being beyond the power of the city, under the grant of authority given them by the legislature. The Court, in answer to that question, and specifically referring to the three statutes already cited by Plaintiffs stated:

It will be noted that the first two of the statutes above referred to deal with prostitution. While the ordinance we are considering contains no definitions of the terms used therein, nevertheless, it is quite evident that the ordinance was not designed to deal with prostitution. The generally accepted definition of prostitution is a practice of a female offering her body to indiscriminate sexual intercourse with men. The ordinance in question goes beyond the grant of power by the legislature to the cities to suppress prostitution. 430 P2d at 372.

Further, the Court stated that:



It is elementary that municipalities are limited by express grants of power from the legislature or as necessarily implied from such grants. It appears that the ordinance we have under consideration goes beyond the grant that any legislative authority granted to the city and is therefore invalid. At 373.

The Court held for the Defendant, the person convicted for violating the ordinance, but later reversed itself, on a petition for re-hearing, (20 Utah 2d 298, 434 P2d (Utah 1968)) when one Justice disqualified himself, allowing a District Court Judge to sit, and tip the balance of power in the other direction. The Court appeared then to change it's mind on the construction of §10-8-84, and state that it gave the City much wider power than those powers given by §10-8-41, and §10-8-51. Judge Cowley, now speaking for the Court, stated:

It is a well settled rule that it is a proper exercise of the police power as set forth in the above statute to preserve and protect public morals, and any practice of business which has a tendency to weaken or corrupt the morals of those who follow it, as shown by experience, is such conduct as affects the public morals. 434 P2d at 435.

We are of the opinion that the general police power is a sufficient grant of authority to authorize the city ordinance involved in this case unless 'prohibited by statute or inconsistent therewith.' at 436.

This language, of course, must be viewed somewhat cautiously, as it was done in a sharply divided case, with a District Court Judge deciding the balance of power, and was decided well before the Jensen and Hart massage cases. In

addition, the Court relied in it's decision in Allred, on the absence of conflict between the state statute and the city ordinance, and the harmony between them. Not only is there no such harmony in this case, but that portion of the second Allred decision dealing with conflict between state statutes and city ordinances has been cut back substantially by subsequent Court decisions which will be dealt with later in this Brief. In addition, there are observations in the dissents of the two Justices who had previously been in the majority, worth presenting. Justice Tuckett stated:

I dissent. After carefully considering the main opinion and the legal problems raised by this Appeal, I am constrained to adhere to the position taken in the prior opinion of the Court. I do not agree that the general grant of police power to the cities by §10-8-84, U.C.A. (1953), was intended by the legislature to authorize adoption of the ordinance we are here concerned with. It would seem that had the legislature intended such broad powers it would not have made specific grants of power to cities to deal with certain aspects of prostitution as provided for by §10-8-41 and §10-8-51, U.C.A. (1953). The latter statutes would be unnecessary and superfluous. At 438.

Justice Henriod, supporting Justice Tuckett, stated:

The two dissenters in the former case cast their lot entirely under Title 10-8-41, U.C.A. (1953). The author of the opinion in the present case pays no attention to those votes, but bases his conclusion entirely on Title 10-8-84, U.C.A. (1953), and does not assign 10-8-41 as a basis for his conclusion. It would seem to me that this new departure amounts to a dissent from the dissenters. Under such circumstances it appears to be sort of an affirmance, not reversal of the former case. At 438.

In the former case Mr. Justice Tuckett simply said what every lawyer should know, that cities cannot

exercise powers not delegated to them by the state or its Constitution. Each Justice soundly and fundamentally said that the subject Ordinance (32-1-1) was an attempt to exercise a power not so delegated. At 439.

Assuming, for the sake of argument, that §10-8-84 does indeed give additional wide powers to the city to do such things as "are necessary and proper to provide for the safety and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the City and the inhabitants thereof, ..." We are still back where we started. This is still not an ordinance necessary or proper in the fight against prostitution. It does not deal with prostitution directly, but deals with it in an indirect manner, which the Court, in Jensen, clearly said cannot be done. This case is not analogous to the Allred case, where simply another aspect of the prostitution business was prohibited.

A case involving many of the same issues as are present here was before this Court in the case of Salt Lake City vs. Revene, 124 P2d 537 (Utah 1942). In that case, the Defendant was charged with the violation of a city ordinance regulating the hours in which a barbershop could remain open. Defendant demurred to the charge, and both the trial court and Supreme Court sustained that demurrer. The city argued that the regulation of hours of the business was "valid under the police power granted it by the legislature by §15-8-39, 15-8-84, and 15-8-61 . . ." at 538. The statutes cited, under the code of 1933, were the same statutes now designated as §10-8-39, 10-8-84,

and 10-8-61. Section 10-8-39 is the general license and taxing authority, and 10-8-61 allows the city to make regulations to "prevent the introduction of contagious, infectious or malignant diseases into the City. . ." Section 10-8-84, of course, is the general statement which has been previously discussed. The Court unanimously turned down the city's position, which the Court characterized as follows:

It is Plaintiff's position that the above ordinance regulating the hours of a barber shop is a valid exercise of the police power delegated by the legislature to the city to "regulate" for the safety and preservation of health of the community. The Plaintiff introduced evidence taken at a previous time in the form of testimony by barbers and health officials to the effect that a "tired barber was a negligent barber", tending to afford an opportunity for the spread of diseases associated with the profession. Further, that from an administrative standpoint it was impossible to inspect the barber shop after 6 o'clock P.M. at 538.

The Court then discussed this contention, as follows:

It has been repeatedly stated by this Court "That a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, -- not simply convenient but indispensable." (citations omitted) at 538.

The rule making power given to cities in reference to barber shops does not mean any rule but such rules reasonably related and designed to protect the health of the public. at 539.

