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Redwood Gym, Alice'S Health Studio, Cindy'S
Golden Touch, Gentlemen'S Quarters, Lynn'S
Health Studio, Ginger'S Health Studio, Kelly'S
Health Studio, Kim'S Health Studio, Cavalier
Health Studio, and Continental Health Studio v.
Salt Lake County Commission, Salt Lake County
Attorney'S office, and Salt Lake County Sheriff'S
Department : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

REDWOOD GYM, ALICE'S HEALTH STUDIO, :
CINDY'S GOLDEN TOUCH, GENTLEMEN'S :
QUARTERS, LYNN'S HEALTH STUDIO, :
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STUDIO, KIM'S HEALTH STUDIO, CAVA- :
LIER HEALTH STUDIO, and CONTINEN- :
TAL HEALTH STUDIO, :

Plaintiffs-Appellants, :

- v - :

SALT LAKE COUNTY COMMISSION, SALT :
LAKE COUNTY ATTORNEY'S OFFICE, and :
SALT LAKE COUNTY SHERIFF'S DEPART- :
MENT, :

Defendants-Respondents. :

No. 116833

BRIEF OF APPELLANTS

Appeal from the Memorandum Decision
Rendered in the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, Judge

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No. _____

BRIEF OF APPELLANTS

NATURE OF THE CASE

The appellants brought this action seeking the lower court's declaration that §§ 15-18-3, 15-18-4, 15-18-5, 15-18-7, and 15-18-8, Revised Ordinances of Salt Lake County, 1966, violate the laws and Constitution of the State of Utah and the Constitution of the United States, and further seeking the lower court's order permanently enjoining the enforcement of said sections.

DISPOSITION IN THE LOWER COURT

Having reviewed the parties' joint motion for summary judgment,

stipulated facts and respective memoranda of points and authorities, the

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Third Judicial District Court, the Honorable Homer F. Wilkinson, Judge, rendered its Memorandum Decision denying appellants' motion for summary judgment and granting respondents' motion for summary judgment.

RELIEF SOUGHT ON APPEAL

The appellants seek to have the lower court's Memorandum Decision reversed, appellants' motion for summary judgment granted, §§ 15-18-3, 15-18-4, 15-18-5, 15-18-7, and 15-18-8 of the Revised Ordinances of Salt Lake County declared unlawful and unconstitutional, and the enforcement of said sections permanently enjoined.

STATEMENT OF FACTS

The Board of County Commissioners of Salt Lake County, on November 20, 1978, enacted Title 15, Chapter 18 of the Revised Ordinances of Salt Lake County (ROSLCO), 1966, as amended (hereinafter "massage ordinance"), which ordinance was to become effective on December 6, 1978. The appellants, being real parties in interest as unincorporated business entities under the laws of the State of Utah whose rights and legal relations were affected by the newly enacted massage ordinance, filed a complaint with the lower court on December 5, 1978, seeking that court's declaration that §§ 15-18-3, 15-18-4, 15-18-5, 15-18-7, and 15-18-8 of the massage ordinance violate the laws and Constitution of the State of Utah and the Constitution of the United States, and further seeking that court's order permanently enjoining the enforcement of said sections. Additionally, on December 5, 1978, appellants filed a motion for a temporary restraining order, which motion was granted, and an order temporarily enjoining and restraining respondents from enforcing the

massage ordinance issued on the same date, upon the signature of the Honorable David B. Dee, Judge. On December 14, 1978, the parties stipulated to the continuance of the temporary restraining order, as it applied to § 15-18-5(1) and (2) of the massage ordinance, and agreed to present arguments on the issues of law raised by appellants' complaint by means of a joint motion for summary judgment, and further agreed to stipulated facts for purposes of summary judgment. Oral arguments were presented before the trial court on August 27, 1979, supplemented by extensive memoranda. The trial court entered its Memorandum Decision under the pen of the Honorable Homer F. Wilkinson, presiding Judge, which decision denied appellants' motion for summary judgment and granted respondents' motion for summary judgment and which decision set aside the restraining order effective December 19, 1979, at 5:00 P.M. Appellants filed their notice of appeal, certificate, designation of record on appeal and appeal bond with the lower court on December 19, 1979. Additionally, on December 19, 1979, appellants filed with this Court a motion seeking the restoration of the restraining order for the pendency of the appeal. On December 21, 1979, counsel for both parties met with the Honorable D. Frank Wilkins in chambers for the purpose of presenting informal arguments relative to whether the restraining order should be restored for the interim period prior to this Court's ruling on appellants' motion. An order issued that day restraining respondents from enforcing § 15-18-5(1) of the massage ordinance, said order to run until January 7, 1980. A hearing was had on appellants' motion before this Court on January 7, 1980, and based upon the parties' oral arguments and appellants' memorandum, appellants' motion was granted and the restraining order, as it applied to § 15-18-5(1) of the massage ordinance, was restored for the pendency of the appeal.

The sections of the massage ordinance challenged herein or otherwise referred to read as follows:

Sec. 15-18-1. Definitions. For the purpose of this chapter the following terms shall have the meanings prescribed:

(2) "Masseur" shall mean any person who gives massages for hire; provided that any person who is duly licensed by the Department of Registration to practice the healing arts shall not be included in this definition.

(4) "Employee" means the operator, owner, or manager of a massage establishment and any person performing massages at or on the premises of a massage establishment and also any agent or independent contractor who gives massages at a massage establishment.

Sec. 15-18-3. Requirements for the Issuance of a License. Each individual desiring a massage establishment license or a masseur license shall: (1) Be an individual at least 21 years of age.

Sec. 15-18-4. Sanitary Premises. 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.

Sec. 15-18-5. Prohibited Acts. The following acts are prohibited:

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

(2) It shall be unlawful to serve, to store, or allow to be consumed, any alcoholic beverages on the licensed premises of a massage establishment.

(3) It shall be unlawful for a masseur to touch or offer to touch or massage the genitalia of customers.

Sec. 15-18-7. Civil Sanctions. Any unlawful conduct, whether the omission to perform an act required by this ordinance, or the performance of an act prohibited by this ordinance, shall be cause for revocation or suspension of a massage establishment's license or masseur's license. The holder of a massage establishment license may have his or her license revoked or suspended for any and all violations of the provisions of this ordinance committed by his or her employees.

Sec. 15-18-8. Penal Sanctions. The person convicted of violations of this chapter of the Revised Ordinances of Salt Lake County may be fined not to exceed \$299.00, imprisoned in the Salt Lake County Jail not to exceed six months, or both.

ARGUMENT

The massage ordinance challenged herein represents Salt Lake County's most recent attempt at reaching the criminal offense of prostitution through enactment of an ordinance designed to suppress and prohibit the legitimate business of massage parlors. The County's prior efforts of this sort have been struck down as being "vague and uncertain," "not subject to regulation by the County," and "not a proper exercise of the police power," Jensen v. Salt Lake County, 530 P.2d 3 (Utah 1974); "creating irrational differentiations," "punishing masseurs without trial and conviction," and as "arbitrary and unreasonable," Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978).

