

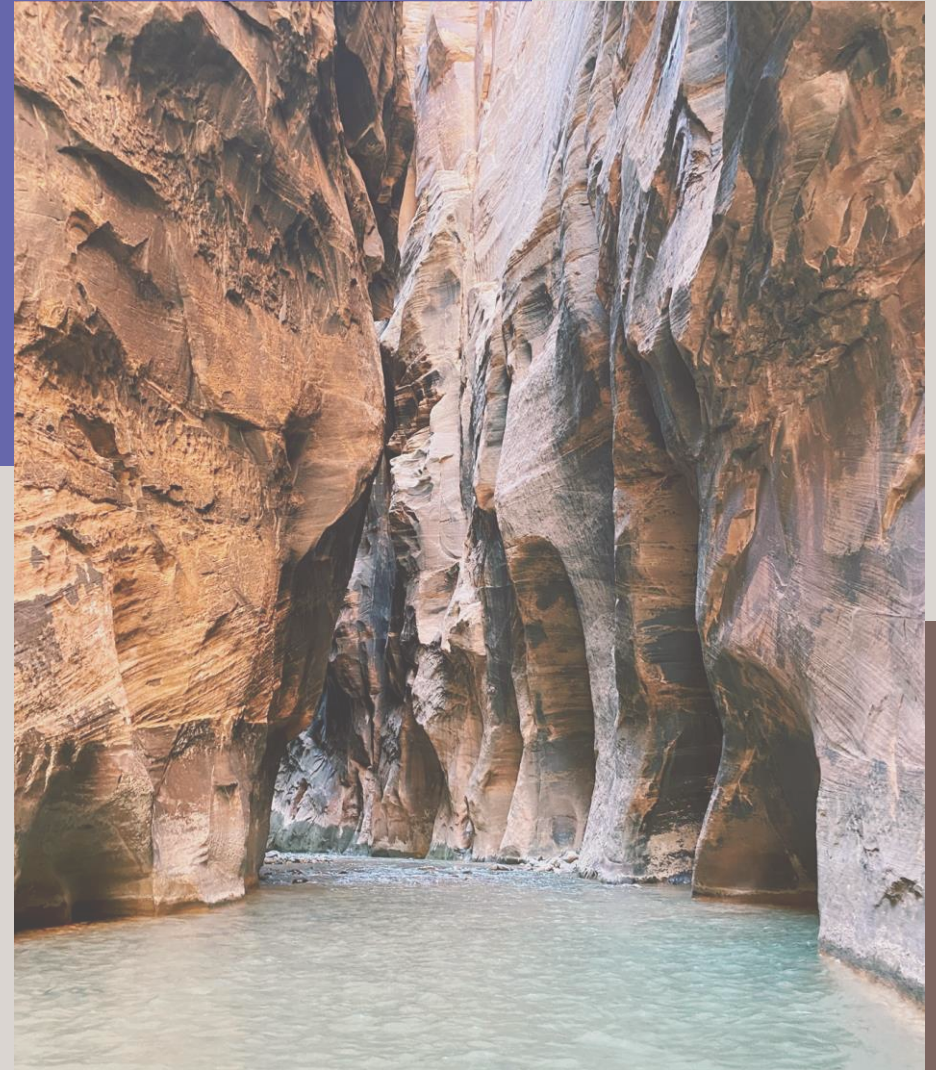
A dramatic landscape of layered rock formations, likely a canyon or mesa, under a cloudy sky. The rock faces are steep and show distinct horizontal strata. The sky is filled with soft, grey clouds, and the overall lighting is somewhat dim, suggesting an overcast day. The foreground shows some sparse green vegetation at the base of the rock walls.

BUSINESS LICENSING – CASE LAW

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AGENDA

1. Introduction
2. Municipal Attorney
 - a. Role of Attorney, Attorney-Client Privilege
3. Licensing and the Constitution
 - a. Types of Challenges
 - b. What is due process?
4. Case Law
 - a. Rational Scrutiny Test
 - b. Issuance/Revocation
 - c. Sexual Oriented Businesses
5. Questions?



