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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 v. the City of South Salt Lake, a Municipal
Corporation, Clint Balmforth, and the South Salt
Lake Police Department : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY HOLLINGSWORTH	:	
d/b/a THE KING'S PALACE &	:	
RUSTY HANNA, et al.,	:	
d/b/a THE SOCIETY OF	:	
LICENSED MASSEURS,	:	
	:	
Plaintiffs-Appellants,	:	No. 16,831
	:	
v.	:	
	:	
THE CITY OF SOUTH SALT LAKE,	:	
a Municipal Corporation,	:	
CLINT BALMFORTH, and THE	:	
SOUTH SALT LAKE POLICE DEPARTMENT	:	
	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

APPEAL FROM A JUDGMENT ENTERED IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
DISMISSING PLAINTIFFS' DECLARATORY JUDGMENT ACTION
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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Appellants,

v.

No. 16,831

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

Defendants-Respondents. :

NATURE OF THE CASE

Appellants contest the validity of South Salt Lake City Ordinances regulating massage parlors, particularly those prohibiting massages by members of the opposite sex. This appeal arises from a judgment entered against appellants in the Third Judicial Court of Utah.

DISPOSITION IN THE LOWER COURT

Judge Homer Wilkinson of the Third Judicial Court of Utah has sustained the validity of the South Salt Lake City Ordinances. His decision is based in part on a similar ordinance enacted by Salt Lake County. Judge Wilkinson also upheld the validity of the County Ordinances in the matter of Redwood Gym et al., v. Salt Lake County Commission et al. which is also pending before this court.

RELIEF SOUGHT ON APPEAL

Appellants seek an order reversing the decision of the Third Judicial Court, with instructions to declare sections of the revised ordinances of South Salt Lake null and void. Appellants alternatively reuquest that the matter be remanded to the Third Judicial Court of Utah.

STATEMENT OF FACTS

Respondents agree with appellants' statement of facts.

ARGUMENT

POINT I. THE UNITED STATES SUPREME COURT HAS UPHELD OPPOSITE-SEX MASSAGE ORDINANCES. NUMEROUS JURISDICTIONS HAVE ALSO UPHELD THE CONSTITUTIONALITY OF SUCH ORDINANCES.

The constitutionality of ordinances regulating opposite-sex massages has been affirmed and upheld by state and federal courts throughout the country.

A landmark case dealing with such ordinances was the California Appellate Court decision of Ex parte Maki, 56 Cal.A;;. 635, 133 P.2d 64 which stated at 64:

The ordinance forbidding administration of massages to persons of opposite sex is not unconstitutional as violating the constitutional provisions that no person shall on account of sex be disqualified from pursuing any vocation. Const. Art. 20 Sec. 18.

and further stating at 64:

a(n) owner, convicted of violating ordinance by calling in a masseuse to administer massage to male patron, could not complain on ground that ordinance violated constitutional provisions that no person shall on account of sex be disqualified from pursuing any vocation. Const. Art. 20, Sec. 18.

Since this decision, this issue has been extensively litigated on all levels of the judicial system, and extended assertions of its constitutionality presented. Patterson v. Dallas, 355 S.W.2d 838 (Tex.Civ App 1962), held that ordinance prohibiting opposite-sex massages in a massage establishment was not arbitrary, discriminatory, or unreasonable and did not violate due process clauses of state or federal constitutions, or deny equal protection of the law. (U.S.C.A. Const. Amend. 14.).

Further, cases on the state level have endorsed or adopted the constitutionality of regulatory statutes and ordinances: City of Houston v. Shober, 362 S.W.2d 886 (Tex Civ App. 1962); Connell v. State, 371 S.W.2d 45 (Tex. Crim. 1964); Thompson v. City of Huntsville, 329 So.2d 664 (Crim.App. 1976); Oueilhe v. Lovell, 560 P.2d 1348 (Nev.Sup.Ct. 1977).

