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Salon Tropicana Midvale, Inc. v. Midvale City Corp. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALON TROPICANA MIDVALE, INC., a Utah corporation, Plaintiff/Appellant, v. CITY OF MIDVALE, a municipal corporation, Defendant/Appellee.	Case No. 20090057-CA

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH HON. MICHELLE CHRISTIANSEN

BRIEF OF APPELLEE

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The City of Midvale ("Midvale" or the "City"), by and through its attorneys, hereby submits its Brief of Appellee.

STATEMENT OF JURISDICTION

Midvale accepts Appellant's Statement of Jurisdiction and agrees that jurisdiction in this Court is proper.

ISSUE PRESENTED FOR REVIEW

As explained herein, there is only one properly preserved issue on appeal: whether the decisions of the Midvale City Planning Commission (the "Planning Commission") and Midvale City Council (the "City Council") to revoke Appellant's Conditional Use Permit (the "CUP") were arbitrary and capricious. In this regard, this Court is not tasked with reviewing the trial court's ruling, but rather is limited to a review of the land use authority's decision. *Fox v. Park City*, 2008 UT 85, 200 P.3d 182 (Utah 2008) ("Like the

review of the district court, our review is limited to whether a land use authority's decision is 'arbitrary, capricious, or illegal.'").[1] "A land use authority's decision is arbitrary or capricious only if it is not 'supported by substantial evidence in the record.' A land use authority's decision is illegal if it 'violated a law, statute, or ordinance in effect at the time the decision was made.'" *Id.*[2]

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

In addition to the constitutional and statutory provisions mentioned by Appellant in its brief ("Appellant's Brief"), the following statutes and ordinances are at issue:

U.C.A. § 10-9a-302

U.C.A. § 10-9a-507(2)(a) and (b)

U.C.A. § 10-9a-701(1)

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1 Appellant invites this Court to depart from this well-established standard of review by stating that "while the Planning Commission may deserve some deference in such a decision, the Court is certainly empowered to review the factual determination with a more neutral eye, and outside of the presence of a bunch of upset property owners." Appellant's Brief, p. 24. This statement completely misconstrues the role of this Court, because statutory provisions make clear that this Court is instructed to presume that a decision, ordinance, or regulation made under the authority of U.C.A.§ 10-9a-801 is valid and to determine only whether or not the decision, ordinance or regulation is arbitrary, capricious, or illegal. U.C.A. § 10-9a-801(3)(a).

2 Appellant also claims to have preserved the issue of whether the procedure followed by the City in revoking the CUP violated Appellant's due process rights. However, Appellant never raised any objection before either the Planning Commission or City Council, as Appellant itself concedes by pointing to its motion for summary judgment before the district court as the instance in which it claims to have preserved the issue for appeal. However, because Appellant failed to raise an objection during the City's proceedings, it cannot be considered on appeal. *See Juback v. Dept. of Workforce Serv.*, 2005 UT App 421 (Utah Ct. App. 2005) ("Because Petitioner failed to raise this argument in the proceedings before the administrative agency, we will not consider it for the first time on appeal."). *See* p. 10 supra.

U.C.A. § 10-9a-801

Midvale City Code § 17-3-13.A.2.

These ordinances are included in the Appendix hereto.

STATEMENT OF THE CASE

Nature of Case

The Planning Commission revoked Appellant's CUP, pursuant to Midvale City Code § 17-3-4.G., based upon a determination that Appellant had violated numerous conditions of the CUP. Appellant appealed to the City Council. On appeal, the City Council determined that the record established before the Planning Commission supported a finding that the conditions of the CUP had indeed been violated and upheld the revocation.

Appellant again appealed, to the Third Judicial District Court for the State of Utah. The district court reviewed the record that was established before the Planning Commission, as well as the transcript of proceedings before the City Council, and again found that the record contained substantial evidence that the conditions of the CUP had been violated. Accordingly, it affirmed the decision of the Planning Commission and City Council.

Appellant has appealed again, and this Court is now presented with the issue of whether the City's determination was arbitrary or capricious.

