STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000378

Dewberry 334 Meeting Street, LLC ..... Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

September 10, 2018

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V. Did the Circuit Court correctly rule the BZA's decision to refuse to approve the use of the *inside* of the eighth floor because of speculation on possible sound from the *outside* rooftop terrace was arbitrary and capricious where the 2011 Special Exception imposed conditions for containing sound on the rooftop terrace and the City has ordinances that prohibit any disruptive sound?

STATEMENT OF THE CASE

Respondent, Dewberry 334 Meeting Street, LLC ("Respondent" or "Dewberry 334"), is the developer and owner of a hotel located at 334 Meeting Street, Charleston, South Carolina (the "Property" or "the Hotel") that was formerly the abandoned L. Mendel Rivers Federal Building. After acquiring the Property in 2008, Respondent applied to Appellant City of Charleston Board of Zoning Appeals (the "BZA") in 2010 for a special exception for accommodations use for the

seven-story building, as required under Section 54-220 of the Ordinances of the City of Charleston. The BZA granted the special exception subject to eight separate conditions. **(R. p. 74).**

The following year Respondent decided to significantly increase the number of guest rooms and add certain interior facilities on the eighth floor to the building that would house accessory uses for the hotel but no guest rooms. To obtain approval for these changes, Respondent applied to the BZA in 2011 to revise the earlier special exception for accommodations use to permit the marked increase in guest rooms and to approve a separate special exception for the additional interior square footage of the eighth floor. **(R. p. 75).** The BZA granted the special exception allowing the additional square footage of the eighth floor and approved the revised special exception for accommodations use, imposing eleven specific conditions on its approval (the "Special Exception"). See **(R. p. 56, line 3- R. p. 57, line 11).**

Respondent did not proceed with the extensive renovations of the building until 2014. In mid-2016 after completing construction of the interior facilities on the eighth floor and the outside rooftop terrace and walkway in accordance with plans approved by the building official of Appellant City of Charleston (the "City"), the City's Zoning Administrator prevented Respondent from using most of the interior facilities on the eighth floor. The City asserted Respondent was prohibited from conducting the hotel accessory uses in the locations built for them inside the eighth floor. See **(R. pp. 89, 144).** The City also instructed Respondent it could not use the walkway around the northeast quadrant of the outdoor terrace.

The City claimed the zoning prevented Respondent from using the four main facilities comprising the interior of the eighth floor for the uses for which they were constructed, even though the City agreed that those intended uses on the eighth floor are accessory uses to the principal use of hotel that are a matter of right. The City instead asserted that the 2011 Special

Exception prohibited those otherwise permissible accessory uses on the inside of the eighth floor as well as the use of the walkway in the northeast quadrant of the rooftop terrace, even though nothing in the 2011 Special Exception or the City's ordinances contains such a prohibition.

The City asserted the only way Respondent could implement the hotel accessory uses it constructed on the interior of the eighth floor and gain access over the walkway on the northeast corner of the outside terrace was for it to obtain a modification of the 2011 Special Exception. The City took the position the BZA had to approve the locations of these particular accessory uses as well as access to the walkway in the northeast quadrant of the rooftop terrace. **(R. p. 41, line 25- R. p. 42, line 2); (R. p. 43, lines 23-25).** Respondent disagreed, contending that no provisions in the 2011 Special Exception nor the City's zoning ordinances prohibited these hotel accessory uses from being located on the interior of the eighth floor nor forbid access to the terrace walkway around the northeast corner of the building.

Nonetheless, at the City's urging and in an effort to avoid litigation, Respondent acquiesced and applied to the BZA in March 2017 to modify the 2011 Special Exception to allow the intended accessory uses in the interior facilities that were constructed according to construction drawings approved by the City, and to permit use of the entire outdoor terrace, while specifically asserting that the modification to the Special Exception was not legally required. **(R. p. 42, lines 1-2); (R. p. 41, line 20- R. p. 42, line 2); (R. p. 43, line 23-R. p. 44, line 5).**

The BZA voted 4-1 to deny Respondent's request to modify the 2011 Special Exception. **(R. p. 71, lines 11-22).**

On May 3, 2017, Respondent filed a notice of appeal of the BZA's decision and requested pre-litigation mediation under South Carolina Code section 6-29-820 (B)(2). **(Notice of Appeal;**

Request for Pre-Litigation Mediation). The mediation was unsuccessful, resulting in the mediator's declaring an impasse on June 20, 2017. **(Proof of ADR).**

On June 27, 2017, Respondent filed its petition with the grounds for its appeal from the BZA's decision denying the amendment to the Special Exception **(Petition and Grounds for Appeal).** The Circuit Court, the Honorable J.C. Nicholson, Jr, Circuit Judge, presiding, heard the appeal on October 9, 2017, and issued an Order reversing the decision of the BZA on December 15, 2017, holding that Respondent had the legal right to use and occupy the interior facilities on the eighth floor and to access the entire outdoor terrace surrounding the eighth floor. **(Tr. 10/9/17); (Final Order).** Appellants filed a Motion to Reconsider, Alter or Amend. **(Mot. To Recons.).** The Circuit Court held a hearing on Appellants' Motion to Reconsider, Alter or Amend on January 10, 2018, and issued an Amended Final Order on February 9, 2018, denying the motion and amending the Final Order. **(Am. Final Order).** Appellants filed their Notice of Appeal on March 1, 2018. **(Notice of Appeal filed 3/1/2018).**

STATEMENT OF FACTS

This appeal concerns an effort by the City to prevent the Hotel from using facilities on the inside of its building that the City concedes contain permissible accessory uses. The City contends the permissible accessory uses cannot be conducted in the particular *locations* built for them *inside* the eighth floor due to rampant speculation about the sound that might emanate from persons being on the *outside* terrace that surrounds the eighth floor that is already allowed as a matter of right.

Dewberry 334 is the owner of the former L. Mendel Rivers Federal Building located at 334 Meeting Street, Charleston, South Carolina (the "Property"). **(R. p. 4, lines 5-6).** At the time of its purchase, the seven-story building had been vacant for years and was in a deteriorated condition.

Dewberry 334 purchased the Property with the intent of renovating the building into a five-star hotel to be known as "The Dewberry."

The Hotel is not surrounded by a residential neighborhood as argued by Appellants in their brief. Instead, the Hotel is surrounded by non-residential properties on three sides with the so-called residential neighborhood being mostly on the opposite side of a large parking lot behind the Hotel. The hotel building extends an entire block along Meeting Street between Charlotte Street and Henrietta Street. To the north of the building is a public open space known as Wragg Square and the Second Presbyterian Church; to the east of the building is a large surface parking lot that is owned by Dewberry 334 and used by guests and employees of the hotel; to the south of the building is Citadel Square Baptist Church; and to the west of the building is Meeting Street (a major traffic artery) and Marion Square, a large public park. **(R. p. 72); (R. p. 4, lines 5-8); (Appellant-Pet'r Return to Resp't Mot. To Reconsider, Alter, or Amend, at Attachment 1).**

The Property is located within the Accommodations Overlay District of the City. **(R. p. 145-47)** (City Ordinance Section 54-220); **(R. p. 4, line 23-R. p. 5, line 2)**. Section 54-220 of the City of Charleston Ordinances prohibits accommodations uses in all areas of the city, except those areas within the accommodations overlay district. **(R. p. 145-47)** (City Ordinance Section 54-220). A property owner within the accommodations overlay district seeking to operate a hotel must take the additional step of obtaining a special exception from the BZA authorizing accommodations use. The BZA can deny the application, approve it, or approve it with conditions. **(R. p. 145-47)** (City Ordinance Section 54-925). [1]

[1] Section 54-925 of the City's zoning ordinances provides if the BZA grants a special exception, the BZA "may attach to it [the special exception] 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." **(R. p. 152).**

In 2010, Respondent applied to the BZA for a special exception for a seven-story hotel with 120 guest rooms. **(R. p. 5, lines 3-6).** On March 16, 2010, the BZA granted the special exception subject to eight specific conditions. **(R. p. 5, lines 7-8); (R. p. 74).**

Within a year of receiving this special exception, Respondent modified the design of the hotel to (i) expand the square footage of the eighth floor, bringing it to about half the square footage of the other floors, (ii) expand the rooftop terrace so that it entirely surrounded the eighth floor, and (iii) convert the seventh floor to additional guest rooms, raising the total number of guest rooms to 161. Because of these changes, Respondent applied to the BZA in 2011 to modify the special exception for accommodations use granted the year before to allow the additional guest rooms on the seventh floor and for a separate special exception to increase the square footage of the eighth floor.[2] **(R. p. 5, line 24-R. p. 6, line 9).** The preliminary conceptual floor plan for the eighth floor submitted with the application for the special exception in 2011 showed the interior as "spa/fitness" and a pool on the rooftop terrace immediately to the south of the new interior spaces on the eighth floor. **(R. p. 7, line 19-R. p. 8, line 2); (R. p. 84).**

The BZA considered the application to modify the earlier special exception for accommodations use and to grant a new special exception allowing the expanded eighth floor at its meeting on April 5, 2011. The BZA granted both special exceptions. The BZA approved the modification of the special exception for accommodations use subject to the following eleven specific conditions:

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

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[2] The former federal building had a small eighth floor that housed mechanical and other functional equipment. **(R p. 5, lines 10-15).** The height of the building was nonconforming because it exceeded the height limit for that district. As a result, a special exception was needed to expand the size of the nonconforming eighth floor. **(R p. 6, lines 3-9).**

(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

(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.