The appellants contend that the newly enacted massage ordinance again suffers from the above-cited defects and other impairing defects, making said ordinance invalid and unenforceable, more specifically set out as follows:

POINT I

THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY EXCEEDED ITS DELEGATED SCOPE OF AUTHORITY IN ENACTING § 15-18-5(1) OF THE MASSAGE ORDINANCE AND SAID SECTION IS THEREFORE INVALID AND UNENFORCEABLE.

- A. SECTION 17-5-27, UTAH CODE ANNOTATED (1953), AS AMENDED, DELEGATES COUNTIES THE AUTHORITY TO LICENSE MASSAGE PARLOR BUSINESSES SOLELY FOR PURPOSES OF REGULATION AND REVENUE -- NOT FOR PURPOSES OF SUPPRESSION AND PROHIBITION.

The underlying purpose and objective of the Salt Lake County Commission's enactment of §§ 15-18-5(1), 15-18-7, and 15-18-8 of the massage ordinance, which sections make the administration of a massage by a licensed masseur or masseuse upon any person of the opposite sex unlawful and subject to civil and penal sanctions, is to reach the criminal offense of prostitution through the suppression and prohibition of massage parlor businesses.

It is contended by respondents that two statutory grants of authority, § 17-5-27, Utah Code Annotated (1953), as amended (UCA), discussed herein, and § 17-5-77, UCA, discussed infra at Point I-B, authorize the County to enact the massage ordinance in question. The appellants contend, however, that the County has significantly exceeded these delegated grants of authority.

Section 17-5-27, UCA, provides in relevant part as follows:

License business for regulation and revenue -- They (County Commissioners) may license for purposes of regulation and revenue all and every kind of business not prohibited by law . . . they may license, tax, regulate, suppress and prohibit billiard, bagatelle, pigeonhole, or any other tables or implements kept or used for similar purposes, also pin alleys or tables, and ball alleys, dancing halls (Emphasis added.)

While it is clear from the above statute, and appellants so concede, that the County may license the business of massage parlors, just as it

may license "all and every kind of business," it is equally clear that the County's licensing authority is statutorily limited, not absolute.

Under the doctrine of statutory construction, expressio unius est exclusio alterius, the express mention of one matter excludes all other similar matters not mentioned. Rio Grande Motor Way, Inc. v. Public Service Commission, 445 P.2d 990 (Utah 1968); Great Salt Lake Authority v. Island Ranching Co., 414 P.2d 963 (Utah 1966); and Hansen v. Board of Education of Emery County School, 116 P.2d 936 (Utah 1941). Thus, properly construed, § 17-5-27 delegates the County authority to use its licensing power, in the case of businesses in general, for purposes of "regulation and revenue" and, in the case of those businesses expressly named (e.g., "billiard, bagatelle . . ."), for the additional purposes of "suppression and prohibition." Since massage parlors are not included among those businesses expressly named, massage parlors can be licensed only for the purposes of regulation and revenue: the County is without authority to suppress and prohibit.

The appellants submit that § 15-18-5(1) of the massage ordinance goes beyond the area of regulation into the areas of suppression and prohibition. As has been stipulated to, there are approximately 140 licensed masseurs in Salt Lake County, of which approximately 130 are women, and the vast majority of massage parlor patrons are men. (See, Stipulated Facts, nos. 6 and 7.) Given the opposite sex massage prohibition of § 15-18-5(1), combined with the sanctions of §§ 15-18-7 and 15-18-8, nearly 95% of the massage parlors and masseurs will be driven out of business as a direct result of the massage ordinance. This is suppression and prohibition, not regulation.

A case analogous to the instant case in that it, too, raises the significant distinction between regulation and prohibition is Combined Communications Corporation v. City and County of Denver, 542 P.2d 79 (Colo. 1975). There, the Supreme Court of Colorado had occasion to examine a city ordinance prohibiting erection of new outdoor advertising and, in that case, as in the instant case, the city's grant of authority spoke only of regulation and not of prohibition. The court stated:

Under a concept of reasonableness, the charter authorization of regulation does not permit (the municipality) . . . to prohibit this entire industry. At 542 P.2d 83.

The court, citing authorities, went on to hold:

. . . that the power to regulate does not include 'any power, express of inherent, to prohibit.' At 542 P.2d 84. (Emphasis added.)

The holding in Combined Communications Corporation, *supra*, is consistent with Winther v. Village of Weippe, 430 P.2d 689 (Idaho 1967), wherein the Supreme Court of Idaho stated the general rule as to municipalities' authority to license and regulate:

It is the general rule that where authority to license and regulate a business is granted by the legislature to a municipality, the regulations adopted must not be unreasonable, unjust or unduly oppressive (citations omitted) nor . . . such as to be prohibitory (citations omitted). At 430 P.2d 695. (Emphasis added.)

In sum, although § 15-18-5(1) of the massage ordinance is couched in the disguising language of a licensing mechanism, the true purpose is to reach the criminal offense of prostitution through the suppression and prohibition of the legitimate business of massage parlors, and appellants submit, based on the general principles of statutory construction and the above-cited authorities, that the County in enacting

§ 15-18-5(1) has exceeded its delegated scope of authority under § 17-5-27, UCA, and said section must be found invalid and unenforceable.

B. SECTION 17-5-77, UCA, DELEGATES COUNTIES THE AUTHORITY TO USE THE POLICE POWER TO IMPROVE MORALS, PEACE AND GOOD ORDER -- BUT ONLY WHERE "NECESSARY AND PROPER" AND § 15-18-5(1) OF THE MASSAGE ORDINANCE IS NEITHER NECESSARY NOR PROPER.

In addition to the grant of authority claimed under § 17-5-27, discussed supra, the County contends that the general police power delegated under § 17-5-77 authorizes the County's enactment of § 15-18-5(1) of the massage ordinance. The appellants contend, however, that the use of the police power is statutorily limited to situations where such use is necessary and proper and that § 15-18-5(1) of the massage ordinance is neither necessary nor proper.

Section 17-5-77, UCA, provides in relevant part as follows:

Ordinances -- Power to enact -- Penalty for violation --
The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, . . . such as are necessary and proper to . . . improve the morals, peace and good order . . . of the county and inhabitants thereof. (Emphasis added.)

(i) SECTION 15-8-5(1) IS NOT NECESSARY.

As was stated supra at Point I-A, the underlying purpose and objective of the opposite sex massage prohibition of § 15-18-5(1), although couched in terms of a licensing ordinance, is to reach the criminal offense of prostitution. The appellants submit that no additional ordinance is necessary to proscribe prostitution specifically or illicit sexual activity in general.

The area of prostitution is comprehensively covered by the Utah Criminal Code: § 76-10-1302, "Prostitution;" § 76-10-1303, "Patronizing a Prostitute;" § 76-10-1304, "Aiding a Prostitute;" § 76-10-1305, "Exploiting Prostitution;" and § 76-10-1306, "Aggravated Exploitation of Prostitution." Additionally, the Utah Criminal code covers other illicit sexual activity: § 76-5-401, "Unlawful Sexual Intercourse;" § 76-5-403, "Sodomy;" and § 76-5-404, "Forcible Sexual Abuse." The Salt Lake County Ordinances cover prostitution as well, at § 16-23-3, and general sexual offenses, at § 16-23-1, et seq.

