THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC, Respondent,

v.

City of Charleston and Board of Zoning Appeals-Zoning, Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellants City of Charleston (the "City") and the City of Charleston Board of Zoning Appeals-Zoning (the "Board" or the "BZA") appeal from a circuit court order reversing the BZA's denial of an amended special exception permit for the Dewberry Hotel, which is located at 334 Meeting Street in the City of Charleston. (Am. Final Order; Notice of Appeal). Respondent Dewberry 334 Meeting Street, LLC ("Dewberry" or "Respondent") owns the hotel property. (R. p.118)

Pursuant to section 54-220 of the City's Zoning Ordinance (the "CZO"), on April 5, 2011, the BZA granted Dewberry a special exception, subject to certain conditions, to develop the existing building on the property into a 161-room hotel. (R. pp.138-39). Dewberry originally submitted floor plans with the 2011 application showing a "penthouse" structure on the 8th floor or rooftop of the building as "SPA/LOUNGE." (R. p. 7, lines 5-18; R. p.142). Prior to the BZA hearing in 2011, Dewberry revised the 8th floor plans to show the same area as "SPA/FITNESS." (R. p. 7, line 19-p. 8, line 7; p. 143).

In 2014 and 2015, Dewberry submitted construction drawings to the City's building department showing the "penthouse" as containing three separate function rooms and a pantry. (R. p. 10, lines 5-17; p. 16, line 2-p. 17, line 11). The construction drawings, which show a bar structure within one of the function rooms, were approved by the City's building department, and Dewberry began construction activities based on the approved drawings. (R. p. 17, lines 3-11).

In 2016, Dewberry applied for a temporary certificate of occupancy for the 8th floor or rooftop. (R. p. 17, lines 13-22). On August 17, 2016, the City's Zoning Administrator granted a zoning permit for the 8th floor, but required that the "Rivers Room," proposed to serve as an event or function room, be limited to space for yoga and fitness classes. (R. p. 144). The "Reading

Room," intended to serve as a lounge area; the pantry, intended to serve as a kitchen; and the "Citrus Club," intended to serve as a bar, were required to be closed by the Zoning Administrator. (R. p. 144). The Zoning Administrator later explained that he conditioned these uses because the proposed uses had not been approved as part of the 2011 special exception. (R. p. 10, lines 17-21).

As a result, on March 20, 2017, Dewberry applied for an amendment to the 2011 special exception to permit Dewberry to open a bar, function room, kitchen, and reading room area within the penthouse on the 8th floor/rooftop of the hotel. (R. pp. 118-134). On April 17, 2017, the BZA denied the request, citing its incompatibility with and adverse impacts on the adjacent homes. (R. p. 137).

On May 3, 2017, Dewberry filed a notice of appeal of the BZA's decision and a request for pre-litigation mediation. (Notice of Appeal; Request for Pre-Litigation Mediation). On June 20, 2017, the mediator declared an impasse. (Proof of ADR). On June 27, 2017, Dewberry filed a Petition and Grounds for Appeal of the BZA's decision. (Petition & Grounds for Appeal). The circuit court held a hearing on October 9, 2017, and, on December 15, 2017, entered a Final Order on Appeal (the "Final Order"), reversing the BZA's decision. (Final Order).

On December 21, 2017, the City and the BZA received written notice of entry of the Final Order on Appeal. (Mot. to Reconsid., p. 1). On December 28, 2018, the City and the BZA filed a motion to reconsider, alter, or amend the Final Order, simultaneously serving copies of the motion on Dewberry and the circuit court. (Mot. to Reconsid. p. 1, Cert. of Serv.).

On January 10, 2018, the circuit court held a hearing on the motion to reconsider, alter, or amend. On February 9, 2018, the circuit court entered an Amended Final Order on Appeal (the "Amended Order"), denying the motion and amending the Final Order. (Am. Order pp. 1-18). The circuit court held that the BZA committed an error of law in denying Dewberry's request for an

amended special exception because: (1) nothing in the City's zoning ordinance prohibited Dewberry from changing or adding accessory uses to a previously-approved accommodations use, and section 54-203 of the CZO permits accessory uses as a matter of right; (2) nothing the 2011 special exception permit prohibited Dewberry from changing or adding accessory uses to the approved accommodations use; (3) the BZA should have only considered negative impacts from the interior accessory uses on the 8th floor, without regard to their impact on the exterior use of the rooftop; (5) testimony from neighbors about the impact of the new accessory uses on their properties in terms of noise or otherwise was speculative or unsupported; (6) to the extent noise was a concern, the BZA provided adequate safeguards against such noise as part of the conditions to the 2011 special exception; and (7) the Zoning Administrator should be estopped from requiring a special exception permit for new accessory uses because the City's building department purportedly approved of such uses in issuing construction permits for the 8th floor. (Am. Order, pp. 1-18).

On February 12, 2018, the City and BZA received written notice of entry of the Amended Order and, on March 1, 2018, served their notice of appeal from the circuit court's decision. (Notice of Appeal; Certificate of Service).

FACTS

Dewberry owns the hotel property, which is the site of the former L. Mendel Rivers Federal Building. (R. p. 3, line 25-p. 4, line 6). The existing building on the site contains seven (7) stories, formerly used for offices, with a "penthouse" structure located on the 8th floor, or rooftop, formerly used for mechanical equipment. (R. p. 5, lines 3-15; R. p. 73).

The building is located at the western portion of the subject property, which is zoned General Business ("GB"). (R. p. 72, p. 136). The remainder of the site, currently used as an outside

parking lot, is zoned for residential uses. (R. p. 72, p.136). The property lies on a block within the City bounded by Meeting Street to the west, Charlotte Street to the north, Elizabeth Street to the east, and Henrietta Street to the south. (R. p.72, p. 136). All other properties within this block are either used as residences or as a parking lot for Citadel Square Baptist Church. (R. p. 65, line 21-24; pp. 135-36).

Dewberry's property also lies within the Accommodations ("A") Overlay Zone. (R. p. 4, line 23-p. 5, line 2). Pursuant to section 54-220 of the CZO, accommodations uses, such as hotels, are permitted within the A Overlay Zone only upon approval of a special exception by the BZA. (R. p. 145). As such, in 2010, Dewberry sought and obtained a special exception, subject to certain conditions, for the renovation of the existing building into a seven (7) story, 120-room hotel. (R. p. 5, lines 3-23; pp. 73-74). At this time, the "penthouse" and outside portion of the 8th floor were shown to be used for storing mechanical equipment. (R. p. 5, lines 11-15). No other use of the 8th floor rooftop was proposed in 2010.

