

2015

**State of Utah, Plaintiff/ Appellee, vs. Felicia Joyce Anderson,
Defendant/ Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,

Plaintiff/Appellee,

vs.

FELICIA JOYCE ANDERSON,

Defendant/Appellee.

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Case No. 20150003-CA

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. BARRY G. LAWRENCE

BRIEF OF APPELLANT

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FILED
UTAH APPELLATE COURTS

MAY 19 2015

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CERTIFICATE OF WORD COUNT

Counsel for Appellant hereby certifies that the Brief contains 6460 words, as a function of Word Perfect, exclusive of tables and indexes.



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STATE OF UTAH

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	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
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FELICIA JOYCE ANDERSON,	:	
	:	
Defendant/Appellee.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. BARRY G. LAWRENCE

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(d) and Utah Code Ann. § 78A-7-118(9). This matter originated in a Justice Court, and the District Court ruled on the constitutionality of a statute.

ISSUES PRESENTED FOR REVIEW

B QUESTIONS OF LAW:

1. Does Utah Code Ann. § 10-8-41.5, which purports to require an escort licensed by a city in Salt Lake County to licensed in each City in which she may

incidentally perform, violate Defendant's rights to free expression under the First Amendment;

This issue was preserved for appeal by Defendant's Motion to Dismiss, R. 72. The Court denied the motion, R. 119. This is a question of statutory construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 2011 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 225 P.3d 153, 2009 UT 73 (Utah 2009).

2. Does this statute violate Defendant's rights to Equal Protection of the Law under the Fourteenth Amendment?

This issue was preserved for appeal by Defendant's Motion to Dismiss, R. 72. The Court denied the motion, R. 119. This is a question of statutory construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 2011 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 225 P.3d 153, 2009 UT 73 (Utah 2009).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

United States Constitution Amendment I

Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances..

United States Constitution Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall made or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah Article I, Sec. 7.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 10-8-41.5:

A person employed in a sexually oriented business may not work in a municipality if the municipality requires that a person employed in a sexually oriented business be licensed individually.

Sandy City Code § § 5-18-3:

It is unlawful for any person to operate an agency, be employed by an agency, or perform escort or outcall services, within the City, without first obtaining a valid license from the business license authority.

This section of the Sandy City Code is part of Title 5 Chapter 18, which regulates

Escort Agencies in some detail. A complete copy of that Chapter is contained in an Addendum to this Brief. Also included is the Midvale City Ordinance regulating the same conduct.

STATEMENT OF CASE

NATURE OF CASE

Defendant, an employee of an Escort Service licensed in the City of Midvale, also has an individual license as an Escort from that City. Defendant was requested, on or about September 12, 2013, by an undercover police officer to come to Sandy for an escort appointment, at a Sandy hotel. After some small talk, she was cited for performing as an escort without a Sandy City License. She filed a Motion to Dismiss in Sandy Justice Court, alleging a violation of her commercial speech rights and her right to the Equal protection of the Law. Her motion was denied, and she was convicted of the license violation in a bench trial. She appealed her conviction to the District Court in West Jordan. R. 15. Once again she filed a Motion to Dismiss on constitutional grounds. R. 72; and once again the Motion was denied. R. 119. She was convicted of the violation after a bench trial R. 147; and filed a timely appeal with this Court. R. 136.

The District Court in Salt Lake County previously ruled in a number of

separate cases that a city had no authority to license an escort who worked for a business licensed in another city. R. 88. In 2010 the legislature enacted Utah Code Ann. § 10-8-41.5, which specifically gives authority to cities to require their own licenses for escorts who are licensed by another city, but who do business in their City. R. 89.

STATEMENT OF FACTS

On September 12, 2013, a Sandy City police officer noticed a BackPage.com ad for adult entertainment. Tr. 7. He made arrangements to have Defendant meet him in a Sandy hotel. Tr. 4. When Defendant arrived at the room, she asked for her “show up fee” of \$200. Tr. 6. After some small talk, she asked to use the bathroom to change clothes, and she was cited for doing business as an escort in Sandy City without a Sexually Oriented Business (SOB) license. Tr. 9. Defendant performed no services in Sandy City, other than walking to the room, and asking for her “show-up” fee of \$200. Tr. 8-9. At the time of the incident, Defendant had such a license in Midvale, a city directly north of Sandy, as an employee of The Doll House. R. 111, 113; Tr. 13.

Sandy City, in §§ 5-18-3 et seq., requires a city license for a sexually oriented business, and also requires each employee to be individually licensed. Chapter 18

“Escort Agencies, Outcall Service Agencies, and semi-nude Dancing Agencies” § 5-18-5 requires an application, and supporting documentation:

- b.3. Residence addresses for the past three years;
- b.4. fingerprints;
- b.6. employment history for five years:
- b.7. a detailed list of convictions of criminal activity, excepting minor traffic offenses; and information on any pending criminal actions;
- b.8. pending criminal charges. R. 59-60.

3. Escorts also must provide, under § 5-18-6:

- a. two color photographs.
- c. Certificate from Salt Lake City-County Health Department showing that applicant is free from communicable disease. R. 60.

A licensing fee of \$300 is required, according to a letter from the Sandy Business License Administrator, received by counsel on May 6, 2014. (The fees around the county are as high as \$1,000). R. 105.

The Midvale Ordinance, § 5.12.090 regarding licensing of Sexually Oriented Business (SOB) employees mirrors that of Sandy:

- D. Names used, business and residence addresses, driver license number and social security number.

F. Color photos and fingerprints.

G. Certificate from Salt Lake City-County Health Department showing that applicant is free from communicable disease.

H. Employment history for three years.

I. Permit history, including any denials or revocations for last five years.

J. a detailed list of convictions of criminal activity, excepting minor traffic offenses for the last five years; and information on any pending criminal actions; R. 63.

License fees in Midvale total \$175.00. R. 111.

The ordinances cited above are but two of the at least thirteen similar escort or SOB ordinances enacted by the County and its subdivisions, each requiring background checks, fingerprints and application fees. R. 65. A list of similar ordinances from various cities in Salt Lake County are contained in an Addendum to this Brief.

SUMMARY OF ARGUMENTS

Utah District Court have repeatedly ruled that a city may not require a business license of a business which is located in another city, but occasionally enters this city on business. Utah Code Ann. § 10-8-41.5 specifically grants authority to cities to single out licensed escorts for disparate treatment, requiring licenses in each of

several cities through which they may pass on business, a requirement not shared with any other profession. This statute thus is an unconstitutional infringement on Defendant's First Amendment commercial speech rights. It is also an unconstitutional denial of Equal Protection of the Law, because it treats discriminates against this profession in a way motivated by animus, and without a valid regulatory interest.

ARGUMENT

POINT I

UTAH CODE ANN § § 10-8-41.5 VIOLATES DEFENDANT'S FIRST AMENDMENT RIGHT TO FREE SPEECH, AND PARTICULARLY VIOLATES THE RIGHT OF DEFENDANT TO COMMERCIAL SPEECH.

Litigation over zoning of "adult" or "sexually oriented businesses" (SOB's) has a long history. Adult entertainment businesses have been recognized to have some protection for their activities under the First Amendment, as protected expression. At the time of the incident, Defendant was employed by The Doll House Escorts, an entity which was expressly found to be protected under the First Amendment in a Declaratory Judgment Action, Bushco v. Utah State Tax Commission, Third District Court Civil No. 040911691, on July 3, 2007:

The escort service Plaintiffs are entitled to First Amendment protection

because they incorporate dancing services; thus for purposes of these cross-motions all the Plaintiffs will be treated as if they are entitled to the same First Amendment Protection. R. 1207.

In Freedman v. Maryland, 380 U.S. 51 (1965) the Supreme Court affirmed that films as a medium of communication are protected by the First Amendment, and that a statute which allows prior restraint of such expression “comes to this Court bearing a heavy presumption against its constitutional validity. Id. at 57. The Court also made it clear that, in such cases, a person has standing to attack the validity of the law “whether or not his conduct might be proscribed by a properly drawn statute, and whether or not he applied for a license.” Id.

