

①

RECEIVED  
SEP 08 2014  
SC Court of Appeals

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 RESPONSE IN OPPOSITION  
TO APPELLANT'S MOTION TO VACATE AND MOTION TO REMAND

Michael W. Battle, SC Bar # 00584  
Battle Law Firm, LLC  
PO Box 530  
Conway, SC 29528  
T: 843-248-4321  
mbattle@battlelawsc.com

Attorneys for Respondent City of Myrtle Beach

September 8, 2014

## **Statement of Case**

On July 9, 2013, City Council voted in open session to revoke KNS's business licenses based upon KNS's representation that it was operating a pool hall when in fact it was determined by City Council that KNS was operating a night club in violation of the zoning ordinances of the City of Myrtle Beach. On July 19, 2013, KNS filed an appeal to City Council's decision to Circuit Court. On August 9, 2013, KNS amended its appeal and introduced several new evidentiary exhibits that were not introduced in the hearing before City Council. The City objected to the new evidence in its response to the appeal.

Prior to the expiration of thirty days of the Notice of Appeal, the City of Myrtle Beach hand delivered the original record of the hearing before City Council to the Clerk of Court's office by the City Attorney. [See attached affidavit of Tom Ellenburg] On September 30, 2013, the Circuit Court denied KNS's amended appeal, and on November 6, 2013, the Circuit Court denied KNS's motion to reconsider its order denying KNS's amended appeal.

Apparently, during the course of assembling the record for appeal, the Clerk of Court for Horry County was unable to locate any record that the original record of the revocation hearing before City Council was filed with the Clerk of Court. [See affidavit of Melanie Huggins Ward] However, a clocked copy of the transcript of record was found in the Clerk of Court's office which was date stamped September 18, 2013, under case number 2013-CP-26-04103 and according to KNS date stamped on December 10, 2013 under the same case number 2013-CP-26-04103. [See Exhibit 1 & Respondent's Initial Brief Statement of Case, pg. 3 & Appellant's Initial Brief Statement of Case, pg 2, fn. 1].

Based upon the inability of the Clerk of Court to locate any record that the original record of the revocation hearing before City Council was filed with the Clerk of Court, KNS jumped to

the unsupported conclusion that Judge William H. Seals, Jr.'s falsely stated in two separate orders that after reviewing the record on appeal he found the decision of City Council should be affirmed on the grounds that there is evidence in the record to support City Council's decision. [R. p.11]. The only evidence that KNS has offered to support its conclusion that false statements were made by Judge Seals is the affidavit of the Clerk of Court which stated she could not locate any record that the original record of the revocation hearing before City Council was filed with the Clerk of Court. Clearly, the Clerk of Court's affidavit is in error because the transcript of record was found date stamped September 18, 2013, in her office. [See Exhibit 1]

At the City's attorney's request, the attorney for the City met with the attorneys for KNS to settle the record. In that meeting the Attorneys for the KNS informed the Attorney for the City that they would include a copy of the transcript of record but they would not include the book of exhibits which the City introduced in the hearing before City Council and which the City requested in its Designation of Matter. While KNS did include a copy of the transcript of the hearing it omitted the book of exhibits introduced by the City without any explanation to the Court. In response, the City moved to supplement the record on appeal to include substituted copies of the exhibits introduced in the record before City Council. KNS now opposes the City's motion to supplement the record on the unsupported claim that Judge Seals did not consider the exhibits when he ruled in favor of the City. KNS has not petitioned the Court for a report from Judge Seals as required by Rule 212(a), SCACR.

KNS has now moved to vacate Judge Seals' orders and remand the matter to Circuit Court with instructions that it consider the KNS's appeal with the certified original record before it. If the Court were to grant KNS's motions, the City anticipates that Appellant will then move to have Judge Seals recused on the grounds of his alleged misstatements in his previous orders.

## DISCUSSION

The disingenuous character of KNS's motions can be demonstrated by the fact that portions of the record or the exhibits which KNS claims Judge Seals should have considered but failed to consider are the same exhibits which KNS refuses to include in the record on appeal and which support the City's position on appeal. KNS now opposes the City's Motion to Supplement the Record which would allow the Court to consider copies of the same record considered by the City Council when deciding to revoke KNS's business license. Instead, KNS has asked the Court to vacate Judge Seal's orders and remand the case with instructions based on the Clerk of Court's affidavit that she could not find a record of filing documents that were obviously filed and at least some of which were found misfiled in her office.

Ordinarily, one would expect the attorneys who participated in the hearing before City Council to agree on the exhibits that were introduced particularly when the attorneys exchanged and maintained copies of the exhibits just prior to the hearing. That solution was suggested by the City's attorney but rejected by KNS's attorneys.

In the present case KNS claims the dispute is not over whether the copies of the proposed exhibits were authentic or introduced into the record before City Council. For KNS the issue is whether Judge Seals had the City's exhibits before him when he decided the appeal in favor of the City. In essence, KNS is making the claim that it was treated unfairly because it suspects Judge Seals did not review evidence which favored the City before ruling in favor of the City.

