

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-17-0546-CC

Be Mi, Inc., d/b/a St. Clements Beach Bar & Grill,
Respondent.

v.

South Carolina Department of Revenue,

And St. Clements Homeowners Association, Intervenor,

Of whom St. Clements Homeowners Association is the
Appellant

And South Carolina Department of Revenue is the
Respondent.

Appellate Case No. 2012-212861

APPELLANT'S FINAL BRIEF

RECEIVED
AUG 06 2013
SC Court of Appeals

James J. Corbett, Esquire
Holler, Garner, Corbett, Ormond,
Plante & Dunn
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities.	ii
Statement of Issues on Appeal	iii
Statement of the Case	1
Standard of Review.	3
Arguments	
I. THE ADMINISTRATIVE LAW COURT ERRED BY IGNORING OR OVERRIDING THE MASTER DEED THAT COMMON AREA SEATING MEETS RESPONDENT'S SIMULTANEOUS SEATING REQUIREMENT AS A MATTER OF LAW	4
II. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT BAR STOOL SPACE AT A RAIL IS TABLE SPACE.	14
III. THE ADMINISTRATIVE LAW COURT ERRED BY GIVING COMMERCIAL RIGHTS TO RESPONDENT IN COMMON AREA SPACE RESERVED TO ALL THE HOMEOWNERS ASSOCIATION MEMBERS UNDER THE MASTER DEED	16
IV. THE ADMINISTRATIVE LAW COURT ERRED IN IGNORING THE REQUIREMENTS OF S.C. CODE OF REGULATIONS CHAPTER 7-202.1 BY HOLDING APPLICANT HAD A CONTRACT TO USE THE PREMISES COUNTED AS EXCLUSIVE SEATING WITHOUT EVIDENCE OF A REQUIRED WRITTEN CONTRACT OR LEASE	18
V. THE ADMINISTRATIVE LAW COURT ERRED IN GRANTING A LICENSE TO AN APPLICANT WHO DID NOT MEET THE REQUIREMENTS	20
Conclusion	21

TABLE OF AUTHORITIES

Cases

<u>Anonymous v. State Bd. Of Med. Exam'rd,</u> 329 S.C. 371, 496 S.E.2d 17 (1988)	3
<u>Clark v. Aiken County Gov't,</u> 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).	4
<u>Feldman v. S.C. Tax Commission,</u> 203 S.C. 49, 26 S.E.2d 22 (1943)	3
<u>Olson v. S.C. Dep't of Health & Envtl.</u> <u>Control,</u> 379 S.C. 57, 63, S.E.2d 497, 500-01 (Ct. App. 2008)	3
<u>Turner v. S.C. Dep't of Health & Envtl.</u> <u>Control,</u> 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008)	4

Statutes

S.C. Code Ann. 1-23-610(B)	3
S.C. Code Ann. 27-31-80 (2007).	5
S.C. Code Ann. 27-31-170.	7
S.C. Code Ann. 61-4-500	1
S.C. Code Ann. 61-4-525	2
S.C. Code Ann. Section 61-6-20.	3, 14
S.C. Code Ann. Section 61-6-20(2)	3, 4, 14, 16, 21
S.C. Code Ann. Section 61-6-1600.	1
S.C. Code Ann. Section 61-6-1610.	3, 21
S.C. Code Ann. Section 61-6-1610(A) (1).	4
S.C. Code Ann. Section 61-6-1610(B)	10
S.C. Code Ann. Section 61-6-1825.	2
SC Code of Regulations Chapter 7-202.1.	11, 18, 20
SC Code of Regulations Chapter 7-401.3.	3

STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR BY IGNORING OR OVERRIDING THE MASTER DEED THAT COMMON AREA SEATING MEETS RESPONDENT'S SIMULTANEOUS SEATING REQUIREMENT AS A MATTER OF LAW?
- II. DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT BAR STOOL SPACE AT A RAIL IS TABLE SPACE?
- III. DID THE ADMINISTRATIVE LAW COURT ERR BY GIVING COMMERCIAL RIGHTS TO RESPONDENT IN COMMON AREA SPACE RESERVED TO ALL THE HOMEOWNERS ASSOCIATION MEMBERS UNDER THE MASTER DEED?
- IV. DID THE ADMINISTRATIVE LAW COURT ERR IN IGNORING THE REQUIREMENTS OF S.C. CODE OF REGULATIONS CHAPTER 7-202.1 BY HOLDING APPLICANT HAD A CONTRACT TO USE THE PREMISES COUNTED AS EXCLUSIVE SEATING WITHOUT EVIDENCE OF A REQUIRED WRITTEN CONTRACT OR LEASE?
- V. DID THE ADMINISTRATIVE LAW COURT ERR IN GRANTING A LICENSE TO AN APPLICANT WHO DID NOT MEET THE REQUIREMENTS?

STATEMENT OF THE CASE

The South Carolina Administrative Law Court ("ALC" or "Court") issued a Final Order and Decision granting a liquor by the drink restaurant license following a contested case hearing involving an application submitted by Be-Mi, Inc., d/b/a St. Clements Beach Bar & Grill ("Respondent") on October 27, 2011. On May 18, 2011, the Respondent applied to the South Carolina Department of Revenue ("Department") for renewal of its on-premises beer and wine permit and restaurant liquor by the drink license pursuant to S.C. Code Ann. §§61-4-500 et. seq., and 61-6-1600 et. seq. for the location at 202 70th Avenue North, Myrtle Beach, South Carolina 29572. The application was reviewed, investigated by the South Carolina Law Enforcement Division ("SLED") and the Department notified Respondent by letter dated May 24, 2011 that the application was denied based on a valid public protest by Appellant and Respondent's failure to be engaged primarily and substantially in the preparation and service of meals. Pursuant to a letter dated June 9, 2011, the Respondent timely protested the Department's denial of the application, and on September 30, 2011, the Department issued a Department Determination confirming the application's denial for the reasons recited in its earlier correspondence. However, the Department gave Petitioner an opportunity to cure certain

deficiencies noted in SLED's inspection report. On November 21, 2011, SLED informed the Department after a second visit that the location met the requirements for the restaurant liquor by the drink license.

The Department withdrew its denial but determined that the license and permit must still be denied based on the Department's receipt of a valid public protest from St. Clements Homeowners Association ("St. Clements HOA" or "HOA") on April 1, 2011.

Upon receipt of a timely and valid public protest, the Department must deny the application and refer the matter to the ALC pursuant to S.C. Code Ann. §§ 61-4-525 and 61-6-1825. On May 24, 2011, the Department notified Respondent that the application was denied and by letter dated June 9, 2011, the Respondent protested the application's denial. On November 30, 2011, the Department issued an Amended Department Determination confirming the denial. Respondent filed a request for Contested Case Hearing with the Court on October 27, 2011 and on December 12, 2011, St. Clements HOA filed a motion with the Court seeking intervenor status. The motion was granted on December 22, 2011.

At a hearing on January 4, 2012 the ALC was informed at the outset that the parties agreed that St. Clements HOA was not protesting the renewal of Respondent's on-premises beer and wine permit, and the sole issue was whether or not Respondent meets the "restaurant requirements" for a liquor by the drink license

as set forth in S.C. Code Ann. §§ 61-6-20(2) and 61-6-1610 (2009) and S.C. Code of Regs. § 7-401.3. The ALC held Respondent met the seating requirements for the permit, and then denied Petitioner's Motion to Reconsider.

STANDARD OF REVIEW

The standard of proof in an administrative proceeding is the preponderance of the evidence. Anonymous v. State Bd. Of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998). A permit holder must comply with the restrictions governing any permit or license by the State for the sale of liquor, beer and wine in order to keep a permit or license. Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943).