In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court applied an "intermediate scrutiny" test with regard to ordinances which regulated the location of adult businesses with regard to their "secondary effects" and "incidentally" affected the expression associated with it. The Court referred to such ordinances as "content-neutral" because the emphasis was not the content of the expression, but the problems the businesses brought to the cities where they located, including increased crime and decreased property values, which are said to occur in close proximity to those businesses:

The District Court's finding as to "predominate" intent, left undisturbed

by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance, by its terms, is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As JUSTICE POWELL observed in *American Mini Theatres*,

"[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number, rather than circumscribe their choice as to location."

Sandy City argued below that this is properly reviewed as a "secondary effects" case. All the cases cited by the City, including some cases which originated in Utah, involved the same issues as in Young and Renton: the regulation of an establishment whose presence in a specific place is alleged to pose a danger of "secondary effects" in the immediate area. The City suggested that the licensing ordinance is a "content neutral" regulation related to "Secondary Effects" associated with adult businesses. It cited Young v. American Mini theaters, 96 S. Ct. 2440 (1996) and Renton as cases supporting the doctrine of "secondary effects":

Further, municipalities may regulate the harmful secondary effects of a sexually oriented business so long as it is done in a "content neutral" manner, meaning the regulation is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communications. See *Renton v. Playtime theaters, Inc.*, 475

U.S. at 47(1986). R. 79.

This doctrine does not apply to an escort service, or a single escort, who arrives and departs a city in an hour or two, and does not have an effect on the surrounding area. See Voyeur Dorm v. City of Tampa, Fl., 265 F.3d 1232 (11th Cir. 2001) where the Court disavowed “secondary effects” jurisprudence when the adult entertainment facility was not in a specific place which was accessible to the public. The difference here is that the business is located in another city, and only has incidental and isolated contacts with Sandy. Like the business in Voyeur Dorm, customers do not come to the business and congregate in the area. Thus, the interest of Sandy City is much less compelling than in a case where the business is located in a specific location and draws people from outside the area to it.

Without conceding that “intermediate scrutiny” is the appropriate level for review of the statute at issue here, Defendant contends that such a level of scrutiny will not sustain this statute. The seminal authority for the application of intermediate scrutiny is United States. v. O'Brien, 391 U.S. 367 (1968), where the the U.S. Supreme Court determined that a general statute regulating behavior may incidentally burden expression if:

1. it is within the constitutional power of government to adopt;

2. it furthers an important or substantial governmental interest;
3. the interest is unrelated to the suppression of expression; and
4. the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 376-7.

The Sandy ordinance, as applied to this Defendant, does not meet the requirements of points 2, 3 and 4, above. The function of a licensing ordinance for escorts is to prohibit those with criminal records from the profession, to avoid the spread of disease, and to enable the city to locate a licensed person if there is an allegation of misconduct. The Sandy Ordinance does not further an important city interest, when observed in conjunction with the Midvale ordinance. Everything which the Sandy ordinance is designed to accomplish has already been accomplished by Midvale. Sandy is not being asked to give up enforcement of laws against lewdness or sexual activity within the City. The application of this ordinance to Defendant does indeed suppress expression; and it creates a greater restriction on freedom than is essential to the furtherance of the governmental interest.

Sandy City, along with other cities in Salt Lake County, claims that the licensing of escorts who might occasionally come into their city is necessary because of the fear of possible prostitution activities. Obviously, the inability to require such

regulatory licenses does not prevent the city from enforcing laws against prostitution. Nevertheless, the city claims that the ability to license will make it easier to track escorts, and to prevent unlawful conduct. It does not say how a full licensing application in each city, as opposed to a simple license issued without fuss to someone already licensed elsewhere would accomplish that. The law was enacted by the legislature in 2010 at the specific request of the Salt Lake City police chief. Chief Burbank testified before a legislative committee that there was a particular problem in his city from the presence of escorts who were not licensed by any city, or had obtained a general business license from a smaller city which did not have an Escort or SOB ordinance. Thus, he claimed, there were escorts coming into his city who had not been checked out by any city to determine whether they had criminal records or might even have communicable diseases. Assuming that the chief had a valid concern, it would not support the substantially overbroad grant of authority in the law at issue here. Defendant has gone through an expensive, time consuming process in Midvale to determine that she has no criminal history and is not a threat to carry communicable disease. What possible function does a law serve which requires her to go through that same procedure multiple times in order to engage in her licensed profession a few miles away? Does Sandy City really contend that they cannot obtain

any necessary information about an escort either by calling her agency (which is required to be open when she is working) or the licensing authority in Midvale?

Defendant suggests that a Sandy City license could easily be issued to someone who already holds a Midvale license, without the necessity of new investigations, photos, health tests, etc., for a nominal fee. While such a license still is unnecessary, it would eliminate the obvious barrier to obtaining multiple licenses. It would still satisfy the interest of the City in determining that the licensee is properly qualified. But the present system of requiring multiple licenses is not geared to the legitimate interests of the City in determining qualifications. Instead, it is done with the clear intent to make it so difficult to do business that nobody will do so. Under any interpretation of “the O’Brien test”, the licensing scheme fails.

The State law that gives each city this explicit right unlawfully interferes with, and unlawfully taxes, First Amendment protected expression. See again Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); and Staub v. City of Baxley, 355 U.S. 313 (1958). The City has made no serious attempt to justify the need for the draconian effect exhibited here; and the city in its memorandum below did not even discuss the licensing authority cited by Defendant in support of her contentions. The City has not shown, and cannot show, deleterious effects on the city if this scheme

is not enforced.

The city licensing scheme, in conjunction with licensing schemes in 12 or more nearby cities, works to erect a barrier of prohibition on constitutionally protected activity. In FW/PBS v. City of Dallas, 493 U.S. (1990) the Supreme Court specifically prohibited licensing schemes regulating adult entertainment businesses, which acted to promote prior restraint, and to effectively prohibit, through harassing provisions, the exercise of First Amendment protected speech. The Ninth Circuit, in Tollis v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987) outlined the test regarding the validity of “content neutral” regulations:

We agree that the County has a substantial interest in preventing the deleterious secondary effects often associated with adult theaters. At a minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. (a regulation's "incidental restriction on . . . First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.") The County must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects. 827 F.2d at 1332, 1333.

The requirement of multiple licensing as practiced here is surely not a good faith effort at regulating the escort profession. The Seventh Circuit reviewed an adult entertainment law containing similar licensing requirements for exotic dancers in

Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000). While it upheld portions of the ordinance, it struck down some as well:

Yet we invalidate the required production of a residential address, recent color photographs, social Security number, fingerprints, taxpayers identification number and driver's license information. This information is redundant and unnecessary for Cumberland's stated purposes. Its required disclosure serves "no purpose other than harassment." Genusa, 619 F2d at 1217, because it is not narrowly tailored to the government's interests in the time, place or manner of adult entertainment. Id. at 852. (Emphasis added).

Defendant's attack on the statute and ordinance here is not as broad as that in Schultz. Defendant is not contending here that no city may require her to produce photographs, personal information, fingerprints and a health certificate. But she does contend that if at least 13 cities do so at once, the combined effect is both impossible to comply with, and serves "no purpose other than harassment." It is the State statute which specifically gives the City such power. Insofar as Utah Code Ann. § 10-8-41.5 authorizes the City to require the additional license and all the requirements that go into applying for one, the statute violates Defendant's First Amendment rights, and also Defendant's rights to Equal Protection of the Law under the Fourteenth Amendment.