A tired barber may be a careless barber but it does not follow that all shops which remain open more than a certain number of hours engage the same barbers throughout the entire period. Barbers can work in shifts. If the object of the law was



to prevent barbers from getting tired the simple way would have been for the legislature to have given power to regulate the working hours of barbers in shops rather than the hours of barber-shops. If limiting the hours of barbers is encompassed within the phrase "regulate barber-shops" the city would need no other power from the legislature than it now has to do that. If the purpose of the ordinance was to limit the working hours of the operators, granted that could be done, the method was too indirect and accomplished far wider results than mere limitation of working hours. (citations omitted) at 539.

The argument that limiting the hours of barbershops tend to cut down the number of hours they must be policed and thus is a reasonable administrative measure to aid in their regulation, is more tenable. It would seem that all establishments where human beings must repair for work to be done on their person might require frequent inspection to see that they were kept clean and neat. Section 35-1-13, R.S.E., 1933, evidently had such inspections in mind "during business hours." Naturally if business hours could be limited to fixed hours it would, in time, cut down the hours not only when they could be inspected but the period during which a proper standard of cleanliness must be maintained therein and consequently the periods when the inspectors would be required to keep them up to standard. The fact that actually there was only infrequent inspection of barbershops cannot itself affect the fact that ordinarily the less hours a place need be policed the less onerous are the duties of policing. Be that as it may, the cases seem to be universally against the contention that limiting hours comes within a power to regulate for the purpose of protecting the health of the public. at 539.

The Court then goes on to cite several cases where hour limitations had been turned down as beyond the power of municipal corporation. The power which the City of South Salt Lake attempts to exercise over the business operated by Plaintiffs, is far in excess of the power attempted to be

used by Salt Lake City, in the cited case. In both instances, the City has attempted to make its own regulation and police job easier, by severely restricting the business that can be conducted. In neither case is the convenience of the city an important enough consideration to allow them to exercise that kind of power. In both cases, the attempted regulation is far wider in scope than is necessary or proper to achieve the valid protection of society, at which the law is aimed. In neither case does the city have the power they have attempted to exercise. The City of South Salt Lake should therefore be told by this Court to once again attempt to achieve reasonable regulations designed to directly achieve a goal which the city may achieve, under its limited powers.

### POINT III

SECTION 3B-8-5(1) IS INVALID AS BEING IN CONFLICT WITH THE GENERAL STATUTES OF THE STATE OF UTAH.

As has been previously noted, the county has openly admitted that its ordinance is an attempt to regulate sexual behavior, and specifically prostitution. The city, not having been called upon by the lower court to present any evidence at all, but having adopted the county ordinance in its entirety can only be assumed to be concerned about the same thing. In fact, the Supreme Court of California, in Lancaster vs. Municipal Court for the Beverly Hills Judicial District of Los Angeles County, 494 P2d. 681 (Calif. 1972) found that that was the only reason for a similar ordinance passed by the City

of Los Angeles:

There has been no suggestion of any reasonable purpose to the ordinance before us other than to limit sexual activity. Although it has been urged that the ordinance should be viewed as a regulation of business of administering massages and not a sexual regulation, the only specification of any actual or potential evil is the sexual activity which may follow in the wake of the massage. at 683.

. . . the purpose of the ordinance in question was not to regulate the operation of massage parlors but was aimed at making the task of the police department and sheriff's office easier in their fight against prostitution and lewd conduct. We are satisfied that the ordinance is a regulation of the criminal aspects of sexual conduct. at 683-684.

This Court has decided many cases involving city ordinances which deal with areas in which the state has extensively legislated. Almost without exception, such efforts by cities have been struck down as in conflict with state statutes. The State of Utah, in Title 76, Chapter 10 of the Utah Code Annotated, has spent 60 pages detailing those acts which are "offenses against public health, safety, welfare, and morals." Included in that chapter, are part 12 and part 13, dealing with pornographic materials and prostitution. In addition, §76-5-401 through 407 treat in detail what are referred to as "sexual offenses." As has already been noted, cities do have limited power given to them by statute to prohibit and punish prostitution. What the city is trying to do in the instant case, however, is regulate a vastly broader area of sexual conduct. If the pronouncements of the deputy county attorney, the sheriff's captain, and previous court decisions to the effect

that this is sexual regulation can be believed, the act of massaging a member of the opposite sex has now been made a separate sex crime. Obviously, that does not come under the definition of "sexual activity" found in §76-10-1301 U.C.A. (1953) as amended, which defines it to mean "intercourse or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant." If the city of South Salt Lake is attempting to redefine sexual activity as including massaging members of the opposite sex, the provisions of state and local law are in direct conflict. The Supreme Court of California, in the Lancaster case, previously cited, based its decision that this particular sexual regulation was invalid on their decision that the state had pre-empted the field of regulating sexual conduct, and that therefore the city was coming into conflict with the state in making any such regulation:

In In re Lane . . . , this Court, after reviewing the principles governing the preemption doctrine and the numerous statutes governing sexual conduct, concluded that the state had adopted a general scheme for the regulation of the criminal aspects of sexual activity and that the state had occupied the field to the exclusion of all local regulation. at 682.

We conclude that the Los Angeles ordinance which is a regulation of sexual conduct must be held invalid because the state has preempted the criminal aspects of sexual activity. at 684.

The Utah Supreme Court, in the earlier Allred decision, appeared to agree with the California Court, in stating:

The State Statutes dealing with sexual offenses are comprehensive and all sexual relations except



those between husband and wife are declared to be unlawful and are denounced as crimes, as an examination of Chapter 53, Title 76 will disclose. . . . Section 76-53-8 to 76-53-12 deal with pandering and prostitution and the incidents related thereto. Section 76-53-10 specified a wide range of acts pertaining to the soliciting or securing patronage or prostitution as well as the procuring of females for the process of prostitution. at 373.

We are of the opinion that the state by enacting comprehensive and complete laws pertaining to sexual offenses has preempted that field. It does not appear that the state intended that municipalities deal with these offenses except in those areas pertaining to prostitution where the legislature has made specific grants of authority to municipalities as set forth above. at 373.