S.C. Code Ann. § 1-23-610(B) (Supp. 2010) provides the standard of review. This Court may reverse or modify an Administrative Law Judge's decision that prejudices the substantive rights of the Appellant if the decision exceeds the agency's statutory authority; is made upon unlawful procedure is clearly erroneous in view of the reliable, probative, and substantial evidence on the record as a whole; is characterized by abuse of discretion; or violates constitutional or statutory provisions is affected by an error of law, or is arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Accord, Olson v. S.C. Dep't

of Health & Env'tl. Control, 379 S.C. 57 63, S.E.2d 497, 500-01 (Ct. App. 2008; Turner v. S.C. Dep't of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).

ARGUMENTS

I. The Administrative Law Court erred by ignoring or overriding the Master Deed to find that common area seating meets Respondent's simultaneous seating requirement as a matter of law.

There record as a whole from the January 4, 2012 hearing shows that Respondent was not primarily and substantially engaged in the preparation of meals as required by S.C. Code Section 61-6-1610(A) (1) as it could not provide 40 seats simultaneously for seating at tables for meals.

The Respondent did not meet the statutory requirements cited by the Court as it does not "provide facilities for seating not fewer than 40 persons simultaneously at tables for the service of meals . . ." S.C. Code (1976, as Amended) § 61-6-20(2), Order P 5. The ALC erred in its count by including common area seating in a covered deck built on 2 parking spaces, and by counting bar stool space, to find 40 table seats for simultaneous service of meals. The Judge also erred in finding that Petitioner's use of "common area" satisfied the statutory seating requirements

because there was ongoing litigation involving a disputed covered deck that Respondent "won."

The Final Order conflicts with the clear language of the St. Clements Master Deed in several ways. The fact that "common area" use was part of other litigation cannot be controlling. In addition, S.C. Code Ann. § 27-31-80 provides that common elements may be used by all co-owners for the purpose for which they are intended without hindering or encroaching upon the other co-owners' rights to the common areas.

The Master-in-Equity litigation as presented to the Court involved the right to build the covered deck on two parking spaces. No evidence was presented that Respondent had "bought" the two parking spaces which he claims as part of his simultaneous seating for 40 people for the service of meals. No evidence was presented that the HOA Board ever properly gave Respondent permission to build the deck pursuant to the Master Deed and/or By-Laws. Respondent admits that the covered deck was built on two common area parking spaces (R.p. 127, lines 7-9).

The Court found "until the Intervenor prevails in that case, the Petitioner meets the minimum licensing requirements." Respondent did not introduce evidence of what the Master-in-Equity found, why it so ruled, or how that case relates to the statutory seating requirement, except for opinions stated by Respondent's sole witness, Raymond Luke Goude. Respondent had a

copy available of the Order the ALC relied on but did not introduce it (R.p. 196, line 24-p.197, line 14). Respondent's attorney even volunteered, after objection, that Respondent was not saying the ALC is bound by another ruling in another Court (R.p. 152, lines 7-24).

Mr. Goude made only vague, self serving reference to a Master-in-Equity ruling then on appeal.¹ Respondent introduced no authority to allow it to take over parking spaces for its exclusive use.

There is no basis in the record or at law for the ALC to hold Appellant must "prevail" in that action or else Respondent meets the minimum seating license requirements based on the reliable, probative and substantial evidence presented at the hearing. The uncontroverted evidence is that common area seating, counted by Respondent and the Court, is not under Be Mi's exclusive use, possession or control, pursuant to Article 5.0(D), Article 6.0(D) and Article 6.2 of the Master Deed (R.p. 238-240) and therefore can not be used for simultaneous seating of 40 at tables for meals.

The Court found that Respondent's unit is governed by the Master Deed (R.p. 3).

Master Deed Article 5.0 defines a common area to include "D. All parking and drive areas... swimming pool and pool deck...."

¹Appellant believes a Motion to Reconsider was pending and the case is now on appeal.