In 2011, Dewberry applied for a special exception to construct a 161-room hotel within the existing building. (R. p. 5, line 24-p. 6, line 2). Dewberry's original application for the special exception included floor plans—required to be submitted with the application—showing the penthouse as used for "SPA/LOUNGE." (R. p. 7, lines 2-18; p. 142). These plans also showed an open deck on the exterior of the rooftop, a pool area on the south end, and a green roof along the perimeter of the entire area. (R. p. 7, lines 2-18; p. 142),

Prior to the BZA hearing in 2011, in response to concerns expressed by neighbors and staff regarding the possibility of a rooftop bar, Dewberry submitted a revised floor plan for the 8th floor, showing the penthouse as being used for "SPA/FITNESS." (R. p. 7, line 19-p. 8, line 22; p. 143). The revised plans continued to show a pool and pool deck on the south end of the property, with

the remaining approximately ¾ of the roof exterior shown on the revised floor plan as "GREEN ROOF (not accessible)." (R. p. 143). Nothing in the revised floor plans mentioned a bar, function room, kitchen, or lounge area. (R. p. 143).

On April 5, 2011, the BZA approved the 2011 application, relying on the revised floor plans, and imposed eleven (11) conditions of the approval. (R. p. 7, line 19-p. 8, line 22; pp.138-139; p.143). These conditions include prohibitions on exterior amplified music and outside activity on the roof after 10pm. (R. p. 78).

In 2014 and 2015, Dewberry submitted construction drawings to the City's building division. (R. p. 16, line 2-p. 17, line 11). The set of construction drawings approved by the building division in 2015 includes the division of the 8th floor penthouse into rooms labeled Function A, Function B, Pantry, and Function C, which included a bar area. (R. p. 17, lines 3-11). Dewberry proceeded with construction in accordance with these drawings. (R. p. 17, lines 13-22).

In 2016, Dewberry applied for a temporary certificate of occupancy for the 8th floor of the building. (R. p. 17, lines 13-22). On August 17, 2016, the City's Zoning Administrator granted approval of a zoning permit necessary for the certificate of occupancy, with conditions, including that the that a function room, called the "Rivers Room," be limited to space for yoga and fitness classes; and that a lounge area known as the "Reading Room," a kitchen area labeled as a "Pantry," and a bar area called the "Citrus Club," be closed. (R. p. 9, line 18-p. 10, line 4; p. 144).[1] The

[1] Dewberry and the circuit court respectfully "cherry pick" comments from the Zoning Administrator during the discussion of this issue at the hearing to infer that the City's position is that, once a special exception is approved, the accessory uses are *perpetually* "locked in" or "set in stone." See R. p. 36, lines 19-24 ("[W]hen they present floor plans and we review them and approve them, then those uses that are shown on those floor plans are –are with respect to these restaurant/bar areas and other—other accessory uses are pretty much set in stone."); R. p. 37, lines 3-8 ("[W]e're looking at the full package, and we're approving something, and once we grant an approval for that package and apply whatever conditions we want, those conditions along with the

Zoning Administrator later explained at the BZA hearing that he placed such conditions on the permits because the new uses "were not part of the zoning approval [in 2011]." (R. p. 10, lines 5-21). The Zoning Administrator also limited access to the northwest corner of the exterior of the rooftop to employees only, to be used as an emergency exit. (R. p. 144). Other areas shown as "GREEN SPACE (not accessible)" in the revised 2011 floor plans were shown on the zoning permit plan as accessible. (R. p. 143; R. p. 144).

In the meantime, the remainder of the hotel has been opened on a floor-by-floor basis. (R. p. 9, lines 8-18). By 2017, the first seven floors were in use. (R. p. 9, lines 7-18).

Dewberry did not appeal the Zoning Administrator's denial of the zoning permit to the BZA. Instead, Dewberry sought an amendment to the 2011 special exception by submitting an application to the BZA seeking approval of the new accessory uses for the 8th floor. (R. pp. 118-134). This application did not include documents necessary to show compliance with the 18 special exception requirements Dewberry and the BZA were required to address under section 54-

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uses shown on the floor plans are—are set in stone."). This is a misreading of the testimony, in which the Zoning Administrator referred to the approved uses shown on the floor plans as being "set in stone," but this comment was qualified several times with explanations that changes would be locked in unless Dewberry received an amended special exception for the completely new accessory uses. See R. p. 10, lines 5-21 (explaining that the Zoning Administrator did not approve the new accessory uses because "those were not part of the zoning approval."); R. p. 37, lines 24-25 ("So we're really being asked to approve a change in use."); R. p. 65, lines 10-15 (The BZA approved the uses on the floor plans as submitted, and changes to such uses "would take board action."). Notably, Dewberry itself vacillates between this position and its position that Dewberry acted in good faith, accommodating the City by requesting a modification to the special exception permit to permit its completely new accessory uses on the 8th floor. (Petition & Grounds for Appeal, p. 7, ¶ 28 ("The City, acting through its zoning official, has steadfastly asserted that Petitioner cannot proceed with the occupation and use of its building as it desires and as shown on the building plans for the eighth floor approved by the City unless it obtains a modification of the 2011 special exception); Hrg. Tr. 10/9/2017, p. 12, lines 5-8 ("We could have just gone ahead and sued the City because the City's position was until you modify that special exception, we can't let you use these rooms up there.").

220(b)(1) of the CZO. (R. p. 118). Instead, Dewberry attached a legal brief and floor plans arguing that Dewberry did not have to obtain a modified special exception, but that, if it did, the modification should be granted. In fact, the application barely touches upon any adverse impacts of the proposed new accessory uses, limiting its mention of such impacts to the following generalized statements[2]:

> -"Rather than expanding the uses already approved for the hotel, the application simply devotes three small areas on the same floor to those same existing uses." (R. p. 121).
> -"Applicant will not allow any amplified music on the rooftop terrace in either [exterior] location nor allow any activities in these two outside terrace areas that might be disruptive in any way." (R. p. 121).
> -"Upon information and belief, the prohibition of use of the Northeast corner was the result of concerns about Second Presbyterian Church. The Applicant has been in touch with the pastor and believes there is no objection to allowing persons on this area of the rooftop." (R. p. 122).[3]

The application did not address traffic, noise, parking, or other potential negative impacts from the proposed new accessory uses on the 8th floor.

At the subsequent BZA hearing on the application, in *reaction* to neighborhood concerns about noise, Dewberry submitted a letter from Mark Mitchum, president of Enterprise Technologies, Inc. ("ETI"), who explained that the speakers ETI installed on the rooftop would

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[2] Dewberry's application originally included a request for outside activities on the terrace to be permitted until midnight, but Dewberry later withdrew this request. (R. p.122). The portion of the application addressing the adverse consequences of the permitting activities after midnight also makes conclusory statements that there will be no impact on the neighborhood. (R. p. 122).

