

1981

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 : Appellant'S Petition For Rehearing
and Supporting Brief

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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, BARBARA'S HEALTH :
STUDIO, KIM'S HEALTH STUDIO, :
CAVALIER HEALTH STUDIO, and :
CONTINENTAL HEALTH STUDIO, :

Appeal No. 16833

Plaintiffs-Appellants, :

-v- :

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

Defendants-Respondents. :

APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF

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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STUDIO, and CONTINENTAL HEALTH :
STUDIO, :

Appeal No. 16833

Plaintiffs-Appellants, :

-v- :

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

Defendants-Respondents.

APPELLANTS' PETITION FOR REHEARING AND SUPPORTING BRIEF

PETITION FOR REHEARING

Plaintiffs-Appellants (hereinafter "appellants"), by and through their counsel, hereby petition the Supreme Court of the State of Utah pursuant to Rule 76(e)(1) of the Utah Rules of Civil Procedure for a rehearing in the above-captioned appeal based upon the following grounds:

1. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Points IB and II set forth in appellants' original brief in light of recent legislation enacted by the Utah State Legislature and signed into law by the

Governor of the State of Utah subsequent to the handing down of said opinion.

2. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point IB set forth in appellants' original brief because of apparent error in the Court's conclusion that "it is not the function of this Court to evaluate the wisdom or practical necessity of legislative enactments," where, as in the instant appeal, the ordinance in question was enacted under the guise of being "necessary and proper."

3. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point II set forth in appellants' original brief due to the apparent conflict and inconsistencies between said opinion and the Court's previous opinions.

4. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point III set forth in appellants' original brief due to the Court's apparent failure to address appellants' contention that respondents violated § 34-35-6(1)(e) of the Utah Antidiscrimination Act.

5. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point III set forth in appellants' original brief because of apparent error in the Court's conclusion that the ordinance in question does not "require a massage parlor to refuse service to a customer

based on his or her gender."

6. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point V set forth in appellants' original brief because of apparent error in the Court's failure to apply the "strict scrutiny-compelling state interest" test to gender-based classifications as required by Article IV, Section I of the Utah State Constitution.

7. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point V set forth in appellants' original brief due to the apparent conflict and inconsistencies between the application of the "rational basis" test in said opinion and the applications in the Court's previous opinions.

8. Appellants respectfully submit that the Court should reconsider its opinion as to appellants' Point V set forth in appellants' original brief due to the apparent conflict and inconsistencies between the interpretation of the Bill of Attainder Clause of the Utah State Constitution in said opinion and the interpretations in the Court's previous opinions.

9. Appellants respectfully submit that the Court should reconsider its opinion in its entirety due to the apparent conflict and inconsistencies between the composition of the Court as said opinion was rendered and the mandate of Article VIII, Section 2 of the Utah State Constitution.

WHEREFORE, appellants petition that a rehearing in the above-captioned appeal be granted on the matters set forth above as

supported by the brief, next herein, and that the lower court's Memorandum Decision be reversed, appellants' motion for summary judgment granted, the massage ordinance in question declared invalid and unconstitutional, and the enforcement of said ordinance permanently enjoined.

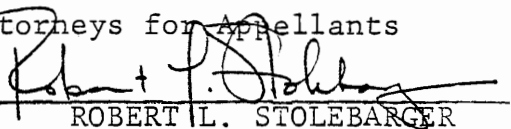
RESPECTFULLY SUBMITTED this 23rd day of February, 1981.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

The facts set forth herein supplement those previously set forth in appellants' original brief.

On or about the 30th day of January, 1981, the Utah State Legislature passed Senate Bill No. 26, amending Title 58 of Utah Code Annotated (1953), and, on or about the 18th day of February, 1981, this legislation, known as the Massage Practice Act, was signed into law by the Governor of the State of Utah. To assist the Court in appreciating the significance of this comprehensive legislation as it relates to the instant appeal, a copy of the newly enacted Massage Practice Act is attached as an appendix to this brief.

As the Court will find from examining the recent legislation, it is an exhaustive regulatory mechanism for masseuses and massage establishments. The new legislation was undoubtedly that contemplated at the public meeting held prior to the enactment of the Salt Lake County massage ordinance under attack in the instant appeal. At that meeting, it was represented to those in attendance that the massage ordinance was a "difficult" short term solution, but that comprehensive state legislation was expected that would treat those in the massage profession fairly.

