

1981

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 : Petition For Rehearing

Utah Supreme Court

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W. ANDREW MCCULLOUGH; Attorney for Plaintiff and Appellant; CLINTON BALMFORTH;
Attorney for Defendant and Respondent

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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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PETITION FOR REHEARING

---ooo0ooo---

Brief of Appellants in support of Petition for Rehearing

---ooo0ooo---

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FILED

FEB 20 1981

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.,
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---ooo0ooo---

PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF UTAH:

COME NOW the Appellants, within 20 days after the de-
cision in the above-entitled case which this Honorable
Court rendered, affirming the judgment of the trial court
dismissing Plaintiffs' Complaint; and respectfully submit
this Petition for Rehearing, pursuant to and in accordance
with Rule 76(e)(1) U.R.C.P., and for cause thereof show:

1. Since the previous decision in this case, the Legislature of the State of Utah has acted to preempt the field of massage regulation, and such legislation is now awaiting the signature of the Governor.

2. Appellants were denied hearing of the full Court due to sickness and resignations; and were denied an opportunity to fully argue the case, due to the failure of Respondents to file their brief until the morning of oral arguments.

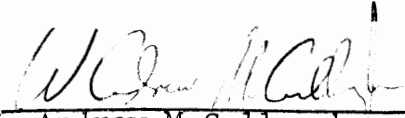
3. Recent developments and trends in the law support Appellants contentions, and suggest that the Court should reconsider its decision.

4. The decision in this case is directly contrary to previous decisions of this Court.

5. Part of the decision, as it affects §3B-8-5(3) was rendered prematurely.

WHEREFORE, Petitioners pray that a rehearing be granted, that the full Supreme Court be allowed to hear the major and important contentions of Appellants, and that a decision taking into effect recent actions of the Utah State Legislature and other factors as stated above be rendered, and that the judgment of the trial court be reversed.

RESPECTFULLY SUBMITTED this 19th day of February, 1981.



W. Andrew McCullough
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Petition for Rehearing, postage prepaid, to Clinton Balmforth, Attorney for Respondents, 2500 South State Street, Salt Lake City, Utah 84115, this 19th day of February, 1981.

Valerie Wright

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ARGUMENT

POINT I

ON JANUARY 30, 1981, THE LEGISLATURE OF THE STATE OF UTAH, BY PASSING THE MASSAGE PRACTICE ACT, DECLARED TITLE 3B, CHAPTER 8 OF THE REVISED ORDINANCES OF THE CITY OF SOUTH SALT LAKE AS CONTRARY TO PUBLIC POLICY AND INVALID.

In their previous brief in this matter, appellants argued, in Points III and VI, that the contested sections of the South Salt Lake City massage ordinance were invalid as having been preempted by state law. This court, finding no comprehensive state legislation in the field of massage, disagreed. In the decision, this court pointed out that its previous decision in Jensen v Salt Lake County Board of Commissioners, 530 P.2d 3 (Utah 1974) declaring a previous Salt Lake County massage ordinance invalid, was based, in part, on the attempt of the county, as part of that ordinance, to regulate physical therapists. Because physical therapists were under the jurisdiction of the Department of Business Regulations of the State of Utah, the court in Jensen held that the county might not also regulate physical therapists. The Redwood Gym decision (the companion to the instant case) after thus alluding to Jensen, stated as follows:

As the proposed ordinance attempted to regulate in an area expressly committed by state law to another agency, it was adjudged an improper exercise of the police power. The instant case

presents no such question. The power to permit or prohibit massages by members of the opposite sex has not been expressly committed by statute to any existing agency of government. As such, the provision does not constitute a jurisdictional infringement, and is not improper on that basis. Redwood Gym v Salt Lake County Commission, Supreme Court No. 16,833, decided January 19, 1981.

Within two weeks after the decision in Redwood Gym, and the companion decision in the instant case, both houses of the legislature passed a bill doing exactly what the court contended would be necessary to deprive counties and cities of the power to permit or prohibit massages by members of the opposite sex. "The Massage Practice Act" is a comprehensive law dealing with the licensing and regulation of both massage establishments and massage practitioners. The act provides for inspection of massage establishments by the state, and details what acts on the part of massage practitioners are prohibited. As a declaration of public policy, the legislature of the State of Utah has spoken. There can no longer be any doubt that it is the intent of the state legislature to preempt the matters of regulation of both massage establishments and massage practitioners. As of the writing of this brief, the Governor has not yet signed the "Massage Practice Act" into law, but it is clear that the legislature has now preempted the field.

This court has previously declared invalid an attempt by Salt Lake City to license private non-profit social clubs, when the State of Utah had a licensing ordinance in

effect. In State v Salt Lake City, 445 P.2d 691 (Utah 1968) the court quoted extensively from Abbott v City of Los Angeles, 3 Cal.Rptr. 158, 349 P.2d 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 P.2d at 694.

The court then went on to say:

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 qualifications 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 cities forbidding what the legislature has expressly licensed, authorized, or required. 445 P.2d at 694.

This court, in its previous decision, also relies on Salt Lake City v Allred, 20 Utah 2d 298, 437 P.2d 434 (Utah 1968) as standing for the proposition that the city is at liberty to legislate in the areas of health, safety and morals "so long as both statutory and ordinance law have a common purpose, and are not in conflict." (Redwood Gym v Salt Lake County Commission, page 7.) The conflict is now evident, and the cases cited, as well as Allgood v Larsen, 545 P.2d 530 (Utah 1976), Salt Lake City v Howe, 37 Utah 170, 106 P. 705 (Utah 1910) and Salt Lake City v Kusse,

97 Utah 113, 93 P.2d 671 (Utah 1938) support appellants' contentions.

For the reason that the legislature has now clearly pre-empted the local licensing and regulation of massage establishments and massage practitioners, §3B-8-5 in its entirety (containing both the prohibition on opposite sex massage and touching of the genitalia) is void, as are all other sections of the ordinance in contention.

