STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2017-CP-10-2183
DEWBERRY 334 MEETING STREET, LLC,	)	
Appellant-Petitioner,	)	**AMENDED FINAL ORDER ON APPEAL**
v.	)	
CITY OF CHARLESTON and BOARD OF ZONING APPEALS - ZONING,	)	
Respondents.	)	

This matter is before the Court on the appeal of Dewberry 334 Meeting Street, LLC, ("Appellant-Petitioner" or "Dewberry 334") of a final decision of the Respondent Board of Zoning Appeals-Zoning of the City of Charleston ("BZA" or "Board") on April 18, 2017, under the provisions of S.C. Code Ann. § 6-29-820. The Court conducted a hearing on the merits of the appeal on October 9, 2017. A final order vacating the decision of the BZA was released on December 15, 2017. Subsequently, the Court reconvened for a hearing on Respondents' Motion to Reconsider, Alter, or Amend the Court's December 15, 2017 Final Order on Appeal. Having fully considered the record on appeal, the applicable law, and the arguments of the attorneys for the parties, the Court Denies Respondent's Motion and Amends the Final Order as follows.

BACKGROUND

This appeal involves the decision of the BZA on April 18, 2017, to deny the request of Dewberry 334 to modify a special exception granted to it in April 2011 (the "Special Exception") to permit an accommodations hotel use at 334 Meeting Street in the former L. Mendel Rivers Federal Building in Charleston, where it owns and now operates a hotel known as The Dewberry.

Under the applicable zoning ordinances of the Respondent City of Charleston (the "City"), a property may be operated as a hotel only if it is located in an accommodations overlay district and if the owner obtains a special exception under City Ordinance Section 54-220 from the BZA for hotel use. Dewberry 334 applied for and obtained the Special Exception. From 2014 to 2016, Dewberry 334 pursued an extensive and complicated renovation of the existing seven-story building, including adding an eighth floor with a surrounding rooftop terrace, at a cost measured in the tens of millions of dollars. The City's Board of Architectural Review ("BAR") approved the design of the eighth floor, and the City's building official approved the specific construction plans for the eighth floor and surrounding rooftop terrace.

It is the use of the interior of the eighth floor that was the subject of Dewberry 334's application that was denied by the BZA on April 18, 2017.

At the time Dewberry 334 completed the construction of the eighth floor in the summer of 2016, the City's zoning official refused to approve the use and occupancy of most of the interior of the eighth floor. He also prohibited Dewberry 334 from using the northeast quadrant of the rooftop terrace. The zoning official asserted that the Special Exception did not allow Dewberry 334 to locate or use a function room, reading room, pantry, and small bar/restaurant (referred to as the Citrus Club) on the eighth floor and that Dewberry 334 could use and occupy the rooms only if the BZA modified the Special Exception. As a result, Dewberry 334 effectively lost the use of those spaces for the purposes it intended to make of them.

Dewberry 334 disputes that the Special Exception contained any of the limitations imposed by the zoning official and that a modification of the Special Exception was necessary to locate those uses in those spaces. Dewberry 334 asserts that the uses for which it constructed the interior portions of the eighth floor are "accessory" to its lawful hotel use and are allowed as a matter of

right. Even so, in a good faith effort to resolve the dispute and accommodate the City, Dewberry 334 made an application to the BZA to modify the Special Exception and seek the BZA's express approval of these four particular uses within the interior of the newly built eighth floor as well as the use of the walkway on the northeast corner of the surrounding rooftop terrace.[1]

At the center of this controversy are the terms of the special exception for hotel use granted by the BZA in 2011. In approving hotel use at 334 Meeting Street, the BZA imposed the following eleven (11) conditions:

(1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;

(2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;

(3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;

(4) No exterior amplified music shall be permitted;

(5) Valet parking shall continue to be provided for on-site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;

(6) No deliveries to be made on Charlotte Street, only in service area on hotel property;

(7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;

(8) Landscape improvements shown on plans to be installed;

(9) All activity outside on the roof shall stop at 10 pm;

(10) Additional buffering around the rooftop deck shall be provided at the roof edge; and

[1] Dewberry 334 also applied to modify a condition of the 2011 special exception that required all activity on the rooftop terrace to end at 10PM (Condition No. 9 of the 2011 Special Exception). Dewberry 334 initially applied to change this time to midnight, but withdrew this request before the BZA hearing.

