

CITY OF DAYTONA BEACH

MINUTES

**SPECIAL
MAGISTRATE
HEARING**

August 23, 2011
City Commission Chambers
301 South Ridgewood Avenue
Daytona Beach, Florida

9:00 AM

ATTENDEES:

Mr. David Vukelja, Special Magistrate

STAFF:

Anthony E. Jackson, Assistant City Attorney
Sgt. Tracy Miller
Colleen Miles, Zoning Officer
Barbara Collins, Code Inspector

Ms. Aimee Hampton, Secretary

Approval of Minutes by: _____

Special Magistrate

Mr. Vukelja called the Hearing to order at 9:05 a.m.

Case 1

SMG 07-11-75 – William Helfrich Bittorf: is cited for failure to correct violations of the Land Development Code, Art. 1.5.3 at **400 E. International Speedway Blvd.**, Violation(s) – **Failure to remove games of skill and all signage advertising the sweepstakes games.** First Notified – 2/26/2011.

Attorney James Lewis appeared on behalf of the Respondent.

Mr. William H. Bittorf came forward and was sworn.

Mr. William Helfrich Bittorf came forward and was sworn.

Mr. Michael Salario came forward and was sworn.

Mr. Vukelja asked Mr. Lewis if his client stipulated to the violations.

Mr. Lewis advised his client was not stipulating to the violations.

Mr. Vukelja then requested the City to begin presenting their case.

Ms. Collins testified on behalf of the City and stated the violations consisted of failure to remove games of skill and the signage advertising games of skill. Ms. Collins advised the sign which said "sweepstakes" had been removed but still says "internet café" and therefore is non-conforming.

Ms. Miles presented a packet as City's Exhibit 1 which included Art. 1 Sec. 4 of the Land Development Code, Section 4.3 describing Games of Skill; a copy of the Business Tax Receipt for WHB of Daytona, Inc. – 400 E. International Speedway Blvd.; and a picture of the sign of the business advertising "Internet Café".

Ms. Miles stated the portion of the sign that says "internet café" is non-conforming and is advertising a business that is a non-conforming use. Ms. Miles advised that internet cafés as a use classification was not provided for in the Land Development Code and therefore according to Article 1 Section 4.3(b) the use shall be treated in the same manner as the most similar use that is provided for in the Code. Ms. Miles explained the most similar use of which to liken the business to is an arcade. Ms. Miles further stated the business is a grandfathered non-conforming alcoholic beverage establishment and cannot be reestablished itself in the same location based upon the City's current standards and therefore are not permitted to have games of skill or arcade games in that zone.

Ms. Miles advised stand alone arcade establishments are permitted in the RDD4 zone which is the Boardwalk.

Mr. Jackson asked direct examination testimony from Ms. Miles regarding her qualifications, employment history and experience as the City's zoning officer.

Mr. Lewis began his cross examination of the Ms. Miles.

Mr. Lewis inquired if Ms. Miles was involved in the issuance of the initial application process for the internet café and if she had conversations with Mr. William H. Bittorf when he applied for the permit as an internet café. Mr. Lewis further inquired if the license was issued and approved.

Ms. Miles stated she was involved in the initial application process and that the initial application was approved for public internet service not an internet café. The business service would have to be similar to a business use like Kinkos.

Mr. Lewis inquired if Ms. Miles was trained or familiar with Florida Statute 894.094 (*corrected to Statute 849.094 later in the meeting*) that allows for game promotion within a business.

Ms. Miles advised she was familiar with game promotion for a business.

Mr. Lewis inquired of Ms. Miles how the determination was made that the machines were games of skill or if she had reviewed any reports regarding the machines that were being used in the business.

Ms. Miles stated she had not played the machines but did review the reports that were sent to her previously by Mr. Lewis.

Mr. Lewis inquired about what she viewed at the business during her inspection.

Ms. Miles stated she did not play the games and that there was only one person at one of the machines.

Mr. Jackson began his re-direct examination of Ms. Miles. Mr. Jackson asked about her inspection of the terminals and server. Mr. Jackson further asked if she viewed any fax machines, copiers or printers which would be associated with a business use.

Ms. Miles stated she did not see any printers or copiers and that there were individual terminals that appeared to be linked to a main server. Ms. Miles stated each independent computer terminal contained a credit card slider.

Mr. Jackson asked Ms. Miles if the determination of likening internet cafés to games of skill has been expressed by the City and if it was a regular practice adopted by the City to liken internet cafés to games of skill since there was no provision for internet cafés in the code.

Ms. Miles stated yes it was a regular practice of the City and that she prepared a memo to inform the permits and licensing staff stating that because there is no use classification in the code for internet café the closest thing they are related to is games of skill.

Mr. Jackson presented the Memo as the City's Exhibit "2".

Mr. Jackson ended his re-direct his examination of Ms. Miles.

Mr. Lewis began re-cross examination of Ms. Miles.

Mr. Lewis asked Ms. Miles if she agreed the opinion she provided to staff was approximately 7 weeks after Mr. Bittorf applied for the license.

