

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Presiding Court Judge

Trial Court Case No. 2013-CP-26-5009

City of Myrtle Beach.....*Respondents,*

v.

KNS Foundation, LLC, d/b/a Elite.....*Appellant.*

RESPONDENT CITY OF MYRTLE BEACH'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. HAS APPELLANT PROPERLY PRESERVED THE ISSUE OF WHETHER THE CIRCUIT COURT HAD ACCESS TO THE RECORD OF THE PROCEEDINGS BEFORE THE CITY COUNCIL OF MYRTLE BEACH WHEN IT AFFIRMED THE DECISION OF CITY COUNCIL TO REVOKE APPELLANT’S BUSINESS LICENSE? NO.

II. SHOULD THE CIRCUIT COURT BE AFFIRMED BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT APPELLANT OBTAINED ITS BUSINESS LICENSE THROUGH FRAUD, MISREPRESENTATION, A FALSE OR MISLEADING STATEMENT, EVASION, OR SUPPRESSION OF A MATERIAL FACT IN THE LICENSE APPLICATION? YES.

III. WAS CITY COUNCIL’S DECISION TO REVOKE APPELLANT’S BUSINESS LICENSE ARBITRARY, UNREASONABLE, OR A CLEAR ABUSE OF DISCRETION? NO.

STATEMENT OF THE CASE

This is an appeal from the order of the Honorable William H. Seals, Jr., Circuit Court Judge, affirming the Myrtle Beach City Council’s decision to revoke the business licenses of Appellant KNS Foundation, LLC, d/b/a Elite (“Elite”).

On June 10, 2013, the Business License Administrator sent Elite notice that their business licenses were suspended because Elite represented to the City on its business license applications that it would be operating a pool hall/arcade, drinking place, and eating place when in fact Elite ended up operating a nightclub. [See Business License Administrator’s Suspension Letter]. The zoning ordinances for the area where Elite was located do not allow nightclubs.

Elite filed a Petition and Motion for a Temporary Restraining Order to prevent the suspension of its business licenses. Elite’s lawsuit was given the Civil Action

Number 2013-CP-26-04103. A temporary restraining order was granted but it expired after ten days.

On June 25, 2013, City Council conducted a business license revocation hearing concerning Elite's business licenses. Present at the hearing were the Business License Administrator, Mary McDowell, her attorney and several witnesses from the City who testified in favor of revocation of Elite's business licenses. Also present at the hearing were the attorney for Elite and Javon Kennedy, husband of Brooke Kennedy, the applicant and owner of Elite, and one other witness who testified as an expert in the field of accounting.

The day following the revocation hearing before City Council, June 26, 2013, Elite filed a second Motion for Temporary Restraining Order, Temporary Injunction, and Rule to Show Cause in Circuit Court under the same civil action number, 2013-CP-26-04103, assigned to the first petition. Before Elite's second motion for temporary relief could be heard in open court, City Council voted in open session on July 9, 2013, to revoke Elite's business licenses and entered an order to that effect signed by Wayne Gray, Mayor Pro Tem. [See City Council Order dated July 9, 2013].

On July 19, 2013, Elite filed an appeal of City Council's decision to Circuit Court and on August 9, 2013, Elite amended its appeal. Elite's appeal was assigned a new civil action number, 2013-CP-26-5009. As a result Elite had two cases pending at the same time against the City in Circuit Court.

A hearing before Judge Seals was held on Elite's appeal on September 17, 2013. On September 18, 2014, Judge Seals signed a Form 4 Order under the new civil

action number, 2013-CP-26-5009, stating that the City's revocation was affirmed and the Attorney for the City was to submit a formal order within ten (10) days. Also on September 18, 2013, a copy of the transcript of record for the City Council's revocation hearing bearing civil action number, 2013-CP-26-04103, was clocked in the Clerk of Court's office. [See Respondent's Supplemental Appendix Exhibit]. The City did not clock in the transcript of record on September 18, 2013. The City previously had delivered the transcript of record to the Clerk of Court's office in early August 2013. The person from the City who delivered the transcript of record did not obtain a receipt for delivery from the Clerk of Court's assistant who took the transcript.

