

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge

Case No. 2011-ALJ-17-0546-CC

RECEIVED
JUL 26 2013

SC Court of Appeals

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

BRIEF OF RESPONDENT

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Did the Administrative Law Court err by finding that Respondent, Be Mi, Inc., d/b/a St. Clements Bar and Grill, met the statutory requirements for a renewal of its liquor by the drink license?

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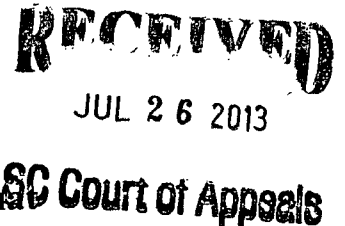


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ISSUE ON APPEAL

Did the Administrative Law Court err by finding that Respondent, Be Mi, Inc., d/b/a St. Clements Bar and Grill, met the statutory requirements for a renewal of its liquor by the drink license?

STATEMENT OF THE CASE

The Appellant, St. Clements Homeowner's Association ("HOA"), appeals the Order of the South Carolina Administrative Law Court ("ALC") granting the renewal of the restaurant liquor by the drink license of the Respondent, Be Mi, Inc., d/b/a St. Clements Beach Bar and Grill ("Be Mi").

On May 18, 2011, Be Mi applied for a renewal of its restaurant liquor by the drink license, which initially was given an unfavorable Department Determination by the Department of Revenue (R. p. 15). Be Mi commenced this action by requesting a contested case hearing on October 27, 2011 (R. p. 47). On November 30, 2011, it was determined, after a re-inspection, that Be Mi met all of the statutory requirements for a license (R. pp. 59-63). However, HOA filed a public protest, so this action proceeded to a contested case heard on January 4, 2012 (R. pp. 21-22).

On June 5, 2012, ALC issued an Order finding that Be Mi met all the statutory requirements for the renewal of its liquor by the drink license and ordered that the license be approved (R. pp. 1-6). On June 19, 2012, HOA moved for reconsideration (R. pp. 79-83). On July 30, 2012, ALC denied HOA's motion for reconsideration (R. pp. 8-9).

On August 31, 2012, HOA filed a Notice of Appeal with this Court (R. p. 248).

STATEMENT OF THE FACTS

In 1988, Be Mi purchased the commercial unit described, in the developer's sales literature, as a snack and pool bar, in this condominium/hotel complex, where none of the units are actually lived in by the owners, but are rented as hotel rooms (R. p. 98, lines 23-25). Since it opened in 1988, this commercial unit has had a beer and wine license, as well as, a liquor by the drink license. From the time, the beach bar first opened in 1988, through the 1990 season, the licenses were in the name of the HOA (R. p. 100, lines 12-13, p. 100, line 23-p. 101, line 1, p. 101, lines 9-11). In the spring of 1990, the developer and the HOA allowed Be Mi to construct the deck attached to the commercial unit, at Be Mi's own expense, which was approximately Eleven Thousand & 00/100 (\$11,000.00) Dollars (R. p. 108, line 11-p. 110, line 3). At its own expense, Be Mi has maintained and exercised control over the deck attached to its commercial condominium unit since 1990, with the knowledge and consent of the HOA. After the construction of the deck, the beer and wine license, as well as, liquor by the drink license, were placed in the name of Be Mi, and have remained in the name of Be Mi for over two decades (R. p. 110, lines 15-22).

In a separate action, the Honorable Cynthia Graham Howe, Master in Equity for Horry County, has addressed the merits of Be Mi's right to maintain and control the deck, built by Be Mi, attached to its commercial condominium unit. The Master in Equity found in favor of Be Mi (R. p.139, lines 17-21). This matter is presently on appeal to this court.

The SLED's November 21, 2011, final inspection of Be Mi's bar and grill found the required number of seats, as well as, the required amount of cold food storage for a restaurant liquor by the drink license. SLED found there to be at least forty (40) chairs and twenty one (21) square feet of cold food storage. This includes eighteen (18) seats around tables on the roof deck and twenty (20) seats around tables on the attached deck and two (2) stools at a wide shelf on the side deck (not at the bar). This does not include the six (6) bar stools at the serving window/bar, or the fourteen (14) seats between the bar and the pool area (Transcript, pp. 5-6).

