2007

Robert C. Stevens d/b/a Keystone Repair, individually v. City of Laverkin, a Municipal corporation and political subdivision of the State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT C. STEVENS d/b/a KEYSTONE REPAIR, individually, Plaintiff/Appellant v. CITY OF LAVERKIN, a municipal corporation and political subdivision of the State of Utah, Defendant/Appellee.	Case No. 20070031-CA

On appeal from a judgment of the Fifth District Court for Washington County
The Honorable Eric A. Ludlow

BRIEF FOR APPELLEE LAVERKIN CITY

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78-2a-3(2)(j) (2002).

ISSUES AND STANDARDS OF REVIEW

Appellant enumerates seven separate issues for appeal, however, those issues can generally be grouped according to the two orders from which he appeals. The first order is the trial court's order granting summary judgment to LaVerkin City. (Appellant's Issue Nos. 1, 2, 3, 4, and 5.) Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). Thus, "[i]n deciding whether summary judgment was appropriate, [this Court] need review only whether the trial court erred in applying the relevant law and whether a material fact was in dispute" Pinetree Assoc. v. Ephraim City, 2003 UT 6, ¶11, 67 P.3d 462.

The second is the trial court's order denying Appellant's motion to set aside the order granting summary judgment. (Appellant's Issue Nos. 6 and 7.) "Utah appellate courts review a trial court's denial of a motion for relief from judgment under rule 60(b) for abuse of discretion." Rukavina v. Sprague, 2007 UT App 331, ¶2. "The outcome of rule 60(b) motions are rarely vulnerable to attack." Fisher v. Bybee, 2004 UT 92, ¶7, 104 P.3d 1198.

PRESERVATION. Appellant does not include, with respect to each issue he raises, a citation to the record showing preservation in the trial court or a statement of grounds for seeking review of issues not so preserved, as required by Rule 24(a)(5) of the Utah

Rules of Appellate Procedure. See Utah R. App. P. 24(a)(5)(A), (B). This is significant because (as set forth in more detail below), a number of the issues he raises on appeal were not sufficiently preserved in the trial court and are therefore waived on appeal.

DETERMINATIVE RULES

Rules that are of central importance to this appeal are Rules 7, 56, and 60(b) of the Utah Rules of Civil Procedure. The pertinent provisions of each of these rules is set forth verbatim in Addendum A.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case arises from an ongoing zoning dispute between appellant Robert Stevens and LaVerkin City. The City took action against Stevens by not renewing his conditional use permits and revoking his business license, thereby preventing him from operating an illegal salvage business from his property. Instead of appealing the City's action through the administrative appeals process, Stevens sued the City in district court for inverse condemnation. He also sought injunctive relief. The City counterclaimed and sought its own injunctive relief to prevent Stevens from illegally operating his business.

The trial court held a hearing and denied each party's request for injunctive relief. Thereafter, the City filed a motion for summary judgment. Stevens failed to timely respond and the trial court granted the motion. Stevens appealed the summary judgment ruling and also filed a Rule 60(b) motion to have summary judgment set aside. The trial court denied Stevens' Rule 60(b) motion. Stevens timely appealed that ruling.

This Court ordered consolidation of both appeals.

II. STATEMENT OF FACTS

A. PRE-LITIGATION BACKGROUND[1]

In late 1998 or early 1999, Plaintiff/Appellant Robert Stevens purchased certain real property located at 95 South State Street in LaVerkin City. (R. 417 ¶1; 446 ¶1.) The property was zoned by the City as "General Commercial." (R. 418 ¶9; 447 ¶9.) When Stevens purchased the property, his stated intent was to operate a business for the repair of damaged vehicles, including the acquisition, repair, and sale of damaged (salvaged) vehicles. (R. 417 ¶2; 446 ¶2.) This intent was disclosed to members of the LaVerkin City Council. (R. 417 ¶3; 446 ¶3.)

On June 2, 1999, Stevens went before the City Council requesting "preliminary conditional use approval for an auto body shop and used car dealership at 95 South State." (R. 417 ¶4; 447¶4.) Discussion centered around concerns related to parking and screened fencing, after which the City Council granted preliminary approval of Stevens' proposed business. (R. 417 ¶4; 447 ¶4.)

On January 5, 2000, the City Council voted to issue Stevens a conditional use permit and a business license for "an auto body repair shop" "on the condition that the [City's] sewer requirements were met." (R. 417-18 ¶5; 447 ¶5.) The conditional use

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[1] The facts as set forth under this subsection are identical to the undisputed facts placed before the trial court on summary judgment in the City's memorandum in support of its motion for summary judgment. These facts essentially mirror the undisputed facts the trial court found in its injunction ruling.

permit contained no other express conditions. (R. 418 ¶5; 447 ¶5.) It also contained no expiration date. (R. 418 ¶5; 447 ¶5.) Although the City Council voted to issue the conditional use permit, Stevens never physically received it. (R. 418 ¶6; 447 ¶6.) Shortly after the vote, Stevens commenced business at the property under the name "Keystone Repair." (R. 418 ¶7; 447 ¶7.)

In early 2002, Stevens purchased another parcel of real property in the City. (R. 418 ¶8; 447 ¶8.) This second parcel was located at 160 South State and, like the property at 95 South State, was zoned "General Commercial." (R. 418 ¶9; 447 ¶9.) Shortly after purchasing this new property, Stevens erected an opaque, paneled fence on the same and began to store vehicles there that would eventually be taken for repair at the 95 South State property. (R. 418 ¶10; 447-48 ¶10.) According to Stevens, he obtained informal verbal approval from City officials to utilize the new property in this manner. (R. 419 ¶10; 448 ¶10.)

At a January 7, 2004 City Council meeting, Stevens sought and obtained a conditional use permit to use the front portion of the property at 160 South State as a used car lot for vehicles that were refurbished at the 95 South State property. (R. 419 ¶11; 448 ¶11.) The City Council granted a six month conditional use permit for "[n]o more than 20 re-furbished cars[.]" (R. 419 ¶11; 448 ¶11.) At the meeting, citizens complained to the City Council about visibility problems caused by vehicles that Stevens had parked along the 100 South side street of his 95 South State property. (R. 419 ¶12; 448 ¶12.)

At its September 1, 2004 meeting, the City Council approved an additional six month conditional use permit for Stevens to continue using the 160 South State property

as a used car lot. (R. 419 ¶13; 448 ¶13.) Stevens was present at, and participated in, this meeting. (R. 419 ¶14; 448 ¶14.) Stevens never appealed any of the conditions imposed at the meeting to the City's board of adjustment. (R. 419 ¶15; 448 ¶15.)

On October 13, 2004, the City held a joint work meeting of its City Council and planning commission, primarily discussing concerns arising from vehicles parked on and around Stevens' two properties. (R. 420 ¶16; 448 ¶16.) Participants indicated their understanding that Stevens originally had been approved to use the 95 South State property only for an auto body repair shop, and that his use of the property to store and refurbish wrecked vehicles was unauthorized. (R. 420 ¶16; 448-49 ¶16.) The group also discussed safety issues related to the parking of Stevens' vehicles on 100 South, and participants stressed that children travel that street on their way to school. (R. 420 ¶16; 449 ¶16.) The City Council also discussed plans to repair and potentially widen 100 South, which would require condemning and compensating Stevens for a portion of his 95 South State property. (R. 420 ¶16; 449 ¶16.)

Though other concerns were discussed, the central theme of the concerns was that the expanding number of vehicles on and around Stevens' properties created an unsightly and unsafe situation that the City neither contemplated nor approved. (R. 420 ¶17; 449 ¶17.) The discussion ended with the City Council resolving to make Stevens' continued operation of his business conditional on his satisfaction of several requirements related to parking on and usage of the property. (R. 420 ¶17; 449 ¶17.)

On December 15, 2004, after Stevens failed to comply with certain of the conditions imposed at the October 13, 2004 meeting, the City Council held a review

hearing to consider revocation of the conditional use permit issued to Stevens on January 5, 2000. (R. 420-21 ¶18; 449 ¶18.) Stevens was present and participated in this hearing. (R. 421 ¶19; 449 ¶19.) At the conclusion of the hearing, the City Council determined not to revoke the conditional use permit, but to modify it by converting it to a temporary, six-month conditional use permit, with additional conditions. (R. 421 ¶20; 449 ¶20.) The City issued the modified 95 South State conditional use permit on or about January 7, 2005. (R. 421 ¶21; 449 ¶20.) Stevens never appealed any of the conditions of the modified conditional use permit to the City's board of adjustment. (R. 421 ¶22; 450 ¶21.)

The City thereafter determined that its plans for 100 South, including the widening of the road, might reduce the distance between the street and Stevens' building at 95 South State so much that the building would be non-compliant with certain zoning regulations and the City might have to condemn all or part of the property. (R. 421 ¶23; 450 ¶23.)

The City then concluded that its ownership of the 95 South State property would resolve the zoning concern as well as ongoing concerns regarding the property's appearance and adverse effects on public safety. (R. 421-22 ¶24; 450 ¶24.) For that reason, the City Council determined to enter into negotiations with Stevens for the acquisition of his 95 South State property. (R. 421-22 ¶24; 450 ¶24.) The City and Stevens then engaged in discussions about the City potentially purchasing the 95 South State property. (R. 422 ¶25; 450 ¶25.) In the meantime, the zoning disputes continued. (R. 422; 450.)

On June 1, 2005, the City conducted a review hearing to consider revocation/non-renewal of Stevens' 160 South State conditional use permit based upon Stevens' non-compliance with conditions imposed on Stevens' use of the 160 South State property. (R. 422 ¶25; 450 ¶25.) Stevens was present at the hearing. (R. 422 ¶26; 450 ¶26.)

At the conclusion of this hearing, the City Council found that Stevens was not in compliance with the conditions of his conditional use permit and voted to revoke/not renew the same. (R. 422 ¶27; 450 ¶27.) Stevens did not, at any time, appeal the revocation/non-renewal of this conditional use permit to the City's board of adjustment. (R. 422 ¶28; 451 ¶28.)

On August 17, 2005, the City conducted another review hearing, this time to consider the revocation/non-renewal of Stevens' modified 95 South State conditional use permit based upon Stevens' non-compliance with conditions of the same. (R. 422 ¶29; 451 ¶29.) Stevens was present at this hearing, and he presented evidence in support of his position that the modified conditional use permit should not be revoked. (R. 422 ¶30; 451 ¶30.) At the conclusion of the hearing, the City Council found that Stevens remained in non-compliance and voted to revoke/not renew the modified conditional use permit. (R. 422-23 ¶30; 451 ¶30.) As with the City's other zoning actions, Stevens did not appeal this action to the City's board of adjustment. (R. 423 ¶31; 451 ¶31.)

Although the City had revoked/not renewed the conditional use permits for both the 160 South State and 95 South State properties, Stevens continued to conduct business operations from both properties and purchased a number of flood-damaged vehicles,

which were to be transported to, stored at, and repaired or otherwise processed at his two properties. (R. 423 ¶32; 451 ¶32.).