The United States Supreme Court has additionally determined that opposite-sex massage ordinances do not violate the Constitution of the United States in either

limiting equal protection or abridging due process clauses. In Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), the Supreme Court dismissed the case for want of a substantial federal question, such dismissal affirming that opposite-sex massage ordinances did not violate the United States Constitution. Other cases were dismissed on the same basis and include: Patterson v. Dallas, supra, Kisley v. Falls Church, 212 Va. 693, 187 S.E.2d 168 (Va.Sup.Ct. 1972), 409 U.S. 907, 93 S.Ct. 237, 34 L.Ed 2d 169 (1972); Smith v. Keator, 285 N.C. 530, 206 S.E. 2d 203, (N.C. Sup. Ct. 1974), 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed. 2d 636 (1974); Rubenstein v. Township of Cherry Hill, No. 10,027, unreported, (N.J. Sup.Ct. 1974), 417 U.S. 963, 94 S.Ct. 3165, 41 L.Ed. 2d 1136 (1974); City of Indianapolis v. Wright, 371 N.E. 2d 1298 (Ind. Sup.Ct. 1977), 439 U.S. 804, 99 S.Ct. 60, 58 L.Ed 2d 97 (1978).

Hogge v. Johnson, 526 F.2d 833 (4th Circuit 1975), cert. denied, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed 2d 1221, at page 835, summarized the reasoning behind a federal court dismissal based on lack of a substantial federal question:

Quite recently, the United States Supreme Court has spoken to the question among the circuits with respect to the meaning to be accorded dismissal

for want of a substantial federal question. Such a dismissal is a decision on the merits binding upon the inferior federal courts. It is stare decisis on issues properly presented to the court and declared by that court to be without substance.

The decision in Hogge v. Johnson, supra, regarding lack of a substantial federal question, influenced later decisions on the question of appeals on the grounds of constitutionality. Colorado Springs Amusements, Ltd. v. Rizzo, 387 F.Supp. 690 (E.D. Pa. 1974), rev'd 524 F.2d 571 (3d Cir. 1975), cert. denied, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed 2d 1222, challenges Philadelphia's opposite-sex massage parlor ordinances charging that assumptions were made as to 1) group characteristics rather than the merits of the individual, 2) illicit sexual conduct occurring as a result of a massage by a member of the opposite sex, 3) and that the ordinance violated the Civil Rights Act of 1964 by forcing them to discriminate in their hiring, among others.

After reviewing the arguments of the case, the Third Circuit Court of Appeals stated at 524 F.2d 576:

By parity of reasoning, we are not free to disregard three dismissals by the Supreme Court for want of a substantial federal question, of challenges to the ordinances identical in all material respects to the one in question here. A reading of the appeal papers shows that the orders dismissing the appeals are precedent for rejecting all but two of the contentions raised in opposition to section

9-610(4) of the Philadelphia Code...Our reason in reaching this conclusion is supported by the similar approach taken by the Fourth Circuit Court in its recent decision in *Hogge v. Johnson*.

Only two cases currently exist which have not been directly overturned which hold such ordinances unconstitutional: J.S.K. Enterprises, Inc. v. Lacey, 6 Wash.App. 43, 492 P.2d 600 (Ct.App. 1971), and City and County of Denver v. Nielson, 572 P.2d 484 (Colo. Sup.Ct. 1977). The J.S.K. Enterprises decision was made prior to the United States Supreme Court's dismissal for lack of a substantial federal question ground, and has been vitiated by the same.

In the case of City and County of Denver v. Nielson, however, the decision that opposite-sex ordinances were unconstitutional was based on the Constitution of the state of Colorado, and not on that of the United States; the decision, then, being based solely on the laws and interpretations of a single jurisdiction.

Clearly, the roots of constitutionality in legislating opposite-sex massages have been established, and the State of Utah, and the City of South Salt Lake are within well established boundaries of legality in attempting to regulate such ordinances.

POINT II. THE SOUTH SALT LAKE MASSAGE ORDINANCES DO NOT VIOLATE ANTI-DISCRIMINATION LAWS.

In order to appropriately address the appellants' arguments on this point, it is necessary to establish the boundaries in which Utah defines unconstitutional discrimination.

State v. Mason, 94 Utah 501, 78 P.2d 920 (1938)
at page 920 set the following precedent:

to be unconstitutional as discriminatory, the discrimination of a statute must be unreasonable or arbitrary and a classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation and if the differentiation bears a reasonable relation to the purposes to be accomplished by the statute. Const. U.S. Amendment 14, Section 1.

