

IN THE UTAH COURT OF APPEALS

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| Salon Tropicana Midvale, Inc., |) | MEMORANDUM DECISION |
| a Utah corporation, |) | (Not For Official Publication) |
| |) | |
| Plaintiff and Appellant, |) | Case No. 20090057-CA |
| |) | |
| v. |) | F I L E D |
| |) | (November 13, 2009) |
| Midvale City, a municipal |) | |
| corporation, |) | 2009 UT App 327 |
| |) | |
| Defendant and Appellee. |) | |

Third District, Salt Lake Department, 080922860
The Honorable Michele M. Christiansen

Attorneys: W. Andrew McCullough, Midvale, for Appellant
H. Craig Hall and Jennifer A. Brown, Salt Lake City,
for Appellee

Before Judges Greenwood, Orme, and Davis.

DAVIS, Judge:

Plaintiff Salon Tropicana Midvale, Inc., is a restaurant that features live entertainment and dancing pursuant to a conditional use permit (the CUP), which was originally granted by Midvale City in April 2003. In May 2005, the Midvale City Planning Commission (the planning commission) conducted a review and found that Plaintiff had violated multiple conditions of the CUP. At that time, the planning commission did not revoke the CUP; rather, the planning commission allowed Plaintiff to submit a plan documenting how it would comply with the CUP.¹

In 2008, based on complaints that the CUP was again being violated, the planning commission notified Plaintiff that it would conduct a hearing to determine whether revocation of the CUP was in order. At the September 2008 revocation hearing,

¹Among other things, Plaintiff agreed to "prevent [its] patrons [from] becom[ing] a problem to [its] neighbors" and to ensure "[n]o drinking, loitering, or any illegal activities [would] be allowed in the parking lot, or adjacent property."

Plaintiff's counsel stipulated to the admission of police reports that documented some sixty arrests on Plaintiff's premises between April and June 2008.² At that same hearing, the planning commission heard testimony from a police detective, affected neighbors, and other business owners in the vicinity. The planning commission also heard testimony from Plaintiff's counsel, one of its owners, employees, and the head of its security program. Based on the evidence presented at the hearing, the planning commission determined that Plaintiff had violated numerous conditions of the CUP and revoked the CUP pursuant to Midvale Municipal City Code section 17-3-4(G), which states as follows:

If the community and economic development department determines that the holder of a conditional use permit . . . is in violation of the terms or conditions upon which the permit was issued, the community and economic development department shall notice 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 . . . 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.

Midvale City, Utah, Municipal Code § 17-3-4(G) (2009), available at <http://www.codepublishing.com/ut/midvale.html> (last visited Nov. 4, 2009).

Plaintiff appealed the planning commission's decision to the Midvale City Council (the city council), which held a hearing on October 7, 2008. At that hearing, Plaintiff was again represented by counsel and the city council gave counsel an opportunity to be heard. The city council then reviewed the record of the hearing before the planning commission and determined that, among other things, "[t]he evidence supported a finding that Condition #5 of the [CUP], which states that 'there shall be no drinking, loitering, or any illegal activity allowed in the parking lot or on adjacent property,' had been violated." Accordingly, the city council upheld the planning commission's

²The arrests were for open container and other alcohol violations, lewdness, and cocaine possession.

decision to revoke the CUP. Plaintiff appealed the decision to the district court. The district court determined, "The record contains substantial evidence to support [the planning commission]'s and [city council]'s determinations that violations of the [CUP] had occurred and, accordingly, substantial evidence supports the decision to revoke Plaintiff's [CUP]."

On appeal to this court, Plaintiff argues that the planning commission's and the city council's decisions to revoke the CUP did not comport with due process because "[r]ather than putting on witnesses who would be subject to cross examination, the [p]lanning [c]ommission held a public hearing in which citizens were allowed to make statements, not under oath, and not subject to cross-examination or standards of proof." Plaintiff cites no legal authority for this proposition. Rather, Plaintiff contends that, under the Utah Supreme Court's decision in Whiting v. Clayton, 617 P.2d 362 (Utah 1980), the planning commission and the city council violated Plaintiff's due process rights when it held public administrative hearings in lieu of pursuing a nuisance abatement proceeding or a criminal action.