In this regard, Mr. Curtis Oberhansley of the Salt Lake County Attorney's Office stated:

... even though it is a difficult situation, those people that are sincere in acting as legitimate masseuses will have a way in which to do this. The words granddaddy clause, etc., have been mentioned, and there are provisions in the proposed legislation that is going up to the State for granddaddy clauses. There is a school that has now been set up in the State of Utah for muscle therapists, so we are not attempting to put anybody out of business who is a lawful masseuse. We are not attempting to put anybody out of business who is not acting as a front for prostitution. It is our intent to help these individuals consistent with the ordinance to become licensed under the State. As you are aware, the County does not have the enabling legislation or the power to create a profession. It will have to go through the State, and will have to be regulated by the Department of Business Regulation, but this will be done and it needs to be done in order to control the situation. That will then become a self-policing organization. (see, Stipulated Facts.) (Emphasis added.)

It is interesting to note that the Salt Lake County Attorney's Office "sold" the massage ordinance to the Salt Lake County Commission and those in attendance at the public meeting by promising that the State would take over the regulation of masseuses and massage establishments, and, some two years later, the State has fulfilled the promise.

ARGUMENT

POINT I

RECENT LEGISLATION ENACTED BY THE UTAH
STATE LEGISLATURE AND SIGNED INTO LAW
BY THE GOVERNOR OF THE STATE OF UTAH
RENDERS THE MASSAGE ORDINANCE IN QUESTION
AN INVALID EXERCISE OF THE POLICE POWER
AND PREEMPTED BY GENERAL STATE LAW

A. CONSIDERATION OF LEGISLATION
ENACTED SUBSEQUENT TO THE
HANDING DOWN OF THE COURT'S
OPINION COMES WITHIN THE
SCOPE OF REVIEW ON REHEARING.

The rule as to what the Supreme Court will consider upon rehearing was established in the case of In Re MacKnight, 9 P. 299 (Utah 1886), wherein this Court held:

We must be convinced, either that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown when the case was argued. (at pp. 299-300.) (Emphasis added.)

Clearly, the newly enacted legislation comes within "some matter ... discovered which was unknown when the case was argued." It is important to note that by referring this Court to the recent legislation appellants are not asserting a new contention (as in Swanson v. Sims, 170 P. 774 (Utah 1918)) nor arguing a question not assigned as error or previously argued (as in State v. Kahua, 390 P.2d 737 (Hawaii 1964)).

In the instant appeal, appellants made the contention that the massage ordinance in question was an unnecessary and improper exercise of the police power (see, Point IB of Appellants' Brief) and that said ordinance was preempted by general state laws (see, Point II of Appellants' Brief). In referring this Court to the recent legislation, appellants are merely supporting their previous contentions.

B. THE NEWLY ENACTED LEGISLATION
RENDERS THE MASSAGE ORDINANCE

AN UNNECESSARY AND IMPROPER
EXERCISE OF THE POLICE POWER.

In this Court's opinion in the instant appeal, reference was made to the case of Jensen v. Salt Lake County Board of Commissioners, 530 P.2d 3 (Utah 1974). This Court cited the language of the Jensen opinion, with approval, as follows:

The regulation of physical therapists is under the jurisdiction of the Department of Business Regulations of the State of Utah pursuant to the provisions of [U.C.A., 1953] Section 58-1-5(12) and would not be subject to regulation by the County. (Redwood Gym, et al., v. Salt Lake County Commission, et al., No. 16833, at p. 6.) (Emphasis added.)

This Court went on to state, interpreting the rationale in the Jensen opinion, that:

As the proposed ordinance attempted to regulate in an area expressly committed by state law to another agency, it was adjudged an improper exercise of the police power. (at p. 6.) (Emphasis added.)

By virtue of the newly enacted Massage Practice Act, the instant appeal is now governed by the above-quoted Jensen rationale. The Massage Practice Act is found within Title 58 of Utah Code Annotated, the same as the Physical Therapists Act in Jensen, and expressly commits regulation of masseuses and massage establishments to the Utah State Department of Business Regulation, just as in the Jensen case.

Given the recent legislation, Salt Lake County (hereinafter "the County") is without jurisdiction to invoke the police power

to prohibit activity expressly committed for regulation to a state agency. This Court's language in its opinion in the instant appeal, although now outdated, is illustrative of the County's jurisdictional limitations:

The power to permit or prohibit massages by members of the opposite sex has not been expressly committed by statute to any existing agency of government. As such, the provision does not constitute a jurisdiction infringement and is not improper on that basis. (at p. 7.) (Emphasis added.)