Within the ordinance adopted by the City of South Salt Lake regarding opposite-sex massages, masseuses and masseurs are treated equally. It applies equally to both men and women. In a similar case in the Supreme Court of North Carolina, Smith v. Keator, supra, the court approved the restrictions of the ordinances:

The ordinance applies equally to both men and women...the barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police

powers...there is nothing in the ordinance that denies equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing...

Again, in the case of Patterson v. City of Dallas, supra, this premise was supported, and the court held the ordinance was valid when it stated at 842:

The ordinance applies alike to both men and women. If petitioner should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, there would be no violation. The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers.

In the landmark case of Ex parte Maki, supra, the appellant argued violation of anti-discrimination acts found under Section 18, Article 20 of the Constitution. The court, however, declared that the ordinance did not disqualify, on the account of sex, any person from entering or pursuing any lawful business, vocation, or profession because the ordinance did not challenge the right of either man or woman to work as a masseur or to own such a business. On that ground, there is no discrimination.

Appellants argue that the ordinance is void as a denial of due process, and is thus contrary to the Fourteenth Amendment. The case of Smith v. Keator, supra, dealing with the constitutionality of opposite-sex massage noted the following at page 209:

"Class legislation" is not offensive to the Constitution when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected. Or, as the principle is more often expressed, when the law applies uniformly to all persons in like situation--which of itself implies that the classification must have a reasonable basis, without arbitrary discrimination between those in like situations.

The appellants' argument that the City Ordinance unreasonably infringes upon the right of contract has no substantial basis. Notwithstanding the ordinance, a licensed masseur may spend all of his time massaging men, and may employ a masseuse to massage any woman requesting treatment. Neither the state nor the federal constitution guarantees to a person unrestricted license in pursuing any line of business that he wishes, as he wishes to do so. The state may have conditions on that right, and may apply such restrictions to massage parlors, just as it does to doctors, lawyers, or garbage collectors. As long as the regulatory laws are not the result of benefit of private interest, unfair, or without justifiable ends, regulations are constitutional

and enforceable. Farther, because the City has found it necessary to regulate the business of massage parlors, but has not comprehended every possible evil that it must legislate, does not negate the need for, nor the impact of enacted ordinances.

Finally, to counter the argument concerning a class being characterized, rather than an individual on the basis of his/her own merit, and to counter the argument that because of class characterization, those honorable, moral, and ethical practitioners are subjected to regulations designed to prevent immoral acts, findings by the legislative body to concur, historically, that the existence of an evil in connection with massage parlors is widespread. This is sufficient answer to the complaint of one engaged in the business, even though he is himself honorable. He is not deprived of his property because he must conform to such legislation. His own compliance with such measures should be considered a privilege and a protection against the further corruption of his legitimate business.

POINT III. THE SOUTH SALT LAKE MASSAGE ORDINANCES
ARE A VALID EXERCISE OF POLICE POWER.

The state codes and the judicial decisions of Utah have historically supported the fact that the exercise of police power is valid when regulating massage parlor business.

Citing the same case which the appellants have used in arguing this point (p. 11, Brief of Appellant), Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978) at 118, the court's opinion was clearly in favor of police regulation:

It is fundamental that the regulation of business--and specifically this type of business--is within the police power of the state...(Emphasis added).

This case alone is enough to validate the argument in favor of the respondent as a clear statement of the Utah Court's sentiment. Further confirmation of this expressed authority are upheld in additional decisions. Salt Lake City v. Allred, 437 P.2d 434 (Utah 1968) at page 434 states:

It is proper exercise of statutory grant of police power to municipalities to preserve and protect public morals, and any practice of business which has tendency to weaken or corrupt morals of those who follow it, as shown by experience, is such conduct as affects "public morals." U.C.A. 1953, 10-8-84.

When rendering the decision on Salt Lake City v. Allred, the court applied the findings of Salt Lake City v. Kusse, 97 Utah 113, P.2d 671 (1938), that found the grant of general police powers to cities under predecessor statutes to Section 10-8-84, U.C.A. 1953, it would appear reasonable that sexual intercourse for hire and related offenses would be included in such general police power.

The protection of public morals has always been a matter of local concern requiring regulation by municipalities. It properly falls within the scope of the police power pertaining to public morals.