The above offenses, in addition to fines, carry penalties ranging from imprisonment terms of 0 to 6 months to imprisonment terms of not less than 1 nor more than 15 years.

These statutes and ordinances, if appropriately enforced, are more than adequate to control prostitution, and no additional proscription of prostitution is necessary. The respondents' contention to the contrary, that the opposite sex massage prohibition of § 15-18-5(1) is necessary to combat prostitution because the above-cited laws are ineffective, is totally without merit. In this regard, the suggestion by Captain Morgan, (see, Stipulated Facts) that it "takes much more time as far as investigation is concerned than is justified by the outcome," speaks much more to the ineffectiveness of the investigators and the courts' reluctance to impose jail sentences than it does to any inherent inadequacies in the laws.

Moreover, in addition to the several above-referred-to statutes and ordinances aimed at controlling prostitution and other illicit sexual activity, the County has enacted § 15-18-5(3) of the massage ordinance. Section 15-18-5(3), not challenged herein, provides as follows:

- (3) It shall be unlawful for a masseur to touch or offer to touch or massage the genitalia of customers.

This section of the massage ordinance would provide additional, although not necessary, proscription of prostitution and is aimed directly at massage parlors. There is no purpose furthered by § 15-18-5(1) of the massage ordinance that is not met by § 15-18-5(3) of the same ordinance. So that, even ignoring the several external statutes and ordinances covering the same area, the massage ordinance itself internally makes § 15-18-5(1) totally unnecessary.

In sum, the existing laws designed to combat prostitution are sufficient to further the County's desire to improve morals, and these laws need only to be more effectively enforced and the punishment more effectively administered. Moreover, with the additional proscription of illicit sexual activity found in § 15-18-5(3) of the massage ordinance, § 15-18-5(1) is totally unnecessary and its enactment, is thus outside the County's delegated scope of authority under § 17-5-77, UCA, and said section must be found invalid and unenforceable.

(ii) SECTION 15-18-5(1) IS AN IMPROPER
EXERCISE OF THE POLICE POWER.

In addition to the County's use of the police power in enacting § 15-18-5(1) of the massage ordinance being unnecessary as discussed supra, its use is also improper.

A case on point is Jensen v. Salt Lake County, supra, wherein an earlier version of the Salt Lake County massage ordinance was challenged as being an improper exercise of the police power. The Utah Supreme Court, in reaching its holding, reasoned as follows:

At the trial in the court below a county commissioner and a member of the county sheriff's office testified that prostitution was the major concern in the adoption of the ordinance in question. It is the County's contention that it is a valid exercise of police power to regulate massage establishments and to control prostitution. We are of the opinion that the County does have the power to deal with those matters directly. However, the ordinance under consideration does neither, but rather it attempts to set standards and qualifications of those persons who intend to engage in a legitimate occupation or trade. This is not a proper exercise of the police power. At 530 P.2d 4. (Emphasis added.)

The Court concluded that the County's attempt to indirectly control prostitution through a licensing ordinance for massage parlors was an improper exercise of the police power, and further concluded that if the County wants to control prostitution, it has the power to do so, but it must exercise the power "directly."

The present massage ordinance suffers from the same sort of attempt to "indirectly" control prostitution through the licensing, in this case suppression and prohibition, of massage parlors. The opposite sex massage prohibition of § 15-18-5(1), like the high standards and qualifications demanded of masseurs by the massage ordinance challenged in Jensen, supra, is an improper exercise of the police power because the County has failed to directly deal with the matter of controlling prostitution and instead has prohibited the acts of a legitimate occupation with the intended purpose of having an indirect effect on prostitution.

In conclusion as to Point I, the County exceeded its delegated authority in enacting § 15-18-5(1) of the massage ordinance because said section is not for the purpose of regulation but for the purposes of suppression and prohibition, contrary to § 17-5-27, UCA, and because said section is neither necessary nor proper, contrary to § 17-5-77, UCA, and thus said section must be found invalid and unenforceable.

POINT II

SECTION 15-18-5(1) OF THE MESSAGE ORDINANCE IS INCONSISTENT WITH AND IN CONFLICT WITH COMPREHENSIVE STATE LAWS REGULATING CRIMINAL SEXUAL ACTIVITY IN THAT SAID SECTION, COMBINED WITH SECTION 15-8-8, ATTEMPTS TO MAKE CRIMES OF ACTS WHICH ARE NOT CRIMES UNDER STATE LAW.

Section 15-18-5(1) of the massage ordinance provides that the administration of a massage by a licensed masseur upon any person of the opposite sex is unlawful and, under § 15-8-8, the offender is subject to penal sanctions. Thus, in effect, the massage ordinance makes an opposite sex massage tantamount to criminal sexual activity.

In the landmark case of Lancaster v. Municipal Court for the Beverly Hills Judicial District of Los Angeles County, 494 P.2d 681 (Calif. 1972), the Supreme Court of California had occasion to review a challenge to a massage ordinance similar to that involved in the instant case. The court examined the municipality's purpose and objective in enacting the massage ordinance and concluded:

. . . the purpose of the ordinance in question was not to regulate the operation of massage parlors but was aimed at making the task of the police department and sheriff's office easier in their fight against prostitution and lewd conduct. We are satisfied that the ordinance is a regulation of the criminal aspects of sexual conduct. At 494 P.2d 683-684. (Emphasis added.)

The Lancaster court, faced with a preemption argument similar to that contended for herein, continued its analysis and held:

We conclude that the Los Angeles ordinance which is a regulation of sexual conduct must be held invalid because the state has preempted the criminal aspects of sexual activity. At 494 P.2d 684.

The court in Lancaster based its conclusion on two grounds, the more broad being that there is no room for a supplementary or complementary local ordinance where the subject matter of the ordinance has been

fully occupied by the State, and the more narrow being that local ordinances in conflict with general state law are void. (See, Lancaster, 494 P.2d at 682.)

The Utah rule with respect to preemption appears to be a hybrid of the California position announced in Lancaster. In State v. Allred, 430 P.2d 371, reversed at 437 P.2d 434 (Utah 1968) (hereinafter "Allred II"), the Utah Supreme Court adopted the position that local ordinances regulating the same subject matter as state laws are valid so long as the two are harmonious and consistent. In this regard, the court stated:

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 scope of the 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. We believe the ordinance is consistent with the statutes pertaining to sex offenses. At 437 P.2d 436. (Emphasis added.)

Thus, the test applied in Allred II, whether the local ordinance is "harmonious" and "consistent" with the general state law, is much the same as the more narrow of the two grounds which served as the basis for the Lancaster court's decision.

In the same year that the Allred II decision was handed down, the Utah Supreme Court had occasion to review another preemption case, State v. Salt Lake City, 445 P.2d 691 (Utah 1968). There, the Court refined and clarified the holding in Allred II. Still abiding to the harmonious-conflicting test announced in the prior opinion, the Court defined what it meant by "conflict:"

. . . 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. At 445 P. 2d 694. (Emphasis added.)