[3] Dewberry included a letter from the pastor in the record. (R. p. 116). The letter is dated March 18, 2011, and indicates that the Church reviewed floor plans from January 2011, but that the Church has not received any updated floor plans. (R. p. 116) The floor plans are not attached to the letter, but the letter provides that the Church had several suggestions with respect to the plans presented. (R. p. 116). The letter expresses concern over screening for parking, but it does not include any other suggestions referenced in the letter or contain any statement that the Church does or does not object to the floor plans submitted. (R. p. 116).

not rise about the level of a normal, conversational level. (R. pp. 140-41). Dewberry also explained at the subsequent BZA hearing that the penthouse structure was insulated with "Miami/Dade 150-mile an hour glass, almost an inch thick, so we're not talking about interior activity that's going to have much effect on the outside." (R. p. 18, lines 5-9).[4] There was no testimony about other adverse impacts, except to state that the neighbors were speculating.

While Dewberry argued the new accessory uses on the interior should not be described as a "rooftop bar," Dewberry proceeded to justify his request by comparing the uses to other rooftop bars within the City. Unlike Dewberry's hotel, these hotels were located across busy City streets from residential neighborhoods, and none were located within the same City block as residences, like the Dewberry is. (R. p. 45, line 24-p. 46 line 4; p. 50, line 23-p.51, line 1). In fact, several houses on Elizabeth Street actually back up to the hotel, and the only thing separating these houses from the exterior of the 8th story of the hotel is an open parking lot. (R. p. 48, line 23-p. 49, line 9). One resident explained: "There's nothing to impede the sound from the Dewberry." (R. p. 51, line 22).

Dewberry also conceded that the new accessory uses and outdoor terrace would be used in tandem. In the application, Dewberry explained it was asking for a modification to the approved uses on the outside of the terrace on the rooftop for a yoga fitness area and a "small outside sitting area associated with the Citrus Club . . . ." (R. p. 121). "These two uses are ***both extensions of the uses on the interior of the eighth floor.***" (R. p. 121) (double-emphasis added). Additionally, many of the neighbors at the BZA hearing emphasized the difference between a rooftop terrace where guests may bring drinks up and a rooftop terrace with an adjacent bar. (R. p. 109, lines 5-13).

[4] There are no conditions on interior amplified music within this structure, and the circuit court imposed none in ruling that the BZA must grant a modified special exception permit.

While Dewberry and the circuit court characterize this testimony as "speculative" or "unsupported," the City contends that this is a matter of common sense, even in the absence of Dewberry's own concession and testimony from residents.

On April 18, 2017, the BZA heard Dewberry's request for an amended special exception permit and denied the application in a 4-1 vote after hearing extensive comments from Dewberry and the public. Dewberry appealed, and the circuit court vacated the BZA's decision, concluding: "Any conditions imposed by the City limiting, restricting or prohibiting those uses are void." Am. Final Order, p. 18. This appeal followed.

STANDARD OF REVIEW

On appeal from the decision of a board of zoning appeals, "[t]he 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." S.C. Code Ann. § 6-29-840(A). "The factual findings of the Board must be affirmed by the circuit court if there is *any* evidence to support them and they are not influenced by an error of law." Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988).

"In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "A reviewing court should not disturb the findings of a zoning board of adjustment unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated

authority." Massey v. City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 197, 532 S.E.2d 885, 886 (Ct. App. 2000).

ARGUMENTS

I. The circuit court erred in reversing the BZA's decision by concluding that nothing in the City's zoning ordinance prohibited Dewberry from adding completely new accessory uses to the 8th floor/rooftop of the hotel building. Section 54-220 of the CZO expressly requires that such uses be evaluated by the BZA as part of a special exception application, to include floor plans.

The circuit court's 18-page Amended Order largely ignores section 54-220 of the City's Ordinance, which is the primary source of authority the BZA relied upon to deny Dewberry's amended special exception request. The expressed intent behind section 54-220, as well as its plain language, requires the BZA to evaluate the impact of accessory uses as part of a special exception application involving an accommodations use. Nevertheless, the circuit court reversed the BZA because, according to the circuit court, "there are no provisions . . . 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." (Am. Final Order, p. 7).

It should first be noted that Dewberry has not simply altered the location of previously-approved accessory uses. Instead, Dewberry added completely new accessory uses to the rooftop of the structure, including uses which he had intentionally omitted from the 2011 application. (R. p. 142, p. 143, p. 144). Moreover, the circuit court's conclusion suggests that, once an accommodations use is approved as a special exception, *any* accessory uses may be added in the discretion of the applicant. This runs afoul of the plain language of section 54-220(b), expressly requiring the BZA to review the impact of accessory uses as part of the application process, and

ignores the stated intent behind section 54-220 to "preserve" and "protect" residential neighborhoods.

"Accommodation uses are prohibited except within the A Overlay Zone [subject to certain exceptions]." § 54-220(a). (R. p. 145). "In any Accommodation overlay zoning district, land may be used and buildings or structures may be erected, altered or used for any purpose allowed by the underlying zoning . . . and [hotel/accommodations uses] subject to approval of the Board of Zoning Appeals." § 54-220(b) (R. p. 145). Section 54-220(b) contains an extensive list of potential adverse effects the BZA must consider before permitting an accommodations use as a special exception, including provisions requiring consideration of proposed accessory uses. (R. pp. 145-46).

For instance, section 54-220(b)(1)(c) requires the BZA to consider "the total square footage of interior and exterior floor area for restaurant and bar space in the proposed facility, including restaurant/bar patron use areas, bar areas, kitchen, storage, and bathroom facilities," to ensure that the percentage of such floor area does not exceed a required maximum. Any restrictions on these areas required to conform the areas to the square footage requirements must be noted "on the floor plans submitted with the application for this zoning special exception . . . ." § 54-220(b)(1)(c) (R. p.145). While Dewberry argues this provision is not being violated here, nothing in the ordinance permits an applicant to simply skip this step in the special exception process based on its own calculations, and the language itself belies a conclusion that the CZO fails to require review of subsequent accessory uses.

Another example is section 54-220(b)(1)(f)(7), which requires the BZA to consider, based on information provided by the applicant "in site plans, floor plans, building elevations, and a detailed written assessment report . . . (7) the accessory uses proposed for the facility in terms of

size, impact on parking, and impact on traffic generation . . . ." (R. pp. 145-46).[5] Additionally, many of the criteria require the BZA to evaluate the impact of the *facility*, not just the principal use, including a requirement that the BZA consider "the proximity of residential neighborhoods to the facility." § 54-220(b)(1)(6) (R. p. 146).

