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 BRIEF TO THE INITIAL BRIEF OF RESPONDENT DEPARTMENT OF REVENUE

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REPLY TO ARGUMENTS

Respondent DOR ignores the documents introduced into evidence concerning whether Be Mi, Inc., meets the seating requirements of § 61-6-1610. The ALC did err to find that Be Mi had control over the required 40 seats. Respondent DOR basically argues that the Master Deed must be ignored, rather than being read, which is arbitrary, clearly erroneous and reversable error.

Respondent Be Mi admitted through counsel to the ALC that Be Mi was not stating that the ALC was bound by the Master's Order not provided (R.p. 152, lines 7-24). Neither the DOR, nor Respondent Be Mi, argued the Master's Order was controlling as to common area ownership at the hearing, therefore that issue is not reserved for appeal. DOR did not present or examine a witness. DOR only gave an opening (R.pp. 90-91), and a closing statement (R.pp. 207-208) without mentioning any of the arguments it now makes.

The Master Deed is a contract, a document admitted (R.pp. 155-156) and cited by the Department in S.C. Code Ann. Regs. 7-202.1, as evidence of premises control, therefore it cannot be ignored. The Master Deed conclusively shows that Be Mi does not control "seating for not fewer than 40 persons simultaneously at tables for the service of meals...." Respondent can not control

the common area, as defined by the Master Deed, including the a parking spaces where the covered deck was built. HOA Board Member Barbara Brown confirmed all area surrounding Be Mi's unit is common area (R.p. 157, lines 6-25). DOR argues, in effect, that the ALC must ignore deeds, leases and contracts, items specifically listed in the statute it cited as evidence of control or lack of control to provide seating. It is arbitrary, clearly erroneous and an abuse of discretion to ignore the Master Deed.

DOR's second argument also has no factual support. There is no "credible witnesses" testimony about Be Mi's control over parking spaces where the deck sits. Respondent Be Mi admitted it was built on two parking spaces, defined as common area under the Master Deed (R.p. 127, lines 7-9). DOR speculates about the Master-in-Equity's Order which Respondent Be Mi asserted to the Court was not binding on the ALC (R.p. 152, lines 7-24). The ALC cannot rely on opinions about an Order not introduced and not relied on. DOR cannot argue the ALC can not interpret a Master Deed in evidence showing Be Mi's lack of control over seating, yet state the ALC can rely on another Order specifically not relied upon by the licensee. Such reliance is arbitrary, clearly erroneous and requires reversal of the ALC Order.

DOR's proposed alternative, that the Circuit Court rule on a violation of the Master Deed, is a non-sequitur. If Be Mi has

exclusive control over the common area needed to comply with the statute, it is no longer common area or an unconstitutional taking. Other Courts must consider the ALC's ruling as res judicata concerning the Master Deed.

DOR further misstates that the Master's Order determines the right to "maintain" the deck, so Be Mi has exclusive control over that deck, and thus provides seating for 40 simultaneously at tables for the purpose of meals. "Maintaining" a structure is not exclusive control, it is an obligation. There is no evidence in the record that the Master considered whether Be Mi met the statutory requirements. The ALC must decide if Be Mi meets the statutory requirement of "facilities for seating not fewer than 40 persons simultaneously at meals for the service of meals...." under § 61-6-20(2). DOR's argument amounts to multiple hearsay.

Be Mi's sole witness testified about Be Mi's control over the deck. The testimony of Appellant's witness Ms. Brown and the picture exhibits (R.pp. 227 - 235) showed Be Mi could not have 40 seats controlled simultaneously for the service of meals. Therefore the Court must reject this argument and the license. Significantly, DOR cites nothing in the record to support the assertion that Be Mi had, as a matter of fact, control over 40 seats at tables simultaneously for the service of meals.

Finally, the issue of the wide rail was not raised by DOR to the ALC so it was not preserved for appeal by either DOR or Be

Mi. DOR's arguments concerning seating at the "wide rail" is factually incorrect. It is a reinforced railing not a table per Be Mi's own witness (R.p. 191, lines 10-17). All the evidence, pictures, and the testimony of Be Mi's Goude shows that the seats using that rail have to be outside the deck area, in common area that even Respondent concedes it has no control over (R.p. 229, 233, R.p. 191, lines 15-23). This area and these bar stools cannot be counted toward the 40 seats at tables. In rebuttal Be Mi's witness Mr. Goude tried to explain away that the bar stools at the rail, obviously sitting in a walkway (R.p. 229, 233) still counted because he would just put them outside the covered deck on undisputed common area (R.p. 191, lines 17 - R.p. 192, line 1).