On September 20, 2013, the Form 4 order signed by Judge Seals was clocked in and entered into the Clerk of Court's file. On September 23, 2013, Judge Seals signed the formal order submitted by the City's attorney. On September 30, 2013, Judge Seals' formal order denying Elite's appeal was clocked in and entered into the Clerk of Court's file. Also, on September 30, 2013, the Honorable Larry B. Hyman, Jr., Circuit Court Judge, dismissed Elite's second motion for a Temporary Restraining Order/Temporary Injunction at Elite's request.

Elite duly made a Motion to Reconsider the formal order signed by Judge Seals, and on November 6, 2013, Judge Seals signed an order denying Elite's Motion to Reconsider. On December 2, 2013, Elite duly filed and served notice of this appeal.

STATEMENT OF THE FACTS

On March 25, 2013, Elite applied for business licenses to operate a pool hall/arcade; an eating place; and a drinking place in a C-3 zoning district in the City of Myrtle Beach.

On April 5, 2013, the City approved Elite's applications for 3 business licenses. The business licenses allowed Elite to do the following: (1) license number 26941 – operate a pool hall; (2) license number 26942 – sell alcohol (3) license number 26943 – sell food. [See applications/licenses]. The business license applications stated the name of the business would be "Elite." Id.

The location of Elite was 641 Robert Grissom Parkway, Myrtle Beach, South Carolina. [Ex. 1] This area is zoned C-3 for general commercial use. [R. p. 81] The general commercial use zone is intended for businesses that use highways, such as "trucking operations and large scale business operations primarily engaged in the retailing of heavy durable goods." [See § 1219.1 Code of Ordinances City of Myrtle Beach]. Therefore, these zones are located "away from congested areas and residential development." Id. A general commercial use zone does not allow night clubs. Id. Under the City's ordinances, a nightclub is "a restaurant, dining room, or similar establishment where a dance floor of 150 square feet or larger is provided for guests." [§ 204.83 Code of Ordinances City of Myrtle Beach].

Elite became a safety concern for the City in late May of 2013. A shooting occurred in the parking lot of Elite. [R. p. 74]. At the outset of the City's investigation into the shooting, no one from Elite's management or ownership would

speak with the City's police officers. [R. pp. 56 & 74]. The City's police officers started performing regular walk-throughs of Elite in the same manner as they do with all nightclubs. [R. p. 74]

During the hearing before City Council, several officers testified to their observations during these walk-throughs. Officer Gavrilis testified that he observed at Elite: (1) lines out the door; (2) a podium setup at the entrance to receive cover charge money; (3) the pool tables pushed against the wall; (4) a dance floor over 150 square feet with people dancing; (5) no food being served; and (6) a DJ playing loud music. [R. pp. 47-51] Officer Gavrilis made these observations either right before or after the shooting and observed a dance floor on at least 3 separate occasions. [R. pp. 52-53]

Officer Castle testified that he observed at Elite a dance floor in front of a DJ booth, people drinking, and the pool tables against the wall. [R. p. 61] When he entered Elite, a woman at the door told patrons there was no charge, but they had to pay a tip to gain entry. [R. p. 62] He also observed crowd barricades for routing crowds entering Elite and people being wanded for weapons or metal objects. [R. p. 62] Officer Castle testified that he had been to Elite five times, and every time the pool tables were against the wall and a dance floor setup in the middle of the room. [R. p. 64]

Officer Clever testified that during a walk-through, one of Elite's employees advised him that the dance floor was packed earlier in the week. [R. p. 69]

Chief Gall testified that he observed: outdoor vendors selling food at Elite but no one selling food on the inside; patrons paying a cover charge to enter Elite; and

pool tables pushed into the corners. [R. pp. 74-75] Based on Chief Gall's observations and his understanding that Elite was only licensed to be a pool hall, Chief Gall asked the City's Business and License Administration to investigate Elite's business license. [R. p. 76].

