THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Presiding Court Judge

Case No. 2013-CP-26-002793

K N S Foundation, LLC, d/b/a Elite ..... *Appellant,*

v.

City of Myrtle Beach ..... *Respondent.*

APPELLANT'S [INITIAL] REPLY BRIEF

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July 21, 2014

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REPLY BRIEF OF APPELLANT

For ease of reference, the Appellant in this Reply Brief will be referred to as "KNS/Elite." The Respondent, City of Myrtle Beach, will continue to be referred to as "the City."

There are two issues in this appeal: (1) the defective record on appeal filed by the City in the Circuit Court[1], and (2) the sufficiency of evidence to sustain the City's revocation of KNS/Elite's business licenses.

As to the first issue, KNS/Elite does not seek an outright reversal but rather – following Supreme Court precedent – a remand and a new hearing in the Circuit Court below based on a proper record on appeal.

As to the second issue, if this Court reaches the merits, it should reverse the license revocation for lack of probative evidence and arbitrariness.

REPLY ARGUMENTS

I. THE RECORD ON APPEAL IS DEFECTIVE.

Facts regarding the record on appeal are clear and undeniable:

1. The Record on Appeal Submitted to the Circuit Court Was Defective.

The record on appeal that the City should have delivered to the Circuit Court, was defective. The Clerk of Court's stamp shows the transcript was filed, but not the exhibits. As shown by the frequent references in the City's brief in this Court, the exhibits are an

[1] Rule 75, SCRCP, refers to the "record on appeal" and S.C. Code Ann. § 18-7-60, refers to the same as the "return". KNS/Elite will refer to the return as the record on appeal.

indispensable part of the record on appeal. The transcript was also filed late, and it is not clear if the Circuit Court judge actually ever saw it.[2]

2. The Court Below Proceeded Without the Full Record, and the Decision Is Based on That Defective Record on Appeal.[3]

In the circumstances presented by this case, the proper route for this Court is to unwind the sequence of events, concluding with the Order Denying the Amended Appeal, and send the case back to the Circuit Court to secure a proper and complete record on appeal under S.C. Code § 18-7-80. Only then can the Circuit Court properly hear and decide the appeal from the Myrtle Beach City Council.

That is the course followed by the Supreme Court in other cases of defective records on appeal. *E.g., State v. Adams,* 244 S.C. 323, 137 S.E.2d 100 (1964); *State v. Barbee,* 280 S.C. 328, 313 S.E.2d 297 (1984); *State v. Evans,* 260 S.C. 523, 197 S.E.2d 282 (1973). In these cases the Supreme Court has held that "it was clearly error for the circuit court to hear the appeal . . ." *State v. Barbee,* 280 S.C. at 329, 313 S.E.2d at 298. It is true that these cases say an appellant is the party with the obligation to secure a proper record on appeal, but those were all cases where the lower court appellant was seeking an outright reversal of the Magistrate's decision. The Supreme Court rejected that remedy but remanded each case so that a proper appeal, on a proper record, could take place.

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[2] The Clerk's stamp shows a transcript was filed on September 18, 2013, which is the same day as the entry of the Circuit Court's Form 4 Order. Also, the transcript was placed in the wrong case file, *i.e.,* Civil Action No. 2013-CP-26-04103, the file of the previous case in which a temporary restraining order had been issued.

[3] KNS/Elite presumes the lower court was unaware that the full record was not before it. The Circuit Court Order does not reference the transcripts or the exhibits.

In this case, moreover, the default was not that of a neutral magistrate, but rather that of the City, one of the parties to this case. To allow a party to benefit by its own default would be a manifest injustice not supported by any precedent. In fact, counsel for the City acknowledged the City's obligation to provide the record and said it would do so. (City's Response to Appeal, p. 2.) The City's objection amounts to an estoppel of City's present argument. *See Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911-912 (Ct. App. 2006).

3. The City Makes Two Main Arguments, Both of Them Wrong.

First, the City says KNS/Elite failed to preserve this issue below, but the issue did not come to light until after the decision below, when counsel for KNS/Elite was searching for the record to file in this appeal.

Second, the City relies on the case of *Joyner v. Glimcher Properties*, 356 S.C. 460, 589 S.E.2d 762 (2002), but that was a dismissal for want of prosecution after the appellant took no action for many months, even after the matter was raised. That, too, was a default by a neutral magistrate rather than a party to the case. The Court of Appeals relied on the fact that no record had been filed, which it distinguished from a defective record (as in the Supreme Court cases referred to above, and the instant case). All in all, there is no case where an appellate court has let stand a judgment based on a defective record.

II. THE REVOCATION OF KNS/ELITE'S THREE BUSINESS LICENSES WAS NOT BASED ON PROBATIVE EVIDENCE AND WAS ARBITRARY, UNREASONABLE, AND AN ABUSE OF ITS DISCRETION[4]

A city cannot act on the personal preferences of its officials. "A governmental body's decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) (internal citations omitted). The City, in this case, has acted on the personal opinions of its employees and without any fixed rules and standards.