The United States Supreme Court, in Cox v. New Hampshire, 312 U.S. 569

(1941) and in Murdock v. Pennsylvania, 319 U.S. 105 (1941), ruled that fees for licenses for activities protected by the First Amendment must be “revenue neutral”. In Fly Fish v. City of Cocoa Beach, 337 F.3d. 1301 (11th Cir. 2003), the Eleventh Circuit Court of Appeals ruled that nude exotic dancing was within the scope of these rulings. It invalidated an adult entertainment licensing ordinance which charged fees higher than the amount necessary to administer the licensing program. Any higher amount, the Court said would effectively be “charging for the privilege of exercising a constitutional right.” While the City may argue that there is substantial cost involved in administering the complicated licensing scheme, there need not be. It is only because the licensing scheme insists on duplicative and burdensome procedures that there is much of a cost at all. A scheme that would allow those licensed in other jurisdictions to get a local license with a minimum fee and no additional tests would not unduly burden either the entertainer or the City administration. The alternative is so simple, so easy, and so inexpensive. Thus, it cannot be seriously argued that the incidental restriction of multiple licensing on First Amendment freedoms “is no greater than is essential to the furtherance of” of important governmental interests. In the context of this case, it also seems obvious that the asserted interests of the City are indeed related to the suppression of expression. There can be little doubt that the

City exhibits substantial animus towards Defendant's profession, despite the professed willingness to license it, if Defendant is willing to undergo the "trial by ordeal" of 13 health tests, background checks and fees. The Sandy City licensing fee is \$300, and Midvale only charges \$175. If we take the average of those two fees (and other cities do charge more), yearly licensing fees alone (not including costs of multiple health exams, background checks, etc.) is over \$3,000. That is a substantial and unnecessary burden on Defendant's free speech.

The Tenth Circuit Court, in Pacific Frontier v. Pleasant Grove City, 414 F.3d 1221 (10th Cir. 2005) recently found a licensing scheme for door to door sales people, who had no long term ties to the City, a violation of First Amendment commercial speech rights. It affirmed an injunction prohibiting the City of Pleasant Grove, Utah from requiring a license, a background check, photographs and other personal information and fingerprints, and posting a bond as part of the licensing process.

Pacific Frontier was a distributor of Kirby vacuum cleaners. Because the company determined that the costs of complying with the licensing ordinance for sales people who were only in the City for a short time, was prohibitive, it refused to comply, and commenced door to door sales without the licenses. When several of its sales people were arrested, legal action was taken in Federal court claiming that the

ordinance was a violation of the First Amendment commercial speech rights. In a footnote, the Court noted that Pleasant Grove had been attempting to collect licensing fees of \$100 per week, instead of the \$100 per year that was actually required in the ordinance. Thus, the burden on the licensee was claimed to be prohibitive. The Plaintiffs specifically sought an injunction against the annual fee, the bond and the fingerprint requirements. The police department cited concerns over thefts committed by door to door sales people, as well as some reports of residential burglaries after specific neighborhoods had been canvassed. The police did admit, however, that the fingerprint information had never led to a refusal to issue a license, nor had it aided in investigating a crime. Further testimony was that there was no procedure to collect on the bond, and that no effort to so collect had ever been made. The City maintained that the Plaintiffs had no standing to contest the law, as they had made no effort to obtain the required license. The Court ruled that “applying for and being denied a license or an exemption is not a requirement to challenge an unconstitutional law”, citing Association of Community Organizations for Reform Now v. Golden, 744 F.2d 739 (10th Cir. 1984)¹.

¹ See also Shuttlesworth v. Birmingham 394 U.S. 147 (1969).

The Court set forth the standard for an ordinance which the City must meet in order to defeat a challenge based on the First Amendment in a commercial speech case:

To defend a regulation against a First Amendment challenge, a municipality must assert “a substantial interest to be achieved by restrictions on commercial speech.” Additionally, the restriction must directly advance that substantial interest. If the regulation “provides only ineffective or remote support for the government’s purpose,” it will not be upheld. Finally, the regulation is unconstitutional “if the governmental interest could be served as well by a more limited restriction on commercial speech,” Pleasant Grove “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” (Internal citations omitted) 414 F.3d at 1231-32.

The court went on to say:

Pleasant Grove has also failed to show why state criminal laws are inadequate to deter fraud, or why state tort law provides insufficient relief to homeowners whose property may be inadvertently damaged. Id. at 1232.

The Court disapproved of the requirement that sales people supply fingerprints, citing the Supreme Court case of Cantwell v. Connecticut, 310 U.S. 296 (1940) as upholding a requirement of supplying identification, but not fingerprint requirements. It also cited Martin v. Strothers, 319 U.S. 141, 149 (1943): “A government’s power to regulate solicitors, even through identification gathering, is of course, bounded by the First Amendment.”

The State cannot authorize a city to violate First Amendment rights, nor can it authorize a city to deny an individual the equal protection of the law. So, in the instant case, the delegation of authority is the target because it specifically authorizes cities to regulate business over which they normally would have no regulatory power, and to violate the constitutional rights of those who have fully complied with the licensing regulations of the City in which their business is located . The Court is urged to review the effect of enforcing the Sandy ordinance as to whether it violates the constitutional rights of Defendant. If the Pleasant Grove ordinance created unconstitutional burdens on sales people who did only limited business in the City, then certainly, the same is true of the Sandy City ordinance at issue here. And it is the State which has overstepped its bounds in its attempt to delegate unconstitutional authority to the city. The ordinance, as applied to a properly licensed escort from a neighboring city amounts to harassment; and it creates an unfair and unequal burden on Defendant in her constitutionally protected activities. The application of the City's authority is invalid; and it is the state delegation of that power that is unconstitutional .

Defendant concedes that if the State of Utah itself introduced a licensing scheme for escorts, there would be some merit to it. Under such a scheme, only one

license, one set of fingerprints, one health test, and one background check would be required. There is no “rational basis” for 13 cities in one county to require the kind of repetitive licensing requirements that are sought here. There is no rational basis for the City of Sandy to require escorts licensed in Midvale, and who have gone through the same exhaustive and expensive list of requirements, to be licensed again. The requirement is only “for the purposes of harassment; and that fails to meet the O’Brien standards.

POINT II

THE STATUTE AT ISSUE DENIES DEFENDANT THE EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The power to license businesses is not inherent in a City, but must be specifically granted by statute. See Consolidation Coal Co. v. Emery County, 702 P.2d 121, 123 (Utah 1985). The governing statute on the subject is Utah Code Ann. § 10-1-203(2) which states:

Except as provided in Subsections (3) through 5, the governing body of a municipality may license for the purpose of regulation and revenue any business within the limits of the municipality and may regulate that business by ordinance.

The act of driving into Sandy City for a meeting with another person does not

constitute the commencement of a business in the City. Clearly, more must be present for the business to exist in Sandy City and to be licensed there. Arranging to meet with someone in the city for a fee does not meet this requirement. Sandy City does not have the legislative power to require anyone to obtain a business license under these circumstances. The rule is the same for any business. A plumber does not have to be licensed in every city where he makes a call. Such a requirement would force those occupations which require mobility to stay in one city, and likely to go out of business. Neither does a delivery company, such as one of the Salt Lake based businesses which run legal papers between law firms, need a license in every place in which it makes deliveries. Florists, pizza delivery services and a myriad of other services that come to our door are exempt from the requirements directed at this Defendant. See Davis v. Ogden City, 215 P.2d 616 (Utah 1950) in which the Supreme Court held that a City can license a legal professional, already licensed by the State, for revenue purposes only, but only those whose offices are located in the City. It is true that the Court held the matter of licensing out-of-city businesses for another day, but seemed to preclude such a tax:

We reserve a discussion of the legal principles involved should Ogden City seek to collect a license tax from lawyers not engaged in business in that city. Facts have not been alleged which indicate that an attempt

is being made to license out of city attorneys and so we have assumed that the ordinance will only be constitutionally applied to those members of the profession who maintain offices or places of business within the corporate limits of Ogden City. For the purpose of this action, Ogden City concedes the ordinance cannot embrace attorneys whose place of business is elsewhere than in that city. 215 P.2d at 624.

