

1980

# George S. Whitting et al v. Charles R. Clayton et al : Brief of Respondent

Utah Supreme Court

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Nick J. Colesides; Attorney for Plaintiffs-Appellants;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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GEORGE S. WHITTING, JUDITH  
SILVA and DANIEL SILVA,  
d/b/a JUDD'S FRONTIER CLUB,

Plaintiffs and  
Appellants

vs.

Case No. 16543

CHARLES R. CLAYTON, Mayor  
of Midvale City, et al.,  
and MIDVALE CITY, a  
municipal corporation,

Defendants and  
Respondents.

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BRIEF OF RESPONDENT

---

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Clerk Supreme Court, Utah

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IN THE SUPREME COURT  
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Defendants and  
Respondents.

Case No. 16543

---

BRIEF OF RESPONDENT

---

STATEMENT OF CASE

Appellants initiated this action in the Court of the Third Judicial District in and for Salt Lake County, Utah, praying for an Extraordinary Writ to review and reverse the ruling of the City Council of the City of Midvale, which revoked the business licenses held by Appellants.

DISPOSITION IN LOWER COURT

The Third District Court, in and for Salt Lake County, Utah, the Honorable James S. Sawaya, Judge, presiding, entered its Order affirming the action of the City Council of the City of Midvale.

## RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the District Court's Order which upheld the revocation of Appellants' business licenses.

## STATEMENT OF FACTS

Appellants, George S. Whiting, Judith Silva and Daniel Silva, made application to Midvale City, a municipal corporation, located in Salt Lake County, State of Utah, for a retail beer license, as partners in a partnership doing business under the name of JUDD'S FRONTIER CLUB on December 13, 1976 (TR 292). Said license was issued and receipt for the fees made December 17, 1976 (TR 291(1)). From the time of the opening of JUDD'S FRONTIER CLUB at 7980 South State Street, Midvale, Utah, numerous complaints had been made by citizens in the immediate vicinity of JUDD'S FRONTIER CLUB (TR 293, 294), the complaints being made by the citizens, including that of disturbing the peace, foul language, drunkenness, fights, parking in residential areas, littering, drag-racing, making public nuisance and destroying the residents' quiet enjoyment of their property (TR 292(2)(3)). As a result of the numerous complaints received by the Mayor, City Council and Police Department with respect to JUDD'S FRONTIER CLUB, Midvale City Corporation, by its Mayor, Boyd N. Twiggs, wrote a letter to George S. Whiting of JUDD'S FRONTIER CLUB, dated September 29, 1977, setting forth various

methods of resolving the complaints against JUDD'S FRONTIER CLUB (TR 20, 21). Again, on November 16, 1977, a letter was sent by Midvale City Corporation, through its Mayor, Boyd N. Twiggs, to George S. Whiting of JUDD'S FRONTIER CLUB, informing him of the many complaints in the area with respect to noise, fighting, lack of parking, broken glass and debris in street, and urinating in public. Appellants were informed at that time, that these problems had not existed prior to the opening of JUDD'S FRONTIER CLUB. The City again requested that remedial action be taken and that if the effectiveness of these measures would not solve the problem within thirty (30) days that Midvale City would consider suspending the licenses of Appellants (TR 18, 19). Thereafter, the Respondents, Midvale City Corporation, prepared a Petition and Notice of Charges (TR 282-288), and an Order to Show Cause, (TR 280-281), ordering the Appellants to appear before the Midvale City Council on the 26th day of April, 1978 at the hour of 7:00 P.M., then and there to show cause, if any they had, why their licenses should not be suspended or revoked for the reasons as set forth therein. Said Petition and Notice of Charges and Order to Show Cause was served personally upon Judith Silva for the Appellants and upon Richard Leedy, Esq., Attorney for Appellants, on the 13th day of April, 1978 (TR 160, 280, 288 (5)(6)). Thereafter, Richard J. Leedy, Attorney for Appellants,

brought suit in the Third Judicial District Court in and for Salt Lake County, State of Utah, seeking a Temporary Restraining Order against Respondents from holding said revocation hearing. The Order to Show Cause on the Temporary Restraining Order was initially set for April 21, 1978, but was continued to May 4, 1978, at which time, Marc Nick Mascaro appeared for the Respondents and Richard J. Leedy appeared for the Appellants. On May 8, 1978, David K. Winder, District Judge, denied Appellant's Motion for Temporary Restraining Order or Preliminary Injunction. Respondents, Midvale City, rescheduled the Order to Show Cause hearing for May 16, 1978 at the hour of 6:00 P.M., which said notice was served by mailing a NOTICE OF HEARING to Richard J. Leedy, attorney for Appellants, the 9th day of May, 1978 (TR 289).

Pursuant to the above NOTICE OF HEARING on May 16, 1978, Midvale City, a municipal corporation, brought the Order to Show Cause hearing against JUDD'S FRONTIER CLUB to consider the suspension or revocation of the club's licenses and regulatory licenses pursuant to Section 7-18, REVISED ORDINANCES OF MIDVALE CITY, 1951, and such other inherent powers as are vested in the City Council of Midvale City. Richard J. Leedy appeared as attorney for Appellants (TR 153, 154, 159, 164, 165-75), having accepted service for said hearings (TR 160); Judith Silva and Daniel Silva were also present (TR 156, 161). Marc Nick Mascaro, Midvale City Attorney,

appeared for Respondents. At that time, members of the Midvale City Council received evidence and took testimony from Respondents' witnesses. At the conclusion of Respondents' evidence, the Appellants presented no evidence (TR 267). Based upon the evidence and testimony taken at the hearing, the Midvale City Council, on May 30, 1978, at a special council meeting, at which time, Mr. Richard J. Leedy, attorney for Appellants, was present, entered its Findings of Fact and Order (TR 102-106), finding INTER ALIA, that since the opening of JUDD'S FRONTIER CLUB in Midvale City, the residents in the immediate vicinity of said club, had experiences fights, (TR 180, 187, 188, 227, 232, 249 and 260), excessive noise (TR 179, 182, 193, 206, 221, 223 and 232), extreme parking problems (TR 193, 199, 205, 214, 215, 218, 219, 227, 232, 260), broken beer bottles and litter (TR 179, 181, 182, 188, 200, 205, 206, 213, 215, 223, 227, 234, 247, 260, urinating in public (TR 181, 193, 194, 195, 198, 199, 201, 205, 207, 225, 227, 232, 234, 247, 260), vulgar and indecent language (TR 179, 181, 194, 206, 223, 227, 232, 260), intoxicated individuals (TR 220, 232, 233, 260), destruction of private property (TR 181, 193, 199, 205, 214, 221, 227), loss of rents and tenants in apartment units (TR 206, 214), loss of quiet enjoyment of private residences (TR 179, 193, 194, 201, 202, 213, 214, 220, 223, 224), diminished property values (TR 207, 224), personal injuries (TR 214, 227, 236), drag