By December 2005, after months of negotiations, the City and Stevens had been unable to reach an agreement regarding the City's purchase of the 95 South State property. (R. 423 ¶33; 451 ¶33.) Specifically, a professional appraisal company hired by the City but chosen by Stevens, estimated that just compensation for the 95 South State property would be $300,000.00. (R. 423 ¶34; 451 ¶34.) In a letter dated December 30, 2005, the City, through its special legal counsel, Heath Snow, offered to purchase the 95 South State property from Stevens "for full appraised value plus and [sic] additional $10,000.00 for [Stevens'] moving expenses." (R. 423 ¶35; 452 ¶35.) The offer was contingent upon Stevens removing his "vehicles, parts and other items of personal property to a location outside of the municipal boundaries of LaVerkin." (R. 423-24 ¶35; 452 ¶35.) Stevens did not accept the offer. (R. 424-25 ¶37; 452 ¶36.) Since the failure of these negotiations, the City no longer has an interest in obtaining either of Stevens' properties. (R. 427 ¶48; 453 ¶46.)

In a letter dated January 5, 2006, months after the City had revoked Stevens' conditional use permits, LaVerkin's City manager sent Stevens notice that, as a result of Stevens' continued non-compliance with the City's zoning ordinances, the City did not intend to renew his business license for the automobile repair and salvage business located at 95 South State. (R. 425 ¶38; 452 ¶37.) The letter provided notice that the action would be "formally taken by the LaVerkin City Council at its regularly scheduled meeting on January 18, 2006." (R. 425 ¶38; 452 ¶37.)

On January 18, prior to the scheduled hearing, Stevens filed suit against the City. (R. 1.) That same day, the City's police chief sent Stevens a letter advising him that because the City had revoked his conditional use permits and because his regular business license expired on December 31, 2005, Stevens was no longer allowed to do any business within the City. (R. 425 ¶40; 452-53 ¶39.)

That evening, as Stevens had been notified in the city manager's letter, the City conducted a formal review hearing to consider the revocation/non-renewal of Steven's business license. (R. 426 ¶42; 453 ¶40.) Stevens was personally present at the hearing, was represented by legal counsel, and was given the opportunity to present evidence and argument in support of his position that his business license should be renewed. (R. 426 ¶43; 453 ¶41.) At the conclusion of the hearing, the City Council voted to revoke/not to renew Stevens' business license. (R. 426 ¶44; 453 ¶42.)

Two days later, on January 20, after Stevens' employees had been observed conducting business activities at the 95 South State property, officers from the City's police department entered the 95 South State property and closed Stevens' business operations. (R. 426 ¶45; 453 ¶42.) The officers posted a notice of closure and ordered the employees to cease working and to leave the premises. (R. 426-27 ¶45; 453 ¶43.) Stevens was subsequently criminally prosecuted for operating a business without a license. (R. 427 ¶47; 453 ¶44.)

B. THE LITIGATION

As stated, Stevens filed suit against the City on January 18, 2006. (R. 1.) The complaint contained ninety-five separate allegations culminating in a single cause of

action for inverse condemnation. (R. 1-13.) Stevens' complaint was a laundry list of allegations about how he believed he had been unfairly treated by the City. (R. 1-11.) The crux of his inverse condemnation claim, however, is contained in the following allegations:

> 83. [The] City has attempted to force [Stevens] to sell his real property to [the] City through the use of explicit and detailed threats of both civil and criminal prosecution.
>
> 84. [The] City has attempted to force [Stevens] to sell his real property to [the] City through the revocation or non-renewal of [Stevens'] conditional use permits.
>
> 85. [The] City has attempted to force [Stevens] to sell his real property to [the] City through the revocation or non-renewal of [Stevens'] business license.
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> 86. [The] City's attempts to force [Stevens] to sell his property constitute a "taking" of private property by [the] City, ostensibly for a public purpose.

(R. 11 ¶¶83-86.) In addition to filing the complaint, Stevens filed an ex parte motion for a temporary restraining order and preliminary injunction. (R. 21-34.)[2]

The City answered the complaint, filed a counterclaim asserting causes of action for injunctive relief, responded to Stevens' motion for injunctive relief, and sought an injunction of its own to prevent Stevens from utilizing his properties as a salvage

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[2] Stevens sought an order restraining the City from, in his words, "using its police powers to deny [him] a business license to continue to lawfully operate his business, from sending police officers and other city officials or employees to harass or threaten [his] and/or [his] employees or customers, and from filing complaints or reports with Utah's Motor Vehicle Enforcement Division regarding [his] business license." (R. 21-22.) The trial court denied the motion on the grounds that Stevens had no basis for seeking the order ex parte without notice to the City. (R. 49-50.)

business in violation of City code, and to prevent him from conducting business without a license in violation of City code. (R. 53-80, 111-131.)

On April 13, 2006, the trial court held a hearing on both motions for injunctive relief. (R. 241; R. 766 Tr. *passim*.) By the time of the hearing, the parties had conducted several depositions, the transcripts of which were filed with the trial court at its request. (R. 766 Tr. 6:5-8; 55:17-18, 57:1-10.) The trial court took the matter under advisement and thereafter issued a memorandum decision denying both parties' request for injunctive relief. (R. 415-435 [Mem. Dec. at 2-13].)[3]

The trial court's memorandum decision included a lengthy and detailed section of factual findings. (R. 416-427 [Mem. Dec. at 2-13].) The trial court noted, with respect to those findings, that "the facts presented here are drawn from either the undisputed facts of the parties' memoranda and exhibits, or from apparently uncontroverted deposition testimony." (R. 416 [Mem. Dec. at 2 n.2].) The trial court ultimately determined that Stevens' inverse condemnation claims had no legal basis and that the City's request for injunctive relief was moot because Stevens had not conducted business at his properties since January 20. (R. 431-433 [Mem. Dec. at 17-19].)

[1] *The City's Motion for Summary Judgment*

Subsequently, the City filed a motion for summary judgment and supporting memorandum. (R. 436-38, 445-468.) In the undisputed facts section of its memorandum

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[3] The memorandum decision is cited specifically along with the Record page citations as "Mem. Dec."

in support, the City detailed forty-six separately numbered paragraphs of undisputed facts, which cited to and, except for minor grammatical and numbering changes, mirrored the trial court's findings in its memorandum decision denying the motions for injunctive relief. (*Compare* R. 446-453 *with* R. 417-427.)[4]

On the basis of those facts, the City argued, *inter alia*, that Stevens failed to exhaust his administrative remedies in appealing the revocation/non-renewal of his permits and license and otherwise failed to timely file a petition for review in district court challenging City's actions as required by state law. (R. 454-458.) In addition, the City argued that Stevens' inverse condemnation claim failed as a matter of law because Stevens had no more than a unilateral expectation of continued rights or benefits in his business license and therefore did not have a sufficient property interest to sustain an inverse condemnation claim. (R. 464-466.)

The summary judgment motion and accompanying memorandum was served on Stevens' attorneys by first class U.S. mail on October 25. (R. 438, 468.) Stevens did not file an opposition memorandum by the deadline required for response. (R. 472; R. 767.)[5]

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[4] For the Court's convenience, citations to both were provided in Subsection II.A at pages 3-9 *supra*.

[5] Rule 7(c)(1) requires memoranda in opposition be filed within ten days of service. See Utah R. Civ. P. 7(c)(1). Rule 6(a) provides that in calculating any period of time less than eleven days, intervening holidays and weekends shall not be counted. See Utah R. Civ. P. 6(a). In addition, when a motion is served by mail, an additional three days are added to the response time; however, weekends and holidays are included in calculating the additional three day period unless the last day of the period is a holiday or weekend. See Utah R. Civ. P. 6(e). By rule, then, Stevens' opposition was due by November 13.

As a result, on November 16, the City filed a request to submit the motion to the trial court for decision. (R. 471-72.)

A flurry of motions and court filings followed. (R. 473-604.) On November 20, apparently undeterred that the motion had already been submitted for decision, Stevens filed a memorandum in opposition. (R. 473-500.) Two days later, Stevens filed a motion to strike the City's motion for summary judgment. (R. 501.) Several days after that, on December 1, the trial court entered an order granting the City's motion for summary judgment. (R. 511-512.) A little over three hours after summary judgment was entered, Stevens filed a motion to amend his complaint. (R. 509, 511, 513.) Three days later the City filed an opposition memorandum to Stevens' motion to strike along with its own motion to strike Stevens' memorandum in opposition to its motion for summary judgment as untimely. (R. 555.) The City also filed an opposition to Stevens' motion to amend his complaint. (R. 604.) Though he filed several motions and other documents, Stevens never filed an objection, a motion to amend, or any other document challenging the sufficiency of the trial court's order granting summary judgment. (R. *passim.*)

On December 29, Stevens filed a notice of appeal. (R. 615.) Thereafter, on January 11, 2007, the trial court issued orders denying Stevens' motion to strike the City's motion for summary judgment and granted the City's motion to strike Stevens' opposition memorandum as untimely. (R. 680-685.)[6]

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[6] The record does not contain an order disposing of Stevens' motion to amend his complaint. However, since it was filed after summary judgment was granted, it was

[*continued on next page*]

[2] *Stevens' Rule 60(b) Motion to Set Aside Summary Judgment*

On January 9, 2007, Stevens timely filed a Rule 60(b) motion to set aside the trial court's order granting summary judgment. (R. 632-656.) The motion was supported by affidavits from Stevens' attorney, Robert Avery of the law firm Ascione, Heideman & McKay ("AHM"), and Avery's assistant, Carlyn Braithwaite. (R. 616-622.) Through their affidavits, the following "facts" emerged. (R. 766-768 [60(b) Ruling at 2-4 & n.2].)[7]

The City's motion for summary judgment and its memorandum in support were served on October 25, 2006, and received at AHM on October 30. (R. 438, 468, 766 ¶2.) At this time, AHM was renovating and expanding its offices to accommodate the hiring of three new attorneys. (R. 766 ¶3.) Avery was the attorney primarily responsible for handling Stevens' case. (R. 766 ¶4.) He was being assisted by Jerry D. Reynolds, another attorney at AHM. (R. 766 ¶4.) In the course of AHM's office renovations, Avery's office was being relocated to another floor of the building in which the law firm was located. (R. 766 ¶5.)

During the time he was waiting for his new office to be completed and equipped, Avery worked from home or from temporarily vacant desks in the office. (R. 767 ¶5.)

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barred as a matter of law. See National Adv. Co. v. Murray City Corp., 2006 UT App 75, ¶13, 131 P.3d 872.

[7] Record references with cited paragraphs are from the trial court's findings of fact on ruling denying Stevens' Rule 60(b) motion. A copy of the trial court's Rule 60(b) ruling is attached at Addendum B.

He also had limited access to the legal files normally in his possession. (R. 767 ¶5.) At this same time, Avery was assigned a new personal assistant, Carolyn Braithwaite. (R. 767 ¶6.) Braithwaite, while admitting that AHM received the City's motion on October 30, could not recall doing anything to track the motion once it was received. (R. 767 ¶7.) It is not known whether Reynolds was facing the same issues as Avery during this time period. (R. 767 ¶8.)

In the midst of this alleged chaos, the deadline to respond to the motion for summary judgment had come and gone. (R. 767 ¶9.) On November 20, Avery received the City's motion and supporting papers. (R. 767 ¶10.) It is not known—and Stevens submitted no evidence to show—where the motion was from October 30, when AHM received it, to November 20, when Avery received it, and why it took twenty days for the motion to find its way into Avery's hands. (R. 767 ¶11.)

Upon receiving the motion, Avery called the City's trial counsel, Heath Snow, and requested additional time to respond to the motion for summary judgment. (R. 767 ¶12.) Snow, however, having waited the period of time required for an opposition memorandum, and having received none, had already submitted the matter to the trial court for decision. (R. 767 ¶13.) On December 1, the trial court entered summary judgment in favor of the City. (R. 767 ¶14.)