In sum, as argued in appellants' Point IB and now that the area of massage regulation has been expressly committed by statute to the Utah State Department of Business Regulation, the County's attempt to regulate by ordinance in the same field is unquestionably an invalid exercise of the police power.

C. THE RECENTLY ENACTED
LEGISLATION PREEMPTS
THE ENTIRE FIELD OF
MASSAGE REGULATION.

This Court's opinion in the instant appeal rejected appellants' contention that the massage ordinance was preempted by general state law because the Court found no conflict between the two. In this regard, the Court stated:

... such conflict is not created by the fact that an ordinance denounces as unlawful an act upon which state law is silent. (at p. 7.) (Emphasis added.)

With the recent enactment of comprehensive legislation regulating massueses and massage establishments, it can no longer

be said that "state law is silent." The state has now spoken and two conflicts are presented, the first a conflict in language and the second a conflict in jurisdiction.

Many activities are prohibited by the new legislation (see, Sections 16 and 19 of the Massage Practice Act), but opposite sex massage is allowed. Since the massage ordinance under attack prohibits opposite-sex massage, therein lies the conflicting language between said ordinance and the new comprehensive legislation. With respect to conflicting language, this Court set forth the test in the case of Salt Lake City v. Kusse, 93 P.2d 671 (Utah 1939), wherein the Court stated:

In determining whether an ordinance is in "conflict" with general state laws, the test is whether the ordinance permits or licenses that which the state forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the state permits. (at p. 673.) (Emphasis added.)

Thus, applying the Kusse test to the instant appeal, it is clear that the massage ordinance is invalid as forbidding opposite sex massage, which the state permits.

An even more compelling reason for invalidating the massage ordinance is the jurisdictional conflict between the County's licensing body and the State's regulatory agency. This Court addressed a similar set of circumstances in the case of State v. Salt Lake City, 445 P.2d 671 (Utah 1968), wherein the Court examined Salt Lake City's attempt to license private clubs when the State of Utah had a regulatory statute in effect. There

the Court stated:

... the invalidity arises, not from the conflict of language, but from the inevitable conflict of jurisdiction which would result from the 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 p. 694.)
(Emphasis added.)

And, reference is again made to the language of the Jensen opinion, wherein this Court stated:

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 [U.C.A., 1953] Section 58-1-5(12) and would not be subject to regulation by the county. (at p. 4.)
(Emphasis added.)

In conclusion, as argued in appellants' Point II and now that the Utah State Legislature has spoken in enacting comprehensive legislation in the field of massage regulation, thereby affirmatively preempting that field, the massage ordinance in question is rendered invalid as prohibiting what the State's regulatory scheme permits and as infringing upon the jurisdiction of the State's regulatory agency.

POINT II

THERE IS APPARENT ERROR IN THE COURT'S CONCLUSION THAT "IT IS NOT THE FUNCTION OF THIS COURT TO EVALUATE THE WISDOM OR PRACTICAL NECESSITY OF LEGISLATIVE EN-ACTMENTS," WHERE, AS IN THE INSTANT

APPEAL, THE ORDINANCE IN QUESTION
WAS ENACTED UNDER THE GUISE OF
BEING "NECESSARY AND PROPER."

In the Court's opinion in the instant appeal, the Court
stated that:

It is not the function of this
Court to evaluate the wisdom or
practical necessity of legislative
enactments. (at p. 5.)

Appellants respectfully submit that the above-quoted
statement of the Court is in error where, as in the instant appeal,
the Court is requested to rule on an ordinance enacted under the
guise of being "necessary and proper."

Appellants concede that ordinarily courts will not determine
the "propriety, wisdom, necessity or expedience" of legislative
enactments. (See, Great Salt Lake Authority v. Island Ranching
Co., 414 P.2d 963, rehearing 421 P.2d 504 (Utah 1966)). But, in
the instant appeal, the ordinance in question was attacked
as being unnecessary and improper and, thus, an invalid exercise
of the police power.

This Court has stated that the powers of a county are limited.
In the case of Salt Lake City v. Kusse, this Court found that a
municipality:

... may possess and exercise only
the powers granted in express words
and such as are necessarily or
fairly implied in or incident to,
the powers expressly granted, or
those essential to the declared
objects and purposes ... not merely
convenient but indispensable.
(at p. 672.) (Emphasis added.)
(see also, Dillon Municipal Corpor-
ations, 5th Ed., p. 448, §237.)