Response to Appellant's Statement of Facts

Given the unique nature of this Court's review (i.e., this proceeding is not a review of the actions taken by the trial court), the "record" on appeal consists entirely of the

documents introduced and testimony provided during the proceedings before the Planning Commission, as well as the written decisions of the Planning Commission and City Council. Initially, when the record was prepared and indexed by the trial court for purposes of this appeal, the binder containing the record as established before the Planning Commission and City Council (the "Record Binder") was not included. Appellant filed a motion to supplement the record, which was granted. Accordingly, the trial court was instructed to supplement and re-index the record.[3]

Thus, when preparing its brief, Appellant had the appropriate record available to which to cite, but it did not do so. Throughout Appellant's Statement of Facts, Appellant cites to the trial court's files (the "Trial Court Record"), rather than the Record Binder. Compounding this problem, Appellant cites to pages in the Trial Court Record that were stricken from the record by the trial court. Pages 162-174 and 177-187 of the Trial Court Record are documents that Appellant improperly attempted to introduce to the trial court as exhibits to its memorandum in support of its motion for summary judgment, even though they were not part of the Record Binder. The City moved to strike those exhibits. R. at 191-197. Recognizing that its review was limited to the Record Binder, the trial court granted that motion on December 29, 2008. R. at 251.

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[3] Unfortunately, although the Record Binder was then included as part of the record, it was assigned only one page number by the district court: 351. The internal pages of the Record Binder were not individually numbered. Locating a specific page within this binder based upon a general description would likely be problematic for this Court. In order to most effectively address this issue, pursuant to Utah R. App. Proc. 24(a)(11)(C), Appellee has included in its Appendix copies of the pages in the Record Binder to which it cites, numbered sequentially, and refers to those documents as "App.-Rec." and the corresponding page number.

Appellant's Statement of Facts does not comply with Utah R. App. Proc. 24(a)(7) or (e) because its citations are not to the Record Binder. This Court's review is limited to the Record Binder, and Appellant's citations to anything other than the Record Binder should be disregarded.[4]

Furthermore, even if this Court determines that Appellant's citations are sufficient, Appellant has failed in its burden of marshaling the facts in the Record Binder that support the City's decision, and then demonstrating how such facts did not constitute sufficient evidence to meet the "substantial evidence" standard. *See Mallinckrodt v. Salt Lake County*, 983 P.2d 566 (Utah 1999) (To prove that a decision is not supported by substantial evidence, the appealing party has the obligation to marshal all of the evidence supporting the findings and show that despite the supporting facts and in light of the conflicting evidence, the findings are not supported by substantial evidence).

Appellant is not allowed to just marshal some of the evidence, but is required to "present 'every scrap of competent evidence . . . which supports the very findings the appellants resists' and then 'ferret out a fatal flaw in the evidence.'" *T.H. v. R.C. (In re E.H.),* 2006 UT 36, ¶ 64, 137 P.3d 809 (Utah 2006). Appellant is then required to describe how the evidence presented related to and supported the City's conclusion:

> To appropriately marshal evidence, parties must 'provide a precisely focused summary of all of the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the [deciding body] erred in the assessment of that evidence to its findings.' Indeed, parties challenging factual findings must 'fully embrace the adversary's position' and play 'devil's advocate.'

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4 Appellant's Statement of Facts is subject to a separate motion to strike that has been filed concurrently herewith pursuant to Rule 22 of the Utah Rules of Appellate Procedure.

Parduhn v. Bennett, 2005 UT 22, ¶ 30, 112 P.3d 495 (Utah 2005).

In light of Appellant's failure to meet its marshaling burden, this Court should hold that the findings of fact supporting Midvale City's decision should not be disturbed. *Showalter Motor Co. v. Dep't of Workforce Servs*, 2004 UT App 220 (Utah Ct. App. 2004).

Appellee's Statement of Facts

1. In 2003, Appellant applied for the CUP from the City of Midvale for live entertainment and dancing. The CUP was necessary because live entertainment and dancing was not a permitted use in the zone assigned to the real property. App.-Rec. 34-37.

2. Although the CUP was issued, it was based upon certain conditions that were intended to mitigate the impact of the proposed use on the surrounding neighborhood and businesses. Among other things, these conditions required Appellant to affirmatively monitor and act to prevent criminal activities in its parking lot and to require those individuals who could not be admitted (due to the maximum occupancy of the building) to leave the premises. App.-Rec. 38-39.