(11) The City also commits to not allowing a loading zone on Charlotte Street to accommodate commercial vehicles, altering the sign at Charlotte and East Bay Streets to read "No Trucks' (the statement "Except Local Deliveries" would be eliminated), and converting Henrietta Street to a one-way westbound street, except for the section between Meeting Street and the 334 Meeting Street driveway closest to Meeting Street, which shall remain two-way.

The BZA placed no further conditions on its approval of hotel use for 334 Meeting Street. There are no City ordinances that prohibit the accessory uses requested by Dewberry 334. The Respondents do not dispute that these four uses are accessory to hotel use,[2] but instead assert the Special Exception prohibits these accessory uses on the eighth floor.

Respondents argue that the conceptual floor plans reviewed by the BZA in 2011 designated the use of the interior of the eighth floor as "Spa/Fitness"; showed a swimming pool with pool deck on the exterior rooftop terrace; and depicted much of the rooftop terrace on the north, east, and west sides as an inaccessible green roof. They allege there was public opposition to a bar being located on the eighth floor or on the rooftop during the hearing on the Special Exception in 2011. They further contend that, because the preliminary conceptual floor plans showed "Spa/Fitness," Dewberry 334 is permanently limited to those two uses on the interior of the eighth floor unless it obtains an amendment to the Special Exception. Respondents assert that all accessory uses and the location of them as shown on preliminary conceptual floor plans "are pretty much set in stone," as expressed by the City zoning official at the BZA hearing on Dewberry 334's application.

Dewberry 334 argues that the BZA did not impose a condition that the uses within the eighth floor and on the rooftop terrace were restricted to those shown on the preliminary conceptual

[2] "The City admits that hotels have accessory uses, which may include meeting space, restaurants and bars, ..." (¶32 of Respondents' Response to Petition).

floor plan reviewed by the BZA in 2011 even though it could have done so. Dewberry 334 contends that there are no City ordinances, or other lawful restrictions, that limit the specific accessory uses and the specific location of those accessory uses within the hotel to the uses and locations reflected on conceptual plans that were part of the application to the BZA for the Special Exception.

Dewberry 334 further points out that, in April 2015, the City approved revised construction drawings that eliminated the spa and fitness center on the inside of the eighth floor and the pool outside on the rooftop terrace. The construction drawings the City approved in April 2015 show the interior of the eighth floor comprised of restrooms, a pantry, and three (3) rooms described as Function A, B, and C. The room labeled Function C included a bar feature on the drawing. These revised drawings also show that the spa and fitness center, originally intended for the eighth floor, had been moved to the second floor.

At the hearing before the BZA on April 18, 2017, Dewberry 334 explained its position that it had a legal right to these uses and was seeking the modification to the Special Exception to allow them in the intended locations only because the City insisted a modification of the Special Exception was necessary and, if granted, would avoid legal action against the City.

The BZA received comments against the proposed modification from the general public at the hearing on April 18, 2017. Most of the speakers in opposition claimed noise from the rooftop terrace would disrupt surrounding properties and destroy their residential neighborhood behind the parking lot to the hotel. ("I am telling you that kind of sound is going to destroy our neighborhood." R. p. 46:13-14. "A rooftop bar ... will destroy our quality of life and marginalize the people." R. p. 47:1`4-17.)