In the instant appeal, the County has argued that the massage ordinance in question is "necessary and proper" to improve the morals of its citizenry. Appellants concede that improving morals comes within the "declared objects and purposes" found at §17-5-77 of Utah Code Annotated (1953). However, appellants insist that, under the holding in Kusse, the County's ordinance must undergo the Court's scrutiny. In this regard, the Court must look to see if the ordinance is "essential" to improving morals "not merely convenient but indispensable."

Appellants respectfully submit that this Court cannot determine whether the questioned ordinance is essential and indispensable without looking to its wisdom and practical necessity.

In sum, appellants ask this Court to reconsider its opinion as to appellants Point IB set forth in appellants' original brief and determine whether the massage ordinance is essential and indispensable to improving the morals of the citizens of Salt Lake County.

POINT III

THERE ARE APPARENT CONFLICTS AND INCONSISTENCIES BETWEEN THE COURT'S OPINION AS TO APPELLANTS' PREEMPTION ARGUMENT IN THE INSTANT APPEAL AND THE COURT'S PREVIOUS OPINIONS.

In rejecting appellants' preemption argument (see, Point II of Appellants' Brief), this Court ruled that "the opposite-sex massage provision is not invalid by reason of preemption by state law. ¹⁸" Footnote 18 then went on to say:

We so hold in awareness of the decision of Layton City v. Speth,

Utah, 578 P.2d 828 (1978). (Emphasis added.)

Prior to the Court's opinion in the instant appeal, the case of Layton City v. Speth was the last word on preemption from the Utah Supreme Court. In the Layton City case, this Court held invalid a city's attempt to regulate the use of illegal drugs by copying in its ordinance the language of the State Controlled Substances Act. The court ruled that given state occupation of the subject matter, 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 p. 829.)

In applying the approach taken in Layton City to the massage ordinance in the instant appeal, appellants argued that said ordinance was preempted by the comprehensive general state laws regulating criminal sexual activity, and that if the County was without authority to even copy the state prostitution laws, it was surely without authority to enact an ordinance that amended the state's laws to include an additional classification of sexual offense.

The Court in rendering its opinion in the instant appeal does not discuss, distinguish or overrule the case of Layton City and yet it appears to adopt the rationale articulated in former Chief Justice Crockett's dissent in Layton City. If the Court wishes to adopt the dissenting opinion in Layton City as its own,

it would seem that the Court would necessarily have to overrule, or at least distinguish, that case from the instant appeal.

In conclusion, until Layton City is overruled or distinguished, appellants respectfully submit that, under the doctrine of stare decisis, this Court must determine the preemption issue presented in the instant appeal under and in accordance with its previous decision.

POINT IV

THE COURT HAS FAILED TO ADDRESS
APPELLANTS' ARGUMENT THAT RESPON-
DENTS HAVE VIOLATED §34-35-6(1)(e)
OF THE UTAH ANTIDISCRIMINATION ACT.

In the Court's opinion in the instant appeal, appellants' contention that the questioned ordinance is violative of the Utah Antidiscrimination Act (see, Point III of Appellants' Brief) is disposed of on grounds that appellants failed to establish that they come within the Act's definition of "employer."

The Court, however, has failed to address appellants' additional contention that the County Commission had, by virtue of enacting the massage ordinance, violated §34-35-6(1)(e), which states in relevant part, as follows:

(1) It shall be a discriminatory or unfair employment practice:
(e) for any person ... to 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.)

The Act defines "person" at §34-35-2(2), as follows:

(2) The word "person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, the State of Utah and all political subdivisions and agencies thereof. (Emphasis added.)

In sum, appellants respectfully request that this Court reconsider appellants' Point III set forth in appellants' original brief insofar as the Court's opinion did not dispose of the issue presented therein.

POINT V

THERE IS AN APPARENT ERROR IN THE COURT'S CONCLUSION THAT THE MESSAGE ORDINANCE DOES NOT "REQUIRE A MESSAGE PARLOR TO REFUSE SERVICE TO A CUSTOMER BASED ON HIS OR HER GENDER."

The Court's opinion in the instant appeal disposed of appellants' contention that the questioned ordinance is violative of the Utah Civil Rights Act (see, Point III of Appellants' Brief) by concluding that the massage ordinance does not "require a massage parlor to refuse service to a customer based on his or her gender." (at p. 10.)