The specific case in which that language was found was later overturned, on rehearing. The Court, upon reconsideration, held that local ordinances could be passed, when those ordinances were in harmony with state laws. In this regard, the Court stated:

However, the Defendant contends in the case before us that the ordinance in question is inconsistent and in conflict with state laws and therefore invalid on the grounds that the ordinance attempts to make crimes of acts which are not crimes under the state laws. Assuming this to be true, a careful examination of the city ordinance, 32-2-1, Revised Ordinances of Salt Lake City, Utah, 1965, and the material sections of the state laws pertaining to sexual offenses, 76-53-8 through 76-53-12, U.C.A. 1953, reveals that both the city ordinance and state statutes have the common purpose of defeating the practice of business of prostitution or the vice of sexual intercourse for hire and are closely related in subject matter. The mere fact that an act is denounced as a crime under the ordinance which is not denounced as a crime under the statute would not necessarily render the act under the ordinance inconsistent with the statute where as here the ordinance is within the scope of the state law dealing with the same related subject of sexual offenses and is no way repugnant to, but

on the other hand is in harmony with the state laws. We believe the ordinance is consistent with the statutes pertaining to sex offense. at 436.

In the Allred case, a woman was convicted of directing a police officer to a place and a person, for the purpose of prostitution. The Court ruled that this was an act intimately associated with prostitution and that the city, in aiding the state in stopping prostitution, could make the one extra step to make it more difficult for prostitution to flourish. The city is not doing that here. They are, instead, making a new class of sexual offense, which has only a tenuous relationship to the offense of prostitution. They are not attempting to do something authorized by the Allred case, but are attempting to do something clearly out of harmony and inconsistent with the state statute, which is therefore invalid, under either Allred decision.

The decision in the 1968 Allred case appears to have been cut back in effect almost immediately. In State vs. Salt Lake City, 445 P2d 691 (Utah 1968) this Court declared invalid an ordinance of Salt Lake City licensing private non-profit social clubs. The city had simply copied the state licensing requirement, changing only enough words to make it apply to city officers, rather than state officers. The Court quoted extensively from Abbott vs. City of Los Angeles, 3 Cal. Repr. 158, 349 P2d 974 (Cal. 1960) in stating that:

The invalidity arises, not from conflict of language, but from the inevitable conflict of jurisdiction

which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation. 445 P2d at 694.

Further commenting on problems of allowing the city to regulate the private clubs in the manner they were attempting to do, the Utah Court said:

Thus the lines of conflict on the instant action emerge, since the ordinance, as enacted by the city, is an encroachment upon the state's exclusive right to determine the qualification of those entities who shall be entitled to operate as state chartered non profit clubs or associations. There is a conflict of jurisdiction because the effect of the ordinance could result in the city's forbidding what the legislature has expressly licensed, authorized, or required. at 694.

Thus, if the state has already regulated the area, the conflict of jurisdictions is sufficient to keep the city from regulating the same area. Here, of course, we have a much wider area of conflict than was deemed sufficient to hold the law invalid in State vs. Salt Lake City.

In Allgood vs. Larsen, 545 P2d, 530 (Utah 1976) the Defendant was convicted of violation of §32-3-3 of the Revised Ordinances of Salt Lake City. That ordinance made the crime of trespass a class B misdemeanor. Section 76-6-206(3) of the Utah Code made the same crime an infraction, for which no jail sentence could be imposed. The criminal Defendant successfully obtained a Writ of Habeas Corpus in the Third Judicial District Court, and that Writ was upheld in this Court. The Court, in upholding the Writ, declared:

The district court ruled "that since the state law provides no jail sentence for trespass, which is classified as 'an infraction,' that the city cannot impose a greater sentence than that provided by state law, and it is for that reason that the Court grants the petition for a Writ of Habeas Corpus." With this we agree and affirm the trial court.

Salt Lake City seeks to exceed the public policy declared by the legislature relating to a new class of offense. It does not have that power of amendment. at 532.

Further, the Court quoted from McQuillin, Municipal Corporations, §17.15, at page 326, in declaring the law in Utah:

. . . . If the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void. The charter ordinance penalty cannot exceed that of the state law. at 532.

Justice Crockett, in dissent, stated as follows:

The legislature has specifically granted authority to the city to prohibit criminal trespass by §10-8-50, Utah Code Annotated 1953, wherein it states that cities have the power to:

. . . . provide for the punishment of trespass and such other petty offenses as the board of commissioners or city council may deem proper. at 532.

In other words, the majority of the court ruled that a city may not decide the punishment of a crime, when that punishment appears to conflict with the state pronouncement on the same subject, even though there is a specific grant of authority for so setting the penalty. The state, then, by making a later pronouncement of public policy, is deemed to have overruled its earlier pronouncement that cities



exercise specific grants of power. In this case, the state has defined the perimeters of what is and is not illegal sexual conduct, and any previous grant of power to the city, is not sufficient to override what the state has pronounced.

In the case of Layton City vs. Speth, 578 P2d 828 (Utah 1978) Defendant was convicted under a city ordinance which duplicated the language of §58-37-8(2) (2ii) which stated that it shall be unlawful:

For any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place, knowingly and intentionally to permit the same to be occupied by persons unlawfully possessing; using, or distributing controlled substances therein.

The Court, apparently returning once again to the more strict construction of the statutes granting legislative authority to the cities which characterized the earlier opinion in Salt Lake City vs. Allred, ruled the ordinance must be set aside, in the following language:

At the time of the alleged offense the statutes of Utah permitted cities certain powers including a prohibition against "...the sale, giving away of furnishing of intoxicating liquors or narcotics, or of tobacco to any person under 21 years of age; ...". The statute has since been amended but the amendment has no bearing on the present case.

Cities are also empowered by statute to pass all ordinances, rules, and regulations for carrying into effect all powers and duties conferred and "such as are necessary and proper to provide by the safety and preserve the health, and promote prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof,..."

The ordinance in question is not one which is necessary for carrying into effect any of the purposes above mentioned. at 829.