The South Carolina Department of Revenue would issue Be Mi a liquor by the drink renewal license, but for the public protest of the HOA. Even after hearing all the testimony at the January 4, 2012 hearing before the ALC, the Department of Revenue told the Court that the liquor by the drink license should be issued to Be Mi, according to the statutory requirements. After a careful review

of the evidence, the ALC found that Be Mi met its burden of proof establishing that it meets all statutory requirements for renewal of the liquor by the drink license for the St. Clements Bar and Grill (Final Order).

STANDARD OF REVIEW

The standard of judicial review of an appeal from the South Carolina Administrative Law Court is determined by statute. §1-23-610(B) states in its entirety:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or,
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The review of factual issues is governed by *MRI at Belfair, LLC v. South Carolina Department of Health and Environmental Control*, 394 S.C. 567, 716 S.E.2nd 111 (S.C. App. 2011), which states, “as to factual issues, judicial review of administrative orders is limited to a determination of whether the order is supported by substantial evidence.” The definition of substantial evidence is found in the case of *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2nd 304 (S.C. 1981), which states:.

Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

... the substantial evidence test need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment; and a judgment upon which reasonable men might differ will not be set aside.

The substantial evidence rule, prescribed in the statute, means that we will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.

ARGUMENT

HOA as Appellant in this case, regardless of the number of issue on appeal it lists, takes two approaches in an attempt to overturn the Order of the ALC in this case. The approaches are, one, HOA asks this Court to ignore the findings of the ALC, that Be Mi meets the requirements, stated in the law, to renew its liquor by the drink license; and, two, HOA attempts to retry the case that it lost, before the Horry County Master in Equity, involving rights under the St. Clements Horizontal Property Regime Master Deed. The rights litigated under the Mater Deed, involved the continuing existence and control of the deck, attached to the St. Clements commercial condominium unit, owned by Be Mi, that contains the St. Clements Bar and Grill.

This case should be concerned with one issue. That issue is whether Be Mi meets the requirements to renew a restaurant liquor by the drink license, that it has had continuously for over two (2) decades. The ALC found that Be Mi, “met its burden of proof establishing that it meets all the statutory requirements for renewal of the liquor by the drink license for this location”. The contested fact in the case was whether Be Mi met the forty (40) seat rule. The ALC found that Be Mi met the required number of seats, and in fact may surpass the required number. There are twenty (20) chairs around tables on the covered deck, eighteen (18) chairs

around tables on the roof, and two (2) stools on a wide shelf that were considered to meet the forty (40) seat requirement.

The reason for the discussion of the number of seats comes from the requirement that a business must prove it is in the food preparation business. A South Carolina establishment to offer and sale liquor by the drink, must show that, “the business is bona fide engaged in primarily and substantially in the preparation and serving of meals or furnishing lodging;”, §61-6-1610(A)(1). This requirement is further defined by §61-6-20(2), which states:

Bona fide engaged primarily and substantially in the preparation and serving of meals means a business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals and that:

- (a) is equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals upon customer request at normal meal times;
- (b) has readily available to its guests and patrons either menus with the listings of various meals offered for service or a listing of available meals and foods, posted in a conspicuous place readily discernible by the guest or patrons; and
- (c) prepares for service to customers, upon demand of the customer, hot meals at least once each day the business establishment chooses to be open.

As mentioned above, the ALC found that Be MI met and surpassed the seating requirement, of forty (40) seats. The ALC adopted the investigation of the South Carolina Law Enforcement Division and found the food inventory was sufficient to meet the requirements of §61-6-20(2). This was not an issue that was contested by the HOA. These findings cannot be said to violate any substantive right of the HOA. Also, the findings of the ALC do not meet any of the examples for violating a substantive right of an appellant.

HOA requests that this court substitute its findings of fact for that of ALC. The ALC, based on substantial evidence, found that Be Mi met its burden of proof in establishing that it meets all statutory requirements for renewal of the liquor by the drink license for St. Clements Bar and Grill. Further, ALC finds that since Be Mi was successful in the case concerning control of the deck, that is currently the law of the case, and this issue cannot be retried in the ALC which does not have jurisdiction, of this issue.