The matter seems to be settled that a municipality generally can only license businesses whose place of business is located within its corporate limits. Cities may claim that they will be inundated by businesses of which they do not approve. Because of the right of free travel and the regulation of commerce by State and Federal entities, that may be something that cities will have to grin and bear. In this case, the inconvenience is small. The lack of authority to license an out-of-town business does not mean that Sandy city must tolerate unlawful conduct, such as prostitution, from outside businesses. If convicted of such a crime, a person can be appropriately punished. She cannot, however, be licensed by every city through which she may pass.

A requirement that a business have many licenses to work in a relatively small area is not practical, and works only to prohibit, not actually license. This issue of licensing in the context of escort licensing has been before the Third District Court many times before, and the decision in each of those cases was in favor of the

Defendant. See Cottonwood Heights v. Curtis, Third District Case No. 051904605; Salt Lake City v. Warren, Third District Case No. 011914968; Salt Lake City v. Derian, Third District Case No. 021901122; Midvale City v. Turner, Third District Court No. 081402051; and Layton City v. Franklin, Second District Case No. 051601326. In each of those cases, the District Court found that the City has only the power to license businesses which are located in their city; and that an occasional entry into the city by an escort licensed by another city, does not convey licensing authority.

Thus, the Utah legislature passed a statute in 2010, Utah Code Ann. § 10-8-41.5, which allow cities to require their own licenses for an escort, who already is licensed by a neighboring city, but who may occasionally enter their city for an appointment. The same District Court that found against Defendant in this case previously ruled that the City could not enforce its general business licensing ordinance against an escort from another city, as the Utah Code Ann. § 10-8-41.5 only applies to SOB ordinances, and does not grant general business licensing authority. See Sandy City v. Dickinson, Third Dist. No. 121400713. R. 66. Thus, the state statute singles out this one profession for treatment not allowed for any other profession.

It should be remembered that undercover Sandy police specifically asked Defendant to come to Sandy for an appointment. There is no evidence that she did business there in any regular way. There is no suggestion that she violated any state laws involving sex solicitation or other crimes. Defendant contends that this statute, which singles out a particular licensed profession for special treatment, and which would require at least 13 separate licenses in order to do business throughout the county, violates Defendant's right to the Equal Protection of the Law. The delegation of authority at issue here is invalid because it delegates authority which can only be used to harass Defendant and to deny her Equal protection of the Law. Though Defendant is not charged with violation of the state statute, it is being used by the City to show that it now has authority to regulate and license an escort who may only come into the City on a rare occasion, and stay only a brief time. It is the City which will use its "police power" to extract unlawful compliance from Defendant, and which will benefit from either licensing fees or fines for nonpayment of those fees. It is the City which will require fingerprints and a health test for an entry into the city which may last only an hour, and which may not be repeated for a period of months. But it is the State statute which purports to grant that power to the City; and it is the State statute which thus ultimately infringes on Defendant's constitutional rights

under the First and Fourteenth Amendments.

In Romer v. Evans, 517 U.S. 620 (1996) the U.S. Supreme Court struck down a Colorado constitutional amendment which prohibited cities and counties from enacting laws which protected gays and lesbians from discrimination, as a violation of Equal Protection of the Law. The Court had the following to say about the effort:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 3 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Id. at 632.

The Court went on to say:

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. Id. at 634. The primary purpose the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to

homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. *Id.* at 635. (Internal citations omitted) (Emphasis in original).

Defendant here contends that the state statute granting power to a myriad of cities to simultaneously license her profession makes her and others in her profession unequal to everyone else. And most assuredly, “the disadvantage imposed is born of animosity toward the class of persons affected.” Thus the law deprives Defendant and others of her class, the Equal Protection of the Law to which they are constitutionally entitled. Because Defendant is licensed to perform a service under strict regulation, but then is prohibited from doing so by a licensing scheme that amounts to a barrier to her profession, she is denied Equal Protection, and the State statute is invalid.

CONCLUSION

The State statute specifically allows cities to license this particular profession, as opposed to all others in the State, in such a way as to constitute a prohibition. Thus, it violates Defendant’s First Amendment rights; and it denies Defendant the

Equal Protection of the Law. The statute is unconstitutional, and it should be stricken.

DATED this 18 day of May, 2015.

W. ANDREW MCCULLOUGH, L.L.C.



W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of May, 2015, I mailed two true and correct copies of the foregoing Brief of Appellant, to Douglas Johnson, Attorney for Appellee, 10000 Centennial Pkwy., Sandy, UT 84111; and also to Laura Dupaix, Deputy Utah Attorney General, 160 East 300 South, Salt Lake City, Utah 84111.



ADDENDUM A

The Information

VAN MIDGLEY 5000
DOUGLAS A JOHNSON 8779
Sandy City Attorney's Office
10000 Centennial Parkway
Sandy, Utah 84070
Telephone: (801) 568-7170
Fax: (801) 568-7177

IN THE THIRD DISTRICT COURT -WEST JORDAN DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SANDY CITY, a municipal corporation
Plaintiff,

vs.

FELICIA JOYCE ANDERSON
1931 S 1170 W
Woods Cross, UT 84087
DOB: 12/18/1988
Police Report #: 13E008374
Justice Court Case#: 131001437
Defendant.

INFORMATION

CASE NO. 131401516

Judge Barry Lawrence


OTN #:

The plaintiff, Sandy City, hereby charges that the defendant, committed within its jurisdiction, the crime(s) of:

COUNT 1: SEXUALLY ORIENTED BUSINESS LICENSE REQUIRED, in violation of Utah State Code 5-18-3, a(n) Class B Misdemeanor, as follows: That on or about September 12, 2013, at 270 W SEGO LILY DR, Sandy, Utah, did It is unlawful for any person to operate an agency, be employed by an agency, or perform escort or outcall services, within the City, without first obtaining a valid license from the business license authority.

This information is based on evidence obtained from the following witness(es): Officer T Davis 184.

Authorized December 26, 2013
for presentment and filing:

By 
City Prosecutor

0000033

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **INFORMATION** by United States First Class mail, postage prepaid, to the following:

W. Andrew McCullough
Attorney for Defendant
6885 South State Street, #200
Midvale UT 84047

THIRD DISTRICT COURT-WEST JORDAN
8080 SOUTH REDWOOD RD
WEST JORDAN, UT 84088

This December 26, 2013

Diane Story
Sandy City Attorney's Office

ADDENDUM B

The Court's Ruling on Defendant's Motion to
Dismiss.

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

FILED
THIRD DISTRICT COURT
JUL 17 2014
WEST JORDAN DEPT.

SANDY CITY,

Plaintiff,

vs.

FELICIA ANDERSON,

Defendant.

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:

**ORDER DENYING MOTION TO
DISMISS**

Case No. 131401516
(Also Filed in Case No. 131401513)

Judge Barry G. Lawrence

THIS MATTER is before the Court on Defendant Felicia Anderson's Motion to Dismiss.¹ The parties briefed the issues and the Court heard argument on March 24, 2014. The Court then requested supplemental briefing from the parties, which was completed on May 20, 2014. Having reviewed the record and considering the arguments of counsel, the Court now issues the following Decision.²

Background and Procedural Posture

Defendant is charged with violating Sandy City Ordinance 5-18-3 (the Sandy Ordinance), which provides that: "It is unlawful for any person to operate an agency, be employed by an agency,

¹ The same motion was advanced by defendant Micaela Lawless, Case No. 131401513

² Neither party filed the requisite Notice to Submit for Decision following the supplemental briefing. Accordingly, the Court was never notified that the matter was ready for a decision; otherwise, this Order would have been issued sooner.

or perform escort or outcall services, within the City, without first obtaining a valid license from the business license authority.” The Sandy Ordinance is authorized by Utah Code Ann. § 10-8-41.5 (the State Statute)³ and is one of thirteen similar ordinances in Salt Lake County that requires escorts to obtain a license before working in the subject municipality. It is undisputed that Defendant is licensed as an escort in Midvale City – one of the thirteen municipalities that require escorts to obtain a license before working in the city – and that Midvale City’s escort licensing requirements are substantially similar to Sandy City’s. It is also undisputed, at least for purposes of the pending motion, that Defendant was performing escort services in Sandy City without a Sandy City license.