(R. pp. 78, 124-126, 129).

The BZA did not impose a condition prohibiting Dewberry 334 from using the interior rooms of the eighth floor for permissible accessory uses other than "spa/fitness." Nor did it impose a condition that prohibited other permissible accessory uses such as a function room for meetings or receptions, or a small bar/restaurant, or a reading room, or a pantry kitchen from ever being situated inside the eighth floor. Nor did the BZA impose a condition that Dewberry 334 was mandatorily required to construct the swimming pool on the outdoor terrace as shown on the

preliminary conceptual floor plan or mandatorily required to construct the spa on the inside of the eighth floor.

Three years later the City reviewed and approved construction permit drawings for the eighth floor dated June 27, 2014, that called for a pool on the outdoor terrace and interior spaces that included restrooms and a large function room. **(R. p. 85-86); (R. p. 9, lines 1-2)** (City staff noting that the project "made its way through the permitting process and -- and construction began."); **(R. p. 16, lines 2-8); (R. p. 16, lines 11-12)** ("So Mr. Dewberry still had the idea that there was going to be a pool there" in 2014).

It later turned out that constructing and operating the pool on the outdoor terrace were cost prohibitive and would have invalidated certain warranties related to the renovations on the lower floors under the pool. See **(R. p. 16, lines 12-22)** ("When he went to price it with the contractor and we went to design the specifics beyond the floor plan, he realized that it was not a very good idea. First, it was going to cost like a million and quarter dollars to put it there, and then he learned he was going to have to cool the water because it was up on top of the building with full exposure to the sun and then there were all kinds of caveat from the builder and designer that if this thing starts to leak, you know, we're out [of luck] -- that's the risk you're going to have to have.").For those reasons, Respondent decided not to build the pool on the outside terrace.

Instead, in 2015, Respondent submitted new construction drawings to the City for the inside of the eighth floor and for the surrounding outside terrace. **(R. p. 86); (R. p. 120)** ("After receiving the engineering and cost estimates for the swimming pool, [Dewberry 334] decided to eliminate the swimming pool and to modify the floor plan for most of the rooftop, also called the eighth floor."); **(R. p. 10, lines 9-18)**. Specifically, Dewberry 334 "changed the floor plan to include a function room (called the "Rivers Room"), a reading room, a small bar called the Citrus

Club, and a pantry area to serve the Citrus Club." **(R. p. 120)**. "In place of the pool and pool deck, [Dewberry 334] created a small outside sitting area on the southwest corner of the rooftop and a small yoga fitness area on the terrace on the southeast corner of the rooftop." **(R. p. 120)**. Dewberry 334 "also installed wood pavers around the entire remaining exterior of the rooftop with this pathway also serving as the exterior means of egress in case of emergency." **(R. p. 120).** The spa was moved to the second floor of the hotel. **(R. p. 120).**[3]

The City reviewed these revised construction drawings dated April 24, 2015, and approved the drawings without qualification. **(R. p. 17, lines 3-11) (R. p. 88).** The drawings showed the interior of the eighth floor surrounded by an outdoor terrace that was accessible for the full perimeter of the building with the interior facilities comprised of restrooms, a pantry, and three rooms described as Function A, Function B, Pantry and Function C. **(R. p. 17, lines 3-11) (R. p. 88).** The room labeled Function C included a bar feature on the drawings. **(R. p. 17, lines 3-11) (R. p. 88).** These drawings also showed that the spa would be constructed on the second floor, not the eighth floor. **(R. p. 17, lines 3-11) (R. p. 88).**

In reliance on the City's approval of the construction drawings dated April 24, 2015, Dewberry 334 proceeded to construct the eighth floor and its interior facilities as well as the outdoor terrace. **(R. p. 17, lines 13-22)**; **(R. p. 120)** ("The Applicant constructed the eighth floor and rooftop area according to the modified floor plan."). The construction included installation of

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[3] Appellants suggest in their brief that Respondent intentionally omitted these uses from the 2011 BZA application only to later substitute them in the construction drawings. See **(Appellants' Br., 10)** ("Dewberry added completely new accessory uses to the rooftop of the structure, including uses which he had intentionally omitted from the 2011 application.") There is no basis in the record for such an assertion, and Appellants' distortion of the facts is inconsistent with Respondent's actions, as summarized above. Respondent submitted, and the City approved, a full set of construction drawings in 2014 that included a pool on the outdoor terrace and showed the interior of the eighth floor as a large function space.

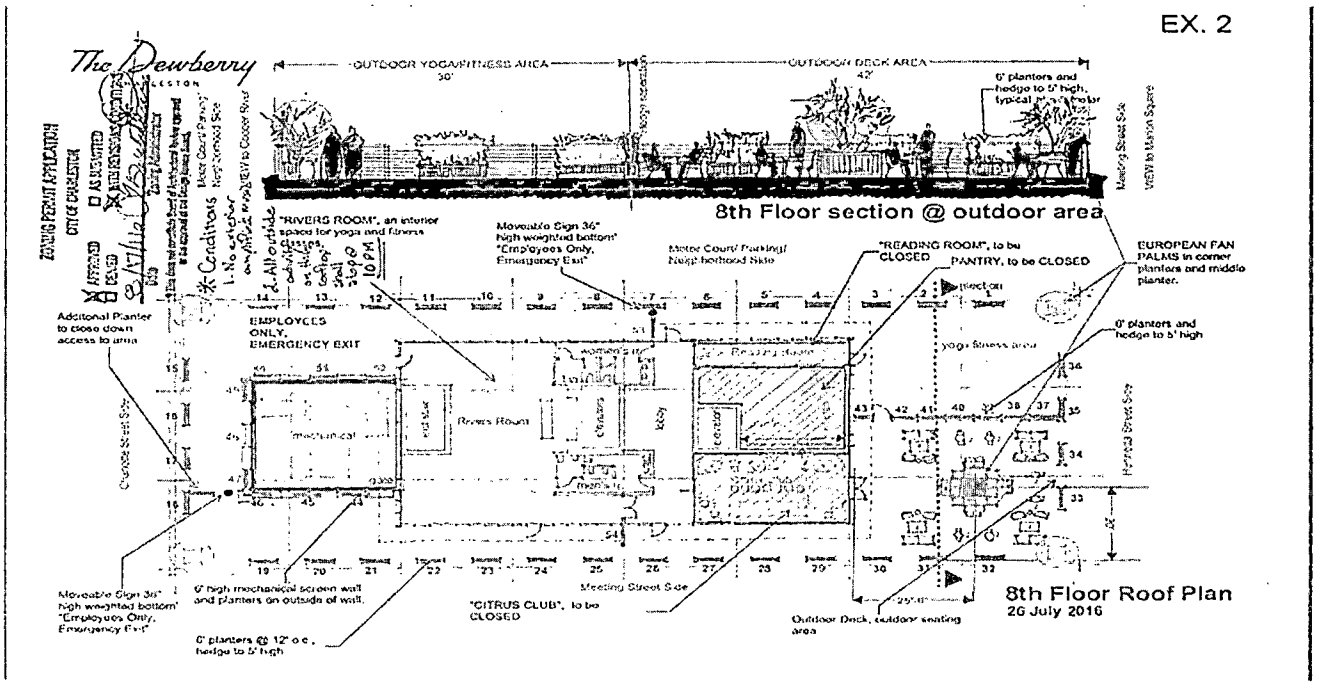
windows that meet the 150-mile per hour Miami/Dade County standard for hurricane-proof windows. **(R. p. 18, lines 5-9)** ("[t]he complete exterior to the [extent of the] glass has Miami/Dade 150-mile an hour glass, almost an inch thick, so we're not talking about interior activity that's going to have much of an effect on the outside.").

There is no dispute that the entire construction of the interior facilities on the eighth floor and the rooftop terrace was subject to numerous inspections by the City's building inspectors throughout the installation and completion of the electrical, mechanical, structural, life-safety systems, and other improvements pursuant to the construction plans approved by City building officials. As observed by Judge Nicholson in the Amended Final Order, under City of Charleston Ordinance 54-901, the building official's inspection of the construction of the eighth floor necessarily included a determination of compliance with the Special Exception authorized by the BZA. See **(Am. Final Order, 17)**; See **(Appellant-Pet'r Return to Res't Mot. To Reconsider, Alter, or Amend, at Attachment 2)** (City Ordinance §54-901: ". . . 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 . . . 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.").