Appellants respectfully submit that the Court is in error in reaching the above-quoted conclusion and that same is totally inconsistent with the following language of the opinion:

All individuals, male or female, are entitled to services of a licensed masseur, provided that the masseur is not a member of the opposite sex. (at p. 10.) (Emphasis added.)

The Court is stating on the one hand that the massage ordinance does not require the refusal of service to a customer based

on his or her sex, and then stating on the other hand that it does require a masseuse to refuse a customer of the opposite sex.

The only case cited by either appellants or respondents that is on point is Cianciolo v. City Council of Knoxville, 376 F. Supp. 719 (D.C. Tenn. 1974). There, the court examined a massage ordinance similar to that in the instant appeal 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 ordinance . . . fails to recognize that not all 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 p. 723.) (Emphasis added.)

Respondents attempt to discredit the precedential value of the Cianciolo case by suggesting that it has been overruled by a footnote in an Indiana case. The Cianciolo case, contrary to respondents' assertions, has not been overruled by any court. The Indiana Supreme Court, in City of Indianapolis v. Wright, 371 N.E.2d 1298, appeal dismissed for want of a substantial federal question, 439 U.S. 804, 99 S.Ct. 60, 53 L.Ed.2d 97 (1978); merely stated in footnote 1 that Cianciolo was decided prior to the flood of federal cases finding massage ordinances constitutional, and, as such, that Cianciolo had

"apparently" been overruled. Appellants wish to point out that the City of Indianapolis case did not present the issue of a Civil Rights Act violation, and, thus, its footnote can in no way be considered as reflecting on that aspect of the Cianciolo case. Furthermore, counsel for appellants have not found a single case that has reached either the Sixth Circuit Court of Appeals or the United States Supreme Court that has addressed the issue presented in Cianciolo, and these two courts are the only courts with the authority to overrule Cianciolo. Thus, the holding reached by the court in Cianciolo is still the law with respect to massage ordinances in violation of the Civil Rights Act and still of precedential value to this Court in deciding the same issue.

In sum, appellants respectfully submit that the Court is in error when it concludes that the sex of the customer is not a determining factor in the rendering of services by a masseuse and that said conclusion is inconsistent with the Cianciolo case and with the Court's own language indicating that the rendering of services by a masseuse is indeed dependent on the sex of his or her customers. Appellants respectfully request that the Court reconsider Point III of appellants' original brief in light of the foregoing inconsistencies.

POINT VI

THE COURT ERRED IN FAILING TO APPLY
THE STRICT SCRUTINY-COMPELLING STATE
INTEREST TEST.

In the Court's opinion in the instant appeal, the Court

elected not to apply the "strict scrutiny-compelling state" interest test (see, Point V of Appellants' Brief) by finding that the massage ordinance in question did not create a gender-based classification. The Court specifically withheld a ruling as to whether a gender-based classification is inherently suspect under Utah law and, thus, whether the strict scrutiny-compelling state interest test should be applied.

As stated more fully above at Point V herein, appellants respectfully submit that the Court is in error when it concludes that the massage ordinance does not create a gender-based classification.

For the reasons set forth in Point V above, in addition to those at Point V of appellants' brief, appellants respectfully submit that the Court should decide if a gender-based classification is inherently suspect under Utah law and, having so decided, that the Court should apply the strict scrutiny-compelling state interest test to the gender-based classification in the instant appeal.

POINT VII

THERE ARE APPARENT CONFLICTS AND INCONSISTENCIES IN THE APPLICATION OF THE RATIONAL BASIS TEST IN THE COURT'S OPINION IN THE INSTANT APPEAL AND THE APPLICATIONS IN THE COURT'S PREVIOUS OPINIONS.

In its opinion in the instant appeal, the Court applied the "rational basis" test to appellants' contentions that the massage ordinance is unconstitutional (see, Point V of Appellants' Brief).

Appellants respectfully submit that the application of the rational basis test in the instant appeal is in conflict with the applications of said test in the Court's previous opinions.

In the Jensen case, for example, this Court stated:

At the trial in the court below a county commissioner and a member of the county sheriff's office testified that prostitution was the major concern in the adoption of the ordinance in question. It is the county's contention that it is a valid exercise of police power to regulate massage establishments and to control prostitution. We are of the opinion that the county does have the power to deal with those matters directly. However, the ordinance under consideration does neither, but rather it attempts to set standards and qualifications of those persons who intend to engage in a legitimate occupation or trade. (at p. 4.) (Emphasis added.)