"F. All other portions of the real property and the improvements thereon which are not specifically part of the units themselves..." Article 6.2 states "General Common Elements and facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all the owners of units in The St. Clements, for their use... for all proper and normal purposes... for which the same are reasonably intended" Respondent admitted this in his testimony (R.p. 126, line 15-p.127, line 1 p. 127, lines 7-12, p. 127, lines 25-p.128 line 23). Parking spaces can not be used to serve meals at tables. Respondent has to abide by the Master Deed, its covenants and restrictions pursuant to S.C. Code § 27-31-170.

Respondent admits that the Master-in-Equity ruling did not deed the covered deck area to Be-Mi, Inc., which he counted as simultaneous seating (R.p. 127, lines 10-12). Witness Mr. Goude admitted in his sworn testimony that these common area seats would be used by everyone.

"Q. And your counting for your seating?

A. Yes sir.

Q. So everybody else can sit there?

A. Sure.

Q. So it is not dedicated seating that -

A. No sir -

Q. - - you can make sure -

A. I want them to sit there.

Q. But it is not dedicated seating?

A. Right."

(R.p. 128, lines 2-11).

And a moment later:

"Q. All right. But you are saying that the common area seating counts toward your 40?

A. Yes sir."

(R.p. 128, lines 21-23).

Later Respondent admitted to also attempting to exercise control over what others ate or drank around the pool (R.p. 132, lines 23-pp. 135, line 25). Respondent cannot prohibit co-owners and their guests and invitees from using the common area, yet that is required to be done to provide simultaneous seating at tables for meals for 40. Respondent's argument later became that he bought the actual seats and therefore he meets the 40 seat requirements. After a long speech, Mr. Goude finally admits Respondent does not own the area in which he puts the seats. (R.p. 186, lines 13-pp. 189, line 17).

"Q. Why only those two areas?

A. Because that's the ones I have control over.

Q. Well where's the Court Order saying you have control over it?

A. We have a copy of it right here if you want to
- - Mr. Allen's got it.

Q. But that only says the Homeowners Association

can't tear down what you built, right?

A. That's what they say. That's what the Court says.

Q. Can't tear it down. Doesn't say you own - -

A. No. But I got a Court Order I can keep it there.

Q. Let me finish my question sir.

A. Yes sir.

Q. It doesn't say that you own, to the exclusion of all the other common owners, the land - -

A. No sir. I never said I did.

Q. Ok good. Thank you sir.

A. I said the deck.

(R.p. 196, line 22-p. 197, line 16).

Even under questioning from the Court, Respondent admitted the covered deck area was common area, but Mr. Goude still thinks he could tell others to leave those common area seats. (R.p. 201, lines 11-24). The only way the Court could find that the Respondent had control to provide seating for "40 persons simultaneously seated at tables for service of meals" is by including the common area with the covered deck and rule that Respondent had additional rights to exclusive use of common areas in violation of the Master Deed and not held by co-owners in the HOA, a clear error of law under S.C. Code § 61-6-20(2).

The Court relies heavily on the oral interpretations of Mr. Goude as to the findings in the "Circuit Court case" (the Master-in-Equity case), that Be Mi would have to lose that case to lose

the "ability to comply with seating requirements." There is no basis in the record for this except vague opinion testimony by Respondent's witness Goude. Despite having the Order, Respondent did not introduce it (R.p. 196, lines 24-p. 197, line 14) so Respondent and the ALC cannot rely on it as a basis for an alcohol permit. It is an abuse of discretion for the Court to rely upon the Master-in-Equity Order, not in evidence and on appeal in that case, to determine control of areas for seating of 40 persons simultaneously for meals in light of the reliable, probative, and substantial evidence in the record as a whole.

S.C. Code of Laws § 61-6-1610(B) (provisions cited by the Court in its Order) specifically requires "the licensed premises do not extend to any portion of the business establishment or the property upon which it is located which is designed as or used for parking area even though food may be served in the area." The parking spaces now contain a covered deck, and over half of Respondent's claimed seating area is common area. Master Deed 7.0(e) states "No business activity of any kind whatever shall be conducted. . . on any portion of the property not designated as commercial area" (R.p. 24). The Court must reverse the ALC's determination that Respondent met the minimum seating requirements under the law.