Dewberry 334 spent millions of dollars performing its renovations of the building in conformity with the approved construction drawings, and on the associated fixtures, equipment, and furnishings for the second and eighth floors. **(R. p. 17, lines 9-15)**; see also, **(R. pp. 91-99)** (photos of completed 8th Floor). After passing the many City inspections, completing construction in compliance with the construction plans approved by the City, and installing the fixtures and

certain furnishings inside the second and eighth floors, Dewberry 334 applied for a temporary certificate of occupancy for the eighth floor in the summer of 2017. **(R. p. 17, lines 13-22).**

On August 17, 2016, the City refused to approve occupancy of most of the interior facilities on the eighth floor for zoning reasons, claiming the 2011 Special Exception did not allow these permissible hotel accessory uses in the locations where the City had approved their construction. **(R. p. 79).** The City prohibited the use of Function Room A on the approved 2015 plans (later named the Rivers Room) except for yoga and fitness, prohibited any use of Function Room B on the approved 2015 plans (later named the Reading Room), prohibited any use of Function Room C on the approved 2015 plans (later named the Citrus Club), prohibited any use of the Pantry on the approved 2015 plans, and prohibited the use of the terrace walkway on the Northeast corner except for "employees" and limited its use by others to an "emergency exit." **(R. pp. 9:18-10:4; 89, 144).** The City Zoning Administrator's refusal to approve occupancy of most of the interior facilities on the eighth floor was memorialized by notations on the 8th floor drawings as follows:



(R. p 144).

The City claimed the zoning, in particular the 2011 Special Exception, prevented these specific hotel accessory functions in the locations inside the eighth floor where they were constructed because those same accessory functions had not been shown in the preliminary conceptual floor plan for the eighth floor reviewed by the BZA five years before, in April of 2011. **(R. p. 10, lines 5-21).** The City took this position even though it acknowledges that all these particular uses and activities are permissible and lawful accessory uses to the primary accommodations use of hotel. **(Resp't. Resp. to Pet., ¶ 32)** ("The City admits that hotels have accessory uses, which may include meeting space, restaurants and bars,...").[4]

Even though (1) the Special Exception permitting the hotel use on the Property did not impose a condition that the layout of the eighth floor and the specific activities inside the eighth floor had to be exactly as depicted on the preliminary concept drawings that were part of the Dewberry's 2011 application to the BZA, and (2) the City's zoning ordinances do not specify that a hotel owner receiving a special exception for accommodations use can never vary the specific accessory uses and locations of those accessory uses within the hotel from those shown on those preliminary conceptual floor plans, the City took the position that all accessory uses and the location of them "are pretty much set in stone" as shown on the conceptual floor plans reviewed by the BZA and can never be changed. **(R. p. 36 lines 19-24); (R. p. 37, lines 6-8).**

The City asserted that the only way Dewberry 334 could legally conduct the accessory use activities for which Dewberry 334 built the eighth floor was if it obtained a modification of the 2011 Special Exception from the BZA to allow those permitted uses in those locations inside the

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[4] Under Section 54-203 of the City Ordinances, "permitted principal uses" include "***[a]ccessory 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,*** ...." **(Mem. in Supp. of Appeal and Determination of Legal Right to Use Interior Spaces, p. 9)** (double emphasis added); See also, **(Tr. 10/9/17, p. 9, line 15- p. 10, line 6)**;

eighth floor. **(R. p. 41 lines 25-R. p. 42 line 2); (R. p. 43, lines 23-25).** In March 2017, at the City's urging and in a good faith effort to avoid litigation, Respondent applied to the BZA to modify the 2011 Special Exception to allow the intended functions in the interior rooms that were constructed according to the permitted construction drawings, specifically asserting that the modification to the 2011 Special Exception was not legally required. **(R. p. 42, lines 1-2)** (". . .we're here, because we were told we needed to be here."); **(R. p. 41, line 20-p. 42, line 2); (R. p. 43, line 23-p. 44, line 5).**

On April 18, 2017, the BZA conducted a hearing on the application to modify the Special Exception to allow Dewberry 334 to utilize the interior of the eighth floor for the hotel accessory uses planned and constructed there. **(R. p. 1-71).** At the hearing Dewberry 334 explained that it had a legal right to these uses and was seeking the modification to the 2011 Special Exception to allow them in the intended locations since the City insisted a modification of the Special Exception was necessary and, if granted, would avoid the necessity of legal action against the City. **(R. p. 41, line 25-p. 42, line 2); (R. p. 43, lines 23-25).**

The BZA received comments against the proposed modification of the Special Exception from various persons attending the meeting. Most of these comments asserted that in their opinions there would be sound generated from the outdoor rooftop terrace and that this sound would negatively impact their property values or quality of life. **(R. p. 46, lines 13-14)** ("I am telling you that kind of sound is going to destroy our neighborhood."); **(R. p. 47, lines 14-17)** ("A rooftop bar ... will destroy our quality of life and marginalize the people."); **(R. p. 48, lines 15-20)** ("The building on the rooftop bar will allow music into and noise into the neighborhood. . . . [p]rotect the neighborhoods that make Charleston famous."); **(R. p. 50, lines 16-23)** (discussing sound concerns). **(R. p. 52, line 17-p. 53 line 6)** (same); **(R. p. 54, lines 17-20)** (referring to the eighth

floor as "this offensive use"); **(R. p. 55, lines 3-4)** ("Sound travels the higher you have it, and just a normal human voice will travel much further. . ."); **(R. p. 57, lines 7-10)** ("We think the quality of life issue, clearly, this application is -- (inaudible) -- quality of life and in the presence of the neighborhood, we'd ask it be denied."); **(R. p. 60, lines 5-10)** (discussing concerns over noise).

Multiple BZA members stated that *the interior use was not an issue*; rather, the concern expressed was sound that might emanate from persons on the outdoor terrace. **(R. p. 66, lines 10-11)** (Chairman Krawcheck: "So the concern is -- is the outside use, not the interior use."); **(R. p. 66, lines 22-23)** (Member Robinson: "I think the use of the interior is fine, but I know it would be a noisy situation outside."). Yet, neither the Special Exception nor the City's zoning review of August 17, 2016, restricted the use of or access to the outside terrace except for access to the walkway in the northeast corner of the terrace. **(R. p. 79).**

As reflected in these quotes from the board members, they considered the hypothetical noise from permissible activities that could occur on the *outdoor* terrace to constitute a basis for denying the request to use the *interior* spaces. In fixating on their speculative projections of the sound that might come from the outside terrace, these board members completely discounted and effectively ignored conditions 4, 9, and 10 of the 2011 Special Exception that are aimed directly at limiting noise and activity on the outdoor terrace: "(4) no exterior amplified music will be permitted; ... (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 ..." **(R. p. 129).**

Board Member Appel took a different view from that of the City and these board members based on the limited scope of the BZA's jurisdiction. He agreed with Dewberry 334 that the BZA is tasked with determining if a special exception for accommodation uses should be granted for a particular property and that the role of the BZA in considering an application for special exception

for accommodation uses does not include approving plans for each accessory use for the hotel as well as its location in the hotel. Board Member Appel observed: "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, lines 2-5).**

Board Chairman Krawcheck ultimately took a contrary view. He stated that in previously approving the accommodation uses for the Property in 2011, the Board "did approve the plans as submitted." **(R. p. 65, line 13).** However, nowhere in the City's ordinance governing the BZA's consideration of a property owner's application for a special exception for accommodations use does it state that the BZA approves plans. See **(R. pp. 145-147)** (City Ordinance §54-220). Instead, Section 54-220 limits the BZA to approving accommodations uses, not plans, stating that the BZA "may permit accommodation uses as an exception where it finds" certain criteria are met. **(R. p. 145)** (City Ordinance §54-220(b)(1)). Plans are approved by the City's Board of Architectural Review, Technical Review Committee, and the Building Official.

As further pointed out by Board Member Appel, none of the eleven conditions imposed by the 2011 Special Exception prohibit the accessory uses that were constructed inside the eighth floor. **(R. p. 78).** He emphasized the absence of any such restrictive conditions in his remarks:

> We did not include a condition on this approval [the 2011 Special Exception] that there will be no bars upstairs.... We didn't restrict to the plans presented. We didn't restrict a reading room, a – any of the other things that have already been shut down...So I think Trenholm [Attorney for Dewberry 334] has a very legitimate case that they don't even need to be here, and if they want to pursue this outside the BZA's frame work, I think that stand a chance of being successful in that regard....

(R. p. 69, lines 5-18).