Plaintiff's reliance on Whiting, however, is misplaced for two reasons. First, Whiting is factually distinguishable from the instant case. In Whiting, the city council revoked the plaintiff's liquor license pursuant to the nuisance provision of the relevant intoxicating liquors ordinance but also revoked the plaintiff's business and amusement licenses, which were not covered by the ordinance. See id. at 365. In this case, the planning commission and city council only revoked Plaintiff's CUP pursuant to its authority under Midvale Municipal Code section 17-3-4(G), while Plaintiff's business and beer licenses remain unaffected. Second, contrary to Plaintiff's contention otherwise, Whiting specifically holds that a liquor license may be revoked by the administrative procedure defined by ordinance and that "[i]t is not necessary that there be a judicial determination that a public nuisance exists before a beer license may be revoked." Id.

In any event, when Plaintiff applied for its CUP, it had, at a minimum, constructive notice of the statute and ordinance governing the issuance and revocation thereof, and accepted the CUP and its terms. Further, Plaintiff had participated in an identical proceeding in 2005 when the planning commission first reviewed the CUP. Finally, Plaintiff had actual notice of and participated fully in the proceedings before the planning commission and the city council. Indeed, counsel for Plaintiff spoke at both hearings and also made closing remarks at the hearing before the planning commission. Moreover, at the hearing before the planning commission, one of Plaintiff's owners, the head of Plaintiff's security, and several of Plaintiff's

employees also testified on Plaintiff's behalf. Where Plaintiff participated in the administrative proceedings and the planning commission and city council did not act beyond the scope authorized by Midvale City Municipal Code section 17-3-4(G), we are unpersuaded by Plaintiff's contention that the administrative proceeding violated its due process rights.

Plaintiff also contends that the district court erred in concluding that the decision to revoke the CUP is supported by substantial evidence. Where, as here,

a district court reviews an order of a local land use authority and we exercise appellate review of the district court's judgment, we act as if we were reviewing the land use authority's decision directly, and we afford no deference to the district court's decision. Like the review of the district court, our review is limited to whether a land use authority's decision is "arbitrary, capricious, or illegal." A land use authority's decision is arbitrary or capricious only if it is not "supported by substantial evidence in the record."

Fox v. Park City, 2008 UT 85, ¶ 11, 200 P.3d 182 (footnotes omitted). In determining whether substantial evidence supports a land use authority's decision, "the district court's review is limited to the record provided by the land use authority or appeal authority." Utah Code Ann. § 10-9a-801(8)(a)(i) (2007).³ Moreover, the district court is required to "presume that a decision . . . is valid" and "determine only whether or not the decision . . . is arbitrary, capricious, or illegal." Id. § 10-9a-801(3)(a). Finally, the land use authority's final decision "is valid if the decision is supported by substantial evidence in the record." Id. § 10-9a-801(3)(c). 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., 2003 UT 16, ¶ 15, 70 P.3d 47 (internal quotation marks omitted).

We determine that the district court did not err in concluding that revocation of Plaintiff's CUP was supported by substantial evidence and was not arbitrary, capricious, or illegal. Indeed, there was ample evidence in the record before

³Our review, like the district court's review, is also limited to the record before the land use authority. Cf. Utah Code Ann. § 10-9a-801(8)(a)(i) (2007).

the district court that Plaintiff had violated numerous conditions of the CUP: (1) sworn affidavits from neighbors impacted by Plaintiff's conduct; (2) written police reports documenting numerous arrests that occurred on Plaintiff's premises; (3) testimony from a police detective describing the arrests conducted on Plaintiff's premises and adjacent property; and (4) testimony from affected neighbors and other business owners in the area describing specific violations of the CUP. This evidence is "adequate to convince a reasonable mind" that Plaintiff violated the CUP and that revocation was appropriate.

Affirmed.

James Z. Davis, Judge

I CONCUR:

Pamela T. Greenwood,
Presiding Judge

I CONCUR IN THE RESULT:

Gregory K. Orme, Judge