Even without being signed into law by the Governor, the quick legislative passage of an act regulating in detail the practice of massage, without attempting to prohibit the acts prohibited by §§5(1) and (3) is a strong statement of public policy as to how the massage business is to be regulated in Utah. The legislature appears to have specifically disapproved, and very quickly, of the types and method of regulation granted validity by this court, while still dealing strongly with the concerns expressed by the county and city in passing their regulatory ordinances. A copy of the "Massage Practice Act" as it was submitted to the Governor for signature, is added at the end of this brief, as an appendix. Therefore, the court is urged to declare those sections invalid at this opportunity, so as to avoid considerable further litigation on the question of preemption.

POINT II

APPELLANTS WERE DENIED A FULL HEARING BEFORE THIS COURT, AS ONLY TWO OF FIVE MEMBERS OF THIS COURT PARTICIPATED IN THE

DECISION RENDERED BY THIS COURT.

Article VIII, §2 of The Constitution of Utah states as follows:

The Supreme Court shall consist of five Judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a Judge from office. A majority of the Judges constituting the Court shall be necessary to form a quorum or render a disposition. If a Justice of the Supreme Court shall be disqualified from sitting in a cause before said Court, the remaining Judges shall call a District Judge to sit with them on the hearing of such cause.

Oral argument on the merits of this case took place on November 10, 1980, with Chief Justice Crockett presiding, accompanied by Justices Stewart, Hall and Wilkinson. As Justice Maughan was ill, his place was taken by Kenneth Rigtrup, Judge of the Third Judicial District. Justice Wilkins resigned from the Court effective November 30, 1980 and Chief Justice Crockett's term ended at the end of December, 1980. Neither of these Justices participated in the decision. The decision was rendered by two regular members of the Supreme Court and one District Court Judge. Likewise, the companion case of Redwood Gym v Salt Lake County Commission, decided the same day and upon part of which the decision in the instant case was based, was decided by two regular members of this Court and one District Judge. While it appears that the Constitution gives this Court authority to make the decision as it did, the issues at hand call for

a hearing by the full Court. Serious issues of constitutional and statutory law and matters of public policy have been before this Court to decide. Several members of the Society of Licensed Masseurs will undoubtedly be thrown out of jobs that some of them have held for years, as it has been stipulated that most licensed masseurs are women and most business is generated by men. Because of the important matters involved, all members of the Supreme Court should be given the opportunity to take part in the decision.

POINT III

APPELLANTS IN THIS MATTER WERE DENIED FULL ARGUMENT ON THE ISSUES PRESENTED BY THIS CASE.

Despite the fact that the decision in Redwood Gym v Salt Lake County Commission was apparently rendered first and the decision in the instant case based thereon, the instant case was filed earlier and argued earlier. It is likely that the briefs and arguments in both matters were reviewed together, before reaching the decision. Unfortunately, however, several items in support of the position of respondents were presented in the respondents brief, which were not accurate and which appellants in this matter had no opportunity to dispute. Specifics of those items are set forth in other points made below. Rule 75(p)(1) U.R.C.P. states that:

Within one month after the service upon him
of appellant's brief respondent shall file

with the clerk of the Supreme Court at least ten copies of his brief and serve upon appellant at least two copies thereof. A reply brief may likewise be served and filed by the appellant at any time before the first of the session of court at which the case is set for hearing.

The brief of respondents in this matter was handed to counsel for appellants by a South Salt Lake City Police officer on Sunday afternoon, November 9, 1980, shortly before counsel left for church. Argument occurred the next morning at 9:00 a.m. before counsel had time to fully read the brief, and utterly no time to prepare a response. The copies which were filed with the Court were brought in by counsel for respondents with him when he attended the arguments that morning. At the hearing, counsel for appellants asked for an opportunity to file a reply brief, which request was taken under advisement by this Court, and nothing further was heard. The implication by Chief Justice Crockett, in putting off a decision on whether to allow a reply brief by appellants, was that none would be necessary if this Court was already inclined to grant appellants the relief sought. Certainly, before an adverse decision was made, the rules of procedure and the rules of fair play required an opportunity on the part of appellants to respond to the arguments made by respondents, which arguments were made some seven and a half months after the Rules of Civil Procedure required them to have been made.

POINT IV

RECENT DEVELOPMENTS IN THE LAW SUPPORT APPELLANTS' POSITION THAT §3B-8-5(1) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS INVALID.

The most recent State Supreme case previously cited by appellants regarding the validity of opposite sex massage ordinances was City and County of Denver v Nielson, 572 P.2d 484 (Col. 1977). In Respondents' Memorandum, which due to circumstances appellants had no opportunity to respond to, the case of City of Indianapolis v Wright, 371 N.E.2d 1298 (Ind. 1978) was cited. Respondents cited that case as another example where the constitutional arguments of denial of equal protection or due process were made by plaintiffs in a massage case, and went unheeded by both state and federal courts. Respondents, however, failed to notice a most important part of the holding rendered by that court. A lower court had invalidated the law by determining that the massage ordinance was an attempted local law in an area preempted by state law. The trial court so held, on the assumption that a violation of the prohibition on massaging a member of the opposite sex or touching of a patrons genitals was a criminal offense, punishable by the "general penalties" provision of the Indiana code, as a misdemeanor. The Indiana State Code provides a specific misdemeanor penalty

for all criminal violations which do not include their own penalties. By making the massaging of a person of the opposite sex or touching of a patron's genitals a criminal act, the lower court held (as appellants claim in the instant action), that the city had legislated in an area preempted by state law -- which sexual activity was criminal. Upon reversing the lower court, the Supreme Court of Indiana decided that the ordinance was not criminal in nature, but was simply a licensing ordinance in which the penalties of license revocation were the sole penalties for violation. The court, therefore found that the issues presented were distinguishable from Lancaster v Municipal Court, 6 Cal.3d 805 100 Cal. Rptr. 609, 494 P.2d 681 (Cal. 1972) in that "the ordinance establishes a licensing plan whereas the statutes establish a penal scheme." (371 N.E.2d at 1300). In the instant case, of course, the ordinance is clearly a criminal one, as well as a licensing plan, and is preempted by state laws regarding sexual criminal activity, as was held by Lancaster v Municipal Court, previously cited.