DO YOU KNOW YOUR CITY ATTORNEY?



- Your City Attorney is your friend, they are there to help you make the right decisions when you are at an impasse, when the area is grey.
- **DON'T MAKE** the difficult decisions on your own, reach out for help.
- Remember: Your conversations are privileged, as you seek their advice.

Attorney-Client Privilege

There are particular relationships in which public policy and the law encourage truthfulness, an attorney-client relationship is one.

“An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication.” Utah Code Ann. § 78B-1-137.




ATTORNEY-CLIENT COMMUNICATIONS & GRAMA



Records that are subject to **attorney client privilege** and records that **were prepared for or by an attorney** in anticipation of, litigation or a judicial, quasi-judicial, or administrative proceeding **are protected** if properly classified by a governmental agency. Utah Code Ann. § 63G-2-305(17), (18).


“The mere existence of an attorney-client relationship ‘does not ipso facto make all communications between them confidential.’” *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 801 P.2d 909, 911 (Utah 1990)

WHICH COMMUNICATIONS ARE PROTECTED?

 Communications between the Government Attorney and the Government agency are privileged (and protected) if they were:

(i) “made for the purpose or in the course of obtaining or facilitating the rendition of legal services”; and

(ii) made between the City’s representative and the City’s attorney (or the attorney’s representative).

 Communications are defined as:

- **Advice, direction, or guidance given by a lawyer** (or the lawyer’s representative) ***and***
- **Disclosures by the client to the lawyer** “incidental to the client’s legal services.”

BUSINESS LICENSING



- City councils have been granted the authority to regulate businesses within the city limits through licensing ordinances.
 - *Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 32, 13 P.3d 581, 590
- Utah Code Ann. 10-1-203: "Business" means any enterprise carried on for the purpose of gain or economic profit
- Utah Code Ann. § 10-8-4: Municipal legislative bodies (city council) may "fix the amount, terms, and manner of issuing licenses"

BUSINESS LICENSING



- Utah Code section 10-1-203, a municipality may not require a license or permit for a business that is operated:
 - Only occasionally and by an individual who is under 18 years old.
- They may not discriminate between “resident community businesses” and “nonresident community businesses” *Id.*
- So, it is up to your city attorney to draft a constitutionally sufficient ordinance, but your input can be important.

BUSINESS LICENSING & CONSTITUTIONAL LIBERTY

COMMONLY, challenges to business licensing regimes are brought under the **first amendment** and the **due process and equal protection amendments**:

FIFTH AMENDMENT:

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

FOURTEENTH AMENDMENT:

“No State shall . . . 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.**”



HOW DO YOU AFFORD DUE PROCESS RIGHTS?



Issuing business licenses?
Denying business licenses?
Revoking business licenses?

*Failing to afford a person their due process, first amendment rights, and or other rights is a serious matter.
Follow your ordinances.

POP QUIZ, TRUE OR FALSE...

- Government officials cannot refuse to issue a business license if the petitioner has met all requirements?



POP QUIZ!!!! TRUE OR FALSE...



TRUE! But...
If you refuse to issue the license, what recourse does the petitioner have?

THE PETITIONER MAY...



Petition a Court to review the action and enter a “Writ of Mandamus” a petition for extraordinary relief, thereby:

1. Commanding the municipality to perform one of its duties. (like issuance a business license or reinstate a license)
2. Requires compliance with non-discretionary actions.

REASONS TO DENY PERMIT:



1. Does not conform to the requirements of the Utah Code, other pertinent laws, and/or ordinances.
2. **Read your ordinance, talk to your city staff, and make sure you understand your responsibilities.**
3. To be successful in obtaining a writ, petitioner must show that they would be entitled to the administrative action, and that the official has no discretion about whether the action should be taken or not (demonstrating how the official acted arbitrarily).