Respondent and the reinspecting SLED agent included this common area pool side seating as defined by the Master Deed as

part of the area to seat 40 persons simultaneously for meals as admitted by Petitioner/Applicant Goude (R.p. 126, lines 15-p. 127, line 23). The Court concludes the Master-in-Equity Order, not in evidence, determined the area in question was somehow no longer common area without legal authority or basis and in direct contradiction of the Master Deed. The Court's conclusion allows all common area seating to count for simultaneous seating for meals for a license, even for several licenses. Respondent's witness avoids at length the issue whether the seats and tables placed on this covered wood deck were built upon parking spaces and were still common area open to all pursuant to the Master Deed, then finally admits "his" seats were built on common area parking spaces. (R.p. 126, line 15-pp. 128, line 23). Article 6.2 of the Master Deed specifically states that all general common areas are open to all owners. (R.p. 239-40) Respondent's witness agrees thus there is no exclusive right owned by Respondent to the seating area to allow simultaneous seating for 40 at tables for meals.

Master Deed Article 5.0(d) defines common area to include the swimming pool and pool deck (R.p. 238-239). Respondent failed to submit any written permission or contract for conversion of the common areas to its ownership, as required by Reg. 7-202.1. Without written evidence of exclusive control of this common area it can not be counted as being "provided" by

Respondent toward simultaneous seating for 40 at tables for meals.

Respondent's control is limited to the approximate (and maximum) 11 - 18 seats on the rooftop of his unit's balcony. The only pictures in evidence shows 17 seats crammed together for 18 seats. (R.p. 226). This arrangement was not normal according to Intervenor's witness Barbara Brown who says for years only 12 seats were on the balcony (R.p. 158, lines 1- 25) and the seating arrangement Respondent depicts appears to have coincided with the SLED reinspection. Based on her years of use and ownership Ms. Brown testified the common area seating under the covered deck could only and normally does only hold 12 seats at tables (R.p. 159, lines 1-17). Therefore even if the common area somehow counted Respondent did not have sufficient seating to reach 40 at tables.

The second SLED agent's report of November 21, 2011 (R.p. 18) specifically counts 20 chairs at tables "in an area of location that can be covered with a pull down canvas instead of a wall" toward 40 seats at tables. There is no testimony or evidence the agent reviewed the Master Deed to determine what is common area, and what is owned by Respondent, to determine the seating requirement was satisfied. The SLED report relies solely on Respondent's assertions at inspection, with no evidence of review of the controlling Master Deed and its restrictions on

commercial use of parking spaces, or definition of common area control. Respondent did not and does not have control over common area seating or pool seating for the simultaneous serving of meals for 40 at tables even with the covered deck area. The SLED Agents e-mail report (R.p. 18) counts 18 seats on the balcony and 20 at tables in the canvas covered area (deck area) leaving Respondent 2 seats short.

The bar stools counted by the ALC's Final Order, by definition, can not count toward seating at tables for meals. The cramped conditions of both areas depicted by the pictures in evidence (R.p. 221-222, R.p. 226, p. 229) and described in the testimony presented at the hearing (R.p. 158, lines 1025, p. 159 lines 1017) are further evidence of the Court's error. If the covered deck is open to all, as Goude testified, it is a clear error of law to conclude that such area can be part of the simultaneous seating for 40 at tables for meals, because others have the same right to that space at all times. Appellant's witness Ms. Brown pointed out several complaints of Respondent improperly preventing persons from using admitted common area seating when possessing outside food or beverage, causing the license to be inspected and challenged (R.p. 159, lines 18-pp. 162, line 14).

The Court should reverse the Administrative Law Court's determination that Respondent met the minimum seating requirement under the law.

The Master Deed 7.2 states any failure to enforce any right or provision of the Master Deed "shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or effect its enforcement." (R.p. 236). The Master Deed remedies are cumulative with any other legal or equitable remedies.