3. Subsequent to the issuance of the CUP in April 2003, Appellant's owners provided Midvale City with a letter affirmatively stating that in order to comply with the decision of the Planning Commission, Salon Tropicana "accept[ed] and agree[d] to follow and enforce the special conditions required by the Commission . . ." App.-Rec. 40.

4. In May 2005, the Planning Commission conducted a review of Appellant's CUP, at which time it found that Appellant had violated its conditions including, but not limited to, allowing drinking, loitering, and other illegal activities in the parking lot. App.-Rec. 41-42.

5. However, the Planning Commission allowed Appellant an opportunity to submit a plan as to how it would comply with the conditions required to maintain the CUP. *Id.*

6. On June 8, 2005, the Planning Commission determined that it would not revoke the CUP, subject to Appellant's compliance with certain conditions, including a recitation of the original conditions from 2003. App.-Rec. 43-44.

7. Appellant again affirmed that it was responsible for complying with those conditions, and submitted a security plan that included a statement that "No individuals will be allowed to linger in the Parking Lot, Suspicious activity will be reported to the Midvale Police Department immediately." App.-Rec. 45.

8. In 2008, upon receiving complaints that the conditions of the CUP were once again (or still) being violated, the City notified Appellant that a hearing would be conducted pursuant to Midvale City Code § 17-3-4.G. to determine whether Appellant's CUP should be revoked.

9. At the September 10, 2008 hearing before the Planning Commission, Appellant's counsel stipulated to the production, introduction and admission to the Planning Commission of police reports (App.-Rec. 3) which established that between the dates of April 27, 2008 and June 8, 2008, Midvale City police made thirty-five arrests for open container or other alcohol violations, twenty-four arrests for lewdness, and three

arrests for cocaine possession, all in the parking lot of Appellant's business. R. at 351 (tabs labeled "Alcohol Violations," "Lewdness," and "Drug Offenses.").[5]

10. In addition, during approximately the same time period, Midvale City police made numerous additional arrests in the parking lot for offenses including, but not necessarily limited to, disorderly conduct, unlawful consumption of alcohol by a minor, and stolen vehicles, and responded to reports of fights or assaults at the premises. R. at 351 (tabs labeled "Assaults," "Vehicle Theft," and "Miscellaneous").

11. The Planning Commission also heard statements from numerous individuals, including residents and business owners adjacent to Appellant's business (App.-Rec. 13-21), Appellant's counsel (App.-Rec. 7-8, 23), Appellant's owner (App.-Rec. 9-12, 24-31), Appellant's head of security (App. Rec. 8-9), and other employees of Appellant (App.-Rec. 16, 18, 20-21, 23).

12. While Appellant fully participated in the hearing, and had counsel present, at no time did Appellant raise an objection to the hearing, or the process used by the Planning Commission in determining whether Appellant had violated the conditions of the CUP and the appropriate remedy for such violations.

13. At the conclusion of the meeting, the Planning Commission determined that Appellant had violated the terms of the CUP.[6] Based upon Appellant's violations, and

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5 Because these documents are somewhat voluminous, and are easily located within the Record Binder marked R. 351 due to the labeled tabs, these documents are not reproduced as part of the Appendix.

6 The violated conditions included, but were not necessarily limited to, those that state that "there shall be no drinking, loitering, or any illegal activity allowed in the parking lot or on adjacent property" and that "if security officers are required to turn people away from the establishment or the parking lot, these people shall be required to leave the premises."

the prior opportunity given to Appellant to comply with the terms of the CUP in spite of being informed of nearly identical violations in 2005, the Planning Commission determined that revocation was appropriate. App.-Rec. 32.

14. Appellant appealed the Planning Commission's decision to the City Council.

15. On October 7, 2008, the City Council reviewed the record created before the Planning Commission, and gave Appellant and its counsel an opportunity to be heard. While Appellant again availed itself of this opportunity and again had counsel present, it once again lodged no objection to the procedure being utilized nor claimed that its due process rights were being violated.

16. At the conclusion of the hearing held on Appellant's appeal, the City Council determined that the evidence before the Planning Commission supported a finding that the conditions of the CUP had been violated, and voted to affirm the Planning Commission's decision. App.-Rec. 46-48.

