

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-CP-10-2183

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SC Court of Appeals

Dewberry 334 Meeting Street, LLC Respondent,

v.

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
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DEWBERRY 334 MEETING)
STREET, LLC,)
)
Appellant-Petitioner,)
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v.)
)
CITY OF CHARLESTON and)
BOARD OF ZONING APPEALS -)
ZONING,)
)
Respondents.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

**AMENDED FINAL
ORDER ON APPEAL**

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

BACKGROUND

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

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

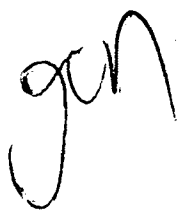
It is the use of the interior of the eighth floor that was the subject of Dewberry 334's application that was denied by the BZA on April 18, 2017.

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

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

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

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

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- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
 - (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
 - (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
 - (4) No exterior amplified music shall be permitted;
 - (5) Valet parking shall continue to be provided for on-site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
 - (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
 - (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
 - (8) Landscape improvements shown on plans to be installed;
 - (9) All activity outside on the roof shall stop at 10 pm;
 - (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and

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

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

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

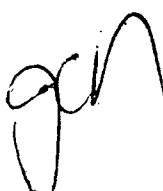
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Respondents argue that the conceptual floor plans reviewed by the BZA in 2011 designated the use of the interior of the eighth floor as "Spa/Fitness"; showed a swimming pool with pool deck on the exterior rooftop terrace; and depicted much of the rooftop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

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

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

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

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



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

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

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

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

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

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

STANDARD OF REVIEW

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

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

In Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 737 S.E.2d

863 (Ct. App. 2013), our Court of Appeals summarized this Court's scope of review as follows:

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

737 S.E.2d 864.

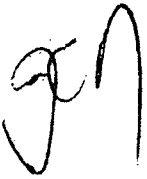
LEGAL ANALYSIS

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

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

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

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



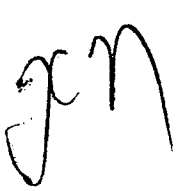
Furthermore, none of the City's zoning ordinances provide that a hotel operator is irrevocably bound by conceptual floor plans presented to the BZA, or that a hotel operator must obtain BZA approval to alter its accessory uses or change the location of those accessory uses within a property that has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

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

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

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

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

 Appeals in Helicopter Solutions, supra:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

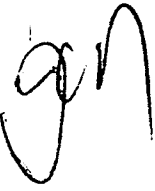
Second, there was no competent evidence that the use of the interior spaces would cause a detrimental effect on the value of the properties in the neighborhood or destroy the neighborhood. The public's comments at the hearing in this case bear a marked similarity to those of the public in Wyndham Enterprises,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

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

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

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

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

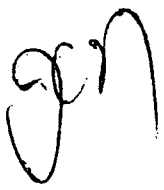
 In Bannum, Inc. v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999), our state Supreme Court reversed a circuit court order that approved the denial of a special exception by a zoning board for a halfway house as being arbitrary and capricious for similar reasons:

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

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

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

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



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

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

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

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

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

Sec. 21-16. - Loud and unnecessary noises restricted.

(b) It shall be unlawful for any person, entity, or establishment to make, continue, or allow to be made or continued, any clamorous singing, yelling, shouting, whooping, bellowing, hollering, or other loud, obstreperous, wanton and unnecessary noises, or to make, continue, or allow to be made or continued, any loud gatherings, either in the day time or at night, which disturb the peace and quiet of the city, whether in the public street, on privately owned or controlled property, or within enclosures, public or private.

(h) Notwithstanding subsection (a) and (f) herein, it shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments, or other amplified device or apparatus making or reproducing musical or other sounds after 11:00 p.m. and before 7:00 a.m. when the said sounds emanate from an open window or door opening of a structure in such a manner as to be audible in any public street or right-of-way.

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

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

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

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

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

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

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

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

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

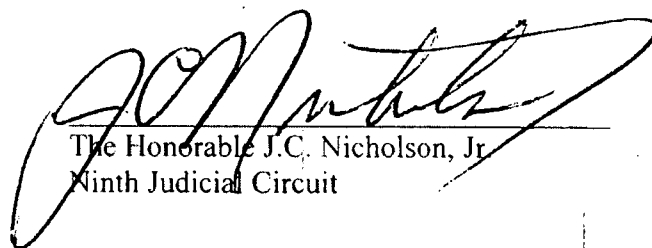
City Ordinance Section 54-901 (double emphasis added). Not only does this ordinance specifically integrate the zoning and building departments, it also imposes a responsibility on the building inspector to check compliance with the authorizations issued by the BZA. Thus, prior to approval of Dewberry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

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

CONCLUSION

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

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



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

February 6, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DEWBERRY 334 MEETING)
STREET, LLC,)
)
Appellant-Petitioner,)
)
v.)
)
CITY OF CHARLESTON and)
BOARD OF ZONING APPEALS -)
ZONING,)
)
Respondents.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

**FINAL
ORDER
ON APPEAL**

2017 DEC 15 PM 2:08

FILED

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This matter is before the Court on the appeal of Dewberry 334 Meeting Street, LLC, (“Appellant-Petitioner” or “Dewberry 334”) of a final decision of the Respondent Board of Zoning Appeals-Zoning of the City of Charleston (“BZA” or “Board”) on April 18, 2017, under the provisions of S.C. Code Ann. § 6-29-820. The Court conducted a hearing on the merits of the appeal on October 9, 2017. Having fully considered the record on appeal, the applicable law, and the arguments of the attorneys for the parties, the Court *vacates* the decision of the BZA and *grants* the relief requested in Dewberry 334’s Petition.

BACKGROUND

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

Under the applicable zoning ordinances of the Respondent City of Charleston (the “City”), a property may be operated as a hotel only if it is located in an accommodations overlay district

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

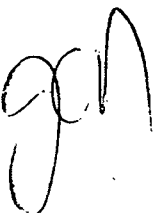
It is the use of the interior of the eighth floor that was the subject of Dewberry 334's application that was denied by the BZA on April 18, 2017.

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

Dewberry 334 disputes that the Special Exception contained any of the limitations imposed by the zoning official and that a modification of the Special Exception was necessary to locate those uses in those spaces. Dewberry 334 asserts that the uses for which it constructed the interior portions of the eighth floor are "accessory" to its lawful hotel use and are allowed as a matter of right. Even so, in a good faith effort to resolve the dispute and accommodate the City, Dewberry 334 made an application to the BZA to modify the Special Exception and seek the BZA's express

approval of these four particular uses within the interior of the newly built eighth floor as well as the use of the walkway on the northeast corner of the surrounding rooftop terrace.¹

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

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- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
 - (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
 - (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
 - (4) No exterior amplified music shall be permitted;
 - (5) Valet parking shall continue to be provided for on-site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
 - (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
 - (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
 - (8) Landscape improvements shown on plans to be installed;
 - (9) All activity outside on the roof shall stop at 10 pm;
 - (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and
 - (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

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

Deliveries" would be eliminated), and converting Henrietta Street to a one-way westbound street, except for the section between Meeting Street and the 334 Meeting Street driveway closest to Meeting Street, which shall remain two-way.

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

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

Dewberry 334 argues that the BZA did not impose a condition that the uses within the eighth floor and on the rooftop terrace were restricted to those shown on the preliminary conceptual floor plan reviewed by the BZA in 2011 even though it could have done so. Dewberry 334 contends that there are no City ordinances, or other lawful restrictions, that limit the specific

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

accessory uses and the specific location of those accessory uses within the hotel to the uses and locations reflected on conceptual plans that were part of the application to the BZA for the Special Exception.

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

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

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

When considering Dewberry 334's request, two Board members stated that *the interior use was not an issue* for them, although they, too, speculated about potential noise. (Chairman Krawcheck: "So the concern is -- is the outside use, not the interior use." R. p. 66:10-11; Member

Robinson: "I think the use of the interior is fine, but I know it would be a noisy situation outside." R. p. 66:22-23). The public and some of the Board members considered the hypothetical noise from the *exterior* rooftop terrace to constitute a basis for denying Dewberry 334's request to confirm the lawful accessory use the *interior* spaces.

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

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

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

STANDARD OF REVIEW

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

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

determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

In Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 737 S.E.2d

863 (Ct. App. 2013), our Court of Appeals summarized this Court's scope of review as follows:

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

737 S.E.2d 864.

LEGAL ANALYSIS

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

As previously stated, there are no provisions in the Special Exception or in the City's zoning ordinances that prohibit Dewberry 334 from altering the locations of permissible accessory uses from the conceptual floor plans submitted with the application for Special Exception. In applying the standards set forth in City Ordinance 54-220, the BZA's charge is to determine whether to grant a special exception for accommodations *use*. Under Section 54-220, the BZA does not have the right or authority to approve building plans, as pointed out by Board Member Appel. Instead, the BZA has the right and authority to approve an accessory use if it is consistent

with the City's zoning scheme and other applicable criteria, as it did in 2011 when it issued the Special Exception.

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

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

Contrary to the City's position in this case, the City's zoning ordinances state that a property owner is entitled to all accessory uses that go along with a principal use. City Ordinance Section 54-203, "Permitted principal uses," states, in relevant part, as follows: "***Accessory uses, which for the purposes of this Chapter are defined as uses of land or of a building or portion thereof which are customarily incidental and subordinate to a principal use located on the same lot or parcel, are allowed***, except that communication towers, home occupations, bed and breakfasts, home day care facilities, and limited commercial uses within the GO district are only

allowed pursuant to the requirements specified in Part 4: Accessory Uses, of this Article.” (double emphasis added).

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

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

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

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

The Court is mindful of the argument ably advanced by Respondents that allowing the accessory uses Dewberry 334 seeks on the eighth floor that differ from those shown in the preliminary conceptual plans would allow a hotel applicant to tell the BZA one thing about its plans and then do another. But there is simply no ordinance preventing an applicant from submitting preliminary conceptual plans to the BZA as part of its application for a special exception under Section 54-220 and then modifying those plans; subject, of course, to any conditions imposed within the special exception and other applicable ordinances, including those pertaining to building codes and safety. After all, again, the BZA's function is to determine

whether an accommodations use is appropriate for a given location within the City, not to approve the building plans. It is a separate agency of the City, the Board of Architectural Review, that has the authority to review and decide on proposed design plans, and it is another, agency, the Building Inspection Division that has the authority to review and decide on proposed building plans.

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

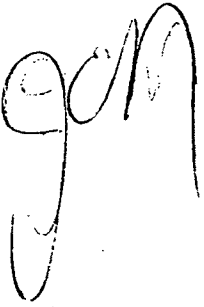
Further in response to the Respondents' argument, it bears noting that the BZA has the authority to craft conditions for its approval under Section 54-925, just as it did in this case by imposing the eleven conditions. Section 54-925 provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

Sec. 21-16. - Loud and unnecessary noises restricted.

(b) *It shall be unlawful for any person, entity, or establishment to make, continue, or allow to be made or continued, any clamorous singing, yelling, shouting, whooping, bellowing, hollering, or other loud, obstreperous, wanton and unnecessary noises, or to make, continue, or allow to be made or continued, any loud gatherings, either in the day time or at night, which disturb the peace and quiet of the city, whether in the public street, on privately owned or controlled property, or within enclosures, public or private.*

(h) Notwithstanding subsection (a) and (f) herein, *it shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments, or other amplified device or apparatus making or reproducing musical or other sounds after 11:00 p.m. and before 7:00 a.m. when the said sounds emanate from an open window or door opening of a structure in such a manner as to be audible in any public street or right-of-way.*

 Section 21-16 of the Code of Ordinances of the City of Charleston.

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

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

These City-approved plans did not show the pool, spa, or fitness center depicted on the preliminary conceptual plans four years earlier.

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



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

The Court is troubled by the seeming disconnect between the City's zoning official and the City's building official. At the hearing the City asserted that they have different roles. That is true, but both are acting on behalf of the City with respect to what is permitted and were acting within their administrative capacity. If the BZA had specific concerns about Dewberry 334's potential

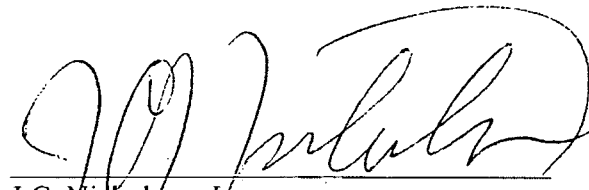
uses it should have communicated those concerns to the City's other approval boards or put some other mechanism in place to ensure those concerns never developed.

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

CONCLUSION

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

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


J.C. Nicholson, Jr.
Ninth Judicial Circuit
December 11, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DEWBERRY 334 MEETING)
STREET, LLC)
)
Appellant,)
)
v.)
)
CITY OF CHARLESTON and)
BOARD OF ZONING APPEALS -)
ZONING,)
)
Respondents.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

**NOTICE OF APPEAL
PURSUANT TO S.C. CODE ANN.
SECTION 6-29-820(B)(2)**

FILED
2017 MAY -3 PM 12:13
JULIE J. ARMSTRONG
CLERK OF COURT

Dewberry 334 Meeting Street, LLC (hereinafter "Appellant") hereby appeals the final decision of the Board of Zoning Appeals - Zoning of the City of Charleston mailed on April 25, 2017, denying Appellant's request to amend an existing special exception for hotel use for allowed accessory and incidental hotel uses within the inside of the top floor of its hotel property in completed improvements approved for construction by the Defendant City of Charleston. This Notice of Appeal is filed pursuant to S.C. Code Ann. § 6-29-820(B)(2), as amended. Accompanying this Notice of Appeal and incorporated herein is the Appellant's Request for Pre-Litigation Mediation pursuant to S.C. Code Ann. Section 6-29- 820(B)(2)) and Section 6-29-825, as amended.

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: *G. Trenholm Walker*
G. Trenholm Walker (SC Bar #5777)
Post Office Drawer 22167
Charleston, SC 29413-2167
Walker@wgflaw.com
843-727-2208
ATTORNEYS FOR APPELLANT

May 3, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DEWBERRY 334 MEETING STREET, LLC,
Plaintiff(s)

vs.

CITY OF CHARLESTON, et al.,
Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP - 10- 2183

Submitted By: G. Trenholm Walker
Address: Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413

SC Bar #: 5777
Telephone #: 843.727.2208
Fax #: 843.727.2238
Other:
E-mail: Walker@wgflaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaints.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____ -NI- ____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☒ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: G. Trenholm Walker Date: May 3, 2017

May 3, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

DEWBERRY 334 MEETING STREET, LLC,)

Appellant,)

v.)

CITY OF CHARLESTON and
BOARD OF ZONING APPEALS - ZONING,)

Respondents.)

**REQUEST FOR PRE-LITIGATION
MEDIATION PURSUANT TO
S.C. CODE ANN. SECTION 6-29-82**

FILED
2017 MAY -3 PM 12:14
JULIE J. ARMSTRONG
CLERK OF COURT

Dewberry 334 Meeting Street, LLC (hereinafter "Appellant") hereby files this Request for Pre-Litigation Mediation upon the City of Charleston and Board of Zoning Appeals - Zoning, as provided for in S.C. Code Ann. Section 6-29-820(B)(2) and Section 6-29-825, as amended. Filed contemporaneously herewith is the Appellant's Notice of Appeal of the final decision of the Board of Zoning Appeals - Zoning of the City of Charleston mailed on April 25, 2017, denying Appellant's request to amend an existing special exception for hotel use for allowed accessory and incidental hotel uses within the inside of the top floor of its hotel property in completed improvements approved for construction by the Defendant City of Charleston.

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: G. Trenholm Walker

G. Trenholm Walker (SC Bar #5777)

Post Office Drawer 22167

Charleston, SC 29413-2167

Walker@wgflaw.com

843-727-2208

ATTORNEYS FOR APPELLANT

May 3, 2017
Charleston, South Carolina

AFFIDAVIT OF SERVICE

State of South Carolina

County of Charleston

Common Pleas Court

Case Number: 2017-CP-10-2183

Plaintiff:

DEWBERRY 334 MEETING STREET, LLC

vs.

Defendant:

CITY OF CHARLESTON, ET AL

For:

G. Trenholm Walker, Esq.

WALKER GRESSETTE FREEMAN AND LINTON, LLC

66 Hasell st

Charleston, SC 29401

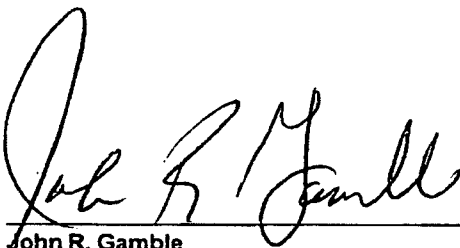
FILED
2017 MAY 18 PM 4:18
JULIE J. ARMSTRONG
CLERK OF COURT

Received by PROCESS SERVICE, INC. to be served on CITY OF CHARLESTON, 80 BROAD ST, CHARLESTON, SC 29401.

I, John R. Gamble, being duly sworn, depose and say that on the 9th day of May, 2017 at 12:05 pm, I:

served a GOVERNMENT AGENCY by delivering a true copy of the CIVIL ACTION COVERSHEET; NOTICE OF APPEAL PURSUANT TO S.C. CODE ANN. SECTION 6-29-820(B)(2); REQUEST FOR PRE-LITIGATION MEDIATION PURSUANT TO S.C. CODE ANN. SECTION 6-29-825 with the date and hour of service endorsed thereon by me, to: VANESSA TURNER MAYBANK as CLERK OF COUNCIL, at 80 BROAD ST, CHARLESTON, SC 29401 and informed said person of the contents therein, in compliance with State Statutes.