The case of Brix v The City of San Rafael, 92 Cal. App.3d 47 154 Cal. Rptr. 647 __ P.2d __ (Cal. 1979) is another recent case regarding the power of cities to regulate massage operations. In that case, provisions regulating the hours of operation and the attire of the masseur, as well as prohibiting intentional contact with the genitals of a

customer was upheld against contentions that the rules were arbitrary and unreasonable and that they intruded into an area preempted by state law. The ruling, however, was based on §51030 et seq. of the California Government Code, enacted in 1976. That state statute gives municipal corporations the specific power to set reasonable standards regarding licensing and other regulatory aspects of the massage business. This, the California legislature appears to have determined, was necessary because of the lack of such authority, after the Lancaster v Municipal Court ruling. While authority was given to regulate massage parlors in a reasonable manner, the legislature specifically stated, in §51034:

Nothing contained in this chapter shall be a limitation on that existing power or on the existing authority of a city to license for revenue purposes, nor shall anything contained in this chapter authorize a city, county, or city and county to prohibit a person of one sex from engaging in the massage of a person of the other sex. (Emphasis added.)

That sentence sets forth very clearly two basic policies decisions regarding the grant of authority to municipalities. The first determination is that cities clearly have power to license for revenue purposes, but would not have power to regulate how the business is practiced, unless specifically granted that power by the state. The second determination is that the State Supreme Court was correct in determining that licensed masseurs may not be prohibited from massaging

members of the opposite sex. Senate Bill 26 appears to have reached the same conclusion.

POINT V

THE POWER TO OUTLAW OPPOSITE SEX MESSAGES IS NOT A PART OF THE POWER OF CITIES AND COUNTIES TO IMPROVE THE MORALS, PRESERVE THE HEALTH, PEACE AND GOOD ORDER AMONG THEIR CITIZENRY.

In its previous decision in Redwood Gym v Salt Lake County Commission, on page 6 and page 7 of the decision, the power of the county (and by implication the city) to legislate in the areas of morals, health, peace and good order, is referred to. The case of Salt Lake City v Allred is cited in support of the proposition that cities and counties have this wide power, providing they do not come in conflict with existing state law. The court specifically refers to the power to "legislate for the prevention of prostitution and other sexual offenses, notwithstanding state legislation in the same area, so long as both statutory and ordinance law have a common purpose, and are not in conflict." (Redwood Gym v Salt Lake County Commission, page 7.) The clear holding of that cited case was that a city was not restricted to using the same approach to fight sexual offenses, that the state had used. The city could regulate other aspects of sexual offenses, to more fully attack the problem. The problem, however, must be the

sexual offenses recognized by the State of Utah. The county and city in the instant case have not regulated various aspects of the same problem, they have openly broken with the state in their definition of what are sexual problems. If the state cannot define what sexual offenses are without interference from the city, state power is almost negligible in the regulation and prevention of sexual offenses. This is not what the court held in Salt Lake City v Allred, and this court is urged to apply that decision as written.

Appellants, in making their arguments regarding pre-emption of this area of regulation by the state, cited in addition to Salt Lake City v Allred, the cases of Allgood v Larsen, 545 P.2d 530 (Utah 1976) and Layton City v Speth, 578 P.2d 828 (Utah 1978). In its previous decision in this case, this court distinguished Allgood v Larsen, but did not mention Layton City v Speth. Layton City v Speth is the most recent of cases along this line. Therefore, it must be given the most weight, if there are any conflicts between it and the previous cases. In that case, the power of cities to regulate in the area of illegal drugs was closely and strictly defined. A city ordinance making it unlawful for one person to permit the occupancy of a space controlled by him by someone unlawfully possessing controlled substances, was declared invalid as both legislating in an

area preempted by the state and beyond the express authority granted to cities by the legislature. Certainly, a city's attempts to regulate usage of illegal drugs can be strongly argued to be in support of its powers to "provide for 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, . . .". (See §10-8-84 U.C.A. 1953). This court found those arguments insufficient, however, in the Layton City case. It was determined there that other statutory language giving the power to regulate certain aspects of drugs were the full grant of authority. It is conceded by appellants herein, that the power to regulate prostitution and sexual offenses has been granted to cities. The state has retained the power to decide what prostitution and sexual offenses are. A careful reading of Salt Lake City v Allred and Layton City v Speth makes the position untenable that the city has been granted authority to make unlawful as a sex crime, the simple act of massaging a member of the opposite sex.

POINT VI

THE DECISION OF THIS COURT IS CONTRARY TO THE HOLDING OF THE CASE OF JENSEN V SALT LAKE COUNTY BOARD OF COMMISSIONERS.

On page 6 of the Redwood Gym v Salt Lake County Commission decision, the court made brief reference to the arguments of appellants based on the previous massage case of Jensen v

Salt Lake County Board of Commissioners. The court's reference to the case was to the previous attempt to regulate physical therapists by the county, something prohibited by a jurisdictional conflict with the Department of Business Regulations of the State of Utah. The court, however, failed to take into account another part of the holding of the Jensen case. The court, on page 4 of the Jensen decision, said:

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.