These facts, Stevens argued, were "significant and unusual" and amounted to excusable neglect under Rule 60(b)(1). (R. 632.) He argued that the delay that caused Avery to receive the City's motion only after it was too late "could only be referred to as a near 'perfect storm' of clerical errors and other circumstances." (R. 638.) He asserted

that AHM's office expansion and hiring of new staff was "unprecedented." (R. 638.) This, Stevens argued, constituted excusable neglect under Rule 60(b)(1). (R. 638-641.) In addition, he argued that it constituted "any other reason justifying relief" under Rule 60(b)(6) because it would deny Stevens a trial. (R. 641-642.)

The City opposed the motion arguing that the facts did not support relief under Rules 60(b)(1) or 60(b)(6). (R. 708-716.) On January 23, Stevens' replaced Avery and AHM with new legal counsel. (R. 705-706.) His new counsel filed a reply memorandum, a request to submit, and requested a hearing on the motion. (R. 741-742.) The trial court summarily denied Stevens' motion to set aside without holding a hearing. (R. 749.) Stevens then filed a request for specific findings of fact and conclusions of law. (R. 752-753.) In response, the trial court issued a detailed ruling denying Stevens' Rule 60(b) motion, including factual findings, legal analysis, and conclusions. (R. 765-773 [60(b) Ruling, Addendum B].)

Ultimately, the trial court simply did not agree that AHM's office renovations and the hiring of a new assistant created a "perfect storm." (R. 769 [60(b) Ruling at 5].) Specifically, the trial court, reasoned:

> [Stevens] has described ordinary challenges in day to day business at a law firm. As a result, the Court is not persuaded that these are circumstances that were beyond [Stevens'] control. Nor is the Court persuaded that a person acting prudently and with due diligence under similar circumstances would not have been able to respond to the motion for summary judgment within the time frame required by rule. [Stevens] submitted no evidence of having taken any precautions to avoid or minimize the challenges the AHM firm claimed to be under as a result of its office renovations.
>
> In short, [Stevens] admits to receiving the motion for summary judgment on October 30th. What happened to it for the next twenty days—until it ultimately

> found its way to Mr. Avery—is a mystery to the Court. [Stevens] has failed to provide this Court with reasonable justification for his failure to timely oppose [the City's] motion for summary judgment.

(R. 769 [60(b) Ruling at 5].)

The trial court also rejected Stevens' claim argument that the judgment entered against him should be set aside under Rule 60(b)(6). (R. 770 [60(b) Ruling at 6].) The trial court reasoned that Stevens' proffered reason for relief under 60(b)(6) was nothing more than "a general statement that he should have the right to have his dispute decided on the merits." (R. 771 [60(b) Ruling at 7].) Moreover, the trial court was not impressed by Stevens' failure to provide the correct legal standard under Rule 60(b)(6), as well as his failure to provide it "with any argument or authority as to why the circumstances in this case are so unusual and exceptional as to justify [the trial court's] granting relief for a reason that must be 'sparingly invoked.'" (R. 771 [60(b) Ruling at 7].) Accordingly, the trial court denied Stevens' Rule 60(b) motion. (R. 772 [60(b) Ruling at 8].)

Stevens also appeals from that ruling. (R. 790.)

SUMMARY OF ARGUMENT

This Court should affirm the trial court's order granting summary judgment to the City and its order denying Stevens' motion to set aside summary judgment for the following reasons.

SUMMARY JUDGMENT.

1. Stevens failed to timely oppose the City's motion for summary judgment. A trial court is justified in entering summary judgment when a summary judgment motion is not opposed. This Court should summarily affirm on this basis.

2. Rules 7 and 56 of the Utah Rules of Civil Procedure and corresponding case law require that a non-moving party set forth in his response to a motion for summary judgment specific facts showing a genuine issue for trial. What a non-moving party cannot do is attempt to create disputed issues of material fact for the first time on appeal. Stevens failed to file any opposition to the City's motion and therefore did not attempt to dispute any facts before the trial court. Thus, this Court can ignore his claims that there are disputed issue of material fact requiring reversal of summary judgment. Furthermore, even if this Court were to entertain his claimed factual disputes, it does not operate to reverse summary judgment because the facts he attempts to dispute are not material to the underlying claim for inverse condemnation.

3. Summary judgment was appropriate as a matter of law. Stevens' lawsuit is an inverse condemnation action. His asserted property right is his real property. He claims that the City's revocation of his permits and licenses, *i.e.*, its regulation of his property, has cost him money. Yet, he does not argue and has not submitted any evidence to show that this regulation has left his properties economically idle, thereby triggering a right to just compensation. Further, it is undisputed that Stevens did not appeal any of the City's land use decisions concerning his conditional use permits, or its decision to revoke his business license. As a result, he failed to exhaust his administrative remedies and his inverse condemnation claim is not ripe.

Additionally, while Stevens spends a great deal of time portraying himself as the victim of the City's alleged "arbitrary and capricious" actions, and claiming that the City violated his due process rights in its actions, it is irrelevant to an inverse condemnation

claim. An inverse condemnation claim seeks compensation for authorized governmental action. Where the government acts in an unauthorized manner, as Stevens alleges in his complaint, the takings clause is not triggered. He has effectively alleged and argued himself out of his own claim.

4. The City's citation to and reliance on the trial court's factual findings from its injunction ruling does not constitute reversible error. While findings on a preliminary injunction ruling do not have a preclusive or binding effect at a subsequent trial on the merits, there was no argument that the trial court's findings were binding and preclusive on summary judgment. Rather, if Stevens had evidence to dispute those facts, he could have put that evidence forward and it would have prevented summary judgment regardless of where the City had derived its statements of fact.

5. Stevens also asks this Court to reverse the trial court because, Stevens claims, its summary judgment order was not sufficiently detailed. However, Stevens did not preserve this argument as grounds for reversal by objecting to, submitting a motion to amend, or otherwise calling the trial court's attention to the alleged deficiency of its order. Therefore, he barred from raising this issue on appeal.

MOTION FOR RELIEF FROM SUMMARY JUDGMENT.

6. The trial court did not abuse its discretion in refusing to grant Stevens relief from summary judgment. Stevens provided no evidence below to show or otherwise persuade the trial court that "a person acting prudently and with due diligence under similar circumstances would not have been able to respond to the motion for summary judgment within the time frame required by rule." (R. 769 [60(b) Ruling at 5].) What

Stevens described were routine back-office problems that can occur in any law firm. The trial court did not err in refusing to recognize Stevens' claimed "perfect storm" as a sufficient excuse under Rule 60(b)(1). Furthermore, Stevens fails to demonstrate that the conduct of his prior attorneys was "deplorable" enough to warrant relief under Rule 60(b)(6). In fact, he recognizes that his description of the conduct he claims warrants relief is not substantiated by the record. Therefore, his Rule 60(b)(6) fails.

7. Finally, the trial court did not commit reversible error in refusing to grant a hearing on Stevens' Rule 60(b) motion because it was not a dispositive motion. Far from ending the litigation or any claim in the litigation, the motion merely sought to and would have put all the claims back on the table and ensured further litigation.

ARGUMENT

I. THIS COURT SHOULD SUMMARILY AFFIRM THE TRIAL COURT AS A RESULT OF STEVENS' FAILURE TO TIMELY OPPOSE THE CITY'S SUMMARY JUDGMENT MOTION.

Stevens concedes that he did not timely file a memorandum in opposition to the City's motion for summary judgment. (Appellant's Br. at 22.) He also does not appeal the trial court's order granting the City's motion to strike his untimely opposition memorandum. As a result, there is no opposition of record to the City's motion.

A trial court is justified in entering summary judgment when the motion for summary judgment is not opposed. See Haycock v. Estate of Haycock, 2000 UT App 347U at para. 2 (citing Thermidor v. Beth Israel Med. Ctr., 683 F. Supp. 403, 414 (S.D.N.Y. 1988) ("Plaintiff's failure to respond to defendant's motion for summary judgment in a timely manner constitutes an independent ground for granting defendant's

motion")); see also Utah Local Government Trust v. Wheeler Machinery Co., 2007 UT App 513, ¶7 n.5, 154 P.3d 175 (noting that Rule 56(e) itself "provides that summary judgment shall be entered when an appropriate response is not filed"), *cert. granted*, No. 20070084-SC (Utah Apr. 27, 2007). On this basis, this Court should summarily affirm the trial court.

II. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDED SUMMARY JUDGMENT.

A. A Party Cannot Attempt To Create Disputed Issues Of Material Fact For The First Time On Appeal.

Even if this Court does not summarily affirm the trial court's grant of summary judgment, it should summarily reject Stevens' attempt to create disputed issues of material fact for the first time on appeal.

The briefing of summary judgment motions is governed by Rules 7 and 56 of the Utah Rules of Civil Procedure. Under Rule 7(c)(3)(A), "[e]ach fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." Utah R. Civ. P. 7(c)(3)(A). See also Bluffdale City v. Smith, 2007 UT App 25, ¶¶11-12, 156 P.3d 175. To controvert a fact, the non-moving party must "provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." Utah R. Civ. P. 7(c)(3)(B). This is also set forth in the plain language of Rule 56(e), which requires a non-moving party to set forth in her "***response*** . . . specific facts showing that there is a genuine issue for trial." Utah R. Civ. P. 56(e) (emphasis added).

The reason for requiring the response to a summary judgment motion specify, with appropriate citation to relevant materials, disputed facts is because any other rule would require the trial court to become the advocate for the non-moving party, searching the entirety of the record on its own to determine whether there is any scrap of evidence that might create a disputed issue of material fact precluding summary judgment—regardless of whether the opposing party cited to such evidence. This is an unsound proposition that has been uniformly rejected by courts that have examined the issue. See, e.g., Amnesty America v. Town of West Hartford, 288 F.3d 467, 470 (2d Cir. 2002) (Rule 56 "does not impose an obligation on a district court to perform an independent review of the record to find proof of a factual dispute"); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028-29 (9th Cir. 2001) ("[i]f a district court must examine reams or file cabinets full of paper looking for genuine issues of fact, as though the judge were the adverse party's lawyer, an enormous amount of time it taken away from other litigants"); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998) (holding "where the burden to present such specific facts by reference to exhibits and the existing record is not adequately met below, we will not reverse a district court for failing to uncover them itself").[8]

Out of necessity, Stevens takes a different view. Recognizing his lack of opposition, Stevens relies on Frisbee v. K&K Construction Co., 676 P.2d 387 (Utah

[8] Because Utah's rule 56 is identical to federal rule 56, this Court looks "freely to federal authorities in interpreting" Utah's rule 56. LeVanger v. Highland Estates Prop. Owners Ass'n, 2003 UT App 377, ¶12, 80 P.3d 569.

1984) for the proposition that a non-moving party can sit on his hands, do absolutely nothing, let summary judgment be entered against him, and then challenge the summary judgment by asserting, for the first time on appeal, that there are disputed issues of material fact. Other than showing that "there is usually a case somewhere that provides comfort for just about any claim[,]" Wilkie v. Robbins, 127 S. Ct. 2588, 2606 (2007), this expansive reading of Frisbee is incorrect and would swallow whole Rules 7 and 56 and the entire body of case law that requires that issues raised on appeal first be preserved in the trial court.