When considering Dewberry 334's request, two Board members stated that *the interior use was not an issue* for them, although they, too, speculated about potential noise. (Chairman Krawcheck: "So the concern is -- is the outside use, not the interior use." R. p. 66:10-11; Member Robinson: "I think the use of the interior is fine, but I know it would be a noisy situation outside." R. p. 66:22-23). The public and some of the Board members considered the hypothetical noise from the *exterior* rooftop terrace to constitute a basis for denying Dewberry 334's request to confirm the lawful accessory use the *interior* spaces.

Board member Appel took a contrary view. In response to the remark by Chairman Krawcheck that the BZA "approve[d] the plans for the hotel," Appel observed the following: "We don't approve plans. We approve uses. We approve accommodations uses. We approved an accommodations use. We approved an accommodations use with 11 restrictions." R. p. 68:2-5.

None of those eleven restrictions of the Special Exception limited the accessory uses on the interior of the eighth floor to those shown on the conceptual floor plan nor prohibited Dewberry 334 from having a function room, small bar with limited food service, a reading room, or a small pantry-kitchen on the inside of the eighth floor. Similarly, none of the eleven restrictions prohibited Dewberry 334 from having use of the perimeter walkway around the northeast quadrant of the rooftop terrace.

After receiving comments and discussing the application, the BZA voted, 4 to 1, to deny Dewberry 334's request to modify the Special Exception to allow the accepted hotel accessory uses on the interior of the eighth floor or Dewberry 334's access and to allow use of the northeast quadrant of the rooftop terrace.

STANDARD OF REVIEW

S.C. Code Ann. § 6-29-840 (A) provides, in pertinent part as follows:

> At the next term of the circuit court or in chambers, upon ten days' notice to the parties, the presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.... In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

In Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013), our Court of Appeals summarized this Court's scope of review as follows:

> 'The findings of fact by the board of [zoning] appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.' S.C. Code Ann. § 6–29–840(A) (Supp. 2012). In determining the questions on appeal, both the circuit court and the appellate court 'must determine only whether the decision of the board is correct as a matter of law.' *Id.* 'A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.' *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). ***'However, a decision of a city zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.'*** Id. (double emphasis added.)

737 S.E.2d 864.

LEGAL ANALYSIS

On appeal, Dewberry 334 asserts that the BZA committed an error of law, acted arbitrarily and capriciously, and abused its discretion, in concluding that the City's zoning, in particular the Special Exception, prevented it from using the interior of the eighth floor for the accessory uses of function room, reading room, pantry, and small bar with limited food and beverage service, and from using the northeast corner of its rooftop terrace. The Court agrees.

As previously stated, there are no provisions in the Special Exception or in the City's zoning ordinances that prohibit Dewberry 334 from altering the locations of permissible accessory uses from the conceptual floor plans submitted with the application for Special Exception. In applying the standards set forth in City Ordinance 54-220, the BZA's charge is to determine

whether to grant a special exception for accommodations ***use***. Under Section 54-220, the BZA does not have the right or authority to approve building plans, as pointed out by Board Member Appel. Instead, the BZA has the right and authority to approve an accessory use if it is consistent with the City's zoning scheme and other applicable criteria, as it did in 2011 when it issued the Special Exception.

City Ordinance 54-925 grants the BZA the authority to impose conditions on their approval of a special exception. Here, the BZA imposed eleven conditions in approving the Special Exception. None of those conditions stated that Dewberry 334 could not have a function room, reading room, small bar with limited food and beverage service, or a pantry/kitchen in the interior of the eighth floor.

Furthermore, none of the City's zoning ordinances provide that a hotel operator is irrevocably bound by conceptual floor plans presented to the BZA, or that a hotel operator must obtain BZA approval to alter its accessory uses or change the location of those accessory uses within a property that has already been granted the required special exception. Although he voted against Dewberry 334 at the April 2017 hearing, Board member Robinson commented on the illogical net effect of the BZA's determination: "I agree with you [Chairman Krawcheck], but I also want to know, since he didn't put the pool in, the pool is on the approved plan, are you going to turn around and make him put the pool in?" R. p. 66:16-19.