17. Appellant appealed to the Third District Court for the State of Utah. There, for the very first time, Appellant claimed that its due process rights had been violated by the proceedings before the Planning Commission and City Council. Appellant also claimed that the decisions of the Planning Commission and City Council were arbitrary, capricious, or illegal.

18. Utilizing the same standard for review that applies to this Court's review of this matter set forth in U.C.A. § 10-9a-801(3)(a), the Third District Court determined that substantial evidence existed in the record to support the decision of the Planning Commission and City Council, and therefore affirmed that decision. R. 256-258.

SUMMARY OF ARGUMENT

Appellant did not properly preserve its due process argument for appeal. Appellant made no objection or otherwise challenged the procedure utilized by the Planning Commission and City Council when the CUP was revoked. Appellant cannot raise the argument that its due process rights were violated on appeal when it failed to preserve it during the administrative proceedings. Even if Appellant did preserve this issue, the procedure followed by the City was proper, prescribed by statute, and adequately provided the Plaintiff with due process.

With regard to the issue of whether substantial evidence exists in the record to support the City's decision, Appellant has failed to marshal the evidence and therefore the findings of the Planning Commission should not be disturbed. Even if Plaintiff met its marshalling burden, the City's decision was not arbitrary, capricious or illegal because substantial evidence existed to support a finding that the conditions of the CUP had been violated. Those conditions required Appellant to take affirmative action to ensure that no drinking, loitering, or illegal activity occurred in its parking lot. Appellant was required to submit a security plan detailing how it would ensure its compliance with such conditions. Accordingly, Appellant cannot now claim that it cannot be held responsible for the actions of third parties that resulted in violations of the CUP.

ARGUMENT

I. APPELLANT DID NOT PRESERVE ITS DUE PROCESS ARGUMENT FOR APPEAL. HOWEVER, EVEN IF THE ISSUE WAS PROPERLY PRESERVED, THE REVOCATION OF APPELLANT'S CONDITIONAL USE PERMIT DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS.

A. Appellant Did Not Raise an Objection to the Procedure Before Either the Planning Commission or City Council.

Although Appellant claims to have preserved its argument that the City revoked Appellant's CUP without a proper proceeding because it made the argument in its motion for summary judgment before the Third District Court, this was in fact too late to preserve this issue. Instead, Appellant was required to object before the Planning Commission and/or the City Council if it believed that the process was violating its right to due process. *See Juback v. Dept. of Workforce Serv.*, 2005 UT App. 421 (Utah Ct. App. 2005) ("Because Petitioner failed to raise this argument in the proceedings before the administrative agency, we will not consider it for the first time on appeal.").

The proceedings before the Third Judicial District Court of Utah were in fact appellate proceedings, in which the district court was limited to a determination of whether the underlying decision was supported by substantial evidence in the record. Appellant could not, for the first time, claim in the district court that the proceedings before the Planning Commission and City Council violated its right to due process.

Appellant fully participated in both the meeting of the Planning Commission and City Council. Appellant was represented by counsel, who addressed the Planning Commission and City Council, respectively, at each proceeding. Appellant itself had numerous individuals present at each meeting (principals of the entity, as well as

employees of its business) who also addressed the Planning Commission and City Council. The transcript of the proceedings demonstrates that Appellant and/or its counsel had numerous opportunities during the meeting to speak, answer questions posed by the City representatives, and make closing remarks. While Appellant certainly availed itself of these opportunities, at no time did Appellant object that its due process rights were being violated by the proceedings. Accordingly, Appellant did not properly preserve this issue for appeal and this Court should decline to address it now.

B. The Administrative Procedure Followed by the Planning Commission was Proper.

Even if this Court considers Appellant's newly raised argument, the administrative procedure followed by the Planning Commission in revoking Appellant's conditional use permit was proper and did not violate Appellant's right to due process.