Just as it was not a proper exercise of the police power to regulate (or punish) a legitimate business for the prevention of prostitution in Jensen, it is not so here. The court indicated there that prostitution could be regulated directly, but not by regulating businesses which are tenuously connected with it. Appellants ask this court to consider the full holding of Jensen, and urge that the holding in that matter is dispositive of this case. The court is further urged to consider the brief concurring

opinion of Justice Ellet, in which he 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 licensed to operate as a masseuse. There surely are masseuses who are moral women. 530 P.2d at page 4.

The county has once again taken the position that there are not masseuses who are moral women. The city and county have determined that if masseuses are allowed near members of the opposite sex, unlawful acts of prostitution will result. This is not a reasonable assumption, and this unreasonable assumption has resulted in an unreasonable regulation, as it did in Jensen. While appellants here are not stopped from qualifying as masseurs, they are stopped from practicing their trade on over 90% of their customers. It is clear that most of the appellants who are members of the Society of Licensed Masseurs will be thrown out of work as a result of this ordinance. As many of them are not educated and skilled to any great extent, many are likely to end up as recipients of state welfare grants. Certainly, an ordinance which would achieve this effect is not reasonable, is not proper, and is prohibited by the holding of Jensen v Salt Lake County Commissioners.

POINT VII

THE DECISION OF THIS COURT IS CONTRARY TO THE HOLDING OF THE CASE OF HART HEALTH STUDIO V SALT LAKE COUNTY.

On page 12 of the Redwood Gym v Salt Lake County Commission

decision, the court cited and distinguished the case of Hart Health Studio v Salt Lake County, 577 P.2d 116 (Utah 1978). This court there observed that:

That case dealt with a licensing fee of \$5,000 imposed upon the proprietor of any massage parlor employing masseurs who had, during the proceeding twelve months, worked at any massage parlor the license of which had been revoked. The ordinance was invalidated as bearing no rational relationship to any recognizable, legitimate state objective.

The Hart decision did not simply invalidate the provision imposing a license fee of \$5,000 as stated above. It also invalidated the provision which prohibited:

The massage of persons of the opposite sex by a massage parlor licensee, unless a performance or cash bond payable to Salt Lake County, in the amount of \$5,000 is first posted by the massage parlor licensee to insure his compliance with the provisions of this ordinance. §15-18-6(4) Revised Ordinances of Salt Lake County (since repealed).

While the language of the Hart court referring to bills of pain and penalties directly referred to the provision mentioned by this court on page 12 of the Redwood Gym v Salt Lake County Commission, it is clear that the Hart Court had the same opinion of the similarly invalidated provision requiring the posting of a performance bond in order to massage members of the opposite sex. If it was unreasonable and invalid to require a massage parlor employee to post a cash bond before massaging members of the opposite sex, it is unreasonable and invalid to prohibit a masseur from massaging members of the opposite sex entirely. If

the former provision had no rational relationship to eliminating immorality, the present provision does not either. If the former provision was a legislative punishment on an entire class of people some of whom might have been involved in illegal practices, so is the present provision. Again, this court is urged to determine that the case of Hart Health Studio v Salt Lake County is dispositive on this issue. Very clearly, the court dealt with the same issues there, and decided them contrary to what the court has decided here.

POINT VIII

THE DECISION OF THIS COURT THAT §3B-8-5(3) OF THE REVISED ORDINANCES OF THE CITY OF SOUTH SALT LAKE WAS VALID, WAS RENDERED PREMATURELY, BEFORE THAT ISSUE WAS RIPENED FOR ADJUDICATION.

When this action for declaratory judgment was brought, there had been several arrests for violation of §3B-8-5(3) by plaintiffs herein. Prosecutions were underway in the Justice Court for the City of South Salt Lake. Most of those prosecutions have since been dismissed. Two of them, however, are still pending in the Third Judicial District Court and one has reached this court, where it is awaiting decision. (See City of South Salt Lake v Hanna, Supreme Court case No. 17081.) It is an established principle of law that a declaratory judgment action should not interfere with the orderly prosecution of cases already in motion, and

where a criminal prosecution has been commenced, a declaratory judgment should not decide the issues pending in that criminal prosecution. See Merritt-Chapman and Scott Corporation v Frazier, 92 Ariz. 136, 375 P.2d 18 (Ariz. 1962) and Nelson v Knight, 460 P.2d 355 (Or. 1969). For Federal parallels, see Samuels v Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d. 688 (U.S. 1971) and Younger v Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d. 669 (U.S. 1971). Appellants relying on those decisions, and calling those decisions to the attention of the court during oral argument, made no attempt to orally argue the issues presented by §3B-8-5(3) of the Revised Ordinances of the City of South Salt Lake. A more detailed brief supporting appellants claims of invalidity has been filed in the case of South Salt Lake v Hanna. Appellants now assume that the entire South Salt Lake ordinance is invalid, but earnestly request the court for a full opportunity to argue this section, if the court does not see it appropriate to strike all sections of the ordinance immediately.

POINT IX

SECTION 3B-8-5(3) OF THE REVISED ORDINANCES OF THE CITY OF SOUTH SALT LAKE IS CLEARLY IN CONFLICT WITH THE LAWS OF THE STATE OF UTAH, AND SO IS INVALID.

In its previous decision in this case, the court made two statements which suggest a need for further review regarding §3B-8-5(3), which prohibits touching or offering

to touch or massage the genitalia of customers in massage establishments. Those statements, are as follows:

In the instant case, no argument is made that the ordinance provision objected to serves any objective at odds with state legislation on the subject, or that it forbids any act expressly or impliedly legalized by state law. We hence decline to invalidate it on these grounds. Hollingsworth v City of South Salt Lake at page 2.