II. The Administrative Law Court erred in finding that bar stool space at a rail is table space.

The Order on appeal also states the Administrative Law Court specifically counts bar stool space facing the rail on the edge of the covered deck structure toward simultaneous seating of 40 at tables for meals, contradicting S.C. Code (1976, as amended) Section 61-6-20(2), which requires "seating for not fewer than 40 persons simultaneously" be "at tables for the service of meals..." Counting the bar stool space at the rail as table seating violates the statute, and is therefore an error of law, an abuse of discretion, and is erroneous in view of the probative and reliable evidence to grant the license.

The Court changes the statutory requirement of "seating at tables" required by the statute to include "bar stool space for four (4) to six (6) patrons at a wide rail." (R.p. 4). Mr.

Goude's "explanation" of room for 4-6 bar stools is contradicted by Petitioner's own picture, Exhibit 1 P 2. (R.p. 221).

The Court relied on Mr. Goude's testimony and the SLED follow up report (R.p. 4), and not the pictures presented by Appellant and Respondent, to conclude there is seating at tables for 40 or more persons. Switching bar stools from the pool deck common area to inside the covered deck near the waist high rail, as the Court does to find 40 seats, would not only make it even more difficult, but legally impossible, to sit 40 people at tables for meals with the other tables already crammed into the deck and the claimed 18 seats crammed onto the rooftop. It would be against the reliable, probative and substantial evidence. Petitioner's Exhibit 1, P 2 shows 5 tables crammed with empty chairs pushed all the way up to the side of each table in the common area deck. Even staged and arranged, two seats stick "over the line" outside the covered deck (R.p. 221). Contrary to the Order @ P 4, the bar stool rail only has room for 2 seats, as specifically shown in Petitioner's Exhibit 1 P 2, Petitioner's Exhibits 5, 6, and Intervenor's Exhibit 8, stools which are outside the deck area but then counted as seating inside the deck area by the Court's Order.

There is not sufficient space on the inside of the rail for 4-6 seats according to the reliable, probative and substantial evidence in the record. Only two stools sit outside the covered

area along the length of the rail, which is the same length as inside the covered area.

Based on the probative, reliable and substantial evidence, people can not physically move around the tables set up by Respondent in Exhibit 1 P 3 (R.p. 233, 235) to sit at tables in the common area. The number of tables and seats would have to be reduced to actually sit 40 people simultaneously for meals even using the space counted by the Court.

Section 61-6-20(2) requires seating be "at tables." It is an abuse of discretion to count bar stools at a railing as seating at tables, especially with the already crowded and empty tables depicted. A "wide rail" is not a table.

III. The Administrative Law Court erred by giving commercial rights to Respondent reserved to the Homeowners Association members under the Master Deed through use of common area space.

Section 7.0(b) of the Master Deed states "No. . . unlawful use may be made of ... the common areas... nor any part thereof...and (e) states "no business activity of any kind whatever shall be conducted in any building or any portion of the property not designated as commercial area...." (R.p. 240). Section 8.0(d) states "Ingress and egress is reserved ... for vehicular traffic over, through and across such portions of the common areas and facilities as from time to time may be paved or intended for such purposes, for all unit owners of units in the

St. Clements, their guests, families....." (R.p. 243). It is uncontroverted by Respondent that the common area covered wood deck was built on parking spaces (R.p. 127, lines 7-12, p. 142, lines 5-7). Parking spaces are not designated as commercial area in the Master Deed, so commercial activity is barred where Respondent counts his seating in the covered deck. Parking spaces are common area open to all co-owners and guest.

It is clearly erroneous, an error of law, and/or an abuse of discretion for the Court to override the Master Deed to count this common area as simultaneous seating for 40 at tables for meals. There is no evidence the parking spaces upon which the covered deck was built upon were ever changed to commercial area.

The ALC is without authority to modify the Master Deed in order to grant an alcohol permit. The Master Deed was not contested by Respondent, which can not exclude other users, owners or guests from using common area, to simultaneously serve meals to 40 at tables.