In her initial memorandum, Defendant seemed to be challenging the constitutionality of the State Statute, which grants municipalities authority to enact local ordinances such as the Sandy Ordinance. (*See* Def.’s Mem. in Supp. of Mot. to Dismiss 6 (“Defendant contends that [the State Statute], which singles out a particular licensed profession for special treatment, and which would require at least 13 separate licenses in order to do business throughout the county, violates the Utah and U.S. Constitutions.”).) After oral argument, the Court issued a Minute Entry requesting additional briefing from the parties relevant to the inquiry whether the State Statute was unconstitutional *as applied to* the Defendant. Because it was unclear to the Court whether the analysis should be from the perspective of the State’s interest or the City’s interest, the Court invited the parties to address whether the Court should analyze the State’s interest or the City’s interest, or both, and what those interests were. The Court also asked Defendant to provide support for her

³The State Statute provides, in relevant part, that “[a] person employed in a sexually oriented business may not work in a municipality: (a) if the municipality requires that a person employed in a sexually oriented business be licensed individually; and (b) if the person is not licensed by the municipality.” Utah Code Ann. § 10-8-41.5(2).

argument that the Sandy City licensure process was identical to Midvale City's. Finally, the Court noted that the State Statute at issue did not itself require the Defendant to do anything, nor did it prevent the Defendant from doing anything, and invited the parties to submit legal authority whether an as applied challenge can be maintained under such circumstances.

The parties each submitted supplemental memoranda. Defendant provided support for the similarity between the Sandy and Midvale ordinances⁴ and the City reiterated its interest in having the Sandy Ordinance. The Defendant, however, shifted her challenge from the State Statute to the Sandy Ordinance. (See Def.'s Supplemental Mem. in Supp. of Mot. to Dismiss 6 ("The Court is urged to review the Sandy ordinance as to whether it violates the constitutional rights of Defendant.")). Defendant now asserts that the Sandy Ordinance violates the First and Fourteenth Amendments to the United States Constitution and their Utah Constitution counterparts. However, despite passing references to the Fourteenth Amendment and the Utah State Constitution, Defendant's briefing and argument focuses exclusively on the First Amendment of the United States

⁴The Sandy Ordinance requires applicants to pay a \$300 fee and provide the following information: (1) date of birth; (2) addresses for previous three years; (3) complete set of fingerprints; (4) height, weight, eye color, hair color; (5) employment history for previous five years; and (6) detailed criminal history for previous ten years, including pending charges. Applicants must also provide two color photographs, the name and address of the applicant's employer, and a certificate from the Salt Lake City-County Health Department stating that the applicant is free of any contagious or communicable diseases.

Midvale City Ordinance 5.12.080 requires applicants to pay a \$175 fee and provide the following information: (1) any other names or aliases; (2) age, date and place of birth; (3) height, weight, eye color, hair color; (4) present business and residence addresses; (5) Utah driver's license or identification number; (6) social security number; (7) proof of required minimum age; (8) employment history for previous years; (9) license or permit history for previous five years; and (10) detailed criminal history for previous five years. Applicants must also provide two color photographs, fingerprints and a certificate from the Salt Lake Valley health department stating that the applicant is free of any contagious or communicable diseases.

Constitution. Defendant fails to explain the basis for her Fourteenth Amendment challenge and, therefore, the Court declines to consider it. *See Hill v. Superior Property Management Services, Inc.*, 2013 UT 60, ¶ 47, 321 P.3d 1054 (“Like an appellate court, a district court ‘is not a depository in which [a party] may dump the burden of argument and research.’” (quoting *Allen v. Friel*, 2008 UT 56, ¶ 9, 194 P.3d 903)). Moreover, because Defendant has failed to separately analyze the state constitutional provisions or explain why the state constitution provides greater protection than its federal counterpart, the Court declines to consider a separate challenge on state constitutional grounds. *See, e.g., State v. Maxwell*, 2011 UT 81 (declining to consider separate state constitutional challenge that was inadequately briefed). Accordingly, the Court considers only Defendant’s challenge to the Sandy Ordinance under the First Amendment to the United States Constitution.

Constitutional Analysis

“‘[L]egislative enactments are presumed to be constitutional,’ and ‘those who challenge a statute or ordinance as unconstitutional bear the burden of demonstrating its unconstitutionality.’” *State v. Green*, 2004 UT 76, ¶ 42 (quoting *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 819 (Utah 1991)). The parties agree that the Sandy Ordinance is a “content neutral” regulation that imposes only an incidental burden on speech and, therefore, is subject to “intermediate scrutiny” pursuant to the framework set forth in *United States v. O’Brien*, 391 U.S. 367 (1968). “Under *O’Brien*, a regulation of conduct is constitutional and must be upheld so long as: (1) it is within the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest.” *Bushco v. Utah State Tax Comm’n*, 2009 UT 73, ¶ 25, 225 P.3d 153 (citing *O’Brien*, 391 U.S. at 377).

Here, Defendant focuses her argument on the fourth factor in the *O'Brien* framework. She concedes that Sandy City is authorized by the State Statute to enact the Sandy Ordinance and that licensing escorts – at least in the abstract – furthers a substantial government interest. Similarly, Defendant does not allege that the government interest is related to the suppression of protected expression. Instead, Defendant argues that the Sandy Ordinance imposes restrictions that are greater than are necessary to further the City's interest. Specifically, Defendant argues that "after she has gone through [the extensive licensing requirements] in a neighboring city, the requirement that she do it all over again [in Sandy City] is indeed 'for no other purpose than harassment.'" (Def.'s Mem. in Supp. of Mot. to Dismiss 10.)

The Utah Supreme Court's decision in *Bushco* is instructive. There, a group of escort service agencies and erotic dancing clubs sought declaratory and injunctive relief to stop enforcement of a state tax that applied only to certain sexually oriented businesses. The plaintiffs challenged the tax under the First Amendment of the United States Constitution, arguing that the tax impermissibly restricted their freedom of speech. The trial court granted summary judgment in favor of the Tax Commission, holding the tax constitutional under *O'Brien*, and the Utah Supreme Court affirmed. In analyzing the fourth *O'Brien* factor, the Utah Supreme Court stated:

Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available. Instead, the fourth prong of the *O'Brien* test imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote[] a substantial government interest that would be achieved less effectively absent the regulation." De minimis impacts on protected speech are permissible.

Plaintiffs argue that the Tax fails this prong because there are less burdensome ways of addressing the state's interest in providing treatment for sex offenders and that the First Amendment requires that these methods, rather than the Tax, be used.

To begin with, Plaintiffs' argument suggests that *O'Brien* requires a regulation of conduct placing incidental burdens on some protected expression to use the least restrictive means available to serve the state's asserted interest. The Supreme Court has expressly rejected that formulation of the *O'Brien* test. Additionally, Plaintiffs' least restrictive means argument is contrary to its own position that a general tax—one that burdens all businesses—would satisfy First Amendment scrutiny under *O'Brien*. A generalized tax would no doubt inflict burdens on a greater variety of protected expression than the Tax at issue here, and therefore would not be the least restrictive means available. The Supreme Court's cases have made clear that the fourth prong of *O'Brien* is satisfied so long as a content-neutral regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." Further, de minimis impacts on protected expression are permissible.

Bushco, 2009 UT 73, ¶¶ 39-41, 225 P.3d 153 (internal citations omitted).

Like the plaintiffs in *Bushco*, Defendant complains that the Sandy Ordinance is not the least restrictive means to serve the City's stated interests. Presumably, where an escort is licensed in another municipality, the City's interests could be served by having the escort simply file proof of compliance rather than duplicating the licensing requirements. Defendant principally relies on *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221 (10th Cir. 2005).