In Frisbee, the Utah Supreme Court merely repeated what it had long held, that a party opposing summary judgment is not required to proffer affidavits to show a disputed issue of material fact if the movant's affidavits on their face show disputed issues of material fact. See 676 P.2d at 390. See also Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983) (stating "when a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue")).

What the Utah Supreme Court did not hold in Frisbee, and what Frisbee has never been relied upon, or cited for, by our appellate courts, is that arguments concerning disputed issues of material fact need not be preserved in the trial court. Rather, as is shown by recent case law, if a party desires to create a dispute as to a material fact, he must first do so before the trial court or he waives the ability to raise the issue on appeal.

See Heideman v. Washington City, 2007 UT App 11, ¶15, 155 P.3d 900; Smith v. Hales & Warner Constr., Inc., 2005 UT App 38, ¶1 n.1, 107 P.3d 701. See also Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002) (holding "[b]y failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion").

This preservation requirement applies even where the competency of an affidavit supporting summary judgment is questionable under Rule 56(e) standards. See Pinetree Assocs. v. Ephraim City, 2003 UT 6, ¶19, 67 P.3d 462 (stating "[f]ormal or evidentiary defects in an affidavit in support or opposition to a motion for summary judgment are waived in the absence of a motion to strike or other objection"); Franklin Fin., 659 P.2d at 1044 (precluding challenge to sufficiency of summary judgment affidavit where not raised first to trial court). Contrary to Stevens' assertions, it also applies regardless of whether there are evidentiary problems on the face of an affidavit or "in the recitation of supposedly uncontested facts in [the moving party's] memorandum of points and authorities submitted in support of the motion." D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989) (holding same and collecting similar cases). Stevens' reading of Frisbee, cannot be squared with the governing rules of civil procedure and this body of case law. And this Court should reject his invitation to allow trial courts to be sandbagged by unadvertised factual issues on summary judgment.

In sum, Stevens failed to respond to the City's summary judgment motion. Therefore, he cannot attempt to create a disputed issue of material fact for the first time on appeal. As a result, this Court should dismiss out of hand the arguments and claims

made at pages 22-28 of Stevens' brief, claiming that there are disputed issues of material fact, and at pages 29-31, claiming that there were disputed issues of material fact in the City's memorandum in support.

B. Stevens' Laundry List Of "Disputed Facts" Are Either Unsupported By The Summary Judgment Record, Not Disputed Facts At All, Or Not Material To His Underlying Claim.

To be sure, even if this Court is willing to entertain Stevens' attempt to create disputed issues of material fact for the first time on appeal, it will not provide grounds for reversal because Stevens' laundry list of "disputed facts" are either unsupported by the summary judgment record, not disputed facts at all, or not material to his underlying claim.

> [1] *"[W]e are confined to the disputed facts that were properly before the trial court."* Heideman v. Washington City, *2007 UT App 11, ¶16, 155 P.3d 900.*

First, in his attempt to create disputed issue of material fact, Stevens merely picks through the record and attempts to argue about what he alleged and the City disputed, or what the City alleged and he disputed. (Appellant's Br. at 23-39.) In Stevens' view, however, the "record" is simply random and scattered papers, documents, and pleadings, including depositions filed at the injunction hearing and "other pieces of evidence before the court[.]" (Appellant's Br. at 22-23.) Given enough time, any litigant could pick through the pleadings, documents, and other items contained within a trial record and create a list of what one party alleges and the other disputes. If this was all that was required, summary judgments would never survive appeal. However, this misapprehends the record on a summary judgment motion.

In reviewing summary judgment, the appellate court only considers documents and evidence properly before the trial court on summary judgment, *i.e.*, before the trial court in the summary judgment briefing. See Pratt v. Mitchell Hollow Irrigation Co., 813 P.2d 1169, 1171 (Utah 1991). As this Court stated recently, "in the context of summary judgment, we are confined to the disputed facts that were properly before the trial court." Heideman v. Washington City, 2007 UT App 11, ¶16, 155 P.3d 900. "Properly," in the context of summary judgment, means compliance with the requirements of Rule 7 of the Utah Rules of Civil Procedure. See id.; see also Utah R. Civ. P. 56(c) ("[t]he motion, memoranda and affidavits shall be in accordance with Rule 7").

Stevens fails to demonstrate that any of the "facts" he claims are in dispute were actually presented to the trial court on summary judgment. Therefore, this Court should reject his claims out of hand.

[2] *Several of Stevens' claimed disputed issues of fact are legal arguments masquerading as disputed "facts."*

Second, much of what Stevens argues fails to focus on actual facts. Rather, he focuses on legal arguments. These arguments include whether he had the right to appeal the modification of his conditional use permit (Appellant's Br. at 25) and whether the City was required to give specific notice of how to appeal its decisions on his license (at 26-27).

"Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing or taking place, as well as the subjective, such as state of mind." State v. Pena, 869 P.2d 932, 935 (Utah 1994),

modified in part by State v. Levin, 2006 UT 50, 144 P.3d 1096. "Legal determinations, on the other hand, are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances." Pena, 869 P.2d at 935.

Here, Stevens claims there is a dispute about whether he had the right to appeal the modification of his conditional use permit. The undisputed fact is that he did not appeal. The question of whether he had the right to appeal requires an interpretation of the laws and ordinances at issue. That is a legal question. See *infra* at 33-37 (discussing same). So too is the question of whether the City was required to walk him through the appeal process. The undisputed fact is that the City did not tell him how to appeal. (R. 456.) Whether the City was required to hold his hand through the process, however, is a legal question. See *infra* at 33-37 (discussing same). Stevens' claimed dispute as to these legal issues cannot form the basis for reversal under the guise of disputed issues of material fact.

[3] *Stevens' "disputed facts" are not material to the underlying claim.*

Even assuming there are disputed facts, the dispute is not relevant to the disposition of a summary judgment motion unless the facts are material. See Utah R. Civ. P. 56(c). An issue of fact is not "material" unless, under the substantive law, it is essential to the proper disposition of the underlying claim. See Horgan v. Indus. Design Corp., 657 P.2d 751, 752 (Utah 1982) (courts "do not consider the disputed issues" which are not material to a resolution of the case); Sanns v. Butterfield Ford, 2004 UT App 203,

¶6, 94 P.3d 301 ("mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case") (citation omitted)).

In his attempt to obtain a reversal, Stevens forgets why he sued the City—to obtain just compensation for the City's alleged taking of his property. The disputes he attempts to create, however, have nothing to do with whether the City has taken or damaged his property without just compensation.

To summarize his arguments, Stevens attempts to create a dispute concerning what his original intent was in his use of the property (Appellant's Br. at 23, 30); whether he was operating a salvage yard in violation of ordinance (at 25); whether he complied with the conditions imposed by the City (at 28-29); whether the City "had an interest in obtaining either of [his] [p]roperties" (at 31); and whether the City's decisions were arbitrary, capricious, or illegal (at 31). He does not argue materiality of these claimed disputes in the context of his inverse condemnation claim and the elements of that claim as set forth in article I, section 22 of our state constitution.

Specifically, whether he was in violation of City ordinances or the conditions imposed by the City relate to the propriety of the revocation of his permits. He does not assert that there was a taking of his permits (or license). And, in any event, by failing to appeal the revocation of his permits and license he gave up any legal challenge to the propriety of the City's actions. See *infra* at 33-37.

Furthermore, whether the City has any interest in obtaining his properties is irrelevant to any issue pending before the Court. The City abandoned its interest in

obtaining Stevens' property. And, as set forth in detail below, this argument—which entails Stevens' claim that the City engaged in a "plan of coercion" is irrelevant to and would actually defeat Stevens' takings claim. See *infra* at 37-39

Finally, whether the City's decision was arbitrary, capricious, or illegal would be a question if this were a review of a land use decision under Utah Code section 10-9a-801. See Utah Code Ann. § 10-9a-801(3)(c) (Supp. 2007) ("[a] final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal"). Stevens, however, has not filed petition for review or otherwise challenged the City's actual land use decisions in district court. See id. § 10-9a-801(2)(a) (providing for review of land use decisions by district court). Thus, whether the City's decisions were arbitrary, capricious, or illegal is simply not a material issue to the takings claim.

In sum, Stevens' claimed "disputed facts" are not material to the underlying legal claim and, therefore, cannot preclude summary judgment.

III. SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW BECAUSE STEVENS HAS NO LEGALLY COGNIZABLE TAKINGS CLAIM.

Article I, section 22 of the Utah Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22. To establish a claim for inverse condemnation under article I, section 22, Stevens must show a property interest that is taken or damaged for a public use. See Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241, 1244 (Utah 1990). If he makes this showing, he is entitled to just compensation. See Utah Const. art. I, § 22.

The property interest Stevens identifies, both in his complaint and in his brief, is his real property. He asserts that the City's revocation of his business license and conditional use permit, and the adoption of the City's ordinances, which he states were "arbitrarily and capriciously enacted," affected the economic viability of his properties. (Appellant's Br. at 32-33.)[9] He also asserts that the City failed to comply with eminent domain laws in its alleged attempt to purchase his property. (Appellant's Br. at 34-35.) His arguments are without merit for the following reasons.

A. Stevens Submitted No Evidence To Show A Substantial Interference Abridging Or Destroying His Claimed Property Rights.

Summary judgment was appropriate because the City's actions did not interfere with all economically viable use of Stevens' properties. As a general proposition, takings claims fall into two categories: (1) physical takings and (2) regulatory takings. See View Condo. Owners Ass'n v. MSICO, L.L.C., 2005 UT 91, ¶31, 127 P.3d 697. "A 'physical taking occurs . . . when there is [either] a condemnation or a physical appropriation of property.'" Id. (quoting Phillip Morris, Inc. v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002)). In contrast to a physical taking, "'[a] regulatory taking transpires when some significant

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[9] Stevens skirts around the fringes of claiming a property right in his business license. (Appellant's Br. at 33.) But simply complaining about the City's revocation of that license does not equate to a taking because it falls short of showing a protected property interest in the license itself. Stevens would have to allege and show a legitimate claim of entitlement to the license as opposed to a unilateral expectation that the City would not revoke it. See Heideman, 2007 UT App 11 at ¶¶17-19. Of course, the license was revoked because he did not have a conditional use permit. He never properly challenged the City's decisions on his conditional use permits and therefore any claim of a property interest in the license suffers the same fate as his claim for taking of his real properties.

restriction is placed upon an owner's use of his property for which 'justice and fairness' require that compensation be given.'" Id. Because the City never condemned or physically appropriated Stevens' properties, his claim is appropriately categorized as a regulatory taking claim.

For government action to constitute a regulatory taking, the regulation at issue must substantially interfere with private property by destroying it, materially lessening its value, or substantially abridging or destroying the owner's right in its use and enjoyment. See id. at ¶¶30, 32. This does not mean that every regulation of real property that results in some interference or diminished value requires compensation. See id.

Government could simply not go on if any regulation or zoning action which diminished property value required the payment of just compensation. Cf. Lingle v. Chevron U.S.A., 544 U.S. 528, 538 (2005). Rather, like the City's regulation of Stevens' properties, "[m]any statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of the property, yet they generally do not require compensation under article I, section 22." Colman v. Utah State Land Board, 795 P.2d 622, 627 (Utah 1990).

"Indeed, the police power allows government, 'without compensation,' to 'regulate and restrain the use of private property when the health, safety, morals, or welfare of the public requires or demands it.'" View Condo. Owners Ass'n v. MSICO, L.L.C., 2005 UT 91 at ¶32 (quoting Colman, 795 P.2d at 627). "Regulations promulgated under that power 'are not considered as appropriating private property for a public use, but simply as regulating its use and enjoyment.'" Id.