Other cases considering similar legislation reached the same conclusion. J.S.K. Enterprises, Inc. v. City of Lacey, supra, at page 600 determined two significant points:

- 1) A city, in exercise of its police power, may regulate massagists on grounds of public health, safety and morality...

and,

- 2) Police Power regulation is subject to provisions of state and federal constitutions prohibiting granting of special privileges and immunities and guaranteeing equal protection of laws, but within limits of such restrictive rules, legislative body has a wide measure of discretion and its determination cannot be successfully attacked unless it is manifest arbitrary, unreasonable, inequitable, and unjust. (Emphasis added).

Ex Parte Maki, supra, at page 64, affirms that the imposition of such ordinances by a city council is in fair exercise of police powers, and that such regulation by police powers to maintain the moral welfare does not arbitrarily deprive a person engaged in a regulated business of his property without "due process of law" (Const. Art I, Section 13, U.S.C.A. Const. Amend. 14. sec. 1).

Finally, Smith v. Keator, supra, at page 207:

...after noting that the California case of Ex parte Maki, supra, was so well decided that it was decisive of the appeal before them, held that a city ordinance declaring that it was unlawful to administer a massage to any person of the opposite sex was a fair exercise of the police power of the city and that did not violate any constitutional rights of the licensees of the massage establishment.

POINT IV. THE SOUTH SALT LAKE MASSAGE ORDINANCES
ARE NOT IN CONFLICT WITH UTAH STATE LAW.

In laying a foundation on the basic premises of this argument, it is important to note two precedents determined in the case of Salt Lake City v. Allred, supra, at page 434, in relation to city/state legislation:

1) There is nothing in 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.
U.C.A. 1953, 76-53-8 to 76-53-12

and,

2) City has the right to legislate on the same subject as state statutes where either general police power or express grant of authority is conferred upon municipalities.

South Salt Lake, in forming legislation dealing with opposite-sex massages, is in harmony with the above decision. Appellants argue that South Salt Lake has adopted an ordinance "in direct conflict with the State of Utah" because prostitution means one thing to the State of Utah and "in South Salt Lake, it means far more." The courts have not found such expansions of definitions either inconsistent or against legislation.

In State v. Salt Lake City, 21 Utah 2d 318,

445 P.2d 691 (1968), at page 691, the Supreme Court of Utah summarizes their position:

...where legislature prohibits citizens from doing some act, there is no basis to imply that the legislature intended that cities and counties should not add additional prohibitions.

By expanding the definition of "prostitution," South Salt Lake has, indeed, added prohibitions, and is therefore within their legal rights as a municipality. This concept is in accordance with Salt Lake City v. Kusse, supra, where the Utah Supreme Court, in commenting on various tests to determine whether there is a conflict between the statute and the ordinance voiced the following with approval:

The city does not attempt to authorize by this ordinance what the legislature has forbidden; nor does it forbid what the legislature has expressly licensed, authorized, or required.

The Supreme Court of the State of Utah has also determined in the case of Layton City v. Speth, 578 P.2d 828, (Utah 1978) at page 831, the following:

Cities are 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 for the safety, preserve the health, promote the prosperity, and improve the morals, peace and good order, comfort and convenience of the city and its inhabitants.

Appellant has argued that this ordinance has exceeded the scope of this definition and is inconsistent and in conflict with the state laws. Appellants argue that the ordinance attempts to make crimes of acts which are not crimes under state laws. A review of the South Salt Lake Ordinances and the relevant 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 the state statute have the common purpose of defeating the practice of business or prostitution or the vice of sexual intercourse for hire and are closely related in subject matter.

Salt Lake City v. Allred provides the Supreme Court opinion on the matter:

The mere fact that an act 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 whereas here the ordinance is within the scope of state law dealing with the same related subject of sexual offenses and is in no way repugnant to, but on the other hand is in harmony with the state laws.

POINT V. 3B-8-5(3) OF THE SOUTH SALT LAKE MASSAGE ORDINANCES IS SPECIFIC IN ITS DESCRIPTION OF PROSCRIBED CONDUCT AND THUS CANNOT BE VAGUE.

3B-8-5(3) of the South Salt Lake Ordinances provides "that it shall be unlawful for a masseur to touch or offer to touch or massage the genitalia of customers."