racine (TR 182, 206), narcotics (TR 260). The City Council further found that said activities were carried on by the patrons of JUDD'S FRONTIER CLUB as evidenced by the testimony of neighbors and police officers and by the acknowledgements of patrons (TR 179, 181, 189, 191, 194, 200, 205, 210, 211, 225, 227, 234, 245 and 260). Testimony from long-time residents of the immediate vicinity of JUDD'S FRONTIER CLUB, with residency ranging from two and one-half (2-1/2) years to thirty five (35) years, indicated that the residents had had no prior problems of the nature above-described prior to the establishment and opening of JUDD'S FRONTIER CLUB (TR 179, 181, 192, 193, 198, 200, 205, 209, 213, 215, 217, 221, 223, 224, 226 and 234). Of the eight (8) residents called, six (6) testified that the above activities carried on by the patrons of JUDD'S FRONTIER CLUB took place at least three (3) to five (5) nights each week (TR 182, 194, 215, 217, 223, 228 and 262). Based upon the testimony and evidence of the above activities, the Midvale City Council found that said activities were contrary to the public peace and morals of the citizens of Midvale City, and therefore, in contravention of Section 7-18, MIDVALE CITY ORDINANCES, 1951, as revised (TR 102, 103). The City Council further found that the above-named activities were carried on with the knowledge of Appellants, who were sent letters September 29, 1977 (TR 20) and November 16, 1977

(TR 18), notifying Appellants of said conduct. That said activities constituted a nuisance pursuant to Section 7-2, MIDVALE CITY ORDINANCES, 1951, as revised, and that violations of Section 7-2 and 7-18 of the MIDVALE CITY ORDINANCES of conduct tending to affect the public peace and morals of Midvale City, was grounds for revocation of Appellant's licenses (TR 103, 104).

The City Council further found that Appellants were allowing public dancing without a license in violation of Section 4-25, MIDVALE CITY ORDINANCES, as revised (TR 104, 105), and that said violation was grounds for revocation under Section 7-18, MIDVALE CITY ORDINANCES. The City Council further found that on the nights when Appellants were allowing public dancing, beer was being sold in contravention of Section 7-10, MIDVALE CITY ORDINANCES, 1951, as revised, which violation was grounds for revocation pursuant to Section 7-18, MIDVALE CITY ORDINANCES (TR 105). The Council further found that based upon the testimony that the City was spending between one-third (1/3) and one-half (1/2) of its police force time patrolling JUDD'S FRONTIER CLUB which caused serious problems with respect to the protection of the property and residents in other parts of the city, (TR 214, 232, 233, 234, 235, 261, 262); that said conduct was contrary to the public peace and morals of Midvale City all in contravention of Section 7-18, MIDVALE CITY ORDINANCES, 1951, as revised, and was grounds for revocation of Appellants'



licenses (TR 103, 104). Based upon the above findings of the Midvale City Council, it voted on May 30, 1978, to revoke the business license, beer license and three (3) amusement device licenses of Appellants by a vote of three (3) for revoking all licenses, one abstaining and one absent (TR 105, 106).

Thereafter, Appellants, through their attorney, Richard J. Leedy, filed a Verified Complaint in the Third District Court, in and for Salt Lake County, State of Utah, challenging the revocation hearing held by Midvale City Council and the ordinances used therein (TR 2-8). Subsequent to various hearings, Appellants, through their attorney, Nick J. Collesides, filed a Verified Amended Complaint and Petition for Extraordinary Writ, dated January 26, 1979 (TR 82-86). Respondents filed an Answer to the Verified Amended Complaint and the Verified Complaint on January 31, 1979 (TR 90-94), and pursuant to the Order of Judge Bryant H. Croft, certified the record of Midvale City Corporation to the Third Judicial District Court (TR 100).

The matter came on for judicial review before the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, District Judge, presiding on the 12th day of June, 1979, pursuant to Rule 65(b) of the Utah Rules of Civil Procedure to review the action of Midvale City Council in revoking Appellant's licenses. Nick J. Collesides appeared for Appellants and

Marc Nick Mascaro appeared for Respondents.

On June 25, 1979, the Court reviewed the transcript of the City Council's hearing, the record on appeal, the Findings of Fact and Order of the Midvale City Council, heard oral arguments from both counsel and affirmed the action of the Midvale City Council (TR 128, 129). The Court thereafter on July 3, 1979, entered its Findings of Fact and Conclusions of Law (TR 137-142), finding inter alia; that the action of the City Council was within the statutory authority of that body to act; that the evidence given at the hearing was sufficient to support the action revoking the said licenses; that said action was based upon competent evidence; that the said hearing comported with all requirements of due process and equal protection; that the said ordinances were constitutional; and that the action of Midvale City Council was not arbitrary or capricious. Based upon its Findings of Fact and Conclusions of Law, the Court entered its Amended Order of Judgment dated July 3, 1979, affirming the action of the Midvale City Council (TR 143, 144).

On June 27, 1979, Appellants filed their Notice of Appeal (TR 130), and on August 20, 1979, Appellants filed an Amended Notice of Appeal from the Judgment entered July 3, 1979 (TR 304).

## POINT I

RESPONDENTS PROPERLY REVOKED THE BUSINESS  
LICENSES OF APPELLANTS AND SAID DECISION  
MUST STAND UNLESS SHOWN TO BE ARBITRARY  
AND CAPRICIOUS.

### STANDARD OF REVIEW

It is well established law that Courts will not attempt to control or interfere with the discretion of a municipal legislative body relative to the granting or denying of a license or a revocation or cancellation thereof. All reasonable doubts as to the correctness of the licensing authorities' rulings should be resolved in its favor. Accordingly, Courts will not question or set aside license or permit requirements or exactions, or the granting, denial or revocation of licenses or permits by municipal authorities, except for oppressiveness, discrimination or clear abuse of power or discretion. 9 McQuillin, Municipal Corporations, Section 26.93. This Honorable Court has consistently followed the general applicable law above stated.

The review power of the District Court over administrative actions is set forth in Rule 65(b)(2), Utah Rules of Civil Procedure, wherein relief in the form of an Extraordinary Writ is permitted in the following situations:

Where an inferior tribunal, Board or Officer exercising judicial function has exceeded its jurisdiction or abused its discretion.

In exercising that review power, this Court in the case of Anderson v. Utah County Board of County Commissioners, 589 P.2d 1214 (Utah 1979), held that the licensing of a business:

. . . should not be destroyed nor disrupted arbitrarily, nor without following fundamental standards of due process of law to guard against capricious or oppressive administrative action.

. . . the operating business should have its license renewed unless there is some reasonable basis for denying it. (emphasis added) Id. at 1216.

Because the record of the trial court and particularly its findings upon which the judgment is based, fail to demonstrate any reasonable ground for the refusal to renew the license, it is our conclusion that judgment should be and is hereby vacated. (emphasis added) Id. at 1217.