As stated in the City's Initial Brief, when KNS did not receive notice from the clerk that the record had been filed prior to the hearing of its appeal on September 17, 2013, KNS 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,

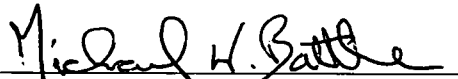
763 (Ct. App. 2002). KNS failed to act with due diligence and KNS now seeks to shift its duty to act with due diligence to the City. KNS claims the City's objection to KNS's attempt to introduce new evidence in its appeal before the Circuit Court prevented KNS from discharging its duty as the appellant to preserve the record on appeal. The City stated in its objection that the City would file the record on appeal with the Clerk Court in accordance with the South Carolina rules of procedure. Based on the affidavit of Tom Ellenburg, the City contends it discharged its duty. The City further contends that KNS failed to discharge its duty and KNS's Motions to Vacate and Remand should be dismissed for failure to prosecute. *Id.*

In connection with the appeal, the City contends that the Standard of Review for this Court is the same standard of review used by Circuit Court. 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 unless they are without evidentiary support or against the clear preponderance of the evidence. *Id.*

The Court of Appeals is capable of determining whether City Council's decision was arbitrary or capricious or whether there is any evidence in the record to support City Council's decision to revoke KNS's business license. Respondent contends that the Court should address the merits of Appellant's appeal on the same record that was before City Council and the City contends was before Judge Seals.

**CONCLUSION**

Respondent City of Myrtle Beach respectfully requests that the Court dismiss KNS's Motion to Vacate and Motion to Remand for failure to prosecute and that the Court proceed to decide the appeal on its merits based upon the entire record, as supplemented by the attorney for the City of Myrtle Beach.



Michael W. Battle, SC Bar # 00584

Battle Law Firm LLC

PO Box 530

Conway, SC 29528

(843) 248-4321

Attorneys for City of Respondent City of Myrtle Beach

September 8, 2014

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.*

---

AFFIDAVIT OF TOM ELLENBURG

---

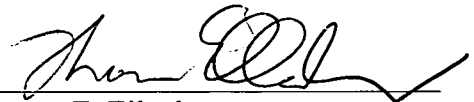
Michael W. Battle, SC Bar # 00584  
James R. Battle, SC Bar # 73604  
Battle Law Firm, LLC  
PO Box 530  
Conway, SC 29528  
T: 843-248-4321  
mbattle@battlelawsc.com

Attorneys for Respondent City of Myrtle Beach

September, 2014


**PERSONALLY APPEARED BEFORE ME, TOM ELLENBURG, WHO BEING DULY  
SWORN SWEARS AND AFFIRMS:**

1. He has personal knowledge of the matters stated herein.
2. Prior to the expiration of the thirty day period for filing the record of the hearing held before the City Council for the City of Myrtle Beach in heard the evidence upon which it decided to revoke the business license of Appellant KNS Foundation, LLC, d/b/a Elite, he personally hand delivered to the office of the Clerk of Court for Horry County what he believes was the official record of the hearing before City Council.
3. The record was prepared by the City Clerk for the City of Myrtle Beach and placed in a labeled brown manila envelope. He handed the envelope to an employee of the clerk's office. When the employee took the record, he asked if they gave receipts when receiving the record and the employee said no. The employee stated she would file the record on behalf of the City.
4. He did not hear anything further about filing the record until Appellant made the claim that the City had not filed the record for the appeal.



Thomas E. Ellenburg  
City Attorney for the City of Myrtle  
Beach

Sworn to before me this 5<sup>th</sup>  
day of September 2014



Claudia R. Zanfussi

Notary Public for Horry  
State of South Carolina

My Commission Expires: 8-26-19

Exhibit 1

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT  
CASE NO: 2013-CP-26-04103

K & S Foundation, LLC. et al.  
Plaintiffs,

vs.

City of Myrtle Beach,  
Defendant.

**COPY**

**THE HEARING HELD BEFORE THE  
CITY OF MYRTLE BEACH  
COUNCIL MEMBERS**

Tuesday, June 25, 2013  
11:03 a.m. -- 1:10 p.m.

HORRY COUNTY  
19 SEP 10 10 51 AM '11  
MEL ANNE HUGGINS - WARD  
CLERK OF COURT

The following is the hearing held before City of Myrtle Beach Council Members, at the City of Myrtle Beach, located at 937 Broadway Street, Myrtle Beach, South Carolina, on Tuesday, June 25, 2013.

**Prestige Court Reporting, Inc.**

413 Paul Street  
Conway, South Carolina 29527  
(843) 248-5252

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED  
SEP 08 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.....*Respondents,*

v.

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

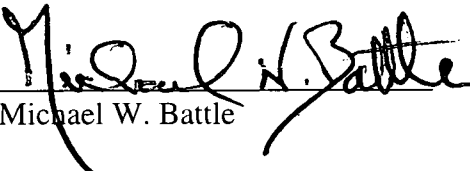
PROOF OF SERVICE

Michael W. Battle certifies that he is a an Attorney with Battle Law Firm, LLC, attorneys for Respondent City of Myrtle Beach and that he has caused to be mailed Respondent City of Myrtle Beach's Response to Motion to Vacate and Remand to the addressees shown this 8<sup>th</sup> day of September, 2014, with proper postage attached thereto.

Howell V. Bellamy, III  
Bellamy Law Firm  
PO Box 357  
Myrtle Beach, SC 29578  
*Attorney for Plaintiff*

John M. Leiter  
1203 48<sup>th</sup> Ave. North, Suite 109  
Myrtle Beach, SC 29577  
*Attorney for Plaintiff*

Armand G. Derfner  
PO Box 600  
Charleston, SC 29402  
*Attorney for Plaintiff*

  
Michael W. Battle