

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 REPLY TO
INITIAL BRIEF OF RESPONDENT
BE MI, INC.

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REPLY TO ARGUMENTS

Respondent Be Mi has the burden to provide a controlling Order from another Court and failed to introduce it because Respondent's attorney at the ALC hearing said the ALC was not bound by that Order (R.p. 152, lines 7-24).

As Respondent points out, 1-23-610(B) requires that review of the ALC's Order must be confined to the record. The record does not contain the order. Using opinion testimony about it as controlling fact is arbitrary and clearly erroneous.

SLED did not review or interpret the Master Deed. The agent simply took Be Mi's word that Respondent had actual control over the 40 seats it pointed out. The ALC Court is the proper place to decide control when considering a license to ensure compliance with the law. Respondent does not meet this threshold.

Be Mi admits in its Brief on page 4 that it has to count "two (2) stools at a wide shelf on the side deck..." to make its minimum 40 seats. A shelf is not a table. Respondent's witness never made reference to it as a table. Those stools can only be used outside the covered area. Tables and seats are crammed inside the covered deck and a walkway is next to the shelf (R.p. 229, 233). Respondent's testimony shows it has only a maximum of 38 seats at tables, not 40, for the service of meals. Contrary to Respondent's witness, he cannot switch the stools "inside to outside" the covered deck (R.p. 191, lines 15-23). Even if it

argues the covered deck is common area under its exclusive control it is uncontroverted that the common area outside the deck is not "his space." Respondent's witness testified the covered deck was common area (R.p. 201, lines 11-18).

Appellant's witness Barbara Brown testified the seating configuration used since 1999 was for less seats than presented by Respondent (R.p. 175, lines 6 - p. 179, line 8). She called the chairs used by Respondent "about the smallest I've seen." (R.p. 181, line 1).

The ALC is required to review the Master Deed to decide if Respondent has exclusive seating for 40, not the Master-in-Equity. Contrary to Be Mi's smoke screen, the Appellant HOA does not attempt to "retry" the Master's case. The Master has no jurisdiction over this alcohol license. Using Respondent's opinion as fact is arbitrary and clearly erroneous.

The Master's Order cannot be "the law of the case" as argued. The Order itself is not part of the record and Respondent said the ALC was not bound by the Master's Order (R.p. 152, lines 7-24). Even if the Master was ever asked to rule about exclusive control over 40 seats simultaneously for the service of meals, the ALC has to determine Respondent's ability to meet the statute. The Master Deed is the best evidence of Respondent's rights, and lack to meet the requirements. The Master Deed clearly states that Be Mi has only shared, not

exclusive use of the common area where Be Mi built a covered deck.

Arguments from Appellant's Initial Brief are not repeated here but are incorporated by reference.

The Master Deed clearly only gives Be Mi exclusive control over the seats on its balcony on top of its own unit. Any seats near the pool or on the deck built over parking spaces are common area and cannot be reserved to seat 40 persons simultaneously at tables for meals.

Be Mi does not meet the statutory requirements and can not get a liquor by the drink permit. To rule otherwise would render the Master Deed's provisions on common area and parking spaces unenforceable, such that common area space at St. Clements subjected to squatters rights, "reservation" and even intimidation over who has the use of it. This contradicts the Master Deed and spoils vacations of renters' making use and enjoyment of the rights granted under the Master Deed. Respondent is exercising exclusive control over common area according to Appellant's witness Ms. Brown (R.pp. 183-184, lines 8-3).

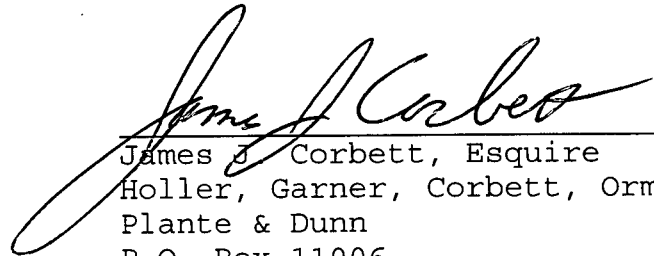
CONCLUSION

Appellant incorporates all arguments made in its Initial Brief. The Court must up hold the Master Deed. It clearly shows

Respondent Be Mi does not have exclusive use and control over the common area seating under the covered deck. Therefore Be Mi does not meet the requirement for 40 seats simultaneously for the service of meals at tables. Be Mi does not meet the statutory requirements for a liquor license even if the covered deck seating is included. A rails is not a table and "outside" is not "inside." Simultaneous does not mean at various times. Be Mi can continue to serve snacks, hot food and even beer but can not "own" common area seating to the exclusion of all others on the premises to serve liquor by the drink.

Respectfully submitted,

August 5, 2013

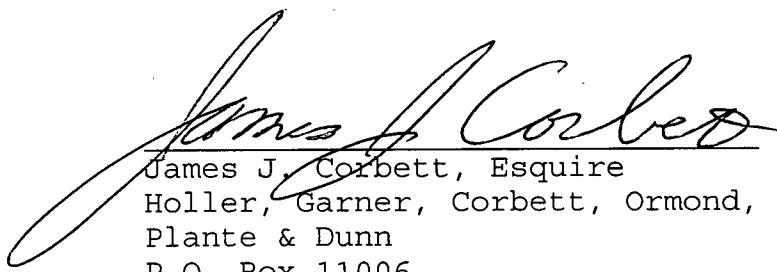


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CERTIFICATE OF COUNSEL

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

August 5, 2013

A handwritten signature in black ink, appearing to read "James J. Corbett", is written over a horizontal line. The signature is fluid and cursive.

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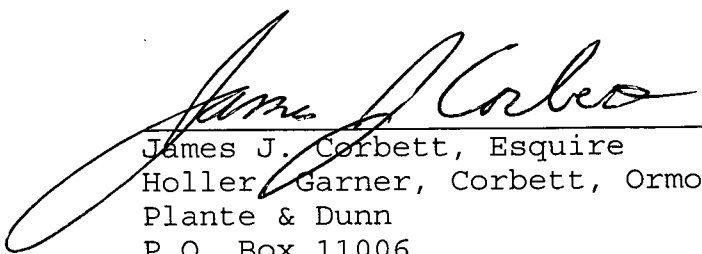
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Appellate Case No. 2012-212861

PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply 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



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AUG 06 2013

SC Court of Appeals