Thus, this Court has clearly established the standard that if there is any reasonable basis for the denial of a license, the decision of the administrative tribunal must stand.

This Court in the case of Peatross v. Board of Commissioners of Salt Lake County, 555 P.2d 281, (Utah 1976), spoke to the review power of the District Court over administrative actions.

. . . where the lower tribunal, acting within the scope of its authority, has conducted a hearing and arrived at a decision, the reviewing court will examine only the certified record; and will not interfere with matters of discretion or upset the actions of the lower tribunal except upon a showing that the tribunal acted in excess of its authority or in a manner so clearly outside reason that its

action must be deemed capricious and arbitrary. Id. at 284.

Thus, it is clear that the action by the administrative tribunal must stand unless the decision rendered is "so clearly outside reason that its action must be deemed capricious and arbitrary."

The Supreme Court of Nevada announced a similar standard of review in Kochendorfer v. Board of County Commissioners of Douglas County, 93 Nev. 419, 566 P.2d 1131 (1977). In that case, the Court quashed a Writ of Mandamus and reinstated the order of the Board revoking a six-month temporary liquor license on the basis of excessive noise complaints. The Court therein held that the burden of proof was on the applicant to show that the Board had acted arbitrarily and capriciously.

Similarly in Webster v. Board of County Commissioners of City of Adams, Colo. App. 539 P.2d 511 (1975), the Colorado Supreme Court explained that the decision of an administrative board is arbitrary and capricious where it is based upon evidence from which reasonable men, fairly and honestly considering the evidence, could only reach a conclusion contrary to that reached by the board.

Sultan Turkish Bath, Inc. v. Board of Police Commissioners of the City of Los Angeles, 169 Cal. App. 2d 188, 337 P.2d 203 (1959), is in accord. The Court stated that the City's Board of Police Commissioners, acting as a quasi

judicial body, and was empowered to make final adjudications of fact with regard to matters properly submitted to it. A Court in reviewing such decision, has no right to judge the value of the evidence or weigh it. The Court is only to decide if there is substantial evidence to support the findings and should disregard all evidence contrary to those findings.

This Court, in speaking of its review power of District Courts, has consistently held that where there is any reasonable basis in the evidence to support the findings of a trial court, the findings will not be overturned. In Holman v. Sorenson, 556 P.2d 499 (Utah 1976), this Court stated:

The policy of this court has been, after reviewing the record, not to disturb the trial court's findings if there is any reasonable basis and evidence to support it. Appellants carry out the burden of showing from the record that the lower court erred.

See also First Western Fidelity v. Gibbons & Reed, 27 Utah 2d 1, 492 P.2d. 132 (1971).

The recent case of Hanover Ltd v. Fields, 568 P.2d 751 (Utah 1977), explains the standard which Appellants must meet if the trial Judge's findings are to be reversed. The Court stated:

In regard to the remaining assertions of error, this court is constrained to look at the whole of the evidence in the light favorable to the trial court's findings, including any fair inferences to be drawn from the evidence and all the circumstances

shown. The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary. (emphasis added) Id. at 753.

Even when the parties to an action each produce evidence supporting its action, this Court has consistently refused to reverse the trial Court unless the evidence is so convincing that reasonable men could not differ as to the results which the evidence dictated. Koesling v. Basamaklis, 539 P.2d 1043 (Utah 1975).

Thus, it is clear that the trial Court will not be overturned if there is any reasonable basis in the evidence to support the findings. At the same time, the Appellant must show that "all reasonable minds would be persuaded to the contrary" before the lower Court can be reversed.

The relief the Appellants seek on appeal is a Restraining Order against the Respondents "until the Complaint on file with the District Court has been heard on its merits". It would seem that the Appellants in essence, are again asking for an evidentiary hearing or trial de novo in the District Court. This Court in Peatross, supra, held:

The standard rule is that the appellate jurisdiction is the authority to review the actions or judgments of an inferior tribunal upon the record made in that tribunal, and to affirm, modify or reverse such action or judgment.

. . . where the Defendant Board had conducted a hearing that comported with due process requirements, and where there is no express statutory grant of a trial de novo, the

plaintiff was mistaken in her insistence that she was entitled to one as a matter of right. 555 P.2d at 284.

The Court went on to indicate that because the issuance of an Extraordinary Writ was in the nature of a proceeding in equity that the trial Court could take evidence if it thought that the interest of justice so required. See also Denver & Rio Grande Railroad v. Central Weber Sewer Improvement District, 4 Ut. 2d 105, 287 P.2d 884 (1955).

#### THE EVIDENCE

In this matter, there is clearly a reasonable basis in the evidence to support the findings of the trial court and the findings of the Midvale City Council, Respondent's herein. In the hearing before the Midvale City Council held May 16, 1978, the City produced eight (8) property owners who resided in the immediate vicinity of said business. Those residents, who had lived in the area from two and a half (2-1/2) to thirty five (35) years, testified that prior to the commencement of business by the Appellants, there had been no problems of the nature which they were experiencing. (See Statement of Facts, page 6) These residents testified of fights, noise, parking problems, litter, urinating in public, foul language, intoxication, destruction of property, loss of rents, loss of tenants, loss of the quiet enjoyment and use of their property, diminished property values, personal injuries and drag-racing. (See Statement of Facts, pages 5 and 6)



The City Council and District Court properly found that these actions were contrary to the public peace and morals of the citizens of Midvale City (TR 103, 138). The Midvale City Council and District Court further found, based upon the above testimony of these injurious activities, that they constituted a nuisance pursuant to Midvale City Ordinance 7-2 (1951, as revised), (TR 104, 140). The Respondents and the District Court further found that the Appellants were aware of the activities of their patrons and were notified on several occasions of these problems (TR 104, 140).

At the hearing, the City further produced testimony from two (2) police officers who had been with the Midvale City Police Department for ten (10) years and six (6) years respectively, who testified that the Appellants were allowing dancing, open to the public, and that said dancing was being carried on without a proper license as required by Midvale City (TR 104, 141). Said officers further testified and the City Council and District Court found that liquor was being sold during the time that public dancing was being carried on in Appellants' business location, which is in violation of Midvale City ordinances (TR 105, 141).

The City Council heard substantial testimony that the injurious activities set forth above were being carried on by the patrons of JUDD'S FRONTIER CLUB (see Statement of Facts, pages 6 and 7), and further, that the Midvale City Police Department was spending an inordinate amount of time

policing the Appellants' business all to the detriment of the rest of the citizens of Midvale City (see Statement of Facts, page 7), and the District Court so found (TR 141).

Appellants would indicate that the Midvale City Council acted arbitrarily and capriciously. However, the record as set forth hereinabove, is replete with injurious activities which constitute conduct contrary to the public peace and morals of Midvale City and in violation of the ordinances therein named.