While, then, the second Allred decision appeared to give cities a grant of authority to protect safety, health, morals, peace and good order, comfort and convenience of the city, which grant of authority was in addition to the many specified grants, the Layton City vs. Speth decision, appears to make that position untenable. In fact, in that decision, the Court very clearly made a rather strict interpretation of what the city can and cannot do in the area of drugs. The Court clarified its view of city powers even further, in stating:

By the statute it is clear that the only authority given to the city was to prohibit anyone from selling, giving away, or furnishing marijuana to a person under twenty-one years of age. Mr. Speth is not charged with doing any of those unlawful acts; and that part of the ordinance which attempts to make it unlawful for a owner of an automobile, knowingly and intentionally, to permit persons to occupy it who possess, use, or distribute marijuana must be held to be beyond the power of the city to enact. The ordinance is, therefore, invalid. at 829.

Although the Court then went on to determine that there was a conflict in penalties, in that a second offense under the state statute was treated more harshly than a second offense under the city ordinance, it is clear that the Court did not make its decision based on the difference of penalties. The Court made its decision based on the fundamental decision that the city did not have a wide range of additional police powers not specifically granted in Title 10 Chapter 8 of the

Utah Code. Obviously the city could, and probably did, argue that such an ordinance was protective of the public health, safety, and morals. In fact, assuming that the state was correct in labeling marijuana a dangerous drug in the first place, such an ordinance on the part of the city may well have exercised the protective functions that the city stated as justification. Nevertheless, the ordinance was both beyond the power of the city to enact, lacking a specific grant of authority, and was in conflict with state regulations in the area. The ordinance at issue in the instant case is also both beyond the power of the city to enact and in direct conflict with the state statutes defining public policy on the issues of sex offenses.

Before leaving this subject, a brief reference should be made to §76-10-1201 through 1226, U.C.A. (1953) as amended, in which the State of Utah takes a strong stand against public displays of nudity and other sexual activities. In this series of statutes, the state legislature recognized that it was enacting a comprehensive scheme of regulation regarding pornography and similar offenses. It therefore, in §76-10-1210 specifically gave authority to the cities to further regulate the materials complained of. It does not appear the legislature felt that the cities would have such authority without the specific delegation of that statute, despite the language of §10-8-84 seemingly giving the cities broad authority to improve the public morals. The legislature wanted it clear that

cities have the right especially to protect minors against materials which might otherwise be too readily available for them. It was the intent of the legislature, as specifically stated in §76-10-1210(3) "to give the broadest meaning permissible under the federal and state constitutions to words 'offends public decency' in §76-10-803." Section 76-10-803 defines a "public nuisance" but note that such broad language is confined to the area of pornography, prohibited by the above cited statutes. No such broad declaration on the part of the legislature has been enacted to give cities like authority in the area at issue here. That can only be due to a decision on the part of the legislature that the conduct they have proscribed was the proper proscription to be applied to consensual adult activity in a non-public place.

#### POINT IV

SECTION 3B-8-5(1) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE DENIES EQUAL PROTECTION AND DUE PROCESS OF LAW IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2 AND 7 OF THE CONSTITUTION OF THE STATE OF UTAH.

Since the similar ordinance of Salt Lake County, containing identical language to this contested section is also here on appeal and since the brief of appellants in that matter exhaustively treats the subject, the appellants here will be concise. In doing so, however, we do not downplay the importance of these legal arguments, and ask the Justices of this Court to carefully



read the arguments of Counsel in the companion case, so as to fully consider the issues presented. Ordinances similar to the ones at issue here have been litigated extensively in the last ten years. Attacks on such ordinances on federal constitutional grounds have concentrated on the following points: (1) that the opposite sex massage prohibition creates a sex based classification without rational basis or compelling interest therefore, contrary to the equal protection clause of the 14th Amendment; (2) that the opposite sex massage prohibition infringes on the fundamental right to pursue a legitimate occupation, contrary to the equal protection clause of the 14th Amendment; (3) that the opposite sex massage prohibition creates an irrebutable presumption that persons massaging persons of the opposite sex will engage in illicit sexual activity, an irrational presumption which denies due process of law contrary to the 14th Amendment; and (4) that the opposite sex massage prohibition is overbroad in its effect when there are less restrictive means of achieving the same objective (prohibition of prostitution), thus rendering the ordinance void as a denial of due process, contrary to the Fourteenth Amendment.

For many years the landmark case on the constitutional issues brought up by this type of ordinance was Ex parte Maki, 113 P2d 64 (Calif. 1943) stating that the fundamental rights of the massage parlor owners and workers were not abridged by such ordinance. The effect of that decision was overruled in Lancaster vs. Municipal Court for the Beverly Hills Judicial

District of Los Angeles County, a 1972 California Supreme Court decision previously cited in this brief, which found such ordinance invalid as intruding into areas preempted by state legislation. Since the Maki decision, a number of other courts have ruled on the same points. The Supreme Court of North Carolina, in Smith vs. Keator, 206 S.E.2d 203 (N.C. 1974); the Supreme Court of Virginia, in Kisley vs. City of Falls Church, 187 S.E.2d 168 (Va. 1972); and a New Jersey intermediate appeals court, in an unreported decision of January 29, 1974, upheld such ordinances. Most courts did not. See J.S.K. Enterprises, Inc. vs. City of Lacey, 493 P2d 1015 (Wash. app. 1972), Corey vs. City of Dallas, 352 F.Supp. 977 (N.D. Texas 1972), Cianciolo vs. Members of City Council, Knoxville, Tenn., 376 F.Supp. 719 (E.D. Tenn. 1974), Valley Health Systems, Inc. vs. City of Racine, 369 F.Supp. 97 (E.D. Wis. 1973). The United States District Court for the Eastern District of Pennsylvania, in deciding the case of Colorado Springs Amusements, Ltd. vs. Rizzo, 387 F.Supp. 690 (E.D. Pa. 1974) at page 695, found the trend towards finding such ordinances in violation of the 14th Amendment, overwhelming. That Court, of course, also found the ordinance of the City of Philadelphia invalid. A development in the United States Supreme Court, in 1975, seemed to put a halt to such decisions. That Court ruled, in Hicks vs. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 233 (1975) that a dismissal in that Court for want of a substantial federal question was to be treated as dispositive of the merits of the issues. In other words, such