1. The City Council's Order For Suspension Was Not Based on a Claim That KNS/Elite Made Negligent Misrepresentations.

Aware that it has not met the required standard of proof to establish fraud and deceit, the City now attempts to cast the City's Order for Suspension as having been grounded in negligent misrepresentation, rather than intentional fraud. This flies in the face of the unequivocal and unambiguous language of the Order for Suspension itself. The City found that "[t]he owner of Elite falsely represented that the premises would not be used as a night club." (Order for Suspension, p. 2, ¶3.) The City found that "[a]fter considering all of the evidence presented at the hearing, City Council has determined that Elite has obtained its business licenses through misrepresentation, fraud, or deception . . ." and that but for KNS/Elite's fraud and deceit, it would not have obtained its three business licenses. (Order

[4] The order revoking KNS/Elite's three business licenses is styled "Order for Suspension of Business Licenses." When the parties refer to the order revoking the business licenses, they are referring to the Order for Suspension of Business Licenses (Order for Suspension). Suspension and revocation are used interchangeably.

for Suspension, p. 5, ¶14)[5]. The City, therefore, concluded that the licenses were issued as a result of a fraud and misrepresentation. (Order for Suspension, p. 6, ¶8, 14.) There is no mistaking that the City took the position, until now, that KNS/Elite acted intentionally and conveyed a known falsehood rather than having transmitted a negligently made false statement. *See Turner v. Milliman*, 381 S.C. 101, 112-113, 671 S.E.2d 636, 642 (Ct. App. 2009). To argue now that KNS/Elite's statements were merely negligent misrepresentations reveals that the City knows that it cannot sustain the revocation of KNS/Elite's business licenses on the basis of fraud.

2. KNS/Elite's Facebook Pages and Signage Do Not Demonstrate Fraud or Misrepresentation.

The City argues that KNS/Elite's signage and Facebook pages show that it is a night club. The fundamental issue in this case is whether Elite had a permanent dance floor of 150 square feet or more. It is important to draw a distinction between what is commonly understood to be a night club as compared to the technical definition of night club in Myrtle Beach for zoning purposes.

Simply put, in Myrtle Beach, for zoning purposes, a night club is any restaurant, dining room or similar establishment where a dance floor of 150 square feet or more is provided. Neither the signage or the Facebook pages show that Elite was a night club as defined by the City's Zoning Code. The City refers to the disputed exhibits to establish that KNS/Elite has identified itself as a night club by referring to an outdoor sign that showed

[5] This conclusion is refuted by the City's Business License Investigator when she testified that KNS/Elite started out as one kind of business (pool hall, food, alcohol) an turned in to a night club. (Tr., 26, lines 16-21.)

"Relax Eat Dance". What the City does not state, however, is that the portion of the sign that the City is referring to predated KNS/Elite. The "Relax Eat Dance" was erected by a pool hall known as RED that preexisted KNS/Elite in the same location. (Tr., 71.)

Likewise, the Facebook pages do not, in any manner, establish that KNS/Elite had a dance floor of 150 square feet or more. Reference to a "lounge" or "Ultralounge" is immaterial to determining whether a dance floor existed.[6] In the same vein, reference to the DJ booth is immaterial, because the DJ booth was previously approved by the City for a predecessor pool hall. (Tr., 30, lines 108, 113.)

These facts are important because the Zoning Code does not expressly prohibit dancing in a pool hall (Tr., 83, lines 22-25). And the Zoning Code does not prohibit a DJ from playing music in a pool hall. However, if these activities constituted zoning violations, then KNS/Elite could have been cited for a Zoning Code violation and given the opportunity to come into compliance. (Tr., 93-94; Myrtle Beach Zoning Code § 301.)

3. KNS/Elite's Gross Revenues Do Not Support City's Argument.

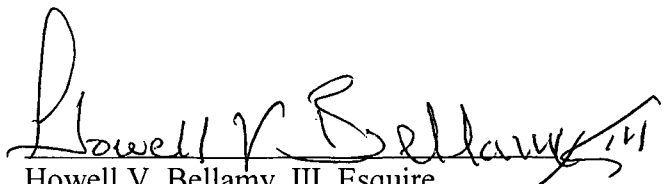
In its Order for Suspension, the City found that KNS/Elite's gross revenues supported a finding that it was operating as a night club and not as a pool hall that served food and alcohol. (Order for Suspension, pp. 2, 6). This argument is continued by the City in its Brief at page 18 arguing that KNS/Elite's gross income did not meet ". . . other gross income profiles for other businesses licensed as pool halls/arcades; drinking places and eating places". However, there is nothing in the City's ordinances that supports this finding.

[6] The City contends that some of the Facebook photographs show nudity; they do not.

The language of the Business Licenses Code §§ 11-21 through 11-26 does not address or provide any expressed guidelines, standards or fixed rules for determining a businesses' primary use classification (with three different licenses) based its reported gross receipts. The personal feelings of the Business License Investigator or Zoning Administrators provided no guidance to how gross revenues can be a basis for showing whether dancing allegedly took place at Elite. The Zoning Administrator, when asked this direct question, demurred and said he would have to look into it. (Tr., 89-90).

CONCLUSION

The Appellant, KNS/Elite, seeks to have this matter returned to the Circuit Court for a decision based on the entire record. In the alternative, KNS/Elite has demonstrated that the decision of City Council and of the Circuit Court should be reversed because those decisions are arbitrary, unreasonable and an abuse of discretion based on the facts contained in the record.



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William H. Seals, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-26-04103

Appellate Case No. 2013-002793

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I certify that I have served a copy of the Appellants' **INITIAL REPLY BRIEF** by depositing a copy of it in the U.S. Mail on July 21, 2014, addressed to the attorneys of record:

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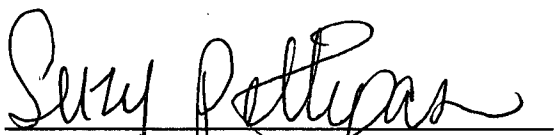

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Appellate Case No. 2014-002793

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the **Appellant's Initial Reply Brief,** together with my **Proof of Service,** to be filed in the above-referenced case. I would appreciate your returning a clocked copy to me in the enclosed, self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,

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/smp
Enclosures

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