Contrary to the City's position in this case, the City's zoning ordinances state that a property owner is entitled to all accessory uses that go along with a principal use. City Ordinance Section 54-203, "Permitted principal uses," states, in relevant part, as follows: "***Accessory uses, which for the purposes of this Chapter are defined as uses of land or of a building or portion thereof which are customarily incidental and subordinate to a principal use located on the same***

lot or parcel, are allowed, except that communication towers, home occupations, bed and breakfasts, home day care facilities, and limited commercial uses within the GO district are only allowed pursuant to the requirements specified in Part 4: Accessory Uses, of this Article." (double emphasis added).

The construction and enforcement of zoning ordinances by a zoning official and board of zoning appeals is a legal question, not a factual finding. "We agree with the circuit court that in construing the County Ordinance, the Zoning Administrator, and subsequently, the Zoning Board, made a legal conclusion." Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 10, 776 S.E.2d 753, 758 (Ct. App. 2015).

Moreover, an interpretation of a special exception and of zoning ordinances to give them a more restrictive application than their plain meaning is impermissible. As stated by the Court of Appeals in Helicopter Solutions, supra:

> This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

776 S.E.2d 759 (internal citations omitted).

The Court is mindful of the argument ably advanced by Respondents that allowing the accessory uses Dewberry 334 seeks on the eighth floor that differ from those shown in the preliminary conceptual plans would allow a hotel applicant to tell the BZA one thing about its plans and then do another. But there is simply no ordinance preventing an applicant from submitting preliminary conceptual plans to the BZA as part of its application for a special exception under Section 54-220 and then modifying those plans; subject, of course, to any

conditions imposed within the special exception and other applicable ordinances, including those pertaining to building codes and safety. After all, again, the BZA's function is to determine whether an accommodations use is appropriate for a given location within the City, not to approve the building plans. It is a separate agency of the City, the Board of Architectural Review, that has the authority to review and decide on proposed design plans, and it is another, agency, the Building Inspection Division that has the authority to review and decide on proposed building plans.

To accept the Respondents' argument would mean that the zoning official and BZA would be at liberty to impose restrictions on specific accessory uses that are allowed as a matter of right and the location of those uses at any time in the future without any legal authority for doing so, based on their recollection of what they felt was intended but not stated in the special exception allowing accommodations use. This type of random, unregulated, subjective after-the-fact restriction without legal basis would be inherently arbitrary, as is evident from the facts in this case. The Respondents are seemingly fine with moving the location in the hotel of the accessory uses of spa and fitness, and with eliminating the accessory use of pool on the rooftop terrace (all of which were shown on the preliminary conceptual plans reviewed by the BZA), but they adamantly oppose the location of other accessory uses on the eighth floor, even though there is no such condition in the Special Exception.

Further in response to the Respondents' argument, it bears noting that the BZA has the authority to craft conditions for its approval under Section 54-925, just as it did in this case by imposing the eleven conditions. Section 54-925 provides as follows:

> In granting an exception or a variance, the Board may attach to it such conditions regarding the location, character or other features of the proposed building, structure, or use as the Board may consider advisable to protect established property values in the surrounding area, or to promote the public health, safety, or general welfare.

Section 54-925 of the Code of Ordinances of the City of Charleston.

If the BZA desired to condition its accommodations use for this location at 334 Meeting Street on the prohibition of uses like a function, reading room, pantry, or small bar/restaurant inside the eighth floor, then it could have crafted such a condition as part of its approval. Or, if it did not want to make a list of all uses that it did not want on the eighth floor, it could simply have imposed a condition that the uses on the eighth floor be limited to those in the preliminary conceptual plan it reviewed. It did not do that. And, more fundamentally, it could have rejected altogether Dewberry 334's plan to add an eighth story to a seven story building for which it granted a variance. It did not do that, either.