Mary McDowell, the City's Business License Administrator, conducted an investigation into Elite's business licenses [R. p. 25]. She viewed the business license applications, police reports, Elite's social media advertising and promotions and Elite's signage [R. p. 26]. After weighing the evidence, Ms. McDowell decided to suspend Elite's business licenses pending a revocation hearing before City Council. [Business License Suspension Letter; R. p. 26]

A revocation hearing was conducted before City Council on June 25, 2013. After hearing testimony and viewing the exhibits submitted by both the City and Elite, City Council voted to revoke Elite's business licenses and entered a formal written order stating their factual findings and conclusions of law on July 9, 2013. [Order]

GENERAL STANDARD OF REVIEW

“Where the city council of a municipality has acted after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion.” *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005) (citing *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843,847 (1963)). “[The Court of Appeals] will not disturb on appeal such findings of the city council, concurred in by a circuit

judge, unless they are without evidentiary support or against the clear preponderance of the evidence.” *Id.*

ARGUMENT

I. APPELLANT HAS NOT PROPERLY PRESERVED THE ISSUE OF WHETHER THE CIRCUIT COURT HAD ACCESS TO THE RECORD OF THE PROCEEDINGS BEFORE THE CITY COUNCIL OF MYRTLE BEACH WHEN IT AFFIRMED THE DECISION OF CITY COUNCIL TO REVOKE APPELLANT’S BUSINESS LICENSE.

STANDARD OF REVIEW

For this court to disturb the decision of the lower court in connection with the record on appeal, it must clearly appear that the trial judge abused his discretion. *See Campbell v. Hall*, 210 S.C. 423, 43 S.E.2d 129 (1947); *Ford v. A.A.A. Highway Express*, 204 S.C. 433, 29 S.E.2d 760 (1944); and *Gray v. Davis*, 247 S.C. 536, 148 S.E.2d 682 (1966). As the appellant, Elite bears the burden of providing this court with a record sufficient to allow appellate review. *See Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (Noting the appellant has the burden of presenting an adequate record on appeal); and *McCall v. IKON*, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008).

I. Transcript of City Council Hearing

Elite claims that the transcript of record from the City Council hearing was not made available to the Circuit Court prior to the Circuit Court affirming City Council’s Order revoking Elite’s business licenses, and therefore, the Circuit Court’s decision should be reversed. Elite’s claims are not preserved in the record on appeal.

The City contends Elite's claims are based on an untimely and faulty investigation of the Clerk of Court's files. The issue is raised for the first time on appeal and the trial judge has not been given an opportunity to address or rule on the issue.

Elite's claims are based upon an incomplete history of stamp dates for filing the transcript of record and the confusing manner in which the Clerk of Court for Horry County indexed the documents on her computer system. The City contends the confusion with the stamp dates and indexing arises from the fact that Elite was pursuing two separate actions at the time Judge Seals heard Elite's appeal from the City's order revoking Elite's business licenses. In the first action, 2013-CP-26-04103 was the number used on the caption by the court reporter who transcribed the City Council hearing. She used that number because Elite had an action pending for injunctive relief under that case number. When Elite filed its appeal from the City's Order a new case number was assigned to the appeal, 2013-CP-26-05009. As a result, two parallel actions with different case numbers were pending at the same time in the office of the Clerk of Court.

It appears the Form 4 Order, filed September 20, 2013, used case number 2013-CP-26-05009 and the formal order, filed September 30, 2013, used case number 2013-CP-26-04103. At a later date, December 10, 2013, the Clerk of Court appears to have entered a filing of the transcript of record in her computer system under case number as 2013-CP-26-04103.

On September 17, 2013 there were numerous times during oral argument of the appeal before the Circuit Court that both attorneys referred to the transcript of

record from City Council. At no time did Judge Seals indicate that he did not have the record before him during oral arguments. [Transcript of Circuit Court hearing] The City contends the trial judge did have the transcript of record but it had not been clocked in by the Clerk of Court.

A. Elite did not properly preserve this issue for appeal.

The City contends that Elite should first petition the Court of Appeals for an order requesting a report of the hearing from the trial judge before it is allowed to seek reversal of the trial judge for an abuse of discretion. Rule 212(a), SCACR. Because Elite has not petitioned the Court of Appeals to request a report from the Trial Court, the trial judge has not had an opportunity to address Elite's claims. Elite has failed to properly preserve the issue of whether the trial judge had a record before he ruled on Elite's appeal. Rule 212, SCACR.