Appellants elected at the public hearing on May 16, 1978, not to introduce any controverting evidence (TR 140, 267). Their attempt to present their entire evidence at the District Court level was improper. In Strader v. Kansas Public Employees Retirement System, 206 Kan. 392, 479 P.2d 860 (1971), the Court held that the Plaintiff could not secure independent review of an administrative proceeding:

We would suggest that a party appearing before an administrative body cannot produce his evidence piecemeal. He cannot produce part of his evidence before an administrative agency and then produce the balance on judicial review. Id. at 868.

To allow the Appellants to have an evidentiary hearing or trial de novo would be contrary to law and justice in this matter. The Midvale City Council had the benefit of observing the witnesses during their testimony and saw the evidence produced. They found sufficient evidence to revoke Appellant's licenses for violation of Section 7-18, 7-2, 4-25 and 7-10, Midvale City Ordinances, (1951, as revised). The

District Court had the benefit of the certified record on appeal and reviewed the same. That Court, on review, found sufficient evidence to affirm the revocation of Appellants' business licenses and found that said evidence was competent and neither arbitrary nor capricious (TR 141).

Appellants would have this Honorable Court believe that the trial Court did not rule on every issue raised in its Verified Complaint and Amended Verified Complaint. However, the Findings of Fact and Conclusions of Law, Order and Amended Order of Judgment entered by the trial Court found upon each and every issue raised by Appellants on review (TR 128, 129, 137, 144). Based upon the findings made by Midvale City Council and the trial Court, this Court should uphold the decision of the District Court and lower tribunal.

## POINT II

### RESPONDENTS REVOKED THE APPELLANTS' BUSINESS LICENSE UNDER PROPER AUTHORITY.

Appellants contend that, to halt the raucous activities at and around JUDD'S FRONTIER CLUB, Respondents were required to bring an action for the abatement of a nuisance, an action which, they state, is "exclusively within the province of the district and subject to the Rules of the Civil Procedure" (sic).

This reasoning is erroneous on several points. First,

assuming arguendo that the City of Midvale were required to abate the nuisance rather than to revoke the license, the Utah State Code does indeed give a municipality such power:

[Municipalities] may declare what shall be a nuisance, and abate same, and impose fines upon persons who may create, continue or suffer nuisances to exist.

Utah Code Annotated, §10-8-60 (emphasis added).

McQuillin is in accord, contrary to Appellants' assertions.

The section quoted in portion by Appellants (Appellant's Brief, p. 7) reads in full as follows:

§ 24.64. --- To declare particular thing or business a nuisance.

The power of a municipal corporation to define, declare, and deal with nuisances is restricted, the view has been taken, to defining, declaring what constitutes, and dealing with nuisances in general or with a class of things as nuisances, and is not a power to declare a particular thing, such as a building, a nuisance. A municipal legislative body's pronouncement that a particular industry, e.g., an oil refinery, is a nuisance, where neither charter nor ordinance makes it a nuisance, is not a legislative determination but an unauthorized judicial pronouncement; it is a counterpart of the case where an ordinance provides that no one shall carry on a certain business in the absence of a permit without specifying any standard for the issuance of the permit. Under a general ordinance setting a standard of uniform application, however, a city council or a board of health acting in an administrative capacity or as a fact-finding body can find, declare and order to be abated a particular business, activity, or thing as a nuisance. Also, under a general ordinance there may be a resolution directing abatement of a specified nuisance, and such a resolution is not void as analogous to an ordinance inflicting a penalty on a particular person. Moreover, it has been ruled that a city council may be by resolution declare a particular nuisance.

such as a gambling or bawdy house, to be a nuisance in fact and order it to be closed without any hearing whatever. A municipality can provide that a particular business ordinarily lawful and unobjectionable, e.g., a hotel, cannot operate after it has been found by a court of competent jurisdiction to be operated in a manner injurious or dangerous to the public morals, health, or safety. But such an adjudication must have been made by a court with jurisdiction in the premises.

6 McQuillan, Municipal Corporations, § 24.64 (3rd Ed. 1964) (emphasis added; footnotes omitted).

The later statement, upon which Appellant so strongly relies (that a business may be declared a nuisance after a finding by a Court of competent jurisdiction in the premises) clearly means, when read in the context of the entire section, only that if a Court finds a business to be a nuisance, a municipality may follow suit. It does not, as Appellant contends, state that a judicial hearing is required before a municipality may revoke a license on nuisance grounds.

Section 76-10-808 of the Utah State Criminal Code, to which Appellant refers in his brief, does provide for the abatement of nuisances, but it is by no means the exclusive vehicle for doing so. That section merely empowers the state attorney general, county attorney or city attorney to bring an action, either civil or criminal, for the abatement of a nuisance or install other appropriate penalties. Section 78-38-1, to which Appellant also refers, is even further off point. It merely provides that a private party, whose personal enjoyment is affected by a nuisance, may sue for

an abatement.

More importantly, however, Appellant, in his labored attempt to bring the City Council's action within the purview of nuisance abatement, fails to realize that the revocation of a license and the abatement of a nuisance are not mutually exclusive remedies.

The Courts, have, on numerous occasions, upheld the power of municipalities to refuse or revoke business licenses on nuisance grounds, as in Wallace v. Mayor of the City of Reno, 27 Nev. 71, 73 P. 528 (1903). There the City Council's revocation of a retail liquor dealer's license was upheld where there was reason to believe the business constituted a nuisance, a menace to public health, and a detriment to peace or morals.

More recently, in Kochendorfer v. Board of County Commissioners of Douglas County, *supra*, the Court of that state quashed a Writ of Mandamus and reinstated the order of the board revoking a six-month temporary liquor license on the basis of noise complaints.

Similarly, Sunset Amusement Company v. Board of Police Commissioners of the City of Los Angeles, 7 Cal. 3rd 64, 101 Cal. Rptr. 768, 496 P.2d 840 (1972), concerned the propriety of a municipality refusing to renew a business license where such business created a public nuisance. Reviewing the board's findings that the business in question caused considerable disruption in the vicinity of the roller rink,

including fights, a high crime incidence, public drunkenness and a general law enforcement problem in the area, the Court upheld the municipality's denial of a license renewal.

The Court reached the same conclusion in Sultan Turkish Bath, Inc. v. Board of Police Commissioners of the City of Los Angeles, 169 Cal. App.2d 188, 337 P.2d 203 (1959), sustaining the board's business license revocation where the establishment created a public nuisance.

Also on point is The Grog House, Inc., v. Oregon Liquor Control Commission, 12 Or. App. 426, 507 P.2d 419, 423 (1973), where the Court upheld the commission's refusal to renew a liquor license, noting evidence of "disorderly, illegal operations over a period of several months which grossly disturbed a neighborhood."