BUSINESS LICENSING & CONSTITUTIONAL LIBERTY

A Section 1983 Civil Rights Action may be brought if a deprivation of rights occur:



“Every person who, **under color of any statute, ordinance, regulation, custom, or usage, of any state**...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, **shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.**”

Due Process and Equal Protection

- Follow the procedures of your ordinance.
- Follow the time restraints required under the ordinance to review the license and issue, deny, revoke, or renew within the time frame.
- Under the Equal Protection Clause, and state law, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable views.
- Applicants have protected rights. Be wary of inserting your own biases in denying or revoking licenses to which you find the business unfavorable.

JUDICIAL REVIEW

- To prevail in a Section 1983 civil action, against a municipality, the petitioner must show the (1) acts by the licensing person, (2) under color of state law, (3) deprived them of federal rights, privileges, or immunities, and (4) caused damages.
- Regulation of businesses must be reasonable and not arbitrary.



MUNICIPALITIES RIGHTS



- Prevent Crime
- Protect Retail Trade
- Maintain Property Values
- Protect and Preserve the Quality of Life
- Cities can regulate “Secondary Effects”
- Thereby monitoring these effects by:
 - Issuing and processing code violations
 - Responding to nuisance complaints
 - Enforcing ordinances consistently

Necessary and Proper

Utah Code Section 10-8-84:

Municipality may pass all "ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties . . . necessary and property to provide for the **safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.**

Deleterious Secondary Effects



Secondary Effects Doctrine – permits normally content-based regulation to be treated as if it were content-neutral.

This doctrine took shape because of Sexually Oriented Businesses (SOB)

- **Many states and municipalities seek to regulate the operation of SOB's.**
- The peace, moral, crime rate, property values, and general welfare of citizens are all legitimate government interests in regulating certain types of business in time, place, manner, in an objective manner.
- **Make sure you understand your ordinance. If it is unclear to you, talk with your City Attorney. It will set forth the objectives.**

Regulating Secondary Effects



ASK QUESTIONS when people are applying for business licenses regarding the type of business that is being operated, review your ordinance for those specific type of business uses.

This will allow you to determine if the business is one that would require a general or special license (adult businesses, described in more detail).

Municipalities are allowed by law to regulate the general welfare of their cities, which includes regulating certain types of business licenses and the potential negative secondary effects they may have on their surrounding neighbors.

Cities want to keep their citizens happy, safe, and preserve the quality of urban life.

Secondary Effects



Young v. American Mini Theaters

427 U.S. 50 (1976)

-The operators of two adult motion picture theaters — the Nortown and the Pussy Cat — **challenged amendments to Detroit's Anti-Skid Row ordinance.**

-The ordinance prohibited adult businesses from locating within 1,000 feet of any two other such "regulated uses" and 500 feet from a residential area.

-The two theatre operators contended that the ordinance violated the First Amendment because it singled out adult businesses on the basis of the content of the films shown.

Secondary Effects



Young v. American Mini Theaters

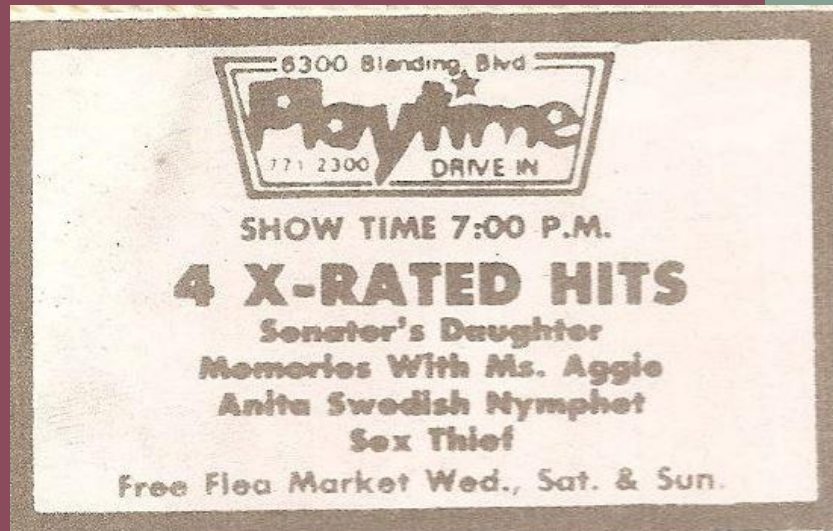
427 U.S. 50 (1976)