By concluding that nothing in the City's zoning ordinances prohibits Dewberry from adding previously unapproved uses to a hotel simply because they are accessory uses, the circuit court effectively omits these provisions from the ordinance, something which it is respectfully not permitted to do. See Home Bldg. & Loan Ass'n v. Spartanburg, 185 S.C. 313, 323, 194 S.E. 139, 143 (1937) ("Full effect must be given to each section, and the words must be given their plain meaning. Where there is no ambiguity, words must not be added to or taken from the statute.").

For the same reason, the circuit court's reliance on section 54-203 of the CZO—which is evidence outside of the record before the BZA[6]—is misplaced. The circuit court's broad interpretation of section 54-203 as giving an owner "carte blanche" to add accessory uses after obtaining a special exception permit for an accommodations use would read specific provisions in section 54-220(b) out of existence. Respectfully, the circuit court's opinion in this regard usurps the legislative authority of City Council.

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[5] The sole dissenting member of the BZA remarked at the hearing that the BZA approved uses, not floor plans. (R. p. 68, lines 2-5). This ignores that the applicant is required to show the accessory uses on the floor plans, so that the BZA may evaluate their size and other impacts. (R. pp.145-46). The opinion of one BZA member does not trump the plain language of the ordinance itself.

[6] See Harkins v. Greenville Cty., 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) ("The record does not contain the Greenville Ordinances controlling appeals from zoning administrator decisions. Furthermore, this Court cannot take judicial notice of such local ordinances."); S.C. Code Ann. § 6-29-840(A) (circuit court may not take additional evidence in determining appeal from BZA's decision).

The circuit court also misinterprets section 54-203, which by its very terms only applies to accessory uses for permitted principal uses in each *base* zoning district, providing:

> Permitted principal uses *for each base zoning district* shall be as set forth in Part 3: Table of Permitted Uses, *and as modified by special provisions, exceptions* and conditions contained herein. Principal use means the primary or predominant use or uses of a lot or parcel. The Table is based upon the 1987 Standard Industrial Classification Manual. *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.

(Emphasis added). The A Overlay Zone is not a base zoning district.

Even reading section 54-203 out of its intended context, it is well established that the more specific provisions in section 54-220(b) will control over the general statement in section 54-203. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.").

Finally, the circuit court interpretation—or failure to interpret—section 54-220 as requiring BZA review of entirely new, after-the-fact accessory uses ignores the stated intent of the A Overlay Zone to protect and preserve residential neighborhoods. "The cardinal rule of statutory construction is that courts will ascertain and effectuate the intent of the lawmaking body." Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994). "The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose." Stephen v. Avins Constr. Co.,

324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). "The real purpose and intent of the lawmakers will prevail over the literal import of the words." Id.

Here, City Council expressly stated that the intent behind the A Overlay Zone is "to identify those areas within the City limits where accommodation uses are allowed." § 54-220(a) (R. p. 145). "The City places a high value on *the preservation of the character of its residential neighborhoods*." § 54-220(a) (emphasis added) (R. p. 145). "*Potential negative impacts affecting residential neighborhoods shall be avoided or minimized to the greatest extent possible*." § 54-220(a) (emphasis added) (R. p. 145).

Contrary to this stated intent, the circuit court read the City's zoning ordinances in favor of hotels, not neighborhoods. Read in light of its stated intent and giving effect to all the provisions of section 54-220, the circuit court committed an error of law in reversing the BZA. *A fortiori*, the circuit court should be reversed and the BZA's decision reinstated.

II. The circuit court erred in reversing the BZA's decision by interpreting the 2011 special exception permit and the conditions contained therein as tacit permission for Dewberry to add completely new accessory uses to the 8th floor/rooftop of the hotel building when the uncontroverted evidence is that the 2011 application did not propose any such uses.

To emphasize, in 2011, the BZA never considered floor plans showing a lounge area, bar, kitchen, or functional space on the top floor of the hotel, nor did it evaluate the use of the exterior rooftop in correlation with these uses. The BZA never had the *opportunity* to consider such uses because Dewberry substituted revised floor plans *prior* to the BZA's hearing on the matter, showing the interior uses as "SPA/FITNESS," with an inaccessible green roof around all but the lower approximately ¼ of the rooftop. (R. p. 7, line 19-p. 8, line 7; p. 143).

Nevertheless, the circuit court relied on the 2011 special exception permit, and its conditions, as some sort of tacit approval of *any* use Dewberry deems accessory to the hotel, concluding: "[T]here are no provisions in the Special Exception . . . that prohibit Dewberry 334 from altering the locations of permissible accessory uses from the conceptual floor plans submitted with the application for Special Exception." (Am. Final Order, p. 7). The circuit court continues: "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." (Am. Final Order, p. 11). The circuit court ignored the uncontroverted fact that the BZA had not been asked to evaluate such accessory uses as part of the 2011 application.

The circuit court's ruling would require the BZA to (1) anticipate any possible future accessory uses associated with a hotel application, whether or not proposed; (2) evaluate any possible future uses, even though the applicant would have no reason to submit evidence relating to their adverse impacts if such possible future uses are not being proposed as part of the special exception application at the time; and (3) prohibit any or all such possible future uses as a condition to the approval (again, without any information from the applicant on whether or not the possible future use has an adverse impact). As applied to this case, the circuit court's opinion would have required the BZA to conclude, in 2011, that a function room, bar, kitchen, and lounge area should not be permitted on the rooftop, even though the BZA was not asked to do so, even though the applicant had not provided any information as to this issue, and even though the issue of whether to place these uses on the rooftop had not been part of the advertised public hearing before the BZA.

There is no requirement in the City's zoning ordinance or elsewhere for the BZA to apply

this "crystal ball" approach to special exception approvals. To the contrary, the applicable ordinances suggest that the BZA should confine its review to the uses actually being proposed. For example, section 54-220(b)(1)(f)(7) requires the BZA to consider the accessory uses "proposed" for the facility. R. p. 146. Likewise, section 54-925 of the CZO, which authorizes the BZA to place conditions on any approval of a special exception request, expressly states that the BZA may attach conditions regarding the "*proposed* building, structure, or use . . . ." (R. p. 152) (emphasis added). Thus, section 54-925 anticipates the BZA placing conditions on *proposed* uses, not any possible future uses.

In 2011, the *proposed* use of the 8th floor was for "SPA/FITNESS." (R. p. 143). Nothing placed the BZA, much less the public, on notice that the BZA's approval would permit a rooftop bar on the 8th floor, especially where, as here, Dewberry removed references to lounge uses on the floor plans originally submitted with the application. (R. pp.143-44). The only evidence presented to the BZA in 2017, and to the circuit court, is that everyone present in 2011 considered such a use "off the table" based on Dewberry's conduct at the time.