a dismissal after contentions that an ordinance violated the 14th Amendment, was in effect, an indication that such an ordinance did not violate the 14th Amendment. That was important to this line of cases in that the three cases previously cited as upholding similar ordinances had all been appealed to the United States Supreme Court, and all three had been so dismissed. The Colorado Springs Amusements case, previously cited, was then overruled by the Third Circuit Court of Appeals, based on the Hicks vs. Miranda decision. See Colorado Springs Amusements Ltd. vs. Rizzo, 524 F2d 571 (3rd Cir. 1975). That decision was followed by similar Circuit Court decisions in Hogge vs. Johnson, 526 F.2d 833 (4th Cir. 1975) and Tomlinson vs. Mayor and Aldermen, 543 F2d 570 (5th Cir. 1976). While it appears that the United States Supreme Court has, to this time, been unwilling to rule that an ordinance such as the one contested here is in violation of the United States Constitution, and other federal law relied on in part in the Cianciolo and Corey cases, that Court has certainly not specifically denied such relief. The Hicks case came after all three appeals to the Supreme Court had been made, and the effect of the Hicks case has then been used retroactively, to achieve the result in the cited Circuit Court cases.

There has been some discussion by legal scholars to the effect that the Supreme Court wishes to decide no more sexual discrimination cases until a final determination is made on the passage of the equal rights amendment. Utah has its own

version of the equal rights amendment, in Article IV, Section 1, of the Constitution of Utah, which states, in part ". . . both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges." That provision of the Utah Constitution certainly appears to give far more protection against irrational sexual classification than does the equal protection clause of the 14th Amendment. Utah of course, has its own Equal Protection and Due Process requirements, found in Article I, sections 2 and 7.

The Supreme Court of Colorado, in the one major development to have occurred in this area of law since the above cited cases, decided the case of City and County of Denver vs. Nielson, 572 P2d 484, in 1977. That Court used its own state constitution to find the ordinance at issue in that case unconstitutional. The Court stated:

Regardless of the Third Circuit Court's decisions in Colorado Springs Amusements Ltd. vs. Rizzo, Supra, states may interpret their own constitutional provisions to afford greater protection than the Supreme Court of the United States as recognized in its interpretation of the Federal counterparts to state constitutions. at 485.

The Denver ordinance is not a reasonable regulation. It creates an unreasonable, arbitrary, and unconstitutional conclusive presumption, in violation of Article II, Section 25 of the Colorado Constitution. The ordinance is unduly oppressive to legitimate massage practitioners and goes beyond the means reasonably necessary to accomplish the legitimate objective of preventing illicit sexual behavior. Alternative, constitutionally permissible methods of curtailing sexually illicit behavior are available to legislative bodies. at 486.



The Utah Supreme Court has plenty of Constitutional grounds in its own Constitution, including the additional prohibition against sexual discrimination, on which to rule this ordinance unconstitutional. Recourse, however, does not even need to be made to the constitution, but can be made simply on statutory and decisional grounds, as laid out in detail in previous points of this brief.

#### POINT V

SECTION 3B-8-5(1) OF THE MASSAGE ORDINANCE IS IN VIOLATION OF THE UTAH ANTI DISCRIMINATION ACT AND UTAH CIVIL RIGHT STATUTES.

Once again, this contention is treated exhaustively in the brief of Plaintiff-Appellants in the companion case of Redwood Gym vs. Salt Lake County Commission. Plaintiffs here do not have much to add to that exhaustive treatment, and simply state here that this ordinance violates §34-35-6 U.C.A. (1953) as amended by illegally forcing massage establishments to hire only male masseurs, as it has been agreed that clientele is almost exclusively male. Plaintiffs right now employ both male and female masseurs, and do not discriminate on the basis of sex in either hiring or providing services.

#### POINT VI

SECTION 3B-8-5(3) IS INVALID AS BEING BOTH BEYOND THE DELEGATED POWER OF MUNICIPAL CORPORATIONS AND IN DIRECT CONFLICT WITH STATE STATUTES.



In addition to the provisions of the South Salt Lake massage ordinance relating to opposite sex massages, there is a provision creating yet another sex crime, that of "touch [ing] or offer [ing] to touch or massage the genitalia of customers." The criminal penalty for a violation of this section is a possible six months in the Salt Lake County Jail and/or \$299.00 fine. This section does not directly affect the right of Plaintiffs to continue an existing business, but it affects currently pending criminal charges. The Society of Licensed Masseurs, a partnership which is a party to this action through its managing partner, Rusty Hanna, is a group of masseurs employed at the King's Palace. Society members Debbie Hanna, Julie Hanna, Pamela Cabey, Susan Rosvall and Shauna Bauer have been charged with violations of this ordinance, and the criminal proceedings are pending, as of the time this brief is written. Plaintiffs have previously made the arguments in this brief, that the act of massaging a member of the opposite sex has been designated as a new sex crime, and that the city has both exceeded its power and come into conflict with general state laws, in so doing. This section of the ordinance under discussion here suffers from the same defects, but the conflicts with the state law are even more clear. The public policy of the State of Utah regarding illegal sexual activity is clearly defined in §76-10-1301 et seq. U.C.A. (1953) as amended. §76-10-1301 defines "sexual activity" and "house of prostitution" as follows:

(1) "Sexual Activity" means intercourse or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

(2) "House of Prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

§76-10-1302 U.C.A. (1953) as amended then goes on to prohibit prostitution in the following words:

- (1) A person is guilty of prostitution when:
  - (a) He engages or offers or agrees to engage in any sexual activity with another person for a fee; or
  - (b) Is an inmate of a "house of prostitution; or
  - (c) Loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.
- (2) Prostitution is a class B misdemeanor, provided that any person who is twice convicted under this section shall be guilty of a class A misdemeanor.