-Federal District Court ruled in favor of City, Sixth Circuit overturned, and then the Supreme Court ruled 5-4 in favor.

-Supreme Court Held: that the ordinance was not vague, the ordinance did not seek out suppression of free expression, and it was instead attempting to limit the adverse effects associated with adult businesses, such as higher crimes and lower property values.

-Holding that it is the secondary effect that these zoning ordinances attempt to avoid, not the dissemination of offensive speech.

Secondary Effects



City of Renton v. Playtime Theaters, Inc. 475 U.S. 41

- Petitioners purchased two theaters in Renton, Washington.
- With the intention of **exhibiting adult films.**
- Petitioners sought injunctive relief and declaratory judgment asking the Supreme Court to find that their 1st and 14th Amendment rights were violated by a city ordinance that prohibited motion picture theaters from **locating within 1,000 feet of any residential zone, single- or multiple- family dwelling, church, park, or school.**

Rational Basis Test



- Supreme Court held that “[s]ince the ordinance does not ban adult theaters altogether, it is properly analyzed as a **form of time, place, and manner regulation.**”
- Upholding their ruling in *American Mini Theaters*.
- Supreme Court found that it was “**Content-neutral**” and the regulation satisfied the intermediate scrutiny test (rational basis): (1) served a substantial governmental interest and (2) did not unreasonably limit alternative avenues of communication.
- Stating that a City’s interest in “preserving the quality of urban life is one that must be accorded high respect.”

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41

Content Neutral

Ordinances targeting adult content per se are content based, and are “considered presumptively invalid and subject to **strict scrutiny.**”

Those targeting the negative secondary effects associated with sexually oriented businesses **are considered content neutral, and subject to intermediate scrutiny.**

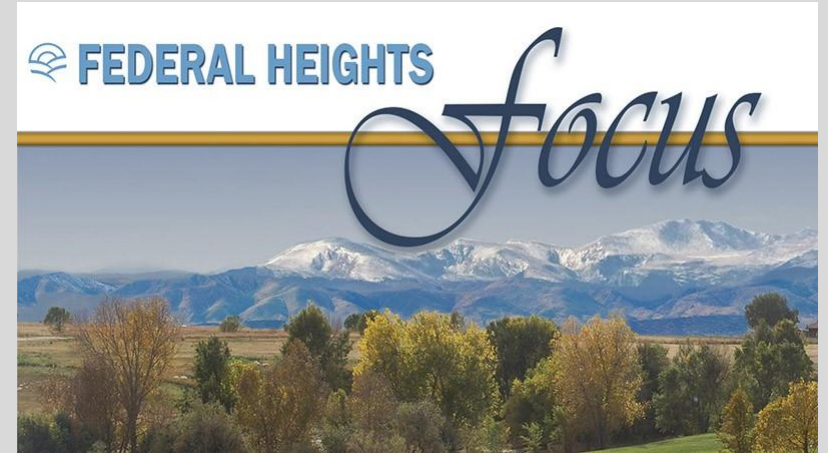
City of Renton* – for a regulation to be content-neutral, the enacting authority must be **predominantly motivated by a substantial governmental interest, such as the control or reduction of deleterious secondary effects of the establishment like public health or safety.