We stated in the decision of Salt Lake City v Allred that the foregoing provision (§10-8-84 U.C.A.) was adequate to empower a municipal government to enact ordinances dealing with sex offenses. We see no reason, nor do plaintiffs point out any, why that decision should not control here. Hollingsworth v The City of South Salt Lake at page 3.

Appellants are concerned that this court found no arguments in appellants brief concerning the conflicts between this section and the state laws on sex offenses. Pages 37 through 44 of appellants previous brief treat these arguments exhaustively. An entire second brief, in the still pending case of City of South Salt Lake v Debbie L. Hanna treats these arguments in even more detail. Briefly, however, these arguments will be reiterated.

The legislature of this state has declared what is illegal sexual activity, in §76-10-1301 et seq. U.C.A. "Sexual activity" is defined in §76-10-1301. Prostitution is defined and prohibited in §76-10-1302 U.C.A. The case of Salt Lake City v Allred expressly gave powers to the cities to regulate areas of sexual activity not specifically regulated by the state, in the common war to stop

illegal sexual practices. It did not give the cities power to change the definition of sexual activity or of prostitution. As previously pointed out, appellants have been at a disadvantage throughout this case by the failure of respondents to state their arguments at such a time and in such a manner that they could be effectively rebutted in either brief or oral argument. The City of South Salt Lake, in its brief in this matter, admitted changing the definition of prostitution within its boundaries, at page 15:

By expanding the definition of "prostitution," South Salt Lake has, indeed, added prohibitions, and is therefore within their legal rights as a municipality.

Respondents attempt to justify such an "expansion" by reference to Salt Lake City v Kusse, 97 Utah 113, 93 P.2d 671 (Utah 1938), State v Salt Lake City, 21 Utah 2d. 318, 445 P.2d 691 (Utah 1978), Layton City v Speth and Salt Lake City v Allred. None of these cases gives a city the right to "expand the definition" of something clearly defined by state law. The city is not expanding anything, they are in open conflict and defiance of what the state law has determined is sexual activity and prostitution. The states of Idaho, Arizona, Oregon and others have definitions of prostitution which include contact with the genitals of another for the purposes of sexual arousal or gratification. The State of Utah has not so defined it, and certainly a state law against prostitution cannot mean

one thing in one city and another thing in another city. Such an argument defies reason. Further, of course, the city law does not require any criminal intent to make it a crime. It does not require it to be a commercial act for hire, as is prostitution. It does not require it to even be a sexual act, absent the requirements of gratification or arousal. Therefore, the holding and rationale of Salt Lake City v Allred not only does not support the contentions of the city in this matter, it mandates that those contentions be overruled and that the ordinance provision be found invalid. The contention that there is no conflict when a city tells the state that its definition of a crime is wrong cannot be upheld. It would put the city in the position of being "the tail that wags the dog" and the far reaching and detrimental implications of that philosophy are clear. The conduct proscribed here is not "sexual activity"; we are not dealing with "the difficult problem of the sex offender"; and the city is preempted from making the act proscribed an act of prostitution. The city must be prohibited from changing state laws. If the city had prohibited "kissing booths" in its jurisdiction as an act of prostitution, the court would have had no hesitancy in striking it down as in conflict with state law. Failing to overrule the earlier decision in the instant case, however, would give the city a green light for doing something just like that.

CONCLUSION

The state of the law in Utah has changed dramatically in the short time since the previous decisions in this matter, and its companion case of Redwood Gym v Salt Lake County Commision. The legislature has decided on a fairer and more rational approach to the regulation of massage establishments. That fact, and the additional materials cited by Appellants in support of their Petition for Rehearing, militate towards a reexamination of the questions posed here. Appellants respectfully urge the Court to grant their Petition for Rehearing.

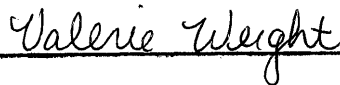
RESPECTFULLY SUBMITTED this 19th day of February, 1981



W. Andrew McCullough
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing ^{Brief in Support of} Petition For Rehearing, postage prepaid, to Clinton Balmforth, Attorney for Respondents, 2500 South State Street, Salt Lake City, Utah 84115, this 19th day of February, 1981.



APPENDIX

LEGISLATIVE GENERAL COUNSEL

Approved RLF

Date 12/03/80

(MESSAGE PRACTICE ACT)

1981

GENERAL SESSION

S. B. No. 26

By Ronald T. Halverson

ARNOLD CHRISTENSEN

AN ACT RELATING TO MESSAGE PRACTICE; PROVIDING FOR A BOARD OF MESSAGE; PROVIDING FOR LICENSURE AND THE SETTING, IMPLEMENTATION AND ENFORCEMENT OF STANDARDS FOR MESSAGE TECHNICIANS AND MESSAGE ESTABLISHMENTS; AND PROVIDING AN EFFECTIVE DATE.

THIS ACT AMENDS SECTION 58-1-5, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 5, LAWS OF UTAH 1980, AND ENACTS NEW SECTIONS.

Be it enacted by the Legislature of the State of Utah:

Section 1. This act shall be known and may be cited as the "Message Practice Act."

Section 2. As used in this act:

(1) "Massage" means the practice of a profession whereby the operator scientifically applies his hands to the patron, using variations of the following procedures: effleurage (stroking), friction (rubbing), petrissage (kneading), tapotement (percussion), and vibration (shaking or trembling).

(2) "Massage technician" means a person who has completed those courses of study in the principles of anatomy and physiology as are generally included in the regular course of study provided by a recognized and approved school of massage and who practices or administers any of the techniques of body massage, either by hands or with a mechanical or electrical apparatus, for the purpose of body massaging, reducing or

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2 contouring, which may include the use of oil rubs, heat lamps,
3 salt glows, hot and cold packs, tub, shower, steam or cabinet
4 baths.

5 (3) "Massage establishment" means any establishment or
6 place of business in which one or more of the methods of
7 treatment identified in subsections (1) and (2) of this
8 section, are administered or used.