In the end, after hearing Board Member Appel's explanation for his position in favor of the modification requested, the Chairman stated that he [Appel] "made a good legal argument and maybe some judge would reverse this." **(R. p. 70, lines 16-17);** see also **(R. p. 63:10-11)** (Member

Smith noting that "I think this is a legal question."). The BZA then voted 4-1 to deny the request to modify the Special Exception to allow the permissible and lawful accessory uses on the interior of the eighth floor that are permitted as a matter of right, with Board member Appel being the only member to support Dewberry 334's application. **(R. p. 122, lines 13-23).**

On June 27, 2017, Dewberry 334 filed its detailed grounds for appeal of the BZA's decision. **(Pet. and Grounds for Appeal).** Dewberry 334 enumerated numerous reasons the BZA decision was arbitrary and capricious, constituted an error of law, and denied it substantive due process. **(Pet. and Grounds for Appeal, ¶ 32).**

The grounds Dewberry 334 alleged for vacating the BZA decision included the following: that 2011 Special Exception did not contain a condition prohibiting these typical lawful hotel accessory uses on the interior of the eighth floor; that Dewberry 334 was entitled to these permitted accessory uses as a matter of right; that no City ordinance requires a hotel owner to seek a new special exception for accommodations use every time it introduces a particular permitted use or moves the location of a permitted use in the hotel; that no condition of the 2011 Special Exception prevented Dewberry 334 from using the walkway around the northeast corner of the outdoor terrace; that the City's conduct in approving the plans for the eighth floor as well as its inspecting and approving the construction itself estopped the City from prohibiting Dewberry 334 from conducting its intended accessory activities inside; and that the BZA decision was based on speculative comments about exterior noise that were was unsupported by any evidence. **(Pet. and Grounds for Appeal).** The Petition and Grounds for appeal requested that "the Decision of the BZA should be vacated and set aside and this Court should rule that the Petitioner has the right to use the interior of its eighth floor for the intended accessory uses and any other accessory uses not

prohibited by ordinance or law as well as the right to have its guests access the northeast quadrant of the rooftop terrace." **(Pet. and Grounds for Appeal, ¶ 32).**

The Circuit Court ruled in Dewberry 334's favor and entered a lengthy and considered order on December 15, 2017, laying out the multiple bases for its decision. **(Final Order).** Thereafter, in denying Appellants' Motion to Reconsider, Alter or Amend, the Circuit Court entered an Amended Final Order on February 9, 2018. **(Am. Final Order).** The Amended Final Order expanded on the reasons the City was estopped to prevent the use of the interior of the eighth floor for the permitted uses for which it was constructed. **(Am. Final Order).** Based on the record before the BZA and the applicable law, the Circuit Court found "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." **(Am. Final Order, 7).**

The Circuit Court based its decision on five separate grounds:

1. [T]here 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.

2. [The BZA's decision was arbitrary and capricious because] 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 various suppositions of activity that might happen on the outside terrace.

3. [The BZA's decision was arbitrary and capricious because] the comments as to possible noise and its possible detrimental effect on the value of the properties in the neighborhood or its possible destruction of the neighborhood were entirely speculative and not competent evidence;

4. [The BZA's decision was arbitrary and capricious because] there are safeguards in place to guard against any disruptive noise from the interior or rooftop terrace, in the form of the conditions the Board imposed in the 2011 Special Exception and the noise ordinances of the City of Charleston; and,

5. The 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 as well as the City's inspection and approval of the construction while it was under way.

(Am. Final Order, 7-16).

STANDARD OF REVIEW

"[S]ection 6-29-840 [of the South Carolina Code] prescribes the standard of review a Circuit Court should apply when considering an appeal from a local zoning board." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). That section provides "[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 § 6-29-840(A). A jury's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the jury's findings. Austin, at 35, 606 S.E.2d at 212.

This Court applies "the same standard of review as the Circuit Court below.... In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." Id. at 33, 606 S.E.2d at 211. Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (citing Mikell v. Cty. of Charleston, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is

permitted when the issue concerns the construction of an ordinance." Id. at 9-10, 776 S.E.2d at 757 (quoting Mikell, 386 S.C. at 158, 687 S.E.2d at 329).

". . . [A] decision of a municipal 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. (quoting Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *183 Cty. of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)). Recently, this Court has stressed that the "deferential standard of review does not mean a zoning board can never be reversed." See Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018), *reh'g denied* (June 5, 2018), *pet for cert pending*. See also, Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012), (revising the Circuit Court's decision to affirm the BZA "because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony."); Bannum, Inc. v. City of Columbia, 335 S.C. 202, 204-05, 516 S.E.2d 439, 439-41 (1999) (finding the zoning board's denial of a permit for an exception was arbitrary and reversing the denial because the zoning board "either discounted or disregarded every single bit of evidence put up by" the appellant and "[i]nstead, it based its holding on the four factors submitted by" the opponents to the exception); Helicopter Solutions, Inc., 414 S.C. at 9-10, 776 S.E.2d at 757-58, (affirming a Circuit Court's reversal of a zoning board, finding the Circuit Court's decision was based on the construction of an ordinance—which was a legal conclusion, not a factual finding).

ARGUMENT

I. The Circuit Court correctly found that neither the City's zoning ordinance nor 2011 Special Exception dictates that Dewberry 334 cannot vary the location of permissible accessory uses from the conceptual floor plan submitted with its application for special exception.

The Circuit Court found that neither the City's zoning ordinance, nor the 2011 Special Exception, requires Dewberry 334 to strictly adhere to the exact accessory uses and the exact location of those accessory uses that were shown in the preliminary conceptual floor plans submitted to the BZA years before the final construction plans were approved by the City's building official. Judge Nicholson correctly determined that the BZA committed an error of law in denying Dewberry 334 the right to use the interior eighth floor for the accessory uses for which they were constructed.

The lower court explained in detail the basis for its ruling that the BZA had no legal basis for refusing to allow Dewberry 334 use of the four interior rooms and the northeast corner of the terrace walkway:

> 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.

* * *

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).

(Am. Final Order, 7-9).

The accommodations overlay zone and the ordinance governing the approval of an accommodation use, inclusive of hotels, "is intended to identify those areas within the City limits where ***accommodation uses are allowed*** . . . [because] [a]ccommodation uses are prohibited

except within the Overlay Zone. . ." **(R. p. 145)** (double emphasis added); see also, **(R. p. 145)** (City Ordinance §54-220(b) stating that "[i]n 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 district as listed in Article 2: Part 3, and the following uses subject to the approval of the Board of Zoning Appeals: 1. Accommodation uses.").

As noted by BZA Member Appel and the lower court, pursuant to section 54-220 governing special exceptions for accommodations uses, the BZA determines whether the accommodations use proposed by a landowner is suitable for the property; its role does not include permanently locking in types of permissible uses accessory to the accommodations use or the location of those accessory uses within a building on the property:

> 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. We have an application -- an applicant right now who is taking a position that I think has some merit that having an interior bar. . .
>
> * * *
>
> ***I don't even know if you need to go to accessory use. I think that is an incidental use to what it means to be an accommodation use under -- under our ordinance.*** I just looked at the definition of use under our ordinance. I think when you approve a hotel, when you approve a hotel, you get a lot of stuff that comes with that automatically.

(R. p. 68, line 2-p. 68, line 18) (double emphasis added); **(Am. Final Order, 7)** (("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 . . ." (emphasis supplied by the Circuit Court)).

Section 54-203[5] of the City's Code of Ordinances cited by the Circuit Court in the above

[5] Appellants argue in their brief that neither the Circuit Court nor this Court can consider Section 54-203 of the City's Code of Ordinances because a court cannot take judicial notice of municipal

excerpt from the Order makes clear that a property owner is entitled to all uses "customarily incidental and subordinate to a principal use located on the same lot or parcel." None of the City's ordinances abridges that right by stating that permissible accessory uses must occur in some specific location on or within the property. The ordinances granting an owner accessory uses as a matter of right are location-neutral.

In other words, under the plain language of the ordinances a property owner must obtain a special exception for accommodations use but is not required to obtain (or seek to amend) a special exception for uses that are accessory to a principal, approved accommodations use either as to the accessory use itself or the location of the use in the hotel. The hotel owner with an approved accommodations use is not required to seek an amendment to its special exception to move its gift shop, or make a guest room an office, or install a laundry for the hotel's linens, or add a small bar-restaurant, or move the spa/fitness center from one floor to another, for instance.