It is well established in South Carolina that parties must present their issues to the lower court in order to raise them on appeal. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure...that we do not reach issues which were not ruled upon by the trial court.”); *see also Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”).

Elite did not raise any issues regarding the Circuit Court's not having the complete original record in its briefs to the Circuit Court, during oral argument, or in

its Motion to Reconsider. Not allowing the Circuit Court to respond to Elite's allegation is particularly pernicious because the Circuit Court's order specifically represented it had reviewed the record and found "the record of appeal in the present case contain[ed] sufficient evidence to support the finding of City Council." [See Order]. Therefore, Elite's claim regarding the record on appeal should be dismissed due to Elite's failure to preserve the issue for appeal. *Greenwood Dev. Corp.*, 368 S.C. at 373.

B. Elite had the duty to ensure the Circuit Court received the certified record.

Rule 75 of the South Carolina Rule of Civil Procedure controls the transmittal of a record on appeal to the circuit court. The last sentence of Rule 75 states, "Upon receipt of the certified record, the clerk of the circuit court shall give notice in writing to the parties that the record has been filed." Elite does not claim that it received a false notice of receipt of the record on appeal. It appears the Clerk of Court did not send out a notice of receipt.

When Elite did not receive notice from the clerk that the record had been filed prior to the hearing of its appeal on September 17, 2013, Elite had a duty to "act with due diligence and seek a writ of mandamus if necessary to compel [the transmittal of the record]." *Joyner v. Glimcher Properties*, 356 S.C. 460, 463, 589 S.E.2d 762, 763 (Ct. App. 2002). (Holding that appellant should have presumed, based on its failure to receive from clerk of circuit court a notice that magistrate had filed a return of testimony, proceedings, and judgment from magistrate court, that such return had not been timely filed under Rule 75, SCRPC and therefore, affirming the circuit court's decision.); see *State v. Barbee*, 280 S.C. 328, 329, 313 S.E.2d 297, 298 (1984)

(citations omitted) (“The burden was on...the party appealing below to obtain the magistrate’s compliance by mandamus if necessary.”); *and State v. Adams*, 244 S.C. 323, 326, 137 S.E.2d 100, 101 (1964) (citations omitted) (Stating it was the duty of the moving party in the appeal from Magistrate’s Court to ensure the Magistrate performed the ministerial duty of transmitting the record of the trial Court to the appellate Court.).

If there were any shortcomings in the transmittal of the record to the Circuit Court, which are denied, Elite had the responsibility to make sure the Circuit Court had the record on appeal. *Joyner*, 356 S.C. at 463, 589 S.E.2d at 763.

C. The Circuit Court had the record from the City Council hearing at the time it issued its order; denying Elite’s appeal.

The Circuit Court signed its Form 4 order affirming the City Council’s order on September 18, 2013. [See Form 4 Order] The record from the City Council hearing was date stamped on September 18, 2013 at 9:31 a.m. [See Cover Page of Hearing Trans. Supplemental Appendix] The formal order was signed September 23, 2013, and the order denying the motion to reconsider was signed November 6, 2013. There is no direct evidence that the Circuit Court did not review the transcript of record prior to signing its orders. Elite’s claim stems from Elite’s faulty assumption based upon the manner in which the Clerk of Court stamped and indexed the transcript of record on appeal.

As indicated above a point of confusion existed between the two case action numbers in the Circuit Court. When Elite filed its motion for temporary restraining order, the Clerk of Court assigned the case number 2013-CP-26-4103. When Elite appealed the City Council order to Circuit Court, the Clerk of Court assigned the new

case number 2013-CP-26-5009. During the appeal, it appears the case action numbers were used interchangeably, and the Clerk of Court filed the same documents in both files. [See Order denying appeal – both orders]. Regardless, there is no evidence the Circuit Court had access to one case but not the other, and Elite’s appeal references both case action numbers. [See Elite Notice of Appeal and Initial Brief.]