In Allgood v. Larsen, 545 P.2d 530 (Utah 1976), the Utah Supreme Court again defined and somewhat enlarged the preemption test set forth in Allred II. There, the Court addressed a Salt Lake City ordinance making criminal trespass a Class B misdemeanor and contrasted it with general state law which, at § 76-6-206(3) of the Utah Criminal Code, set out the same offense as only an infraction, for which no jail sentence could be imposed. The defendant, having been convicted under the ordinance and sentenced to jail, sought a Writ of Habeas Corpus. The Utah Supreme Court, in upholding the issuance of the Writ, held as follows:

The District Court ruled "that since the State Law provides no jail sentence for trespass, which is classified as an 'infraction,' that the city cannot impose a greater sentence than that provided by state law, and it is for that reason that the Court grants the petition for a Writ of Habeas Corpus." With this we agree and affirm the trial court Salt Lake City seeks to exceed the public policy declared by the legislature relating to a new class of offense. It does not have that power of amendment. At 545 P.2d 532. (Emphasis added.)

The most recent Utah case and that completing the second phase of the hybrid approach with respect to preemption, Layton City v. Speth, 578 P.2d 828 (Utah 1978), appears to adopt the more broad of the two grounds set forth in Lancaster. There, the Utah Supreme Court ruled, given the State's full occupation of the subject matter regulated by the challenged ordinance, that the municipality, under its general police power, did not even have the authority to copy the statute. In this regard, the court stated:

The State of Utah has enacted statutes controlling the sale, gift, or use of controlled substances . . . [t]he city has no power or authority to copy the statute in its ordinance. At 578 P.2d 829.

The Layton City decision, therefore, is grounded on the same basic principle announced in Lancaster: that there is no room for a supplementary or complementary local ordinance where the subject matter of the ordinance has been fully occupied by the state. Moreover, the court, in Layton City, went so far as to say that the municipality could not even "copy" the statute.

First, applying the more narrow approach taken in Allred II, as refined in Salt Lake City and Allgood, supra, appellants submit that § 15-18-5(1) of the massage ordinance must fail as being inconsistent and in conflict with general state law.

As stated earlier in this point, and as the court concluded under nearly identical facts in Lancaster, the opposite sex massage prohibition of § 15-18-5(1), although contained within a licensing ordinance, is properly characterized as a criminal ordinance regulating sexual activity. Criminal sexual activity is comprehensively dealt with in the Utah Criminal Code at § 76-5-401 et seq. and at § 76-10-1301 et seq. Nowhere therein is the simple act of giving a massage to a person of the opposite sex made criminal. Indeed, criminal sexual activity as defined in § 76-10-1301, UCA, even under the most tortured interpretation, does not include massages:

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

The issue, under the Allred II test, is whether § 15-18-5(1), which prohibits opposite sex massage as criminal sexual activity, is inconsistent with or in conflict with general state law, which excludes massages from the definition of criminal sexual activity.

In Allred II, the Utah Supreme Court found no inconsistency between general state law proscribing prostitution and the city ordinance, which made it an offense to direct or offer to direct any person to any place for the purpose of committing any lewd act or act of sexual intercourse. The distinction between Allred II and the instant case, however, is obvious. In Allred II, both the ordinance and the statutes specifically, directly and consistently dealt with criminal sexual activity as defined by state law, whereas in the instant case, the massage ordinance deals with opposite sex massages as criminal sexual activity and state law makes no mention of massages and does not even include massages within the definition of criminal sexual activity. So that under the massage ordinance, a new class of offense is created, amending general state law -- the exact problem posed in Allgood -- and thus, unlike the situation in Allred II, the massage ordinance and state law are inherently contradictory and cannot be harmonized, so that state law must be said to preempt § 15-18-5(1) of the massage ordinance.

Next, applying the most recent and broader approach taken in Layton City, § 15-18-5(1) of the massage ordinance is even more clearly preempted by the comprehensive general state laws regulating criminal sexual activity. If the County is without authority to even copy the state prostitution laws, it is surely without authority to enact an ordinance that is inconsistent with said state laws.

Additionally, although perhaps not of the precedential value of a Utah Supreme Court opinion, further support for appellants' contention that § 15-18-5(1) is preempted can be found in Jensen v. Salt Lake County, Civil No. 216089 (1974). There, with the Honorable Stewart M. Hanson, presiding Judge, the Third Judicial District Court ruled in its Memorandum Decision, entered March 19, 1974, that:

The evidence indicated that basically the purpose for enacting the ordinance was to control prostitution, which illegal practice is already covered by the criminal laws of the State of Utah, and an attempt to regulate it by the above-referred-to ordinance would be a contravention of the state law. (Emphasis added.)

The County appealed to the Utah Supreme Court. (See Jensen v. Salt Lake County, 530 P.2d 3 (Utah 1974).) There, the Court found the massage ordinance invalid and unenforceable on grounds of vagueness and improper exercise of the police power and, having made that finding, did not have occasion to reach the preemption question. Judge Stewart M. Hanson's decision, though, was not reversed, and appellants submit that it still remains of significance in this Court's determination of the same issue.

In sum as to Point II, applying any or all of the approaches taken in Lancaster, Allred II, Salt Lake City, Allgood, Layton City, or Jensen, and given the kind of inconsistency between the massage ordinance and state laws regulating criminal sexual activity, the state laws must be said to preempt the massage ordinance insofar as the two are in conflict, so that § 15-18-5(1) of the massage ordinance must be found invalid and unenforceable.

POINT III

SECTION 15-18-5(1) OF THE MASSAGE ORDINANCE IS IN VIOLATION OF THE UTAH ANTIDISCRIMINATION ACT AND UTAH CIVIL RIGHTS STATUTES.

Section 15-18-5(1) of the massage ordinance, as already stated, prohibits licensed masseurs from performing massages on persons of the opposite sex. Sections 15-18-7 and 15-18-8 provide for civil sanctions, such as license suspension and revocation, and penal sanctions, such as fines and imprisonment, respectively. Thus, in order to comply with the mandate of the massage ordinance and avoid its sanctions, a massage

parlor is compelled to hire its male and female employees in proportion to the sexual composition of its clientele. In other words, if all of a massage parlor's customers are male, (see, Stipulated Facts, no. 7, "The vast majority of massage parlor patrons are men.") then the massage parlor must employ only male masseurs, even though female masseurs are equally qualified and even though female masseurs outnumber their male counterparts thirteen to one (see, Stipulated Facts, no. 6, "There are approximately 140 licensed masseurs in Salt Lake County; of this number, approximately 130 are women.") Not only does the massage ordinance require an impossibility -- a mere ten licensed male masseurs cannot meet the employment needs of all the massage establishments --but appellants submit that it requires a violation of the Utah Antidiscrimination Act. A massage parlor must hire its employees not on the basis of their respective qualifications but on the sole basis of their sex.

Specifically, any massage parlor that adheres to the mandate of the massage ordinance violates § 34-35-6, UCA, of the Utah Antidiscrimination Act, which states in relevant part as follows:

(1) It shall be a discriminatory or unfair employment practice:

- (a) For an employer to refuse to hire . . . because of . . . sex (Emphasis added.)