Nor is that hotel owner required to obtain an amendment to the special exception to ***remove*** an accessory use that was shown on the preliminary conceptual plans that were submitted to the BZA as part of the application for the special exception. Dewberry 334 was not required to return to the BZA for permission to forego building the swimming pool on the outdoor terrace. As Board Member Robinson pointed out, the City's logic would mean the City could force Dewberry 334 to install the swimming pool on the outdoor terrace since it appeared on the preliminary conceptual

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ordinances, citing Harkins v. Greenville County, 340 S.C. 606, 533 S.E. 2d 886 (2000). **(Appellants' Brief, p. 12, fn. 6)** In Harkins our Supreme Court said it could not take judicial notice of an ordinance that was not in the Record on Appeal. In this case, all the referenced ordinances were presented to the Circuit Court and are in the Record on Appeal. Harkins is not applicable. Further, Appellants complain that the ordinances cannot be considered because they were not part of the record before the BZA. Appellants are mistaken again. On appeal from the BZA, "the court may not take additional evidence." S.C. Code Ann. §6-29-840(A). Ordinances are not factual matters in the nature of evidence. Ordinances are law and may be considered by the reviewing court just like statutes.

floor plans. **(R. p. 66, lines 16-19).** Yet, the City has never taken the position that the BZA had to approve the removal of the pool from the hotel's plans, and it has never required the spa and fitness center to be moved back up to the eighth floor from the second floor. **(R. p. 25, lines 3-25).**

As the Circuit Court remarked in the preceding excerpt from the Amended Final Order, the construction of zoning ordinances by a zoning administrator and board of zoning appeals is a legal question, not a factual finding, and is therefore not entitled to the same level of deference to the BZA as a factual finding. See also, Mikell v. Cty. of Charleston, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). Further, as stated by the Circuit Court in the quoted excerpt from the Amended Final Order, statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed. They are in derogation of the common law right to use private property to realize its highest utility. Such statutes and ordinances should not be impliedly extended to cases not clearly within their scope and purpose. See Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953); Keane/Sherratt P'ship by Keane v. Hodge, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App.1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted)).

Appellants argue that "[t]he 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." **(Appellants Br., 10).** Contrary to Appellant's argument, the "Intent" section of section 54-220 does not make a single reference to accessory uses:

> (a) ***Intent.*** The A Overlay Zone is intended to identify those areas within the City limits where ***accommodation uses*** are allowed. ***Accommodation uses*** are prohibited except within the A Overlay Zone, with the exception of bed and breakfasts that are approved in accordance with the provisions of Section 54-208 or 54-208.1, and short term rentals that are approved in accordance with the provisions of Section 54-227. The City places a high value on the preservation of the character of its residential neighborhoods. Potential negative impacts affecting residential neighborhoods shall be avoided or minimized to the greatest extent possible.

(R. p. 145) (double emphasis added).

The ordinance's reference to accessory uses outside the "Intent" section is far more limited than suggested by Appellants. In determining whether to grant a special exception for accommodations use, the BZA is to consider eighteen factors including: "(7) the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation; ...." **(R. p. 146).** The BZA's decision denying the amendment to the Special Exception in this case had nothing to do with the size of the permissible accessory uses inside the eighth floor, or their impact on parking or on their impact on traffic generation. The BZA's decision rested completely on their and the commenters' speculation about possible noise. Moreover, their concern about the sound they speculated might occur was not from the accessory use locations *inside* of the building that Dewberry 334 sought permission to use but from the *outside* of the building from the terrace that Dewberry 334 was free to use, subject to conditions 4, 9, and 10 of the 2011 Special Exception.

Appellants argue that the BZA was correct in denying Dewberry 334's request to amend the 2011 Special Exception because Dewberry 334 did not demonstrate the impact on parking and traffic from the accessory uses inside the eighth floor, or satisfy any of the other seventeen criteria Section 54-220(b)(1) requires the BZA is to consider.[6] Appellants overlook that Dewberry 334

[6] Obtaining a special exception for accommodations use does not exempt a hotel owner from

was not applying in 2017 for a special exception for *accommodations use*. It had already obtained the Special Exception for *accommodations use* in 2011. Instead, at the insistence of the City, it applied for approval of the location of permissible *accessory uses* in the rooms constructed for them on the inside of the eighth floor.

In their brief Appellants repeatedly state that the accessory uses constructed on the inside of the eighth floor were new accessory uses. First, it does not matter whether we are talking about a new accessory use or an existing accessory use. All that matters under Sections 54-120 and 54-203 of the City's Code of Ordinances is whether the use is accessory to the principal use of the Hotel. If so, the use is allowed as a matter of right. Second, the accessory uses constructed on the inside of the eighth floor are in fact accessory uses already occurring in the Hotel; they are not new accessory uses for the Hotel. On the first floor the Hotel has a ballroom that serves a function-meeting room, a restaurant known as Henrietta's, a kitchen, and a bar known as the Living Room. **(R. p. 9, lines 14-15); (R. p. 19, line 24-p. 20, line 2); (Tr. 10/9/17, p. 20, lines 10-12)**. These are the identical accessory uses that were constructed on the inside of the eighth floor.

Appellants argue that disclosure of the accessory uses of restaurant and bar is especially important on the application to the BZA for a special exception for accommodations use because Section 54-220(b)(1)(c) caps the square footage of these particular uses as a percentage of the overall square footage of the hotel.[7] Putting aside that this provision in the ordinance was *not*

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mandatory minimum off-street parking requirements. If the addition or expansion of an accessory use in a hotel would increase the minimum number of off-street parking spaces required, enforcement of the additional parking requirement would be through the separate ordinances governing off-street parking, not through the accommodations use ordinance, as somewhat suggested by Appellants.

[7] "[T]he 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, shall not exceed 12 percent of the total interior, conditioned floor area in the facility, except that each facility shall be permitted to exempt from the calculation of total

adopted until 2012, a year after the BZA approved the Special Exception, the Appellants never asserted that the addition of the small Citrus Club would cause the hotel to exceed this cap, nor is there any proof to this effect. Additionally, there is nothing in the current version of Section 54-220 that states that the locations of these uses cannot change. It simply imposes a cap on the square footage for these two particular accessory uses. Finally, Appellants did not raise this argument until their Motion to Reconsider, Alter, or Amend. Rule 59 (e) prevents a party from raising an argument for the first time in the party's motion under Rule 59(e). Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

The Appellants never fully explained the rationale for preventing the Hotel from accessing the terrace walkway around the northeast corner of the eighth floor other than that the preliminary conceptual plans accompanying the application for the special exception in 2011 showed this portion of the perimeter of the eighth floor as a "green roof." For the reasons already discussed at length, the 2011 Special Exception did not contain a condition that prohibited Dewberry 334 from changing this narrow section from "green roof" to terrace walkway. The BZA's decision to refuse to allow normal access to this walkway for zoning reasons based on the 2011 Special Exception was erroneous as a matter of law. [8]

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restaurant floor area one interior, ground floor restaurant tenant space if the total tenant space does not exceed 2,000 square feet, the restaurant tenant does not serve alcoholic beverages, and the exempt restaurant tenant space is clearly labeled with these restrictions on the floor plans submitted with the application for this zoning special exception;..." 54-220(b)(1)(c) **(R. 145).**

[8] To the extent Appellants suggest that the prohibition on access has something to do with protecting Second Presbyterian Church, which is well to the northeast of the Hotel at the opposite end of Wragg Square, the church's letter made no mention of concern about the rooftop, and simply requested adequate screening of the rear of the parking lot across from the church. **(R. p. 116).**

In sum, neither the City's zoning ordinance nor the 2011 Special Exception prevented Dewberry 334 from locating any particular permissible accessory uses inside the eighth floor or required Dewberry 334 to seek BZA approval to vary the location of permissible accessory uses from the conceptual floor plan submitted with its application for the 2011 Special Exception. The BZA committed an error of law in preventing Dewberry 334 from occupying and using the four rooms within the eighth floor of the Hotel and accessing the terrace walkway around the northeast corner of the building on the basis the Special Exception prevented these accessory uses in the locations where they were constructed. The Circuit Court should be affirmed.

II. The Circuit Court correctly determined that Appellants are estopped to deny Dewberry 334 the right to use and occupy the permissible accessory uses it constructed on the inside of eighth floor based on its reliance on the City's building official's approval of the construction plans showing the intended accessory uses and approval of the actual construction.

The Circuit Court correctly determined that Appellants are estopped to deny Dewberry 334 the right to use and occupy the permissible accessory uses it constructed on the interior of the eighth floor. The City approved the construction plans showing the intended accessory uses and approved the construction itself. Dewberry 334 relied on the City's approval by authorized officials of the City in proceeding with constructing the eighth floor in compliance with those plans. As just discussed, no City ordinance nor any condition in the 2011 Special Exception forbid those accessory uses from being located inside the eighth floor.