1. A Conditional Use Permit May be Revoked Without Judicial Assistance.

Although Appellant attempts to make much of the fact that the Planning Commission's revocation of the CUP through administrative means was somehow improper, and cites *Whiting v. Clayton,* 617 P.2d 362 (Utah 1980), in support of such argument, *Whiting* simply does not hold that Midvale City was without legal authority to revoke Appellant's CUP through a public hearing. To the contrary, *Whiting* specifically affirms that a license may be revoked through such procedure. In affirming the revocation of a liquor license through the administrative procedure defined by ordinance, the Utah Supreme Court stated "it is not necessary that there be a judicial determination that a public nuisance exists before a beer license may be revoked," *Id*. at 365, and that revocation of the club's beer license "was clearly within the authority and sound

discretion of the City Council." *Id.* The error identified by the Utah Supreme Court in *Whiting* was not that the municipality had revoked the liquor license through administrative means, but that it had overreached its ordinance and had also revoked the business and amusement licenses, which were not covered by the ordinance at issue: "[A] municipal ordinance that *only* authorizes revocation of the liquor license as a result of the creation of a nuisance cannot be used to circumvent the requirements of a statute with respect to the abatement of a public nuisance through injunction, nor can it be given effect beyond its scope and used as the basis for revoking *other licenses*." *Id.* (emphasis added).

Here, the Planning Commission did not take any action beyond the scope authorized by Midvale City Code § 17-3-4.G.--that of determining whether violations of the CUP had occurred and revoking the CUP once that decision was rendered in the affirmative. The fact that a planning commission may make land use decisions through administrative hearings is specifically contemplated by U.C.A. § 10-9a-302, which sets forth municipal planning commission powers and duties. Provided within that section is a requirement that the application processes allow the "participant to be heard *in each public hearing* on a contested application." Appellant was provided with notice and due process as set forth in both Utah Code and Midvale City Code, and the Planning Commission's revocation of the CUP was in compliance with applicable law.[7]

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[7] That Appellant received proper notice of the proceedings before the Planning Commission and the City Council, and the intended purpose of those proceedings was no surprise to Appellant are clear based upon the number of individuals Appellant had present at the hearings prepared to speak in its defense.

Appellant compounds its error of claiming that the procedure followed by the City was improper by mischaracterizing the purpose of the hearing before the Planning Commission. *See* Appellant's Brief, p. 17 ("If the City wishes to use allegations of nuisance to revoke the conditional use permit, it should proceed on that action and obtain a judgment to that effect. Attempting to short-circuit the process here is legally insufficient."). However, Midvale City did not base the revocation of Appellant's CUP on a finding of nuisance. Rather, the revocation was based upon a determination that Appellant had violated the conditions of its CUP. Midvale City Code § 17-3-4.G. specifically provides for such action:

> "If the community and economic development department determines that the holder of a conditional use permit or an administrative conditional use permit is in violation of the terms or conditions upon which the permit was issued, the community and economic development department shall notify the permit holder and schedule a hearing before the planning commission at which the permit holder must show cause to the planning commission why the conditional use permit or administrative conditional use permit should not be revoked. *If the planning commission determines that the terms or conditions of the permit have been violated, it shall cause the permit holder to specify how the holder will promptly comply with the terms and conditions of the permit, or it shall revoke the permit."*

(emphasis added).

Here, the Planning Commission, pursuant to applicable ordinance, determined that the conditions of the CUP had in fact been violated, and acted to revoke the permit, after taking due notice of all of the information provided and the fact that Appellant had been before the Planning Commission in 2005 and had already been provided with prior opportunities to comply with the conditions of the CUP. The City did not seek to revoke Appellant's business license, or liquor license, as neither was included within the specific

ordinance at issue. The Planning Commission acted in accordance with state and local law and, contrary to Appellant's argument, *Whiting* actually supports the Planning Commission's actions.

2. Administrative Proceedings are the Intended Procedure for Land Use Decisions.

That an administrative hearing was the intended procedure for land use decisions is made abundantly clear by Utah statute. For example, U.C.A. § 10-9a-701(1) requires that each municipality adopting a land use ordinance establish one or more appeal authorities to hear and decide: (a) requests for variances from the terms of the land use ordinances; and (b) appeals *from decisions applying the land use ordinances* (emphasis added). Subsection (3) goes on to require that as a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance. Appellant's argument that the Planning Commission could not revoke the CUP without judicial assistance is simply without support either in Utah's statutory or case law. *Whiting* does nothing more than prohibit a municipality from reaching beyond the scope of its applicable ordinances, an error that did not occur here.[8]

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[8] Appellant repeatedly refers to the nuisance action that Midvale City has filed in Third District Court and claims that the Planning Commission has somehow circumvented that action by its ruling. However, nothing precludes Midvale City from separately pursuing the various remedies available to it. Thus, while it is true that Appellant's violations of the CUP quite likely created a nuisance in the surrounding neighborhood, the issue before the Planning Commission was simply that of whether Appellant had violated the conditions of the CUP, a matter that was squarely within its authority and discretion.