Narrowly Tailored

- Does not burden substantially more speech than necessary.
- Limited to time, place, and manner

Essence, Inc. v. City of Federal Heights – Tenth Circuit

- Corporation operated a nude dancing establishment and two women were denied employment as dancers.
- The ordinance restricted businesses operating nude dancing establishments from allowing *anyone* on the premise under the **age of 21 wherein live nude dancing was offered.**
- Held dancing is an expression of speech protected under the First Amendment, even nude dancing. The Court applied the rational basis test.
- Finding that there was no support for a substantial government interest for the overly broad ordinance language.



Essence, Inc. v. City of Federal Heights – Tenth Circuit

- Secondary effects must be real. Shown by real evidence and germane.
- The Supreme Court has allowed licensing of adult entertainment establishments so long as two classic evils of prior restraints are not present:
 1. Unbridled discretion or
 2. Decisionmaker given unlimited time to decide otherwise indefinitely suppressing speech

Essence, Inc. v. City of Federal Heights – Tenth Circuit

- Secondary effects must be real. Shown by real evidence and germane.
- Age Restriction Must Further the City's Interest
 - Here the city failed –on what may seem a technicality.
 - City must prove that the language of the ordinance will address the harmful secondary effects.
 - City ordinance did not ban nude dancing, instead banned those under 21 from being in nude dancing establishments.
 - City must be able to prove how banning those under 21 would meet the city's interests.
 - Banning nude dancing would meet those interests but that's not what the ordinance says or does.

Abilene Retail No. 30, Inc. (Tenth Circuit)

- Owner-operator of adult bookstore brought action challenging constitutionality of county zoning ordinance that restricted bookstore's location and mode of operation.
- **Using Foreign Material to Support the Substantial Government Interest Claim:**

“[W]hen a municipality chooses to rely solely on foreign evidence, ‘the experience elsewhere [must be] germane to the measure under consideration and actually relied upon.’”



Unbridled Discretion

“A licensing scheme confers too much discretion on a governmental decisionmaker when it allows the decisionmaker to deny an application based solely on the decisionmaker’s “own ideas of ‘public welfare, peace, safety, health, decency, good order, morals, or convenience.’”

Unbridled Discretion

-A licensing scheme confers too much discretion when the decisionmaker's own ideas of 'public welfare, peace, safety, health, decency, good order, morals, or convenience.' are used in the process.

-A licensing scheme is valid when 'concrete standards guide the decision-maker's discretion,' such as limits placed by 'textual incorporation, binding judicial or administrative construction, or well-established practice. To survive constitutional scrutiny, a licensing regulation must therefore provide 'narrow, objective, and definite standards to guide the licensing official.'

Midvale City v. Haltom, Doctor John's Lingerie and Novelty Boutique

- Following an initial application for a general license, upon a physical inspection of the business, the City found sexual oriented devices, based on the ordinance. These devices would require the business to apply for a special license for sexually oriented businesses.
- Haltom continued to operate without a license until the district court entered a permanent injunction prohibiting Dr. John's from doing business.