It could easily be argued, under the doctrines set forth in Layton City vs. Speth, that any regulation of prostitution whatsoever on a local level is now void, as being in conflict with the state law. The penalty phase, seen as sufficient conflict in both the Layton City vs. Speth and Allgood vs. Larsen cases, must be in dispute, as cities have no power to pass ordinances punishable on a second offense, as a class "A" misdemeanor. While that issue is not directly in front of the Court, a very similar issue is. Salt Lake County has enacted section §16-23-4 of their revised

ordinances, defining and punishing prostitution. The act reads as follows:

§16-23-4. Prostitution.

- (1) Any female person who performs, solicits, offers or agrees to perform any of the following acts for money or other consideration commits an act of prostitution:
  - (a) Any act of sexual intercourse; or
  - (b) Any act of deviate sexual conduct.
- (2) Deviate sexual conduct for the purpose of this section means:
  - (a) Any act of sexual, ratification involving the sex organs of one person and the mouth or anus of another.
  - (b) Any lewd fondling or touching of either the female person or male person with the intent to arouse or satisfy the sexual desires of either the male person, female person, or both.
- (3) A person convicted of prostitution shall be fined not to exceed \$299.00 or imprisoned in the County Jail not to exceed six months, or both. (Emphasis added).

Salt Lake County, then, has passed an ordinance in direct conflict with the prostitution statute of the State of Utah. In all areas of the state outside of Salt Lake County, prostitution means one thing, and in Salt Lake County, it means far more. Even the most tortured reading of the second Allred decision does not give the county authority for doing this. The fact that the ordinance was passed long before the new criminal code defining what prostitution is in the State of Utah, would seem to read a simple over-ruling of the county by the state. Going back to the second Allred decision, the majority of the Court,

upon re-hearing, stated:

There is nothing in the state statutes regulating sexual offenses that evidences any express or implied intent to preclude local governments from also attempting to prohibit and suppress the difficult problem of the sex offender. Therefore, it is our opinion that the city is not precluded in enacting the ordinance in question unless it is inconsistent or in conflict with the states statutes dealing with sex offenses. At 436.

A redefining of prostitution to include matters that the state decided were not prostitution, is both inconsistent and in conflict with the state statutes. The county clearly has no authority to pass this ordinance.

The county, in passing their version of §3B-8-5(3) (their number 15-18-5(3)) were restating their obviously invalid view of prostitution. Whereas some might contend that the opposite sex provisions of the new ordinance were designed to "prohibit and suppress the difficult problem of the sex offender" as defined by the state, §5(3) of the county of city massage ordinances is directly in conflict with the state law. It is not designed to suppress something the state has declared to be prostitution. It is either a direct frontal assault on the state statute, or, in the alternative, simply an anachronism from the time before the state passed its comprehensive Act on the subject, in 1973. While the state, in addition to its prostitution laws, prohibited certain unnatural sex acts, under the heading of "Sodomy" (§76-5-403) and also prohibited adultery (§76-7-103, and fornication (§76-7-104) the decision was clearly made that the conduct defined

as prostitution and deviate sexual conduct by the county, was not a crime. The county prostitution ordinance, and this portion of the county massage ordinance, are not intended to attack "the difficult problem of the sex offender" because, in fact, a person engaging in the conduct prohibited by the ordinance section at issue here is not a sex offender.

The city, in adopting the county ordinance regarding the touching of members of the opposite sex, adopted the county's invalid decision as to what is and is not prostitution. The city, however, has even a further problem, which the county does not have. The city has now clearly denied masseurs the Equal Protection of the law in violation of the Fourteenth Amendment the United States Constitution, and Article I, §2 of the Constitution of the State of Utah. There is no law in the city of south Salt Lake, or any other community, outside of the unincorporated area of Salt Lake county, that I can find, which makes it a crime for two people, married or unmarried, for a fee or not for a fee, to touch each other wherever they please, as long as both consent, it is not done in a place open to public view, and no sexual contact as defined in state statute, results therefrom. Therefore if a person is licensed as a masseur, he is subject to imprisonment for the same kind of conduct which any other person may engage in with impunity. This then renders §3B-8-5(3) of the revised ordinances of South Salt Lake null and void as in direct conflict with the constitutions of the State of Utah and the United States.



It is appropriate here to refer to the case of In re Lane,  
372 P2d 897 (Calif 1962) in which the Court stated as follows:

Defendant was convicted of the crime of "resorting," after a court trial in the Municipal Court for the Los Angeles Judicial District on two charges of violating §51.07 of the Los Angeles Municipal Code, which provides: "No person shall resort to any office building or to any room used or occupied in connection with, or under the same management and any cafe, restaurant, soft drink parlor, liquor establishment, or similar businesses, or to any public park or to any of the buildings therein or to any vacant lot, room rooming house, lodging house, residence, apartment house, hotel, house trailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with any such person. At 898.

The court, on page 899 of the decision lists numerous acts of sexual intercourse which have been made illegal by the state, and then goes on to list lewd acts in public places, crimes against children, indecent exposure, obscene exhibitions and acts against public decency as being outlawed by the state of California. Defendant was accused of going from her own living room to her own bedroom "for the purpose of having sexual intercourse with a male to whom she was not married." (At 898) The court stated:

Although living in a state of cohabitation and adultery is prohibited, neither simple fornication or adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state. (citations omitted.)

Accordingly, a city ordinance attempting to make sexual intercourse between persons not married to each other criminal is in conflict with the state law and is void. At 900.

In this state of course, sexual intercourse between unmarried persons has been made a crime, although rarely enforced. The mere touching without sexual contact, has not been made a crime. The city may not add numerous new sex crimes to what the state legislature has declared is the public policy of this state.

#### POINT VII

§3B-8-5(3) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS VOID FOR VAGUENESS.

It is settled rule of law that a statute written so vaguely that it does not set out a clear standard of the behavior prohibited, is void as a denial of due process of law. That standard was set out, among other places, in Champlin Refining Co. vs. Corporation Com., 286 US 210, 76 L Ed. 1062, 52 S.Ct. 559 (1932) where the United States Supreme Court said:

In light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of Due Process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. (Citations omitted.) 52 S.Ct.