II. THE DECISION OF THE PLANNING COMMISSION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

Given that the procedure utilized by the Planning Commission was proper, the issue before this Court is rather straightforward--whether there was substantial evidence in the record to support a finding that the conditions of the CUP had been violated. In making this determination, the Court should keep in mind that a conditional use permit is fundamentally different from either a business license or a liquor license because it specifically contemplates that conditions not normally associated with either of those licenses may need to be imposed in order to mitigate the impacts of the otherwise disallowed use in the applicable zone.[9]

A. A Conditional Use Permit is Controlled by Statute.

U.C.A. § 10-9a-507(2)(a) and (b) govern the issuance of conditional use permits. Specifically, those statutory provisions provide:

> (a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.
>
> (b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with the applicable standards, the conditional use may be denied.

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[9] Appellant refers to the City's citation of *Diamond B-Y Ranches v. Tooele County*, 2004 UT App. 135, 91 P.3d 841 (Utah App. 2004) in its pleadings before the district court and claims that the City has exaggerated this case's support for the City's position. Initially, it should be noted that the pleadings and arguments before the district court are not subject to review here. However, substantively, the City referred to this case in a footnote simply for the premise that a conditional use permit has fundamental differences from a business license, as is also clearly established by the different statutory treatment of conditional use permits from other licenses discussed herein.

Midvale City Code § 17-3-4 is consistent with Utah statute in that it provides that "[t]here are certain uses that, because of unique characteristics or the potential for detrimental impacts, may not be compatible in some areas of a zone or may be compatible only if certain conditions are imposed."[10]

Accordingly, both Utah statute and Midvale Code contemplate that in order for a conditional use permit to be issued, reasonable conditions may need to be imposed to mitigate the impact of a use that would not normally be allowed. This is precisely what occurred in this matter. In 2003, Appellant sought the CUP, and agreed to the conditions that were imposed by the Planning Commission in exchange for the issuance of that CUP. App.-Rec. 38-40. The conditions included an obligation on the part of Appellant to affirmatively act to prevent criminal activity from occurring in the parking lot and to require anyone who was unable to enter the Appellant's premises as the result of the maximum occupancy limit to leave the parking lot. *Id.* Appellant never challenged the propriety or enforceability of these conditions. In fact, Appellant specifically agreed to the conditions of the CUP, reaffirmed its understanding of the conditions, and reiterated

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10 Appellant misstates the basis and reasoning for the Planning Commission's decision. *See* Appellate Brief, p. 23 ("The City claims that the very economical viability of the property is why the conditional use permit must be withdrawn."); ("The business can stay, the City proclaims, as long as is [sic] it doesn't draw enough customers to succeed") *Id.* However, Appellant fails to acknowledge that live entertainment and dancing is not a permitted use in the zone in which the real property is located. The only way Appellant could engage in such activities is through a conditional use permit. And, as the holder of the CUP, Appellant was required to abide by the CUP's conditions. Obviously, a logical effect of the violation of conditions that were imposed specifically to mitigate the impact of a particular use on surrounding property owners would be that those property owners would suffer. However, it was not the number of Appellant's customers (after all, there was a maximum occupancy of 500 pursuant to the CUP), or the impact upon neighboring property owners that formed the basis for revoking the CUP--it was simply whether Appellant had violated the CUP's conditions.

its willingness to be bound by them in 2005, when faced with a possible revocation of the CUP due to violations of those conditions.

