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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 Respondents

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,
GINGER'S HEALTH STUDIO, KELLY'S
HEALTH STUDIO, KIM'S HEALTH STUDIO,
CAVALIER HEALTH STUDIO, and
CONTINENTAL HEALTH STUDIO,

Plaintiffs-Appellants,

v.

SALT LAKE COUNTY COMMISSION, SALT
LAKE COUNTY ATTORNEY'S OFFICE, and
SALT LAKE COUNTY SHERIFF'S DEPARTMENT

Defendants-Respondents.

No. 16833

BRIEF OF RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH
HONORABLE HOMER F. WILKINSON, PRESIDING

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CINDY'S GOLDEN TOUCH, GENTLEMEN'S
QUARTERS, LYNN'S HEALTH STUDIO,
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No. 16833

V.

SALT LAKE COUNTY COMMISSION, SALT
LAKE COUNTY ATTORNEY'S OFFICE, and
SALT LAKE COUNTY SHERIFF'S DEPARTMENT

Defendants-Respondents.

NATURE OF THE CASE

Appellants seek a declaratory judgment adjudging a Salt Lake County ordinance invalid and unconstitutional.

DISPOSITION IN THE LOWER COURT

The lower court granted respondents' motion for summary judgment and denied appellants' motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Appellants seek an order reversing the lower court's summary judgment in favor of the respondents and an order granting appellants' motion for summary judgment.

STATEMENT OF FACTS

Respondents agree with appellants' statement of facts.

ARGUMENT

POINT I. THE UNITED STATES SUPREME COURT HAS HELD THAT OPPOSITE-SEX MESSAGE ORDINANCES DO NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES. THE OVERWHELMING WEIGHT OF AUTHORITY FINDS MESSAGE PARLOR ORDINANCES PROHIBITING OPPOSITE-SEX MESSAGES TO BE CONSTITUTIONAL.

Numerous state and federal courts have rendered decisions on the constitutionality of municipal ordinances that proscribe opposite-sex massages. Since 1943, when an appellate court in California handed down its decision in Ex parte Maki, 56 Cal App. 635, 133 P.2d 64, holding such an ordinance constitutional, many jurisdictions have enacted similar ordinances and this area of the law has been exhaustively litigated. Patterson v. Dallas, 355 S.W.2d 838 (Tex. Civ. App. 1962), appeal dismissed for want of a substantial federal question, 372 U.S. 251, 9 L.Ed.2d 732, 83 S. Ct. 873 (1963); City of Houston v. Shober, 362 S.W.2d 886 (Tex. Civ. App. 1962); Connell v. State, 371 S.W.2d 45 (Tex. Crim. 1963); Gregg v. State, 376 S.W.2d 763 (Tex. Crim. 1964); J.S.K. Enterprises, Inc., v. Lacey, 6 Wash. App. 43, 492 P.2d 600 (Ct. App. 1971); Kisley v. Falls Church, 212 Va. 693, 187 S.E.2d 168, (Va.Sup.Ct. 1972), appeal dismissed for want of a substantial federal question, 409 U.S. 907, 93 S.Ct. 237, 34 L.Ed.2d 169 (1972); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, (N.C.Sup.Ct. 1974) appeal dismissed for want of a substantial federal question, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974); Rubenstein v. Township of Cherry Hill, No. 10,027, unreported, (N.J. Sup.Ct. 1974), appeal dismissed for want of a substantial federal question 417 U.S. 963, 94 S.Ct. 3165, 41 L.Ed.2d 1136 (1974); Colorado

Springs Amusements Ltd. v. Rizzo, 387 F.Supp. 690 (E.D. Pa. 1974), rev'd, 524 F.2d 571 (3d Cir. 1975), cert. denied, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222; Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), cert. denied, 428 U.S. 913, 96 S. Ct. 3228, 49 L.Ed.2d 1221; Cullinane v. Geisha House, 354 A.2d 515 (D.C. App. 1976), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed2d 1226; Tomlinson v. Mayor and Aldermen, etc., 543 F.2d 570 (5th Cir. 1976); Thompson v. City of Huntsville, 329 So.2d 664 (Crim. App. 1976); Oueilhe v. Lovell, 560 P.2d 1348 (Nev. Sup. Ct. 1977), dealing with opposite-sex wrestling; City and County of Denver v. Nielson, 572 P.2d 484 (Colo. Sup. Ct. 1977); City of Indianapolis v. Wright, 371 N.E. 2d 1298 (Ind. Sup. Ct. 1978), appeal dismissed for want of a substantial federal question, 439 U.S. 804, 99 S.Ct. 60, 58 L.Ed.2d 97 (1978);

With the exception of City and County of Denver v. Nielson, supra, and J.S.K. Enterprises, Inc. v. Lacey, supra, all of the decisions cited above uphold the constitutionality of opposite-sex massage ordinances similar to the one here at issue.

The United States Supreme Court has held that opposite-sex massage parlor ordinances do not violate the equal protection and due process clauses of the United States Constitution. In Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223, (1975), the Supreme Court ruled that a dismissal for want of a substantial federal question is a disposition on the merits. Therefore, when the United States Supreme Court dismissed Smith v. Keator, Rubenstein v. Township of Cherry Hill, Kisley v. City of Falls Church, and City of Indianapolis v. Wright, it determined that

opposite-sex massage ordinances did not violate the United States Constitution.

This reasoning has been adopted by the federal circuit courts. The Fourth Circuit Court of Appeals in Hogge v. Johnson, supra, at page 835 stated:

Quite recently, the United States Supreme Court has spoken to the question among the circuits with respect to the meaning to be accorded dismissal for want of a substantial federal question. Such a dismissal is a decision on the merits binding upon the inferior federal courts. It is stare decisis on issues properly presented to the Supreme Court and declared by that Court to be without substance.

The plaintiff in Colorado Springs Amusements, Ltd., v. Rizzo, challenged Philadelphia's opposite-sex massage parlor ordinance upon the following grounds: that it failed to consider individuals on the basis of their own capacities, and instead unreasonably characterized the group to which individuals belong; that it established a constitutionally impermissible presumption that illicit sexual conduct was apt to occur when a customer was massaged by someone of the opposite sex; that it created a sex-based classification and invidiously discriminated on that basis; that it would require them to violate the Civil Rights Act of 1964; that it carved out a wholly irrational exception by exempting medical practitioners; that it abridged the fundamental right to pursue a livelihood by disenabling every licensed massagist from serving approximately fifty per cent of the public; and that it encroached upon an area--sex offenses--over which the Pennsylvania Legislature intended to exert sole control. After reviewing plaintiff's arguments, the Third Circuit Court of Appeals stated

at 524 F.2d 576:

By parity of reasoning, we are not free to disregard three dismissals by the Supreme Court, for want of a substantial federal question, of challenges to ordinances identical in all material respects to the one in question here. A reading of the appeal papers shows that the orders dismissing the appeals in Smith v. Keater, Rubenstein v. Cherry Hill, and Kisley v. City of Falls Church are precedent for rejecting all but two of the contentions raised in opposition to section 9-610(4) of the Philadelphia Code. The dismissal by the Supreme Court in these three cases dispose of the plaintiff's claims based upon equal, but reprehensible, treatment of both sexes, an individually discriminatory sex-based classification, an irrational exception in the ordinance for massage treatments given under the direction of a medical practitioner, unreasonable abridgement of the right to pursue a legitimate livelihood, and the irrebuttable presumption doctrine. Our reasoning in reaching this conclusion is supported by the similar approach taken by the Fourth Circuit in its recent decision in Hogge v. Johnson.

The Fifth Circuit Court of Appeals in Tomlinson v. Mayor and Aldermen, held a Savannah ordinance constitutional based upon the rationale of the Third and Fourth Circuits in Colorado Springs and Hogge, respectively.