Ms. Miles agreed that the written statement was issued 7 weeks after but the determination was made long before that.

Mr. Lewis rested his re-cross of Ms. Miles.

Mr. Lewis began direct examination of Mr. Michael Salario.

Mr. Lewis asked Mr. Salario to provide his educational background, employment, and work experience.

Mr. Salario provided testimony related to his educational background and his employment with the Department of Agriculture. Mr. Salario stated his job consisted of regulating game promotion. Mr. Salario further stated his current employment was governmental consulting and working for Hess Technologies who is the software maker of the software contained on the terminals located at 400 E. International Speedway Blvd.

Mr. Lewis inquired of Mr. Salario if he was familiar with Nick Farley and how he is known in the field of sweepstakes promotion.

Mr. Salario stated he was familiar with Nick Farley.

Mr. Jackson objected to Mr. Salario testifying to bolster a witness or bolstering a report by Mr. Farley.

Mr. Vukelja allowed the testimony to continue.

Mr. Salario explained the regulation of gaming by the State. Mr. Salario stated Mr. Farley tests whether or not machines are legal and the software that is used for sweepstakes.

Mr. Jackson objected again as to relevance, hearsay and lacking a foundation.

Mr. Vukelja asked Mr. Lewis to tie in how the report is related to the case at hand.

Mr. Salario stated the business that was operating was selling internet time. Mr. Salario further stated sweepstakes by law has to be free and the winners are pre-determined. Mr. Salario stated there is no skill involved and it was more of an illusion for entertainment which was determined at the point of sale.

Mr. Lewis stated there was no misrepresentation to the City with regard to the business when they applied for the license.

Mr. Jackson advised that the City's opinion of the report is that it is a non-issue as the City is not trying to regulate whether the activity is legal according to the State of Florida but rather that the closest thing the City can relate it to in their code is "games of skill".

Mr. Vukelja asked Mr. Salario to explain the process of when someone comes into the business and wants to buy internet time and play sweepstakes.

Mr. Salario further described in more detail the sweepstakes game process and the prizes that are awarded.

Mr. Jackson began cross examination of Mr. Salario and inquired about the business services, machines and software that were inside the business.

Mr. Salario stated he had been inside the business but that there was no use going on at that time as they were closed.

Mr. Jackson ended his cross examination.

Mr. Lewis began direct examination of Mr. William H. Bittorf.

Mr. Lewis asked Mr. William H. Bittorf to explain the process he went through in obtaining the business tax license for the business.

Mr. Helfrich described the process of what was required from the City in order to obtain the business license which included a drawing of the computers for the Fire Marshall and that he expended over \$700,000 for the terminals in order to provide the internet service.

Mr. Lewis ended his direct examination of Mr. Bittorf.

Mr. Jackson began his cross examination of Mr. Bittorf and asked about the number of machines and the manner of how the machines were used.

Mr. Bittorf stated they had 99 machines and they were used for internet time.

Mr. Jackson further inquired about the redemption amount the business received in the past year.

Mr. Bittorf stated he did not know how much money they received.

Mr. Jackson ended his cross examination.

Mr. Lewis began direct examination of William Helfrich Bittorf. Mr. Lewis asked Mr. Bittorf to explain the operations of the business and how he got into the business.

Mr. Bittorf stated there were several meetings with Ms. Miles regarding what was required to get the business license. Mr. Bittorf stated they also had a bar and a cabaret license. Mr. Bittorf stated the sweepstakes was a wonderful promotion for the internet business. Mr. Bittorf stated they had adequate parking and there were no churches or schools near the business.

Mr. Lewis ended his direct examination of Mr. William Helfrich Bittorf.

Mr. Jackson began his cross examination of Mr. William Helfrich Bittorf and inquired about how much money has been given out to patrons and how much money they have learned.

Mr. Bittorf stated the approximate prizes given out are \$0.92 on every dollar that is paid to the customer.

Mr. Salario explained the process of accounting for winning and providing records to the State of Florida. Mr. Salario believed they were running a \$250,000 prize pool.

Mr. Jackson inquired of Mr. Bittorf of how much he made from the bar.

Mr. Bittorf stated sometimes he made \$1,000 or \$10,000 a month but no more than \$50,000 annually from the earnings from the bar. Mr. Bittorf stated prior to the problems with the license they were making over \$150,000.

Mr. Jackson ended his cross examination of Mr. William Helfrich Bittorf.

Mr. Vukelja inquired of Mr. Salario about the process of selling the internet time and the sweepstakes payout.

Mr. Salario further explained the process of what a patron would do when coming into the business to purchase internet time.

Mr. Vukelja summarized his understanding of each party's position regarding the case as presented to him.

Order

Mr. Vukelja requested a memorandum from each party for more information in support of their positions regarding Florida Statute §849.094 and include a closing argument up to a maximum of 7 pages. Mr. Vukelja further advised he was not making a ruling until after he has reviewed the memorandums submitted by the due date of Friday, September 9, 2011.

Adjournment: The meeting was adjourned at 10:55 a.m.