B. The CUP Required Appellant to Affirmatively Act to Monitor and Control Activity in Its Parking Lot.

Because the Planning Commission was concerned about the impact that the conditional use would have if the CUP was granted, numerous conditions of the CUP required Appellant to take affirmative action to prevent that impact. App.-Rec. 38-39. In its attempt to claim, belatedly, that those conditions are improper, Appellant cites to *14th Street Gym, Inc. v. Salt Lake City Corporation*, 183 P.3d 262 (Utah Ct. App. 2008) for the proposition that Appellant cannot be held responsible for the actions of third parties and that the Planning Commission's revocation of its CUP was therefore arbitrary, capricious, or illegal. However, *14th Street Gym* dealt specifically with enforcement of an order prohibiting any further violation *on the part of the business itself* and the actual violations that had formed the basis of the order were offenses *by the gym. 14th Street Gym,* 183 P.3d at 265. In addition, the city ordinance at issue allowed for revocation of a business license upon a finding of a violation or conviction of any of various enumerated offenses *"with respect to the licensee or licensee's operator or agent." Id.* (emphasis in original). Therefore, because there was no evidence in the record of culpable conduct specifically attributable to the gym, the court found the revocation of the gym's business license to be arbitrary, capricious, or illegal. It should be noted, however, that the Utah Court of Appeals indicated that it is possible that the acts of third parties could also represent code violations by the gym if the gym knew of, should have known of, or condoned the acts, but that there were no such findings to support those premises. In

addition, the Utah Court of Appeals was careful to clarify that the city ordinance at issue "does not speak to whether a provisional license may be conditioned on the conduct of persons outside a licensee's knowledge or control." *Id*. Therefore, by its own acknowledgement, the Utah Court of Appeals limited its decision to the revocation of a business license, not a conditional use permit, in accordance with the specific language of the city's ordinance at issue in that case.

Here, Appellant's CUP clearly required Appellant to monitor and control the actions of third parties. While Appellant now claims that it was unaware of much of the activity that formed the basis for revocation of the CUP, such lack of awareness is itself a violation of the terms of the CUP and the security plan Appellant put into place in order to comply with those terms. The conditions of the CUP imposed a duty upon Appellant not to allow drinking, loitering, or any illegal activity within the parking lot or neighboring property. The security plan required Appellant to actively patrol and monitor the parking lot in order to "ensure compliance with the conditions" of the permit.[11] *14th Street Gym* is both factually and legally distinguishable from this matter, as carefully noted by the Utah Court of Appeals. Appellant simply did not comply with the conditions of the CUP, and the City's revocation of the CUP was supported by substantial evidence in the record.

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11 Taken to its logical conclusion, Appellant's claim of ignorance of the activities in its parking lot would render the conditions of the CUP meaningless--Appellant's circular argument is that its failure to affirmatively ensure that it was fulfilling the conditions of the CUP excuses it from its failure to meet those conditions; i.e., ignorance is bliss.

C. If Appellant Believed that the Conditions Associated with the CUP Were Unreasonable, it Had an Obligation to Appeal Them at the Time They Were Imposed.

Appellant's argument that it is unreasonable to hold it responsible for monitoring the actions of third parties within the parking lot of the real property is untimely. If Appellant believed that the conditions requiring it to do just that[12] were unreasonable, it had an obligation to appeal their imposition at the time the CUP was granted. U.C.A. § 10-9a-701(2) states that, "as a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance." Appellant's failure to do so prevents it from asking this Court to hold the conditions invalid. *See* U.C.A. § 10-9a-801(1) ("No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable."). Further, "where the legislature has imposed a specific exhaustion requirement, a court will enforce it strictly. Strict enforcement of such a provision dictates that if a party fails to exhaust its administrative remedies prior to filing suit, the suit must be dismissed." *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, 184 P.3d 599 (Utah 2008).

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12 See, for example, the conditions stating that "[t]here shall be no drinking, loitering, or any illegal activity allowed in the parking lot or on adjacent property" and "[i]f security officers are required to turn people away from the establishment or the parking lot, these people shall be required to leave the premises." App.-Rec. 38-39, 43-44. Each of these conditions imposes an affirmative obligation on Appellant to monitor and control the activity within its parking lot. Furthermore, the "security plan" to which Appellant repeatedly refers requires Appellant to provide security guards within the parking lot for that very purpose.