What the BZA did do was impose eleven conditions that were directly responsive to various concerns. The overriding concern expressed by the speakers at the BZA hearing was the possibility of noise from activity on the rooftop terrace, not the interior. The BZA imposed three conditions directed to preventing any disturbance of the surrounding area by any activity on the rooftop terrace:

> (4) No exterior amplified music shall be permitted;
>
> (9) All activity outside on the roof shall stop at 10 pm; [and]
>
> (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and

Although not highlighted by Respondents in their arguments to the Court, these express conditions of the Special Exception constituted mechanisms to limit activity on, and noise from, the rooftop terrace that were the root concern of both the BZA and the public. The BZA members acknowledged at the hearing that they had no problem with the uses inside the building, *i.e.*, the request of the applicant, but rather were fixed on any noise generated from the rooftop terrace that may indirectly result from those inside activities. Conditions (4), (9), and (10) of the Special

Exception are in place and provide a means to control and restrict any unreasonable disturbance of the surrounding area, including the residential neighborhood to the east of the hotel.[3]

For these reasons Dewberry 334 was entitled to the accessory uses and access it requested in its application and the refusal of the BZA to allow them was an error of law and an abuse of the Board's discretion.

The Board's decision must also be vacated for a second, alternative reason because it was arbitrary and capricious for three reasons described below.

First, the BZA denied the request for the lawful accessory uses inside the eighth floor, which the Board openly admitted was not a problem, based on their projection of activity on the outside terrace. Yet, even under the zoning official's restrictive interpretation, the Special Exception without any modification does not prevent Dewberry 334 from using three-quarters of the rooftop terrace. The BZA's denial of Dewberry 334's lawful accessory uses on the interior will not prevent activity on the exterior rooftop terrace that was the sole concern expressed by the Board.

Second, there was no competent evidence that the use of the interior spaces would cause a detrimental effect on the value of the properties in the neighborhood or destroy the neighborhood. The public's comments at the hearing in this case bear a marked similarity to those of the public in Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) where our Court of Appeals reversed the circuit court and found the public comments to be

[3] To the North of the hotel is a public open space known as Wragg Square and the Second Presbyterian Church, to the South is Citadel Square Baptist Church, and to the West is Meeting Street (a major traffic artery) and Marion Square, a public park. The residential neighborhood is largely to the East of the hotel, on the opposite side of its parking lot. The outside seating area on the rooftop terrace is on the southwest side of the rooftop terrace towards Meeting Street and Marion Square.

entirely speculative and insufficient to sustain the denial of a special exception by the board of zoning appeals of North Augusta:

> We find the BZA's decision was arbitrary and capricious. Regarding the third criterion, the BZA determined the special exception would not discourage or negate the use of the commercially zoned property immediately surrounding the property, but would have a detrimental impact on existing and proposed residential development. ***At the hearing, residents testified as to their concerns regarding the proposed fireworks business. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the character of the surrounding area. The testimony proffered was based on speculation and opinion.*** Although property owners can generally testify as to the value of and damage to their own property, here only one of numerous witnesses addressed the special exception's effect on property value. ***Moreover, the property owner did not testify about his specific parcel but rather testified broadly about the undesired fireworks store's possible effect on the neighborhood's home values as a whole. This testimony was not competent to support the denial of the special exception.***

735 S.E.2d 662 (double emphasis added).

In Bannum, Inc. v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999), our state Supreme Court reversed a circuit court order that approved the denial of a special exception by a zoning board for a halfway house as being arbitrary and capricious for similar reasons:

> As to numbers 1-3, although there was evidence concerning existing traffic on Forest Drive, and ***speculation*** that the halfway house residents will use Westminster as a cut-through, ***there was simply no evidence presented the proposed use will generate greater use than the existing mental health facility***. On the contrary, the evidence was to the effect that the proposed use would likely decrease traffic as the majority of halfway house residents will not own automobiles but will utilize public transportation. ***Although neighboring residents testified they felt the halfway house would increase traffic, there is simply no concrete evidence to support this fact***. Accordingly, the BZA's finding that any increase in traffic would adversely impact vehicle and pedestrian safety is irrelevant as there is no evidence of an increase.