The Order on appeal would allow all other unit owners and guests the equal right to use common area space designated by the Master Deed as parking spaces for commercial use, because the Court allows simultaneous seating for 40 at tables for meals for Respondent using parking spaces. Since Respondent's sworn testimony confirms all of this, it is an error of law to count

the seating at tables under the covered deck built on parking spaces toward simultaneous seating for 40 at tables for meals.

The pictures and sworn testimony presented by Appellant's witness Ms. Brown (R.pp. 158-159, R.pp. 226-227, 229, 233-235) confirm that the area under Petitioner's control can not include common area table seating simultaneously for 40 for meals, that the reasonable number of seats at the tables shown is less than those claimed by Respondent, and that there is no commercial use allowed of the common area space claimed for commercial purposes by Respondent.

Based on the reliable, probative and substantial evidence presented at the hearing it would be clearly erroneous and/or an abuse of discretion in view of this evidence in the whole record to find that Respondent had control over 40 seats simultaneously at tables for serving meals.

IV. The Administrative Law Court erred in ignoring the requirements of S.C. Code of Regulations Chapter 7-202.1 by holding Applicant had a contract to use the premises counted as exclusive seating, without evidence of a required written contract or lease.

The Court's Order violates S.C. Code of Regulations Chapter 7-202.1, General Requirements - All licenses, (B). This section states that a license holder must have "direct control" of its designated space.

"License holders direct control of buildings and grounds may be shown by any of the following: (a) a

deed or lease conveying to the license holder an appropriate interest that includes the premises; (b) a writing from a local governmental jurisdiction giving the license holder the right to use and the duty to maintain an area owned or controlled by the local governmental jurisdiction; (c) an enforceable written contract granting the license holder a right to use the premises."

The Applicant failed to provide any such proof of direct control by a written lease, deed or control to control or own the covered deck. Respondent only had control of the unit next to the pool according to its own witness. There is no evidence even of whether Mr. Goude owns the unit with a proper lease to Be Mi, Inc.

The Master Deed and Mr. Goude's testimony is direct evidence of common area use to qualify for the license. Respondent's testimony about an Order on appeal but not introduced as evidence, or an alleged contract not introduced, is not reliable, probative or substantial. It is an error of law for the Order to hold that a years old alleged oral agreement by someone with the HOA with Respondent to build a covered deck over 2 parking spaces is ownership and therefore direct control, especially since Mr. Goude sold units earlier and owned one. The alleged contract does not meet the statutory requirements.

There is no reliable or probative evidence of a written agreement in the record to support the finding that "the developer gave Petitioner permission to expand the bar and grill by adding a covered wooden deck to the unit" to contradict the

clear statutory requirement to have a written contract, deed or lease.

It is an error of law to conclude such contract, if it exists supercede the Master Deed applicable to all unit owners, including Respondent, based on his oral testimony so it is clearly erroneous. The Court erroneously concludes control over the 2 parking spaces was somehow "given" to Respondent to use for commercial purposes, even though this is an additional right not equally available to other HOA members. Other units have balconies and Respondent has a roof top balcony. There is no written evidence of any agreement claimed by Applicant of direct control as required by 7-202.1 so the permit cannot be granted and the Order must be reversed.

V. The Administrative Law Court erred in granting a license to an Applicant who did not meet the requirements.

Respondent can not simultaneously seat 40 at tables for meals without counting the common area space, and Respondent does not have exclusive control for this jointly owned, non-commercial space. The space claimed by Respondent for more than 20 seats was built on parking spaces, an area prohibited from being used as commercial space. Even counting the common area, Respondent lacks 40 seats simultaneously at tables. There is room for a maximum 38 seats at tables when erroneously including common area

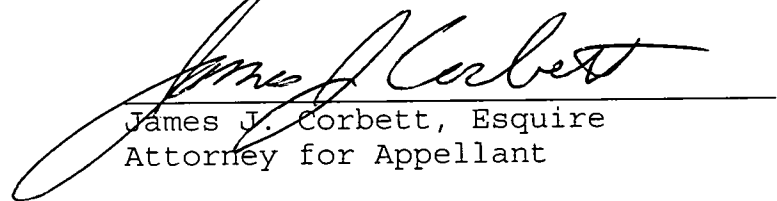
seating room, since bar stool seating at a rail is not table seating.