II. THE CIRCUIT COURT SHOULD BE AFFIRMED BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT APPELLANT OBTAINED ITS BUSINESS LICENSE THROUGH FRAUD, MISREPRESENTATION, A FALSE OR MISLEADING STATEMENT, EVASION, OR SUPPRESSION OF A MATERIAL FACT IN THE LICENSE APPLICATION.

III. CITY COUNCIL’S DECISION TO REVOKE APPELLANT’S BUSINESS LICENSE WAS NOT ARBITRARY, UNREASONABLE, OR A CLEAR ABUSE OF DISCRETION BECAUSE THERE WAS SUBSTANTIAL EVIDENTIARY SUPPORT FOR ITS DECISION AND CITY COUNCIL’S DECISION WAS NOT AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE.

(Because of the overlapping nature of Elite’s Arguments II & III, the City has combined its response to those arguments as set forth herein below.)

STANDARD OF REVIEW

Where the city council of a municipality has acted to revoke a business license after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion. *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005) (citing *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843,847 (1963)). An appellate court will not disturb on appeal such findings of the city council, concurred

in by a circuit judge, unless they are without evidentiary support or against the clear preponderance of the evidence.” Id.

ARGUMENT

In its Argument II, Elite attempts to frame the business license revocation proceeding as a fraud action by the Business License Administrator against Elite. Elite further claims the trial judge did not require the City to apply the appropriate standard of proof when he affirmed the decision of City Council. In other words, Elite claims the trial judge should have conducted a *de novo* review of the record and determined whether there was clear and convincing evidence that Elite committed fraud when applying for its business license. Elite claims the trial judge should have required a clear and convincing standard of proof before he affirmed the City’s order.

In Argument III, Elite claims that the record on appeal does not contain substantial evidence to support the City’s decision to revoke Elite’s business license and the City’s decision should be reversed on that ground.

Elite’s claims fail for three reasons. First, Elite has not applied the correct standard of review to the Circuit Court appeal. The correct standard of review is whether the City Council’s decision was arbitrary, unreasonable, or an obvious abuse of its discretion. *Gay v. City of Beaufort*, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005). City Council was acting in a quasi-judicial capacity when it made its decision. City Council was not acting as the prosecutor.

Second, the City revoked Elite’s business license because it had been obtained in violation of § 11-35 (3) of the Code of Ordinances for the City of Myrtle Beach. That section of the ordinance states that a business license may be revoked when “a

licensee has obtained a license through a fraud, misrepresentation, a false or misleading statement, evasion or suppression of a material fact in the license application.” § 11-35 (3), Code of Ordinances for City of Myrtle Beach.

There are distinctions between a fraud and a misrepresentation, a false or misleading statement and an evasion or a suppression of a material fact. *See Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App.2003). The City contends that misrepresentation, a false or misleading statement, and an evasion or a suppression of a material fact as used in the context of § 11-35(3) Code of Ordinances City of Myrtle Beach are not synonyms for fraud. For example in *Redwend Ltd. P'ship*, the Court of Appeals stated the key difference between fraud and negligent misrepresentation is that “fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. *Id.* Although substantial and strong circumstantial evidence exists in the record to support a finding of Elite’s fraud, the record on appeal undoubtedly shows that Elite made false and misleading statements in order to obtain its business licenses for its business location.

The third reason Elite’s claims fail is that the record on appeal shows there was substantial evidence to support the decision of City Council to revoke Elite’s business licenses. The basic underlying question before City Council was whether Elite obtained its business license by falsely representing to the City that it would

operate a pool hall/arcade, eating place and drinking place in a C-3 zone but in fact Elite operated a night club contrary to the restrictions in its business licenses.

The substantial evidence that Elite obtained its license by misrepresenting that it would operate a pool hall/arcade, drinking place, and eating place is shown on Elite's business license applications, the testimony of the Business License Administrator, Mary McDowell and the testimony of the Zoning Administrator, Ken May. The substantial evidence showing that Elite in fact operated a night club is shown in the testimony of Mary McDowell, Ken May, the police officers who investigated Elite's business and Elite's advertising and promotional materials.