516 S.E.2d 441(double emphasis added).

After the hearing on that appeal, our Court of Appeals issued another opinion in step with the cited precedent that once again held generalized, unsupported claims of harm from neighborhood residents about their imagined effects of a project are speculative and cannot provide

a factual foundation for an administrative decision. In Preservation Society of Charleston, et al v. SCDHEC et al, Unpublished Opinion No. 2017-UP-403 (October 18, 2017), the Court of Appeals upheld the Administrative Law Court's determination that certain preservation groups and neighborhood associations in Charleston did not demonstrate actual harm sufficient to establish standing through having their members testify that the cruise ships docking in Charleston would adversely affect their property value:

> Appellants also presented affidavits from several individuals who expressed concern about the effect of the permitted activities on their property values and businesses. However, as the ALC observed, Appellants expressed only '[c]oncern[] without evidence of declining property values and business reasonably attributed to granting the permit,' which, the ALC correctly concluded 'does not constitute actual or imminent harm.' See Sea Pines 345 S.C. at 601, 550 S.E.2d at 291 (stating '[t]he party seeking to establish standing carries the burden of demonstrating each of the three elements' of 'the irreducible constitutional minimum of standing,' which include 'a causal connection between the injury and the conduct complained of, "i.e., 'the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' " (quoting Lujan, 504 U.S. at 560)). ***We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses.***

Unpublished Opinion No. 2017-UP-403, at p. 9.

While this opinion of our Court of Appeals is not precedent itself, it carries forward the line of decisions of our appellate courts finding alarmist comments by residents of their personal opinions of the effects on them and their property values from future actions are speculative and insufficient to constitute a factual basis to find actual harm from the proposed activity.

The third basis for finding the decision of the BZA was arbitrary and capricious is that there are safeguards in place, including those the Board specifically imposed for the rooftop terrace, to prevent sound from the rooftop terrace from disturbing the residential neighborhood. Conditions 4, 9, and 10 constitute protections that reduce or eliminate sound from the rooftop

terrace. Further, as pointed out by Dewberry 334, the City has a noise ordinance that directly outlaws the type of disturbance that the persons at the hearing speculated might occur. Section 21-16 provides, in relevant part as follows:

> Sec. 21-16. - Loud and unnecessary noises restricted.
>
> (b) ***It shall be unlawful for any person, entity, or establishment to make***, continue, ***or allow to be made*** or continued, ***any clamorous singing***, yelling, shouting, whooping, bellowing, hollering, ***or other loud***, obstreperous, wanton ***and unnecessary noises, or to make, continue, or allow to be made or continued, any loud gatherings, either in the day time or at night, which disturb the peace and quiet of the city, whether in the public street, on privately owned or controlled property, or within enclosures, public or private.***
>
> (h) Notwithstanding subsection (a) and (f) herein, ***it shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any*** radio, ***amplified musical instrument*** including but not limited to brass or drum instruments, ***or other amplified device or apparatus making or reproducing musical or other sounds after 11:00 p.m. and before 7:00 a.m. when the said sounds emanate from an open window or door opening of a structure in such a manner as to be audible in any public street or right-of-way***.

Section 21-16 of the Code of Ordinances of the City of Charleston. Considering the above safeguards in light of the hotel's surroundings, concerns stemming from noise do not provide a reasonable basis for denying Dewberry 334's amendment.

For these reasons, the BZA acted arbitrarily and capriciously and committed an error of law in denying the request for approval of certain interior accessory uses based on speculative noise and harm from the outside terrace that is already the subject of three noise-containment conditions in the 2011 special exception and otherwise prohibited by applicable city ordinances.

Finally, the Court also finds as a third alternative reason for reversing the decision of the BZA that Respondent City and BZA are estopped to deny Dewberry 334's right to permissible accessory uses on the interior of the eighth floor because of the City's approval of the April 2015 construction plans showing the pantry along with Function Rooms A, B, and C, as well as an

improved rooftop terrace with walkway around the perimeter of the outside of the eighth floor. These City-approved plans did not show the pool, spa, or fitness center depicted on the preliminary conceptual plans four years earlier.