Furthermore, the Salt Lake County Commissioners, in enacting the discriminatory ordinance, have violated the same section of the Utah Antidiscrimination Act, at part (e), which states as follows:

- (e) For any person, whether an employer, an employment agency, a labor organization, or employees or members thereof, to aid, abet, incite, compel or otherwise coerce the doing of an act defined in this section to be a discriminatory or unfair employment practice or to obstruct or prevent any person from complying with the provisions of this chapter. . . . (Emphasis added.)

Thus, in order for a massage parlor to remain in business and in compliance with the massage ordinance, it must consciously and openly discriminate on the basis of sex in employment, thereby violating § 34-35-6(1) of the Utah Antidiscrimination Act. Moreover, the massage ordinance that compels such a discriminatory employment practice and prevents employers from complying with the terms of the Utah Antidiscrimination Act is itself in violation of § 34-35-6(1)(e) of the same Act.

The respondents may very well contend that, given the massage ordinance's prohibition of opposite sex massages, sex is a bona fide occupational qualification for massage parlors and, therefore, within an exception of the Utah Antidiscrimination Act found at § 34-35-6(2)(a). Such reasoning, however, is circular and without merit in that it presumes the ordinance valid, and once valid, the occupational qualification bona fide, and once the occupational qualification bona fide, the ordinance creating it valid, and so on. The questions as to the validity of the ordinance and the bona fide-ness of the occupational qualification are separate and involve different considerations.

Section 34-35-6(2)(a) states the bona fide occupational qualification exception as follows:

(2) It shall not be a discriminatory or unfair practice:

- (a) For an employer to hire and employ employees on the basis of . . . sex . . . where . . . sex is a bona fide occupational qualification reasonably necessary to the normal business or enterprise or essential to the motif, culture or atmosphere displayed, illustrated or promoted by such particular business or enterprise. (Emphasis added.)

In the instant case, it is not "normal" for a massage parlor to hire male masseurs merely because its customers are male, nor it is "essential" to the "atmosphere" that male masseurs perform massages on persons of the male gender. Indeed, such practices would be contrary to

the present operation of massage parlors in Salt Lake County, most of which administer massages without regard to sex. Thus sex, as an occupational qualification, in this instance, is invalid -- not bona fide -- and the massage ordinance must be struck down as violative of the Utah Antidiscrimination Act.

Moreover, not only would a massage parlor be required to discriminate on the basis of sex in employment in order to comply with the massage ordinance, it would also have to discriminate on the basis of sex in rendering services. For example, if a massage parlor had only female masseurs in its employ, or only female masseurs on duty, the business would be forced to deny its services to male customers. Such a denial of services on the basis of sex is a violation of Utah's civil rights statutes, of which § 13-7-3, UCA, states in relevant part as follows:

Equal right in business establishments, places of public accommodation, and enterprises regulated by the state. -- All persons within the jurisdiction of this state are free and equal and are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of . . . sex (Emphasis added.)

The case of Cianciolo v. City Council of Knoxville, 376 F.Supp. 719 (D.C. Tenn. 1974), is on point. There, the court examined a massage ordinance similar to that in the instant case under the federal Civil Rights Act of 1964, which Act served as the model for Utah's civil rights statutes. The court found that sex was not a bona fide occupational qualification and further concluded that:

The [massage] ordinance . . . fails to recognize that not all female masseuses will abuse a historically legitimate occupation when permitted to massage clients of the opposite sex The infirmity is that this presumption is grounded on an individual's sex. In conclusion, it would appear that [the ordinance] does not comply with the spirit, if not the letter, of the Civil Rights Act of 1964. At 376 F.Supp. 723. (Emphasis added.)

Just as the massage ordinance was invalid as violative of the federal Civil Rights Act in Cianciolo, the massage ordinance challenged in the instant case is also invalid as violative of Utah's civil rights statutes.

In conclusion as to Point III, § 15-18-5(1) of the massage ordinance, which creates discriminatory qualifications regarding employment and rendering of services, must be found invalid and unenforceable in violation of the Utah Antidiscrimination Act and the Utah civil rights statutes.

POINT IV

SECTION 15-18-5(1) OF THE MASSAGE ORDINANCE DENIES EQUAL PROTECTION AND DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The appellants, in asserting Point IV, acknowledge the cases of Smith v. Keater, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974); Rubenstein v. Township of Cherry Hill, 417 U.S. 963, 94 S.Ct. 3165, 41 L.Ed.2d 1136 (1974); and Kisley v. City Falls Church, 409 U.S. 907, 93 S.Ct. 237, 34 L.Ed.2d 169 (1972), appeals from state court decisions upholding the federal constitutionality of massage ordinances similar to the massage ordinance in the instant case, in which the United States Supreme Court dismissed for want of a substantial federal question. The appellants further acknowledge that under Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), the United States Supreme

Court's dismissal of an appeal for want of a substantial federal question is to be treated as dispositive on the merits of the issues raised.

The appellants, however, respectfully submit that the United States Supreme Court's decisions in the above-cited massage ordinance cases are in error. Realizing that this Court is not the proper forum for seeking a reversal of the United States Supreme Court as to that Court's interpretation of the United States Constitution (see, Oregon v. Haas, 420 U.S. 714, at 719, f.n. 4, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975)), the appellants, for purposes of preserving the issues raised for appeal only, briefly set forth the points of contention as follows:

- (1) That § 15-18-5(1) creates a sex-based classification without a compelling state interest therefor, contrary to the Equal Protection clause of the Fourteenth Amendment;
- (2) That § 15-18-5(1) creates a sex-based classification without a reasonable basis therefor, contrary to the Equal Protection clause of the Fourteenth Amendment;
- (3) That § 15-18-5(1) creates a classification in the exercise of the fundamental right to pursue a legitimate occupation including licensed masseurs and excluding licensed persons who practice the healing arts or professions, contrary to the Equal Protection clause of the Fourteenth Amendment;
- (4) That § 15-18-5(1) creates an arbitrary and irrational classification including licensed masseurs and excluding licensed persons who practice the healing arts or professions;
- (5) That § 15-18-5(1) abridges the fundamental right to pursue a legitimate occupation without a compelling state interest therefor, contrary to the Due Process clause of the Fourteenth

Amendment;

- (6) That there are less restrictive means of achieving the same objective sought by § 15-18-5(1) and the failure to use such means is a denial of due process, contrary to the Fourteenth Amendment; and
- (7) That § 15-18-5(1) creates an irrebuttable presumption that persons massaging persons of the opposite sex will engage in illicit sexual activity and such presumption is irrational and denies due process, contrary to the Fourteenth Amendment.

POINT V

SECTION 15-18-5(1) OF THE MASSAGE ORDINANCE DENIES EQUAL PROTECTION AND DUE PROCESS OF LAW AND PUNISHES PERSONS WITHOUT TRIAL OR CONVICTION IN VIOLATION OF THE CONSTITUTION OF THE STATE OF UTAH.

The appellants contend that, while in some instances the United States Supreme Court's interpretation of the United States Constitution may be helpful to state courts in interpreting their own constitutions, the former in no way binds the latter. (See, Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); City and County of Denver v. Nielson, 572 P.2d 485 (Colo. 1977).) The appellants submit that this is especially true where, as in the instant case, the language of the two constitutions differs significantly.