CONCLUSION

In light of the reliable, probative and substantial evidence in the whole record, it would be clearly erroneous for this Court to find that the severely limited space on top of Respondent's small unit meets the required 40 seats at tables simultaneously for meals. Even with reasonable seating on the common area wood deck erroneously included as available for simultaneous seating at tables there still is not seating at tables for meals for Respondent to provide seating for "40 persons simultaneously at tables for the service of meals" as required by Section 61-6-1610 and defined by Section 61-6-20(2). The common area cannot be counted as under Respondent's direct control pursuant to Reg. 7-202.1, so the Court's finding is clearly erroneous. The ALC can not override the Master Deed and allow commercial activity on or over parking spaces which are not designated commercial areas and not available for seating, another reason the common area does not count toward table seating. The law also requires a written contract, lease or deed to exercise direct control for dedicated space used for seating "for 40 persons simultaneously at tables for meals" and the record reflects none. The ALC's Order must be

reversed and the permit application to serve alcohol by the
drink be denied.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "James J. Corbett", is written over a horizontal line. Below the line, the text "James J. Corbett, Esquire" and "Attorney for Appellant" is printed.

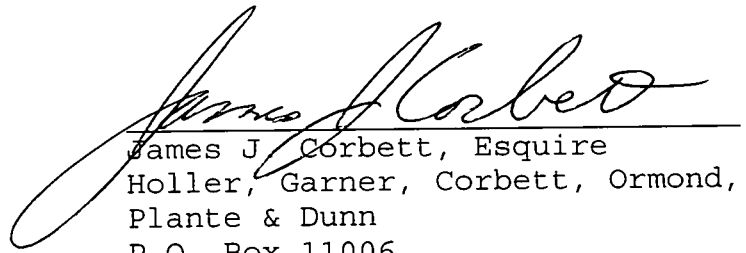
James J. Corbett, Esquire
Attorney for Appellant

August 5, 2013

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief contains all material proposed to be included by any of the parties and not any other material.

August 5, 2013



James J. Corbett, Esquire
Holler, Garner, Corbett, Ormond,
Plante & Dunn
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-17-0546-CC

Be Mi, Inc., d/b/a St. Clements Beach Bar & Grill,
Respondent.

v.

South Carolina Department of Revenue,

And St. Clements Homeowners Association, Intervenor,

Of whom St. Clements Homeowners Association is the
Appellant

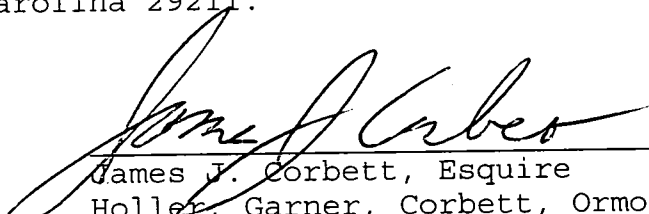
And South Carolina Department of Revenue is the
Respondent.

Appellate Case No. 2012-212861

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on Respondent Be Mi, Inc., d/b/a St. Clements Beach Bar & Grill by depositing a copy of it in the United States mail, postage prepaid, on August 6, 2013, addressed to its attorney of record, Clifford L. Welsh, Esquire, 457 Main Street, North Myrtle Beach, South Carolina 29582 and to South Carolina Department of Revenue by depositing a copy of it in the United States mail, postage prepaid on August 6, 2013 addressed to its attorney of record, Kathryn Brown, Esquire, Law and Compliance Division, Post Office Box 12265, Columbia, South Carolina 29211.

August 6, 2013


James J. Corbett, Esquire
Holler, Garner, Corbett, Ormond,
Plante & Dunn
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968
Attorney for Appellant

RECEIVED

AUG 06 2013

SC Court of Appeals