In this case it is an undisputed fact that the City's actions on Stevens' conditional use permits came as a result of concerns related to the parking of Stevens' vehicles along streets that created visibility and safety issues for the public generally, including children who travel that street on their way to school. (R. 420 ¶16; 448 ¶16.) The vehicles also created an unsightly appearance not authorized or contemplated by the City. (R. 420 ¶17; 449 ¶17.) These are not mere allegations as Stevens claims (Appellant's Br. at 34), they are undisputed facts.

Stevens argues, in conclusory fashion, that the City's actions "substantially interfered" with his property rights and interests. (Appellant's Br. at 33.) He asserts that he lost a "major source of income" and also claims that "the economic viability of [his] properties was severely lessened." (*Id.*) Of course, there is no evidence to support this claim. The one record citation he does provide is not of any evidence that was before the trial court in the summary judgment record and therefore cannot be considered on appeal. See Heideman, 2007 UT App 11 at ¶16. Stevens is simply asking this Court to do what it was reversed for doing in View Condominium Owners Ass'n v. MSICO: assume that there was evidence supporting substantial abridgment or destruction of a property right. See 2005 UT 91 at ¶33.

Furthermore, the "evidence" Stevens cites is his own self-serving deposition testimony placed in the record in the course of the injunction hearing. (R. 795 Tr. 189.) There, he testified that the revocation of his business license "cost me a lot of money." (R. 795 Tr. 189:5.) If this was sufficient to substantially interfere with a property right, every time a governmental authority shut down a business for violation of its ordinances

it would have to pay just compensation to the business. Fortunately, the constitution requires more. While arguing generally that he lost income, suffered some other losses, and had the "the economic viability of [his] properties [] severely lessened" (Appellant's Br. at 33) as a result of the City's regulation, Stevens never argues, nor did he allege in his complaint, that the City's actions left his properties "economically idle[.]" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

In other words, he does not argue or allege that the City's actions "prevent him from engaging in any and all permissible uses" of his properties. View Condominium Owners Ass'n v. MSICO, L.L.C., 2005 UT 91 at ¶36. For good reason, both his properties are zoned general commercial under the City's zoning ordinances. This zone expressly permits over thirty uses along with "[o]ther uses in harmony with those listed." LaVerkin City Ord. § 10-6G-2. (Add. C.) It is difficult to see, and Stevens makes no argument to show otherwise, that his properties have no other viable use than as unauthorized salvage yards.

In sum, Stevens has not suffered a legally cognizable regulatory taking that requires just compensation under article I, section 22.

B. Stevens Failed To Exhaust His Administrative Remedies By Appealing The Revocation Of His Licenses And Therefore His Taking Claim Has Not Ripened.

Summary judgment was also appropriate because Stevens did not exhaust his administrative remedies by appealing any of the City's actions on his licenses and permits. Before a party may assert a regulatory takings claim, he must first exhaust his administrative remedies. See Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001). This

exhaustion requirement applies for inverse condemnation claims under article I, section 22. See B.A.M. Dev., L.L.C. v. Salt Lake County, 2004 UT App 34, ¶35 n.8, 87 P.3d 710 (Orme, J., dissenting), *rev'd on other grounds* 2006 UT 2, ¶30 n.3,128 P.3d 1161 (noting with approval Judge Orme's dissent summarizing takings jurisprudence). See also Patterson v. American Fork City, 2003 UT 7, ¶18, 67 P.3d 466 (recognizing that administrative remedies must be exhausted prior to assertion of state constitutional claims). Under the exhaustion requirement, a takings claim is not ripe until the land use authority has reached a final decision on the merits of the underlying action. See Palazzolo, 533 U.S. at 620; see also Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736-37 (1997).

In the instant case, following Stevens' refusal to comply with its condition on his use, the City modified and revoked Stevens' conditional use permits. It is undisputed that Stevens failed to appeal that revocation to the City's board of adjustment. Stevens claims he was not required to make such an appeal because the City's code does not provide a method to appeal a modification or revocation of a conditional use permit. (Appellant's Br. at 26.) Even if, as Stevens suggests, City ordinance did not specifically state that the board of adjustment could review a modification or revocation of a conditional use permit, see LaVerkin City Ord. § 10-9-11 (providing for review in board of adjustment of "the decision to grant, grant with conditions or deny a conditional use permit"), our state land use code fills the gap.

State statue provides that if a municipality fails to enact an ordinance establishing an appeal of a land use decision, the adversely affected party has ten days to appeal that

decision to the municipality's "appeal authority." Utah Code Ann. §§ 10-9a-704(1), (2) (Supp. 2007). The "appeal authority" is "the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance." Utah Code Ann. § 10-9a-103(2) (Supp. 2007). In LaVerkin City, the appeal authority is its board of adjustment. See LaVerkin City Ord. Chap. 4.

Stevens never appealed to the board of adjustment. Not once. If the City's action in revoking or modifying his conditional use permit was in error, the board of adjustment was in a position to correct that error. If the board of adjustment could have corrected the error, then Stevens may have his conditional use permits. If he had his conditional use permits, he may have a business license. If he had a business license he would not have suffered the damages he alleges and the takings clause would not be implicated. Stevens' failure to follow this remedy, however, has deprived him of a final decision and a final determination on the correctness of the City's actions. It is therefore fatal to his inverse condemnation claim. See Palazzolo, 533 U.S. at 620-21.[10]

The same is true of his business license. See LaVerkin City Ord. Chap. 8 (providing appeal procedure). Stevens concedes he did not appeal that decision through the administrative appeals process but argues instead he did not have to because the City never told him how. (Appellant's Br. at 26-27.) In support of this argument, he relies on language from the plurality opinion in Worrall v. Ogden City Fire Department, 616 P.2d

[10] Even if there was no further appeal to the board of adjustment, the same analysis would apply because Stevens failed to petition the district court for review of the City's decisions under Utah Code section 10-9a-801. As a result, there still would be no final decision.

598 (Utah 1980). His reliance on Worrall is misplaced. In Worrall, the Utah Supreme Court was interpreting due process under the Fourteenth Amendment to the United States Constitution. See id. at 601. The plurality[11] relied on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and its progeny to support their position that the civil service commission was required to specifically inform the plaintiff how to appeal the administrative decision. See Worrall, 616 P.2d at 601-602 (plurality opinion).

More recently, however, the United States Supreme Court limited the Mullane line of cases and held that where state-law remedies are available and established through published and generally available statutes and case law, a citizen is obligated to turn to these public sources and determine for himself what remedial procedures are available to him. City of West Covina v. Perkins, 525 U.S. 234, 241 (1999). See also Atkins v. Parker, 472 U.S. 115, 130-131 (1985) ("[a]ll citizens are presumptively charged with knowledge of the law . . . [t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny").

As a result, the plurality opinion in Worrall lends no support to Stevens' claim that ignorance of the law is an excuse to his failure to appeal. Rather, as Justice Hall recognized, there is no rule that requires an adverse party to notify a plaintiff about

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[11] The reasoning of a plurality is not binding precedent. See State v. Anderson, 910 P.2d 1229, 1234 n.5 (Utah 1996) (noting that plurality opinions "represent[] the views of only two justices of this court and [are] therefore not the law of this state"); State v. Giron, 943 P.2d 1114, 1121 (Utah Ct. App. 1997) (stating that the analysis contained in a plurality opinion is "not binding").

applicable time limits or "outline for him the appropriate response to make." Worrall, 616 P.2d at 603 (Hall, J., dissenting, joined by Crockett, C.J.). The United States Supreme Court has now vindicated Justice Hall's view.

LaVerkin City Ordinances are published and generally available to the public through the City's offices or, like many municipalities in Utah, on-line at www.sterlingcodifiers.com/UT/LaVerkin/index.htm. In this regard, Stevens did not find it difficult to get copies of these ordinances to attach to his brief. (Appellant's Br. at Add.) Further, Stevens submitted no evidence on summary judgment to show that copies of these ordinances were not available to him.

In sum, Stevens failed to exhaust his administrative remedies and therefore his takings claim is not ripe.

C. Stevens Impermissibly Equates Alleged Violations Of Due Process And "Arbitrary And Capricious" Action With A Taking Requiring Just Compensation.

In both his complaint and in his brief, Stevens tosses out the terms "arbitrary and capricious" and asserts that his due process rights were violated in his ongoing disputes with the City. (Appellant's Br. at 33-36; R. 11 ¶¶83-86.) He apparently believes these arguments bolster his inverse condemnation claim. However, claims of arbitrary and capricious action and alleged violations of due process have no place in a takings analysis.

Government cannot exercise its power of eminent domain arbitrarily or capriciously. See Salt Lake County v. Ramoselli, 567 P.2d 182, 183 (Utah 1977). Therefore, a plaintiff cannot premise an inverse condemnation claim on alleged arbitrary

and capricious conduct because—as its name implies—an inverse condemnation is an action to obtain just compensation from government when government has taken or damaged property for public use without formally exercising its eminent domain power. See Farmers New World Life, 803 P.2d at 1243; B.A.M. Dev., 2004 UT App 34 at ¶35 n.8 (Orme, J., dissenting).

In Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), the United States Supreme Court clarified this issue, holding claims that allege violation of due process and related analyses are inconsistent with, and have no place in a takings analysis. The Court made clear that the takings clause only "requires compensation where government takes private property '***for public use***.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of ***otherwise proper interference*** amounting to a taking.'" Id. at 543 (emphasis original) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987)). On the other hand, "if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." Id.

Thus, although Stevens spends a great deal of time complaining and arguing about whether the City's actions—its negotiations with him over the potential purchase of his property, the enactment of its ordinances, or the manner in providing him an appeal—are arbitrary and capricious or otherwise violate his due process rights, it is ultimately irrelevant to his inverse condemnation claim. Indeed, if the City is guilty of all these

things, then Stevens has no claim for inverse condemnation and summary judgment must be affirmed because the City's action would not be a lawful exercise of governmental authority and no inverse condemnation claim would arise. See Lingle, 544 U.S. at 543; Ramoselli, 567 P.2d at 183.

D. Stevens Cannot Maintain An Inverse Condemnation Action For Alleged Threats To Get Him To Sell His Property.

Stevens' final argument is that summary judgment was not appropriate because the City, he claims, did not follow Utah Code section 57-12-13 in its negotiations with him. (Appellant's Br. at 37.) Instead, Stevens argues, the City attempted to get him to sell his property through coercion and threats. There are several problems with this argument. First, there is no competent evidence on summary judgment that supports it.

Second, the City did not purchase his property; it did not exercise its power of eminent domain; and it no longer has any interest in acquiring his property. Stevens cites no authority for the proposition that he can maintain an inverse condemnation action based on a City's failed and abandoned attempt to acquire property. Carrying his argument to its conclusion, Stevens wants a trial on the merits of an inverse condemnation action concerning property the City has never taken from him. This is not a basis to reverse the trial court.

IV. THE CITY'S CITATION TO THE PRELIMINARY INJUNCTION FACTUAL FINDINGS DOES NOT CONSTITUTE REVERSIBLE ERROR.

Stevens next argues that summary judgment should be reversed because, he claims, the City inappropriately cited to and relied on the trial court's factual findings in its memorandum in support of its motion for summary judgment. (Appellant's Br. at 38-

39.) We agree, as a general proposition, that findings of fact and conclusions of law resulting from a preliminary injunction ruling do not have a binding, preclusive effect in the subsequent trial of the case on the merits. See Centro de la Familia v. Carter, 2004 UT 43, ¶¶4-5, 94 P.3d 261. However, this general proposition does not warrant reversal of summary judgment.