Elite picked up its business license on April 5, 2013, and within 12 days (April 17, 2013) Elite was posting on its Facebook page professionally produced advertising and promotional materials promoting the activities of a night club at its business location. [Ex. 4] Elite's own on-premises identification sign identified Elite's business as "Elite" and listed the activities that occurred on the premises as "Relax Eat Dance." [Ex. 4] The identification sign does not mention billiards or pool hall. The City contends that Elite's customers would not know that Elite was a pool hall from its advertising, promotions and signage. However, they would recognize it as a night club.

Business License Administrator, Mary McDowell, testified she believed that she had been deceived by Elite when she issued it's business licenses. [R. p. 26] She testified that Elite applied for business licenses for what the City's zoning ordinances allowed at the business location. [R. p. 26] The record shows the business licenses were picked up on April 5, 2013, and shortly thereafter the Business License

Administrator observed signage, advertising, promotions and activities that showed that Elite was operating a night club. [R. p. 26]

The first Facebook page promotion in the record on appeal shows a posting date of April 17, 2013. [Ex. 4] That promotional material shows three stylized pictures of nude women together with advertising script stating, “Lee Johnson Presents,” “Elite Ultra Lounge,” “\$1 Dollar Wednesdays,” and “DJ Lui Diamante Spining Live.” The on premises electric lighted sign identifying Elite’s business stated, “Elite” and “Relax Eat Dance” in large bold letters. [Ex. 4]

Elite’s other early advertising and promotional materials referred to Elite’s business as “Elite Ultra Lounge” and advertised weekly promotions such as S.I.N. Night on Mondays; Shellin’ Tuesdays Reggae Night on Tuesdays; \$1 Wednesday on Wednesdays; \$3 Thirsty Thursday on Thursdays; Famous \$5 Dollar Fridays on Fridays, and Sexy Social Saturday (Ladies Free until 1:00 A.M.) on Saturdays. [Ex. 4] The activities promoted at Elite’s business emphasized the traditional night club activities of drinking, music and dancing. For example, Elite promoted Old School New School Music by Jaekwon Streets on \$3 Thirsty Thursdays; free admission for ladies appearing in animal print or swimwear on Wet ‘n Wild \$1 Wednesdays and after parties featuring various celebrities. [Ex. 4] Elite gave a false written statement to the Business License Administrator on March 25, 2013, representing that it would not charge an admission charge. However, at least as early as April 18, 2013, Elite was posting material advertising “Everybody Free Until 12” on its Facebook page. [Ex. 4].

Upon viewing the professionally produced advertising and promotional material, the City contends that should be obvious that such materials were not produced on the spur of the moment. A great deal of planning and forethought went into the promotion of Elite's business as a night club. The short time period between Elite's representations to the Business License Administrator about the nature of its business as a pool hall/arcade; drinking place and eating place and Elite's representations to the public that Elite Ultra Lounge was the place where the public can come to Eat Relax and Dance on S.I.N. Night; Shellin' Tuesdays Reggae Night; \$1 Wednesday; \$3 Thirsty Thursday; Famous \$5 Dollar Fridays; and Sexy Social Saturday (Ladies Free until 1:00 A.M.) on Saturdays is substantial circumstantial evidence that Elite obtained its business licenses in violation of § 11-35 (3) of the Code of Ordinances for the City of Myrtle Beach.

In addition, Zoning Administrator Ken May testified that he made it clear to Elite in April that Elite could not operate a night club at Elite's business location. [R. p. 82] Mr. May gave zoning approval for the business license applications when Elite convinced him Elite would be a pool hall/arcade by renting additional pool tables to further emphasize that it would be a pool hall/arcade. [R. p. 82] However, Mr. May testified that he changed his mind about Elite's business being a pool hall/arcade when he was informed of the evidence that the pool tables were being pushed to the side walls to create a dance floor. [R. pp. 81-82]

The distinction between a pool hall/arcade; drinking place and eating place and a night club has legal significance because Elite's business was located in a C-3 zone. The categories of pool hall/arcade; drinking place and eating place are

permitted in a C-3 zone. [R 81] A night club is not a permitted use in a C-3 zone. [R. p. 81] Furthermore the City's building code requires night clubs to have sprinkler systems. Elite's night club does not have a sprinkler system. [R. p. 29]

The practical significance of the distinction between a night club and the business for which Elite held its business license is also demonstrated throughout the record. Photographs of the outside of Club Elite show a congested parking lot with lines of people waiting to get inside the club together with security and barricades to secure those lines of people. [Ex. 4] C-3 zones are located away from congested areas for safety reasons. Elite's night club use is not a compatible use for its location.