9 (4) "Board" means the Utah board of massage created in
10 this chapter.

11 Section 3. There is created, subject to the requirements
12 of chapter 1 of title 58, a board of massage which shall
13 consist of five members, all of whom shall be appointed for
14 terms of four years and until their respective successors have
15 been appointed and qualified, except the members of the first
16 board, two of whom shall be appointed to serve until July 1,
17 1983, and three of whom shall be appointed to serve until July
18 1, 1985.

19 Section 4. The members of the board shall, as soon as
20 appointed, and annually thereafter in the month of June, elect
21 from their number a chairman.

22 Section 5. It shall be unlawful for any person to engage
23 in the practice of, or attempt to practice massage; to act as a
24 massage technician for a fee, for a gratuity, or in a free
25 demonstration; or to conduct or teach massage without a license
26 issued under the provisions of this chapter. Any person
27 employed by an educational institution or business that is
28 primarily engaged in providing physical conditioning and
29 fitness courses to the public, by a private secondary or post secondary
30 school, or by an educational institution regulated by the state board of
31 education, the board of regents, state department of education, or a
32 regional accrediting body shall be exempt from the provisions of this
33 chapter.

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2 Section 6. Nothing herein shall be construed as
 3 authorizing any person licensed as a massage technician to
 4 engage in any manner in the practice of medicine as defined in
 5 the laws of this state.

6 Section 7. Doctors of medicine, R.N.'s, L.P.N.'s, physical
 7 therapists, osteopaths and chiropractors licensed in this state, HOSPITAL
 8 STAFF MEMBERS and school athletic trainers shall be exempt from the provisions of
 9 this chapter.

10 Section 8. Any person who furnishes to the department
 11 satisfactory proof that he or she is 18 years of age or older,
 12 [a--high--school--graduate--or--equivalent,] and of good moral
 13 character and temperate habits, and makes oath that he or she
 14 has not been convicted of any offense that would constitute a
 15 felony, either in this state or any other state or country
 16 within the last five years, and presents a diploma or
 17 credentials issued by a school of massage approved by the
 18 American Massage and Therapy Association or its successor or
 19 like institute, representing study as determined by the board
 20 [*of*not*less*than*] of up to 1,000 hours and who passes a
 21 reasonable demonstrative, oral and written examination,
 22 conducted by and under the supervision and direction
 23 of the board, in the art of body massage by hand, or
 24 with any mechanical or electrical apparatus (excluding fever
 25 therapy) for the purpose of body massaging, reducing or
 26 contouring, and in the use of oil rubs, salt glow, hot and cold
 27 packs, tub, steam, shower, heat lamps and similar bath, and
 28 pays the fees specified in this chapter, which fees shall
 29 accompany the application to the department, shall be entitled
 30 to be licensed and to be issued a license as a massage
 31 technician. Minimum requirements for a license shall be a
 32 general average in the examination of 75% in each subject.

33 Any person who has engaged in the practice of massage in
 34 the State of Utah for five years before July 1, 1981, and meets
 35 all age and moral requirements shall only be required to pass

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2 the examination specified in this section, in order to be
3 licensed[**, * provided*the*person*takes*the*examination*before*Jul
4 1, 1981. * After *June * 30, * 1981, * all * persons * seeking * to * be
5 licensed * shall * be * required * to * satisfy * the * educational * and
6 examination * requirements * in * addition * to * the * age * and * moral
7 requirements. **] .

8 The fee to be paid by an applicant to determine his or her
9 fitness to receive a license to practice as a licensed massage
10 technician shall be not more than \$75, as determined by the
11 director.

12 The board shall hold examinations, oral, written, and by
13 way of demonstrations, at least annually and from time to time
14 at such place or places as the board, under the direction of
15 the director, may designate.

16 Section 9. Any applicant failing to pass the examination
17 provided for in section 8 shall be entitled, after six months,
18 to a reexamination upon payment of an additional fee of \$10.
19 Should the applicant fail to pass the examination the second
20 time, the director may refuse a subsequent application until
21 the expiration of one year.

22 Section 10. Any person who has been duly licensed in
23 another state to practice massage which state has and maintains
24 a standard of practice which is substantially the same as that
25 maintained in this state, and who has been lawfully and
26 continuously engaged in such practice for two years or more
27 immediately before filing his or her application to practice in
28 this state and who submits to the board a duly attested
29 certificate from the examining board of the state in which he
30 or she is licensed, certifying to the fact of his or her
31 licensure and being a person of good moral character and of
32 professional attainments, may upon paying the required fee be
33 granted a license to practice in this state without being
34 required to take an examination; except that no license shall

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2 be issued to any such applicant unless the state or territory
3 which issued the person his or her license extends the same
4 privilege reciprocally to persons holding licenses from this
5 state. The board shall have the power to enter into reciprocal
6 agreements with other states whose requirements are
7 substantially the same as those herein provided.

8 Section 11. An applicant may upon paying a fee of not to
9 exceed \$50, as determined by the director, take the examination
10 on anatomy, physiology and related subjects given by the board,
11 and, on passing the examination shall be issued by the
12 department an apprenticeship registration certificate,
13 permitting that person to work under a licensed massage
14 technician for a period of one year only. After the one-year
15 period the apprentice may make request for examination as
16 provided in section 8.

17 Section 12. If the department or a majority of the board
18 members has reason to believe that the physical or mental
19 health of any applicant is such as to jeopardize or endanger
20 the health of those who seek relief from him or her, then the
21 department or the board shall require the applicant to have a
22 physical examination by a competent medical examiner selected
23 by the board. The department shall pay the cost of the
24 examination. If the medical examiner confirms that the
25 applicant's physical or mental health is such as to jeopardize
26 or endanger the health of those who seek relief from him or
27 her, the department may deny the application for a license
28 until the applicant furnishes satisfactory proof of being
29 physically and mentally competent to practice massage.