Appellants argue that this provision of the South Salt Lake Ordinances is unconstitutional because of vagueness. The issue of vagueness is best explained by the standard which Utah has applied in various cases:

If the statute is so designed that persons of ordinary intelligence, who would be law abiding can tell what their conduct must be to conform to its requirements, and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness.

See Kent Club v. Toronto, 6 Utah 2d 67, 72, 305 P.2d 870, 874 (1957); State v. Packard, 122 Utah, 369, 376, 250 P.2d 561, 564 (1952); Henrie v. Rocky Mountain Packing Corp., 113 Utah 444, 448, 202 P.2d 727, 729 (1949).

Applying the standard to the South Salt Lake Ordinance 3B-8-5(3) it is clear to a person of ordinary intelligence which conduct is unacceptable under the ordinance.

Appellants cite Champlin Refining Co. v. Corporation Com, 286 US 210, 76 L.Ed. 1062, 52 S.Ct. 559 (1932) and Jensen v. Salt Lake County, previously cited, to support

the claim of vagueness. Champlin concerned an Oklahoma Oil Regulation, Jensen concerned licensing. Appellants do not show how the vagueness issue in either case influences the alleged vagueness in the South Salt Lake Ordinance.

Appellants also support their claim of vagueness by calling upon two South Salt Lake City cases which were tried in a Court of the Justice of the Peace. Both cases alleged violations of 3B-8-5(3). Appellants cite City of South Salt Lake v. Susan Mae Rosvall No. 79-6559 and one other case. No citation or defendant's name is provided in the second case.

In Rosvall, appellants assert that the ordinance does 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. Appellants assume this interpretation because their jury instruction was rejected. In fact, the complaint against Rosvall specifies the date, time, and place of occurrence. The complaint specifies that the act occurred at a massage establishment, while Rosvall was acting as a masseur, and that Rosvall offered to touch the genitalia of a customer. Appellants construct their analysis of the ordinance on the basis of their interpretation of what a jury instruction should have read.

In the second case, defendant was charged with

violations of 3B-8-5(3). Defendant, through counsel, urged a jury instruction requiring the defendant actually touch the genitalia before she could be convicted. The instruction was rejected. Again, appellants base the vagueness issue of the ordinance on their interpretation of a rejected jury instruction.

Neither case was conducted in a court of record. The actual reason for rejection of the instructions, and the judge's interpretation of the ordinance are not available.

POINT VI. THE CITY OF SOUTH SALT LAKE MAY ESTABLISH
MINIMUM AGE STANDARDS FOR MASSAGE PARLOR LICENSEES.

Section 3B-8-3(1) of the South Salt Lake Massage Ordinances provides that each individual desiring a massage establishment license or masseur license shall "be an individual at least 21 years of age."

The City of South Salt Lake has a responsibility to protect the morals, health, and welfare of the community. The massage ordinances, including the ordinance in question, were fashioned for the purpose of fulfilling those responsibilities.

The minimum age requirement is a reasonable attempt of the City to regulate the massage parlor business. There is a legitimate relationship between the City's obligations to the community and the ordinance it has enacted to achieve that end. The City of South Salt Lake also has an interest in protecting minors from possible sexual exploitation in the massage parlor establishments.

There are numerous precedents for the establishment of a minimum age requirement. Utah Code Annotated, Section 58-2-1 et seq. provides that persons seeking licenses for various occupations must be 21 years of age, including architects, embalmers, barbers, chiroprodists dentists, surveyors, etc.

The same minimum age requirement has been enforced with regards to consumption of alcohol.

In Purdie v. University of Utah, 584 P.2d 831 (Utah 1978), the court held that age may be a valid classification as long as the reason for the classification is based on a legitimate state interest.

POINT VII. CIVIL SANCTIONS AND PENALTIES INCLUDED IN THE SOUTH SALT LAKE MASSAGE ORDINANCES DO NOT CONFLICT WITH EXISTING STATE CONSPIRACY STATUTES.

3B-8-7 and 3B-8-8 of the South Salt Lake Massage Ordinances provide for civil sanctions and penalties against the holder of a massage establishment license "for any and all violations of the provisions of this ordinance committed by his or her employees." Sanctions include license suspension or revocation and fines.