In *Pacific Frontier*, a group of door-to-door solicitors challenged on First Amendment grounds a city ordinance that required individuals to obtain a license before engaging in door-to-door sales. The plaintiffs sought to enjoin enforcement of three provisions of the ordinance: the annual fee, bond and fingerprint requirements. The district court granted the plaintiffs' request for a preliminary injunction and Pleasant Grove City appealed. The 10th Circuit Court of Appeals affirmed the district court. In doing so, the court noted the "deferential standard" that an appellate court employs when reviewing a lower court's decision to grant a preliminary injunction. *Id.* at 1231. And,

given the posture of the case, the 10th Circuit only decided that the lower court did not abuse its discretion in determining that the plaintiffs were *likely* to prevail on the merits. Moreover, and most importantly, *Pacific Frontier* did not involve application of the *O'Brien* framework, which the parties here agree is the proper standard. Accordingly, the Court determines that Defendant's reliance on *Pacific Frontier* is misplaced.

As the Utah Supreme Court stated in *Bushco*, an ordinance "is not invalid simply because there is some imaginable alternative that might be less burdensome on speech. The validity of [content neutral regulations of conduct] does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.* at ¶ 42 (quotations and citations omitted) (alteration in original). Here, Defendant argues that a license issued by one municipality should be good for all municipalities. Inherent in that argument is that Sandy City should be required to either coordinate its licensure efforts with other municipalities or rely on another municipality's application and enforcement procedure. The Court has been presented with no authority, and is aware of no authority, that would impose such a requirement on Sandy City. And, the above-quoted language from *Bushco* seems to indicate just the opposite.

In sum, while the Court can understand Defendant's perception that this licensing scheme is harassing, her concerns should be voiced to the state legislature, which could amend the State Statute to enable escorts to work throughout the state with a single license.

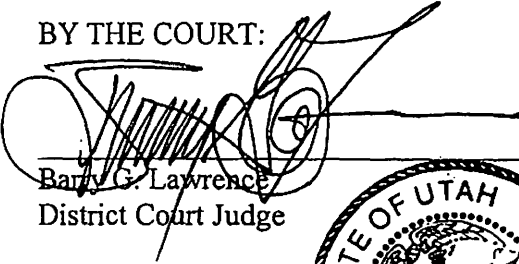
Conclusion

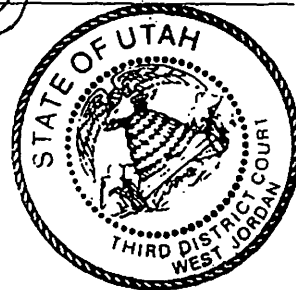
For the foregoing reasons, the Court concludes that the Sandy Ordinance passes muster under the intermediate scrutiny framework set forth in *O'Brien* (and *Bushco.*) Accordingly, Defendant's Motion to Dismiss is hereby DENIED.

No further Order is necessary.

So ORDERED this 17th day of July, 2014.

BY THE COURT:


Barry G. Lawrence
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 131401516 by the method and on the date specified.

MAIL: DOUGLAS A JOHNSON 10000 CENTENNIAL PKWY SANDY, UT 84070
MAIL: W ANDREW MCCULLOUGH 6885 S STATE ST STE 200 MIDVALE UT
84047

Date: 07/17/2014

/s/ LISA MUNK

Deputy Court Clerk

ADDENDUM C

Sandy City Sexually Oriented Business
Ordinance.

any service fee is not paid within ninety days of the due date, an additional penalty of ten dollars shall be added to each one hundred-dollar service fee so unpaid, for a total penalty of thirty dollars. If any service fee is not paid within one hundred twenty days of the due date together with all applicable penalties, the City may use such lawful means as are available to collect such fee, including all penalties, costs and attorneys' fees.

5-17-16. Appeal Procedure.

- (a) Any alarm user may appear before the alarm coordinator and present and contest the assessment of any penalty. The burden to prove any matter shall be upon the person raising such matter.
- (b) If the alarm coordinator finds that no violation of this chapter occurred, or that a violation occurred but one or more of the defenses set forth in this section is applicable, the alarm coordinator may dismiss the penalty and release the alarm user from liability there under, or may reduce the penalty associated therewith as he or she shall determine. Such defenses are:
 - (1) The false alarm for which the penalty has been assessed did not originate at the premises of the alarm user who has been assessed the penalty.
 - (2) The alarm for which the penalty has been assessed was, in fact, not false, but was rather the result of an actual or attempted burglary, robbery, or other emergency.
 - (3) The police dispatch office was notified by the permit holder or the alarm business that the alarm was false prior to the arrival of a police officer to the alarm site in response to the false alarm; or
 - (4) Such other mitigating circumstances as may be approved by the City law department.
- (c) If the alarm coordinator finds that a false alarm did occur and no applicable defense exists, the alarm coordinator may, in the interest of justice and on behalf of the City, enter into an agreement for the timely or periodic payment of the applicable penalty.
- (d) Any decision made by the alarm coordinator under this section may be appealed to the Chief of Police.

Chapter 18	ESCORT AGENCIES, OUTCALL SERVICE AGENCIES, AND SEMI-NUDE DANCING AGENCIES
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Table

- 18-1 Privileged Businesses
- 18-2 Definitions
- 18-3 License Required

EXHIBIT A

0000057

- 18-3 Zoning
- 18-5 License Application; Disclosure
- 18-6 Additional Requirements to Perform Services
- 18-7 License Fees
- 18-8 Granting of License; Suspension, Revocation
- 18-9 License Limitations
- 18-10 Operational Restrictions
- 18-11 Violations; Penalties
- 18-12 Applicability to Existing Regulations
- 18-13 Severability

5-18-1. Affected Business.

The Sandy City ("City") Council finds that escort agencies, outcall service agencies, and semi-nude dancing agencies seriously affect the economic, social and moral well being of the city and its residents, that such businesses must be regulated strictly for the welfare of the public, and that such businesses must therefore comply with this chapter.

5-18-2. Definitions.

For the purpose of this chapter the following words shall have the following meanings:

"Agency" means an escort agency, outcall service agency, or a semi-nude dancing agency.

"Business License Authority" means the business license section of the City's Community Development department.

"Escort" means a person who, for pecuniary compensation, dates, socializes, visits, consorts with or accompanies or offers to date, consort, socialize, visit or accompany another or others to or about social affairs, entertainment or places of amusement or within any place of public or private resort or any business or commercial establishment or any private quarters. "Escort" shall not be construed to include persons who provide business or personal services such as licensed private nurses, aides for the elderly or handicapped, social secretaries or similar service personnel (1) whose relationship with their patron is characterized by a bona fide contractual relationship having a duration of more than twelve (12) hours or (2) who provide a service not principally characterized as dating or socializing. "Escort" shall also not be construed to include persons providing services such as singing telegrams, birthday greetings or similar activities characterized by appearances in a public place, contracted for by a party other than the person for whom the service is being performed and of a duration of not longer than one (1) hour.

"Escort agency" means any person who, for a fee, commission, hire, or profit, furnishes or arranges for escorts to accompany other persons for social engagements.

"Outcall service agency" means any person which furnishes, books, or otherwise engages or offers to furnish, book or otherwise engages outcall services.

"Outcall services" means services performed for pecuniary compensation and of a type generally

performed within a sexually oriented business but performed outside of the premises of the sexually oriented business. Outcall services are prohibited in public places.

"Person" means any individual, agency, firm, unincorporated association, corporation, partnership or other legal entity. For purposes of this chapter, a person who operates an agency also includes each officer, director and shareholder owning 10% of the stock or beneficial ownership if the agency is a corporation, and each partner, including limited partners, if the agency is a partnership.

"Public places" means any location within the City frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public.

"Semi-nude dancing agency" means any person which furnishes, books, or otherwise engages or offers to furnish, book or otherwise engage the service of a professional dancer for performance or appearance at a sexually oriented business.