I am over eighteen and have no interest in the above action.



John R. Gamble
PROCESS SERVER

Subscribed and Sworn to before me on the 10th day of May, 2017 by the affiant who is personally known to me.



NOTARY PUBLIC

Commission Expires: 5-6-19

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: LEX-2017001137

AFFIDAVIT OF SERVICE

State of South Carolina

County of Charleston

Common Pleas Court

Case Number: 2017-CP-10-2183

Plaintiff:

DEWBERRY 334 MEETING STREET, LLC

vs.

Defendant:

CITY OF CHARLESTON, ET AL

For:

G. Trenholm Walker, Esq.

WALKER.GRESSETTE.FREEMAN AND LINTON, LLC

66 Hasell st

Charleston, SC 29401

Received by PROCESS SERVICE, INC. to be served on **BOARD OF ZONING APPEALS, 80 BROAD ST, CHARLESTON, SC 29401.**

I, JOHN KEARSE, being duly sworn, depose and say that on the **10th day of May, 2017** at **8:45 am**, I:

PERSONALLY served by delivering a true copy of the **CIVIL ACTION COVERSHEET; NOTICE OF APPEAL PURSUANT TO S.C. CODE ANN. SECTION 6-29-820(B)(2); REQUEST FOR PRE-LITIGATION MEDIATION PURSUANT TO S.C. CODE ANN. SECTION 6-29-825** to: **LEE BATCHELDER** at the address of: **2 GEORGE ST., CHARLESTON, SC 29401.**

I am over eighteen and have no interest in the above action.

Subscribed and Sworn to before me on the **11th** day of **May, 2017** by the affiant who is personally known to me.

Linda Williams
NOTARY PUBLIC

Commission Expires: **5-6-19**

John Kearse
JOHN KEARSE
Process Server

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: LEX-2017001138

FILED
2017 MAY 18 PM 1:19
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Dewberry 334 Meeting Street, LLC,

Plaintiff,

vs.

City of Charleston and Board of Zoning
Appeals – Zoning,

Defendants,

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

PROOF OF ADR OR EXEMPTION

FILED
2017 JUN 20 AM 9:38
JULIE J. ARMSTRONG
CLERK OF COURT

(An original and a copy of this form are to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the Court's Standing Order for Alternative Dispute Resolution:

A. _____ I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption:

B. X 1. Alternative Dispute Resolution (ADR) was conducted in the form of a **mediation.**

2. The neutral was **Wade H. Logan, III, Mediator.**

3. The ADR was conducted on **June 8, 2017.**

4. As a result of ADR, this case should be considered:

() Fully settled.

() by Consent Judgment, to be filed by _____

() by Voluntary Dismissal to be filed by _____

() Partially Settled.

(X) At an Impasse.

() In need of further ADR.

5. **The parties were present.**

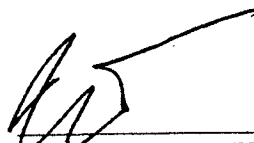
6. Other participants were:

{00958796.DOC}

Appearing on behalf of the Plaintiff:
G. Trenholm Walker, Esq.
John Dewberry
Lockie Brown

Appearing on behalf of the Defendants:
Frances I. Cantwell, Esq.
David S. McQueeney, Jr., Esq.
Lee Batchelder
Margaret Smith
Michael C. Robinson
Joshua L. Martin

7. Choice of the neutral was by **Stipulation**.
8. The total number of hours spent in ADR was **4.0 hours**.
9. Further comments of the neutral: **Although the mediation resulted in an impasse, substantial progress was made. The parties, through counsel, agreed that any mediation in the future pertaining to the grounds of appeal as may be filed in this matter shall be a re-convening of this mediation under S. C. Code Section 6-26-825.**



Wade H. Logan, III, Mediator

MOUNT PLEASANT, SC
June 14, 2017

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

**PETITION AND
GROUNDS FOR APPEAL**

FILED
2017 JUN 27 PM 12:08
CLERK OF COURT

Dewberry 334 Meeting Street, LLC hereby sets forth the grounds for its appeal of the final decision of the Board of Zoning Appeals - Zoning of the City of Charleston mailed on April 25, 2017. This Petition and Grounds for Appeal is filed pursuant to S.C. Code Ann. § 6-29-820(F) within thirty (30) days of the declaration of an impasse by the mediator in the mandatory mediation requested by Dewberry 334 Meeting Street, LLC, pursuant to S.C. Code Ann. § 6-29-820(A). In support of its Petition for reversal of the decision of the Board of Zoning Appeals - Zoning of the City of Charleston mailed on April 25, 2017, Dewberry 334 Meeting Street, LLC alleges and shows as follows:

1. Dewberry 334 Meeting Street, LLC (hereinafter "Petitioner" or "Dewberry"), is a limited liability company that owns real property at 334 Meeting Street (the "Property") in the City of Charleston that was formerly the L. Mendel Rivers Federal Building.
2. Respondent City of Charleston ("City") is an incorporated municipality within the State of South Carolina that has adopted zoning ordinances pursuant to enabling legislation, including certain zoning ordinances concerning accommodations uses in the City.

3. The Respondent Board of Zoning Appeals - Zoning of the City of Charleston (the "BZA") is an appointed board charged with responsibilities that include determining applications for special exceptions in accordance with the pertinent ordinances of the City and the applicable law.
4. Before Petitioner acquired the Property, the seven-story building on the Property was dilapidated and had not been used or occupied for years.
5. The City, through the administration of its former mayor, Joseph P. Riley, Jr., desired that the former L. Mendel Rivers Federal building be preserved, renovated, and put into use, and encouraged Petitioner to bid on the Property.
6. At the urging of the City, Petitioner bid on the Property and was the successful high bidder, purchasing the Property from the federal government in 2008 for \$15,000,000 for the express purpose of converting the Property into a luxury hotel.
7. The conversion and renovation of the former L. Mendel Rivers' building to a five-star hotel required an enormous financial commitment and tremendous attention to every aspect of the design and construction as well as the management of the future hotel.
8. Under the zoning ordinances of the City, a property must be located within an accommodations overlay zone before it may seek hotel use. The Property was located within the accommodations overlay district.
9. Under those same zoning ordinances, a property owner seeking to operate a hotel must obtain a special exception authorizing hotel use from the BZA under Section 54-220 of the City's Ordinances that requires, among other things, the applicant specify in the application for special exception the number of guest rooms in the hotel. City Ordinance Section 54-220(f)(15).

10. 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."
11. Petitioner initially applied to the BZA for a special exception for a seven-story hotel with 120 guest rooms. On March 16, 2010, the BZA granted the special exception subject to eight specifically enumerated conditions. A copy of the BZA's approval of special exception with conditions for a 120-room hotel on the Property is attached as Exhibit 1.
12. Petitioner decided to change the design of the hotel to add an eighth floor and convert the seventh floor to additional rooms, bringing the total number of rooms to 161. Petitioner applied to the BZA for a modification of its special exception to allow for the additional rooms and the additional height. The conceptual floor plan for the eighth floor submitted with the application showed the interior as "spa/fitness" and a pool on the rooftop deck, copy attached as Exhibit 2.
13. The BZA considered the application at its meeting on April 5, 2011, and granted the special exception subject to eleven (11) specific conditions. A copy of the BZA's approval of the requested special exception with conditions is attached as Exhibit 3.
14. The special exception granted on April 5, 2011, allowed Petitioner to use the Property for a hotel subject ONLY to the following eleven conditions:
 - (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
 - (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;

- (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
- (4) No exterior amplified music shall be permitted;
- (5) Valet parking shall continue to be provided for on-site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
- (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
- (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
- (8) Landscape improvements shown on plans to be installed;
- (9) All activity outside on the roof shall stop at 10 pm;
- (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and
- (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.

15. The BZA did not impose a condition requiring that Petitioner must use the interior of the eighth floor solely for spa/fitness, which were the activities that were shown for the eighth floor on the concept floor plan it reviewed, nor did it require as a condition that Petitioner construct the swimming pool on the rooftop terrace as shown on the concept floor plan it reviewed.

16. In 2014 the City reviewed and approved construction permit drawings for the eighth floor dated June 27, 2014, that showed a pool on the rooftop terrace and interior spaces that included restrooms and a large function room. A copy of the relevant portions of these approved construction drawings is attached as Exhibit 4.

17. Because the cost of the pool on the roof turned out to be prohibitive and placing the pool on the rooftop terrace likely would have invalidated certain warranties related to the renovations on the lower floors under the pool, Petitioner decided not to build the pool on the rooftop and, instead, submitted new drawings for the eighth floor and rooftop terrace to the City for approval.
18. These revised construction permit drawings dated April 24, 2015, showed the eighth floor surrounded by a rooftop terrace that was accessible for the full perimeter of the building with the interior comprised of restrooms, a pantry, and three rooms described as Function A, B, and C, a copy of the relevant pages are attached as Exhibit 5. The room labeled Function C included a bar feature on the drawings. These drawings also showed that the spa would be constructed on the second floor, not the eighth floor.
19. The City reviewed and approved the construction permit drawings dated April 24, 2015, for the completely revised eighth floor and rooftop terrace.
20. In reliance on the City's approval of the construction drawings dated April 24, 2015, Petitioner proceeded to construct the eighth floor and rooftop terrace as shown on them, making significant expenditures to accomplish the construction.
21. The City inspected the construction of the eighth floor and rooftop terrace for conformance with the permitted drawings and applicable building codes.
22. In further reliance on the approval of the construction drawings, Petitioner spent considerable money on fixtures, equipment, and furnishings for the eighth floor.
23. In the summer of 2016, when Petitioner sought the zoning permit for the occupation of the eighth floor after construction, the City zoning official refused to approve the entire eighth floor. Instead, the City, acting through its zoning official, approved use of a limited portion of

the eighth floor for specified uses but prohibited the use of the Function areas shown on the plans that would be a small bar known as the Citrus Club, a reading room, and a pantry on the basis that these particular functions had not been shown in the floor plan for the eighth floor reviewed by the BZA in granting the special exception for hotel use on April 5, 2011. The zoning official also closed off the northeast corner of the rooftop terrace for any pedestrian passage other than as an emergency exit. A copy of the limited zoning approval for the eighth floor with conditions is attached as Exhibit 6.

24. The City's zoning ordinances allow meeting/event space, pantry/kitchen, bar, and reading rooms as accessory and incidental uses for a hotel. All uses and activities proposed and intended by Petitioner for the interior of the eighth floor are hotel uses as a matter of right.
25. Neither of the two special exceptions permitting hotel use on the Property imposed a condition that the layout of the eighth floor and the specific activities on the eighth floor had to be exactly as depicted on the concept drawings that were part of Petitioner's applications to the BZA.
26. The City's zoning ordinances do not specify that a hotel owner receiving a special exception cannot vary the specific hotel uses within his hotel from those shown on the application for special exception nor that he cannot vary the location of his hotel uses within his building. There is also no City ordinance stating that each location in the hotel must be utilized for the precise use on the concept floor plans submitted with the application for special exception for hotel use under Section 54-220.
27. The City had no legal basis in its ordinances or in the terms of the special exceptions for refusing to issue a zoning permit to allow Petitioner to use the interior of its building for the hotel functions it intends to carry out on the eighth floor and to deny it regular access and use to the northeast corner of the rooftop terrace.

28. The City, acting through its zoning official, has steadfastly asserted that Petitioner cannot proceed with the occupation and use of its building as it desires and as shown on the building plans for the eighth floor approved by the City unless it obtains a modification of the 2011 special exception.

29. Even though the City has no legal basis for requiring a modification of the special exception as a condition of zoning approval of the functions Petitioner intends on the eighth floor, in March 2017 Petitioner applied to the BZA to modify the special exception to allow the intended functions in the rooms that were constructed according to the permitted construction drawings, merely as an accommodation to the City, specifically asserting that the modification to the special exception was not legally required.

30. On April 18, 2017, the BZA conducted a hearing on Petitioner's application and voted 4-1 to deny Petitioner's request to modify the special exception to allow Petitioner to utilize the eighth floor for the hotel accessory uses on the inside of the eighth floor to which it is entitled as a matter of right. A copy of the BZA's decision is attached as Exhibit 7 (the "Decision").

31. As a result of the BZA Decision, the Petitioner has been prevented from using **the interior of the eighth floor** for the accessory uses to which it is entitled as matter of right and denied access to a portion of its rooftop terrace on the grounds that the zoning does not allow such uses and activities, even though the applicable zoning does allow these uses and activities.

32. The Decision is erroneous as a matter of law, unsupported by substantial evidence, arbitrary and capricious, and denied Petitioner substantive due process for reasons that include, but are not limited to, the following:

- A. The BZA committed legal error in finding and concluding that the 2011 special exception prohibited the occupation of the eighth floor for a function room, small bar, pantry and reading room when none of the conditions associated within the 2011 special exception prevented those activities on the inside of the eighth floor

or specified that the activities shown in the 2011 conceptual floor plan were the only activities that could ever occur on the eighth floor without an amendment of the special exception.

- B. The BZA committed legal error in finding and concluding that Petitioner cannot use the interior of its building for activities and uses that are accessory to the operation of the hotel since they constitute accessory uses as a matter of right.
- C. The BZA committed legal error in finding and concluding that Petitioner cannot use the interior of its building for activities and uses that are different from those shown on the conceptual floor plan submitted with the 2011 application for special exception since there is no City ordinance that prohibits a hotel operator who obtained a special exception for hotel use from changing the location of permitted activities within the hotel without BZA approval. For example, a hotel operator does not need to obtain an amendment to the special exception allowing hotel use to move the location of the reception desk, gift shop, or fitness room within the hotel. The City did not require a special exception for the relocation of the spa from the eighth floor to the second floor, nor could it have. By the same token, the City cannot compel Petitioner to move the spa back to the eighth floor.
- D. The BZA committed legal error in finding and concluding that Petitioner cannot use the northeast quadrant of the rooftop terrace since the conditions associated with the 2011 special exception did not prohibit such pedestrian passage which is permitted as a matter of right under the zoning ordinances, and the alleged justification for such prohibition was inaccurate. The zoning file reflects that Second Presbyterian Church did not object to any rooftop activities but was concerned with screening the rear parking lot during construction, which Petitioner did. Further, the zoning official does not have the authority to unilaterally impose conditions prohibiting use and access to a portion of a building for zoning reasons when the ordinances allow those uses and activities.
- E. The BZA committed legal error in finding and concluding that the 2011 special exception had to be modified to allow any activities on the inside of the eighth floor that vary from those in the 2011 special exception because the City approved building plans that showed three function rooms, including one with a bar feature, and a pantry, and approved the construction of those building elements. Petitioner proceeded with the construction of the interior of the eighth floor in reliance on this approval. As a result the City is estopped from preventing Petitioner from using the function room, small bar, pantry and reading room on the eighth floor.
- F. The decision of the BZA is unsupported by the evidence. The BZA relied on the speculative unsupported comments of the speakers including but not limited to assertions that the occupation of the inside of the eighth floor would cause noise in the surrounding neighborhood and persons on the rooftop terrace would destroy the neighborhood and cause their homes to lose value even though the proof was uncontradicted that: the exterior glass is extra strong, impact-resistant Miami-Dade

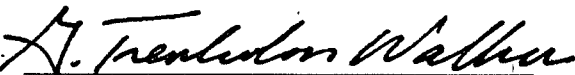
Hurricane glass; the Petitioner is already entitled to allow guests on the rooftop terrace; the seating area on the rooftop terrace faces Marion Square; and the conditions of the 2011 special exception address any possible noise from the rooftop by prohibiting activities on the rooftop terrace after 10 PM and prohibiting any amplified music on the rooftop terrace.

- G. The BZA committed legal error in denying an amendment of the condition of the 2011 special exception to allow activity on the rooftop until midnight because the Petitioner withdrew this request for an amendment to the condition by email to the Zoning Official before the hearing and stated again at the hearing it was not seeking to modify the condition on the hours of use of the rooftop terrace. This request was not before the BZA and the BZA erred in ruling on it.

33. For the foregoing reasons 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.

WHEREFORE, the Petitioner prays for the relief stated herein, for the recovery of its attorneys' fees and costs under S.C. Code Ann. Section 15-77-300, and such other and further relief as the court deems just and proper.

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: 

G. Trenholm Walker (SC Bar #5777)
Post Office Drawer 22167
Charleston, SC 29413-2167
Walker@wgflaw.com
843-727-2208

ATTORNEYS FOR APPELLANT-
PETITIONER

June 27, 2017

Charleston, South Carolina



City of Charleston
South Carolina

Joseph P. Riley, Jr.
Mayor

Timothy J. Keane
Director

Department of Planning, Preservation and Sustainability

March 24, 2010

Gibson Thompson Guess Architects
12 B Vanderhorst Street
Charleston, SC 29403

Re: 334 Meeting Street (TMS# 459-13-03-022)

Dear Mr. Thompson:

Please see attached copies of the decision from the March 16, 2010 meeting of the **Board of Zoning Appeals-Zoning** concerning the above referenced application.

Should you have any questions, please contact me at (843) 724-7177.