The City never asserted that Stevens was barred from challenging the factual findings made following the injunction hearing on summary judgment. The City never asserted that any of the factual findings or conclusions of law made in the injunction ruling were binding or preclusive. The City merely put the trial court's findings that supported its injunction ruling forward as facts that the City believed were undisputed for purposes of summary judgment. (R. 446.)[12] If Stevens had evidence to dispute those facts, he could have put that evidence forward and, assuming it was competent under Rule 56(e) and created a dispute of material fact, he could have prevented summary judgment regardless of the course of the City's statement of facts. See Utah R. Civ. P. 56(c). Thus, in the context of this summary judgment motion, Stevens' argument is erroneous and does not provide a basis for reversing the trial court.

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[12] It is not difficult to understand why the City put those facts forward as undisputed on summary judgment. The trial court had noted, with respect to those facts, that "the facts presented here are drawn from either the undisputed facts of the parties' memoranda and exhibits, or from apparently uncontroverted deposition testimony." (R. 416 [Mem. Dec. at 2 n.2].) Thus, regardless of whether the City relied on those findings and repeated them almost verbatim in its memorandum in support, Stevens had all but conceded that they were undisputed.

V. STEVENS DID NOT PRESERVE HIS CHALLENGE TO THE SUFFICIENCY OF THE TRIAL COURT'S SUMMARY JUDGMENT RULING.

Stevens next argues that the trial court should be reversed for failing to give a written statement of grounds for its order granting summary judgment. (Appellant's Br. at 39.) This argument fails for two reasons. First, Stevens did not preserve this argument as grounds for reversal by objecting to, submitting a motion to amend, or otherwise calling the trial court's attention to the alleged deficiency of its order. "In order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶14, 48 P.3d 968 (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). This includes placing a trial court on notice of any claim that its ruling is not sufficiently detailed. See 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶¶52-54, 99 P.3d 801.

The reason for requiring this notice is exemplified in the context of this case. When the trial court issued its initial ruling denying Stevens' Rule 60(b) motion without explanation, Stevens objected and filed a request for specific findings and conclusions. (R. 749, 752-753.) Having been alerted and placed on notice to this issue, the trial court subsequently, and in response to Stevens' objection and request, issued specific findings and conclusions. (R. 765-773.) Unlike the Rule 60(b) ruling, Stevens never alerted the trial court to any alleged problem with the sufficiency of its summary judgment ruling; therefore, Stevens deprived the trial court of the opportunity to correct the alleged error.

As a result, Stevens waived any challenge to the sufficiency of the trial court's summary judgment ruling. See 438 Main Street v. Easy Heat, Inc., 2004 UT 72 at ¶¶52-54.

Second, even though the City's motion for summary judgment was based on multiple grounds and the trial court's ruling did not state on what basis it granted summary judgment, that alone does not constitute a basis for reversal. See Retherford v. AT&T Comm., 844 P.2d 949, 958 n.4 (Utah 1992) ("failure to issue a statement of grounds is not reversible error absent unusual circumstances"). The issues before the trial court were not complex, and, as set forth above, in light of the procedural posture of the case and the resolution of the parties' requests for injunctive relief, there was only one issue remaining for the trial court to address: Stevens' inverse condemnation claim.

In this regard, while Stevens focuses his attention on the language of the trial court's ruling, he provides no explanation about how the issues were so complex that this Court is left with no choice except to remand for clarification. See, e.g., Gabriel v. Salt Lake City Corp., 2001 UT App 277, ¶10, 34 P.3d 234 (reversing only because court was "unable to square the trial court's ruling with the various arguments asserted in the City's motion"). A remand here to require more detail from the trial court would ensure only one thing—that after the trial court provides more detail, this case will come right back to this Court for resolution of the issues that this Court can easily resolve here and now. In the interests of judicial economy, this Court should dismiss Stevens' argument and instead rule on the substantive issues in this appeal. See Granite Credit Union v. Remick, 2006 UT App 115, ¶9, 133 P.3d 440.

VI. THE TRIAL COURT WAS WITHIN ITS DISCRETION TO DENY STEVENS' MOTION FOR RELIEF FROM SUMMARY JUDGMENT.

Stevens next argues that the trial court abused its discretion in refusing to grant him relief from summary judgment under Rules 60(b)(1), for excusable error, and 60(b)(6), for the alleged gross negligence of his prior attorneys. He, like many, begins his argument with an attempted resort to the "liberal application" language in Rule 60(b) cases implying that any result other than granting the Rule 60(b) motion is an abuse of discretion. However, those cases are in the context of a default judgment. See Menzies v. Galetka, 2006 UT 81, ¶63, 150 P.3d 480 (collecting cases that discuss application of Rule 60(b) in context of default judgment). This was not a default judgment. It was a summary judgment. Relief from an order granting summary judgment does not require liberal application from the trial court. Rather, the trial court need only grant relief under Rule 60(b) in limited circumstances. See Rukavina v. Sprague, 2007 UT App 331 at ¶3. And, as stated by the Utah Supreme Court, "[t]he outcome of rule 60(b) motions are rarely vulnerable to attack." Fisher v. Bybee, 2004 UT 92, ¶7, 104 P.3d 1198. Against this backdrop, the trial court should be affirmed.

A. The Trial Court Did Not Abuse Its Discretion In Concluding That Renovating An Office And Hiring A New Assistant Do Not Demonstrate Excusable Neglect Under Rule 60(b)(1).

Stevens first seeks relief under the excusable neglect component of Rule 60(b)(1). The Utah Supreme Court has defined "excusable neglect" under 60(b)(1) as "the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." Mini Spas v. Indus. Comm'n, 733 P.2d 130, 132 (Utah 1987).

Stevens argues that he demonstrated excusable neglect because, he asserts, his former attorneys, Avery and AHM, exercised due diligence and that but for "circumstances beyond his control" he would have timely filed a memorandum in opposition to summary judgment. (Appellant's Br. at 43.) He then describes the utter "chaos" that AHM experienced because of its office renovations and hiring new staff. (*See id.* at 43-44.) This, Stevens argues, is due diligence.

The trial court saw it differently. It reasoned that what Stevens had described was nothing more than "ordinary challenges in day to day business at a law firm." (R. 769 [60(b) Ruling at 5].) In fact, contrary to Stevens assertions on appeal concerning the precautions that AHM allegedly took to prevent this from happening, the trial court stated: "[Stevens] submitted ***no evidence*** of having taken any precautions to avoid or minimize the challenges the AHM firm claimed to be under as a result of its office renovations." (R. 769 [60(b) Ruling at 5]) (Emphasis added.) The trial court was simply not "persuaded that a person acting prudently and with due diligence under similar circumstances would not have been able to respond to the motion for summary judgment within the time frame required by rule." (R. 769 [60(b) Ruling at 5].)

The trial court summarized its decision as follows: "In short, [Stevens] admits to receiving the motion for summary judgment on October 30th. What happened to it for the next twenty days—until it ultimately found its way to Mr. Avery—is a mystery to the Court. [Stevens] has failed to provide this Court with reasonable justification for his failure to timely oppose Defendant's motion for summary judgment." (R. 769 [60(b) Ruling at 5].)

The trial court did not abuse its discretion in denying relief under Rule 60(b)(1). "Routine back-office problems . . . do not rank high in the list of excuses for defaults." Pretzel & Stouffer v. Imperial Adjusters, Inc., 28 F.3d 42, 46 (7th Cir. 1994). Neither does an attorney's failure to respond to a motion, even if the attorney is preoccupied with other matters. See Solaroll Shade & Shutter Corp., Inc. v. Bio-Energy Sys., 803 F.2d 1130, 1132 (11th Cir. 1986).[13] Were the rule otherwise, there would be no need to impose deadlines. Adopting Stevens' argument about what constitutes excusable neglect under Rule 60(b)(1) would render the briefing requirements of Rule 7 meaningless and suggest that any excuse for failing to timely respond to a motion would provide sufficient grounds to grant relief from the judgment entered as a result of that motion. This cannot be the law.

Stevens has failed to demonstrate that the trial court abused its discretion in refusing to grant relief from summary judgment under Rule 60(b)(1).

B. The Conduct Of Stevens' Attorneys Does Not Warrant Relief Under Rule 60(b)(6).

After asserting Avery and AHM exercised due diligence, Stevens next argues they were grossly negligent and disregarded his interests, which, he asserts, entitles him to relief under Rule 60(b)(6) of the Utah Rules of Civil Procedure. Rule 60(b)(6) authorizes the setting aside of a final judgment "for any other reason justifying relief from the

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[13] Because Rule 60(b)(1) of the Federal Rules of Civil Procedure is nearly identical to Utah's Rule 60(b)(1), federal interpretations of the rule are considered by this Court as persuasive authority. See Rukavina, 2007 UT App 331 at ¶4 n.4.

operation of the judgment." Utah R. Civ. P. 60(b)(6). "Rule 60(b)(6) is the 'catch-all' provision of rule 60(b)." Menzies, 2006 UT 81 at ¶71. As such, Rule 60(b)(6) "may not be relied upon if the asserted grounds for relief fall within any other subsection of rule 60(b)." Id. In other words, relief under 60(b)(6) is "exclusive of the grounds for relief allowed under other subsections." Id. (citations omitted). Moreover, "relief under rule 60(b)(6) is meant to be the exception rather than the rule[,]" and therefore should be "'sparingly invoked' and used 'only in unusual and exceptional circumstances.'" Id. (quoting Laub v. S. Cent. Utah Tel. Ass'n, 657 P.2d 1304, 1307-08 (Utah 1982)).

Stevens' argument for relief under Rule 60(b)(6) fails for two reasons. First, this argument was not sufficiently preserved below. As stated in the trial court's decision,

> [Stevens'] proffered reason is a general statement that he should have the right to have his dispute decided on the merits. He does not state the correct legal standard under Rule 60(b)(6), nor does he provide the Court with any argument or authority as to why the circumstances in this case are so unusual and exceptional as to justify this Court's granting relief for a reason that must be "sparingly invoked."

(R. 771 [60(b) Ruling at 7].) See also R. 641-642 (Stevens' Rule 60(b)(6) argument below.) To preserve an argument for appeal, a litigant must present the trial court with argument and authority and provide the trial court with the first opportunity to rule on that issue. See Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998). Stevens did not do so here. This Court should summarily affirm on that basis.

Second, Stevens has not met the standard for granting relief under 60(b)(6). Stevens attempts to equate Avery and AHM's conduct to the conduct of the attorney in Menzies. In Menzies, the Utah Supreme Court called the attorney's representation

"deplorable," 2006 UT 81 at ¶24, and included a lengthy and detailed description of this representation, substantiated by a lengthy and detailed record. See id. at ¶¶24-48, 53. Avery and AHM's conduct cannot even remotely be described as "deplorable." And Stevens knows it.