Here, Appellant not only failed to appeal the Planning Commission's 2003 decision to impose the applicable conditions, Appellant specifically affirmed its willingness to be subject to those conditions in 2003 and again in 2005 when the Planning Commission considered revoking Appellant's CUP. App.-Rec. 40, 45. It cannot now claim that those conditions are somehow unreasonable--it has failed to exhaust its administrative remedies and the time for doing so is long past. *See* Midvale City Code § 17-3-13.A.2. ("The city council shall hear appeals of planning commission decisions with respect to a conditional use permit or small scale MPD. The appeal must be filed with the city recorder *within ten days of the planning commission's final action.*") (emphasis added).

D. The Record Contains Substantial Evidence Supporting the Decision to Revoke the CUP.

Since Appellant cannot now be heard to claim that the conditions imposed in conjunction with the issuance of its CUP are improper or unenforceable, the sole issue before this Court is whether the record contains substantial evidence to support the revocation of Appellant's CUP. "Substantial evidence is defined as that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley v. Payson City Corp.*, 70 P.3d 47, 52 (Utah 2003). Here, evidence was submitted to the Midvale Planning Commission in several forms: (1) sworn affidavits, App.-Rec. 49-64; (2) testimony from Midvale City police personnel, App.-Rec. 5-6; (3) written police reports documenting incidents of illegal activity occurring in the parking lot, R. at 351 (see internal tabs); (4) public statements regarding the impact of perceived violations on the neighboring community, App.-Rec. 13-23; (5) statements by

Mayor Joann Seghini, App.-Rec. 6; and (6) an acknowledgement by both counsel for Appellant and Appellant's owner that violations of the CUP had in fact occurred.[13] This evidence is more than adequate to convince a reasonable mind that the terms of conditional use had been violated, warranting a revocation.

While Appellant complains repeatedly in its brief that the hearings were conducted improperly (but made no such objection at the hearings themselves),[14] "Utah law has long recognized that technical rules of evidence need not be applied to proceedings before administrative agencies." *Taft v. Draper City*, 2006 UT App. 315 (Utah Ct. App. 2006). The caveat to this rule is that while hearsay evidence is admissible in proceedings before administrative agencies, findings of fact cannot be based *exclusively* on hearsay testimony. *Id*. Here, the Planning Commission's findings of fact were based on significant non-hearsay evidence and not exclusively on hearsay testimony. Accordingly, the Planning Commission's decision was proper.[15]

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13 *See* App.-Rec. 24, Tr. p. 91, where David Kifuri testified that up to 60 people were allowed to congregate in the parking lot to await entrance into the premises, in spite of conditions prohibiting loitering in the parking lot and stating that the security officers require anyone who cannot enter the premises to leave.

14 "A party who fails to make a clear and timely objection waives the right to raise the issue at the appellate level." *State v. Olsen*, 860 P.2d 332 (Utah 1993).

15 Appellant also claims, for the first time, that the trial court's order did not adequately set forth the basis for revocation of the CUP. Initially, it should be noted that the trial court was not a factfinder in this matter. Rather, the role of the trial court was to review the record, in an appellate capacity to determine whether the decision of the Planning Commission and the City Council was based on substantial evidence. Moreover, to the extent that the trial court should have included more particular findings of fact in its order, Appellant has waived its right to challenge the sufficient of those factual findings because it failed to raise the issue with the district court. *See Bergman v. Burke*, 2009 UT App. 146 (Utah Ct. App. 2009) (citing *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, 99 P.3d 801 (Utah 2004)) (finding that appellant waived his challenge to the sufficiency of the

CONCLUSION

For the foregoing reasons, Midvale City respectfully requests that this Court affirm the decisions of the Third Judicial District Court, Midvale City Council, and Midvale City Planning Commssion, finding that substantial evidence existed in the record to support the revocation of Appellant's CUP.

Respectfully submitted this _____ day of June, 2009

CHAPMAN AND CUTLER LLP

By:_____
H. Craig Hall
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Attorneys for Defendant

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district court's findings of fact because he failed to raise the issue with the district court).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPELLEE'S BRIEF** was served on the ___ day of June, 2009, by hand delivery, on the following:

W. Andrew McCullough
6885 South State Street, Suite 200
Midvale, UT 84047

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