Midvale City v. Haltom, Doctor John's Lingerie and Novelty Boutique

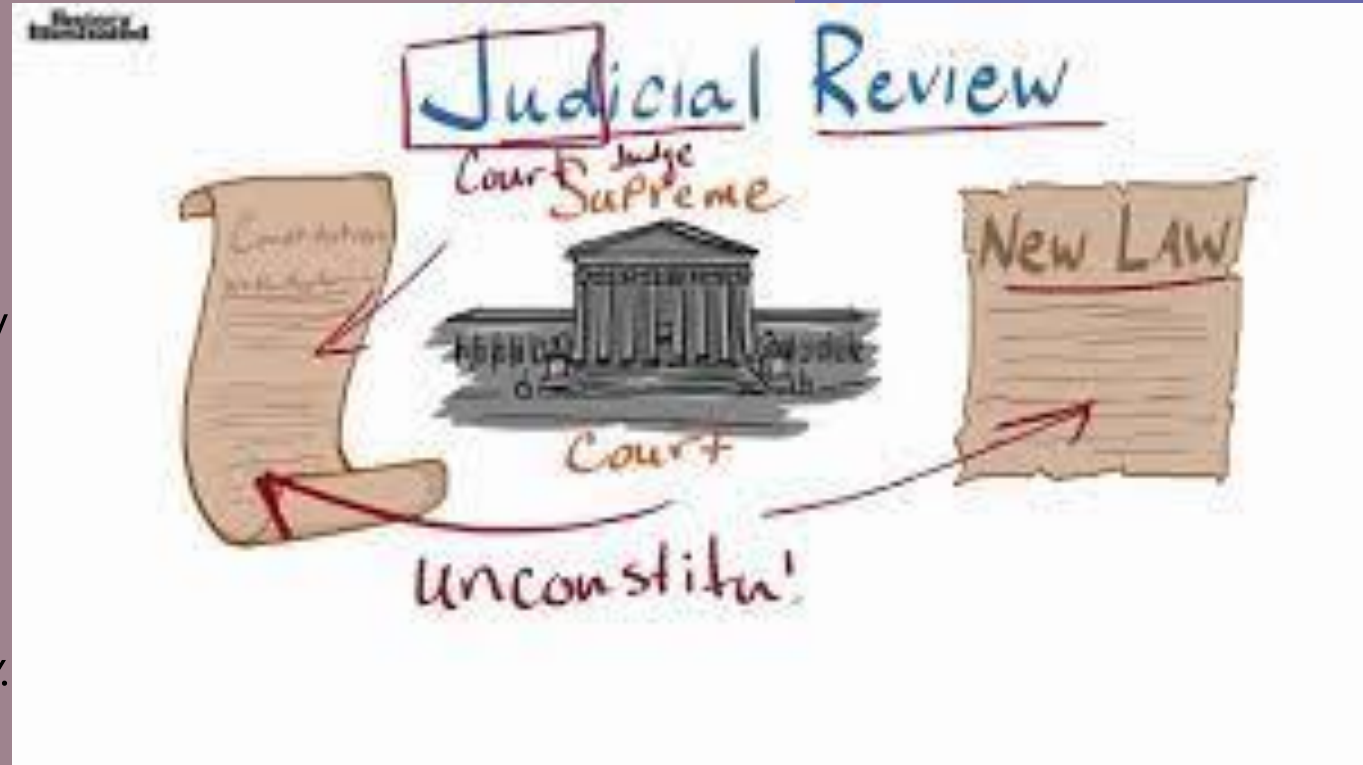
- Utah Supreme Court held that sexual devices did not amount to expression of speech under the First Amendment.
- The process of classifying businesses and requiring specific types of licenses for certain types of businesses—the court held did not implicate the First Amendment unless it somehow restricted communications.

Judicial Review of a License Revocation

Judicial review of a business license revocation by municipalities is limited to determining whether the municipality acted:

1. Within its lawful authority, and
2. Examine at the language of the ordinance.
The best evidence of the legislature's intent is the plain language of the statute itself. *State v. Miller*, 193 P.3d 92

*Looking to the preamble statement of the ordinance.



Judicial Review of a License Revocation

In a manner that is not arbitrary or capricious. *Dairy Prod. Servs., Inc. v. City of Wellsville*, 13 P.3d 581.

Arbitrary and capricious means there is no evidence in the record to support the decision. *14th St. Gym, Inc. v. Salt Lake City Corp.*, 2183 P.3d 262.



Best Practices

Read your ordinance carefully.

Talk to your staff and city attorney about the procedure for your city in licensing certain types of businesses.

Be certain that you are not using your own biases to deny or revoke business licenses.

Follow your ordinances.



QUESTIONS?