These tortured definitions and assertions by DOR on appeal were never even made by Be Mi, much less DOR, at the hearing. The pictures in evidence (R.p. 229, 233) show the wide rail was not "specifically used for serving food to those seated at it." The seats to be used are even outside of area claimed controlled by Be Mi. Giving Be Mi even more control of common area is further violation of the Master Deed. Mr. Goude mistakenly stated if he owns the chairs and puts them out, it does not matter if they are located on common area; he controls them (R.pp. 186, line 13 - R.p. 189, line 17) and qualifies for the license. If DOR's arguments are followed, all future applicants

will never have to provide tables for meals, just "wide rails" or long bars with stools. This is rewriting the statute. Even if a rail was a table it is only logical that the two seats at that rail counted by the ALC toward the exclusively controlled 40 had to be located outside the covered deck area for 40 at tables. It is uncontroverted that the area outside the covered deck was not under Respondent's direct control, according to it's own sole witness (R.pp. 196, lines 22 - R.p. 197, line 16). These bar stools outside the covered deck could not physically occupy the same space as the seats and tables inside the area or the walkway.

Even if the Master's Order, not in evidence, stated that the "deck remains in place" that still does not give exclusive control of any common area to Be Mi, or prove the bar stools outside the deck were exclusively controlled by Be Mi. The Master Deed before the Court specifically states that Be Mi does not have control over either the parking spaces upon which the covered deck sits or the common area where the bar stools sit. DOR errs to assert that Appellant "put forth testimonial evidence regarding the ruling." DOR states only that the matter was on appeal DOR makes no citation to the Record. DOR's assertions that the Master's ruling was "in Be Mi's favor" is opinion, not fact. Relying on an Order not relied upon by Respondent Be Mi is arbitrary and clearly erroneous.

Upon appeal there absolutely is a dispute as to the Master's Order; the dispute is in the record but not the Order.

Appellant HOA did "put forth evidence disputing Be Mi's exercise and control over the deck area." The cross-examination of Be Mi's lone witness, Mr. Goode (R.pp. 125-150), and the entire testimony of Appellant witness Barbara Brown (R.pp. 154-194) points out the lack of legal foundation for such exercise and control. Ms. Brown testified that Be Mi even tried to exercise control over the entire pool area by telling guests that they could not bring their own food or drink to the pool and had to buy it to sit in common area seats (R.pp. 159, lines 18 - R.p. 162, line 14). The Court can not conclude that Appellant's assertions that "the deck violates the Master Deed are not supported by the Master-in-Equity's ruling" is not based in fact, because the Order itself is not before the Court and was not relied upon as controlling (R.p. 152, lines 7-24).

Appellant also asserts all of the arguments made in its Initial Brief.

CONCLUSION

The Master Deed is a contract clearly showing that Be Mi does not have exclusive use and control over the area to have seating at tables simultaneously for meals for 40 as set forth in Appellant's Brief. Common area can not count. The Master's

Order was not in evidence and not relied upon, so it cannot be the basis for any portion of the ALC's findings of fact or legal conclusions that Be Mi met the statutory requirements. The Master Deed was in evidence and it would be arbitrary to ignore it.

The DOR's assertion that a rail is a table under the statute was not preserved by DOR and is illogical and incorrect. DOR's tortured reasoning can not be used by this Court to uphold the ALC's Order. Should the Court uphold the ALC's Order, the common area provisions of Master Deeds in general would become unenforceable, and the ALC could always ignore the statute that states that deeds and contracts may be considered and any deeds or contracts presented. The Master Deed is the best evidence of Be Mi's rights and its lack of control over 40 seats at tables simultaneously for the service of meals.

Appellant asserts all of the arguments made in its Initial Brief.

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

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief on Respondent 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 Carlina 29211 and to 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.

August 6, 2013

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