Sincerely,


Penny Ashby
Zoning Planner

Attachment

334 Meeting Street
BZAZ Hearing
March 16, 2010

BZA-Z grants approval of the requested special exception with the following conditions:

1. Adequate parking to be provided for employees on site or in a parking garage.
2. Install buffer wall along east side property-line, at option of each neighboring property owner and provide intensive landscaping.
3. No collection of refuse from dumpsters and no commercial deliveries or pick-ups between 10 PM and 6 AM.
4. No exterior amplified music.
5. No valet parking on streets in the neighborhood.
6. No deliveries to be made on Charlotte Street, only in service area on hotel property.
7. Driveway changes shown on plans to be constructed to direct vehicles to Meeting Street.
8. Landscape improvements shown on plans to be installed.



City of Charleston

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

**Request special exception under Sec. 54-220 to allow a 120-room inn in a GB-A zone district.
Zoned GB-A.**

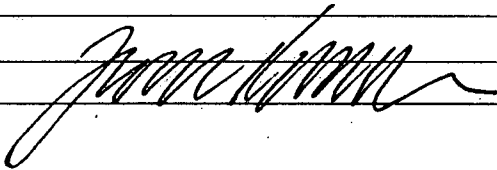
Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☐ **DENIED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☐ **APPROVED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

— WITH CONDITIONS —

Date issued: 3/16/10 Chairman 

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ **DENIED.** The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ **APPROVED.** The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any: _____

Date issued: _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

R. p. 0057

+

DESIGNS AND THE DESIGN ARE THE PROPERTY OF THE ARCHITECT WHETHER THE PROJECT IS FOR WHICH THEY ARE PREPARING OR EXECUTING OR NOT. THE DRAWINGS SHALL NOT BE USED BY THE PROJECT OWNER OR ANYONE ELSE FOR ANY OTHER PROJECT.

1
A102

ROOF PLAN - PROPOSED

SCALE: 1/8" = 1'-0"



City of Charleston
South Carolina

Joseph P. Riley, Jr.
Mayor

Timothy J. Keane
Director

Department of Planning, Preservation and Sustainability

April 25, 2011

Gibson Guess Architecture
12-B Vanderhorst Street
Charleston, SC 29403

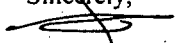
Re: 334 Meeting Street (TMS# 459-13-03-022)

Dear Mr Wingfield:

Please see attached documents of the decision from the April 5, 2011 meeting of the Board of Zoning Appeals-Zoning concerning the above referenced application.

If I may be of any further assistance, please do not hesitate to contact me at (843) 724-7177.

Sincerely,


Penny Ashby
Zoning Planner

Enclosures

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pick-ups 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.



Board of Zoning Appeals - Zoning
- Results -

City of Charleston

EXH. 3
Page 1 of 1

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

Request special exception under Section 54-220 to allow a 161-room Inn in a GB-A zone district.
(Approval granted on 3-16-10 was for a 120-room inn).

Request special exception under Section 54-110 to allow an addition that extends a non-conforming building height.
Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions:

☐ DENIED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☒ APPROVED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/5/11 Chairman [Signature]

8 AM - 6 PM
actual - approx 10 PM
[Signature] (See attached)

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions:

☐ DENIED. The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ APPROVED. The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

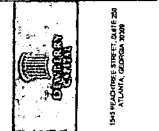
EXH. 4

THE DEWBERRY CHARLESTON

BUILDING PERMIT SET - 06.27.14

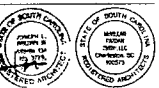
VOLUME 1: CIVIL, LANDSCAPE, ARCHITECTURAL,
INTERIORS, STRUCTURAL

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architects
charleston
334 MEETING STREET, SUITE 200
CHARLESTON, SOUTH CAROLINA 29401
803.733.1211
www.mcmillanpaxsonsmith.com



THE DEWBERRY
CHARLESTON
334 MEETING STREET, CHARLESTON, SC 29401

REVISIONS:



BUILDING PERMIT SET

PROPOSAL IN CHARGE: L.S.
PROJECT NUMBER: 450
DRAWN BY:

SHEET TITLE:
COVER SHEET

SHEET NO. FROM NO.
G000-1 011103.00
DATE: 06/27/14

PROJECT TEAM

OWNER

DEWBERRY CAPITAL
ONE PEACHTREE PARK
156 PEACHTREE STREET
SUITE 550
ATLANTA, GA 30300
P: 404.844.7900
F: 404.844.7901

ARCHITECT OF RECORD

MC MILLAN PAXSON SMITH ARCHITECTURE
134 VANDERBILT STREET
CHARLESTON, SC 29403
P: 803.733.1211
F: 803.733.1212

CIVIL ENGINEER

FORCE PROJECTING AND SURVEYING, INC.
101 CANNONBANK HIGHWAY
SUITE 9
CHARLESTON, SC 29417
P: 803.733.1211
F: 803.733.1212

LANDSCAPE ARCHITECT

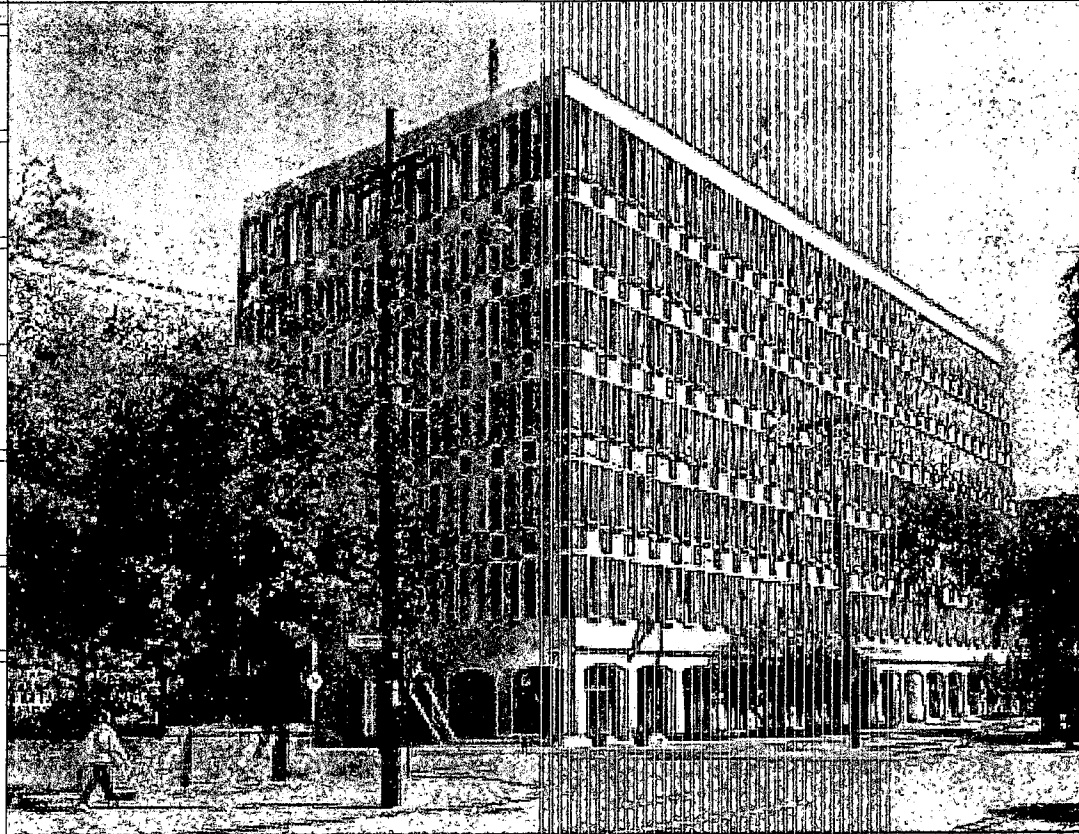
Designworks
101 Cannonbank Highway
Charleston, SC 29417
P: 803.733.1211
F: 803.733.1212

MECHANICAL, ELECTRICAL, PLUMBING ENGINEER

ROBERT L. CONNORS, P.E.
SOUTH CAROLINA LICENSE #10290
4800 ARLOUTON PK CIRCLE S.
SUITE 200
JACKSONVILLE, FL 32218
PROJECT MANAGER: ROBERT CONNORS
PHONE: 813-440-1000

STRUCTURAL ENGINEER

41E, INC.
7 RADCLIFF STREET
SUITE 201
CHARLESTON, SC 29403
P: 803.733.1211
F: 803.733.1212



334 MEETING STREET, CHARLESTON, SC 29401

A1 PROJECT TEAM

EXH. 5

THE DEWBERRY

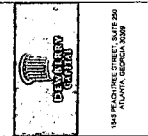
CHARLESTON

BUILDING PERMIT SET - 06.27.14

BULLETIN #6 - 04.24.15

VOLUME 1: CIVIL, LANDSCAPE, ARCHITECTURAL
AND STRUCTURAL

mcmillan | paxson | smith
architects
1945 PEACHTREE STREET, SUITE 200
ATLANTA, GEORGIA 30309
P: 404.588.7500
F: 404.588.7501
www.mcmillanpaxsonsmith.com



THE DEWBERRY
CHARLESTON
334 MEETING STREET, CHARLESTON, SC 29401

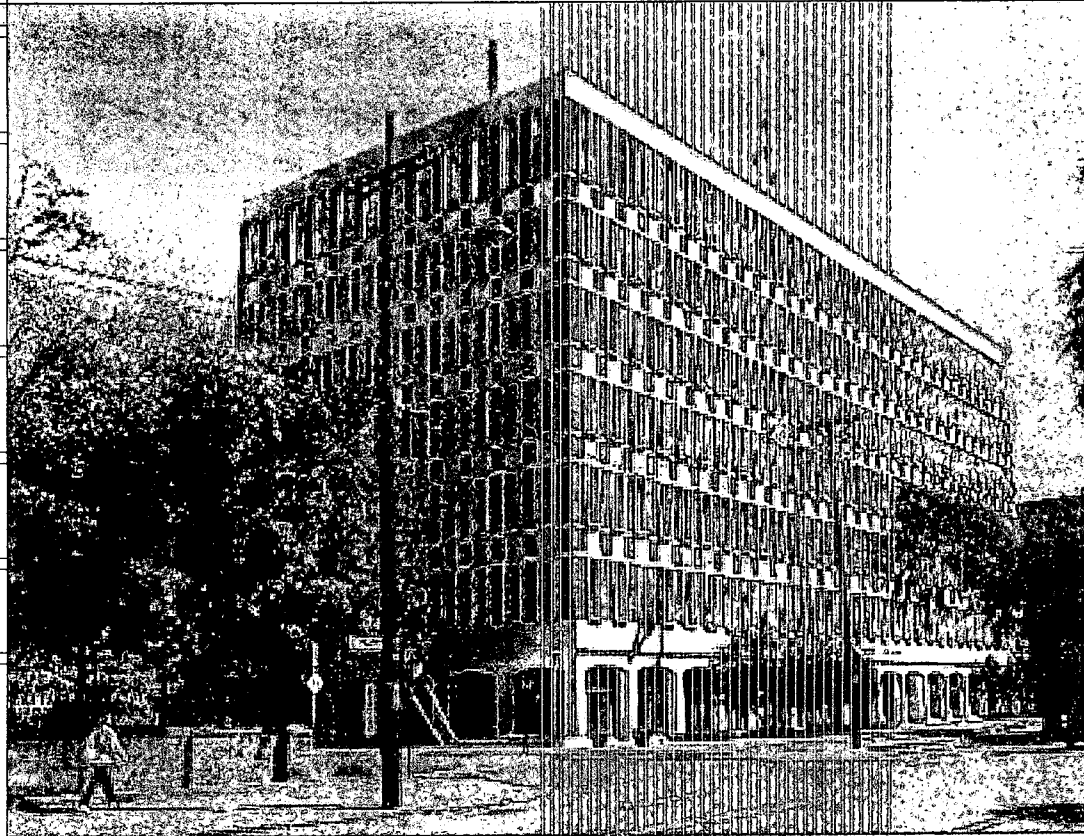
NO.	DATE	DESCRIPTION	BY
1	10.17.14	WORKING DOCUMENTS	EG
2	10.24.14	PERMIT REVIEW	EG
3	11.20.14	BULLETIN 1	EG
4	01.28.15	BULLETIN 2	EG
5	01.06.15	BULLETIN 3	EG
6	02.19.15	BULLETIN 4	EG
7	02.19.15	BULLETIN 5	EG
8	02.19.15	BULLETIN 6	EG
9	04.24.15	BULLETIN 7	EG



BUILDING PERMIT SET
PRINCIPAL IN CHARGE: LB
PROJECT NUMBER: SC
DATE: 06/27/14

SHEET TITLE:
COVER SHEET

SHEET NO. PROJ. NO.
G000-1 C11103.00
DATE: 06/27/14



334 MEETING STREET, CHARLESTON, SC 29401

PROJECT TEAM

OWNER

DEWBERRY CAPITAL
ONE PEACHTREE SQUARE
1945 PEACHTREE STREET
SUITE 200
ATLANTA, GA 30309
P: 404.588.7500
F: 404.588.7501

ARCHITECT OF RECORD

MC MILLAN PAXSON SMITH ARCHITECTURE
124 VANDERBILT STREET
CHARLESTON, SC 29403
P: 843.564.8711
F: 843.564.8778

CIVIL ENGINEER

FORRESTER ENGINEERING AND SURVEYING, INC.
1387 CAVANAH ROAD
DAVIS, GA 31201
P: 478.371.2522
F: 478.371.8788

LANDSCAPE ARCHITECT

Designworks
20 Orange Street
Charleston, SC 29401
P: 843.725.8329
F: 843.853.3495

MECHANICAL, ELECTRICAL, PLUMBING ENGINEER

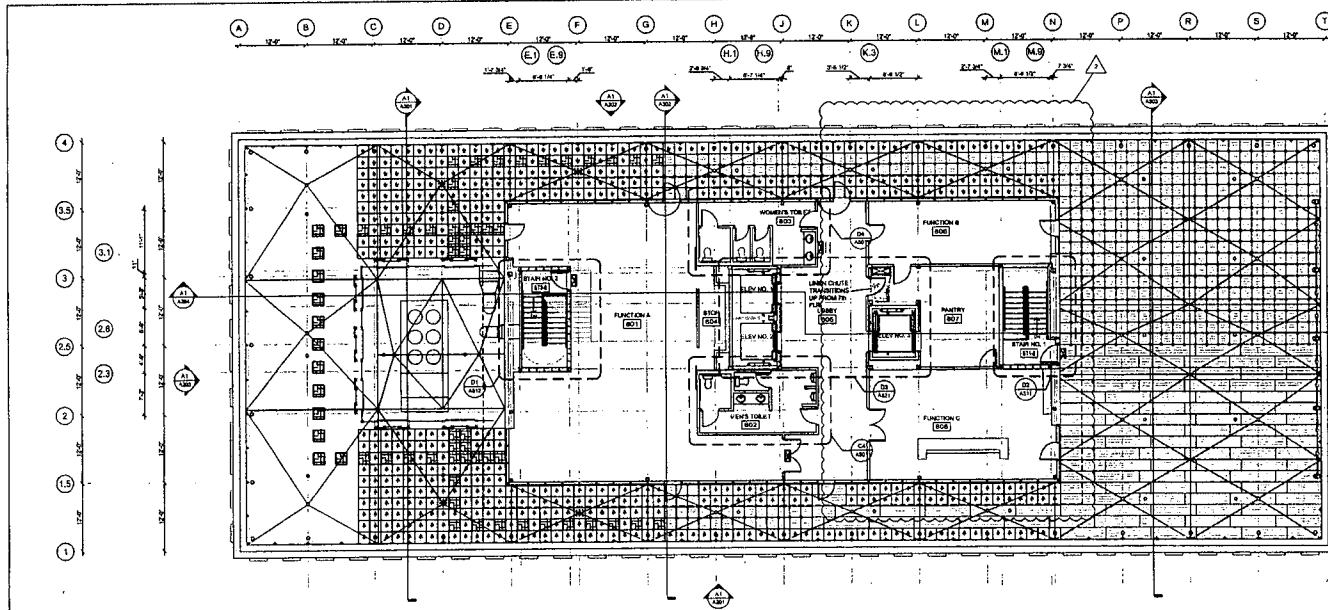
ROBERT L. CONNORS, P.E.
SOUTH CAROLINA LICENSE #00205
4000 HIGGINS ROAD
JACKSONVILLE, FL 32214
PROJECT MANAGER: SCOTT McNEELSEN
PHONE: 904-744-1855