Unlike the United States Constitution which, absent the Equal Rights amendment, has no constitutional language raising sex-based classifications to the level of "strict scrutiny," the Constitution of the State of Utah does have such language. Specifically, Article IV, Section I provides in relevant part as follows:

. . . Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Given this constitutional protection of sexual equality, any state intrusion upon equality of the sexes should be subjected to strict scrutiny, with the burden on the state to show a compelling state interest furthered by such intrusion.

The application of the strict scrutiny-compelling state interest test in matters involving sex-based classifications, such as that presented by § 15-18-5(1), is consistent with and mandated by the Utah Supreme Court's decision in Beehive Med. Electronics v. Industrial Commission, 583 P.2d 53 (Utah 1978). There, the Court characterized the protection against discrimination based on sex founded in the Constitution of the State of Utah, Article IV, Section I, as a "precious right in our basic law." At 583 P.2d 60. As such a "precious right," any abridgements thereof should undergo the Court's most careful scrutiny, with only those abridgements of a legitimate and compelling nature surviving.

Additionally, as § 15-18-5(1) creates a classification in the exercise of the fundamental right to pursue a legitimate occupation which includes licensed masseurs and which also includes licensed persons who practice the healing arts or professions, and further as said section suppresses and prohibits the fundamental right to pursue the commercial enterprise of administering massages, a legitimate occupation, the strict scrutiny-compelling state interest test is mandated by the Utah Constitution, Article I, Sections 2, 7 and 24.

The strict scrutiny-compelling state interest analysis has been applied in several cases involving classifications based on sex. (See,

Mercer v. Board of Trustees, 538 S.W.2d 201 (Texas 1976); Long v. California State Personnel Board, 116 Cal. Rptr. 562 (Calif. 1974); Daugherty v. Daley, 370 F.Supp. 338 (D.C. Ill. 1974); Johnston v. Hodges, 372 F.Supp. 1015 (D.C. Ky. 1974); U.S. v. Reiser, 394 F.Supp. 1060 (D.C. Mont. 1975); Gilpin v. Kansas State High School Activities Association, 377 F.Supp. 1233 (D.C. Kan. 1974); M. v. M., 321 A.2d 115 (Del. 1974); Anderson v. City of Detroit, 221 N.W.2d 168 (Mich. 1974); Darrin v. Gould, 540 P.2d 882 (Wash. 1975); and Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971.).

Directly on point are several cases involving massage ordinances nearly identical to that in the instant case, where the strict scrutiny-compelling state interest test has been applied with the universal result that the ordinances were found unconstitutional.

In Cianciolo v. City of Knoxville, supra, the court held:

As the commercial enterprise of administering massages is, per se, a legitimate occupation, the city in this instance must show a compelling state interest before this ordinance can be upheld It is settled law that before a regulation can withstand judicial examination under the compelling state interest, the state must show that there was no alternative method of achieving the objective sought It appears that in this instance there is available to the City viable, existing alternative methods of curtailing sexually illicit conduct -- alternatives that place a less onerous burden on those who practice [massages] (Emphasis added.)

In Corey v. City of Dallas, 352 F.Supp. 977 (D.C. Texas 1972), reversed on the issue of standing at 492 F.2d 496 (5th Cir. 1974), the court held:

This court concludes that Corey has a fundamental right to operate a massage establishment in the City of Dallas. Any ordinance which infringes on Corey's right to do business through a classification based on sex which restricts who Corey may employ in his business contravenes the Fourteenth Amendment unless the objective of the ordinance is supported by a compelling state interest. . . .

This court finds that there are practicable alternative methods available to the City of Dallas which would achieve the same objective of this ordinance. Therefore, the objective of this statutory classification based on sex is not supported by a compelling state interest. . . . At 352 F.Supp. 981 and 983. (Emphasis added.)

In the instant case, the County cannot meet the demanding burden of the strict scrutiny-compelling state interest test. The admitted purpose of § 15-18-5(1) of the massage ordinance is to reach the criminal offense of prostitution and, since there are several other existing alternative methods available to the defendants, such as the several statutes and ordinances outlawing prostitution and illicit sexual activity (see, Point I-B(i)), the interest furthered by the ordinance is duplicative and in no manner compelling.

Even if the lesser standard of the "rational basis" test is applied to the massage ordinance in question, it would fail as unnecessary, irrational and creating an irrebuttable presumption. In J.S.K. Enterprises, Inc. v. City of Lacey, 492 P.2d 600 (Wash. 1971), the court applied the rational basis test to a massage ordinance very similar to that in the instant case and held:

Massage is one of the oldest forms of therapy. When properly administered in an appropriate case, it can be one of the most useful forms of therapy. To deny all massagists the right to practice their profession because some individuals utilize a massage parlor as a subterfuge to perform lewd acts for compensation would require stereotyping of the worst kind. It is saying, in effect, that all massagists can be judged to be lewd if given the opportunity and therefore they cannot massage members of the opposite sex. Not only is this discrimination as to both sexes of massagists but it would deny the people who need their services the opportunity to select the best qualified massagist available to them We therefore hold that the ordinance is an unreasonable and arbitrary exercise of the police power. At 492 P.2d 607. (Emphasis added.)

Similarly, in City and County of Denver v. Nielson, supra, the Supreme Court of Colorado, addressing itself to the constitutionality of a massage ordinance nearly identical to that in the instant case, applied the rational basis test under the Colorado Constitution and held:

The Denver ordinance is not a reasonable regulation. It creates an unreasonable, arbitrary, and unconstitutional conclusive presumption. . . . The ordinance is unduly oppressive to legitimate massage practitioners and goes beyond the means reasonably necessary to accomplish the legitimate objective of preventing illicit sexual behavior. Alternative constitutionally permissible methods of curtailing sexually illicit behavior are available to legislative bodies. At 572 P.2d 486. (Emphasis added.)

In the instant case, the massage ordinance should fail for the same reasons articulated in the above-cited cases. The manner in which the massage ordinance attempts to regulate illicit sexual activity is unreasonable and unnecessary given the available alternatives and further it creates an unreasonable, arbitrary, irrebuttable presumption that all masseurs will commit illegal sexual acts but for the prohibition to the contrary.

Speaking to the issue of the creation of irrebuttable presumptions, then-Justice Ellett, writing a concurring opinion in Jensen v. Salt Lake County, supra, summarized the Court's findings as follows:

The requirements of the [massage] ordinance in my opinion are too severe to be considered reasonable requirements for a license to operate as a masseuse. There surely are masseuses who are moral women. At 530 P.2d 4. (Emphasis added.)

The appellants, echoing the words of Justice Ellett, submit that there are masseuses who are moral women, and further submit that any massage ordinance which conclusively and irrebuttably presumes that all masseuses are immoral is violative of the Utah Constitution.