The most recently reported case dealing with opposite-sex massage parlor ordinances to reach the United States Supreme Court is City of Indianapolis v. Wright. As in Smith, Rubenstein, and Kisley, the Supreme Court on October 2, 1978, dismissed for lack of a substantial federal question the appeal of Wright, dba Touch of Class Massage Parlor, and left standing the decision of the Indiana Supreme Court. In their decision, the Supreme Court of Indiana, after reviewing all of the major cases in the area concluded at page 1301:

Having reviewed these decisions and their rationale,

it is unnecessary to pursue the parties' various constitutional arguments for we are in agreement with the propositions and results of the overwhelming weight of authority which finds massage parlor ordinances prohibiting opposite sex massages to be constitutional.

In footnote number 1, at page 1301, the Indiana Supreme Court noted:

Those federal cases which have found such ordinances unconstitutional were previous to the cited summary dispositions and are apparently overruled. Cianciolo v. Members of the City Council (E.D. Tenn. 1974) 376 F.Supp. 719; Joseph v. House (E.D. Va. 1973) 353 F.Supp. 367.

As stated earlier, of all the cases cited in the parties' briefs and in the legal literature on this subject, [see, Annot. 51 A.L.R. 3d 939 (1973)], there are only two that have not been directly overruled that hold such ordinances unconstitutional: J.S.K. Enterprises v. Lacey, and City and County of Denver v. Nielson. J.S.K. Enterprises v. Lacey was decided by an intermediate appellate court in the State of Washington in 1971, prior to the United States Supreme Court's summary dispositions cited above, and based its decision upon the belief that the subject ordinance ". . .constitutes discrimination on the basis of sex in contravention of the equal protection clause of the fourteenth amendment of the United States Constitution." at page 607. The precedential value of the J.S.K. Enterprises decision was vitiated by the United States Supreme Court's rulings holding that such ordinances do not violate the equal protection clause of the fourteenth amendment.

This leaves only the case of City and County of Denver v. Nielson, wherein the Supreme Court of Colorado conceded that the ordinance did not violate the United States Constitution and

elected to interpret Colorado's constitution in such a way as to find the ordinance unconstitutional under the state constitution. The entire substance of appellant's case here rests on its supplication that this honorable court abandon the clear weight of legal authority throughout the United States and base its decision on one lone jurisdiction. This court has never held itself bound by the decisions of the Colorado Supreme Court; it was, however, shown such deference to decisions of the United States Supreme Court interpreting constitutional provisions similar to Utah's constitution.

POINT II. THE SUBJECT ORDINANCE DOES NOT VIOLATE THE CONSTITUTION OF THE STATE OF UTAH.

A. SIMILAR PROVISIONS IN THE FEDERAL CONSTITUTION AND THE CONSTITUTION OF THE STATE OF UTAH SHOULD BE SIMILARLY INTERPRETED.

Appellants claim that the county ordinance, in addition to violating the federal constitution, violates the Constitution of the State of Utah. Appellants allege in their complaint that the ordinance in question violates Article VI (Legislative Department) and Article I, Section 7 (due process) of the Constitution of the State of Utah (see paragraphs 5, 6 and 7 of the Complaint at page 3 of the record). Without amending their complaint the appellants now raise, in this appeal, the argument that the ordinance also violates the Article IV, Section I, and Article I, Sections 2, 18 and 24 of the state constitution.

The due process clause of the Federal Constitution (5th and 14th Amendments) and the due process clause of our state consti-

tution (Article I, Section 7) are nearly indential. The equal protection clause of the Federal Constitution (14th Amendment, Section 1) and the equal protection clause of our state constitution (Article I, Section 2) are dissimilar in their wording, however, their application has been equated in Purdie v. University of Utah, 584 P.2d 831 (1978).

A state may choose to interpret its state constitutional provisions more liberally than the United States Supreme Court has interpreted similar federal constitutional provisions. As previously noted, this was the technique used by the Colorado Supreme Court in City and County of Denver v. Nielson, wherein the court ruled at page 485, supra:

Regardless of the Third Circuit Court's decision in Colorado Springs Amusements, Ltd. v. Rizzo, supra, states may interpret their own constitutional provisions to afford greater protections than the Supreme Court of the United States has recognized in its interpretation of the federal counterparts to state constitutions.

Shortly after the Colorado Supreme Court handed down its decision in City and County of Denver v. Nielson, the Supreme Court of Indiana handed down a decision that involved substantially the same issues, City of Indianapolis v. Wright. The Supreme Court of Indiana observed at page 1301, supra: "It is therefore settled that the due process and equal protection provisions of the federal constitution are not violated by massage ordinances as involved here." That court rejected the idea of interpreting the Indiana Constitution more liberally than the United States Supreme Court interpreted similar provisions of the federal constitution. The court, at pages 1300-1, supra, quoted from one of their earlier decisions:

It is the province of the state courts to interpret and apply the provisions of their state Constitutions, but where a provision of a state Constitution is similar in meaning and application to a provision of the federal Constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts on the subject involved. While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the Fourteenth Amendment is not absolutely binding on the courts of the state when the statute is attacked as being in conflict with a provision of the state Constitution having the same effect, still, the federal decision in such cases is strongly persuasive as authority, and is generally acquiesced in by the state courts.

The Supreme Court of the State of Utah has long held the view that the United States Supreme Court's decisions on federal constitutional clauses are persuasive when it must interpret similar state constitutional provisions. This rule was pronounced in Untermeyer v. State Tax Commission, 129 P.2d 881 (1942), where it stated at page 885:

The due process clause of the state constitution is substantially the same as the Fifth and Fourteenth amendments to the Federal Constitution. Decisions of the Supreme Court of the United States on the due process clauses of the Federal Constitution are "highly persuasive" as to the application of that clause of our state constitution.

More recently, the Supreme Court of Utah restated its policy on this issue in Terra Utilities, Inc., v. Public Service Commission, 575 P.2d 1029 (1978) at page 1033:

Since the due process clause of our state Constitution (Article I, Section 7) is substantially similar to the Fifth and Fourteenth Amendments to the federal Constitution, the decisions of the Supreme Court of the United States on the federal due process clauses are highly persuasive as to the application of that clause of our state Constitution.

The traditional goals of our system of jurisprudence, including equal protection and predictability, are better served when

the federal and state courts interpret their similar constitutional provisions in the same manner.

The equal protection and due process arguments that appellants raise were also raised in the Smith, Rubenstein, Kisley, and City of Indianapolis. As noted above, the United States Supreme Court has ruled that those arguments do not raise a substantial federal question. Unless the Supreme Court of Utah interprets its state constitution more liberally than the United States Supreme Court interprets the Federal Constitution, the appellants' arguments do not raise a substantial state question, and should likewise be summarily dismissed.

- B. SINCE THE PROHIBITION AGAINST MASSAGING MEMBERS OF THE OPPOSITE SEX APPLIES EQUALLY TO BOTH MEN AND WOMEN, THE ORDINANCE DOES NOT DISCRIMINATE WHATSOEVER BASED ON SEX.

Part of the rationale upon which the courts have grounded their decisions that opposite-sex massage ordinances do not create a discriminating classification based on gender is that the treatment accorded the respective sexes is uniform. In the cases where discrimination has been found, the treatment accorded the respective sexes has differed significantly, and generally the treatment accorded the female was found to be inferior based upon historical and out-moded conceptions of the rights and duties of the respective sexes. The Supreme Court has condemned statutes based upon assumptions that men would generally be better estate administrators than women, Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); that women are the weaker sex and are more likely to be childrearers or dependents,

Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); or that female spouses of servicemen would normally be dependent on their husbands while male spouses of servicewomen would not, Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

Opposite-sex massage ordinances, like the subject one, treat masseuses and masseurs equally. The ordinance does not use gender as a basis for imposing different legal rights and responsibilities upon masseuses and masseurs. It does not assume that either sex is in greater need of protection. The Supreme Court of North Carolina adopted this reasoning in Smith v. Keator, supra, at page 210:

Since the prohibition against massaging members of the opposite sex applies equally to both men and women, we fail to discern any discrimination whatsoever based on sex. Admittedly, if the ordinance provided that male massagists could massage female patrons but that females could not massage males, a different situation would be presented. However, this is not the case under the ordinance in question.