In April 2015, the City's building official approved the final construction plans for the interior spaces on the eighth floor that showed Function Rooms A, B, and C, as well as the Pantry. **(R. pp. 87-88)** (Permitted set of plans for the eight floor); **(R. p. 8, line 24-p. 9, line 2)** (BZA Staff discussing that after the 2011 Special Exception was granted, the project "made its way through the permitting process and - - and construction began"). In reliance on this approval, Dewberry

spent millions of dollars in constructing the eighth floor (and the second-floor spa and fitness facilities) and the outdoor terrace. However, after the eighth floor and the outside terrace were constructed, the City—for the first time—asserted that the applicable zoning did not allow the Dewberry to use and occupy the small bar with limited food service, nor the pantry-kitchen adjacent to it, nor a small room to the side described as the reading room; nor the function room called the Rivers Room for anything other than "yoga and fitness classes." **(R. p. 128).**

As noted by the lower court, the South Carolina Supreme Court has applied the doctrine of estoppel 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. **(Am. Final Order, 16);** Charleston County v. Natl. Advert. Co., 292 S.C. 416, 357 S.E.2d 9 (1987) (finding Charleston County estopped from contending construction permits were erroneously approved when the applicant spent $36,000 erecting an approved billboard and "[t]he interpretation given by [the County Building Inspector and Zoning Regulator] was clearly within the scope of his authority since he is the Building Inspector and is designated in the ordinance as the official charged with its enforcement.")); Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985) ("Government agents, acting within the proper scope of their authority, can by their acts give rise to estoppel against a municipality. . . .To allow the City to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon a re-assessment of the meaning of an undefined term in the ordinance would be unconscionable."); 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 essential elements of an equitable estoppel the party claiming the estoppel must demonstrate are: (1) the party's lack of knowledge and of the means of knowledge of the truth as

to the facts in question; (2) the party's reliance upon the conduct of the party estopped; and (3) the action based thereon was of such a character as to change prejudicially the position of the party claiming the estoppel. Landing Dev. Corp., at 219, 329 S.E.2d at 424 (citing Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311, 313 (1980)). As found by the Circuit Court, all three elements are present here, and the Appellants are estopped from asserting the zoning does not allow Dewberry 334 to use and occupy the accessory uses constructed inside the eighth floor pursuant to plans approved by the City's building 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.

(Am. Final Order, 17)

Appellants do not dispute that the City's building official approved the construction plans, nor that the City's building construction officials repeatedly inspected and approved the construction of the eighth floor over many, many months, nor that the Dewberry spent millions of dollars in reliance on that approval. Instead, Appellants claim that the building official went rogue and that Appellants should not be estopped by the "***erroneous conduct of its agents***, even if there has been reliance on that conduct." **(Appellants Br., 28)** (double emphasis added). In making this audacious assertion, Appellants invoke S.C. Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, (Ct. App. 1987) to assert that the building official's countless approvals were erroneous and beyond the scope of his authority. But, here, unlike Vogel, the government official was acting in his official capacity and exercising the authority vested in him.

In Vogel, Mrs. Vogel asserted that the Myrtle Beach planner for the S.C. Coastal Council verbally told her that she could rebuild a deck without a permit in the same location as it once stood. Id. at 451, 357 S.E.2d at 188. However, the planner had no authority to approve deck construction as he "had authority only to issue dock permits." Id. at 453, 357 S.E.2d at 189. Unlike Vogel, in this case there is no dispute that the City's building official had the authority to review the construction drawings and approve or reject them, as well as authority to issue or refuse to issue the building permit. See e.g. **(Appellants Br., 28-29)** (asserting that the building official did her job by approving the construction drawings).

Appellants attempt to parse the authority of the building official by arguing his approval is limited to compliance with the building code and has nothing to do with zoning. Id. However, the contrary is true. As noted by the Circuit Court, the City's ordinances impose on the building official the responsibility in inspecting new construction to confirm the construction is in compliance with the zoning, including any conditions imposed by the BZA:

> 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.

(Appellant-Pet'r Return to Res't Mot. To Reconsider, Alter, or Amend, at Attachment 2) (City Ordinance Section 54-901 (double emphasis added); see also, **(Am. Final Order, 17)**.

The clear wording of this ordinance completely undermines Appellants' argument that the City's building official has nothing to do with zoning. The ordinance charges the building inspector with noting any construction that is not authorized by the BZA. The approvals issued

by the building inspector did not include any notation or explanation that the construction was in violation of the BZA's Special Exception or that Dewberry 334 could not proceed with construction until the BZA modified the 2011 Special Exception to approve these particular accessory uses in the locations shown on the construction plans. Simply put, the Dewberry was entitled to rely upon the approval of the construction plans, the issuance of the building permit, and the approval of the actual construction by the City official vested with these responsibilities.

Appellants rely heavily on Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (2001), for the proposition that the issuance of building permit will not preclude later enforcement of a zoning provision. **(Appellants Br., 28)**. Grant involved the conversion of the ground floor of a building into an apartment below the minimum elevation allowed under the municipality's flood ordinance. Id. The Court determined that that the municipality was not estopped by mistakenly issuing the permit because the landowner could have easily determined that the city's ordinances plainly stated a residence was not allowed below the flood elevation. See id. ("Grant could have easily ascertained the flood limitations on his building by reviewing the zoning/flood ordinance.").

Here, as explained above, there was no condition in the 2011 Special Exception nor provision in the City's zoning ordinance that forbid Dewberry 334 from placing permissible accessory uses in locations other than those shown on the preliminary conceptual plans provided to the BZA four years before the City approved the final construction drawings in April 2015. Where, as here, there is no ordinance expressing the limitation urged by Appellants, it would be unconscionable to allow Appellants to repudiate the actions of the City's building official taken within the scope of his authority and to repudiate his approval of the final construction plans and the construction itself. See e.g. Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 221, 329 S.E.2d 423, 426 (1985) ("To allow the City to repudiate its former interpretation of permissible

rentals and the statements of its zoning director, based upon a re-assessment of the meaning of an undefined term in the ordinance would be unconscionable." (citing Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958))).

Finally, Appellants assert that Respondent has unclean hands and the Circuit Court should not have applied the doctrine of estoppel on that basis. **(Appellants Br., 31-32)**. The doctrine of 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. See generally, Ingram v. Kasey's Associates, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000); First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

Appellants claim the "intentional submission of construction plans that called for other than SPA/Fitness uses approved as part of its Special Exception, and then pretend surprise at being caught, is disingenuous and certainly provides no basis for estoppel." **(Appellants Br., 32)**. Appellants make this bold statement in the last several lines of their brief with absolutely no citation to the record. The record does not support any finding of the intent attributed to Respondent by Appellants, and, in fact, supports the opposite inference.

The preliminary conceptual floor plan for the eighth floor submitted with the application for the Special Exception in 2011 showed the interior as "spa/fitness" and a pool on the rooftop terrace immediately to the South of the new eighth floor. **(R. p. 84) (R. p. 5, line 24-p. 6, line 9) (R. p. 7, line 19-p. 8, line 2)**. Dewberry 334 acted consistently three years later when it submitted, and the City approved, construction permit drawings for the eighth floor dated June 27, 2014, showing a pool on the rooftop terrace and interior spaces that included restrooms and a large function room. **(R. p. 85-86); (R. p. 16, lines 2-8) (R. p. 16, lines 11-12)** ("So Mr. Dewberry still had the idea that there was going to be a pool there" in 2014). However, the feasibility of

constructing and operating the pool on the outdoor terrace became too doubtful. See **(R. p. 16, lines 12-22)** ("When he went to price it with the contractor and we went to design the specifics beyond the floor plan, he realized that it was not a very good idea. First, it was going to cost like a million and quarter dollars to put it there, and then he learned he was going to have to cool the water because it was up on top of the building with full exposure to the sun and then there were all kinds of caveat from the builder and designer that if this thing starts to leak, you know, we're out that's the risk you're going to have to have.").

For those reasons, Respondent decided not to build the pool on the outdoor terrace and, instead, submitted new drawings for the eighth floor and terrace to the City for approval in 2015. **(R. pp. 87-88); (R. p. 120)** ("After receiving the engineering and cost estimates for the swimming pool, the [Dewberry] decided to eliminate the swimming pool and to modify the floor plan for most of the rooftop, also called the eighth floor."); **(R. p. 10, lines 9-18)**; **(R. p. 17, lines 3-11) (R. pp. 87-88).** The changes were all reflected on the revised construction permit drawings dated April 24, 2015. **(R. p. 17, lines 3-11) (R. pp. 87-88).**

The record shows that there is no basis for the Appellants' suggestion that Dewberry 334 engaged in a "bait and switch" tactic or otherwise committed some nefarious act that would trigger the equitable doctrine of unclean hands and prevent it from invoking equitable estoppel against Appellants. As explained above, the record supports the conclusion of the Circuit Court that Dewberry 334 worked diligently to modify its plans and seek appropriate approvals from the City as the project progressed. See **(Am. Final Order, 15-17).** In fact, it was the City's conduct during the plan review process that "troubled" the Circuit Court. **Am. Final. Order, 16)** ("The Court is troubled by the seeming disconnect between the City's zoning official and the City's building official."). What is "disingenuous"—the word used by Appellants—is the City's after-the-fact

repudiation of its approval of the construction plans and its repudiation of its approval of the construction based on the contention the zoning never allowed those uses.

Finally, it was the lower court's prerogative to determine whether the conduct of the Dewberry 334 under these circumstances amounted to unclean hands that might prevent the application of estoppel in this instance. The balancing of the competing equities associated with the assertion of estoppel and the defense of unclean hands is in the discretion of the judge. Straight v. Goss, 383 S.C. 206-07, 678 S.E.2d 443,457-58 (Ct. App. 2009) (In an action seeking equitable relief, the court balances the equities of the parties, including those involving the defense of unclean hands, to determine what, if any, relief to give).

Therefore, for these reasons, the Court should affirm the Circuit Court's decision reversing the BZA's decision on the separate alternative ground of estoppel.