In addition to the above constitutional analyses, the most recent Utah Supreme Court case on massage ordinances, Hart Health Studio v. Salt Lake County, supra, provides a constitutional ruling that, appellants submit, is controlling in the instant case. There, the Utah Supreme Court was presented with an earlier version of the Salt Lake County massage ordinance, which provided in part for an annual license fee of \$5,000.00 for any massage parlor employing a masseur whose massage parlor license had been revoked within the past 12 months. The Court, in examining this provision, stated:

We also believe this section of the ordinance is somewhat like the old bills of pains and penalties (special acts of a legislature which inflict punishment on persons without any conviction by the ordinary course of judicial proceedings), prohibited by the Utah and U.S. Constitutions (see, Article I, Section 18, Utah Constitution; and Article I, Section 10, U.S. Constitution.) The ordinance clearly penalizes the masseur and his employer without a trial or conviction, and thus is clearly invalid and unenforceable under the constitutional provisions cited. At 577 P.2d 118. (Emphasis added.)

In the instant case, a type of punishment without trial or conviction, on a somewhat larger scale than that in Hart Health Studio, is presented by the massage ordinance in question. Given the conclusive presumption that all masseurs administering opposite sex massages will engage in illicit sexual activity, but for the prohibition against opposite sex massages, all masseurs are being conclusively presumed guilty and punished without trial or conviction. Whereas in Hart, the punishment was an annual license fee of \$5,000.00, in the instant case, the punishment is being driven out of business. Such punishment without trial or conviction is contrary to Article I, Section 18 of the Utah Constitution.

In conclusion as to Point V, § 15-18-5(1) of the massage ordinance must fail under either or both of the strict scrutiny-compelling state interest test and the rational basis test under the due process and equal protection requirements of Article I, Sections 2, 7 and 24 of the Utah Constitution, and further must fail as establishing punishment without a trial or conviction under Article I, Section 18 of the Utah Constitution.

POINT VI

SECTION 15-18-3 OF THE MASSAGE ORDINANCE CREATES AN ARBITRARY AND IRRATIONAL CLASSIFICATION ON THE BASIS OF AGE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTIONS 2 AND 24 OF THE UTAH CONSTITUTION.

Section 15-18-3 of the massage ordinance provides that an applicant for a masseur's license must be at least 21 years of age. The appellants contend that there is no rational basis in support of such a classification.

The respondents suggest that there are two reasons for the classification set forth in § 15-18-3: because "a 17-year-old girl was arrested in a Massage Parlor, acting as a masseuse, unlicensed," (see, Stipulated Facts); and because persons under the age of 21 generally lack the necessary experience and maturity to conduct the business of a masseur (see, Defendants' Trial Memorandum, Point VII).

As to the concern of "17-year-old girls" acting as masseuses, the problem associated therewith would be alleviated by setting the age requirement at 18 years. The apparent concern is that runaways will turn to massage parlors for employment unless the age requirement is set at 21 years, but this ignores the fact that 18 years of age is the age

of majority in the State of Utah. (See, § 15-2-1, UCA, "the period of minority extends in males and females to the age of eighteen years.") Once an individual obtains the age of majority, he cannot legally be considered a runaway; thus the age requirement need only be set at 18 years to resolve this problem.

Next, the contention that an individual must be 21 years of age in order to "handle" the responsibilities of a masseur is totally without merit. The State of Utah regulates the licensing of nurses whose responsibilities are far more substantial than those of a masseur and no age requirement is provided for. (See, § 58-31-9, UCA, "Registered Nurses -- Requirements for license," and § 58-31-10, UCA, "Practical Nurses -- Requirements for license.") Many nurses are licensed every year between the ages of 18 and 21 years; and if they are able to assume their responsibilities at that age, then there is no reason to require more of masseurs.

The standard articulated by the United States Supreme Court, by which classifications based on age are judged, is the rational basis test. (See, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, at 314 (1976); see, contra, Nelson v. Miwa, 546 P.2d 1005 (1976), which case applies the strict scrutiny-compelling state interest analysis.) Similarly, the Utah courts have applied the rational basis standard to classifications which treat one group of persons different from another group. (See, Crowder v. Salt Lake County, 552 P.2d 646 (Utah 1976); Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975); Leatham v. McGinn, 524 P.2d 323 (Utah 1974); Cannon v. Oviatt, 520 P.2d 883 (Utah 1974), appeal dismissed 95 S.Ct. 24, 419 U.S. 810, 42 L.Ed.2d 37, reh. denied 95 S.Ct. 645, 419 U.S. 1050, 42 L.Ed.2d 658 (1975).)

In the instant case, respondents contend that two bases serve for the age classification presented by § 15-18-3 of the massage ordinance: the concern for runaway minors and the concern that a person must be 21 years of age to handle the responsibilities of a masseur. The appellants submit, as stated earlier in this Point, that neither basis is rationally related to the County's purpose, as 18-year-olds are not minors and, as persons between the ages of 18 years and 20 years, are capable of assuming the responsibilities of a masseur.

In conclusion as to Point VI, § 15-18-3 of the massage ordinance creates an arbitrary and unreasonable classification on the basis of age, not rationally related to the County's purpose, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1, Sections 2 and 24 of the Utah Constitution.

POINT VII

SECTIONS 15-18-1(2), 15-18-1(4), AND 15-18-4 OF THE MASSAGE ORDINANCE ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN.

Sections 15-18-1(2), 15-18-1(4), and 15-18-4 fail to give adequate notice of what is necessary in order to comply with the requirements of the massage ordinance.

In Jensen v. Salt Lake County, supra, similar contentions as to vagueness were raised and the Court set the test as follows:

The trial court was of the opinion that the language of the ordinance was too vague and uncertain as to render it invalid. We conclude that that determination by the trial court was correct. A person who might wish to enter the field covered by the ordinance would be unable to determine from its wording what qualification or skill would be necessary to qualify for a license. It is noted that the ordinance uses the term "massage therapist" but nowhere is that term defined. At 530 P.2d 4. (Emphasis added.)

In the instant case, § 15-18-1(2) of the massage ordinance uses the term "healing arts" but nowhere is that term defined. This presents much the same problem as that presented by the undefined term, "massage therapist," since the person who might wish to enter the field of healing arts instead of that of a masseur has no idea of what the ordinance has in mind. For the same reasons stated in Jensen, § 15-18-1(2) is so vague and uncertain as to render that section invalid.

Section 15-18-1(4) of the massage ordinance is similarly troubled by the use of uncertain terminology. Section 15-18-1(4) provides the definition of "employee" and proceeds to define it as meaning, among other things, "owner" and "manager." It is confusing as to how one can be both the owner and the employee at the same time. Such a definition is contrary to common usage and, as such, the ordinary person is unable to determine who is considered an employee and who is not. Thus, § 15-18-1(4) is so uncertain as to render it invalid.

Additionally, § 15-18-4 sets standards so vague as to be outside the ordinary person's ability to determine what is required for compliance with the massage ordinance. Section 15-18-4 provides the requirement that the premises of massage parlors must be "sanitary," but does so in such vague terms that an applicant is not put on notice as to what is required. Section 15-18-4 states in relevant part as follows:

. . . 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. (Emphasis added.)

No standards are specified so as to give an applicant any indication of what is meant by "sanitary enough." Without more specificity, the ordinary person is unable to determine what requirements must be

met, and thus, under Jensen, § 15-18-4 of the massage ordinance is rendered invalid.