The Supreme Court of Nevada found no violation of equal protection in a municipal ordinance proscribing opposite-sex wrestling for pleasure in the case of Oueilhe v. Lovell, supra, and stated at 1349:

Women and men are treated equally. Neither can wrestle for sexual pleasure with a member of the opposite sex for pay. Thus, the ordinance is neutral on its face and does not carry with it a gender-based discriminatory effect. Cf. Colorado Springs Amusements, Ltd. vs. Rizzo, 524 F.2d 571 (3d Cir. 1975), holding that an ordinance prohibiting intersex massage was not a denial of equal protection.

C. UNDER THE CONSTITUTION OF THE STATE OF UTAH, GENDER-BASED CLASSIFICATIONS ARE SUBJECT TO THE EQUAL PROTECTION STANDARD OF BEING REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

Article IV of the Constitution of Utah is entitled "Elections and Right of Suffrage." Section 1 of Article IV provides:

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Appellants contend that the foregoing provision is the operational equivalent of the proposed Equal Rights Amendment (ERA) to the United States Constitution and thereby raises sex to a suspect classification under Utah law. Admittedly, the legislative intent of the sponsors of the ERA was to make sex a suspect classification.

The courts of this state have never construed Article IV, Section 1 as a mandate to treat sex as a constitutionally suspect classification (see 90 A.L.R. 3d 158, 166 n.25). In Salt Lake City v. Wilson, 46 U.60, 148 P.1104 (1915), the defendant claimed a city ordinance violated Article IV, Section 1 because it levied a road poll tax against men but exempted women. The court rejected the defendant's position and held that our constitution permits reasonable classifications based upon gender. The court stated at page 1107:

The defendant, however, further contends that our Constitution is broader with respect to the rights and privileges that are enjoyed by the sexes than are the provisions of the Constitutions of the several states whose decisions we have referred to, and hence it is contended those cases are not controlling here. As we have seen, our Constitution provides:

"The rights of citizens of the state of Utah to vote and to hold office shall not be denied or abridged on

account of sex. Both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges."

We confess our inability to see anything in the foregoing quotation which prevents a reasonable classification of the citizens of the state with regard to the performance of certain duties which may be required by the state under its police power.

* * *

Such a classification has, however, always been made and enforced from time immemorial, and, unless prohibited in express terms in the Constitution, it is a natural and proper one to make. We can discover nothing in the constitutional provision now under consideration which prohibits such a classification, and hence the contention cannot prevail.

This court's position in Salt Lake City v. Wilson, Id., was reaffirmed in the Matter of the Estate of Baer, 562 P.2d 614 (1977). There a party challenged the constitutionality of a Utah probate statute containing a gender-based classification favoring widows and not widowers. The court ruled that gender-based classifications were subject to the less stringent equal protection standard of being reasonably related to a legitimate state purpose. The court held at pages 615-6:

The constitutional issue presented by respondents requires a determination whether the allowance of a distributive share only for widows is a discriminatory classification. Such a classification may be upheld if it bears a fair and substantial relation to a legitimate state purpose.

* * *

The Utah statute serves a policy of long standing which cushions the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. It is a legitimate state purpose to support widows who would have difficulty supporting themselves and therefore does not violate the equal protection clause.

The decisions of this court unanimously support a presumption of constitutionality of legislative enactments. In determining constitutionality, statutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be

indulged in and every reasonable doubt resolved in favor of constitutionality.

Appellants rely upon Beehive Med. Electronics v. Industrial Commission, 583 P.2d 53 (1978) as authority for their assertion that Article IV, Section 1 mandates strict scrutiny for all gender-based classifications. The case they so heavily rely upon does not even deal with a statute that has a gender-based classification. In Beehive, the plaintiff was challenging the constitutionality of the State Antidiscrimination Act alleging that it violated the due process and contract clauses of the state constitution. The plaintiff did not allege that the Antidiscrimination Act offended Article IV, Section 1, but rather that Article IV, Section 1 and Article I, Section 18 may represent conflicting goals in some situations. In this regard the court commented at page 60:

One other matter concerning constitutionality should be mentioned. If we assume, arguendo, that there is irreconcilability between two provisions of the Constitution of Utah, viz., Art. IV, Sec. 1, ante, and Art. I, Sec. 18 which states:

No . . . law impairing the obligations of contracts shall be passed. then Art. IV, Sec. 1 must prevail as the more precious right in our basic law.

Appellants argue that the court's reference to Article IV, Section 1 as a "more precious right" makes gender-based classifications constitutionally suspect; however, the court's comparative ranking of the rights guaranteed under those two sections does not constitute a categorization for equal protection scrutiny.

Whether sex should be elevated to the category of constitutionally suspect classifications is presently being determined through the traditional democratic process. Respondents urge

this court to permit this process to continue to a conclusion. To quote Mr. Justice Powell in his dissent in Frontiero v. Richardson, supra:

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court [should not assume] a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes. [Emphasis added].

D. THE ORDINANCE IS REASONABLY AND RATIONALLY RELATED TO ITS LEGITIMATE LEGISLATIVE OBJECTIVE OF SUPPRESSING THE USE OF MASSAGE PARLORS FOR IMMORAL PURPOSES.

In the absence of a showing by the appellants that the strict scrutiny-compelling state interest test is the appropriate test of gender-based classifications under Utah law, the proper standard of review is the reasonable relation test. Justice Wolfe defined this test in State v. Mason, 78 P.2d 920, 923 (1938):

Of course, every legislative act is in one sense discriminatory. The Legislature cannot legislate as to all person or all subject matters. It is inclusive as to some class or group and as to some human relationships, transactions, or functions and exclusive as to the remainder. For that reason, to be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded

from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

The court in Patterson v. City of Dallas, determined that the opposite-sex massage ordinance before it had a reasonable relationship to its legislative purpose. The court stated at pages 840-1:

The question is directly presented: Does Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas bear a reasonable and substantial relationship to the ends sought to be achieved by the legislating body, or does same arbitrarily establish a fixed Code of conduct which bears but a remote speculative and conjectural relationship to any valid results sought to be achieved under the Police power?

* * *

From the undisputed testimony of Captain Gannaway, and considering the record as a whole it is apparent that the Police Department of the City of Dallas was confronted with a real problem in the operating of massage establishments because of lewd acts committed or arising from the massaging of a person of one sex by a person of another sex. In an effort to correct this evil the Police Department of the City of Dallas made investigations and collected facts which were presented to the attention of the City Council of the City of Dallas with the recommendation that the Ordinance in question be passed in an attempt to curb the evil which then existed. It is to be observed that the Section under attack prohibits a member of one sex from administering a massage to a person of the opposite sex, with the exception noted. It does not prohibit, but permits, a masseur to administer a massage to a member of the male sex, and a masseuse to administer a massage to a member of the female sex. The right to conduct a massage establishment, after complying with the Massage Ordinances and securing a permit, is not prohibited but is merely regulated. This record does not demonstrate failure on the part of the City Council to perform its legal functions. Appellants have failed to sustain their burden of proof to show that the Ordinance complained of was enacted without reason or that it was enacted arbitrarily.