In the Jensen vs. Salt Lake County case, previously cited, the court ruled an earlier version of the Salt Lake County massage ordinance void for vagueness, in the following language:

The trial court was of the opinion that the language of the ordinance was so vague and uncertain as to render it invalid. We conclude that that determination

by the trial court was correct. A person who might wish to enter the field covered by the ordinance would be unable to determine from its wording what qualifications or skill would be necessary to qualify for a license. It is noted that the ordinance uses the term "massage therapist" but nowhere is that term defined. At 4.

At first glance, the ordinance at issue here seems to be deceptively simple and clear. Litigation undertaken under this ordinance in the Justice Court for the city of South Salt Lake, indicates that the ordinance is not quite so clear. In a jury trial held in that court on February 25, 1980, a masseur working at the King's Palace was charged with the crime of:

"Unlawful massage on November 25, 1979 at or about 60 West, 3300 South, King's Palace Health Studio at or about 8:15 P.M. in violation of city ordinance Title 3B, chapter 8, §3B-8-5(3), in that said Defendant, acting as a masseur, did offer to touch or massage the genitalia of a customer, to wit: special South Salt Lake officer Cliff Dye. (Complaint No. 79-6559, Justice Court of South Salt Lake, in the matter of City of South Salt Lake vs. Susan Mae Rosvall).

Defendant, through counsel, submitted the following Jury instruction defining the crime charged:

The Defendant in this matter is charged with violation of §3B-8-5 (3) of the ordinances of South Salt Lake which states "It shall be unlawful for a masseur to touch or offer to touch or massage the genitalia of customers." The ordinance is designed to prohibit a commercial sexual business. In order to convict the Defendant, you must believe beyond a reasonable doubt that she offered to massage the genitals of the complaining witness for a fee, and the offer was immediate in nature in that she was to perform the act at the time and place the agreement was made.

The court, having heard objections from the city of South Salt Lake on several phases of this instruction, gave the instructio

to the jury, minus the underlined portions. The Court then, in effect, ruled that the ordinance did not require the act to be a commercial act for a fee, and that the offer to touch need not be confined to the massage establishment. Under the interpretation of the South Salt Lake City Justice Court, a masseur who accepts date from a customer, even if she may have known him before, and the date offer contains any language relating to possible physical affection, may have violated the law. That interpretation does not sound reasonable, but it appears to have been made by a court charged with interpreting that ordinance.

In a subsequent action in the same court involving another masseur, where the charging part of the complaint was substantially the same, counsel submitted the following proposed instruction:

You are instructed that the word "offer" according to Black's Law Dictionary, means "To present for acceptance or rejection."

The Defendant in this matter is charged with offering to touch the genitalia of a customer. You may find the Defendant guilty of that act, if you believe that she has offered, according to this definition. If, however, the police officer made the offer, and no actual touching took place, the Defendant is not guilty.

The Court rejected this instruction outright, after objection by the city, in the apparent assumption that the word "offer" could be interpreted, as the city contended, to include the acceptance of someone else's offer. Again, this appears to be a simple misinterpretation of what the ordinance says, but a court of competent jurisdiction has so interpreted it, thus leading



to the inescapable conclusion that the ordinance is so vague as to lend itself to such tortured interpretations.

In the case of State vs. Peterson, 560 P2d. 1387 (Utah 1973) the Defendant was charged with Forceable Sexual Abuse, in that he touched "the genitals of another with the intent to arouse his own sexual desire, without the consent of the other," in violation of §76-5-404 U.C.A. (1953) as amended. The Court ruled at that time that the Defendant had touched the genitals of the victim, despite the uncontroverted evidence that the contract was made through a layer of clothing. (See page 1390-1391). While in a prosecution for a sexually motivated assault, such a tight prohibition may have merit, such interpretation of the word "touch" in construing this ordinance would allow a masseur to be convicted for a mere brushing passed the genitals of a customer, even though the customer may be fully covered with a towel, as is the practice at the King's Palace. Unlike the obviously invalid prostitution ordinance of Salt Lake County, this ordinance does not require any intent thus allowing lower courts a wide latitude as to what kind of conduct can be proscribed under it. Reading the ordinance so as to not require any kind of sexual intent for a conviction, certainly renders the ordinance so vague and over-broad as to constitute a denial of Due Process of Law.

#### POINT VIII

SECTIONS 3B-8-3, 4, 7 AND 8 OF THE REVISED ORDINANCES OF THE CITY OF SOUTH SALT LAKE ARE INVALID BECAUSE THEY ARE



UNCONSTITUTIONALLY VAGUE, BEYOND THE DELEGATED POWERS GIVEN TO MUNICIPALITIES BY THE STATE OF UTAH AND ARE IN CONFLICT WITH UTAH STATUTES.

While the two ordinance sections discussed at length previously are the most onerous portions of this ordinance, other sections are also invalid. Section 3B-8-3 states requirements for issuing licenses to both a massage establishment and a masseur working in such an establishment. While §10-8-39 and 10-3-40 appear to give cities the power to license a massage establishment, as any other business, nowhere is the power given to license those who work in the massage establishments. It is established legal doctrine that a state statute conferring licensing power on a city is to be strictly construed and any doubt resolved against the city. See McCarthy vs. City of Tucson, 255 P. 329 (Ariz. 1924). Since it nowhere appears that the city has specific authority to license masseurs employed in a massage establishment, this portion of the ordinance should fail completely. Even assuming that the city does have this licensing power, this section of the ordinance appears to be so vague as to come under the proscription previously cited in the Jensen case. A careful reading of the licensing portion indicates only that a masseur must make an application to the city council through the city recorder, must provide certain information specifically asked for, and must be 21 years of age. It is also established doctrine that licensing ordinances or statutes are to be strictly construed when they deal with the right of someone to pursue his chosen

occupation. See Roberts vs. State Bd. of Embalmers and Funeral Directors, 434 P2d 61 (N.M. 1967). A strict construction of that ordinance could render it constitutional, by indicating that the city has no power to refuse licensing to anyone who has filled those simple requirements. The city, in several cases to date however, has assumed more power. The city council has assumed that it has the power to decide the fitness of a person, depending on the information received pursuant to the ordinance. Such a wide discretion in the city council, the licensing authority, renders the licensing ordinance invalid for failure to state comprehensible standards, also pursuant to the Jensen case. The city council then has the power to be as arbitrary and capricious as it wishes with no standards on which its performance is to be judged.