III. The Circuit Court correctly ruled the BZA's decision was arbitrary and capricious where the BZA denied the request for the lawful accessory uses *inside* the eighth floor, based on concerns about permissible activity *outside* on the terrace.

The Circuit Court correctly ruled that the BZA acted arbitrarily and capriciously in denying the request for the interior uses based on speculation about noise from the exterior terrace. As the Circuit Court noted, the denial of the use of the interior will not prevent persons from being on the outside 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." **(Am. Final Order, 11).**

The BZA's denial of the accessory uses on the inside of the eighth floor does not eliminate the activities on the terrace the opponents claimed could possibly generate sounds that might be heard in the residential area on the far side of the Hotel's parking lot. Further, as highlighted below, the Board members who voted against modifying the Special Exception agreed that noise

or sound from the inside was not an issue or a concern. If the hypothetical problem is not sound from the inside but instead sound from the outside from activity that can occur there even if the interior accessory uses were not allowed, the denial of Dewberry 334's request to be allowed the accessory uses inside was per se arbitrary and capricious. **(Am. Final Order, p. 12)**

As Respondent explained to the BZA, the interior uses will not create noise issues for the neighborhood because "[t]he complete exterior to the [the extent of the] glass has 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 of an effect on the outside." **(R. p. 18, lines 5-9).** Several members of the BZA recognized and commented that the use of the interior space on either floor as proposed by the Dewberry raised no exterior sound concerns. See **(R. p. 66, lines 7-11)** (Chairman Krawcheck explaining ". . . 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. So the concern is -- is outside use, not interior use."); **(R. p. 66, lines 16-24)** (Member Robinson agreeing the only concern is the outside and stating ". . . the use on the interior for the bar is fine, but I know that it would be a noisy situation outside. That's the detriment").

Dewberry's 334's request to the BZA in 2017 was for approval of the *interior* accessory uses for the eighth floor. The request did not include a request to be allowed to use the seating area on the outside terrace or to allow activity on the terrace because nothing limited such seating or other activity in the first place. As for the potential for "noise," the three previously mentioned conditions in the 2011 Special Exception were for the specific purpose of reducing or eliminating the chance that sound from persons on the terrace would be heard eight stories below. Yes, guests visiting the interior accessory uses are free to go on the terrace, and, to that extent, their presence on the terrace might be considered an extension of the uses on the interior or facilitated by the

accessory uses, as Appellants argue. But, there is no zoning restriction preventing them from standing, walking, sitting, or talking on the outside terrace. As noted by the lower court, "***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.***" **(Am. Final Order, 12)** (double emphasis added). The BZA members who voted against the modification of the Special Exception admitted that the planned and intended accessory uses inside the eighth floor were not an issue or concern.

The BZA's decision to deny those permissible accessory uses on the *inside* because of unsupported speculation about sound from persons engaged in permissible activity *outside* was inherently arbitrary and capricious, as the lower court concluded. **(Am. Final Order, 12).** The Circuit Court's ruling vacating the BZA's decision on this alternative ground should be affirmed.

IV. The Circuit Court correctly ruled the BZA's decision was arbitrary and capricious for being unsupported by competent evidence where the BZA denied the request for the lawful accessory uses *inside* the eighth floor, based solely on random speculative comments about possible sound that might be emitted from the *outside* terrace as well as speculative comments the possible sound would cause a detrimental effect on the value of the properties in the neighborhood or destroy the neighborhood.

A decision of a municipal 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." Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). An abuse of discretion occurs when the BZA's "decision is unsupported by the evidence . . . ." Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting Cty. of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

The Circuit Court correctly ruled the BZA's decision to deny the request for use of the ***inside*** areas on the eighth floor based on speculative conjecture from Board members and lay

persons that possible sound from the ***outside*** terrace on top of building would disrupt the residential neighborhood and destroy property values was arbitrary and capricious. This "finding" of the BZA was unsupported by any competent, substantial, and material evidence. See **(Am. Final Order, 12).**

Even though conjectural opinions about noise from the ***outside*** rooftop terrace was not a valid reason to deny allowed uses on the ***inside*** of the building, as discussed in the previous argument, there was no competent proof that there would in fact be excessive noise from the outside rooftop terrace that would disrupt the residential neighborhood and destroy property values and the neighborhood itself as the alarmist opponents contended. Unsupported, speculative, off-the-cuff comments about possible noise from persons on the outdoor terrace eight floors above street level do not provide competent evidence to sustain a factual finding by the BZA that there will be excessive noise from the rooftop terrace that will disrupt the neighborhood. See, Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012) (this court reversed the Circuit Court's decision to affirm the BZA "because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony.").

None of the opponents brought forth anything other than their personal speculation that sound from the rooftop terrace would be audible in the residential area to the east of the Hotel and that it would be loud and disruptive. See **(R. p. 46, lines 13-14)** ("I am telling you that kind of sound is going to destroy our neighborhood."); **(R. p. 47, lines 14-17)** ("A rooftop bar ... will destroy our quality of life and marginalize the people."); **(R. p. 48, lines 15-16)** (citizen commenting that "[t]he building on the rooftop bar will allow music into and noise into the neighborhood."); **(R. p. 59, lines 21-22 & p. 60, lines 8-9)** (citizen commenting that "I do not need

another bar especially a rooftop bar" and "I know I would hear loud music from the Dewberry."); **(R. p. 47, lines 4-17); (R. p. 135)** (Petition stating that "Quality of life is paramount. It is unthinkable a zoning board would approve the use of a rooftop bar capable of holding up to 400 people without neighborhood consensus. This will destroy our quality of life and marginalize the people.").

As indicated in the last excerpt from the record before the BZA, the opponents and Appellants repeatedly refer to the small bar to be known as the Citrus Club as a "rooftop bar." Putting aside Appellants' implication that there is something inherently pernicious in a "rooftop bar" in a five-star hotel, the Citrus Club is a small intimate space of three booths and roughly ten bar stools on the southwest side of the eighth floor looking out on Meeting Street and Marion Square, the opposite direction of the opponents' neighborhood. **(R. pp. 91-93)** (interior pictures of the Citrus Club); **(R, p. 115)** (floor plan of eighth floor and outside terrace). It is not a dance hall, nightclub, or disco. There is no room for a band, much less 400 people. The small bar area is ***inside*** not outside on the rooftop terrace, nor wide open to the rooftop area like the bars at other hotels such as the Vendue, Market Pavilion, Charleston Place, The Restoration, and the Hotel Bennett. **(R. p. 15, line 3-5) (R. p. 22, lines 24-5); (R. pp.103-108).**

The seating area for the outside terrace is on the southwest corner of the terrace and along the western terrace walkway, also facing Meeting Street and Marion Square; it is not even on side of the residential neighborhood behind the Hotel's large parking lot on the other side of the building. **(R. pp. 79, 89, 97-99).** As the pictures show, the combined seating area and other areas on the rooftop terrace also could not hold anything close to 400 persons.

As to Appellants' unsupported suggestion that there will be loud and crazy behavior on the rooftop terrace, one need only consider the seating arrangement on the terrace as well as the fact

that in its brief history of operation the Dewberry has proven itself to be the highest quality hotel and received numerous awards. **(Transcript of Hearing 10/9/17, p. 16, lines 23-25).**

Appellants refer to the remarks of one person who said that he walked his dogs in Marion Square and could hear noise from a rooftop bar at the corner of Calhoun and Meeting Street. **(Appellants Br., 24) (R. p. 50, lines 12-20).** Aside from the Citrus Club being on the inside of the Hotel and not on the rooftop terrace, there was no showing at all of similarity of circumstances. The noise very well could have been from amplified music that Dewberry 334 is prevented from having outside.

The single noise citation that the Hotel received arose from a wedding reception in the ballroom on the ground floor where there was outside amplified music. The management of the Hotel mistakenly thought the prohibition on outside amplified music in the conditions of the Special Exception applied only to the rooftop terrace. The management now understands the condition forbids amplified music anywhere outside the Hotel. **(R. p. 31, lines 2-18).**

Appellants assert the Circuit Court misapplied the "burden of proof" in reversing the BZA's decision as arbitrary and capricious. **(Appellants Br., 18-20)**. According to Appellants, the Circuit Court should not have reversed the BZA, even if the BZA decision was based solely on unsupported and speculative testimony, because according to Appellants, Dewberry 334 did not meet its burden of proof at the BZA. **(Appellants Br., 18-20)**. Appellants' argument conflates Dewberry 334's burden on appeal to the Circuit Court to show the BZA's decision was arbitrary with a trial-like burden of proof at the BZA level. None of the cases cited by Appellants holds that an applicant has the burden of evidentiary proof before a board of zoning appeals. Proceedings before a board of zoning appeals are not trial proceedings. Instead, the burden referenced is the burden on an appellant from an adverse decision in Circuit Court to show the board committed

legal error. See Pressley v. Lancaster County, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001) (in case not involving a board of zoning appeal, the party claiming Lancaster County Council acted arbitrarily had the burden of proof); Application of Groves, 226 S.C. 459, 466, 85 S.E.2d 708, 711 (1955) (discussing that no evidence supported a board of adjustment's decision to grant a *variance*).