STRUCTURAL ENGINEER

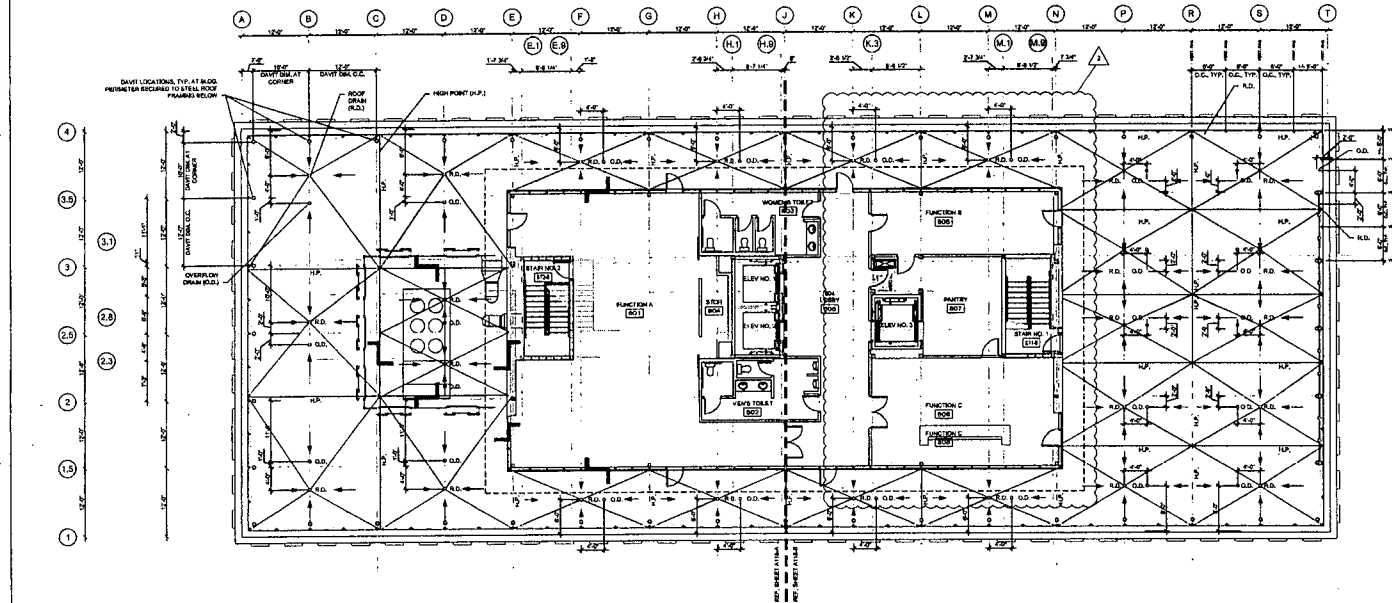
K&E, INC.
1 RINGSIDE STREET
SUITE 301
CHARLESTON, SC 29405
P: 843.725.1880
F: 843.725.1711

A1 PROJECT TEAM

EXH. 5



C1	N/A 10' x 10'	EIGHTH LEVEL FLOOR PLAN - PAVERS



A1	MA 06' x 14'	EIGHTH LEVEL FLOOR PLAN - DRAINAGE

ROOF SYMBOL LEGEND

	CONCRETE PIEDestal PAVEN
	PS "BISHOP" PIEDestal PAVEN
	VELGE (A)TED HOOP INAY
	PIEDestal MOUNT WALKING PADS
	2x2 PS-FINISHED ROOF DRAIN COVER
	R.D. ROOF DRAIN
	O.O. OVERFLOW DRAIN
	H.P. HIGH POINT
	OWET LOCATION

D5	HA N.T.B.	ROOF LEGEND

1. A CAD DRAWING SYSTEM IS TO BE INSTALLED AND MAINTAINED TO ALLOW FOR THE EASY WALL, FLOOR AND CEILING CONSTRUCTION FOR THE NEW OFFICE BUILDING. THE SYSTEM IS TO BE CAPABLE OF HANDLING ALL THE NEW OFFICE BUILDING CONSTRUCTION. THE SYSTEM IS TO BE CAPABLE OF HANDLING ALL THE NEW OFFICE BUILDING CONSTRUCTION. THE SYSTEM IS TO BE CAPABLE OF HANDLING ALL THE NEW OFFICE BUILDING CONSTRUCTION.
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C5	~~NS~~ NTA	ROOF NOTES

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THE DEWBERRY
CHARLESTON

304 MEETING STREET, CHARLESTON, SC 29403

REVISIONS:			
NO.	DATE	DESCRIPTION	BY
2	10/27/14 04/24/15	Revising Bulletin 8	

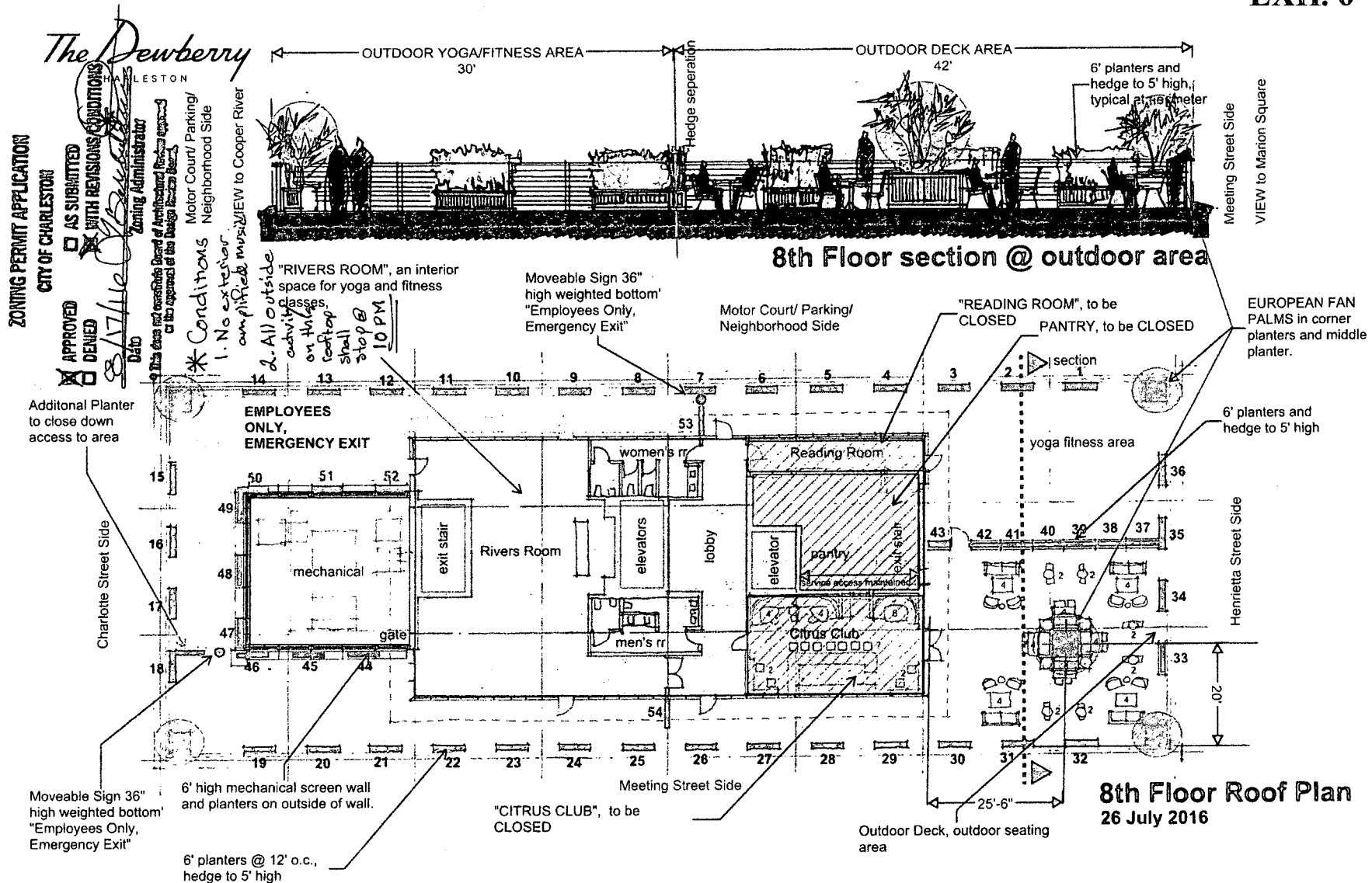
BUILDING PERMIT SET 06/27/14

SHEET TITLE:
EIGHTH LEVEL
FLOOR PLAN

SHEET NO. PROJ. NO.

A108 DATE:
06/27/14

A108





Board of Zoning Appeals - Zoning
Results
City of Charleston

Page 1 of 1

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK/WRAGGBOROUGH) (459-13-03-022)

**Request approval to amend the April 5, 2011 special exception approval for a hotel to add uses on the top floor/rooftop and change the closing time for rooftop activities from 10pm to midnight.
Zoned GB-A.**

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☒ **DENIED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☐ **APPROVED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/18/17 Chairman *[Signature]*

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ **DENIED.** The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ **APPROVED.** The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

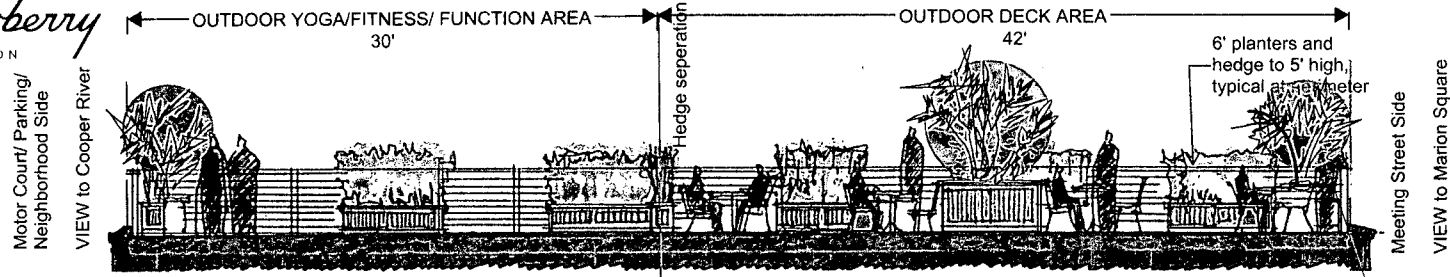
THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman _____

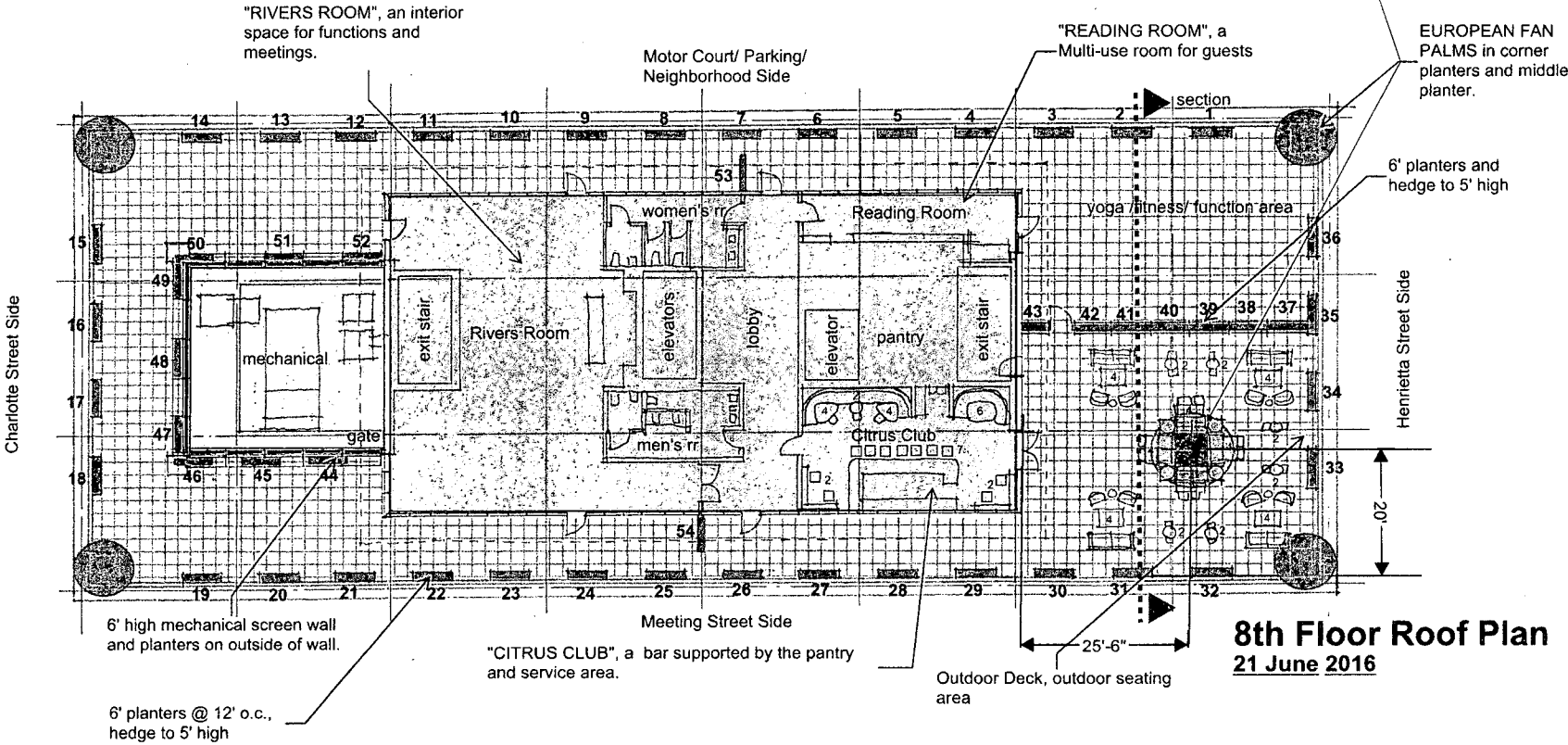
Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

1/09

The Dewberry
CHARLESTON



8th Floor section @ outdoor area



R. p. 0068

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Dewberry 334 Meeting Street, LLC,)
)
Petitioner-Appellant,)
)
v.)
)
City of Charleston and Board of)
Zoning Appeals-Zoning,)
)
Respondents.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO. 2017-CP-10-2183

**Response to Petition by Respondents City of
Charleston and Board of Zoning Appeals-Zoning**

FILED
2017 SEP 25 PM 2:08
CLERK OF COURT

Respondents City of Charleston (the "City") and the City of Charleston Board of Zoning Appeals-Zoning ("BZA") hereby respond to the petition ("Petition") filed by Petitioner-Appellant Dewberry 334 Meeting Street, LLC ("Appellant" or "Dewberry") as set forth further herein. In their capacity as respondents, the City and the BZA are collectively referred to herein as the "City."

1. This appeal arises from the BZA's decision denying Appellant's application to amend an April 5, 2011 special exception for an accommodations use on Appellant's property.

2. The City objects to consideration of the factual allegations in the Petition because this appeal must be determined based on the certified record. See S.C. Code Ann. Section 6-29-840(A) ("The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.").

3. In responding to the allegations in the Petition, the City asserts that the BZA's decision should be affirmed because there is evidence supporting the BZA's decision. See Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) ("On appeal, we apply the same standard of review as the circuit court below: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional

evidence.”); Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (“A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.”). The City denies any allegations in the Petition to the contrary.

4. No answer or other pleading is required from the City because this appeal is limited to the evidence contained in the record presented to the BZA. See S.C. Code Ann. Section 6-29-840(A) (“The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.”).

5. The City objects to and moves to strike the allegations in Paragraphs 4, 5, 6, and 7 of the Petition as irrelevant and unrelated to the issues involved in this appeal.

6. The City admits that this court has jurisdiction over the subject matter and the parties to determine this appeal; provided, however, the City objects to the consideration of any matter or issue outside the scope of this court’s appellate review under section 6-29-840(A) of the South Carolina Code. Without limiting the foregoing, the City specifically denies Appellant’s prayer for relief to the extent Appellant seeks attorneys’ fees or costs under section 15-77-300 of the South Carolina Code.

7. The City reserves the right to file a legal memorandum in opposition to Appellant’s requests, based on the certified record and the applicable law.

8. The City’s remaining responses to the Petition are subject to the foregoing objections.

9. The City denies each and every allegation of the Petition not hereinafter specifically admitted or modified.

10. The City admits the allegations in Paragraph 1 of the Petition.

11. The City admits the allegations in Paragraph 2 of the Petition.

12. The City admits the allegations in Paragraph 3 of the Petition.

13. The City admits the allegations in Paragraph 4 of the Petition.

14. With respect to the allegations in Paragraph 5 of the Petition, the City admits that the City supported the reuse of 334 Meeting Street, but denies the remaining allegations. To the extent such allegations are material to this appeal, the BZA's decision as to these issues is supported by evidence and should be affirmed.

15. With respect to the allegations in Paragraph 6 of the Petition, the City admits that Appellant was the highest bidder for 334 Meeting Street, but denies the remaining allegations. To the extent such allegations are material to this appeal, the BZA's decision as to these issues is supported by evidence and should be affirmed.

16. With respect to the allegations in Paragraph 7 of the Petition, to the extent such allegations are material to this appeal, the BZA's decision as to these issues is supported by evidence and should be affirmed. The remaining allegations in Paragraph 7 of the Petition are denied.

17. With respect to the allegations in Paragraph 8 of the Petition, the City craves reference to the City's Zoning Ordinance, which speaks for itself. The City denies any allegations inconsistent with such Zoning Ordinance, and the City admits that Appellant's property is located within the accommodations overlay zone.

18. With respect to the allegations in Paragraph 9 of the Petition, the City craves reference to section 54-220, which speaks for itself.

19. With respect to the allegations in Paragraph 9 of the Petition, the City craves reference to section 54-220, which speaks for itself.

20. With respect to the allegations in Paragraph 10 of the Petition, the City craves reference to section 54-925, which speaks for itself.

21. With respect to the allegations in Paragraph 11 of the Petition, the City craves reference to the referenced application and the BZA's decision, each of which speaks for itself, but objects to the consideration of evidence such as exhibits outside the certified record.