In addition, the requirement that a masseur be at least 21 years of age is in direct conflict with Utah State Law which, in §15-2-1 (1953) as amended, states in the relevant part, "the period of minority extends in males and females to the age of 18 years; but all minors obtain their majority by marriage." While certain rights of adults are specifically withheld until 19 or 21 (e.g. rights to smoke and drink) by the state, no municipality has the right to decide under what circumstances a person should be treated as an adult, and what circumstances he may not. That area is clearly preempted by the state. Therefore, §3B-8-3, of the massage ordinance, because of various assumptions of authority and conflicts with state law, is

invalid in its entirety.

Section 3B-8-4 of the Revised Ordinances of The City of South Salt Lake gives the unbridled power to the City-County Board of Health to decide when the premises of a massage establishment are "sanitary enough" to conduct business. For the reasons enunciated above, the statute is invalidly vague as it does not state comprehensible standards, and allows complete arbitrary and capricious descretion to a regulating authority.

Sections 3B-8-7 and 8 of the Revised Ordinances of South Salt Lake, the civil and criminal penalties sections, are invalid as they allow a massage establishment owner to lose his license or be convicted of a crime due to not what he has done, but what his employees have done. Since by the very nature of the business, massages are given out of the view of the public on a "one on one" basis, a massage establishment owner cannot have full control over what goes on between a masseur and a customer. All he can do is his best to check on them and educate them as to what is allowed and what is not allowed. If he has done this, he has done his duty under the law. This ordinance section is in conflict with §76-4-201 U.C.A. (1953) as amended, in that it defines a new conspiracy-type offense. The law is plain on what conspiracy is, as stated in the cited statute:

. . . a person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct and anyone of them commits an overt act in pursuance of the conspiracy . . . .

If the ordinance allowed conviction or revocation of license only after conspiracy was proven, it might well be valid. The fact that it now permits punishment for no crime at all, renders it clearly invalid as another example of the "bills of pain and penalty" prohibited by Article I, Section 18 of the Constitution of the State of Utah.

#### POINT IX

SECTION 3B-8-5(2) IS AN INVALID ATTEMPT BY THE CITY TO REGULATE LIQUOR, AN AREA OF LAW PREEMPTED BY THE STATE.

In the companion case of Redwood Gym vs. Salt Lake County Commission, the memorandum filed by the County Commission in attempting to get summary judgment in the lower court, stated, in point VI, page 23,

The Defendants concede that §15-18-5(2) purports to limit the places where liquor can be stored and sold and that it is invalid because the state preempted the area governing the siting of liquor stores.

Plaintiffs allege in paragraph 8 of their Complaint that §15-18-5(2) of the ordinance is invalid because Salt Lake County does not have the authority to regulate in the area of liquor control. Section 15-18-5(2) of the ordinance provides "It shall be unlawful to serve, to store, or allow to be served, or allow to be consumed, any alcoholic beverages on the licensed premises of a massage establishment." The State of Utah does have general authority over the sale and storage of liquor and the language of §15-18-5(2) could be construed to be in conflict with the province of the state.

The Defendants cannot in good conscience oppose an order determining §15-18-5(2) to be invalid as it is presently enacted.

The lower court did not respond to the County's concession that this section of the ordinance is invalid. They have,



however, so conceded and the ordinance should be struck down based on that. Since the city has copied their ordinance word for word from the county, it can only be assumed that they will also concede that point, and this ordinance section should be declared invalid.

#### POINT X

THE ENTIRE SOUTH SALT LAKE MASSAGE ORDINANCE, SECTIONS 3B-8-1 THROUGH 3B-8-10, SHOULD BE DECLARED INVALID, BECAUSE THE PROVISIONS ARE INTERRELATED.

It is the general practice of legislative bodies in this country to include a severability clause in any multi faceted piece of legislation, to assure that the valid provisions will remain in effect, if invalid portions are found by courts, and stricken. It is established law, however, that a piece of legislation in which major interrelated sections are invalid, can and should be stricken in its entirety. This was clearly stated in the case of State vs. Salt Lake City, previously cited, where this Court stated:

Finally we are confronted with the issue of the effect of the severability clause contained in §20-29-25 of the ordinance. This Court has previously held that even where a savings clause existed, where the provisions of the statute are interrelated, it is not within the scope of this court's function to select the valid portions of the act and conjecture that they should stand independently of the portions which are invalid. At 696.

Almost the entire working sections of this ordinance are clearly invalid for one reason, or many. Therefore, this ordinance



in its entirety should be declared invalid and the City of South Salt Lake should be told to write an ordinance which permissibly regulates, but does not invalidly restrict or surpress the legitimate business of giving massages.

### CONCLUSION

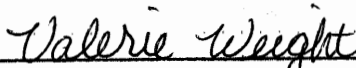
The order of the Third Judicial District Court dismissing Plaintiff's Complaint should be reversed, and the matter remanded to the Third Judicial District Court with instructions to enter judgment for Plaintiffs declaring §3B-8-1 through 3B-8-10 of the Revised Ordinances of the City of South Salt Lake void and of no effect. In the alternative, this action should be remanded to the Third Judicial District for proper evidence taking, during which time the Third Judicial District Court should be ordered to take appropriate steps to prevent Defendants from enforcing the ordinance.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of March, 1980.

  
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W. Andrew McCullough  
Attorney for Plaintiffs-Appellants

### CERTIFICATE OF SERVICE

I hereby certify that I mailed 2 true and correct copies of the foregoing Brief of Appellant, postage prepaid, to Clint Balmforth, Attorney for Defendants, 2500 South State Street, Salt Lake City, Utah 84115, this 24<sup>th</sup> day of March, 1980.

  
\_\_\_\_\_  
Valerie Wright