The facts in the instant case, like those in Patterson v. City of Dallas, are undisputed. The minutes of the Board of County Commissioners' meeting of November 20, 1978, (see record

at pp.35-C and 35-D), contain the statements of Captain Morgan of the Salt Lake County Sheriff's Office and Assistant Salt Lake County Attorney Oberhansly and reflect the serious problems that law enforcement officials were faced with as a result of the lewd and immoral acts arising from the massaging of a person by a person of another sex. Each official recommended that the ordinance in question be adopted in an effort to curb the problem that then existed in Salt Lake County.

The reasonable relationship between the restrictions imposed by a similar ordinance and the end sought to be achieved was recognized by the court in Ex parte Maki, when it stated:

The likelihood that licentiousness may result from the intimate contact of members of opposite sexes in the secrecy of the treatment chamber is a necessary factor in considering whether the ordinance is an intelligent and serious effort to regulate the occupation of maintaining a massage parlor. [Id. at 69]

* * *

The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers. [Id. at 67]

Similarly, the Supreme Court of North Carolina in Smith v. Keator, supra, at 210 ruled:

Furthermore, in light of the inherent character of the subject matter and the evil sought to be eliminated -namely, immoral acts likely to result from too intimate familiarity of the sexes - we hold the classification is reasonable and not arbitrary and has a fair and substantial relation to the object of the ordinance.

Appellants have the burden of showing that the subject ordinance does not bear a reasonable relationship with the purpose to be accomplished by the ordinance. They have failed to sustain that burden of proof.

E. THE ORDINANCE DOES NOT CONSTITUTE A BILL OF ATTAINDER UNDER ARTICLE I, SECTION 18 OF THE CONSTITUTION OF UTAH.

Appellants allege, at page 29 of their brief, that the ordinance constitutes a bill of attainder and is therefore unconstitutional under Article 1, Section 18, Constitution of the State of Utah. In support of this claim they cite the case of Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978). In that case, the court held that a \$5,000.00 license fee imposed upon massage parlors employing masseurs who worked at any massage parlor whose license had been revoked during the preceeding 12 months created a class that was not reasonably related to a legitimate legislative objective and therefore violated equal protection guaranties. The court further likened the imposition of the large license fee to the old "bill of pains." The court wrote at page 118:

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

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

A bill of attainder, as defined by the United States Supreme Court in Nixon v. Administrator of General Services, 433 U.S.

425, 53 L.Ed.2d 867, 97 S. Ct. 2777 (1977), is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. In United States v. Brown, 381 U.S. 437, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965), the United States Supreme Court invalidated an act that made it a crime for a Communist Party member to serve as an officer of a labor union. The court ruled that the act worked a bill of attainder by focusing upon easily identifiable members of a class and imposing upon them the sanction of mandatory forfeiture of a job or office.

When the subject ordinance is examined in light of Nixon and Brown, it is apparent that the requisite characteristics of a bill of attainder are not present. This ordinance applies to everyone, not just a selected group or class, it restricts all persons from massaging a member of the opposite sex. Therefore, it lacks the first requisite, that of being directed at a select group as opposed to the universe.

Even if the ordinance were deemed sufficiently specific in the definition of the group it punished, it would not automatically be a bill of attainder. Rather, it must be determined that the ordinance's regulations inflict punishment within the constitutional proscription against bills of attainder. The court in Nixon, propounded a staged test for this purpose. First: does any feature of the challenged act fall within the historical meaning of "legislative punishment?" Second: does the challenged law, viewed in terms of the type and severity of burdens imposed, further legislative purposes that are nonpunitive? Third: does

the legislative record indicate a legislative intent to punish?

The historical meaning of "legislative punishment" commonly included imprisonment, banishment, punitive confiscation of property by the sovereign, and barring designated individuals or groups from specified vocations--a mode of punishment commonly employed against those legislatively determined to be disloyal. The subject ordinance does not bar designated individuals or groups from employment as masseurs, but regulates the sexual makeup of their clientele.

Under the second test, it is apparent from the minutes of the hearing held before the Board of County Commissioners prior to the adoption of the subject ordinance that the ordinance served a non-punitive purpose. The testimony clearly indicates that the functional purpose was to decrease the incidents of immoral and indecent sex acts in massage parlors, a severe problem that existed in the community. There is no evidence to show that its functional purpose was to punish a specified group.

The third test is motivational: did the Board of County Commissioners intend to punish the group or class identified in the ordinance? Here again, the record is devoid of any indication that the motivation for enacting the ordinance was punitive.

The application of the tests set forth in Nixon, leads to rejection of appellants' argument that the ordinance constitutes a bill of attainder.

Appellants' argument is far outside of traditional bill of attainder analysis. Usually, the individual or group that is the subject of legislative punishment is named in the statute,

and the punishment imposed on that group is also specified in the body of the statute. But appellants' claim that the group that the ordinance is directed at is the massage parlor owners and the punishment is that they will be driven out of business. Appellants are actually arguing that the ordinance will impose a burden upon them that is disproportionate and unfair. President Nixon made the same argument in Nixon and the court in rejecting his position stated:

Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment.

This court, in Hart Health Studio, determined that the ordinance then under examination levied a specific penal sanction (a \$5,000.00 license fee) on a specific class (licensees employing masseurs who had worked at parlors that had their licenses revoked within the preceeding 12 months), and it therefore constituted a bill of attainder. The punishment that appellants' claim will be imposed upon them--being put out of business, is speculative and remote. Appellants' claim that the ordinance is a bill of attainder relies upon arguments outside the law and logic.

POINT III. UTAH CODE ANNOTATED, SECTIONS 17-5-27 AND 17-5-77
AUTHORIZE THE ADOPTION OF THE OPPOSITE-SEX MASSAGE
ORDINANCE.

Appellants claim, at Point I-A of their brief, that Utah Code Annotated Section 17-5-27 does not authorize the County to enact an opposite-sex massage ordinance. Section 17-5-27 provides

They may license for purpose of regulation and revenue all and every kind of business not prohibited by law and all shows, exhibitions and lawful games carried on in the county outside the limits of incorporated cities; they may fix the rates of license tax upon the same and provide for the collection thereof by suit or otherwise; 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, dancing resorts, dancing pavilions and all places or resorts to which persons of opposite sexes may resort for the purpose of dancing or indulging in other social amusements; provided, that any person who is unable to obtain a livelihood by manual labor and who is deemed worthy may be given a privilege to hawk, peddle or vend goods, wares and merchandise not prohibited by law without payment of a license tax or fee therefor. The board of county commissioners may pass all ordinances and rules and make all regulations not repugnant to law necessary for carrying into effect all powers and duties conferred by this section, and to enforce obedience to such ordinances with such fines and imprisonments as the board may deem proper; provided, that the punishment for any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment.

Appellants, without supporting evidence, speculate that the subject ordinance will put 95 per cent of existing massage parlors out of business and that such a result amounts to prohibiting and suppressing and not merely regulating.

The subject ordinance does not prohibit or suppress messages or massage parlors. The ordinance does nothing to prevent a person who desires a massage from purchasing one. In the absence

of evidence to the contrary, it can be assumed that the demand for massages will remain relatively constant after the ordinance becomes effective. The entrepreneur operating a massage parlor will adapt to this governmental regulation and hire masseurs and masseuses in a ratio corresponding to his clientele. Massage parlors that have been relying on the sale of sexual favors will suffer financial losses and their business will be suppressed, but the commerce of selling massages will continue with regulation and without suppression or prohibition.