22. With respect to the allegations in Paragraphs 12, 13 and 14 of the Petition, the City admits that, in 2011, Appellant submitted an application for a special exception under section 54-220 of the City's Zoning Ordinance to permit a 161 room hotel on the property, together with a request for a variance under section 54-110(f) of the City's Zoning Ordinance to laterally expand the nonconforming height of a small structure on the roof of the building, referred to as the "8th Floor," to permit a "SPA/LOUNGE" area within the penthouse. The application initially included floor plans showing this structure as "SPA/LOUNGE"; however, prior to the hearing on Appellant's application, Appellant revised and resubmitted this page of the floor plans to show the expanded structure as "SPA/FITNESS" to address concerns raised by the City's planning staff and neighbors. These floor plans also showed the majority of the "8th Floor" or rooftop as inaccessible green space, again to address concerns raised by the City's planning staff and neighbors. On April 5, 2011, the BZA granted, with conditions, Appellant's requests based on the application submitted to the BZA, including the revised floor plans. The City denies the remaining allegations in Paragraphs 12, 13 and 14 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

23. With respect to the allegations in Paragraph 15 of the Petition, the City craves reference to the BZA's decision, which speaks for itself. The City further admits that the BZA granted the Appellant's special exception request in 2011 based on the applications submitted by

Appellant, including without limitation, the revised floor plans. The floor plans were required to be submitted to assist the BZA in its evaluation of special exceptions in the accommodations overlay zone, the floor plans submitted by Appellant designated intended and requested uses of the eighth floor, and the BZA approved only those uses. The City denies any remaining allegations in Paragraph 15 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

24. With respect to Paragraph 16 of the Petition, the City admits that Applicant submitted construction drawings to the City's building department that were approved. In further response to Paragraph 16 of the Petition, the City admits that the plans submitted were drafted by or on behalf of Appellant, complied with building code requirements, but not with zoning code requirements, a circumstance known by, or at least should have been known by, Appellant. The City denies any remaining allegations in Paragraph 16 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

25. With respect to the allegations in Paragraph 17 of the Petition, to the extent such allegations are material to this appeal, the BZA's decision as to these issues is supported by evidence and should be affirmed. The City denies any remaining allegations in Paragraph 17 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

26. With respect to the allegations in Paragraph 18 of the Petition, to the extent such allegations are material to this appeal, the BZA's decision as to these issues is supported by evidence and should be affirmed. The City denies any remaining allegations in Paragraph 18 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

27. With respect to Paragraph 19 of the Petition, the City admits that Applicant submitted construction drawings to the City's building department that were approved. In further response to Paragraph 19 of the Petition, the City admits that the plans submitted were drafted by or on behalf of Appellant, complied with building code requirements, but not with zoning code requirements, a circumstance known by, or at least should have been known by, Appellant. The City denies any remaining allegations in Paragraph 19 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

28. The City denies the allegations in Paragraph 20 of the Petition, except that the City admits Appellant proceeded with the referenced construction to facilitate uses within the structure on the 8th floor or rooftop and the outside area which have never been approved by the BZA and which are in derogation of the revised floor plans submitted to the BZA in 2011.

29. With respect to the allegations in Paragraph 21 of the Petition, the City admits that the City's building and fire employees conducted inspections of the 8th floor or rooftop for compliance with applicable building and fire codes.

30. The City denies the allegations in Paragraph 22 of the Petition.

31. With respect to the allegations in Paragraph 23 of the Petition, the City admits that the City's zoning official refused to issue a zoning certificate of occupancy for the 8th floor or rooftop of the property because the 8th floor, as constructed, failed to comply with the special exceptions approved by the BZA. The City denies any remaining allegations in Paragraph 23 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

32. The City denies Paragraph 24 of the Petition, as written. The City admits that hotels have accessory uses, which may include meeting space, restaurants and bars, the location and

extent of which are required to be disclosed in floor plans to enable the BZA to weigh the appropriateness of the special exception or which conditions should be placed thereon.

33. The City denies the allegations in Paragraph 25 of the Petition.

34. The City denies the allegations in Paragraph 26 of the Petition.

35. The City denies the allegations in Paragraph 27 of the Petition.

36. The City admits the allegations in Paragraph 28 of the Petition.

37. The City denies the allegations in Paragraph 29 of the Petition, but admits that Appellant applied to the BZA in March 2017 for an amendment to its special exception to allow uses it had already constructed on the 8th floor or rooftop of 334 Meeting Street.

38. With respect to the allegations in Paragraph 30 of the Petition, the City admits that, on April 18, 2017, the BZA conducted a hearing on Appellant's application for an amendment to the BZA's special exception and voted, 4-1, to deny the request. The City denies the remaining allegations in Paragraph 30 of the Petition and objects to the consideration of evidence such as exhibits outside the certified record.

39. The City denies the allegations in Paragraph 31 of the Petition.

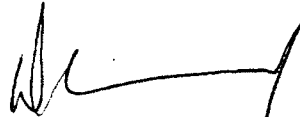
40. The City denies the allegations in Paragraph 32 of the Petition.

41. The City denies the allegations in Paragraph 33 of the Petition. The City also specifically denies Applicant's request for relief in Paragraph 33 of the Petition to the extent it seeks a declaratory adjudication of the parties' respective rights outside of those determined by the BZA and to the extent it seeks relief outside of this Court's appellate jurisdiction and scope of review.

WHEREFORE, the City prays for an Order of this Court affirming the BZA's findings of fact and conclusions of law.

Charleston, SC

September 22, 2107



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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DEWBERRY 334 MEETING)
STREET, LLC,)
)
Appellant-Petitioner,)
)
v.)
)
CITY OF CHARLESTON and)
BOARD OF ZONING APPEALS -)
ZONING,)
)
Respondents.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

**APPELLANT-PETITIONER'S
MEMORANDUM IN SUPPORT OF
APPEAL AND DETERMINATION
OF LEGAL RIGHT TO USE
INTERIOR SPACES**

DOCT-9 11:10 AM
10/19/17

Dewberry 334 Meeting Street, LLC, Appellant-Petitioner, appeals the decision of the Board of Zoning Appeals-Zoning of the City of Charleston ("BZA") on April 5, 2017, attached hereto as Exhibit 1 (the "Decision"), denying the request of Appellant-Petitioner to amend a special exception for hotel use granted it by the BZA in 2011. The BZA denied the request of Appellant-Petitioner to be able to use interior rooms on the eighth floor of Appellant-Petitioner's hotel even though the intended uses for those rooms are permitted as a matter of right. Appellant-Petitioner seeks to have the Decision reversed and the Court determine that it has the legal right to use the interior spaces of the eighth floor as requested.

**THE ZONING APPROVALS AND CONVERSION OF BUILDING
TO AN AWARD-WINNING HOTEL**

The Appellant-Petitioner owns The Dewberry Hotel at 334 Meeting Street. The hotel building is the former L. Mendel Rivers Federal Building that was closed and in a deteriorated state when purchased by Appellant-Petitioner in 2008.

Under the applicable zoning ordinances of the Respondent City of Charleston (the "City") a property may be operated as a hotel only if it is located in an accommodations overlay district

and if the owner obtains a special exception under City Ordinance Section 54-220 for hotel use. The property was re-zoned to place the property within the accommodations overlay district. Appellant-Petitioner took the second step and obtained its special exception for hotel use from the BZA on April 5, 2011, copy attached as Exhibit 2 (the "Special Exception"). (R. pp. 124-126). The BZA granted the Special Exception subject to the following eleven (11) conditions indicated on page 2 of Exhibit 2. (R. pp. 78, 124, 129):

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
- (4) No exterior amplified music shall be permitted;
- (5) Valet parking shall continue to be provided for on-site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
- (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
- (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
- (8) Landscape improvements shown on plans to be installed;
- (9) All activity outside on the roof shall stop at 10 pm;
- (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and
- (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.

Appellant-Petitioner did not begin the final design process and construction for another three to four years after receiving the Special Exception. This mammoth renovation project was ultimately completed in 2016. In 2017, The Dewberry received an award from Hospitality Design Magazine as the best in the world in the lifestyle hotel category. It has received numerous other industry recognitions for excellence.

BASIS OF THIS CONTROVERSY

This controversy arises from Respondents' determinations that prohibit Appellant-Petitioner from using its interior rooms on the eighth floor of the hotel even though the City's Board of Architectural Review ("BAR") approved the design of the eighth floor and even though the City's building official approved the specific construction plans and interior floor layout for the interior eighth floor. Respondents assert that the *zoning* prohibits Appellant-Petitioner from using these rooms for proper hotel accessory uses based on their interpretation and application of the Special Exception (Exhibit 2 hereto) even though the Special Exception contains no such restrictions.

Respondents base their refusal on the conceptual floor plans reviewed by the BZA in 2011. These conceptual floor plans designated the interior of the eighth floor as "Spa/Fitness" and showed a swimming pool with pool deck on the exterior rooftop terrace. (R. p. 127). The first set of the construction drawings submitted to and approved by the City three years later in June of 2014 showed a pool on the rooftop terrace and interior spaces that included restrooms and a large function room. (R. p. 86).

Because of the enormous cost of the rooftop pool and the potential complications including problems for the floors below if there was a leak, Appellant-Petitioner decided against a rooftop

pool. In 2015 it submitted revised construction permit drawings for the eighth floor eliminating the pool on the terrace. (R. p. 86) (A copy of the revised design is attached as Exhibit 3). The City approved these revised construction drawings, without qualification. The approved drawings show the interior of the eighth floor comprised of restrooms, a pantry, and (3) rooms described as Function A, B, and C. (Exhibit 3). The room labeled Function C included a bar feature on the drawing. (Exhibit 3). These revised drawings also show that the spa, originally intended for the eighth floor, had been moved to the second floor.

After Appellant-Petitioner completed the construction of the eighth floor, the City asserted that the zoning prevented Appellant-Petitioner from using almost all the interior rooms on the eighth floor for their intended use. The City zoning official asserted that Appellant-Petitioner could not use a small food and bar room known as the Citrus Club, could not use the pantry-kitchen adjacent to it, and could not use a small room to the side described as the reading room. (A copy of the City zoning official's limited zoning approval for the eighth floor is attached as Exhibit 4). As for the function room described as the Rivers Room, the City took the position it could be used only for "yoga and fitness classes," even though Appellant-Petitioner seeks to use it as a meeting room and function space. The City refused to let the Appellant-Petitioner use these areas even though it acknowledges that all these uses and activities are accessory uses to hotel use. "The City admits that hotels have accessory uses, which may include meeting space, restaurants and bars,..." (§32 of Respondents' Response to Petition). Respondents also contend that the special exception prohibits the exterior use of the northeast quadrant of the rooftop terrace.

Respondents assert that a hotel owner does not have the right to change any of the accessory uses or the location of those accessory uses from what was shown on the conceptual floor plans reviewed by the BZA when it issued the Special Exception. The City asserts that all accessory

uses and the location of them “are pretty much set in stone” as shown on these conceptual floor plans and can never be changed. (R. p. 36:19-24).

The City has been steadfast in this position (1) even though none of the conditions in the Special Exception prohibit the location of these particular accessory uses on the inside of the eighth floor nor limit the use of the northeast quadrant of the rooftop terrace, and (2) even though there is no statute or ordinance that supports the Respondents’ position.

THE BZA APPLICATION AND BZA DECISION

Because the City was unwilling to allow Appellant-Petitioner to use its interior rooms on the eighth floor for their intended purposes, Appellant-Petitioner filed an application to the BZA to amend the 2011 Special Exception, even though it did not believe such an amendment was necessary to allow the conduct of these accessory uses in the desired locations on the eighth floor. A favorable determination by the BZA would have eliminated the need for extensive litigation against the City over its refusal.

The BZA heard the proposed amendment to the Special Exception on April 18, 2017. At the hearing Appellant-Petitioner explained to the BZA that it had a legal right to these uses and was seeking the modification to the Special Exception to allow them in the intended locations since the City insisted a modification of the Special Exception was necessary and, if granted, would avoid legal action against the City. (R, pp. 41:25-42:2; 43:23-25).

The BZA received comments against the proposed modification from the general public. Most of these comments asserted that noise from the rooftop terrace would destroy their property values if these uses inside the building were allowed. (“I am telling you that kind of sound is going to destroy our neighborhood.” R. p. 46:13-14. “A rooftop bar ... will destroy our quality of life and marginalize the people.” R. p. 47:14-17.)

The board members stated that *the interior use was not an issue* for them except to the extent it might result in noise from the rooftop terrace. (Chairman Krawcheck: "So the concern is -- is the outside use, not the interior use." R. p. 66:10-11; Member Robinson: "I think the use of the interior is fine, but I know it would be a noisy situation outside." R. p. 66:22-23). The public and some of the board members considered the hypothetical noise from the rooftop terrace to constitute a basis for denying the request to use the *interior* spaces even though conditions 4 and 9 of the 2011 Special Exception directly limit noise and activity on the rooftop terrace: "(4) no exterior amplified music will be permitted; ... (9) All activity outside on the roof shall stop at 10 pm;..." R. p. 129.

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

None of those eleven restrictions of the 2011 Special Exception limit the accessory uses on the interior of the eighth floor to those shown on the conceptual floor plan nor stated that the owner could not have a function-meeting room, small bar with limited food service, a reading room, or a small pantry-kitchen on the inside of the eighth floor. Similarly, none of the eleven restrictions prohibited Appellant-Petitioner from having access to the entire perimeter of the rooftop terrace.

In the end, after hearing Board Member Appel's explanation for his position, and the Chairman stating that he [Appel] "made a good legal argument and maybe some judge would reverse this" (R. 70:16-17), the BZA voted 4-1 to deny the request to modify the special exception to allow the accessory uses on the interior that are permitted as a matter of right.

SUMMARY OF LEGAL ARGUMENT

In so ruling, the BZA acted arbitrarily and capriciously and committed legal error. The Appellant-Petitioner has the legal right to conduct these accessory uses in the interior spaces of its hotel building. Neither the conditions of the 2011 Special Exception nor any of the City's zoning ordinances prohibit these uses in these locations nor specify that a hotel operator can never move an accessory use or hotel function from one location in the hotel building to another location.

The Decision is also arbitrary and capricious because it is unsupported by the evidence in the record before the BZA. The public's comments were entirely speculative and not based in fact, and concerned imagined noise from the rooftop terrace as opposed to the interior of the building. Conditions (4) and (9) of the 2011 Special Exception address possible noise from the rooftop terrace. Additionally, the Board Members conceded that the intended accessory uses on the interior of the eighth floor were not a problem or source of concern in and of themselves.

Further, the refusal to allow Appellant-Petitioner to use the interior spaces for accessory uses that are permissible as a matter of right violates the Appellant-Petitioner's right to due process under the Constitutions of the State of South Carolina and the United States. Nothing in the ordinances or the special exception contain the restriction imposed by the City and BZA. For this reason, Respondents' interpretation of the ordinances and 2011 Special Exception constitute an "as applied" violation of Appellant-Petitioner's rights to due process.

Finally, the City is estopped from asserting that Appellant-Petitioner cannot use the interior areas of the eighth floor and the northeast quadrant of the rooftop terrace based on the City's approval of the construction plans and the Appellant-Petitioner's reliance on that approval and expenditure of millions of dollars to construct the eighth floor and the rooftop terrace.

LAW

Standard of Review

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

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

737 S.E.2d 864.

- I. **The Respondent BZA committed an error of law and acted arbitrarily and capriciously. Neither the 2011 Special Exception nor the City's zoning ordinances dictate that a hotel operator cannot vary the location of permissible accessory uses from the conceptual floor plan submitted with the application for special exception.**

There is nothing in the 2011 Special Exception or the City's zoning ordinances that prohibits a hotel owner from altering the locations of permissible accessory uses from the conceptual floor plans submitted with the application for special exception. The BZA's charge in applying the standards set forth in Sec 54-220 (R. pp. 145-147) is to determine whether to grant a special exception for accommodations use. The BZA does not approve plans, as pointed out by Board Member Appel.

Section 54-925 grants the BZA the authority to impose conditions on their approval of a special exception. (R. p. 152). The BZA imposed eleven conditions in approving the Special Exception for accommodations use in 2011. None of those conditions state that the Appellant-

Petitioner cannot have a function room, reading room, small bar with limited food service, or a pantry/kitchen on the eighth floor.

Furthermore, none of the City's zoning ordinances states that a hotel operator is locked in to the conceptual floor plans that were reviewed by the BZA or must obtain BZA approval to alter accessory uses or the location of those accessory uses. Although voting to turn down the amendment to the Special Exception, board member Robinson commented on the nonsensical end result of the City's logic: "I agree with you [Chairman Krawcheck], but I also want to know, since he didn't put the pool in, the pool is on the approved plan, are you going to turn around and make him put the pool in?" R. p. 66:16-19.

Contrary to the City's position with respect to the The Dewberry, 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 Sec. 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 of zoning ordinances by a zoning administrator 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 the Special Exception and zoning ordinances to give them a more restrictive application than their wording is impermissible. As stated by the Court of Appeals in Helicopter Solutions, *supra*:

This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that

statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

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

The BZA committed legal error and acted arbitrarily and capriciously. All of Appellant-Petitioner's proposed uses of the eighth floor are permissible accessory uses to hotel use and there is no prohibition on the location of those uses on the eighth floor in either the Special Exception or the applicable zoning ordinances of the City. For these same reasons, the City's interpretation of the Special Exception and refusal to allow these accessory uses on the interior of the eighth floor is erroneous as a matter of law.