In this respect, BZA member Margaret Smith, who was present during the 2011 proceedings, explained:

> I do know that when I voted for those conditions and for the special exception of the Dewberry Hotel, I considered this [referring to the revised floor plan] – (inaudible) –I looked at it, and I saw that where it was non-accessible and . . . I did it based on this [referring to the revised floor plan]– (inaudible) – and I looked at it and I studied it and it was part of my thought process.

(R. p. 63, lines 10-19). The chairman of the BZA had the same recollection:

> CHAIRMAN KRAWCHECK: Me, too. I remember it, and I remember doing it real carefully . . . .

> [A]nd the rooftop thing was first and foremost, probably, in our—in our considerations.

(R. p. 63, line 20-64, line 6).

> [CHAIRMAN KRAWCHECK:] . . . . The rooftop bar was not approved for this hotel, and I think that Mr. Batchelder summed it up when he said that—that we did approve the plans as submitted, and then we put the conditions on that we—we did, and it changed those plans.
>
> . . .
>
> . . . . I think that the concern really is—is what is going to happen on the out—on the rooftop outside and that was one of the original conditions.

(R. p. 64, line 16-p. 65, line 15, p. 66, lines 8-10).

> UNIDENTIFIED MALE: . . . . I remember the case very well because it was aired out very thoroughly. There was no question about it, and I had it in my mind, as Ms. Smith did, that the issue of the bar was very, very important to the neighborhood, and I have that in my mind in the protection of the neighborhood from anything that might be perceived to be a negative influence, and I know I cast my vote because of that particular reason. Mr. Walker had some excellent points, but I've got to tell you how I voted, and it was because of the lack of a bar up on that roof inside or outside.

(R. p.67, lines 4-15).

Simply put, the circuit court cites no authority supporting its proposition that a BZA must speculate on future uses of a property, and the plain language of the zoning ordinance supports the contrary conclusion. The circuit court respectfully committed an error of law in judicially imposing this burden on the BZA. Again, respectfully, City Council is the legislative arm of the City, not the circuit court. As a result, the circuit court erred in concluding the 2011 special exception provided Dewberry with the ability to add completely new accessory uses to the hotel, after-the-fact, simply because it did not provide otherwise.

III. The circuit court misapplied the burden of proof in reversing the BZA's decision.

While the circuit court focuses its criticism on what it deems to be the unsupported and speculative testimony of neighboring residents, the circuit court fails to put Dewberry to its proof. Dewberry was the applicant in 2011 and 2017. As a result, Dewberry bore the burden of supporting its application for a special exception (in 2011) and an amended special exception (in 2012)—not the City, not the BZA, and not the opponents to the application.

"A party applying or appealing for relief to a zoning board of adjustment or review has the burden of proof of facts entitling the party to that relief." 8A McQuillin Mun. Corp. § 25.267 (3rd ed.). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." Pressley v. Lancaster Cty., 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). "'[T]he court must consider all the relevant evidence available; and, in order to warrant the granting of a variance or exception, there must be satisfactory proof or certification of the existence of the circumstances or conditions contemplated by the statute or ordinance, *and the burden of proof rests on applicant,* the presumption being that the ordinance is reasonable in its application.'" In re Groves, 226 S.C. 459, 466, 85 S.E.2d 708, 711 (1955), quoting 62 C.J.S. Municipal Corporations § 227 (emphasis in Groves). Section 220(b)(1)(f) of the CZO also expressly requires the BZA to make certain findings based upon "information to be provided by the applicant." (R. p. 145).

Dewberry offered minimal evidence in support of its request for an amendment to the 2011 special exception, instead choosing to simply challenge whether such an amendment is required. For example, Dewberry submitted no evidence addressing traffic or parking impacts from the new accessory rooftop uses, despite the clear language in section 54-220(b)(1)(f)(7) requiring the BZA to evaluate these impacts in reviewing accessory uses proposed for a hotel. (R. p. 146). Instead,

Dewberry appeared to take the approach, which the circuit court adopted, that Dewberry need only react to concerns raised by the City, the BZA or neighbors. This is not the standard, and it was error to shift the burden in this respect.

As to noise, Dewberry explained at the 2017 hearing before the BZA that the interior space was surrounded by almost 1" thick glass. (R. p. 18, lines 5-9). Dewberry also offered a letter from a EPI stating that the speakers on the rooftop were not expected to rise above the level of conversational speech. (R. pp. 140-41). Dewberry further offered that the exterior portion of the sitting area for the bar would be located on the southwest portion of the rooftop. Finally, upon appeal to the circuit court only, Dewberry argued, for the first time, that the City's noise ordinance, codified at section 21-16 of the City Code, would protect the residents from inappropriate noise, even though the noise ordinance provides only after-the-fact protection and is not part of the zoning ordinance. That's Dewberry's evidence on noise. That's all of it.

And this does not even consider that, according to Dewberry and the circuit court, Dewberry may expand the outdoor sitting area for the bar or relocate it as a matter of right, without interference from the City, the BZA, or the Zoning Administrator, because it is an accessory use to the hotel. End of story. In this respect, Dewberry's promises ring hollow.

There was no testimony or evidence about traffic impacts or parking from the new accessory uses on the interior of the 8th floor, or the exterior, and the circuit court concluded that the BZA should not consider noise from the exterior in evaluating a special exception permit for interior uses, even though Dewberry concedes the exterior uses are extensions of the interior.

Specifically, Dewberry produced no evidence that the traffic or parking situation would be impacted (or not) by changing the interior use of the penthouse from a spa and fitness area to an event space, bar, kitchen, and lounge area, together with outdoor seating. In this respect, it is clear

that Dewberry was simply arguing that it was entitled to these uses as a matter of right, and Dewberry made little attempt to establish how the new interior uses, and the resulting intensification of the outdoor uses, would or would not impact the adjacent residents.

Instead of looking to Dewberry to satisfy each of the requirements in section 54-220(b)(1) for obtaining a special exception, the circuit court placed the burden on the neighbors, finding that their testimony was speculative and unsupported. While the City and the BZA challenge this finding, in any event, the ruling ignores that it is Dewberry's responsibility to show that the adverse impacts from the hotel facility, and all uses therein, will preserve and protect the adjacent residential neighborhood. Dewberry failed to satisfy this burden, which the circuit court respectfully ignored. The circuit court should therefore be reversed.

IV. The circuit court misconstrued the nature of Dewberry's request in reversing the decision of the BZA by limiting the BZA's consideration to interior uses on the 8th floor.

The circuit court mistakenly limited the BZA's review of Dewberry's application by solely focusing on potential adverse impacts from the interior uses, disregarding concerns that these new interior uses would lead to more intense use of the exterior rooftop spaces, especially given Dewberry's proposal to open the entire rooftop area to patrons in contravention of the proposed use in the 2011 floor plans, which showed 75% of the rooftop as inaccessible green space. In this respect, the circuit court held: "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." (R. p. 12).