The restrictions imposed by the ordinance are regulatory in nature and not prohibitory. See WORDS AND PHRASES, "Regulate", Vol. 36A, page 315. The court in Patterson v. City of Dallas, rejected the plaintiff's allegation that the opposite sex massage ordinance went beyond regulation and stated:

It does not prohibit, but permits, a masseur to administer a massage to a member of the male sex, and a masseuse to administer a massage to a member of the female sex. The right to conduct a massage establishment, after complying with the Massage Ordinances and securing a permit, is not prohibited but is merely regulated. [At page 841]

The court in Ex parte Maki, adopted the same view:

Since the ordinance in question does not prohibit either man or woman from engaging in the occupation of the masseur but merely regulates the conduct of a business in the interest of the state, there is no infraction of article XX of the Constitution. [At page 67]

In summary, the ordinance before the court will regulate massage parlors and will suppress the sale of sex acts in massage parlors.

The appellants then argue, at Point I-B of their brief, that the subject ordinance is not necessary nor proper and therefore Utah Code Annotated, Section 17-5-77 does not authorize the same.

All regulatory ordinances authorized by Utah Code Annotated, Section 17-5-27 must be proper and necessary, this court so held in Butt v. Salt Lake City Corporation, 550 P.2d 202, at 203 (Utah 1976):

Very early in our State's history this court recognized that city councils and boards of commissioners have large discretion in regulating businesses. We held in Salt Lake City v. Revene that a statute empowering a city to "regulate" a particular business authorizes the city to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary and wholesome in conducting the business in a proper and orderly manner.

Section 17-5-77 is a codification of this rule; it provides:

The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by this title, and such as are necessary and proper to provide for the safety, and preserve the health, promote the prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as the board may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment. The board of county commissioners may pass ordinances to control air pollution.

The necessity of the subject ordinance was determined by the County's legislative body, the Board of County Commissioners. After a public hearing, the minutes of which are part of this record (pages 35 A,B,C,D), the board made the legislative judgment

that the ordinance was a necessity. The court in Ex parte Maki made the following observation relative to legislative judgment and the necessity of an opposite sex massage ordinance at page 67:

In testing the legislative judgment with respect to the necessity for the enactment of regulatory laws in the absence of a judicial determination to the contrary, the presumption is that the city council's action was supported by known facts requiring the enactment. Such presumption demands but little application here. The inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices arising from the sex impulse is too well known to the student of history and sociology to require extended discussion.

In support of their contention that the ordinance was enacted without supporting statutory authority, the appellants claim that the ordinance does not constitute a proper exercise of police power and therefore not authorized by Section 17-5-77. They cite Jensen v. Salt Lake County Board of Commissioners, 530 P.2d 3 (Utah 1974) as authority for their notion. In Jensen, the County had enacted an ordinance setting certain qualifications for operators and employees of massage parlors. The plaintiffs applied for business licenses and were denied the same because they failed to demonstrate that they met the qualifications set by the ordinance which required:

- (5) A certificate showing that:
- (a) the applicant has practiced as a massage therapist for a period of at least five (5) years prior to the date of this amendment to the Massage Parlor Regulations; or (b) That the applicant is a graduate of a massage and therapy school approved by the American Massage and Therapy Association; or (c) is a fully accredited member, in good standing, of the American Massage and Therapy Association. Id. at 4.

The trial court struck down the ordinance because of vagueness and the Supreme Court concurred and held:

The trial court was of the opinion that the language of the ordinance was so vague and uncertain as to render it invalid. We conclude that that determination by the trial court was correct. A person who might wish to enter the field covered by the ordinance would be unable to determine from its wording what 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. The regulation of physical therapists is under the jurisdiction of the Department of Business Regulation of the State of Utah pursuant to the provisions of Section 58-1-5(12) and would not be subject to regulation by the County. It cannot be determined from the language of the amendment under consideration whether or not the terms "massage therapist" and "physical therapist" are synonymous. The other qualifications mentioned in the amendment require compliance with rules and standards of private associations which are not spelled out in the amendment, nor is there any indication as to where those standards might be found. Id at 4.

The Court in Jensen, Id. at 4, then added the language upon which the appellants rely:

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.

The subject ordinance does not attempt to set standards or qualifications for occupations. It prevents the continuation of the licentiousness that breeds in massage parlors by eliminating

intimate contact between members of the opposite sex in the secrecy of the treatment chambers. The relationship between the standards imposed by the ordinance in Jensen, and its goal of suppressing prostitution was too remote and the Court struck it down. However, the regulations imposed by the opposite-sex massage ordinance have a direct relationship to the goal to be achieved.

POINT IV. THE STATE HAS NOT PREEMPTED THE FIELD OF SEXUAL OFFENSES AND THIS ORDINANCE IS NOT IN CONFLICT WITH STATE LAW.

The appellants urge this court to adopt the rule set down by the Supreme Court of California in Lancaster v. Municipal Court for Beverly Hills, 494 P.2d 681 (1972) wherein the landmark case in the area of opposite-sex massages, Ex parte Maki, was partially overruled. The court in Lancaster determined that the criminal aspects of sexual activity had been preempted by the state legislature and any local municipal ordinance is invalid if it attempts to pose additional requirements in that area of the law. The court held at page 684:

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.

The preemption rule set forth in Lancaster is based on the California rule that the state has exclusive jurisdiction of criminal aspects of sexual activity, the Supreme Court of the State of Utah has taken an opposite position that makes the adoption of the Lancaster preemption argument inconsistent with existing law.

The leading case in the State of Utah in the area of pre-emption is Salt Lake City v. Kusse, 93 P.2d 671 (1938), wherein Justice Wolfe set down the rule that a local municipal ordinance is not in conflict with a similar state criminal statute unless (1) the local ordinance permits activities prohibited by the state law, or (2) the local ordinance is inconsistent with the state law. The court stated at page 673:

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

* * *

Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of the mere lack of uniformity and detail.

Thirty years later, the Supreme Court of Utah, in the case of Salt Lake City v. Allred, 437 P.2d 434 (1968), had before it an argument similar to the one that is now urged upon the court by the appellants and set forth in Lancaster. Salt Lake City had adopted an ordinance prohibiting aiding or abetting the directing of any person to any place for purposes of committing and act of sexual intercourse for hire and the court upheld the ordinance and stated at page 437:

In summary we conclude that the state has not preempted the field of sexual offenses since the ordinance in question is a proper exercise of police power, and the ordinance is not inconsistent with the state statutes pertaining to sexual offenses.

Thus, the rule in Utah is directly contrary to the rule in California set forth in Lancaster. As to whether or not the

passing of ordinances by municipalities, for the purpose of defeating the business of prostitution is a proper exercise of police power the court in Allred stated at page 436:

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

It is a well-established principle in this state that the city has the right to legislate on the same subject as the state statute where either the general police power or express granted authorities conferred upon municipalities. (citations omitted)

However, the defendant contends in the case before us that the ordinance in question is inconsistent and in conflict with the state laws and, therefore, invalid on the grounds that the ordinance attempts to make crimes of acts which are not crimes under the state laws. Assuming this to be true, a careful examination of the city ordinance (citation omitted) and the material sections of the state laws pertaining to sexual offenses, (citations omitted) reveals that both the city ordinance and the state statutes have the common purpose of defeating the practice of business of prostitution or the vice of sexual intercourse for hire and are closely related in subject matter. The mere fact that an act denounced as a crime under the ordinance which is not denounced as a crime under the statute would not necessarily render the act under the ordinance inconsistent with the statute whereas here the ordinance is within the scope of 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 statute pertaining to sex offenses.

The enabling statute under which Salt Lake City enacted its anti-prostitution ordinance that was the subject of the Allred case is found at Utah Code Annotated, Section 10-8-84, 1953, as amended, and is, in all pertinent parts, identical to Utah Code

Annotated, Section 17-5-77, 1953 as amended, supra, under which Salt Lake County enacted the subject ordinance.