The initial incident that caused Elite's business to come to the attention of the City was a shooting which occurred when Elite refused allow some "gentlemen" to enter their establishment because they were not dressed properly and because Elite knew they were troublemakers. [Tr. pg. 111-112]

In addition, the Business License Administrator testified that the sources of gross income for Elite's business did not match the gross income profiles for other businesses licensed as pool halls/arcades; drinking places and eating places. The City contends the gross income profile is that of a night club. [R. p. 45]

Finally, the photographs in the record depict a large dance floor. [Ex. 4] The police officers testified that they encountered a dance floor at Elite's business that was larger than 150 square feet on several occasions. [R. pp. 49, 50, 63] The dance floor was created when Elite pushed the pool tables to the sides of the walls. The police officers further testified that they witnessed admission charges being collected

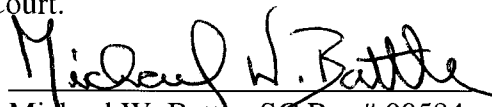
at Elite's entry door, loud music, and patrons dancing on the large dance floor during several investigations of Elite's business. [R. pp. 49-50, 63 & 75]

The City's ordinances define a night club as a restaurant, dining room, or similar establishment where a dance floor of 150 square feet or larger is provided for guests. § 204.82 Code of Ordinances for City of Myrtle Beach. Elite was clearly providing a dance floor of 150 square feet or larger for its guests when it pushed back its pool tables.

Elite applied for and obtained business licenses for a pool hall/arcade, drinking place and eating place after being told that it could not operate a night club in a C-3 zone. [Tr p. 21 & p. 82] After obtaining the business licenses Elite then began operating a night club contrary to its applications and representations to the City. The trial judge's order should be affirmed on its merits.

CONCLUSION

For the forgoing reasons stated in connection with Appellant's failure to preserve its first issue on appeal and the fact that the record contains substantial evidence supporting City's revocation of Elite's business licenses, Respondent City of Myrtle Beach respectfully requests that the Court of Appeals dismiss the appeal and affirm the decision of the Trial Court.



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June 9, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUN 10 2014

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Presiding Court Judge

Trial Court Case No. 2013-CP-26-5009

City of Myrtle Beach.....Respondent,

v.

KNS Foundation, LLC, d/b/a Elite.....Appellant.

PROOF OF SERVICE

Sherrill Benninga certifies that she is a paralegal with the Battle Law Firm, LLC, attorneys for Respondent City of Myrtle Beach, and that she has mailed the Initial Brief and Designation of Matter on behalf of Respondent City of Myrtle Beach to the addressees shown this 9th day of June, 2014, with proper postage attached thereto.

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A handwritten signature in black ink, appearing to read "Sherri Benninga", written over a horizontal line.

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June 9, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, SC 29211

RE: K & S Foundation, LLC d/b/a Elite v. City of Myrtle Beach
Appellate Case No.: 2013-002793

Dear Ms. Kitchings:

I have enclosed for filing the original and one copy of the Respondent's Initial Brief and Designation of Matter on Behalf of The City of Myrtle Beach ("City"), as well as our Proof of Service.

By copy of this letter to all counsel involved in this Appeal, I am serving them with a copy of this Brief and Designation of Matter and enclose a Proof of Service to that effect.

Please return a "clocked" copy of the Proof of Service. I have enclosed and extra copy of Proof of Service, as well as a self-addressed, stamped envelope for your convenience.

I appreciate your assistance in this matter.

Sincerely,


Michael W. Battle

C Tom Ellenburg
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SC Court of Appeals

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SC Court of Appeals

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