In reliance on the City's approval of its final construction plans for the eighth floor and surrounding terrace, Dewberry 334 spent millions of dollars and completed the construction of the hotel. However, in August 2016, after the improvements were constructed, the City asserted that the Special Exception and the zoning ordinances did not allow Dewberry 334 to use the Citrus Club as a small bar with limited food and beverage service, nor to use the pantry-kitchen adjacent to it, nor to use a small room to the side described as the reading room. As to the function room called the Rivers Room, the City took the position it could be used only for "yoga and fitness classes," and not for any other functions or lawful accessory uses even though the City approved the plans for construction of a room plainly denominated as "Function A."

Although the doctrine of estoppel does not apply to governmental bodies to the same extent it applies to private persons, our courts have invoked it in the context of zoning and building permits where a property owner detrimentally relied on the statement of the building official or zoning official acting in the scope of his authority. Charleston County v. Natl. Advert. Co., 292 S.C. 416, 357 S.E.2d 9 (1987); Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985); Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (S.C. 1979); Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958).

The Court is troubled by the seeming disconnect between the City's zoning official and the City's building official. The City asserted that the roles played by each are independent, separate and distinct from one another. To some degree, that is true, but both act on behalf of the City with respect to what is permitted and were acting within their administrative capacity.

Additionally, as the petitioner notes in its return to Respondent's Motion to Reconsider, City Ordinance section 54-901 specifically intertwines the City's board's and administrator's functions. The ordinance provides, in pertinent part:

> The duty to administer and to enforce the provisions of this Chapter is hereby conferred upon ***the zoning administrator***, herein referred to as the administrative officer of the Zoning Ordinance. The city building inspector shall inspect all construction or alteration for which permits are issued by the city engineer or ***as authorized by the Board of Zoning Appeals*** or as authorized by the Board of Architectural Review, as hereinafter provided, and shall make a weekly report in writing to the city engineer's office, ***listing all construction inspected and specifying any work observed by him which is not in accordance with permits issued***, or which violates this chapter or any other ordinance of the city.

City Ordinance Section 54-901 (double emphasis added). Not only does this ordinance specifically integrate the zoning and building departments, it also imposes a responsibility on the building inspector to check compliance with the authorizations issued by the BZA. Thus, prior to approval of Dewberry 334's final construction plan or at some point prior to completion of construction, there should have been some form of communication between the building officials and the zoning officials.

The Court concludes, based on the unusual facts of this case, that Dewberry 334 was entitled to rely on the approval of the plans for various function rooms as shown on the plans; was entitled to proceed with the construction in reliance on that approval; and did not know that the City would later contend that it was not entitled to use the "function" spaces for the permissible accessory uses, the pantry for a pantry, or the entirety of the outside terrace around the eighth floor as shown on the approved plans. For these reasons, Dewberry 334 has established sufficient basis to estop the City from now preventing it from using these interior spaces for the intended and lawful accessory uses consistent with the Special Exception.

CONCLUSION

For these reasons, the Court finds that the BZA committed errors of law, vacates the decision of the Board of Zoning Appeals rendered on April 18, 2017, and grants the declaratory relief requested by Dewberry 334. Dewberry 334 has the legal right to the accessory uses on the eighth floor as indicated in the floor plan of the constructed improvements appearing at p.90 of the Record on Appeal, including access to the northeast quadrant of the terrace walkway. Any conditions imposed by the City limiting, restricting or prohibiting those uses are void.

The Court has considered all arguments of Respondents made in their brief as well as at the hearing. The Court rejects them as a basis for sustaining the BZA's decision even though each may not have been specifically addressed herein. All those grounds have been considered and over-ruled. No motion shall be necessary to preserve them for appeal.

The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

February 6, 2018
Charleston, South Carolina