The court in Allred further stated that the language contained in the enabling statute was sufficient to sustain the ordinance directed at prostitution and stated at page 435:

Also in accordance with the power contained in Section 10-8-84, U.C.A. 1953, the Utah Supreme Court, in Ogden City v. Leo, 54 Utah 556, 182 P. 530, 5 A.L.R. 960, upheld as reasonable and valid a city ordinance prohibiting the maintenance of booths of certain dimensions in restaurants so as to prevent persons of both sexes having no regard for law or morals meeting in such places. If the prohibition involved in the Leo case had a reasonable relationship to the preservation of the public morals, the prohibition of an act of sexual intercourse for hire under the city ordinance in this case would also appear to bear a reasonable relationship to the preservation and protection of public morals.

The protection of public morals has always been a matter of local concern which requires regulation by municipalities, and properly falls within the scope of the police power.

The supreme court in State v. Salt Lake City, 21 U.2d 318, 445 P.2d 691 (1968), had before it a comprehensive ordinance that purported to license nonprofit clubs. The plaintiffs sued Salt Lake City alleging that the area of licensing private clubs was preempted by the State. The court determined that the area was preempted by the State and the City's ordinance was struck down, but in doing so, the court made an important distinction between municipal ordinances that impose additional requirements above and beyond those required by the State legislature and those municipal ordinances that prohibit citizens from doing some act, such as is the case with the ordinance in question. The court stated at page 694:

There is a relevant distinction which should be observed: where the legislature imposes the requirement of doing some affirmative action, such as obtaining a license or a charter, upon a citizen, it may be implied that the legislature intended that the cities and counties shall not require him to do more. In contrast, where the legislature prohibits the citizens from doing some act, there is no basis to imply that the legislature intended that cities and counties should not have additional prohibitions. This concept is in accordance with Salt Lake City v. Kusse, where this court in commenting on various tests to determine whether there is a conflict between the statute and the ordinance, quoted with approval the following:

* * *

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

In Allgood v. Larson, 545 P.2d 530 (Utah 1976) and Layton City v. Speth, 578 P.2d 828 (Utah 1978), the Supreme Court of Utah held that municipal ordinances may not set a criminal punishment that varies from the punishment imposed under state law for the same culpable behavior. The subject ordinance does not impose a criminal sanction that varies in magnitude with the state statutes and therefore Allgood and Layton City do not control.

The precedential value of the language in Allgood and Layton City is further diminished by the fact that a majority of the court did not join in the majority opinion in either case.

If this court finds the subject ordinance invalid because it is in conflict with the state criminal law, respondents urge this court to strike only that section of the ordinance that offends the state criminal law, namely, Section 15-18-8, and leave in

place the respondents' ability to revoke a business license for violation of the ordinance.

In City of Indianapolis v. Wright, the opposite-sex massage ordinance did not provide for criminal sanctions and therefore it was not preempted by general state law. The court held at page 1300:

The massage parlors contend that the city-county ordinance prohibits the same acts as are prohibited by the above state statutes and that the ordinance is therefore invalid. We have, however, already determined that the ordinance does not provide for misdemeanor penalties and there is no state statute which establishes a licensing system for massage parlors. Lancaster v. Municipal Court, (1972) 6 Cal.3d 805, 100 Cal.Rptr.609, 494 P.2d 681, is distinguishable in that the ordinance involved in that case provided for misdemeanor penalties. Under the facts of this case we do not believe that the present massage parlor ordinance involves the same "subject matter" as the state statutes. City of Indianapolis v. Sablica, (1976) Ind., 342 N.E.2d 853, 855. The ordinance establishes a licensing plan whereas the statutes establish a penal scheme. The ordinance is therefore not unconstitutional under Ind. Const. Art. 4 §§ 22 and 23 as being an attempted local law where the legislature has determined that a general law shall apply.

If Salt Lake City v. Kusse and Salt Lake City v. Allred still correctly represent the law in the State of Utah, the ordinance here in question does not violate general state law. If the ordinance is deemed invalid because it contradicts, or is preempted by, state criminal law, the section providing for penal sanctions should be severed in accordance with Section 15-18-9 of the ordinance, which provides: "In the event that any provision of this ordinance is declared invalid for any reason, the remaining sections shall remain in effect."

POINT V. THE SUBJECT ORDINANCE DOES NOT VIOLATE THE UTAH
ANTIDISCRIMINATION ACT NOR UTAH CODE ANNOTATED,
SECTION 13-7-3.

Appellants complain in their brief (though not in their complaint) that the ordinance requires massage parlor operators to violate Utah's Antidiscrimination Act because as a practical matter, operators will hire employees based upon the sex ratio of the clientele and not solely upon the ability of the employee. The statute appellants claim is offended is Utah Code Annotated, Section 34-35-6(1)(a); it provides:

It shall be a discriminatory or unfair employment practice:

For an employer to refuse to hire, to discharge, to promote, demote, or terminate, or to discriminate in matters of compensation against any person otherwise qualified, because of race, color, sex, age, if the individual is 40 years of age or older, religion, ancestry, national origin, or handicap.

The term "employer," as used in the foregoing section, is defined at Utah Code Annotated, Section 34-35-2(5):

"Employer" means the state or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing 25 or more employees within the state; but it does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole, a bona fide private membership club (other than a labor organization).

The appellants do not have standing to challenge the ordinance upon the grounds it violates Section 34-35-6(1)(a). There is no evidence before this court that any of the appellants employ 25 or more employees, therefore they are not employers as the the term is defined in the Code.

The Supreme Court of Utah has not, previous to the instant case, had the opportunity of deciding if an opposite-sex massage ordinance violates Section 34-35-6(1)(a); however, the federal government has very similar legislation in Title VII of the Civil Rights Act of 1964 and the federal courts have ruled on this issue. The corresponding legislation provides in part:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a)(1).

The term "employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe.... 42 U.S.C. §2000e(b).

The United States Court of Appeals, Fourth Circuit, in Hogge v. Johnson, and the Third Circuit in Colorado Springs Amusements, Ltd. v. Rizzo, ruled that in the absence of evidence showing plaintiffs (massage parlors) met the definition of "employer" there was no violation of Title VII of the Civil Rights Act. The court in Colorado Springs Amusements, Ltd., supra, decided at page 576-7:

The owners' argument is that compliance with section 9-610(4) of the ordinance would force them to breach section 703(a)(1) and section 703(a)(2) of the Act, which respectively prohibit refusal to hire and deprivation of employment opportunities on the basis of sex. That claim must fail, however, at least in this case. This is so because section 703(a) of the Civil Rights

Act applies only to employment practices by an "employer," and section 701(b) defines an employer as "a person... who has fifteen or more employees...." It is neither alleged nor in any way suggested that any of the owners employ this number of persons. There is thus no violation of the Civil Rights Act.

The Fourth Circuit Court of Appeals, a year after its opinion in Hogge v. Johnson, was handed down, decided the case of Aldred v. Duling, 538 F.2d 637 (1976), where the massage parlor owner was an "employer" as defined in the law and, in a per curium decision, the court found that opposite sex massage ordinances do not violate Title VII of the Civil Rights Act of 1964. The court stated at pages 637-8:

The plaintiffs contend that the ordinance conflicts with the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. §2000e et seq. After receiving evidence and hearing arguments, the district court dismissed the complaint as presenting no substantial federal question.

We affirm.

Bo-Jac, Ltd. owns and operates massage parlors in Virginia and North Carolina. It has employed fifteen or more employees for twenty or more calendar weeks and has also purchased materials and supplies that were shipped in interstate commerce. Thus, it is clear that Bo-Jac is an "employer" within the meaning of 42 U.S.C. §2000e.