- II. **The Respondent BZA committed an error of law and acted arbitrarily and capriciously because it denied the request to use the interior spaces for permissible accessory uses based on speculative comments about noise from the outside rooftop terrace. Further, the conditions in the 2011 Special Exception address outside noise, and noise would be subject to the City's noise ordinances, Section 21-16.**

The BZA acted arbitrarily and capriciously since it denied the request for use of the *interior* areas on the eighth floor because of concerns about noise from the *exterior* of the building on the rooftop terrace. Concerns about conduct on the outside on the rooftop terrace is not a sound basis to deny Appellant-Petitioner its intended permissible accessory uses on the interior of the building.

Additionally, there was no competent evidence the requested use of the interior spaces would cause a detrimental effect on the value of the properties in the neighborhood. The facts of this case are remarkably similar to those in Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) where our Court of Appeals reversed the circuit court and found the denial of a special exception by the board of zoning appeals of North Augusta was arbitrary and capricious and not supported by any evidence:

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

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

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

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

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

For the same reasons, there was no proof other than speculation that the noise from the rooftop terrace is going to be a problem. Even though conjectural noise from the *outside* rooftop terrace is not a valid reason to deny allowed uses on the *inside* of the building, there was no competent proof of excessive noise from the rooftop.

On the other hand, Appellant-Petitioner 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).

Finally, the Decision of the BZA is arbitrary and capricious for the additional, alternative reason that safeguards are in place to control the level of sound from the terrace. Conditions 4 and 9 both address containing sound from the terrace by prohibiting amplified music outside and by requiring all activities on the terrace cease by 10 PM.

Furthermore, 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

The attempt to regulate speculative noise from the rooftop terrace on the *outside* of the building by denying Appellant-Respondent's right to accessory uses on the *inside* of the building is arbitrary and capricious where the volume of any such noise must comply with the conditions of the Special Exception and the City's noise ordinance.

III. The Decision of the Respondent BZA and denial of use by the City violates the Appellant-Petitioner's constitutional rights to due process.

As previously stated, there is nothing in the City's zoning ordinances or in the 2011 Special Exception that says that Appellant-Petitioner can use the eighth floor only for the uses shown on the conceptual floor plans considered by the BZA four years before its final plans were complete. Nor is there any ordinance that specifies that a hotel owner who receives a special exception cannot change the location of permissible accessory uses within the interior of the hotel from the locations shown in the conceptual floor plans considered by the BZA in determining whether to grant the accommodations use. Both the City and BZA imply this prohibition in their application of the 2011 Special Exception and the other applicable ordinances of the City.

"A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." State v. Green, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). Here, there is nothing in the ordinances or the 2011 Special Exception that informs a person of common

intelligence that the right to operate the hotel abridges the owner's rights to locate accessory uses where he chooses and that he must locate those uses precisely as shown in the conceptual floor plans before the BZA when it granted the Special Exception six years ago.

IV. The Respondent City and BZA are estopped to deny Appellant-Petitioner'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 Function Rooms A, B, and C, as well as the Pantry.

In April 2015 the City's building official approved the final construction plans for the eighth floor that showed Function Rooms A, B, and C, as well as the Pantry. (R. pp. 87-88) (Exhibit 3). In reliance on this approval, Appellant-Respondent spent millions of dollars in constructing the eighth floor and the deck on the outside terrace. However, once they were constructed, the City asserted that the zoning did not allow Appellant-Petitioner to use the Citrus Club as a small bar with limited food service, nor to use the pantry-kitchen adjacent to it, nor to use a small room to the side described as the reading room. As to the Rivers Room, the City took the position it could be used only for "yoga and fitness classes," and not for any functions even though approved for construction as "Function A."

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

Here, the Appellant-Petitioner was entitled to rely on the approval of the plans for various functions shown on the plans, proceeded 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.

CONCLUSION

For the foregoing reasons, as requested in Paragraph 33 of the Petition and Grounds for Appeal, "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."

Respectfully submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC

By: *G. Trenholm Walker*
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Post Office Drawer 22167
Charleston, SC 29413
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ATTORNEYS FOR APPELLANT-
PETITIONER

October 9, 2017

Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, ~~or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this~~ 9th day of October, 2017, in Charleston, South Carolina

G. Trenholm Walker



PROPERTY LOCATION, TMS NUMBER[S] AND DESCRIPTION OF REQUEST[S]:

334 MEETING ST. (MAZYCK/WRAGGBOROUGH) (459-13-03-022)

**Request approval to amend the April 5, 2011 special exception approval for a hotel to add uses on the top floor/rooftop and change the closing time for rooftop activities from 10pm to midnight.
Zoned GB-A.**

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions:

☒ **DENIED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☐ **APPROVED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/18/17 Chairman: [Signature]

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions:

☐ **DENIED.** The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ **APPROVED.** The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman: _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

EXH 1

ZONING PERMIT APPLICATION

CITY OF CHARLOTTE

APPROVED
DELETED

AS SUBMITTED
WITH REVISIONS

The Dewberry
DATE: 7/26/2016
BY: [Signature]
FOR: [Signature]

Motor Court/ Parking/
Neighborhood Side

* Conditions
1. No exterior
activity on the
roof top shall
stop @
10 PM

"RIVERS ROOM", an interior
space for yoga and fitness
classes.

Moveable Sign 36"
high weighted bottom
"Employees Only,
Emergency Exit"

Motor Court/ Parking/
Neighborhood Side

8th Floor section @ outdoor area

"READING ROOM", to be
CLOSED
PANTRY, to be CLOSED

EUROPEAN FAN
PALMS in corner
planters and middle
planter.

Meeting Street Side
VIEW to Marion Square

Additional Planter
to close down
access to area

Charlotte Street Side

EMPLOYEES
ONLY,
EMERGENCY EXIT

mechanical

exit stair

Rivers Room

elevators

lab

women's r

men's r

elevator

yoga fitness area

6' planters and
hedge to 5' high

Moveable Sign 36"
high weighted bottom
"Employees Only,
Emergency Exit"

6' high mechanical screen wall
and planters on outside of wall

6' planters @ 12' o.c.,
hedge to 5' high

"CITRUS CLUB", to be
CLOSED

Meeting Street Side

Outdoor Deck, outdoor seating
area

8th Floor Roof Plan
26 July 2016

DATE: 7/26/2016
ZONING OFFICIAL: [Signature]
"THE APPROVAL EXPRESSES IN TWO YEARS UNLESS AN
EXTENSION IS APPROVED PURSUANT TO SEC. 34-92
THIS DOES NOT CONSTITUTE APPROVAL
BY OTHER CITY BOARDS OR DEPARTMENTS."

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pick-ups 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.



PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

Request special exception under Section 54-220 to allow a 161-room inn in a GB-A zone district.

(Approval granted on 3-16-10 was for a 120-room inn).

Request special exception under Section 54-110 to allow an addition that extends a non-conforming building height.

Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☐ DENIED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☒ APPROVED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued 4/5/11 Chairman [Signature]

8 AM - 6 PM

activity - report 10 PM

all other requests approved

(See attached)

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions:

☐ DENIED. The Board concludes that the requirements for granting a variance have not been met and therefore orders that the variance be denied.

☐ APPROVED. The Board concludes that

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good and the character of the district will not be harmed by the granting of the variance

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted subject to the following conditions, if any:

Date issued _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

1/09

EXH. 3

THE DEWBERRY

CHARLESTON

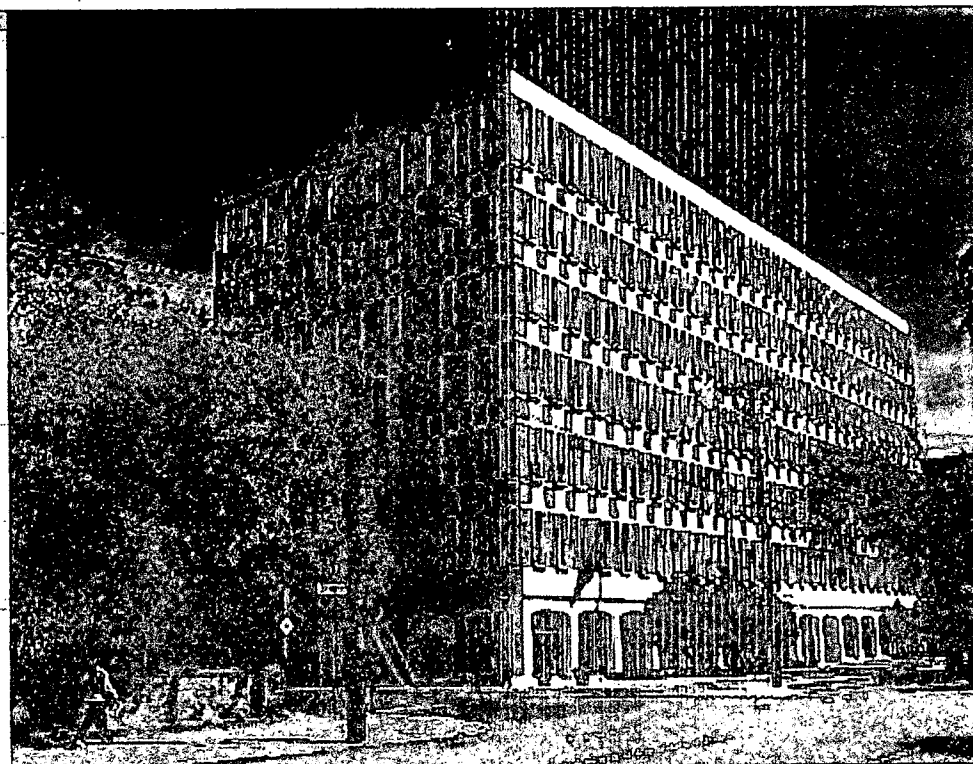
BUILDING PERMIT SET - 06.27.14

BULLETIN #6 - 04.24.15

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334 MEETING STREET, CHARLESTON, SC 29401



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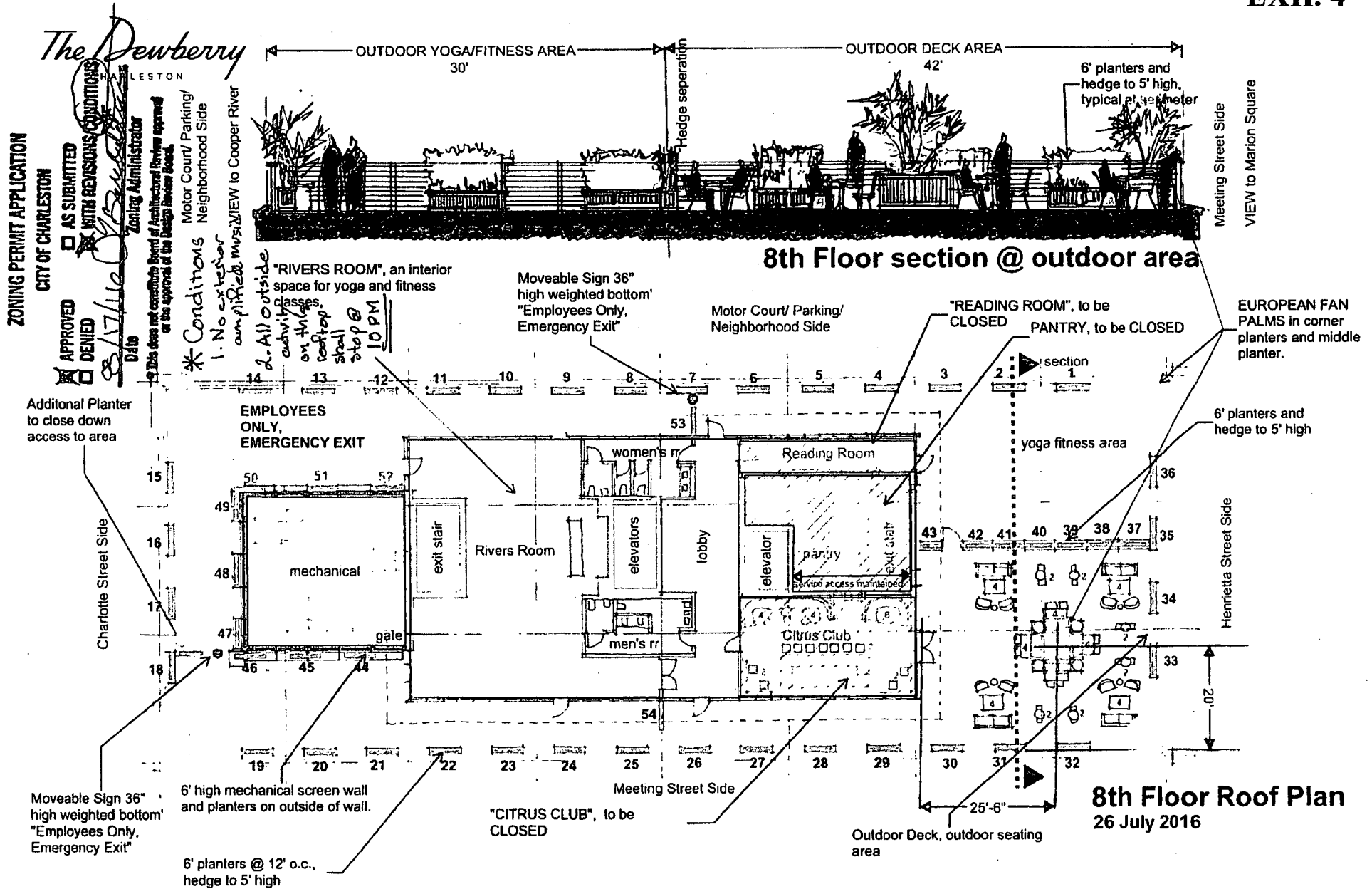
BUILDING PERMIT SET 06.27.14

COVER SHEET

R.p. 0097

G000-1

41 PROJECT TEAM



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

CASE NO. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC,)
)
Petitioner-Appellant,)
)
v.)
)
City of Charleston and Board of)
Zoning Appeals-Zoning,)
)
Respondents.)

Memorandum of Law by
Respondents City of Charleston and
Board of Zoning Appeals-Zoning

FILED
2017 OCT 13 AM 11:23
JULIE A. ARMSTRONG
CLERK OF COURT

INTRODUCTION

This is an appeal from a decision of the City of Charleston Board of Zoning Appeals-Zoning (the “BZA” or “Board”) denying an application to amend a special exception to permit a bar, function room, and kitchen area within a nonconforming structure on the rooftop of the Dewberry Hotel. **R. p.137.**

In 2011, Petitioner-Appellant Dewberry 334 Meeting Street, LLC (“Appellant” or “Dewberry”) sought and obtained special exceptions, subject to certain conditions, to use Appellant’s property as a 161-room hotel and to expand a nonconforming structure on the rooftop of the hotel building for a proposed spa/fitness area. **R. pp.5:24-6:11, pp.138-139.**

In support of its 2011 application, Appellant originally submitted floor plans showing a “SPA/LOUNGE” area within the nonconforming structure. **R. p.6:13-23, p.7:2-18, p.142.** In reaction to neighborhood opposition to a rooftop bar, Appellant amended the floor plans prior to the hearing in 2011 to show the spa/lounge area as “SPA/FITNESS.” **R. p.6:13-23, pp.7:19-8:21, p. 42:4-9, pp.48:23-49:19, R. p.67:6-15, R. p.143.**

In 2017, Appellant sought an amendment to its special exception to use the nonconforming structure for a bar, function room, and kitchen. **R. pp.118-123.** The BZA denied this request, and this appeal followed. **R. p.137.** As set forth further herein, the BZA’s decision is supported by the evidence. Consequently, the City and the BZA respectfully assert that the Court should affirm the BZA’s decision.