Appellants argue that this ordinance is contrary to Utah State Law. Appellants cite a section of the State Criminal Code dealing with conspiracies, 76-4-201:

For purposes of this part, 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 and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a capital offense, a felony against the person, arson, burglary, or robbery, the overt act is not required for the commission of conspiracy.

This section is limited to Part 2 Chapter 4 of the Utah Criminal Code. The controlling language of the conspiracy statute is encompassed within the first five words, "For purposes of this part." Careful examination of the appellants brief will show that these words have been eliminated or omitted from their discussion of the statute.

Since this statute is limited in its application, it does not prohibit cities from enacting ordinances which hold licensees accountable for the conduct of employees on the premises.

Specifically, the legislature has enacted statutes that do hold licensees accountable for the conduct of persons on their premises. A licensee may be held responsible for persons who are drunk on his premises (See U.C.A. 32-7-24). A licensee may also be held responsible for permitting persons to consume beer on his premises. (U.C.A. 32-7-19).

Courts have upheld convictions of licensees who were charged for the conduct of their employees. See Brodsky v. California State Board of Pharmacy, 344 P.2d 68 (Cal. 1959) and Clown's Den, Inc. v. Canjar, 518 P.2d 957 (Colo Ct. App, 1973).

POINT VIII. THE UTAH STATE LEGISLATURE HAS AUTHORIZED THE CITY OF SOUTH SALT LAKE TO REGULATE LIQUOR IN MASSAGE PARLORS.

Section 3B-8-5(2) of the South Salt Lake Massage Ordinances makes it 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

Appellant contends that this is an invalid attempt to regulate liquor, an area of law that is preempted by Utah State Law. In defense of their position, appellants cite so-called concessions of invalidity made by Salt Lake County during their memorandum to the 3rd Judicial Court. Appellants wrongly assume in their brief that because South Salt Lake has adopted the wording in the County Statute, the City is also willing to make identical concessions about the statute's validity.

On the contrary, the City of South Salt Lake maintains that the power to regulate liquor on the licensed premises of a massage establishment is well founded in statutory and case law. Chapter 8 of the Utah Code Annotated describes the power which has been reserved for the cities in regulating liquor:

They may prohibit, except as provided by law, any person from knowingly having in his possession any intoxicating liquor, and the manufacture, sale, keeping or storing for sale,

offering or exposing for sale, importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing, or serving of intoxicating liquors (U.C.A. 10-8-42)

Cities may enforce the same punishments and prohibitions which are enforced by state law when they occur within the jurisdiction of the municipality. See American Fork City v. Charlier, 43 U 231, 134 P 739; Tooele City v. Hoffman, 42 U. 596, 134 P. 558, and American Fork City v. Briggs, 43 U. 252, 134 P. 747.

Cities may not enforce liquor ordinances where there is a conflict between the city ordinance and the state statutes. Rogue v. Utah Liquor Control Commission, 500 P.2d 509 (1972) upheld the right of local authorities to regulate the establishment of liquor stores through zoning ordinances. The decision overturned the rule outlined in Salt Lake County v. Liquor Control Commission, 357 P.2d 488 (1960), a case which appellants in Redwood Gym cite.

Appellants in the South Salt Lake case do not address state statutes in this area of law, nor do they demonstrate a conflict in light of existing case law.

POINT IX. THE CITY OF SOUTH SALT LAKE MAY REGULATE
THE SANITARY CONDITIONS OF MASSAGE PARLORS IN THE
INTEREST OF PUBLIC HEALTH.

Section 3B-8-4 of the South Salt Lake Massage Ordinances provides: "All applications for a massage establishment license shall be referred to the Salt Lake City-County 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."

Appellants argue that this ordinance is beyond the delegated authority of cities and that it is unconstitutionally vague.

Indeed, the sanitary conditions in a massage parlor establishment are well within the areas of public health and welfare that the cities are obliged to protect (See U.C.A. 10-8-84).

With respect to vagueness, the appellants do not have standing to object to the ordinance unless they can show they are prejudiced by the ordinance or, are about to be prejudiced by it.