* * *

The restrictions imposed by the Richmond ordinance apply equally to males and females; neither can perform massages on customers who are members of the opposite sex. Until then, Bo-Jac's all-male clientele had requested masseuses exclusively. The ordinance simply prohibits such a practice. It does not, as a legal matter, require Bo-Jac to hire or fire anyone; nor on its face, does it restrict the gender of the customers that Miss Masseuse may serve. As a practical matter, the ordinance made unlawful the only business Bo-Jac had conducted, the business of supplying masseuses to

service male customers, but, surely, Title VII cannot be read to foreclose the enactment of ordinances which have the effect of making unlawful conduct which may not have been unlawful when Title VII was enacted. Aldred was not discharged because of her sex; her employment was terminated because her employer went out of business. It had no work to be done which Aldred could lawfully perform.

We hold that the ordinance is not in conflict with Title VII of the Act.

Applying the rationale of Aldred v. Duling, Id., to the instant case, the ordinance does not require the appellants to hire or fire anyone and therefore it does not violate Utah Code Annotated, Section 34-35-6(1)(a). This reasoning is consistent with the general purpose of Title VII as expressed in 12 ALR FED 31, §4, "Employment--Sex Discrimination," which is, to eliminate disparate treatment of female employees and to place women on an equal footing with men with respect to their employment. The subject ordinance treats men and women equally; neither has an employment advantage because of its respective sex.

Therefore, even if appellants had raised this issue in their complaint, and even if they were employers as defined in the law, their attack must still fail on its merits.

Furthermore, for the purposes of this analysis, the ordinance has the benefit of a presumption that it is constitutional. Assuming the ordinance to be constitutional, it would follow that sex may be a bona fide occupational qualification and therefore exempt from the Utah Antidiscrimination Act under Utah Code Annotated, Section 34-35-6(2)(a).

The Utah civil rights statutes (Utah Code Annotated Section 13-7-1 et seq.) prohibit discrimination in public businesses on

the basis of race, color, sex, religion, ancestry, or national origin. Appellants argue that the subject ordinance will require them to violate the civil rights statutes if they only employ female massagists because they will have to deny service to men. Even if the civil rights statutes prohibit businesses from separating the sexes where customers typically disrobe (an assumption respondents do not accept), the subject ordinance is not rendered invalid by the civil rights statutes; it merely requires massage parlors to have the personnel necessary to provide service to both sexes.

Utah Code Annotated Section 13-7-1 declares that discrimination in public businesses violates the public policy of this state. A regulation that separates the sexes where the participants undress, e.g., rest rooms, dressing rooms, and massage parlors, does not run contrary to the public policy of eliminating discrimination.

The appellants, in support of their theory cite the case of Cianciolo v. Members of the City Councils, 376 F.Supp. 719 (E.D. Tenn. 1974). This case has been overruled, see footnote number 1, City of Indianapolis v. Wright, supra at page 1301.

POINT VI. THE ORDINANCE IS NOT VAGUE. APPELLANTS LACK THE STANDING TO CHALLENGE SECTIONS 15-18-1(2) AND 15-18-4 OF THE ORDINANCE, ON GROUNDS OF VAGUENESS.

Appellants contend that Sections 15-18-1(2) and 15-18-4 of the ordinance are unconstitutional because they are vague and uncertain. They challenge 15-18-1(2) on the basis that the phrase

"healing art" is used in the section but is not defined therein. Section 15-18-1(2) provides:

"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 within this definition.

This definitional provision exempts from the regulations of the ordinance all persons who are licensed by the Department of Registration in any of the healing arts. The Department of Registration is established by Utah Code Annotated, Section 58-1-1 and the Department is charged with the responsibility of regulating the professions named in subsequent chapters of Title 58. The list of professions include barbers, podiatrists, dentist dental hygienists, embalmers, cosmetologists, nurses, optometrists pharmacists, plumbers, sanitarians, engineers, contractors, psychologists, accountants, veterinarians, irrigation fitters, landscape architects, social workers, electricians, electronic repair dealers, recreational therapists, speech pathologists, occupational therapists, water condition installers, midwives, security dealers, and hearing aid dealers.

The fact that the Board of County Commissioners could have been more specific in its wording does not render the ordinance unconstitutional, see Wagner v. Salt Lake City, 504 P.2d 1007 (Utah 1972). The ordinance is capable of sensible interpretation. The phrase "healing art" has the commonly accepted definition of being the skill of relieving and curing human ills, see WORDS AND PHRASES, "Healing Art," Permanent Edition, Vol. 19. By applying

the common usage definition of "healing art" to the professions licensed by the Department of Registration, a reasonable application can be made. This court has ruled:

Concerning the charge that the statute is void for vagueness: the presumption of validity hereinabove stated, gives rise to the rule that a statute will not be declared unconstitutional for that reason if under any sensible interpretation of its language it can be given practical effect. The requirement is that it must be sufficiently clear and definite to inform persons of ordinary intelligence what their conduct must be to conform to its requirements and to advise one accused of violating it what constitutes the offense with which he is charged. Greaves v. State, 528 P.2d 805, 807 (1974).

The ordinance is not substantially uncertain and whatever uncertainty may exist should be cured through case-by-case analysis. We may speculate that an individual, licensed by the Department of Registration as one of the professionals provided for in Title 58, may assert that the profession for which he is licensed is a healing art and therefore exempt from County regulation under the subject ordinance. If the County disagreed and asserted that his profession was not a healing art, the individual would have standing to seek judicial relief.

In the present case, the appellants do not have standing to challenge Section 15-18-1(2) and Section 15-18-4, the latter of which provides:

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

With the exception of Section 15-18-5(1) (opposite sex provision) and Section 15-18-5(2) (regulation of alcoholic beverages on licensed premises), all provisions of the ordinance have been in effect since December 14, 1978. During this period of time, there hasn't been one case where a person claimed he was licensed by the Department of Registration and thereby exempt under Section 15-18-1(2) (healing arts provision), nor has a massage establishment's license been revoked or denied under authority of Section 15-18-4 (sanitary premises provision). Appellants speculate someone may, in the future, be harmed.

Certainly there isn't any evidence in this record to indicate that the appellants are licensed in any profession by the Department of Registration, let alone one of the healing arts and therefore cannot claim that they have suffered or shall suffer harm due to Section 15-18-1(2). Nor is there any evidence that any of the appellants has suffered by reason of the sanitary standard of Section 15-18-4, "...premises are sanitary enough to conduct business therein without jeopardizing the public health."

This court requires that parties possess the concrete adversity which sharpens the presentation of issues upon which it largely depends for illumination of difficult questions. The court so held in Cavaness v. Cox, 598 P.2d 349 (1979) at pages 351-2:

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

This Court in State v. Kallas, expressed the rule on the matter as follows:

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

And in Peck v. Dunn, 574 P.2d 367 (1978) at 369 this court wrote:

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

Appellants' assertion that Section 15-18-1(4) of the ordinance is uncertain, because of the definition of "employee" is at variance with its definition in common usage, is without merit. If appellants' position were valid, nearly every statute containing definitions would be unconstitutional. The term "employee" is defined at Section 15-18-1(4) and it states:

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

The term "employee" is used twice in the body of the ordinance, once in Section 15-18-5(1) and again in Section 15-18-7. The application of the term is consistent with its definition.

When a court reviews an ordinance to ascertain its constitutionality, certain rules of construction apply. Those rules are described in Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975), certiorari denied 96 S.Ct. 1514, 425 U.S. 915, 47 L.Ed.2d 766 (1975), and apply equally to the present examination:

In reviewing an ordinance or statute to ascertain its constitutionality, certain rules of construction must be applied:

(a) A legislative enactment is presumed to be valid and in conformity with the constitution.

(b) It should not be held to be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular constitutional provision.

(c) The burden of showing invalidity of an ordinance or statute is upon the one who makes the challenge.