Stevens states, "the record does not accurately reflect the true nature of [Avery and AHM's] negligence." (Appellant's Br. at 46.) He goes on to argue that Avery and AHM misled him, failed to keep him informed, and failed to communicate with him. (Appellant's Br. at 46.) Unfortunately for Stevens, however, the record does not substantiate his claims. It is a well-settled rule that an appellate court will not consider assertions that are not substantiated by the record. See Wilderness Bldg. Sys., Inc. v. Chapman, 699 P.2d 766, 768 (Utah 1985) (stating "our review is of course limited to the evidence contained in the record on appeal"). As a result, this Court cannot consider any of the unsubstantiated conduct alleged and described by Stevens in his brief in determining whether Avery and AHM's representation of him warranted relief under Rule 60(b)(6). That spells the end of his argument. Without more, all that has been described is conduct that belongs solely within the confines of Rule 60(b)(1), and is not therefore appropriately considered under 60(b)(6). See Menzies, 2006 UT 81 at ¶71.

The trial court should be affirmed.

VII. A RULE 60(b) MOTION IS NOT A DISPOSITIVE MOTION THAT REQUIRES A HEARING UNDER RULE 7(e).

Stevens' final argument is that the trial court committed reversible error by not granting him a hearing on his Rule 60(b) motion. He is wrong. Rule 7(e) of the Utah

Rules of Civil Procedure requires trial courts to grant a request for a hearing only where the motion at issue is dispositive. See Utah R. Civ. P. 7(e). In cursory fashion, Stevens asserts that a Rule 60(b) motion is a dispositive motion. It is not.

A dispositive motion is a motion that "would dispose of the action or any claim or defense in the action[.]" Utah R. Civ. P. 7(e). Stevens' Rule 60(b) motion to set aside the summary judgment would not have disposed of this action or any claim or defense in this action. Rather, the motion merely could have put all the claims back on the table and ensured further litigation by setting aside the summary judgment which ended the action.

Because the motion was not dispositive, the trial court was "afforded great latitude" in determining whether to hold a hearing on the motion. Utah County v. Butler, 2006 UT App 444, ¶19, 147 P.3d 963, *cert. granted*, No. 20070009-SC (Utah Mar. 15, 2007) (certiorari granted to address other issues). Stevens cites no authority and makes no substantive argument to support his claim that the trial court abused its considerable discretion in not granting a hearing on the Rule 60(b) motion. Therefore, the trial court did not commit reversible error when it did not hold a hearing on the motion.

CONCLUSION

This Court should affirm the trial court.

Respectfully submitted this 23rd day of October 2007.

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CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I certify that on October 23rd, 2007, I caused two (2) copies of the **BRIEF FOR APPELLEE LAVERKIN CITY** to be served upon counsel for Appellant, via first class mail with sufficient postage prepaid, to the following address:

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Tab A

DETERMINATIVE RULES

Rules 7(c)(3), (d), and (e) of the Utah Rules of Civil Procedure:

(c)(3) Content.

> (c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.
>
> (c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.
>
> (c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.
>
> (c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

Rules 56(c) and (e) of the Utah Rules of Civil Procedure:

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Rule 60(b) of the Utah Rules of Civil Procedure:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tab B

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

ROBERT C. STEVENS d/b/a KEYSTONE REPAIR, individually, Plaintiff, v. CITY OF LaVERKIN, a Utah municipal corporation, Defendant.	**RULING ON PLAINTIFF'S MOTION TO SET ASIDE ORDER GRANTING SUMMARY JUDGMENT** [Proposed] Case No.: 060500154 Judge: Eric A. Ludlow
CITY OF LaVERKIN, a Utah municipal corporation, Counterclaimant, v. ROBERT C. STEVENS d/b/a KEYSTONE REPAIR or KEYSTONE AUTO, LLC, individually. Counterclaim Defendant.	

This matter is before the Court on Plaintiff's Motion to Set Aside Defendant's Motion for Summary Judgment. The Court, having reviewed and considered the parties' memoranda and supporting papers, makes the following Ruling:

FINDINGS OF FACT[1]

1. On October 26, 2006, Defendant filed a motion for summary judgment along with a memorandum in support.

2. The motion for summary judgment and memorandum in support were received at the law firm of Ascione Heideman & McKay ("AHM")—attorneys for the Plaintiff—on October 30, 2006.

3. At the time, the AHM law firm was undertaking office renovation and expansion because it had hired three new attorneys.

4. Robert Avery, an attorney with AHM, was the attorney primarily responsible for handling Plaintiff's case. Jerry D. Reynolds, another attorney in the AHM firm, also appeared with Mr. Avery on the case.

5. In the course of AHM's office renovations, Mr. Avery's office was being relocated to another floor of the building in which the law firm was located. During the time he was waiting for his new office to be ready and equipped, Mr. Avery worked from home or from temporarily vacant desks in the office. He also had limited access to the legal files normally in his possession.

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[1] These factual findings are based on the documentary evidence (affidavits) submitted by the parties in their briefing to the Court on the motion to set aside.

6. At this time Mr. Avery also received a new personal assistant, Mrs. Carolyn Braithwaite.

7. Mrs. Braithwaite, while admitting that AHM received the motion for summary judgment on October 30th, could not recall doing anything to track the motion for summary judgment once it was received.

8. It is not known whether Mr. Reynolds was facing the same issues as Mr. Avery.

9. In the midst of this, the deadline to respond to the motion for summary judgment had come and gone.

10. On November 20, 2006, Mr. Avery received Defendant's motion for summary judgment and supporting papers.

11. Though the motion for summary judgment was received by the law firm on October 30, it is not known—and Plaintiff submitted no evidence to show—where the motion for summary judgment was from October 30 to November 20 and why it took twenty days to find its way into Mr. Avery's hands.

12. Upon receiving the motion, Mr. Avery called counsel for the Defendant, Heath Snow, and requested additional time to respond to the motion for summary judgment.

13. Mr. Snow, however, having waited the period of time required for an opposition memorandum, and having received none, had already submitted the matter to the Court for decision.

14. On December 1, 2006, the Court entered summary judgment in favor of Defendant.

15. Plaintiff filed his motion to set aside that judgment on January 9, 2007.

LEGAL ANALYSIS AND CONCLUSIONS

To obtain relief from a final judgment under Rule 60(b), a party against whom judgment has been entered must show: (1) the judgment was entered against him for any of the reasons specified in Rule 60(b); (2) his motion to set aside the judgment is timely; and (3) he has a meritorious defense to the action. See Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147, 1148 (Utah 1994) (citing State ex. rel. Dep't of Social Servs v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983) (plurality opinion)).

A. Timeliness

As an initial matter, the Court concludes that the motion to set aside was timely filed insofar as it was submitted shortly after the final judgment had been entered and therefore within a reasonable time as it relates to Plaintiff's Rule 60(b)(6) argument, and within 3 months as it relates to Plaintiff's Rule 60(b)(1) argument . See Utah R. Civ. P. 60(b).

B. Rule 60(b) Reasons

Plaintiff asserts that the judgment was entered against him for the reasons specified in Rule 60(b)(1) and (6). The Court addresses these in turn.

1. Rule 60(b)(1)

Plaintiff[2] first asserts that the final judgment was entered against him because of mistake, inadvertence, or excusable neglect. Specifically, Plaintiff asserts that the judgment was entered

[2] While the actions specified in Plaintiff's motion to set aside and papers in support are the actions of the Plaintiff's attorneys (now former attorneys), the Court generally refers to them as the actions of the Plaintiff insofar as an attorney's conduct is ordinarily attributable to the client because an attorney is acting as an agent for the client. See Menzies, 2006 UT 81 at ¶76.

against him because he did not timely receive a copy of Defendant's motion for summary judgment and supporting materials. Plaintiff argues this was the result of a "perfect storm." This "perfect storm", as described by Plaintiff, was: (1) AHM's office renovation; (2) Mr. Avery not having immediate access to his files; and (3) Mr. Avery hiring a new assistant, all of which Plaintiff argues is "unprecedented."

The Court, however, agrees with Defendant's argument. Plaintiff has described ordinary challenges in day to day business at a law firm. As a result, the Court is not persuaded that these are circumstances that were beyond Plaintiff's control. Nor is the Court persuaded that a person acting prudently and with due diligence under similar circumstances would not have been able to respond to the motion for summary judgment within the time frame required by rule. Plaintiff submitted no evidence of having taken any precautions to avoid or minimize the challenges the AHM firm claimed to be under as a result of its office renovations.

In short, Plaintiff admits to receiving the motion for summary judgment on October 30th. What happened to it for the next twenty days—until it ultimately found its way to Mr. Avery—is a mystery to the Court. Plaintiff has failed to provide this Court with reasonable justification for his failure to timely oppose Defendant's motion for summary judgment.

Plaintiff further argues that he was unaware of Defendant's "intent" to file a motion for summary judgment and therefore scheduled the office move in "good faith" not anticipating the delay of delivery of office furniture and other equipment. However, the parties were in the middle of ongoing litigation. A reasonably prudent attorney would anticipate that any motion, including a motion for summary judgment, could be filed by the opposing party at any time.

While the excuses offered by Plaintiff may amount to neglect, Plaintiff has not sufficiently demonstrated that they amount to excusable neglect as required under Rule 60(b)(1).

Finally, Plaintiff attempts to raise a question as to the actual date of receipt of Defendant's request to submit, calling it a matter of importance. However, that date is irrelevant to the timeliness of his opposition. It is undisputed that Plaintiff received the motion for summary judgment and did not timely file a memorandum in opposition to the motion for summary judgment as required by Rule 7(c)(1).

For the foregoing reasons, the Court concludes that Plaintiff has failed to show that the judgment against him resulted from mistake, inadvertence, or excusable neglect under Rule 60(b)(1).

2. Rule 60(b)(6)

Plaintiff also asserts that the judgment entered against him should be set aside under Rule 60(b)(6) which authorizes the setting aside of a final judgment "for any other reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b)(6). As stated recently by the Utah Supreme Court, "Rule 60(b)(6) is the 'catch-all' provision of rule 60(b)." Menzies v. Galetka, 2006 UT 81, ¶71, 150 P.3d 480. As such, Rule 60(b)(6) "may not be relied upon if the asserted grounds for relief fall within any other subsection of rule 60(b). In other words, the grounds for relief under 60(b)(6) are exclusive of the grounds for relief allowed under other subsections." Id. (citations omitted). Moreover, "relief under rule 60(b)(6) is meant to be the exception rather than the rule[,]" and should therefore be "'sparingly invoked' and used 'only in

unusual and exceptional circumstances.'" Id. (quoting Laub v. S. Cent. Utah Tel. Ass'n, 657 P.2d 1304, 1307-08 (Utah 1982)).

Plaintiff's proffered reason is a general statement that he should have the right to have his dispute decided on the merits. He does not state the correct legal standard under Rule 60(b)(6), nor does he provide the Court with any argument or authority as to why the circumstances in this case are so unusual and exceptional as to justify this Court's granting relief for a reason that must be "sparingly invoked."

Therefore, the Court concludes that Plaintiff has failed to show that the judgment should be set aside under Rule 60(b)(6).

C. Meritorious Defense

Because the Court concludes that the judgment was not entered against Plaintiff for any of the reasons specified in Rule 60(b), it will not and need not address the existence of a meritorious defense. See State ex. rel. Dep't of Social Servs v. Musselman, 667 P.2d 1053, 1056 (Utah 1983) (stating it is "unnecessary" and "inappropriate [] to consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown."); see also Board of Educ. of Granite Sch. Dist. v. Cox, 384 P.2d 806, 808 (Utah 1963) (stating meritorious defense question arises only after sufficient excuse is shown).

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to Set Aside the Order Granting Defendant's Motion for Summary Judgment is DENIED.