It is ironic that Appellant places so much reliance on McQuillin to bolster his position; for that authority himself states:

A license to carry on a business which affects health, safety, morals or the public welfare may be revoked by virtue of the police power. Where the granting of a license or permit forms a part of the police system of the state, as in the sale of intoxicating liquors, the authority which grants the license always retains the power to revoke it. . . .

9 McQuillin, Municipal Corporations, § 26.83 (3rd ed. 1964).

That the Midvale City Council has such licensing power is clear under Utah Code Annotated, § 10-13-6:

10-13-6. License of specified businesses.-- They may license, tax, regulate, suppress and prohibit



billiards, pool, bagatelle, pigeonhole and any other table or implement kept or used for similar purposes; license and regulate hotel and tavern keepers, eating houses, restaurants, theaters, picture shows, merchants, grocers, peddlers, butchers, slaughterers, druggists, apothecaries and photographers, and any business within the town; may prohibit the manufacturing, selling, giving away or disposition in any manner of any intoxicating liquor contrary to law, or the maintaining of places where such liquors are being kept for such purpose, or the obtaining of such liquors by fraud from any practicing physician or druggist, or in any manner aiding in the selling, giving away, manufacturing, keeping, distributing or disposition of such intoxicating liquor contrary to law.

(emphasis added).

Appellants' position is confusing and untenable. While they state in the first section of their brief that the City Council, who concededly granted their business license, was required to bring an action for an abatement of a nuisance, they later state in another section that "[t]here is little question that the revocation of a liquor license itself ordinarily rests in the studied discretion of the body which has been delegated such power" (Appellants' Brief, p. 10). On the same page, they also state that: "a business license may be revoked by the issuing authority for legal cause; with that Appellants do not quarrel."

As the cases clearly show, the City Council acted within proper authority when, in the interest of public welfare, peace and morals, it revoked the Appellants' business licenses.



POINT III

WHERE THE MIDVALE CITY COUNCIL CONDUCTED A HEARING COMPORTING WITH DUE PROCESS AND HEARD EVIDENCE SUFFICIENT TO DETERMINE THAT PLAINTIFF WAS IN VIOLATION OF SECTION 7-2, 7-10, 4-35 OF THE REVISED ORDINANCES OF MIDVALE CITY (1951), THE SAID CITY COUNCIL WAS AUTHORIZED PURSUANT TO SECTION 7-18 OF SAID ORDINANCE AND SECTIONS 10-13-6 AND 32-4-17, UTAH CODE ANNOTATED (1953) AS AMENDED, TO REVOKE PLAINTIFFS' BUSINESS LICENSES.

Appellants contend that the evidence before the City Council established insufficient grounds for revocation and that, as a matter of due process, he was entitled to a trial de novo before the District Court. Appellants base such contention, in part, on the argument that the three (3) weeks which they were given to prepare their case before the Midvale City Council hearing of May 16, 1978 were inadequate.

The trial Court found that the Defendants were given notice of an Order to Show Cause hearing for April 26, 1978, pursuant to a Petition and Notice of Charges dated April 12, 1978, which Order to Show Cause and Petition and Notice of Charges was served upon Judith Silva, a partner of Appellants, and Richard J. Leedy, Esq., attorney for Appellants, on April 13, 1978 (TR 280, 288 (5 and 6), 160). After a

continuance of the original setting, a subsequent Notice of Hearing was served upon Richard J. Leedy, attorney for Appellants, on May 9, 1978, for a hearing to be had May 16, 1978 (TR 289). The Court further found that the hearing held by Midvale City Council on May 16, 1978, comported in all respects with those requirements of due process and equal protection under the constitution; that Appellants were represented by counsel, Richard J. Leedy, Esq., and that two (2) members of the partnership, namely Judith Silva and Daniel Silva, were present at said hearing (TR 138, 140). The trial Court further found that a full and complete hearing was had on the matter before the Midvale City Council, but that the Appellants elected not to introduce any controverting evidence at that time (TR 138, 140). The trial Court further found that after said hearing, the Midvale City Council took the matter under advisement and on May 30, 1978, entered its decision revoking the business license, Class B Beer License and three (3) amusement device licenses of Appellants, at which time, Richard J. Leedy, Esq., attorney for Appellants, was present (TR 138).

In The Grog House, supra, the Court held that one-and-one half (1-1/2) days were sufficient preparation time where "the evidence against petitioners was overwhelming testimony concerning disorderly, illegal operations over a period of several months which grossly disturbed a neighborhood." 507 P.2d at 423. The Court noted that the evidence before the commission

showed that the Appellant had been repeatedly warned by police of the shortcomings of his establishment and that "this was the kind of evidence, if there had been contra evidence, that would have been readily rebuttable." Id.

In this matter, the trial Court concluded as a matter of law that the Respondents conducted a hearing comporting in all respects with due process and equal protection; that the hearing was held within the scope of the Respondent's authority; and that the tribunal acted upon competent and sufficient evidence and that their actions were neither arbitrary nor capricious (TR 140, 141). The trial Court further upheld the constitutionality of the ordinances used in the revocation, 7-18, 7-2 and 4-25 (TR 141). Therefore, the decision should stand. See Peatross, supra.

The Supreme Court of Nevada in the Kochendorfer, supra, noting that the central elements of due process are notice and hearing appropriate to the case, found that any due process rights of Plaintiff's which might have been violated by a first hearing without notice were amply protected by a second hearing within a ten-day notice, the presence of counsel and an opportunity to be heard. The Court also found that there was sufficient evidence to support the board's revocation based on maintenance of a public nuisance and the diminished value of adjoining property.

Appellants also maintain that the City Council's dual function as Prosecutor and Judge is violative of due process.

Nevertheless, the Court, in Palm Gardens, Inc. v. Oregon Liquor Control Commission, 15 Or. App. 20, 514 P.2d 888 (1973), rejected such a challenge:

The case law, both federal and state, generally rejects the idea that the combination with judging or prosecuting or investigating functions is a denial of due process . . .

Id. at 895, quoting 2 Davis, Administrative Law, Section 13.02 (1958).

The combination of prosecutory and adjudicatory functions in a single agency is not considered to be a violation of due process guarantees.

Id. quoting 1 Cooper, State Administrative Law, 339 (1965).

In the case at bar, the City Council is authorized by Utah Code Annotated, 10-13-6 and 32-4-17, (1953) as amended, to license, regulate or prohibit the sale of intoxicating liquor and beer. Those sections state:

10-13-6. License of specified businesses.--- They may license, tax, regulate, suppress and prohibit billiards, pool, bagatelle, pigeonhole, and any other table or implement kept or used for similar purposes; license and regulate hotel and tavern keepers, eating houses, restaurants, theaters, picture shows, merchants, grocers, peddlers, butchers, slaughterers, druggists, apothecaries and photographers, and any business within the town; may prohibit the manufacturing, selling, giving away or disposition in any manner of any intoxicating liquor contrary to law, or the maintaining of places where such liquors are being kept for such purpose, or the obtaining of such liquors by fraud from any practicing physician or druggist, or in any manner aiding in the selling, giving away, manufacturing, keeping, distributing or disposition of such intoxicating liquor contrary to law.