5-18-3. License Required.

It is unlawful for any person to operate an agency, be employed by an agency, or perform escort or outcall services, within the City, without first obtaining a valid license from the business license authority.

5-18-4. Zoning.

It is unlawful for any agency to do business at any location within the City not zoned for such business. Agencies shall not be permitted as a home occupation.

5-18-5. License Application; Disclosure.

All persons applying for any license required under this chapter shall:

- a. Pay the required fee.
- b. File a written application with the business license authority on a form to be provided by the business license authority to include the following as applicable:
 - 1) the complete name of each person, including the date and state of incorporation,
 - 2) the date of birth,
 - 3) the complete residence and business address, not by post office box, and previous residence and business addresses for a period of 3 years immediately prior to the date of application,
 - 4) a complete set of fingerprints,
 - 5) height, weight, color of eyes, color of hair,
 - 6) business, occupation or employment history for 5 years immediately preceding the date of application including, but not limited to, whether such person previously operated under any permit or license in another city in this state or another state and whether any such permit or license had ever been suspended or revoked,
 - 7) any convictions, including pleas of guilty or nolo contendere in any state or federal court within the past 10 years, including municipal ordinance violations, exclusive of traffic violations, with a brief statement of the nature of the

- convictions and the jurisdiction in which the convictions occurred,
- 8) any pending criminal charges in any state or federal court, with a brief statement of the nature of the pending charges and the jurisdiction in which the charges are pending,
- 9) the name and address of persons who will have custody of the business records at the business location,
- 10) the name and address of the person who will be the agent for service of process,
- 11) a description of the nature and scope of the proposed business or services.

5-18-6. Additional License Requirements to Perform Escort or Outcall Services.

In addition to the requirements under section 5 of this chapter, all persons performing escort or outcall services shall provide to the business license authority:

- a. Two passport-size color photographs at least one inch by one inch taken within 3 months of the date of application.
- b. The name and address of the business, if any, at which the applicant is currently working or at which the applicant expects to be employed.
- c. A certificate from the Salt Lake City-County Health Department, stating that the applicant has, within 30 days immediately preceding the date of the application, been examined and found to be free of any contagious or communicable disease.

5-18-7. License Fees.

The initial license and annual renewal fees for any license required under this chapter shall be as set by resolution passed by the Sandy City Council.

5-18-8. Granting of License; Revocation, Suspension.

- a. The business license authority may refuse to grant any license and may suspend, revoke or refuse to renew any license issued under this chapter if it finds:
 - 1) The applicant is under eighteen (18) years of age or any higher age, if the license sought requires a higher age.
 - 2) The required fee(s) have not been paid.
 - 3) The application does not conform in all respects to this chapter.
 - 4) The applicant has knowingly made a material misstatement in the application.
 - 5) The agency or the services as proposed by the person would not comply with all applicable local, state and federal laws, including but not limited to the city's building and zoning regulations.
 - 6) The person has had an agency license or permit or service license or permit or other similar license or permit revoked or suspended in this state or any other state within 3 years prior to the date of application.

- 7) The person has at the time of the application a pending criminal charge, or within 5 years prior to the date of application has been convicted of, has pled guilty or nolo contendere to, any specified criminal activity as defined under Sandy City Ordinance 12-2-1 et seq. or any offense involving dishonesty, fraud, deceit, robbery, the use or threatened use of force or violence upon the person of this state or any other state.
 - 8) The person, if a corporation, is not licensed to do business or is not in good standing in the state of Utah.
 - 9) For good cause shown.
- b. Before a license may be suspended or revoked, the business license authority shall afford the person an opportunity for a hearing to show cause why such license should not be suspended or revoked.

5-18-9. License Limitations.

- a. Each license shall remain valid from the date of issuance through January 1st of each succeeding year unless otherwise suspended or revoked. Such license may be renewed only by making a new application and payment of a fee as provided in section 5 and section 7. The license fees shall not be prorated for any portion of a year but shall be paid in full for whatever portion of the year the license is applied for. Application for renewal should be made at least thirty (30) days before the expiration date, and when made less than thirty (30) days before the expiration date, the expiration of the license will not be affected.
- b. Any change in the information required to be submitted for any license required under this ordinance shall be given, in writing, to the business license authority within fourteen days after such change.
- c. Any license granted under this chapter shall not be transferable.
- d. Each application for an agency license under this chapter shall post with the business license authority a cash or corporate surety bond payable to Sandy City Corporation in the amount of two thousand dollars. Each application to perform escort or outcall services under this chapter shall post with the business license authority a cash or corporate surety bond payable to Sandy City Corporation in the amount of five hundred dollars. Any fines assessed for violations of City ordinances shall be taken from this bond if not paid in cash within ten (10) days after notice of the fine unless an appeal is filed as provided by this chapter. In the event that funds are drawn against the cash or surety bond to pay such fines the bond shall be replenished to two thousand dollars within fifteen days of the date of notice of any draw against it.
- e. It is unlawful for any agency to fail to display the license granted pursuant to this ordinance in a prominent location within the business premises. It shall be unlawful for any individual licensed pursuant to this ordinance to fail to, at all times while engaged in licensed activities within the corporate boundaries of the city, carry their license on their person. When requested by police, City licensing or other enforcement personnel or health official, it is unlawful to fail to show the appropriate licenses while engaged in licensed activities within the corporate boundaries of the City.

- f. It is unlawful to conduct business under a license issued pursuant to this ordinance at any location other than the licensed premises. Any location to which telephone calls are automatically forwarded by said business shall require a separate license. It is unlawful to do business under any name other than the business name specified in the application.

5-18-10. Operational Restrictions for Escort and Outcall Services.

All persons licensed pursuant to this chapter shall:

- a. Provide to each patron a written contract in receipt of pecuniary compensation for escort or outcall services. The contract shall clearly state the type of services to be performed, the length of time such services shall last, the cost to the patron and any special terms or conditions relating to the services performed. The contract need not include the name of the patron. The person shall keep and maintain a copy of each such written contract for a period not less than one year from the date of provision of services thereunder. The contracts shall be numbered and entered into a register listing the contract number, date, names of all employees involved in the contract and pecuniary compensation paid.
- b. Maintain an open office or telephone, regardless of the primary location of the business, at which the person's designated agent, may be personally contacted during all hours such services are being provided. The address and phone number of the office location shall appear and be included in all patron contracts and published advertisements.
- c. Permit the police department, or other City official, to have access at all times to all premises licensed or applying for a license under this chapter and to make periodic inspection of said premises.

5-18-11. Violations; Penalties.

In addition to revocation or suspension of a license, each violation of this chapter shall, upon citation by the business license authority, require the person to pay a civil penalty in the amount of \$500.00, to be deducted from the cost bond required pursuant to this chapter. In addition to any civil fines, the violation of any provision of this ordinance shall be a class B misdemeanor. Each day of violation shall be considered a separate offense. In addition to the civil and criminal penalties provided herein, any person who violates any provision of this chapter is subject to a suit for injunction and any other remedy available at law or in equity.

5-18-12. Applicability to Existing Regulations.

- a. The provisions of this ordinance shall be applicable to all persons described herein whether the herein-described activities were established before or after the effective date of this chapter and regardless of whether such persons are currently licensed to do business in the City. All such persons shall have forty-five days from the effective date of this chapter, or until their current license expires, whichever is first in time, to comply with the provisions of this chapter.
- b. Except where the context or specific provisions require, this ordinance does not supersede or nullify any other City ordinance.

5-18-13. Severability.

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ADDENDUM D

Midvale City Sexually Oriented Business
Ordinance.