FACTS

Pursuant to section 54-220(a) of the City of Charleston’s Zoning Ordinance (the “CZO”), the use of property within the City for a hotel or other accommodations use is *not* a matter of right. **R. p.145.** In fact, a property may *only* be used as a hotel *if* the property is located in the Accommodations (A) Overlay Zone, *and* the BZA grants a special exception for the use, after applying criteria of the Accommodations Overlay Zone. **R pp.145-147.**

Appellant’s property, which is the site of the former Federal Building located at 334 Meeting Street (the “Property”), lies within the A Overlay Zone. **R. p.4:5-6, 4:23-5:2, p.72.** Although a portion of the Property is zoned General Business (GB), the remainder of the Property, along with the other properties on the block—bounded to the west by Meeting Street, south by Henrietta Street, east by Elizabeth Street, and north by Charlotte Street—is zoned for residential uses. **R. p.72.** In fact, the Property is surrounded on three (3) sides by residentially-zoned properties located in the Mazyck-Wraggborough neighborhood. **R. p.72.**

In 2010, Appellant sought and obtained, subject to certain conditions, a special exception to permit a seven (7) story, 120-room hotel within the existing building on the Property. **R. pp.4:23-5:5.** The 8th floor of the building, consisting of an outside rooftop area and a “penthouse” structure, was used for mechanical equipment. **R. p.5:3-15.** The structure was nonconforming

because it violated the height limit applicable to the Property. **R. p.6:3-9.** No other use of the 8th floor rooftop was proposed in 2010. **R. p.5:6-15.**

In 2011, Appellant applied for two (2) special exception requests. **R. pp.5:24-6:11.** Pursuant to section 54-220 of the CZO, Appellant sought to amend its special exception to permit a 161-room hotel on the Property. **R. pp.5:24-6:2.** Additionally, pursuant to section 54-110(f) of the CZO, Appellant sought to expand the nonconforming structure on the 8th floor by increasing its square footage, thus expanding the nonconforming height horizontally. **R. p.6:2-11, R. pp.150-151.**

Appellant originally submitted floor plans in support of its application showing the area within the nonconforming rooftop structure as “SPA/LOUNGE.” **R. pp.6:24-7:18, p.142.** These plans also showed an open deck on the north end of the rooftop, a pool area on the south end, and a green roof along the perimeter of the entire area. **R. p.142.**

Prior to the hearing in 2011, Appellant revised the floor plans for the 8th floor. **R. p. 6:21-23.** The revised floor plans included the pool and an accessible deck on the south end of the roof. **R. p.143.** The revised floor plans eliminated the exterior deck on the north end, and approximately $\frac{3}{4}$ of the roof—the entire outside area, with the exception of the pool and pool deck on the south end—was shown as “GREEN ROOF (not accessible).” **R. p.143.** Appellant also revised the floor plan for the interior rooftop structure to show the area as “SPA/FITNESS.” **R. p.143.** There was no mention of a bar, function room, kitchen, or lounge area in the revised floor plans. **R. p.143.**

The BZA approved the 2011 application based on the revised floor plans, subject to eleven (11) conditions, which were accepted by Appellant. **R. pp.7:19-8:22, pp.138-139, p.143.** During the hearing in 2017, neighbors and BZA members explained that the primary concern in 2011 was the possibility of a rooftop bar, that the Appellant knew of these concerns, and that the revised

plans were submitted to eliminate these concerns. **R. p.6:13-23, pp.7:19-8:21, p. 42:4-9, pp.48:23-49:19, R. p.67:6-15, R. p.143.**

In 2016, the hotel began opening, on a floor by floor basis. **R. p.9:7-18.** By 2017, the first seven floors were in use. **R. p.9:7-18.** In the meantime, in 2014, Appellant submitted different plans for the 8th floor to the City's building permit office and constructed a bar called the Citrus Club, a function room called the Rivers Room, and a kitchen called the Pantry within the enclosed structure on the 8th floor. **R. pp. 10:5-21, p.43:7-13, p.90, p.144.** The proffered reason for the changes was that a pool proved to be too expensive on the rooftop. **R. p.6:6-22, pp.8:24-10:21, p. 90.** On August 17, 2016, the zoning administrator approved a zoning permit to allow use of the 8th floor on the condition that the bar, function room and kitchen be closed because they did not conform to the floor plans approved by the BZA in 2011. **R. pp.10:15-11:3, R. p.144.**

The present appeal arises from Appellant's 2017 application to amend its 2011 special exception "to allow the existing floorplan and proposed uses for" the Citrus Club (bar), Rivers Room (function room), and Pantry (kitchen) "on the interior of the eighth floor." **R. p.121.** Appellant also seeks to amend the special exception permit to allow patrons to access the entire perimeter of the exterior of the rooftop. **R. p.122.**

On April 18, 2017, the BZA heard Appellant's latest application. **R. p.1.** There was considerable public opposition to the application. After hearing from Appellant and the public, and after extensive discussion, the BZA voted 4 to 1 to deny the application. **R. pp.44:8-62:16, pp.63:10-71:22.**

STANDARD OF REVIEW

On appeal from the decision of a board of zoning appeals, "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court

may not take additional evidence.” S.C. Code Ann. § 6-29-840(A). “The factual findings of the Board must be affirmed by the circuit court if there is *any* evidence to support them and they are not influenced by an error of law.” Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988).

“In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law.” Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). “A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). “A reviewing court should not disturb the findings of a zoning board of adjustment unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority.” Massey v. City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 197, 532 S.E.2d 885, 886 (Ct. App. 2000).

DISCUSSION

I. The BZA did not act arbitrarily, capriciously, or in excess of its authority, and there is sufficient evidence supporting the BZA’s decision.

Simply put, the BZA’s decision is amply supported by the evidence on record. Appellant fails to establish that the BZA’s decision is arbitrary, capricious or in excess of its authority.

A. The City Council adopted zoning ordinances intended to protect existing neighborhoods from the potentially negative impacts of hotels.

At the outset, it should be noted that the City Council of Charleston has adopted zoning ordinances that place a high premium on preserving existing neighborhoods, requiring the BZA to closely scrutinize applications for hotel and other accommodations uses: “The City places a high value on the preservation of the character of its residential neighborhoods.” CZO, § 54-220(a) (R.

p.145). “Potential negative impacts affecting residential neighborhoods shall be avoided or minimized to the greatest extent possible.” § 54-220(a).

As a result, the City Council not only limited hotel uses to specific geographic locations, but also refused to permit hotel uses as a matter of right: “The A Overlay Zone is intended to identify those areas within the City limits where accommodation uses are allowed.”¹ § 54-220(a). “Accommodation uses are prohibited except within the A Overlay Zone [subject to certain exceptions].”² § 54-220(a). “In any Accommodation overlay zoning district, land may be used and buildings or structures may be erected, altered or use for any purpose allowed by the underlying zoning . . . and [hotel/accommodations uses] subject to approval of the Board of Zoning Appeals.” § 54-220(b).

City Council requires the BZA to consider an extensive list of potential adverse effects before permitting accommodations as an exception under section 54-220(b) of the CZO. Among other things, an applicant must demonstrate that the proposed uses will not significantly increase traffic on streets in residential neighborhoods, will fit within the character of the immediate neighborhood, and will be located and designed to facilitate the use of transit systems. § 54-220(b). These criteria are in lockstep with City Council’s stated intent of “preserving the character of its residential neighborhoods.”

But City Council did not stop there. Before the BZA may grant an exception under section 54-220(b), the CZO places the burden upon the applicant to address, in a written assessment report filed with the application, a number of factors, to include the proximity of residential

¹ The definition of “accommodations uses” includes hotels. See § 54-120 (**R.p.148**).

² The exceptions apply to condition uses for bed and breakfasts and short term rentals.

neighborhoods to the facility, the accessory uses proposed for the facility, and their impacts. § 54-220(f).

B. The record demonstrates that the BZA properly applied the criteria under section 54-220 before denying Appellant's application.

The BZA was quite mindful of the criteria in section 54-220 of the CZO in its discussion and ultimate disposition of the application on appeal. **R. pp.40:6-15, 64:16-65:15, 65:21-66:15, 66:22-24.** The BZA took into account the very criteria germane to the application by focusing on the predominant uses in the vicinity, the proximity of residential neighborhoods and the effect the proposed uses would have in terms of its size, traffic generation and noise. **R. pp.64:16-65:15, 65:21-66:15, 66:22-24.**

While Appellant suggests that the BZA should limit its analysis to only the exterior of the rooftop, nothing in the CZO suggests that the BZA's determination should be so limited, and the BZA's ruling that an interior rooftop bar would intensify the negative impacts from the exterior of rooftop is supported by testimony at the 2017 hearing. **R. pp.49:5-50:9, 53:20-54:5, 58:5-13, 65:21-66:15, 66:21-24.** As one person explained at the hearing:

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

R. p.58:5-13.

The BZA's concern about other negative impacts on the neighborhood is also supported by the evidence of record. **R. pp.47:3-24, 49:5-50:9, 50:22-1, 55:2-7, 59:23-60:2.**

C. The constantly changing floor plans for the 8th floor also supports the BZA's decision.

The history of the ever-evolving plans for the 8th floor of this hotel is hard to ignore. The 8th floor went from a place to store mechanical equipment in 2010, to a proposed lounge area, to a fitness center. **R. pp.5:3-15, 5:24-6:11, 7:2-18, 7:19-8:21.** The most recent iteration calls for a publicly accessible use of the entire rooftop, serviced by a bar, a room for conferences and luncheons, and a small kitchen. **R. p.144.**

It is undisputed that the uses on the rooftop have been a concern throughout the zoning process for this hotel. Not only is this evident from the public comments, but also from the statements of the Board itself:

MS SMITH: . . . But I do know that when I voted for those conditions and for the special exception of the Dewberry Hotel, I considered this – (inaudible) – I looked at it, and I saw that where it was non-accessible and . . . I did it based on this – (inaudible) – and I looked at it and I studied it and it was part of my thought process.

R. p.63:10-19.

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

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

R. pp.63:20-64:6.

[CHAIRMAN KRAWCHECK:] The rooftop bar was not approved for this hotel, and I think that Mr. Batchelder summed it up when he said that—that we did approve the plans as submitted, and then we put the conditions on that we—we did, and it changed those plans.

. . . .

. . . . I think that the concern really is—is what is going to happen on the out—on the rooftop outside and that was one of the original conditions.

R. pp.64:16-65:15, 66:8-10.

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

R. p.67:4-15.

As the BZA recognized, Appellant's latest application, if approved, would fundamentally alter the nature of the uses permitted on the 8th floor to the detriment of the neighborhood. No one could seriously contend that traffic and noise posed by the now-approved fitness uses for hotel guests confined to the south quadrant of the 8th floor are remotely equivalent to the traffic and noise posed by use of the entire rooftop for public events and a bar space.

As opposed to being arbitrary or capricious, the record reveals the Board was deliberative and considered the application in terms of the effect the changes proposed on the 8th floor and rooftop would have on neighbors in terms of noise, parking and traffic. Indeed, it would have been remiss of the Board had it not done so.

II. Appellant fails to establish that the BZA committed an error of law in finding that the 2011 special exception prohibited Appellant's proposed for the 8th floor.

On appeal, Appellant contends that the Board committed an error of law in denying its current application because none of the conditions of the Board's prior approvals prevented Appellant from using the 8th floor for a bar, event space or related activities. As a result, Appellant contends that Appellant did not need a special exception.

Section 54-220(b)(1)(f) of the CZO requires an applicant for a hotel use to include a "detailed written assessment report" with its application, addressing each criterion the BZA is required to consider under section 54-220(b) of the CZO. **R. pp.144-45.** This assessment report

requires an applicant to advise the BZA of the types and locations of uses proposed on the property, and specifically requires the applicant to include information on accessory uses within the facility. § 54-220(b)(1)(f)(7). This information is critical to the Board if it is to responsibly assess whether the proposed uses are in keeping with the purpose of the ordinance that potential negative impacts of hotels to neighborhoods be “avoided or minimized to the greatest extent possible.” **R. p.145.**

As part of its detailed written assessment report, Appellant submitted the floor plans for the building in its 2011 special exception application, which focused primarily on the use of the 8th floor. **R. pp.72, 75.** Appellant’s hotel immediately abuts viable, established residential neighborhoods. **R. p.72.** This fact alone made it incumbent for the Board to evaluate the hotel, its operations and the location of accessory uses in context with the abutting neighborhoods.

Appellant contends that, once the special exception is approved, the developer is free to vary from the plans submitted as part of his assessment. If that were the case, then the plans would be rendered superfluous, in contravention to the rules of statutory construction. See Nexsen v. Ward, 96 S.C. 313, 321, 80 S.E. 599, 601 (1914) (“The rule sustained by all the Courts requires that every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”). To ignore the importance of the written detailed assessment report would leave the door open for a “bait and switch” approach to zoning applications.

III. Appellant mistakenly interprets section 54-220 to permit any accessory use in any location within a hotel after a special exception is granted. This argument ignores the plain language of the ordinance.

Appellant’s assertion that, once a special exception for a hotel is approved, an applicant then has full authority to introduce new accessory uses anywhere as a matter of right flies in the face of the requirement that an applicant for special exception show “the accessory uses proposed

for the facility in terms of size, impact on parking, and impact on traffic generation.” § 54-220(b)(1)(f)(7) (**R. p.146**). It also ignores section 54-925 of the CZO, in which City Council authorizes the BZA to attach “conditions regarding the location, character or other features of the proposed building, structure, or use as the Board may consider advisable” **R. p.152**. Finally, this argument belies Appellant’s own conduct in submitting a revised floor plan in 2011 to mitigate concerns about a bar directly serving the rooftop.

IV. Appellant incorrectly asserts that the BZA should ignore how the new interior uses proposed for the 8th floor facilitate an intensification of the exterior uses.

Appellant’s argument that the BZA committed legal error in its review of changes to the interior floor plans for the 8th floor is also misplaced. First, contrary to Appellant’s suggestion, Appellant is not currently proposing to *move* a spa or pool which were previously approved to another location within the hotel. Instead, Appellant is *adding* a new bar, a new kitchen, and a new function room previously undisclosed to the BZA.

Second, Appellant’s attempt to parse interior uses on the roof from the outdoor space rings hollow where, as here, Appellant intends to use the outdoor space as an extension of what it is now describing as an interior use. There is no separation of the uses—there is no question that the proposed interior uses are intended to serve the outdoor area and vice versa. This new proposed use of the rooftop would encourage the general public—not just hotel patrons—to utilize the rooftop—fundamentally altering the character of the rooftop as approved by the BZA in 2011.

V. Appellant mistakenly asserts that the zoning administrator erred in limiting access on the exterior of the rooftop.

As a preliminary matter, Appellant may not collaterally attack the zoning administrator’s decisions by direct appeal to the circuit court. “Appeals *to the board* may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county.” S.C.

Code Ann. § 6-29-800(B) (emphasis added). Appellant never appealed from the zoning administrator's conditional approval of Appellant's zoning permit application in August 2016, and such an appeal would now be untimely under state statute and the CZO.³

Even if the zoning administrator's decision had been appealed to the BZA, his decision should be affirmed. Section 54-220 and section 54-925 of the CZO provide the BZA with extensive discretion to condition Appellant's use of the hotel in order to protect the surrounding neighborhood. The floor plans of the roof approved by the BZA in 2011 specifically and unequivocally illustrate that the lion's share of the roof was denominated as "GREEN ROOF (inaccessible)." **R. p.143.** If Appellant wanted a deck over the outdoor area of the roof, it should have included that in its floor plans so as to allow BZA review.

Finally, the zoning official did not "unilaterally impose conditions prohibiting uses and access to a portion of a building," as Appellant contends. Instead, the zoning administrator merely enforced the floor plans and conditions the BZA imposed on Appellant's 2011 approval.

VI. The doctrine of "governmental estoppel" does not apply where, as here, Appellant's building plans failed to comply with the previously permitted zoning.

Appellant complains on appeal that the City's building permit department—which Appellant describes as a "different arm" of the City—approved building plans showing the Citrus

³ See § 6-29-800(B) ("The appeal [from an administrative officer's decision] must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken."); CZO, Chapter 54, Appendix C, Art. III, § 2 ("An appeal from an administrative decision must be filed within ten (10) business days after actual notice of the decision by delivery of the approved appeal form and fee . . ."). **R. p.155.**

Club, Rivers Room, and Pantry, asserting that Appellant relied on this approval to construct such facilities. **R. p.43:7-19.**

“As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.” Greenville Cty. v. Kenwood Enters., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003). The issuance of a building permit does *not* estop a municipality from enforcing its zoning ordinance. See Grant v. City of Folly Beach, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) (“In this case, City issued a building permit for work in ‘Downstairs Apt. # 1.’ Assuming the permit’s reference to an ‘apartment’ misled Grant into believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor.”).

“If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government’s conduct, and (3) a prejudicial change in position.” Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 236-37, 692 S.E.2d 499, 506 (2010).

Appellant was fully aware of the 8th floor uses approved by the BZA, and Appellant was fully aware that those uses did not include a bar or a kitchen or an events room. The record is clear on these points—it unequivocally demonstrates that, in 2011, Appellant revised the floor plans for the rooftop to specifically delete any inference that a bar, function space, or kitchen would be constructed on the 8th floor. It comes with ill grace for Appellant to claim estoppel on the basis of the building department approving plans that Appellant knew were not compliant with the zoning approved by the BZA in 2011.

Even if Appellant’s actual knowledge were disregarded, Appellant certainly had the means of knowing the truth of the facts in question by simply requesting an opinion from the zoning

administrator about whether Appellant could avail itself of these new uses in its building plans. Appellant did not justifiably rely on the building permits—Appellant tried to game the system and got caught. Any change of position arises from Appellant’s own conduct—not the City’s.

It is well settled that one who seeks equity must do equity. See Norton v. Matthews, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967) (“He who seeks equity must do equity.”); Ingram v. Kasey’s Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 (2000) (“Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.”). Appellant does not have clean hands. For Appellant to submit building plans that it knew did not comply with the terms of its zoning, and then feign surprise and harm when caught, is disingenuous, at best.

VII. To the extent the BZA’s decision contains language applying to a portion of Appellant’s request that had previously been withdrawn, such decision does not constitute legal grounds for reversal.

As part of its 2017 application, Appellant originally requested that the hours for outdoor activities on the rooftop be extended from 10pm to midnight. **R. p.119.** While the BZA’s order includes pre-printed language regarding the scope of the application, it is clear from the record that the BZA did not consider or rule on Appellant’s request for the change in hours, which was withdrawn prior to the hearing. **R. p.12:11-23, p.137.** The BZA never discussed or addressed the issue at the hearing.

To the extent that the pre-printed description of the application was not amended to delete the portion of the application regarding an extension of hours for rooftop activities, such was an inadvertent clerical miscue. To the extent this clerical miscue constitutes error, such error is harmless. See Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988) (to warrant reversal, BZA’s decision must be *influenced by* an error of law);

McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn’t make any difference, doesn’t matter.”).

CONCLUSION

The BZA’s decision is supported by evidence and was not arbitrary, capricious, in excess of its authority or influenced by an error of law. The BZA’s decision should be affirmed, and this appeal dismissed.