30 Section 13. Each licensed massage technician shall
31 conspicuously display at the place of his or her practice of
32 massage, the license issued him or her, within 30 days after
33 issuance of the license.

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2 Section 14. All licenses issued by the department shall
3 expire on the first day of January of the year next succeeding
4 the issuance thereof. A license may be renewed upon the
5 payment of a fee to be fixed annually by the department.

6 Section 15. Attendance at such postgraduate course as
7 may be prescribed by the board, at least two days each year, is
8 a further requirement for renewal of the license. The board
9 may waive the continuing education requirement in case of
10 certified illness or undue hardship.

11 Section 16. It shall be unlawful for any person to
12 operate or conduct any massage establishment which is not
13 licensed, or does not conform to the sanitary regulations which
14 may be adopted by the department, or to employ any person as an
15 operator or massage technician who does not hold a license
16 issued under the provisions of this chapter.

17 It shall be unlawful for any massage establishment to
18 display signs indicating massage or to advertise massage unless
19 all of the massage technicians in the establishment are
20 licensed under this chapter. All license holders shall be
21 designated massage technicians and shall not use any title or
22 abbreviation thereof without the designation "massage
23 technician."

24 Section 17. Any person desiring to operate a massage
25 establishment where massage is practiced shall make application
26 to the department for a massage establishment license. All
27 licenses shall expire on January 1 of each year and shall be
28 renewed annually. The fee for the massage establishment
29 license shall be fixed annually by the department and shall not
30 exceed the sum of \$10 and shall be paid to the department.

31 Section 18. It shall be the duty of the board at least
32 annually and from time to time to examine and inspect or cause
33 to be examined and inspected all massage establishments in the
34 state. The board and its agents and employees may enter and

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2 inspect any massage establishment at any time when the
3 establishment is open for the transaction of business. The local
4 board of health shall report infractions to the local law enforcement
5 agency. THE BOARD MAY CHARGE A REASONABLE FEE NOT TO EXCEED ACTUAL COST FOR THE
5a INSPECTION PROVIDED.

6 Section 19. The license of a massage technician or a
7 massage establishment may be revoked, suspended or canceled
8 upon any one or more of the following grounds:

9 (1) The licensee is guilty of prostitution or fraud or
10 deceit in the admission to the practice of massage;

11 (2) The licensee has been convicted during the past five
12 years of a felony. The conviction of a felony shall be
13 construed to be the conviction of any offense which if
14 committed within the State of Utah would constitute a felony
15 under the laws thereof;

16 (3) The licensee is engaged in the practice of massage
17 under a false or assumed name or is impersonating another
18 practitioner of a like or different name;

19 (4) The licensee is addicted to or psychologically
20 dependent upon the use of intoxicating liquors, narcotics or
21 stimulants to such an extent as to incapacitate him or her from
22 the performance of his or her professional duties;

23 (5) The physical or mental condition of the licensee is
24 determined by a competent medical examiner to be such as to
25 jeopardize or endanger the health of those who seek relief from
26 the registrant. The department or majority of the board may
27 demand an examination of the licensee by a competent medical
28 examiner selected by the board at the department's expense.
29 Failure to submit to such an examination shall constitute
30 immediate grounds for suspension of the licensee's license;

31 (6) The licensee is guilty of willful negligence in the
32 practice of massage or has been guilty of employing, allowing
33 or permitting any unlicensed person to perform massage in his
34 or her establishment;

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2 (7) The licensee is guilty of untrue, fraudulent,
3 misleading or deceptive advertising, or he or she prescribes
4 medicines or drugs; or

5 (8) The licensee has violated any provision of this
6 chapter.

7 Section 20. The proceedings for cancellation, revocation
8 or suspension of a license may be initiated when the department
9 or the board has information that any person may have been
10 guilty of any misconduct as provided in section 19 or is guilty
11 of gross incompetence or unprofessional or dishonorable
12 conduct.

13 Section 21. Upon written application establishing
14 compliance with existing licensing requirements and for reasons
15 the department deems sufficient, the department, for good cause
16 shown, may, under such conditions as it may impose, reinstate
17 or reissue a license to any person whose license has been
18 suspended or revoked and, upon suspension of a license, the
19 department in its order may provide for automatic reinstatement
20 thereof after a fixed period of time as provided in the order.

21 Section 22. Any person violating the provisions of this
22 chapter may be enjoined from further violations in the district
23 court of competent jurisdiction, pursuant to Utah law, for
24 cause shown, upon the initiative of the department.

25 Section 23. Section 58-1-5, Utah Code Annotated 1953, as
26 last amended by Chapter 5, Laws of Utah 1980, is amended to
27 read:

28 58-1-5. The functions of the department of registration
29 shall be exercised by the director of registration under the
30 supervision of the commission of the department of business
31 regulation and, when so provided, with the collaboration and
32 assistance of representative committees of the several
33 professions, trades and occupations as follows:

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2 (1) For accountants, a committee of three competent
3 public accountants.

4 (2) For architects, a committee of five architects, to be
5 known as the "Architectural Examining Board."

6 (3) For barbers, a committee of three persons, citizens
7 of the United States who have practiced barbering for at least
8 five years.

9 (4) For podiatry, a committee of three podiatrists.

10 (5) For chiropractors, a committee of three
11 chiropractors; chiropractic is defined as the science of
12 palpating and adjusting the articulation of the spinal column.

13 (6) For dentists, a committee of five persons; but no
14 member of such committee shall be a member of the faculty of
15 any dental college or dental department of any medical college
16 or have a financial interest in any such college.