32-4-17. Retail licenses-Light beer-Sale to minors. (a) Cities and towns within their corporate limits, and counties outside of incorporated cities and towns shall have power to license, tax, regulate or prohibit the sale of light beer, at retail, in bottles or draft; provided, that no such licenses shall be granted to sell beer in any dance hall, theater or in the proximity of any church or school. The commission granting the license shall have the authority to determine in each case, what shall constitute proximity. (b) In addition to other penalties which are provided in this act, the license of any person to sell light beer shall either be revoked or suspended for a period of not less than thirty (30) days, upon conviction of selling or furnishing beer to a minor.

(emphasis added).

Section 7-18 of the Midvale Revised Ordinances, (1951), authorizes the City Council to revoke licenses when "necessary for the protection of public peace or morals," and states that "any license shall be revoked if the . . . licensee . . . fails to comply with the ordinances of Midvale City . . ."

The trial Court found that, as a matter of fact, Appellants' business has experienced "traffic and parking problems, fights, noise, accidents, obscene conduct, profanity, trespass and other injurious activities" and that said injurious activities were contrary to the public peace and morals of Midvale City (TR 138-141).

The Appellants in the instance case were afforded notice and a hearing at which the Council heard evidence sufficient to conclude that JUDD'S FRONTIER CLUB created a traffic problem and a crime problem injurious to the public peace or morals; that the club constituted a nuisance within the

meaning of Section 7-2 of the Midvale City Ordinances Revised, (1951) in that laws or ordinances were violated by its patrons tending to affect the public health, peace, or morals; and that the club was in violation of Sections 7-2, 7-10 and 4-34 of the Midvale City Ordinances Revised, (1951), by virtue of its allowing public dancing without a license and selling beer to patrons while dancing was in progress (TR 149-142).

Since the Council's actions were in compliance with due process and based on substantial evidence, their license revocation must be upheld.

#### POINT IV

APPELLANTS HAVE NO STANDING TO ASSERT THAT SECTION 7-18 OF THE REVISED ORDINANCES IS UNCONSTITUTIONAL IN THAT IT PERMITS THE REVOCATION OF A BUSINESS LICENSE WITHOUT A HEARING.

Section 7-18 of the Revised Ordinances of Midvale City, (1951), sets forth proceedings and grounds for liquor license application, rejection, suspension, and revocation of such licenses:

Section 7-18. The City Council may with or without a hearing at its discretion, when in their opinion it is necessary for the protection of public peace or morals, refuse to grant any license applied for and may revoke any license at any time and in no case need any cause be stated. No license shall be issued and license issued shall

be revoked if the applicant or licensee shall not possess or shall cease to possess all of the qualifications required by the Liquor Control Act and by the ordinances of Midvale City or fails to comply with the ordinances of Midvale City or rules, regulations and orders of the Board of Health relating to health matters.

Appellants contend that, because the ordinance permits revocation of a license without a hearing, it is an unconstitutional violation of due process.

Appellants have no standing to make such an assertion. They received a hearing before the City Council prior to the revocation of their license and were represented by counsel at that time:

An asserted violation of due process can be urged only by those who claim an impairment of their rights in the application of the statute to them.

Baird v. State, 574 P.2d 713, 717 (Utah 1978).

In Pride Club, Inc. v. State, 25 Utah 2d 333, 481 P.2d 669 (1971), Plaintiffs sought to challenge the constitutionality of a statute requiring permission of local authorities before a liquor license could be granted. Since Plaintiffs did not allege in their Complaint that any local authorities had refused to give consent for the Liquor Control Commission to issue them licenses, the Court held that they had no standing:

Before a party may attack the constitutionality of a statute, he must be adversely affected by that very statute. The court will not listen to an objection made as to the constitutionality of an act by

parties whose rights are not specifically affected.

Id. at 671.

Similarly, in Strader v. Kansas Public Employees Retirement System, supra, the Court dismissed a claim that the Retirement System violated due process in that it did not provide for the subpoenaing of witnesses where there was no indication that the Appellant intended to present evidence in any form other than oral testimony on his own behalf.

Constitutionality of legislation or of due process before an administrative body will be considered by the courts only where necessarily involved and such constitutionality may not be questioned by one not affected by its operation.

479 P.2d at 862.

#### POINT V

ASSUMING ARGUENDO THAT APPELLANTS DO HAVE  
STANDING, SECTION 7-18 OF THE MIDVALE CITY  
ORDINANCES IS NOT AN UNCONSTITUTIONAL VIOLATION  
OF DUE PROCESS BY VIRTUE OF THAT ORDINANCE  
ALLOWING A LICENSE REVOCATION BY THE CITY  
COUNCIL WITH OR WITHOUT A HEARING.

McQuillin states that:

[T]here is no contract or vested right or property in a license or permit as against the power of the state or a municipality to revoke it for cause or in the exercise of the police power to protect the public health, safety, morals or welfare . . .



Especially with respect to licenses or permits for those business, activities or things potentially or frequently unlawful, such as the sale of intoxicating liquors, there is no vested interest in a license or permit or in its continuance, and it can be revoked at the pleasure of the municipality, provided the revocation is not arbitrary, unreasonable, or discriminatory.

McQuillin, supra, § 26.81

A majority of jurisdictions agree that the revocation of a liquor license without notice or hearing does not violate due process. Annot., "Right to a hearing before revocation or suspension of liquor license," 35 A.L.R. 2d 1067 (1945). It has long been held that such a license does not constitute a contractual or vested right, but a mere permit to do what would otherwise be unlawful. Thus in Wallace v. Mayor of the City of Reno, supra, the City Council's revocation of a retail liquor dealer's license pursuant to an ordinance allowing such revocation without notice where there was reason to believe the business constituted a nuisance, a menace to public health or a detriment to peace or morals was held not to be repugnant to the state or federal constitution.

In Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940), the Court ruled that a statute giving the State Revenue Bureau Liquor Control Division the power to cancel a license for stated causes without notice or hearing was not an unconstitutional deprivation of property rights without due process, since the selling of liquor was not a

property right, but a revocable privilege and no right to a hearing attached thereto unless so provided by statute. As late as 1969, in an appeal from an order of sale of a liquor license to pay indebtedness, the same Court ruled that, though a liquor license was an attachable property right vis a vis a third party, there was no vested right to such license as against the state. Cantrell v. Carnutt, 80 N.M. 519, 458 P.2d 594 (1969).

In State Board of Equalization of California v. The Superior Court in and for the City and County of San Francisco, 5 Cal. App. 2d 374, 42 P.2d 1075 (1935), in an appeal from an injunction granted to tavern owners against the board, the Court held that the board's independent investigation required no notice or hearing when it possessed facts sufficient to support the conclusion that grounds for revocation existed, since a license was not a property right within the meaning of the due process clause.