Problems of vagueness, similar to those in the instant case, arose in New York State Society of Medical Masseurs, Inc., et al. v. City of New York, et al., 74 Misc.2d 573 (N.Y. 1973), wherein the court had occasion to review New York City's massage parlor ordinance. There, faced with the wording "may license massage institutes upon receipt of approval from all necessary governmental agencies having jurisdiction," the court ruled:

. . . the very failure to set standards for the enforcement of the statute (citations omitted) makes the statute susceptible of discriminatory enforcement and therefore void on its face. At 870.

The court further stated:

It is not necessary to prove that this broad statute is likely to be enforced in a manner to harass persons who are not intended to fall under its structures. It is sufficient if 'the broad prohibitive language of the statute together with the lack of any defined standards for judging violations renders it peculiarly susceptible to arbitrary enforcement' (citations omitted). At 870.

In the instant case, the massage ordinance in question presents similar broad language with no defined standards for judging violations. The appellants submit that this absence of defined standards will allow and promote arbitrary enforcement of the provisions of the massage ordinance.

In sum as to Point VII, §§ 15-18-1(2), 15-18-1(4), and 15-18-4 of the massage ordinance are so vague and uncertain that they fail to impart adequate notice of what requirements must be met in order for compliance, and said sections must be found invalid and unenforceable.

POINT VIII

SECTIONS 15-18-5(1) AND 15-18-8 PROVIDE FOR INCHOATE OFFENSES IN CONFLICT WITH GENERAL STATE LAWS SETTING FORTH INCHOATE OFFENSES.

Section 15-18-5(1) provides in part:

It shall be unlawful for any massage establishment to cause or permit in or about his place of business, an employee to administer a massage upon any person of the opposite sex. (Emphasis added.)

Section 15-18-8 additionally sets forth penal sanctions for persons convicted of violations of the massage ordinance, including violations of the above-stated § 15-18-5(1).

Since it is the combined effect of the two sections to make an owner of a massage parlor criminally liable for the acts of his employees, even though the owner does nothing more than "permit" employees to engage in prohibited acts, the two sections are in conflict with general state criminal laws setting forth the inchoate offense of conspiracy.

Under the Utah Criminal Code, at § 76-4-201, UCA, the elements of conspiracy are set out as follows:

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

Two of these necessary elements for the crime of conspiracy are circumvented by the massage ordinance's use of the word "permit." Permit is defined in Black's Law Dictionary as ". . . to acquiesce, by failure to prevent," and, therefore, one can permit certain acts to take place without either "intending that conduct constituting a crime be performed" or "agreeing" with someone "to cause the performance of such conduct."

In conclusion as to Point VIII, appellants submit that Salt Lake County's enactment of §§ 15-18-5(1) and 15-18-8, which make a massage

parlor owner vicariously liable for the acts of his employees, in effect establishes the crime of conspiring to commit prohibited acts under the massage ordinance. The appellants further submit that §§ 15-18-5(1) and 15-18-8 are inherently contradictory to general state conspiracy laws and, under the rationale advanced in Point II, supra, said sections must be found to be preempted by state law and, to the extent preempted, invalid and unenforceable.

POINT IX

SECTION 15-18-5(2) OF THE MASSAGE ORDINANCE IS PREEMPTED BY STATE LIQUOR LAWS AND MUST BE FOUND INVALID AND UNENFORCEABLE.

Section 15-18-5(2) purports to regulate serving, storing and consumption of alcoholic beverages on premises of massage parlors. As the respondents have conceded (see, Defendants' Memorandum Point VI), said section is preempted by the comprehensive state liquor laws set out at Title 32, Chapters 1 through 10, UCA, under the rationale advanced in Point II, supra.

More specifically, the State Liquor Control Act makes provision for "State stores," at § 32-1-36; "Sale and delivery of liquor to individuals," at § 32-1-39; "Manufacture, importation and sale," at § 32-4-11; "Consumption on premises," at § 32-4-19; "Prohibited sale of alcoholic beverages," at § 32-7-1; "Possession of liquor," at § 32-7-2; "Supply of liquor to prohibited persons," at § 32-7-13; and "Having liquor without permit," at § 32-7-25. The appellants submit that the Liquor Control Act comprehensively deals with intoxicating liquor and nowhere therein makes it unlawful for a business to possess and consume liquor on its premises; selling, yes, but not mere possession and consumption.

Section 15-18-5(2) of the massage ordinance in no manner addresses the sale of alcoholic beverages; instead it outlaws the "serving," "storing," and "consumption" of alcoholic beverages on the premises of massage parlors. Further, respondents have made no contention that massage parlors have in the past or will in the future "sell" alcoholic beverages.

The appellants submit that § 15-18-5(2) attempts to create a new class of offenses, the mere serving, storage or consumption of alcoholic beverages, and that such is inconsistent to and conflicting with the offenses set forth by comprehensive state law. The appellants further submit that under the authorities of Lancaster, supra, Allred II, supra, Salt Lake City, supra, Allgood, supra, and Layton City, supra, and the rationale set forth in Point II, supra, said section is preempted and invalid.

Further support for appellants' contention, and dealing more directly with the subject of intoxicating liquor, is the case of Salt Lake County v. Liquor Control Commission, 357 P.2d 488 (Utah 1960). There, the Utah Supreme Court addressed a Salt Lake County ordinance in conflict with the comprehensive state liquor laws set out in the Liquor Control Act and reasoned:

. . . a county zoning ordinance in and of itself should not be permitted to interdict against such sweeping authority [Liquor Control Commission's], without a further and clear showing that the state's police power is being abused and exercised in an unreasonable manner. At 490.

The Court, not finding any showing of abuse of the state's police power, held:

We conclude, therefore, that the local county arms of the state sovereign must yield to the statewide arm
At 490.

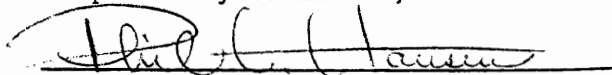
In conclusion as to Point IX, appellants submit that § 15-18-5(2) of the massage ordinance is inconsistent and in conflict with general state liquor laws and, therefore, invalid and unenforceable as being preempted thereby. The appellants further submit, as respondents conceded to this point at trial and advanced no authorities to the contrary, that the lower court's ruling is unsupported by the record on appeal.

CONCLUSION

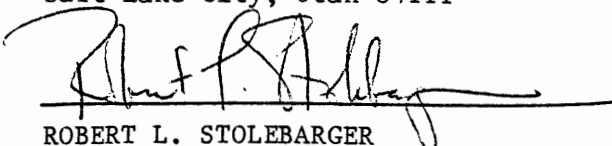
For the several reasons advanced above in Points I through IX, appellants respectfully request this Court to reverse the Memorandum Decision of the lower court, to grant appellants' motion for summary judgment, to find §§ 15-18-1(2), 15-18-1(4), 15-18-3, 15-18-4, 15-18-5(1), 15-18-5(2), 15-18-7, and 15-18-8 of the massage ordinance unlawful and unconstitutional, and to issue a permanent injunction enjoining respondents from enforcing said sections.

DATED this thirty-first day of March, 1980.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Appellant were served on Theodore L. Cannon, Salt Lake County Attorney, attorney for respondents, Metropolitan Hall of Justice, Salt Lake City, Utah, 84111, this 31st day of March, 1980.

Robert P. Adley