The Court in Jensen, as the above-quoted language indicates, concluded that the County's massage parlor licensing ordinance was an attempt to indirectly control prostitution and, thus, said ordinance was not rationally related to the stated purpose, and further concluded that if the County wanted to control prostitution it had the power to do so, but that it must exercise that power "directly."

Appellants respectfully submit that the Court should apply the rational basis test in the instant appeal in the manner in which it was applied in Jensen. That is to say, that this Court should examine the massage ordinance in question to see if it attempts to do indirectly what could be done directly, and,

therefore, whether it is rationally related to its objective.

An additional example of the conflict and inconsistencies between the application of the rational basis test in the instant appeal and the applications of said test in prior decisions can be found in Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978). In Hart Health Studio, this Court was presented with a massage ordinance somewhat similar to that in the instant appeal which required the posting of a performance bond before a masseuse could be permitted to massage a customer of the opposite sex. There, the Court was informed that the purpose for such a performance bond was to discourage "pleasure-type" massages. The Court, applying the rational basis test, found no reasonable basis for such a performance bond.

Appellants respectfully submit that if it was unreasonable to require a masseuse to post a performance bond before he could render services to a customer of the opposite sex, it is, under the same rationale, unreasonable to prohibit a masseur from massaging members of the opposite sex entirely. If, as this Court determined in Hart Health Studio, requiring a performance bond had no rational relationship to discouraging "pleasure-type" massages, then surely the massage ordinance in question, which blanketly prohibits opposite-sex massage, has no rational relationship to the objective of curbing prostitution.

In sum, appellants respectfully submit that the rational basis test be applied to the instant appeal in a manner consistent with its application in this Court's previous opinions.

POINT VIII

THERE ARE APPARENT CONFLICTS AND INCONSISTENCIES BETWEEN THE COURT'S INTERPRETATION OF THE BILL OF ATTAINDER CLAUSE OF THE UTAH STATE CONSTITUTION IN THE INSTANT APPEAL AND THE COURT'S INTERPRETATIONS IN PREVIOUS OPINIONS.

In this Court's opinion in the instant appeal, appellants' contention that the massage ordinance in question is a bill of attainder under Article I, Section 18 of the Utah State Constitution (see, Point V of Appellants' Brief) is disposed of summarily

Appellants respectfully submit that in summarily disposing with the bill of attainder issue presented, the Court created several inconsistencies between its interpretation of the Bill of Attainder Clause in the instant appeal and its interpretation in Hart Health Studio.

The Court, in the instant appeal, found the massage ordinance in question to bear none of the characteristics of a bill of attainder. In this regard, the Court stated:

A bill of attainder is one which imposes guilt, and inflicts punishment, upon an identifiable individual or group without judicial process. (citations omitted.) The enactment here under consideration bears none of these characteristics. (at p. 12.)

In Hart Health Studio, the Court was presented with an earlier version of the 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. This Court, in examining the constitutionality of this provision, stated:

We also believe this section of the ordinance is somewhat like the old bills of pains and penalties (see, Article I, Section 18, Utah 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 p. 118.) (Emphasis added.)

The instant appeal presents a type of penalty to masseuses without trial or conviction similar to that in Hart Health Studio. Only in the instant appeal, the punishment is not an excessive license fee it is being driven out of business.

The sanction of forfeiture of a job or business enterprise has long been deemed to be punishment within the contemplation of the Bill of Attainder Clause. (See, Nixon v. Administration of General Services, 433 U.S. 425 (1977), at p. 469; see also, United States v. Brown, 381 U.S. 437).

That a group need not be small to be encompassed within the Bill of Attainder Clause is well accepted. (See, United States v. Brown; Communist Party v. Subversive Activities Control Board, 367 U.S. 1).

Appellants submit that the attainder presented in Hart Health Studio was the County's deciding for itself that a group of masseuses who had worked for a massage establishment who's license had been revoked should be punished by requiring license fees so high that no one would hire them. In the instant appeal, the

size of the group and the degree of punishment have been increased so that, under the new ordinance, the County has decided for itself that all masseuses should be punished by limiting their clientele to the same sex, in effect, driving them out of business. Under the approach taken in Hart Health Studio, both ordinances inflict punishment to ascertainable groups without trial or conviction, and both constitute violations of the Bill of Attainder Clause.