The second approach HOA attempts is revisiting the case, it lost before the Master in Equity for Horry County. HOA spends a good bit of its brief discussing issues that are beyond the jurisdiction of the ALC and that have been previously litigated before the Master in Equity for Horry County. Included in this argument(s) is a misinterpretation of 23 S.C. Code Ann. Regs. 7-202.1, which defines premise. The pertinent part of that regulation states:

A. Unless otherwise limited by statute or regulation, as used in Title 61, “premise” means all buildings and grounds that are both (1) subject to the direct control of the license holder and (2) used by the license holder to conduct its business.

B. For purposes of establishing premise:

(1) The license holder 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 premise.

(2) A presumption arises that the buildings and grounds described with particularity in the license application, as required by Regulation 7-200.1(B), are used by the license holder to conduct business.

(Emphasis added)

Regulation 7-202.1 does not require a written lease or contract over the subject property. The regulation simply suggests what evidence “may” be used to prove direct control of buildings and grounds. Further, it should be pointed out that Regulation 7-202.1(B)(2) provides that there is a presumption that the buildings and grounds, described in the license application, are used by the license holder to conduct business.

The issue as to the control and right to control the “deck area” attached to the commercial unit owned by Be Mi has been litigated. HOA apparently did not like the decision of the trial court, that had jurisdiction over that issue, and wants to re-litigate the issue, in it’s protest of Be Mi’s renewal of its liquor by the drink license, in a court that does not have jurisdiction over the issue.

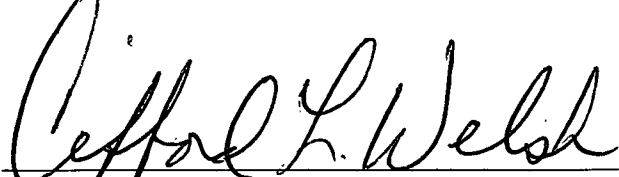
The record reveals that in August, 2009, that there was a trial before The Honorable Cindy Graham Howe, Master in Equity for Horry County, concerning the existence of the deck that was built by Be Mi. The ruling of the court was in favor of Be Mi (R. pp. 60-61).

HOA has several other arguments that demand interpretation of the Master Deed, that are similarly out of the jurisdiction of the ALC, and have been litigated, or should have been litigated, in Circuit Court. However, the argument above combined with the prior decision of the Master in Equity, have sufficiently dealt with these issues, and further discussion at this point is thought not to useful to this Court in this appeal.

CONCLUSION

This Honorable Court should affirm the Order of the ALC which found that Be Mi, met its burden of proof establishing that it meets all statutory requirements for the renewal of the liquor by the drink license for the St. Clements Bar and Grill.

Respectfully Submitted,

A handwritten signature in black ink, reading "Clifford L. Welsh". The signature is written in a cursive, flowing style with a large initial 'C'.

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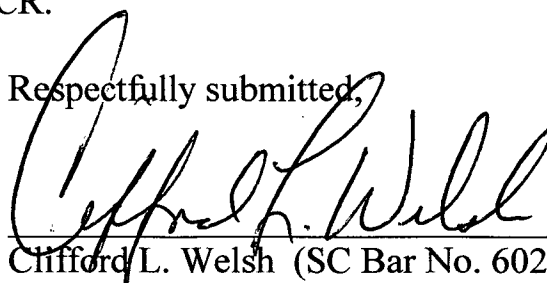
Be Mi, Inc., d/b/a St. Clements Beach
Bar & Grill and South Carolina
Department of Revenue,

Respondent,

CERTIFICATE OF RULE 211(b) COMPLIANCE

The undersigned hereby certifies that the Brief of Respondent complies with
the requirements of Rule 211(b) SCACR.

Respectfully submitted,



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July 24, 2013

STATE OF SOUTH CAROLINA
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Shirley Robinson, Administrative Law Judge

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CERTIFICATE OF SERVICE

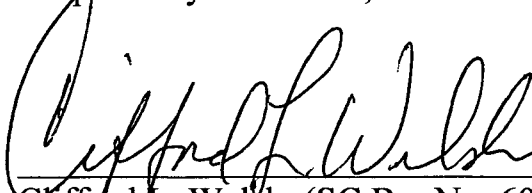
The undersigned hereby certifies that on the date indicated below he served the other counsel of record with a copy of the Brief of Respondent by mailing copies of the same by United States mail with first class postage prepaid to the following addresses:

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Clifford L. Welsh", written over a horizontal line.

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