As a preliminary matter, this ruling misconstrues the application presented to the BZA in 2017, which emphasizes Dewberry's intent to expand patron usage of the interior spaces onto the outside rooftop. Nothing is more telling in this respect than Dewberry's 2017 application, which

seeks a modification to the exterior use of the rooftop to facilitate outside seating "associated with the Citrus Club." (R. p. 121). Dewberry also emphasizes in its 2017 application that the new exterior rooftop uses are "extensions of the uses on the interior of the eighth floor." (R. p. 121).

Rather than a limited use of the exterior rooftop, as approved by the BZA in 2011, it is clear from Dewberry's own application that Dewberry seeks to use the interior space to support the exterior, and vice versa. The two areas are not separable, as the circuit court ruled. The BZA relied on the application, and the circuit court disregarded it.

While Dewberry asserts that one of the outdoor areas will be limited to yoga and fitness uses (R. p. 121), Dewberry maintains, and the circuit court held, that Dewberry should be able to move these uses around in its discretion or replace these uses with any other uses accessory to the hotel because they are, according to Dewberry and the circuit court, permitted as a matter of right. Thus, under Dewberry's own argument, a mere promise to use a portion of the rooftop for yoga and fitness to protect residential neighborhoods holds no weight. In light of Dewberry's complete about-face from its revised 2011 floor plans, suggesting to both the BZA and the public that Dewberry intended the entire 8th floor interior to be used for "SPA/FITNESS," it is important to emphasize, once again, that this new promise to limit a small outside area to "YOGA/FITNESS" rings hollow.

Dewberry also seeks to use the paved walkway around the entire outside terrace, presenting no evidence on potential adverse impacts from the use, except to say that the only possible objection the City could have to the use would be to accommodate Second Presbyterian Church. In this respect, Dewberry submits a 2011 letter from the pastor of the Church, which says the Church reviewed floor plans from January 2011, never received any revised or updated plans, and had some suggestions and concerns about the hotel based on what was reviewed. (R. p. 116). The

letter lists one concern about screening for parking, but never states what other suggestions were made, and there is no copy of the floor plans reviewed by the Church in the record (or at least no evidence establishing that the Church reviewed any of the floor plans included in the record). (R. p. 116).

Moreover, while the circuit court suggests that the BZA should limit its analysis to only the exterior of the rooftop, nothing in the CZO suggests that the BZA's determination should be so limited. As a matter of fact, such a limited reading of section 54-220(b) would again ignore the intent of the statute—to protect and preserve residential neighborhoods.

An instructive decision is Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 36, 766 S.E.2d 707, 719 (2014), in which the Supreme Court of South Carolina adopted DHEC's interpretation of its own regulation, focusing on the protective purpose behind the enabling legislation, and concluding: "DHEC's interpretation is sound because it cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the critical area may affect the broader coastal zone."

Here, City Council established the A Overlay Zone with a look to preserving and protecting residential neighborhoods. (R. p. 145). The BZA could not be expected to protect such areas as instructed by City Council if it could not consider how new proposed accessory uses within the hotel may affect proposed extensions of those uses on the exterior and, as a result, how those uses may affect residential neighborhoods. It is the combined impacts that matter to the neighborhood, and there is no support for judicially imposing a different interpretation requiring that the uses be treated separately—especially when Dewberry seeks to use them in tandem.

The BZA's ruling that an interior rooftop bar would intensify the negative impacts from the exterior of the 8th floor is supported not only by Dewberry's own application, but also by

testimony at the 2017 hearing. (R. p.49, line 5-50, line 9; p. 53, line 20-p.54, line 5; p. 58, lines 5-13; p. 65, line 21-p. 66, line 5; p. 66, lines 21-24). As one person explained at the hearing:

> [W]e would contend that it's not about how cozy and intimate a bar is on the inside. It's about the use on the rooftop that it enables . . . . There's a large difference of paying guests of a hotel, getting drinks via room service on a bar and having a publicly open bar on the roof top . . . .

(R. p.58, lines 5-13). Again, the City believes this is a matter of common sense, regardless of the testimony.

As the BZA recognized, the new proposed use of the rooftop would fundamentally alter the character of the rooftop as approved by the BZA in 2011. Thus, the negative impacts of the interior and exterior uses should have been considered. The BZA did just this. The circuit court did not. The circuit court should therefore be reversed.

V. The circuit court erred in reversing the BZA's decision based on what the circuit court characterized as the unsupported and speculative nature of the testimony offered by opponents to the completely new accessory uses on the 8th floor/rooftop of the hotel.

Ignoring that the burden of proof lies with the applicant, not the public, the circuit court also reversed the BZA's decision by concluding: "[T]here 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." (Am. Final Order, p. 12). The circuit court did not rule on what testimony in particular the circuit court found unsupported or speculative, instead throwing it all out based on its interpretation of extant case law.

Let's first establish what was said at the hearing by neighbors. In response to Dewberry's comparison of its rooftop bar to other hotels in the area, Lisa Thomas, who has lived in the City all her life, explained that several of the "comparison" hotels—the Bohemian, the Bennett Hotel, and the Omni—do not have rooftop bars facing residential neighborhoods because they face a

public street. (R. p. 45, line 24-p. 46, line 4). If this testimony is incompetent, speculative, or unsupported, then so is Dewberry's testimony on the same issues.

In response to Dewberry's unsupported *promises* that noise would not impact the neighborhood and that the rooftop would not be a place for live music or wedding events, Bill Weston, who lives on the same street as the hotel, explained that he had been in livability court when the hotel was issued tickets for violations of its zoning restrictions based on an outdoor band party on March 25. (R. p. 47, lines 1-6). He explained a similar party had occurred on February 25. (R. p. 48, lines 1-6). Likewise, Glen Gordon, another resident, explained that he received an invitation for a wedding rehearsal dinner and after-party that had already been held at the Dewberry. (R. p. 52, lines 3-14). Based on his conversations with other invitees, he understood that the party, including 200-250 people had been planned for the rooftop. (R. p. 52, lines 3-14).

An unidentified female, who lives on Elizabeth Street, explained that all the houses on Elizabeth Street back up to the hotel, and that there is nothing between these houses and the eastern face of the hotel. (R. p. 48, line 23-p. 49, line 2). She believed the noise from the rooftop on the 8th floor would come right into her backyard because there were no business or commercial properties between her house and the hotel, in contradistinction to the rooftop bars used as examples by Dewberry during its presentation. (R. p. 49, lines 2-9).