DATED THIS 16th day of April 2007.

Eric A. Ludlow
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2007, I served an unsigned copy of the foregoing **RULING ON PLAINTIFF'S MOTION TO SET ASIDE ORDER GRANTING SUMMARY JUDGMENT [Proposed]** on the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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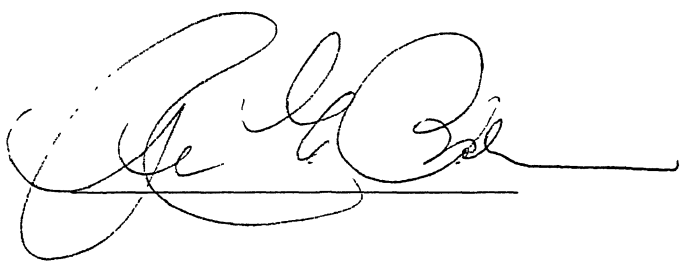

Tab C

CHAPTER 8
ADMINISTRATIVE HEARINGS

1-8-1: REQUEST:

Unless otherwise specifically provided in any ordinance of the city or any code adopted by reference, a hearing before the city council may be requested by any person:

A. Who is denied or refused a permit or license by any officer, agent or employee of this city.

B. Whose permit or license is revoked, restricted, qualified or limited from that for which it was first issued. (1982 Code § 1-411)

1-8-2: FORM OF REQUEST:

The request for hearing must be made in writing to the mayor or city clerk/recorder and made within thirty (30) days following the date notice denying, refusing, revoking, qualifying or restricting the license or permit is mailed by the city to the applicant or license holder at his address as it appears on the application or license. (1982 Code § 4-412)

1-8-3: PROCEDURE:

A. Time And Place: Following receipt of a request for hearing, the city council shall inform the person requesting a hearing of the time and place the hearing is to be held.

B. Witnesses; Evidence: At the hearing, the aggrieved party shall have the right to hear and examine any witnesses the city may produce to support its decision and to present his own evidence in support of his contention.

C. Decision Of City Council: The city council shall, within ten (10) days following the conclusion of the hearing, in writing, inform the person who requested the hearing of the decision of the city council. (1982 Code § 1-413)

1-8-4: NOT ADDITIONAL REMEDY:

This chapter shall not be construed so as to afford any aggrieved party more than one hearing before the city council, nor shall the hearing provided in this chapter apply to any criminal complaint or proceeding. (1982 Code § 1-414)

3-1-13: REVOCATION OR DENIAL OF LICENSE:

A. Failure To Comply; Unlawful Activities: Any license issued pursuant to the provisions of this code or of any ordinance of the city may be revoked and any application denied by the city because of:

1. The failure of the licensee or applicant to comply with the conditions and requirements of this code or any ordinance of the city.

2. Unlawful activities conducted or permitted on the premises where the business is conducted.

3. Fraud, misrepresentation or a false statement contained in the application for the license.

4. Fraud, misrepresentation for false statement made in the course of carrying on the business.

5. Conviction of any crime or misdemeanor involving moral turpitude.

B. Notice To Licensee: Prior to the revocation of a license or denial of an application to renew business license, the licensee or applicant shall be given a notice which shall state in substance that the city intends to revoke the business license or deny the application to renew, together with the reason or reasons therefor, at a regular or special meeting of the city council (which shall be at least 10 days and not more than 30 days from the date notice is sent), and that the licensee or applicant has a right to appear, to be represented by counsel, to hear the evidence against him, to cross examine witnesses and to present evidence as to why the license should not be revoked or the application denied. (1982 Code § 9-120; amd. 1998 Code)

C. Not Applicable To Businesses Not Previously Licensed: The preceding subsection shall not apply to applications for licenses for businesses which have not previously been licensed by the city, and such applicants need only be informed that their application has been denied. (1982 Code § 9-120)

CHAPTER 4
BOARD OF ADJUSTMENT [20]

10-4-1: COMPOSITION:

The board of adjustment shall consist of five (5) members, of whom shall be appointed by the mayor with the advice and consent of the city council for a term of five (5) years; provided, that the term of the members of the first board so appointed shall be such that the term of one member shall expire each year. Any member may be removed for cause by the city council upon written charge and after public hearing, if such public hearing is requested. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. The board of adjustment shall elect a chairperson and chairperson pro tem from among its members, whose terms shall be for one year. (Ord. 2000-05, 3-15-2000; amd. Ord. 2004-02, 1-21-2004)

10-4-2: DUTIES AND POWERS:

The board of adjustment shall have the following powers:

A. Appeals: To hear and decide appeals where it is alleged that there was error in any order, requirement, decision or determination made by the administrative official in the enforcement of this title or of any ordinance adopted pursuant thereto.

B. Exceptions: To hear and decide special exceptions to the terms of this title upon which such board of adjustment is required to pass under provisions of this title.

C. Variances: To authorize upon appeal such variance from the terms of this title as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this title will result in unnecessary hardship; provided, that the spirit of this title shall be observed and substantial justice done. Before any variance may be authorized, however, it shall be shown that:

1. The variance will not substantially adversely affect the comprehensive plan of zoning and that adherence to the strict letter of this title will cause difficulties and hardship, the imposition of which upon the petitioner is unnecessary in order to carry out the general purpose of the zoning plan.

2. Special circumstances are attached to the property covered by the application which do not generally apply to other property in the same district.

3. That because of said special circumstances, property covered by application is deprived of privileges possessed by other properties in the same district; and that the granting of the variance is essential to the enjoyment of a substantial property right that is possessed by other property in the same district. (Ord. 2000-05, 3-15-2000; amd. Ord. 2004-02, 1-21-2004)

10-4-3: RULES OF CONDUCT:

The board of adjustment shall adopt rules for the regulation of its procedures and the conduct

of its duties not inconsistent with the provisions of this title or of state law. Such rules, to become effective, shall first be approved by the city council. (Ord. 2000-05, 3-15-2000; amd. Ord. 2004-02, 1-21-2004)

10-4-4: APPEALS TO BOARD:

A. Scope: Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the city affected by any decision of the building inspector or city manager.

B. Decision On Appeal: In exercising the above mentioned powers, the board of adjustment may, in conformity with the provisions of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

C. Vote Necessary For Reversal: The concurring vote of three (3) members of the board of adjustment shall be necessary to reverse any order, requirement or determination of any such administrative official, or to decide in favor of the appellation, any matter upon which it is required to pass under this title, or to effect any variation in the provisions of this title. (Ord. 2000-05, 3-15-2000; amd. Ord. 2004-02, 1-21-2004)

10-4-5: JUDICIAL REVIEW; TIME LIMITATION:

The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefor in any court of competent jurisdiction, provided petition for such relief is presented to the court within thirty (30) days after the filing of such decision in the office of the board of adjustment. (Ord. 2000-05, 3-15-2000; amd. Ord. 2004-02, 1-21-2004)

ARTICLE G. GENERAL COMMERCIAL (C)

10-6G-1: PURPOSE:

To provide appropriate areas where commercial activities may be established, maintained and protected. (Ord. 2006-09, 3-1-2006)

10-6G-2: PERMITTED USES:

The following shall be permitted uses within the general commercial zone:

Animal hospitals, veterinary clinics.

Automobile, truck, trailer, farm and construction equipment sales, rentals and service stations.

Bakery, laundry, cleaning and dyeing establishments.

Building material sales yards, but not including ready mix concrete or hot mix asphalt plants.

Business and technical schools.

Business offices and personal service enterprises.

Car dealers, new or used.

Carpenter, electrical, plumbing or heating shops; printing and publishing or lithographic shops; furniture upholstering shops.

Clothing stores.

Commercial recreation uses, including recreational vehicle parks.

Department stores.

Entertainment sales and rental.

Garages for repair of automobiles.

Garages for storage or automobiles, commercial parking lots.

Grocery stores.

Health, fitness and beauty supply and salons.

Hotels and motels.

Light manufacturing.

Mortuaries.

Nurseries, greenhouses and fruit stands.

Office supply stores.

Offices, administrative and professional.

Public or quasi-public areas.

Public utility buildings.

Restaurants.

Retail sales.

Schools and studios for photography, art, music and dance.

Storage facilities one thousand five hundred (1,500) square feet or smaller per commercial lot.

Accessory buildings and uses customarily incidental to the above uses.

Other uses in harmony with those listed. (Ord. 2006-09, 3-1-2006)

10-6G-3: PROHIBITED USES:

The following uses shall be prohibited within the general commercial zone:

Auto wrecking yards.

Dwellings, single-, two-, multiple-family.

Mobile home parks.

Ready mix concrete or hot mix asphalt plants.

Residential facility for the disabled.

Residential facility for youth under the age of eighteen (18).

Sexually oriented business.

Warehouses.

Other uses inconsistent with the permitted uses set forth in section 10-6G-2 of this article. (Ord. 2006-09, 3-1-2006)

10-6G-4: HEIGHT REGULATIONS:

No building shall be erected to a height greater than thirty five feet (35') as measured from its allest side or point, except that facades, rooflines and other nonoccupied building mprovements may be constructed to a maximum height of forty five feet (45') inclusive of the underlying building structure. However, the city shall not impose or restrict the height of a structure in a manner that imposes a substantial burden on the religious exercise of a person, ncluding a religious assembly or institution, unless the city demonstrates that imposition of the burden on that person, assembly or institution:

A. Is in furtherance of a compelling governmental interest; and

B. Is the least restrictive means of furthering that compelling governmental interest. (Ord. 2006-09, 3-1-2006)

10-6G-5: AREA, WIDTH, AND YARD REQUIREMENTS:

District	Area	Lot Width In Feet	Setback In Feet		
Front	Side	Rear			
C	1/2 acre (21,780 square feet) 2	70	35 for commercial buildings abutting SR9 and SR17; 25 when abutting city streets	See note 1	See note 1

Notes:

1. Side and rear setbacks shall be 10 feet where abutting a residential zone which may be reduced, provided proper visual and sound screening, along with construction per uniform building code, and provided drainage is not allowed to cross property lines. Maximum height of structure shall not exceed 18 feet.

2. Commercial condominium projects shall meet the 1/2 acre minimum requirement for the project, but buildings may be divided into subunits and platted for individual ownership within the project.

(Ord. 2007-16, 4-4-2007)

10-6G-6: SCREENING REQUIREMENT:

As a condition of any use granted under this article, an eight foot (8') block fence shall be required when abutting a residential zone for proper visual and sound screening. (Ord. 2006-09, 3-1-2006)

10-9-10: MODIFICATION OR REVOCATION:

The city council may modify or revoke a conditional use permit, following notice and a hearing. A conditional use permit may be modified or revoked if the city council finds one or more of the following:

A. The permit was obtained by misrepresentation or fraud,

B. The specific use for which the permit was granted is not being exercised; or

C. Noncompliance with conditions imposed upon said use permit. (Ord. 2004-12, 5-19-2004)

10-9-11: APPEAL OF DECISION:

Any person shall have the right to appeal the decision to grant, grant with conditions or deny a conditional use permit. Such appeal shall be made to the board of adjustment.

Any person or entity desiring a special exception may apply to the board of adjustment in the terms of this title as applied to zoning districts; providing a landowner relief in extraordinary cases where the board of adjustment finds the existing special fact and circumstances specified therein as sufficient to warrant a diversion from the general rule. Special exceptions are not to be granted liberally. (Ord. 2004-12, 5-19-2004)