In the case of State v. Packard it was said:

It is recognized that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework (citations omitted), and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it. (Citations omitted.)

POINT VII. THE REQUIREMENT THAT ALL LICENSEES UNDER THE ORDINANCE BE AT LEAST 21 YEARS OF AGE IS RATIONALLY RELATED TO THE LEGITIMATE LEGISLATIVE CONCERN OF SUPPRESSING ILLICIT SEXUAL ACTIVITIES IN MASSAGE PARLORS.

Prior to adopting the ordinance, the Board of County Commissioners held a hearing for the purpose of receiving public comment on the draft ordinance. They heard from the attorneys representing the massage parlor owners and from representatives of the Salt Lake County Sheriff's Office. Based upon the comments, the Board

determined that the health, safety, and welfare of the community required a regulation requiring massage parlor licensees and masseurs to be at least 21 years of age. Section 15-18-3(1) of the ordinance requires all licensees to be at least 21 years of age.

This court ruled that age was not a constitutionally suspect classification in Purdie v. University of Utah, supra, and that classifications based on age need only be rational related to a legitimate state interest. This court held at page 833:

Plaintiff has also urged us to declare that age is an inherently suspect classification and that post-graduate education at a university is a fundamental right, requiring application of the strict scrutiny test. We decline to do so, as the authorities cited are unpersuasive, but base our reasons and opinion on the rational relationship test, noted ante.

At the public hearing, Captain Morgan testified that massage parlors are often fronts for the sale of illicit sexual activities and that it was common to see teenage girls who worked in the massage parlors arrested for such crimes (record, pp. 35C and 35D). It is apparent that the purpose of the ordinance, including this section, was to suppress the incidence of illicit and immoral sexual activities in massage parlors in the unincorporated area of Salt Lake County. Such a purpose constitutes a legitimate state interest for the purpose of equal protection analysis. By reasoning that young massagists would be susceptible to sexual exploitation because of their lack of maturity, and that there is some relationship between age and the maturity, the Board acted in a reasonable manner to further a legitimate state purpose.

For an annotation reviewing cases determining the validity of a minimum age requirement for public office, see 90 A.L.R.3d 900.

There is legislative precedent for imposing the requirement that licensees for certain occupations must be at least 21 years of age, see Utah Code Annotated, Section 58-2-1, et seq., where it is required that physical therapists, embalmers, landscape architects, sanitarians, and many others be 21 years of age. Similarly, the state has not entrusted the privilege of consuming alcoholic beverages to individuals under 21 years of age.

POINT VIII. SECTION 15-18-5(2) OF THE ORDINANCE IS NOT PREEMPTED BY STATE LIQUOR LAWS.

Section 15-18-5(2) of the Ordinance provides:

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

Appellants cite the case of Salt Lake County v. Liquor Control Commission, 357 P.2d 488 (1960), as authority for the proposition that the ordinance is invalid because it attempts to regulate areas preempted by state law; however, after that case was decided the legislature enacted new laws in the area of liquor sales. The new legislation countermands the rule pronounced in Salt Lake County v. Liquor Control Commission, Id. This fact was acknowledged by the court in a later decision in Rogue v. Utah Liquor Control Commission, 500 P.2d 509 (1972), where it stated at page 510:

The argument derives from the case of Salt Lake County v. Liquor Control Commission, and the action of the State Legislature subsequent thereto. That case involved a dispute over the authority of the Liquor Commission to locate a liquor store in violation of a county zoning ordinance. It was held that the state statute, Sec. 32-1-6, U.C.A. 1953, having given the Commission plenary power to decide the number and location of liquor stores, took precedence over county zoning ordinances. Subsequent to that decision the Legislature saw fit to eliminate the conflict by amending that section, 32-1-6(b), by adding the provision: "that a state store or package agency shall not be located in violation of any valid zoning ordinance of any city, town or county...."

The intent of the legislature in enacting the new laws was to grant to the local authorities the power to control the siting of liquor outlets in their communities. Utah Code Annotated, Section 32-1-36.15 provides in part:

Before establishing any state store or package agency, the commission shall:

(a) Consult with the local governing authority of the locality where the store is to be operated;

(b) Comply with all existing zoning ordinances of the locality where the store is to be operated;

The State has relinquished its preemptive rights in this area of the law. Therefore, there is no conflict between the ordinance and the state's liquor laws.

POINT IX. THE ORDINANCE DOES NOT CREATE INCHOATE CRIMES IN VIOLATION OF GENERAL STATE CRIMINAL LAW.

At Point VIII of their brief, the appellants contend that the ordinance is invalid and contrary to "general state criminal laws" because it makes the licensee responsible for the unlawful conduct of his employees, which he permits, upon the premises.

Citing as authority for the "general state criminal law" that invalidates the ordinance, the appellants quote from Utah Code Annotated, Section 76-4-201. It provides:

For purposes of this part a person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a capital offense, a felony against the person, arson, burglary, or robbery, the overt act is not required for the commission of conspiracy.

By its own words, this provision is limited in its application and scope to Part 2 of Chapter 4 of the Criminal Code. The section begins with its limiting language, "For purposes of this part...." There is nothing in this section that preempts a county from enacting an ordinance that makes a licensee responsible for the criminal acts he permits his employees to engage in on the licensed premises. Appellants do not cite any authority in support of their notion.

It is proper for a municipality to enact an ordinance that places an affirmative responsibility upon licensees to see that their businesses are not conducted by their employees in violation of the law.

The legislature has enacted statutes making it unlawful for a person to "permit" certain conduct on the person's premises, see Utah Code Annotated, Sections 32-7-24 (permitting drunkenness) and 32-4-19 (permitting consumption of beer). It must be assumed, in light of the fact the legislature has, itself, enacted laws rendering an individual culpable for permitting others to engage

in proscribed conduct on specified premises, that Utah Code Annotated 76-4-201 does not invalidate all such laws as appellants suggest.

The ordinance is not in conflict with the cited conspiracy section. A person may unlawfully permit another to perform a proscribed act without conspiring with another to commit a proscribed act.

Similar laws have sustained criminal convictions, see Brodsky v. California State Board of Pharmacy, 344 P.2d 68 (Cal. 1959) and Clown's Den, Inc. v. Canjar, 518 P.2d 957 (Colo. Ct. App. 1973).

The subject ordinance does not create inchoate offenses in violation of general state criminal law.

CONCLUSION

Several jurisdictions have already ruled on the constitutionality of opposite-sex massage ordinances and nearly all have found them to be constitutional and a valid exercise of police power. The constitutionality of such ordinances is so well established that the Supreme Court of Minnesota recently refused to grant massage parlor owners a preliminary injunction while the constitutionality of Rochester City's opposite-sex massage ordinance was being litigated, because they were unable, in light of recent decisions, to show a "likelihood of success on the merits." Hvamstad v. City of Rochester, 276 N.W.2d 633, 634 (Minn. 1979).

A critical examination of the points raised by the appellants fails to disclose a single reason why this court should abandon the reason and precedent of the United States Supreme Court, the

3rd, 4th and 5th Circuit Courts of Appeal, and the overwhelming majority of state supreme courts and strike down the ordinance before it.

The State of Utah has not preempted the area of sex offenses; rather, it has granted boards of county commissioners great latitude to preserve the health and improve the morals, peace, and good order of its citizens.

The regulations imposed by the subject ordinance bear a reasonable relationship to the legislative purpose of curbing the use of massage parlors as shelters for illicit sex merchants.

The appellants have the burden of proof in this case and they have failed to sustain that burden. The presumption of validity and constitutionality is un rebutted.

DATED this 29th day of May, 1980.

Respectfully submitted,

TED CANNON
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By



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF OF RESPONDENTS were served by hand delivering the same on the 30th day of June, 1980, to the following attorneys for appellants:

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