In conclusion, appellants respectfully submit that this Court should interpret the Bill of Attainder Clause in the instant appeal in a manner consistent with its interpretation in Hart Health Studio.

POINT IX

THE COURT SHOULD RECONSIDER ITS
OPINION IN ITS ENTIRETY DUE TO
THE APPARENT CONFLICT AND INCON-
SISTENCIES BETWEEN THE COMPOS-
ITION OF THE COURT AS SAID
OPINION WAS RENDERED AND THE
MANDATE OF ARTICLE VIII,
SECTION 2 OF THE UTAH STATE
CONSTITUTION.

The opinion handed down by the Court in the instant appeal indicated that it was authored by Justice Hall and concurred in by Justice Stewart and District Judge Conder, and further indicated that then-Chief Justice Crockett, Justice Wilkins and now-Chief Justice Maughan did not participate.

Appellants submit that the above composition of the Supreme Court is improper as being in conflict with the mandate of Article VIII, Section 2 of the Utah State Constitution. In this

regard, Article VIII, Section 2 states in relevant part, as follows:

The Supreme Court shall consist of five judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a judge from office If a justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such a cause
(Emphasis added.)

As pointed out in Shippers Best Exp., Inc. v. Newsom, 579 P.2d 1316 (Utah 1978), by then-Justice Maughan in his well supported dissent:

In interpreting the Constitution of Utah, reference must always be made to the fundamental guide set forth in Article I, Section 26: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (at p. 1319.)
(Emphasis is Justice Maughan's.)

In the instant appeal, the Supreme Court, contrary to Article VIII, Section 2, was composed of only three judges, not the required five. Appellants realize that Justice Wilkins and then-Chief Justice Crockett resigned from the Court and that now-Chief Justice Maughan was ill during the pendency of this appeal. Nevertheless, appellants respectfully submit that the remaining judges were mandated to call up three district judges to sit with them in the place of their disqualified brethren.

With respect to what constitutes disqualification within the meaning of Article VIII, Section 2, this Court is referred to its earlier decision in In Re Thompson's Estate, 269 P. 103 (Utah ____). There this Court ruled that the term "disqualified" is to be used in its rational and ordinary sense to include illness, physical disability or any other condition of incapacity. Thus, resignation and illness clearly come within the meaning of disqualified as it was used in Article VIII, Section 2.

As then-Justice Maughan further pointed out in his dissent in Shippers:

... the procedure to substitute for a disqualified justice in Sec. 2, Art. VIII is exclusive; for all instances in which a justice does not sit on a particular case. (at p. 1320.) (Emphasis added.)

Thus, for the foregoing reasons, appellants respectfully submit that this Court should reconsider its opinion in the instant appeal with five judges participating, as contemplated in and mandated by Article VIII, Section 2 of the Utah State Constitution.

CONCLUSION

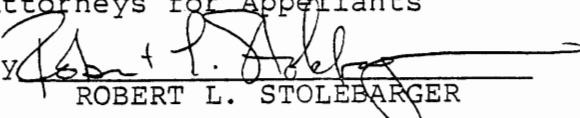
Appellants respectfully request that a rehearing in the above-captioned appeal be granted on the matters set forth in Points I through IX hereinabove and that the lower court's Memorandum Decision be reversed, appellants' motion for summary judgment granted, the massage ordinance declared invalid and unconstitutional, and the enforcement of said ordinance permanently enjoined.

RESPECTFULLY SUBMITTED this 23rd day of February, 1981.

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APPENDIX

(MASSAGE PRACTICE ACT)

1981

GENERAL SESSION

S. B. No. 26

By Ronald T. Halverson

ARNOLD CHRISTENSEN

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

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

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

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

Section 2. As used in this act:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2 inspect any massage establishment at any time when the
3 establishment is open for the transaction of business. The local
4 board of health shall report infractions to the local law enforcement
5 agency. THE BOARD MAY CHARGE A REASONABLE FEE NOT TO EXCEED ACTUAL COST FOR THE
6a INSPECTION PROVIDED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 (30) For the practice of massage, a board of[*five*] four
5 licensed massage technicians[**]**] and one lay member.

6 Section 24. This act shall expire on July 1, 1987, in accordance
7 with the provisions of Chapter 55, of Title 63.

8 Section [**24**] 25. This act shall take effect upon approval.

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