Aaron Gilchrist, who lives at 9 Elizabeth Street, on the corner of Henrietta Street, explained that there is nothing to impede sounds coming from the 8th floor of the hotel toward the residences in this area. (R. p. 50, lines 22-25). He emphasized that none of the examples of other rooftop bars provided by Dewberry included rooftops which were 8 stories high and in which sound from the rooftop would travel, unimpeded, to adjacent residential properties. (R. p. 50, line 22-p. 51, line 1).

An unidentified male testified, in response to Dewberry's conclusory statements, adopted by the circuit court, that the additional uses on the interior of the 8th floor would not intensify the uses on the exterior, that, from his perspective, a rooftop bar on the interior would increase the potential for the exterior as an accessory to the bar. (R. p. 53, lines 20-23). This testimony was echoed by a representative of the Historic Charleston Foundation. (R. p. 58, lines 5-22). If this testimony is inadmissible, why should the circuit court—or the BZA—rely on witness testimony to the contrary offered at the same hearing by Dewberry? Dewberry did not present an expert witness on this issue, and nothing in the record shows that Dewberry's witness was more qualified to offer his opinion than the neighbors were to offer theirs. There is no way to say that the testimony and evidence submitted by Dewberry is more or less speculative than the testimony submitted by others. There is no way to conclude that the testimony and evidence submitted by Dewberry at the hearing is more or less supported than the testimony submitted by others.

In fact, the circuit court erred in ignoring the above-referenced testimony, which rises well above the speculative and unsupported offered in the case law cited by the circuit court. In this respect, reliance on Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 150-51, 735 S.E.2d 659, 662-63 (Ct. App. 2012) is misplaced. In Wyndham, unlike in the present case, the Court of Appeals concluded neighborhood testimony about a decline in property values based on the location of a third fireworks store in the same area was speculative, mostly because no owner testified as to the impact on the individual owner's property and because of the proliferation of the same uses in the area. Here, there are not two other hotels surrounding the residential properties.

With respect to traffic, the Wyndham court noted that speculation on increases in traffic from the fireworks store was inadmissible, but emphasized that the City had procured a traffic study showing the store would not generate a significant amount of traffic. Id. Here, there is no

traffic study or other evidence proffered by Dewberry relating to traffic, despite the requirement in section 54-220(b)(1)(f)(7) that Dewberry address traffic impacts from accessory uses to a hotel.

Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205 n.4, 516 S.E.2d 439, 440 (1999), also relied upon by the circuit court, contains similar distinctions. Unlike the situation here, neighbor testimony about increased traffic was held to be speculative, but the applicant submitted a "Brief Traffic Assessment," which the Supreme Court held the BZA could have relied upon to grant the special exception. Id. Moreover, neighbor testimony in Bannum attempted to established that a proposed halfway house would generate more use of a cut-through than an existing mental health facility on the site. Id. at 206, 516 S.E.2d at 441.[7]

Here, the circuit court applied a double standard to neighbor testimony as opposed to testimony offered by the applicant. Moreover, the case law cited by the circuit court is inapplicable. Consequently, the circuit court's decision should be reversed.

VI. The circuit court erred in reversing the BZA's decision based on the circuit court's new finding that the 2011 special exception provided adequate safeguards against potential disturbance of adjacent residential properties.

The circuit court also held that the conditions imposed by the BZA on the 2011 special exception would adequately safeguard against potential disturbances of residential properties, concluding: "[T]here 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." (Am. Final Order, p. 14). In 2011, when the BZA imposed these conditions, the

[7] The circuit court also relies upon an unpublished opinion of the Court of Appeals following in the footsteps of Wyndham and Bannum. This case provides no further support for Dewberry's position. See also Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

entire rooftop terrace was not accessible, based on the floor plans submitted by Dewberry showing ¾ of the rooftop as inaccessible green space. (R. p. 143). It bears repeating that there was also no bar, lounge, kitchen, or event space shown on the interior of the 8th floor, and, thus, no intent to extend such uses to such uses from the interior onto the rooftop terrace, as Dewberry concedes there is now. (R. p. 121).

As a result, the conditions to the 2011 accessory uses have little to no import in the present case, which involves a complete 180 from SPA/FITNESS uses on the 8th floor to the much more intensive interior uses, and Dewberry applied for changes to the exterior as "extensions to the uses on the interior." (R. p. 121). In his order, the circuit court expressly refuses to consider the change in intensity with respect to these uses, so there is, respectfully, no basis for the circuit court to issue a different, new special exception to Dewberry relying solely on the conditions imposed in 2011.

As discussed in Arguments I-V of this Brief, the BZA's factual findings on this issue are supported by the evidence. In this respect, the circuit court erred by usurping the role of the BZA as the finder of fact under section 6-29-840(A) of the South Carolina Code. This is especially true where, as here, the circuit court applied safeguards to a special exception which did not include the same proposed accessory uses in 2017. Likewise, as discussed *supra*, the City's noise ordinance, which was not part of the record before the BZA, is irrelevant as a zoning mechanism.

The completely new special exception permit issued by the circuit court should therefore be reversed.

VII. The circuit court erred in reversing the BZA's decision to deny Dewberry an amended special exception based on the doctrine of government estoppel. Building officials do not have authority to issue or modify a special exception permit, and, to the extent there was any reliance by Dewberry on approved construction plans, that reliance was not justified. Finally, Dewberry has unclean hands.

The circuit court held that the City was estopped to deny Dewberry the uses it sought for the 8th floor of its hotel because the building official approved construction plans for the 8th floor using Dewberry's revised floor plans instead of those which Dewberry presented to the BZA. This holding is not supported by the facts and is legally erroneous.

Precedent of this State is clear. The application of governmental estoppel is the exception, not the rule. "As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Greenville Cty. v. Kenwood Enters., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003). The issuance of a building permit does *not* estop a municipality from enforcing its zoning ordinance. See Grant v. City of Folly Beach, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) ("In this case, City issued a building permit for work in 'Downstairs Apt. # 1.' Assuming the permit's reference to an 'apartment' misled Grant into believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor."). The government is also not estopped by erroneous conduct of its agents, even if there has been reliance on that conduct. See South Carolina Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987) ("A governmental body is not immune from the application of estoppel where its officers or agents act within the proper scope of their authority... The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.") (emphasis original).

The circuit court faulted the City for what he deemed a "disconnect" between the City's zoning official and building official. There was no disconnect. The zoning official did his job, to wit: enforcing the conditions of the special exception issued by the Board. The building official

did her job, to wit: approving construction plans that complied with the building code. As in Grant, *supra*, approval of code compliant construction plans for a bar, kitchen, events room and an accessible outdoor deck, cannot serve as a basis for estopping the City from enforcing its zoning ordinance, which curtailed, if not precluded, these uses.

Moreover, it was Dewberry's burden to prove estoppel. The record is clear that it failed to meet that burden. "If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 236-37, 692 S.E.2d 499, 506 (2010).