Several cases isolate the effect a statute must have on a party before it can be deemed unconstitutionally

vague. Consider the language in Cavaness v. Cox,
598 P.2d 349 (1979) 351-52:

The constitutionality of a statute is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application; and a person may challenge the constitutionality of a statute only when and as far as it is being, or is about to be applied to his disadvantage.

This court took a similar position in State v. Kallas when it held:

This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute.

The Court has explained its position if appellants do not satisfy this requirement of standing. See Peck v. Dunn, 574 P.2d 367 (1978) p. 369:

In regard to plaintiff's contention, these things are to be said generally about the interpretations and application of a statute or ordinance: it is not our duty to indulge in conjecture that the statute may be so distorted or unreasonably applied that some innocent person might come within its terms. Rather, it is our duty to assume that those who administer a statute will do so with reason and common sense, in accordance with its language and intent; and further, that if there is a choice as to the matter of its interpretation and application, that should be done in a manner which will make it constitutional, as opposed to one which would make it invalid.

The City of South Salt Lake has not revoked the license of any massage parlor because of violations of this ordinance. There are no cases pending where violations of this ordinance may result in the suspension or revocation of any licensed massage parlor. No licenses have been denied on this basis.

At best, the appellants are speculating that their establishment may at some future time violate this ordinance.

POINT X. THE PROVISIONS OF THE SOUTH SALT LAKE MASSAGE ORDINANCES ARE SEPARATE AND DISTINCT. INDIVIDUAL PROVISIONS OF THE ACT REMAIN IN EFFECT EVEN THOUGH OTHERS MAY BE DEEMED INVALID.

Section 3B-8-9 of the South Salt Lake Ordinances provides: "In the event that any provision of this ordinance is declared invalid for any reason, the remaining sections shall remain in effect."

There are numerous provisions of the South Salt Lake Ordinances that deal with varying aspects of the Massage Parlor business. This severability clause was incorporated into the ordinances should any portion of the act be declared invalid. The clause is inserted into the ordinances to voice support for the individual ordinances as well as for the ordinances as a uniform body.

Appellants argue that if one part of the South Salt Lake Ordinances is found to be invalid, the remaining provisions should likewise be invalidated because the provisions are interrelated.

The United States Supreme Court has ruled that provisions of a legislative act remain in effect, even though a portion is held to be unconstitutional. In Champlin Refining Co. v. Corporation Com, previously cited, The Supreme Court struck down a portion of an Oklahoma statute regulating the production of oil.

In so doing, the Court held:

And if section 2 were to be held unconstitutional the provisions on which the orders rest would remain in force. The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature could not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. (p. 234)

It is clear from this case that portions of the South Salt Lake Ordinances may still remain in effect even though a portion or portions are found to be invalid. A declaration that massaging the genitalia is invalid, does not invalidate provisions governing licensing, etc. The licensing requirements may remain operative as a law, regardless of the outcome of issues involving other provisions.

Continuing in the Champlin decision, the Court said:

Section 10 declares that the invalidity of any part of the Act shall not in any manner affect the remaining portions. That discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without regard to section 2. (p. 235)

CONCLUSION

The South Salt Lake City Ordinances regulating massage parlors are a valid exercise of police power.

Support for these ordinances is echoed in the decisions of other jurisdictions at the federal and state levels. Massage parlor ordinances similar to the South Salt Lake Code have been sustained throughout this country. In fact, the propriety of such ordinances is now so well recognized that many courts have refused to rule on questions of their validity because they do not raise "substantial questions of constitutionality."

The South Salt Lake Ordinances are in harmony with the U. S. Constitution and with existing state laws.

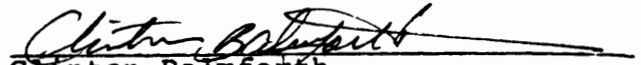
The ordinances are clear in their intent. The Code applies equally to men and women. Provisions of the ordinances are also very specific in their descriptions of proscribed conduct.

The City of South Salt Lake has a responsibility to safeguard the health and morals of the community.

These ordinances are a lawful and reasonable means to that end.

The decision of the Third Judicial Court of Utah should be upheld.

RESPECTFULLY SUBMITTED this 10th day of November, 1980.


Clinton Balmforth
Attorney for Defendants-Respondents

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing
BRIEF OF RESPONDENTS were served by hand delivering
the same on the 9th day of November, 1980, to
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