Likewise, the Colorado Court, while acknowledging a property right in a liquor license, terms such right a relatively restricted one subject to the regulations under which it is issued. New Safari Lounge, Inc. v. The City of Colorado Springs, 567 P.2d 372 (Colo. 1977). In considering the summary suspension of a liquor license for violation of laws regarding nude entertainment, the court noted that the purpose of liquor regulatory laws was to allow the sale of alcoholic beverages while protecting the public health,

safety, and welfare and that a licensee's rights relative to the state were narrow, confined and transitory. Therefore, a summary suspension followed by a hearing at a later time did not violate due process.

Similarly, in the instant case, the general due process requirement of notice and hearing prior to a deprivation of a "property right," does not exist for the revocation of a mere privilege, especially in the light of the fact that independent investigation revealed facts sufficient to support the revocation. (State Board of Equalization of California, supra). Moreover, JUDD'S FRONTIER CLUB had been put on notice repeatedly that their operation constituted a nuisance in violation of Section 7-2 and 7-18 of the Revised Ordinances of Midvale City, and Notice and a hearing was had prior to the revocation (TR 18-21, 9-17, 289, 149-303). Thus Ordinance 7-18 is neither unconstitutional on its face, nor as applied to the instant situation.

#### POINT VI

SECTION 7-2 OF THE REVISED ORDINANCES OF  
MIDVALE CITY, DEFINING A NUISANCE SO AS  
TO INCLUDE ACTS OF AN ESTABLISHMENT'S  
PATRONS DOES NOT VIOLATE DUE PROCESS OR  
EQUAL PROTECTION.

Section 7-2 of the Revised Ordinances of Midvale City,  
1951, defines a nuisance:

Sec. 7-2. The words and phrases used in this ordinance shall have the meanings specified in the State Liquor Control Act unless a different meaning is clearly evident.

Nuisances:

Any room, house, building, structure or other place or licensed premises where: (a) alcoholic beverages are manufactured, sold, kept, bartered, stored, given away or used, or where persons resort for drinking alcoholic beverages contrary to the Liquor Control Act of Utah or this ordinance, or where (b) Beer is sold, dispensed, or consumed between the hours of one o'clock a.m. and seven o'clock a.m. or where (c) Minors are permitted to purchase or drink beer or to loiter about or are employed thereon, or where (d) Laws or ordinances are violated by licensees, agents, or patrons with the consent or knowledge of licensees upon such premises which tend to affect the public health, peace or morals are hereby declared to be nuisances. (emphasis added)

The Courts in many jurisdictions, including Utah, are willing to find the creating of a nuisance by virtue of the acts of those other than the licensee or his agents under certain circumstances. The Supreme Court of Utah has affirmed an injunction against a business for the creation of a nuisance by activities of the business's patrons. In Wade v. Fuller, 12 Utah 2d 299, 365 P.2d 802 (1961), the operators of a drive-in restaurant appealed an injunction issued against them. The Court, reviewing the evidence that the business's clientele created loud and disturbing noises in the residential area, used vulgar language, caused traffic problems, and urinated on neighboring premises, held that the operators could be found reasonably responsible for

creating a nuisance where they attracted such a clientele.

Sunset Amusement Company v. Board of Police Commissioners of the City of Los Angeles, supra, involved an appeal from a mandamus proceeding which upheld the board's denial of an application to renew the operating permit of a roller rink. The Court affirmed the propriety of a municipality revoking a business license where such business created a public nuisance where such nuisance was caused by the acts of the establishment's patrons. The court noted that while a business cannot, in general, be held responsible for governing conditions beyond its control, it concluded that under certain circumstances such as those presented, a business catering to the general public would be held accountable for the unlawful or immoral behavior of its patrons both on and off its premises, especially where steps could have been taken by the licensee to help alleviate the problem.

Similarly, in Sultan Turkish Bath, Inc. v. Board of Police Commissioners of the City of Los Angeles, supra, the Court considered a licensee's liability for patron conduct in a license revocation proceeding. The board was sustained in its findings that the establishment created a public nuisance by permitting or failing to control patron conduct which was indecent, lewd and prohibited by law. Police testimony as to their arrest of these patrons and police observation of such indecent conduct was held sufficient

evidence to uphold the board's findings and its revocation of the business's operating license.

In an earlier California case, evidence was held sufficient to sustain a criminal conviction for violation of a statute prohibiting the conducting of a beer parlor in such a manner as to create a public nuisance. People v. Montoya, 137 Cal. App. 784, 28 P.2d 101 (1933). The Court ruled that the presence of disorderly crowds in the vicinity of Defendant's establishment and their disruption of the quiet neighborhood constituted a violation of the statute.

The law is thus clear: Where the client conduct is not outside the control of the business, Sunset Amusement Co., supra, and where the business caters to the public, continued noise and disruption in the vicinity has been held to be within the business's control, People v. Montoya, supra, then the business may be held responsible Wade v. Fuller, supra. In view of the repeated acts constituting a nuisance by JUDD'S patrons, then it is pursuant to a long and respected line of authority that JUDD'S may be held liable for the violation of Midvale City Ordinance, Section 7-2.

#### POINT VII

SECTION 7-2 OF THE REVISED ORDINANCES OF  
MIDVALE CITY, DEFINING A NUISANCE, DOES NOT  
VIOLATE DUE PROCESS BY INSUFFICIENT DEFINITENESS  
OR FAILURE TO GIVE NOTICE AS TO THE CONDUCT  
PROHIBITED.

The Supreme Court of Utah ruled on the constitutionality of a Salt Lake City loitering ordinance in Salt Lake City v. Savage, 541 P.2d 1035 (Utah, 1975), cert. denied, 425 U.S. 915. Holding that the ordinance was not unconstitutionally vague, the Court noted that legislative enactments are presumatively valid and constitutional and are not to be struck down unless shown beyond a reasonable doubt to be incompatible with some particular constitutional provision and that the burden of such a showing rests with the party challenging the enactment.

In Sunset Amusement Co. v. The Board of Police Commissioners of the City of Los Angeles, supra, the city ordinance authorizing denial of an operating license to an establishment if such a business would be detrimental to the peace, health, safety, convenience, good morals, or general welfare of the public was held to provide adequate standards and was not unconstitutionally vague. The Court observed that in drafting its ordinances, a municipality cannot be expected to isolate and specify all conduct proscribed.

Similarly, in Sultan Turkish Bath, Inc. v. Board of Police Commissioners of the City of Los Angeles, supra, the Court ruled that an ordinance providing for license revocation on evidence that the business was carried on in an unlawful, improper, or irregular manner was a sufficiently clear and ascertainable standard, and not in violation of

due process.