B. In the event of a contract for nude modeling or appearance signed more than forty-eight hours in advance of the modeling or appearance, the individual to appear nude shall not be required to obtain a license pursuant to this chapter. During such unlicensed nude appearance, it is unlawful to:

1. Appear nude or seminude in the presence of persons under the age of eighteen;
2. Allow, offer or agree to any touching of the contracting party or other person by the individual appearing nude;
3. Allow, offer or agree to commit prostitution, solicitation of prostitution, solicitation of a minor, or committing activities harmful to a minor;
4. Allow, offer, commit or agree to any sex act as validly defined by city ordinances or state statute;
5. Allow, offer, agree or permit the contracting party or other person to masturbate in the presence of the individual contracted to appear nude;
6. Allow, offer or agree for the individual appearing nude to be within five feet of any other person while performing or while nude or seminude. (Ord. 10/28/2003O-12 (part), 2003: Ord. 11-22-88A § 6, 1988)

5.12.070 Business categories—Number of licenses.

A. It is unlawful for any business premises to operate or be licensed for more than one category of sexually oriented business, except that a business may have a license for both outcall services and nude and seminude dancing agency on the same premises.

B. The categories of sexually oriented businesses are: outcall services, adult businesses, nude entertainment businesses, seminude dancing bars, nude and seminude dancing agency. (Ord. 10/28/2003O-12 (part), 2003: Ord. 11-22-88A § 7, 1988)

5.12.080 Employee licenses.

It is unlawful for any sexually oriented business to employ, or for any individual to be employed by a sexually oriented business in the capacity of a sexually oriented business employee, unless that employee first obtains a sexually oriented business employee license. (Ord. 10/28/2003O-12 (part), 2003: Ord. 11-22-88A § 8, 1988)

5.12.090 License—Application—Disclosures required.

Before any applicant may be licensed to operate a sexually oriented business or as a sexually oriented business employee pursuant to this chapter, the applicant shall submit, on a form to be supplied by the city license official, the following:

A. The correct legal name of each applicant, corporation, partnership, limited partnership or entity doing business under an assumed name;

B. If the applicant is a corporation, partnership or limited partnership, or individual or entity doing business under an assumed name, the information required below for individual applicants shall be submitted for each partner and each principal of an applicant, and for each officer, director and any shareholder (corporate or personal) of more than ten percent of the stock of any applicant. Any holding company, or any entity holding more than ten percent of an applicant, shall be considered an applicant for purposes of disclosure under this chapter;

C. All corporations, partnerships or noncorporate entities included on the application shall also identify each individual authorized by the corporation, partnership or noncorporate entity to sign the checks for such corporation, partnership or noncorporate entity;

D. For all applicants or individuals, the application must also state:

1. Any other names or aliases used by the individual;
2. The age, date and place of birth;
3. Height and weight;
4. Color of hair and eyes;
5. Present business address, not to include post office box, and telephone number;
6. Present residence, not to include post office box, and telephone number;
7. Utah driver's license or identification number;
8. Social Security number;

E. Acceptable written proof that any individual is at least eighteen years of age or, in the case of employees to be employed in businesses where a different age is required, proof of the required age;

F. Attached to the form as provided above, two color photographs of the applicant clearly showing the individual's face and the individual's fingerprints on a form provided by the city police department. For persons not residing in the city, the photographs and fingerprints shall be on a form from the law enforcement jurisdiction where the person resides. For persons residing in the city, the photographs and fingerprints shall be paid by the applicant directly to the issuing agency;

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G. For an individual to obtain a sexually oriented business employee license as an escort, or as a nude entertainer, shall provide a certificate from the Salt Lake Valley health department stating that the individual has, within thirty days immediately preceding the date of the application, been examined and found to be free of any contagious or communicable diseases;

H. A statement of the business, occupation or employment history of the applicant for three years immediately preceding the date of the filing of the application;

I. A statement detailing the license or permit history of the applicant for the five-year period immediately preceding the date of the filing of the application, including whether such applicant previously operating or seeking to operate, in this or any other county, city, state or territory, has ever had a license, permit or authorization to do business denied, revoked or suspended, or has had any professional or vocational license or permit denied, revoked or suspended. In the event of any such denial, revocation or suspension, state the date, the name of the issuing or denying jurisdiction, and state in full the reasons for the denial, revocation or suspension. A copy of any order of denial, revocation or suspension shall be attached to the application;

J. All criminal convictions or pleas of nolo contendere, except those which have been expunged, and the disposition of all such arrests for the applicant, individual or other entity subject to disclosure under this chapter, for five years prior to the date of the application. This disclosure shall include identification of all ordinance violations, excepting minor traffic offenses (any traffic offense designated as a felony shall not be construed as a minor traffic offense), stating the date, place, nature of each conviction or plea of nolo contendere, and sentence of each conviction or other disposition; identifying the convicting jurisdiction and sentencing court; and providing the court identifying case numbers or docket numbers. Application for a sexually oriented business employee license shall constitute a waiver of disclosure of any criminal conviction or plea of nolo contendere for the purposes of any proceeding involving the business or employee license;

K. In the event the applicant is not the owner of record of the real property upon which the business or proposed business is or is to be located, the application must be accompanied by a notarized statement from the legal or equitable owner of the possessory interest in the property specifically acknowledging the type of business for which the applicant seeks a license for the property. In addition to furnishing such notarized statement, the applicant shall furnish the name, address and phone number of the owner of record of the property, as well as the copy of the lease or rental agreement pertaining to the premises in which the service is or will be located;

L. A description of the services to be provided by the business, with sufficient detail to allow reviewing authorities to determine what business will be transacted on the premises, together with a schedule of usual fees for services to be charged by the licensee, and any rules, regulations or employment guidelines under or by which the business intends to operate. This description shall also include:

1. The hours that the business or service will be open to the public, and the methods of promoting the health and safety of the employees and patrons and preventing them from engaging in illegal activity;

2. The methods of supervision preventing the employees from engaging in acts of prostitution or other related criminal activities;

3. The methods of supervising employees and patrons to prevent employees and patrons from charging or receiving fees for services or acts prohibited by this chapter or other statutes or ordinances;

4. The methods of screening employees and customers in order to promote the health and safety of employees and customers and prevent the transmission of disease, and prevent the commission of acts of prostitution or other criminal activity. (Ord. 10/28/2003O-12 (part), 2003; Ord. 11-22-88A § 9, 1988)

5.12.110 License—Bond.

Each application for a sexually oriented business license shall post with the city's licensing official a cash or corporate surety bond payable to Midvale City Corporation in the amount of two thousand dollars. Any fines assessed against the business, officers or managers for violations of city ordinances shall be taken from this bond if not paid in cash within ten days after notice of the fine, unless an appeal is filed as provided by this chapter. In the event the funds are drawn against the cash or surety bond to pay such fines the bond shall be replenished to two thousand dollars within fifteen days of the date of notice of any draw against it. (Ord. 10/28/2003O-12 (part), 2003; Ord. 11-22-88A § 11, 1988)

5.12.120 License—Premises location and name.

A. It is unlawful to conduct business under a license issued pursuant to this chapter at any location other than the licensed premises. Any location to which telephone calls are automatically forwarded by such business shall require a separate license.

B. It is unlawful for any sexually oriented business to do business in the city under any name other than the business name specified in the application. (Ord. 10/28/2003O-12 (part), 2003; Ord. 11-22-88A § 12, 1988)

ADDENDUM E

List of other City Sexually Oriented Business
Ordinances.

SALT LAKE COUNTY SOB ORDINANCES

1. Draper City Code Chapter 6-5-010
2. South Jordan City Code Chapter 5.32
3. Salt Lake County Code Chapter 5.136
4. Holladay City Code Chapter 5.82
5. West Jordan City Code Chapter 22-11
6. Murray City Code Chapter 5.28
7. West Valley Municipal Code Chapter 17-26
8. South Salt Lake City Code 5.56
9. Salt Lake City Code 5.61
10. Cottonwood Heights City Code Chapter 5.82
11. Taylorsville City Code Chapter 5.82
12. Sandy City Code Chapter 18
13. Midvale City Code Chapter 5.12

EXHIBIT C

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