To obtain a special exception for an accommodations use, an applicant must provide sufficient detail in the application and presentation to the board to support the application, but an applicant does not have a burden of proof similar to a plaintiff in civil trial or the government in a criminal trial. Section 220 provides the BZA "may permit accommodation uses as an exception where it finds. . ." the criteria are met; nothing prevents the BZA from granting a special exception based upon the information in an application and the staff report. **(R. p. 145)** (City Ordinance §54-220).

It is also worth noting that no BZA board member expressed any concern over a lack of proof offered in support of Dewberry 334's application, and lack of support was not a basis for the BZA denial.

Furthermore, even if there were a burden of proof at the BZA level, Dewberry 334 more than satisfied the burden with the substantial evidence it presented in support of the application to amend the 2011 Special Exception. Respondent submitted a letter from the firm that was responsible for the design and installation of the system of speakers on the terrace. After noting that the system was designed for background music typically adjusted to "the level of the human voice or slightly lower," the firm concluded that "[w]e do not believe under normal circumstances the music at that elevation will be heard at street level, at any of the surrounding buildings, or by the residential neighborhood to the East." **(R. pp. 140-141).** Even City staff agreed with Dewberry

334 that speakers of this nature are allowed and do not violate the condition prohibiting amplified music. **(R. p. 35, lines 3-6)** (City staff explain that "Speakers are okay, but they can't be -- can't be -- the volume level can't be turned up above the normal conversational stones (sic) that people have. That's - - that's when it becomes amplified in my opinion.).

Appellants seems to suggest that to change the location of a few accessory uses on the eighth floor of the Hotel, Dewberry 334 was required to reapply for the approval of the accommodation use of the entire eight story building. See **(Appellants Br., 20)** (suggesting Dewberry 334 should have "satisf[ied] each of the requirements in section 54-220(b)(1) for an accommodations use). Appellants' position is inconsistent with the procedural posture of the application to the BZA and the comments at the BZA. It was clear at the hearing that the application was for an amendment to Special Exception for accommodations use to allow certain accessory uses. The many provisions of 54-220(b)(1) were not implicated because Dewberry 334 was not seeking a special exception for accommodations use. It already had that.

There was also no competent evidence before the BZA that there would be any negative effect on properties values or quality of life in the neighborhood. Nonetheless, the BZA embraced unsupported concerns by a small number of vocal opponents. See **(R. p. 67, lines 8-15)** (Unidentified Member stating that his position was based upon "protection of the neighborhood from anything that ***might be perceived*** to be a negative influence" (double emphasis added)).

Board member Appel recognized the absence of competent evidence of harm. He aptly described the opponents' comments as "at times slightly, frankly, overblown and borderline hysterical." **(R. p. 68, lines 20-21).** He reminded everyone, "[W]e're talking about people having a drink on a rooftop bar having a conversation. We are not talking about bands or anything like that on a rooftop." **(R. p. 68, lines 21-24).**

In holding that the BZA's "finding" activity on the terrace would produce disruptive noise and injure the residential neighborhood was unsupported by competent evidence, the Circuit Court relied on analogous holdings by this Court and the Supreme Court determining that similar board decisions for similar reasons were based entirely on speculation and not competent proof:

> 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.***

Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) (double emphasis added); **(Am. Final Order, 13-14)**. Similarly, in Bannum, Inc. v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999), the Supreme Court reversed a Circuit Court order that affirming 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 ZBA'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).

Because the BZA's finding that activity on the outside rooftop terrace that is already allowed will cause sound that will disrupt the neighborhood and injure property values was unsupported by competent evidence, the Circuit Court correctly reversed the BZA's decision on this separate alternative ground for being arbitrary and capricious.

V. The Circuit Court correctly ruled the BZA's decision was arbitrary and capricious because there are safeguards in place both in the 2011 Special Exception and in the City's noise ordinance that contain the sound from the rooftop terrace and prohibit disruptive noise.

The Circuit Court correctly ruled the decision of the BZA was arbitrary and capricious for the additional, alternative reason that there are legal restrictions in place that control the level of sound from the terrace and prohibit noise from the terrace that might disturb persons in the residential neighborhood behind the Hotel. See **(Am. Final Order, 14)** ("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 of the 2011 Special Exception impose controls on sound on the outside terrace to keep it from being a problem. **(R. p. 125)** ("(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"). Additionally, it is worth noting that 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 large 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. See generally, **(R. p. 72).**

Additionally, as the Circuit Court concluded, 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***.

City Code of Ordinances, Sec. 21-16. **(Am. Final Order at 15)**.

The BZA acted arbitrarily and capriciously by ignoring the conditions it had already imposed on Dewberry 334 to eliminate the possibility of any sound from the outside terrace intruding on the residential area beyond the Hotel's large parking lot. In fact, before hearing from the opponents, Chairman Krawcheck agreed with Respondent and questioned why Respondent had requested relief from the BZA to modify the Special Exception. He emphasized the Board already addressed noise from the outside terrace in the conditions to the Special Exception. If there was excessive noise from the outside terrace, Chairman Krawcheck stated that was an enforcement issue beyond the scope of the BZA's power. **(R. p. 35, lines 13-18)** (Chairman Krawcheck discussing whether the speakers on the terrace would violate the condition prohibiting amplified music: "But that's an enforcement issue" and ". . . this board . . . isn't an enforcement

board.); **(R. p. 36, lines 9-10)** (Chairman Krawcheck questioning "whether that's a Board of Zoning Appeals issue" in response to the Zoning Official's explanation that the Dewberry 334 was objecting to the limitations the City placed on the use of the interior of the eighth floor after it was constructed); **(R. p. 42, lines 14-16)** (Chairman Krawcheck noting that the conditions to the Special Exception "anticipated that there would be activity on the roof but not after 10:00 PM.").

As discussed by the Circuit Court, the City's noise ordinance provides another layer of protection from the opponents' speculative fear of noise. See Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975) (affirming a trial court decision that a municipality's decision not to rezone certain properties to a transitional commercial/residential zoning classification because the decision was "unreasonable" when ". . . the transitional 'D—1' classification includes provisions which can adequately protect the remaining residential lots from further encroachment.").

The Circuit Court correctly held the BZA's decision to deny Dewberry 334 the right to permissible accessory uses on the ***inside*** of the eighth floor because of speculative opinions about possible intrusive noise emanating from the ***outside*** terrace was arbitrary and capricious because there are adequate protections in place that prevent disruptive noise. Both the conditions of the Special Exception and the City's noise ordinance enact safeguards against excessive noise. As Chairman Krawcheck initially put it, potential noise is an "enforcement issue." The Circuit Court's ruling should be affirmed on this separate, alternative ground.

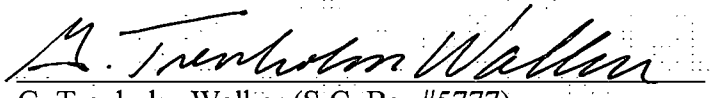
CONCLUSION

Throughout the proceedings in the Circuit Court, and now again in this appeal, Appellants have attempted to frame this case as one that is about what happens *outside* the building. It is not. This case concerns only whether Dewberry 334 should be allowed to use a meeting room, a reading room, a pantry kitchen and a small bar *inside* the building. Dewberry 334 has an absolute right to use those indoor facilities because they are plainly accessory to Dewberry 334's approved hotel use. And while, in contesting this litigation, Appellants may think they are protecting the interests of certain constituents, in fact, they are not. The irony of Appellants' position is that by reducing what Dewberry 334 may do *indoors*, Appellants would be relegating Dewberry 334 to actually doing more *outdoors* on the terrace.

For the reasons stated above, the Circuit Court's decision reversing the BZA should be affirmed on all five grounds.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC



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September 10, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000378

Dewberry 334 Meeting Street, LLC ..... Respondent,

v.

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

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have served on this 10th day of September 2018, a copy of the Respondent's Initial Brief and Designation of Matter on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

Frances I. Cantwell, Esq.
Daniel S. ("Chip") McQueeney, Jr., Esq.
City of Charleston Corporation Counsel
50 Broad Street
Charleston, SC 29401

Nancy Jane Dennis

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September 10, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Clerk, Court of Appeals
John C. Calhoun Building
1220 Senate Street
Columbia, SC 29201

Re: Dewberry 334 Meeting Street v City of Charleston and Board of Zoning Appeals
Appellate Case No. 2018-000378
WGFL File 7907.003

Dear Ms. Kitchings:

Enclosed please find Respondent's Initial Brief, Designation of Matter, and Proof of Service. Thank you for your courtesies in filing these with the Court.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC

G. Trenholm Walker

Enclosures (As Stated)
cc: Frances I. Cantwell, Esq.
Daniel S. McQueeney, Esq.

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