The Utah Supreme Court held void for vagueness a criminal statute requiring registration with the State Industrial Commission of a prospective worker, where his employer was being struck by any "nationally recognized union." State v. Packard, 122 Utah 369, 250 P.2d 561 (1952). In that case, the Court announced its standards for reviewing such a constitutional challenge. The Court asserted that a statute would not be held void for uncertainty if it might be given any sensible practical effect. A statute which forbids or requires an act in such vague terms that men of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. However, the Court noted that due to the limitations of language, neither absolute exactness of expression nor complete precision of meaning are expected. Here, where a criminal penalty was exacted, the Court was unwilling to force a prospective worker to judge the national recognition of any particular striking union.

The ordinance in question mentions violations "which tend to affect the public health, peace or morals." Surely it is within the common understanding (and does not require unnecessary guesswork) that such patron conduct as fights, noise, accidents, obscene conduct, profanity and trespass (requiring a substantial burden placed on Midvale City's police force) constitute at the very least an infringement on



public health and peace.

#### POINT VIII

THE CITY COUNCIL'S CHARGE AND FINDING THAT APPELLANT WAS IN VIOLATION OF SECTION 4-25 OF THE REVISED ORDINANCES OF MIDVALE CITY, REQUIRING LICENSING OF A DANCE HALL, WAS NOT IN VIOLATION OF APPELLANT'S DUE PROCESS OR EQUAL PROTECTION RIGHTS BY REASON OF THEIR LACK OF NOTICE OR BY DISCRIMINATORY ENFORCEMENT.

The application for and receipt of a license puts a licensee on notice of regulations thereto. Chroma Corporation v. County of Adams, 36 Colo App. 345, 543 P.2d 83 (1975). The California Court in Sunset Amusement Co. v. Board of Police Commissioners of the City of Los Angeles, *supra*, rejected the Appellant's constitutional challenge with regard to his notice of municipal ordinances. The Court ruled that a business owner is charged with notice of municipal code sections regarding regulation of his business or grounds for license denial.

In the case of Condas v. Board of Salt Lake County Commissioners, 5 Utah 2d 1, 295 P.2d 829 (1956), which was an action for declaratory judgment to construe a county ordinance defining a nuisance as any building where dancing is permitted on premises licensed to sell beer, the Utah Court held that the statute was not invalid as to holders

of beer and cabaret licenses who allegedly were led to believe that dancing was permissible by failure of the commissioners to complain.

Earl and Sons Tire Center, Inc. v. City of Boulder Board of Appeals, 559 P.2d 236 (Colo. 1977), involved the refusal by the chief of the City's Bureau of Fire Prevention to grant Plaintiff an exception to the city's sprinkler requirement. In ruling on the Plaintiff's appeal from the order to install such sprinklers, the Court acknowledged that a facially valid municipal regulation may not be discriminatorily enforced, but held that the complainant must show more than that the ordinance was not enforced against others. There must be a showing of clear and intentional discrimination. In that case, such showing was insufficient; the fact that some other businesses were not in compliance with the sprinkler requirement was not enough proof of discriminatory enforcement.

Likewise, in the instant case, the allegation that JUDD'S was given no notice of the dancing ordinance does not make out a violation of due process or equal protection in that the proprietors are charged with notice of such ordinance. Further, the charge of discriminatory enforcement of that ordinance cannot be proved by a mere showing that others similarly situated were not required to obtain a license for dancing. "A discriminatory purpose must be shown clearly by one claiming discrimination since such a purpose cannot be

presumed." State v. Nixon, 10 Wash. App. 355, 517 P.2d 212 (1973).

#### POINT IX

THE DISTRICT COURT HAD JURISDICTION TO  
ENTERTAIN RESPONDENTS' MOTION AND AMEND  
ITS ORDER.

On June 25, 1979, the trial Court entered its Order in this matter (TR 128-129). This was done without formal entry of Findings of Fact and Conclusions of Law. Two (2) days later, on June 27, 1979, the Appellants filed their Notice of Appeal to the Utah Supreme Court (TR 130). Four (4) days after the entry of Judgment, on June 29, 1979, Respondents filed their Motion to Amend Findings and Order, which was granted on the same day (TR 136). Appellants now contend that, because their Notice of Appeal was filed before the Respondents made their motion, the trial Court was without jurisdiction to hear the matter.

This position is untenable. The relevant Rule here is 52(b) of the Utah Rules of Civil Procedure. It provides:

(b) Amendment. Upon motion of a party made not later than ten days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to

such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

Respondent clearly complied with the ten-day requirement. If such compliance could be circumvented by a quick filing of a Notice of Appeal, the provisions would cease to have any meaning. Wright and Miller, commenting on the nearly identical provision in the Federal Rules, state:

A timely motion under Rule 52(b) terminates the running of the time for filing a notice of appeal and the full time for appeal commences to run and is computed from the entry of an order granting or denying the motion. This is true whether or not an alteration of the judgment would be required if the motion is granted. A quick filing of Notice of Appeal by one party cannot defeat the adverse party's right to have the District Court consider the merits of a motion under Rule 52(b) filed within ten days after entry of the judgment. (emphasis added)

Wright and Miller, Federal Practice and Procedure, Civil § 2582 (1971).

Attacking Appellants' position from a different vantage, it can be argued that, since Findings of Fact and Conclusions of Law are required by Utah Rule 52(a) and, since Utah Rule 72 requires appeal to be taken from final judgments, no appeal may be properly taken until Findings of Fact and Conclusions of Law have been entered. In Hinkins v. Santi, 25 Utah 2d 324, 481 P.2d 53 (1971), the Court, in fact, made such a determination, holding that, where the trial Court orally found the Defendant in contempt for violation of an injunction, but did not make and enter Findings of Fact and Judgment, there was no final judgment from which an appeal could be taken. In

accord is Valley Bank and Trust Co. v. Gerber, 526 P.2d 1121, 1124 (Utah, 1974), where the Court states:


The timely filing of any of the motions allowed by the rules to attack or change the findings and judgment involves the continuing jurisdiction of the court and suspends the running of time on the judgment until the motion is ruled upon.

A final decision to note here is Ellison v. Johnson, 18 Utah 2d 374, 423 P.2d 657 (1967). There the Appellants moved for reversal on grounds that the trial Court did not file its Findings of Fact and Conclusions of Law until 19 days after entry of judgment. The Court, sustaining the judgment below, held that, since Appellants had failed to show any prejudice as a result of the late filing, they were not entitled to relief.

#### CONCLUSION

For the foregoing reasons, the judgment of the trial Court should be affirmed.

DATED this 14 day of March, 1980.

  
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I hereby certify that three (3) copies of the Brief of Respondent were mailed, postage prepaid, to NICK J. COLESSIDES, Esq., Attorney for Appellants, 610 East South Temple, Suite 202, Salt Lake City, Utah 84102 this 14 day of March, 1980.

  
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