17 (7) For persons in the practice of funeral service, a
18 committee of three persons licensed for the practice of funeral
19 service or as funeral directors or embalmers or for a
20 combination thereof, each of whom has had a minimum of five
21 years' experience in the preparation and disposition of dead
22 human bodies, and in the practice of embalming, immediately
23 preceding their appointment. The committee shall be known as
24 the "State Board of Funeral Service."

25 (8) For cosmetologists and electrologists, a board of
26 five licensed cosmetologists.

27 (9) For persons who apply for, or have been granted, a
28 license to practice medicine and surgery in all branches
29 pursuant to the Utah Medical Practice Act, sections 58-12-26
30 through 58-12-39, a committee of seven physicians licensed
31 pursuant to that act, to be known as the "Physicians Licensing
32 Board." Notwithstanding the provisions of section 58-1-14, the
33 concurrence of at least five members of the board shall be

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2 required for the taking of any action under the Utah Medical
3 Practice Act.

4 (10) For practitioners in the treatment of human ailments
5 in accordance with the tenets of a professional school,
6 college, or institution, recognized by the department of
7 registration, of which the applicant is a graduate as
8 designated in his application for a license, including the
9 practice of obstetrics with the use of drugs or medicine, but
10 without operative surgery, except operative minor surgery, a
11 committee of five members to be designated by the director.
12 Notwithstanding the provisions of section 58-1-6, one member
13 shall be licensed to practice medicine and surgery in all
14 branches, two members shall be practitioners of naturopathy
15 licensed to practice the treatment of human ailments without
16 the use of drugs or medicine and without operative surgery, one
17 member shall be a citizen who is not licensed in any healing
18 art and one member shall be on the staff of the university of
19 Utah medical school.

20 (11) For practitioners of naturopathy, a committee of
21 three members, each of whom shall be a graduate of a school of
22 naturopathy of standing recognized by the department of
23 registration.

24 (12) For practitioners of physical therapy, a committee
25 of three members, each of whom shall be a licensed practitioner
26 of physical therapy in this state and a graduate of an approved
27 school of physical therapy.

28 (13) For osteopathic physicians and surgeons, a committee
29 of three members each of whom shall be a graduate of a
30 chartered college of osteopathy of recognized standing.

31 (14) For optometrists, a committee of three licensed
32 optometrists.

33 (15) For pharmacists, a committee of five pharmacists to
34 be designated as Utah state board of pharmacy.

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2 (16) For veterinaries, a committee of three
3 veterinarians each of whom shall be a graduate of a college or
4 university of standing recognized by the department of
5 registration.

6 (17) For plumbers, a committee of five persons.

7 (18) For sanitarians, a committee of five persons, each
8 of whom shall have had a minimum of five years' experience as a
9 sanitarian.

10 (19) For persons engaged in conducting, operating or
11 maintaining in any home, residence or domiciliary facility the
12 business of a nursing home, maternity home, the refuge care or
13 maintenance of the needy, the care of the aged or infirm, for
14 two or more nonrelated individuals, a committee of five
15 certified operators, each of whom shall have had a minimum of
16 five years' experience as a home operator.

17 (20) For psychologists, a committee of five
18 psychologists.

19 (21) For landscape architects, a landscape architectural
20 examining board of three (3) landscape architects, each of
21 whom, after effective date of this act, shall be a licensed
22 practitioner of landscape architecture in all branches thereof
23 in this state and a graduate of a recognized school of
24 landscape architecture.

25 (22) For the practice of social work, a board of three
26 certified social workers, one social service worker, and one
27 social service aide.

28 (23) For marriage and family counselors, a committee of
29 five persons.

30 (24) For electricians, a board of five persons, to be
31 known as the state electrical board.

32 (25) For electronic repair dealers, a committee of five
33 persons. Three members of the committee shall be electronic

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2 service dealers. The remaining members shall be chosen from
3 the general public.

4 (26) For recreational therapists, a committee of one
5 therapeutic recreation specialist, one therapeutic recreation
6 worker, one therapeutic recreation technician, and one member
7 who shall be either an instructor in therapeutic recreation at
8 an accredited school providing a program in therapeutic
9 recreation or a director of a clinical treatment center.

10 (27) For the practice of speech pathology and audiology,
11 a committee of five speech pathologists or audiologists,
12 notwithstanding provisions of 58-1-6, all of whom shall be
13 licensed, except for those initially appointed under this act,
14 and shall be engaged in providing speech pathology or audiology
15 services to the public as a major interest. One of the
16 committee shall be in private practice as a primary
17 professional interest and activity, one shall be from a non-
18 school clinic setting which provides ongoing speech pathology
19 or audiology services, one shall be a provider of speech
20 pathology or audiology services in the elementary or secondary
21 schools, one shall be from a speech pathology and audiology
22 college or university training program, and one shall be a
23 provider of speech pathology or audiology services at large.
24 At no time shall the board consist of more than three members
25 who represent speech pathology or more than three members who
26 represent audiology.

27 (28) For occupational therapists and occupational therapy
28 assistants a board of five occupational therapists.

29 (29) For hearing aid dealers, a committee of five persons
30 consisting of a physician specializing in diseases of the ear,
31 two licensed hearing aid specialists who are certified members
32 of the national hearing aid society or who are approved by the
33 Utah hearing aid society, two persons, either utilizing a

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2 hearing aid or a parent or guardian of a child utilizing a
3 hearing aid.

4 (30) For the practice of massage, a board of five
5 licensed massage technicians.

6 Section 24. This act shall take effect upon approval.

MANAGEMENT AND FISCAL ANALYSIS

S.B. 26

It is estimated that passage of this bill would necessitate an expenditure of approximately \$30,000 the first year for 1 FTE position and related expenses. Revenue to the General Fund is estimated at \$2,000 the first year.

OFFICE OF THE LEGISLATIVE FISCAL ANALYST