Dewberry was fully aware of the 8th floor uses approved by the BZA, and Dewberry was fully aware that those uses did not include a bar or a kitchen or an events room or a fully accessible roof deck. The record is clear on these points, as it unequivocally demonstrates that, in 2011, Dewberry revised the floor plans for the 8th floor to specifically delete any inference that a bar, function space, or kitchen would be constructed. (R. p. 7, line 6-p. 8, line 7; pp. 142-43). Further, Dewberry showed only a small, accessible outdoor deck for the 8th floor. (R. p. 143). It is simply not credible for Dewberry to claim estoppel on the basis of the building department approving plans that Dewberry knew were not compliant with the zoning approved by the BZA in 2011, and it was error for the circuit court to countenance such a contention.

Even if Dewberry's actual knowledge is disregarded, Dewberry certainly had the means of knowing the truth of the facts in question by simply asking the Zoning Administrator if the new uses shown in its building plans fell within the parameters of the special exception. In light of these circumstances, be it actual knowledge or having the means of ascertaining the truth, if there was any reliance by Dewberry, such reliance was not justified.

The circuit court's reliance on section 54-901 of the CZO to support the application of estoppel is misplaced. Section 54-901 devolves upon the Zoning Administrator the duty of enforcing and administering the zoning ordinance. Section 54-901 imposes on the building inspector the duty to inspect construction "authorized by the Board of Zoning Appeals." Based on the ordinance, the circuit court concluded " . . . at some point in time, prior to the completion of construction, there should have been some form of communication between the building officials and the zoning officials." (Am. Final Order, p. 17). Even if correct, this circumstance does not give rise to estoppel.

If the building official approved plans without consulting the zoning officials, as seemingly found by the circuit court to be required by the ordinance, that approval was unauthorized, and unauthorized conduct cannot estop the City. South Carolina Coastal Council, *supra*. Moreover, section 54-901 makes clear that it is the zoning administrator, not the building official, that administers the zoning ordinance, and no act of the building official can estop the zoning administrator from enforcing the zoning ordinance. Grant, *supra.* Finally, state law and the CZO delegate to the BZA—not any other authority—the ability to grant special exception permits. See S.C. Code Ann. § 6-29-800(A)(3) (enabling the board of zoning appeals "to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance . . . .").

The holding by the circuit court that Dewberry did not know that the City would later deny the uses shown on its construction plans is error. See Labruce v. North Charleston, 265 S.C. 465, 467, 234 S.E.2d 866, 877 (1977) ("Citizens are charged with knowledge of existing law."); Ex Parte Wessinger, 235 S.C. 239, 111 S.E.2d 13 (1959) ("Accordingly, cognizant of the city ordinances is presumed"); see also Carolina Nat'l Bank v. State, 60 S.C. 465, 475, 38 S.E. 629,

633 (1901) ("All men are bound to take notice of the special authority of the State's officers, and when dealing with them outside their authority, they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the State.").

Dewberry knew, or certainly had the means of knowing, the limitations of the authority of the building official in relation to that of the zoning official.

All the cases relied on by the circuit court to support the application of estoppel involved circumstances where the act giving rise to estoppel was carried out by an official acting within the scope of his authority. Charleston v. Nat'l Advert. Co. 292 S.C. 416, 417, 357 S.E.2d 9, 10 (1987) (County officer issuing the permit was "designated in the ordinance as the official charged with [the zoning code's] enforcement); Landing Dev. Corp. v. Myrtle Beach, 285 S.C. 216, 220, 329 S.E.2d 423, 425 (1985) (City estopped to change its interpretation of zoning ordinance where zoning director previously issued contrary interpretation); Kerr v. Columbia, 232 S.C. 405, 412, 102 S.E.2d 364, 367 (1958) ("The officials of Eau Claire had previously told the interested inquirers concerning the property that it was zoned for business. Upon the ordinance and those assurances, they acted."). None of these cases stand for the proposition that a building permit, which only connotes compliance with building code specifications, trumps the application of a zoning ordinance.

Estoppel should not lie against the City for the further reason that Dewberry does not have clean hands. It is well settled that one who seeks equity must do equity. See Norton v. Matthews, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967) ("He who seeks equity must do equity."); Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 (2000) ("Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.").

Here, Dewberry does not have clean hands. The Court need not go beyond Dewberry's conduct in submitting a revised floor plan, changing the proposed use of the 8th floor from "SPA/LOUNGE" to "SPA/FITNESS" in its 2011 special exception application to come to such a conclusion. Dewberry was aware of the necessity of BZA approval of its hotel floor plans, and was aware of what the BZA had approved for its rooftop. Dewberry's intentional submission of construction plans that called for other than SPA/FITNESS uses approved as part of its special exception, and then to pretend surprise at being caught, is disingenuous and certainly provides no basis for estoppel.

CONCLUSION

Based on the foregoing, the circuit court's decision should be REVERSED, and the BZA's decision REINSTATED.

Respectfully submitted,

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July 11, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED
JUL 16 2018
SC Court of Appeals

Case No. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC, Respondent,

v.

City of Charleston and Board of Zoning Appeals-Zoning, Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter on Respondent Dewberry 334 Meeting Street, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2018, addressed to its attorney of record, G. Trenholm Walker, Walker Gressette Freeman & Linton, LLC, Post Office Drawer 22167, Charleston, South Carolina 29413.

July 11, 2018

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July 11, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Dewberry 334 Meeting Street, LLC, Respondent, v. City of Charleston and Board of Zoning Appeals-Zoning, Appellants
Appellate Case No. 2018-000378

Dear Ms. Kitchings:

Please be advised that I represent Appellants City of Charleston and Board of Zoning Appeals-Zoning (collectively, "Appellants") in the above-captioned appeal. Enclosed for filing, please find a copy of the Appellants' Initial Brief and Designation of Matter, along with a Proof of Service of same on opposing counsel.

Your courtesies and consideration of this matter are greatly appreciated.

With kindest regards, I am,

Daniel S. ("Chip") McQueeney, Jr.
S.C. Bar No. 06802

c: G. Trenholm Walker (Counsel for Respondent)

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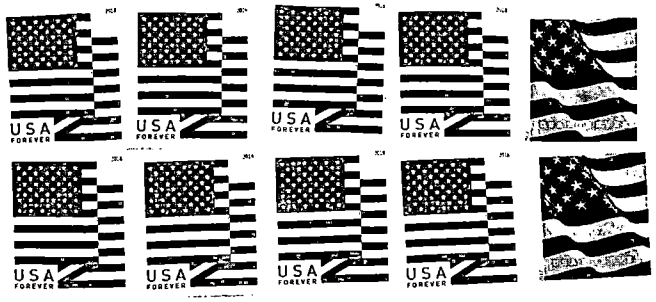

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