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ATTORNEYS FOR RESPONDENTS

Charleston, South Carolina
October 9, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Dewberry 334 Meeting Street, LLC,)

Appellant-Petitioner,)

vs.)

City of Charleston and Board of Appeals-Zoning,)

Respondents.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-2183

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

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☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider, Alter or Amend

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted _____

SECTION III: Motion Fee

☒ **PAID – AMOUNT: \$25.00**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED – AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Dewberry 334 Meeting Street, LLC,
Petitioner-Appellant,

v.

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

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2017-CP-10-2183

**Respondents' Notice of Motion and Motion
to Reconsider, Alter, or Amend**

TO: G. TRENHOLM WALKER, WALKER GRESSETTE FREEMAN & LINTON, LLC,
ATTORNEYS FOR APPELLANT-PETITIONER DEWBERRY 334 MEETING STREET, LLC

YOU WILL PLEASE TAKE NOTICE THAT Respondents City of Charleston and the City of Charleston Board of Zoning Appeals-Zoning (collectively, "Respondents"), by and through their undersigned counsel, hereby move the Court for an order reconsidering, altering, or amending the Court's Final Order on Appeal (the "Order") filed on December 15, 2017. Respondents received written notice of entry of the Order on December 21, 2017.

This appeal concerns whether Respondent Board of Zoning Appeals (the "BZA") erred in denying Appellant's request to reprogram uses for the rooftop of its hotel to allow for a rooftop bar and events space. At the outset, note must be made that, in the City of Charleston (the "City"), a hotel is *not* a permitted use as a matter of right, even if a property is located in the Accommodations overlay zone. **R.p.145** (§ 54-220(a)). A hotel is only allowed if a special exception is approved by the BZA. **R.p.145** (§ 54-220(a)).

As part of a special exception application, an applicant must submit floor plans delineating the size and location of uses, including accessory uses. **R.pp.145-46** (§ 54-220(b)(1)(f)). Prior to its 2017 application, Appellant *never* submitted any floor plan to the BZA showing a rooftop bar.

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CLERK OF COURT
SOUTH CAROLINA
NINTH JUDICIAL CIRCUIT

Prior to its 2017 application, Appellant *never* submitted any floor plan to the BZA showing space for events on the 8th floor. Prior to its 2017 application, Appellant *never* submitted a floor plan to the BZA showing the majority of its rooftop as an accessible, patron-use area.

In fact, the record reveals that Appellant went to painstaking ends to propose a rooftop with passive uses, limited to hotel patrons. **R.p.6:13-23, pp.7:19-8:21, p.42:4-9, pp.48:23-49:19, p.67:6-15, p.143.** The BZA is entitled to rely on floor plans presented by an applicant, as its decision can only be informed by what an applicant presents. See § 54-220(b)(1)(f) (instructing the BZA to make findings based on floor plans and other documents submitted by applicant) (**R.p.145**). Indeed, an argument for capriciousness could be made if the BZA were to conjecture about something not before it. The BZA should not be required to address uses, even accessory uses, outside the scope of a special exception application. The City's Zoning Ordinance (the "CZO") recognizes this. See § 54-220(b)(1)(f)(7) (requiring BZA to consider the impacts of proposed accessory uses before granting special exception for accommodations uses) (**R.p.146**). Respectfully, the Order does not.

Respondents respectfully contend that the Order should be reconsidered, altered, or amended for each of the following reasons:

1. This is not an appeal from the zoning administrator's decision to deny a zoning permit. Such an appeal would be untimely under state law and the CZO. See S.C. Code Ann. § 6-29-800(B) (permitting appeal from administrative decision to BZA within a reasonable time established by local zoning ordinance); **R.p.155** (CZO, Appendix C, Art. III, § 2) (requiring appeal from administrative decision to be filed within ten (10) business days of actual notice of the decision).

Respondents raised this issue in their Memorandum of Law (pp.11-12). The Order effectively reverses the zoning administrator's decision without addressing this argument. The issue on appeal is whether the BZA erred in denying an amendment to a 2011 special exception—not whether the zoning administrator erred in his application of the zoning ordinance.

2. The BZA did not rely solely on the 2011 special exception to deny Appellant's zoning permit, as the Order suggests (p.4). Instead, the BZA asserts that section 54-220 of the CZO expressly and necessarily requires a special exception before a property owner may implement completely new uses within an accommodations facility, such as Appellant's hotel.

Several provisions in section 54-220(b) of the CZO support Respondents' interpretation. For instance, the introduction to section 54-220(b) of the CZO permits uses within an accommodation overlay zoning district "subject to approval of the [BZA]." **R.p.145**. Additionally, section 54-220(b)(1)(c) limits the total square footage of interior and exterior floor area for restaurant and bar space in the proposed facility to a percentage of the total conditioned floor area in the facility. **R.p.145**. The BZA could not make this determination without reviewing a new special exception application (or application for an amendment to an existing special exception) for any additional bar or restaurant spaces proposed within an accommodations use. Further, section 54-220(b)(1)(f)(7) requires an application for a special exception to include a written assessment, including floor plans, to assist the BZA in evaluating "the accessory uses *proposed* for the facility in terms of size, impact on parking, and impact on traffic generation." **R.p.146** (emphasis added). Thus, contrary to what the Order says, the CZO makes clear that an accessory use to a hotel, such as a rooftop bar, requires scrutiny and approval by the BZA.

Moreover, the Order's conclusion that additional uses, not previously approved as part of a special exception, may be located anywhere, anytime, without an amended special exception

approval would erroneously “read out” or omit these provisions of section 54-220(b) of the CZO, which expressly require the BZA to consider the impacts of proposed accessory uses. See Nexsen v. Ward, 96 S.C. 313, 321, 80 S.E. 599, 601 (1914) (“The rule sustained by all the Courts requires that every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”).

Respectfully, the Court erred in limiting its focus to whether Appellant’s 2011 special exception prohibited the new accessory uses Appellant now seeks on the hotel property. The issue is not whether a rooftop bar is an accessory use. The issue is whether the circumstances attendant to that use, such as its size, impact, and location, are appropriate.

3. Section 54-220 should be interpreted in light of its stated purpose to minimize residential impacts “to the greatest extent possible.” See § 54-220(a); **R.p.145.** See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”); Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (“The real purpose and intent of the lawmakers will prevail over the literal import of the words.”).

Section 54-220(a) of the CZO states, in pertinent part: “The City places a high value on the preservation of the character of its residential neighborhoods.” **R.p.145.** “Potential negative impacts affecting residential neighborhoods shall be avoided or minimized to the greatest extent possible.” **R.p.145.**

Instead of interpreting section 54-220 to protect neighborhoods, the Court respectfully reads the ordinance in favor of hotels. In this respect, the Court relies upon Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 12, 776 S.E.2d 753, 759 (Ct. App. 2015) to support its decision. In Hinde, the appellate court emphasized that the purpose behind the relevant ordinance was to accommodate

entertainment establishments. See id. (“The obvious purpose of the AC zoning district is to accommodate ‘[e]stablishments providing entertainment primarily as a commercial activity.’”).

Here, on the other hand, City Council’s expressly stated purpose for passing section 54-220 is to protect neighborhoods. The Order ignores this underlying purpose in interpreting section 54-220.

4. The burden of proof is on Appellant, not Respondents or the opponents to the special exception request, to make its case to the BZA.

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

Appellant offered minimal evidence in support of its request for an amendment to the 2011 special exception, instead choosing to simply challenge whether such an amendment is required. The Order focuses solely on the evidence presented by the opponents to the special exception request. See, e.g. Order, p.12 (“[T]here was no competent evidence that the use of the interior spaces would cause a detrimental effect on the value of the properties in the neighborhood or destroy the neighborhood.”). It was error to shift the burden.

5. The Court misconstrues the nature of Appellant's request. Appellant did not simply seek to reprogram interior spaces on the rooftop, as the Order suggests. Appellant also sought to expand patron usage of the outside rooftop, to accommodate and compliment the interior uses. In fact, Appellant's 2017 application provides, in relevant part: "The applicant also seeks to modify the approved uses of the exterior terrace on the rooftop." **R.p.121**. The application continues: "The Applicant seeks approval to use the terrace on the South side of the rooftop [for yoga] and for a small outside sitting area associated with the Citrus Club rather than for a pool and pool deck." **R.p.121**. "These two uses are both extensions of the uses on the interior of the eighth floor." **R.p.121** (double emphasis added).

The application goes on to address additional outside uses: "The Applicant also seeks permission for access to the exterior paved walkway around the remaining portions of the exterior rooftop that has been restricted to 'Employees Only Emergency Exist,' as shown on Exhibit 3." **R.p.122**.

Rather than a limited use of the outdoor rooftop, as approved by the BZA in 2011, Appellant sought to open more of the outdoor roof to patrons. The Order does not address this issue, instead concluding: "It is the use of the interior of the eighth floor that was the subject of Dewberry 334's application that was denied by the BZA on April 18, 2017."

6. The BZA found that the proposed new uses within the interior of the 8th floor would intensify the outside use of the rooftop, and this finding is supported by substantial evidence:

[W]hat they do need permission is for the bar and having the bar upstairs creates potential for a larger use of the rooftop terrace, and so I disagree for the use of the bar because of the potential that it creates. **R.p.54:1-5**.

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

via room service on a bar and having a publicly open bar on the roof top **R. p.58:5-13.**

I think 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. **R.p.66:21-24.**

In fact, Appellant's 2017 application concedes that its proposed new exterior rooftop uses would extend the interior uses on the 8th floor: "These two uses are both extensions of the uses on the interior of the eighth floor." **R.p.121** (double emphasis added). If there is any evidence to support the decision of the BZA, the Court is bound to uphold it, even if it disagrees with the decision or deems it unwise. See Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 169, 72 S.E.2d 66, 68 (1952) (recognizing that courts may not interfere with the enactment or enforcement of zoning provisions for the sole reason that such laws may be considered unwise).

7. The Order erroneously places the burden on the BZA to limit future uses of a hotel when granting a special exception. The CZO requires the BZA to address and condition only those uses which are *proposed* in a special exception application.

For example, section 54-220(b)(1)(f)(7) expressly requires the BZA to "consider the following information to be provided by the applicant in site plans, floor plans, building elevations, and a detailed written assessment report to be submitted with the application . . . (7) the accessory uses *proposed* for the facility in terms of size, impact in parking, and impact on traffic generation." **R.p.146** (emphasis added).

Likewise, section 54-925 of the CZO expressly authorizes the BZA to attach conditions "regarding the location, character or other features of the *proposed* building, structure, or use" as the BZA "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** (emphasis added). Thus, section 54-925 anticipates conditions to *proposed* uses, not any possible future uses.

Here, it is conceded that the *proposed* use of the 8th floor in 2011 was for “SPA/FITNESS.” **R.p.143.** In fact, prior to the hearing on Appellant’s 2011 special exception request, the record shows that Appellant changed the floor plans submitted with its application to show the interior, 8th floor space as “SPA/FITNESS,” instead of “SPA/LOUNGE.” **R.pp.7:15-8:21, p.42:4-9, p.49:5-19.** Under the CZO, applicants are required to anticipate and address the impact of future proposed uses of the premises. The BZA is not.

8. The Order’s finding and conclusion that the City is estopped from applying a zoning ordinance based on the issuance of a building permit constitutes error, as it is premised on a misunderstanding of the independent roles played by boards, commissions and building officials. The roles of City boards, commissions and administrative officials are separate and distinct. As applied here, it is the BZA that sets the parameters of a hotel use. It is the Board of Architectural Review that addresses the exterior appearance of a hotel. And it is the Building Department that reviews construction drawings for compliance with standard codes.

The Order correctly finds that the BZA has no authority to approve building plans because “the BZA’s function is to determine whether an accommodations use is appropriate for a given location within the City, not to approve the building plans.” Order, pp.9-10. “[I]t is another agency, the Building Inspection Division, that has the authority to review and decide on the proposed building plans.” Order p.10.

Nevertheless, the Order later concludes—inconsistently—that the City’s zoning officials are estopped from requiring a special exception amendment for new proposed uses by the previous approval of construction plans. Order, pp.16-17.

Appellate courts in South Carolina agree that a local government should not be estopped from enforcing a zoning ordinance based on the issuance of a building permit. See Grant v. City

of Folly Beach, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) (“In this case, City issued a building permit for work in ‘Downstairs Apt. # 1.’ Assuming the permit’s reference to an ‘apartment’ misled Grant into believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor.”).¹ Grant emphasizes that a governmental agent’s scope of authority determines whether estoppel applies, and that the issuance of a building permit does not permit uses otherwise prohibited under applicable zoning regulations.

As in Grant, the appellate decisions referenced in the Order limit estoppel to those decisions made within a governmental agent’s scope of authority. See Abbeville Arms v. Abbeville, 273 S.C. 491, 494, 257 S.E.2d 716, 718 (1979) (“[T]here is no evidence whatsoever that the City Zoning Administrator was acting outside the scope of his authority in issuing the letter confirming that the property was zoned R-6 High Density Residential on the Official Zoning Map. It would then follow that under the instant circumstances, the City of Abbeville is not immune from application of the doctrine of estoppel.”); Landing Dev. Corp. v. Myrtle Beach, 285 S.C. 216, 220, 329 S.E.2d 423, 425 (1985) (City estopped to change its interpretation of zoning ordinance where zoning director previously issued contrary interpretation); Cty. of Charleston v. Nat’l Advert. Co., 292 S.C. 416, 417, 357 S.E.2d 9, 10 (1987) (County estopped to change interpretation of zoning

¹ See also Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 237, 692 S.E.2d 499, 507 (2010) (“Because the erroneous zoning information relied on by Quail Hill was conveyed by unauthorized individuals, the doctrine of equitable estoppel may not, as a matter of law, be invoked against County.”); Greenville County v. Kenwood Enters., 353 S.C. 157, 172, 577 S.E.2d 428, 435-36 (2003) (“Platinum Plus and Heartbreakers argue that because the County issued certain permits to them, the County should be estopped from enforcing the ordinance. This Court recently rejected a similar argument in Grant.”); Town of Sullivans Island v. Byrum, 306 S.C. 539, 546, 413 S.E.2d 325, 329 (Ct. App. 1992) (“Assuming that the building inspector knew of the garage apartment construction, nothing indicates that he had authority to allow such construction or grant a variance to the Zoning ordinances.”).

ordinance where County's zoning regulator issued contrary opinion, which County had implemented in the past)²; Kerr v. Columbia, 232 S.C. 405, 412, 102 S.E.2d 364, 367 (1958) ("The officials of Eau Claire had previously told the interested inquirers concerning the property that it was zoned for business. Upon the ordinance and those assurances, they acted."). None of these cases stand for the proposition that a building permit, which only connotes compliance with building code specifications, trumps the application of a zoning ordinance.

9. Respondents argued that Appellant is barred from asserting estoppel under the doctrine of unclean hands. The Order does not address this argument.

It is well settled that one who seeks equity must do equity. See Norton v. Matthews, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967) ("He who seeks equity must do equity."); Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 (2000) ("Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.").

Here, Appellant does not have clean hands. The Court need not go beyond Appellant's conduct in submitting a revised floor plan, changing the proposed use of the 8th floor from "SPA/LOUNGE" to "SPA/FITNESS" as part of its 2011 special exception application to come to such a conclusion. Moreover, Appellant is charged with knowledge of the law. See Greenville County v. Kenwood Enters., 353 S.C. 157, 172-73, 577 S.E.2d 428, 436 (2003) ("The general rule is that administrative officers of the state cannot estop the state through mistaken statements of law."); Carolina Nat'l Bank v. State, 60 S.C. 465, 475, 38 S.E. 629, 633 (1901) ("All men are

² Charleston v. Nat'l Advert. Co., 292 S.C. 416, 417, 357 S.E.2d 9, 10 (1987), requires careful reading. While the governmental agent who issued a building permit was the County's building inspector, his full title was "County Building Inspector and Zoning Regulator." Moreover, as the Supreme Court notes, he was "designated in the ordinance as the official charged with [the zoning code's] enforcement." Id. at 418, 357 S.E.2d at 10.

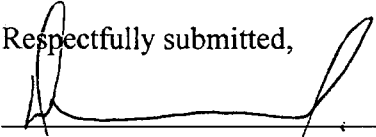
bound to take notice of the special authority of the State's officers, and when dealing with them outside their authority, they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the State.").

Appellant was aware of the necessity of BZA approval of the proposed uses within its hotel, and Appellant was aware of what the BZA had approved for its rooftop. Appellant's intentionally altering plans to accommodate uses other than SPA/FITNESS and then to pretend surprise at being caught is disingenuous and certainly provides no basis for estoppel.

CONCLUSION

For the foregoing reasons, the Order should be reconsidered, altered or amended.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTS

Charleston, South Carolina
December 28, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Dewberry 334 Meeting Street, LLC,)
)
Petitioner/Appellant,)
)
v.)
)
City of Charleston and Board of)
Zoning Appeals-Zoning,)
)
Respondents.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NO. 2017-CP-10-2183

Certificate of Service

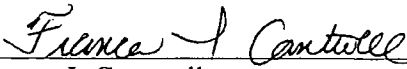
FILED
343 PM 3:43
DEC 28 2017
JULIE ANN LARSON
CLERK OF COURT

I certify that, on this date, I served a copy of Respondents' Notice of Motion and Motion to Reconsider, Alter or Amend (the "Motion") on Petitioner/Appellant Dewberry 334 Meeting Street, LLC ("Petitioner/Appellant") by depositing a copy in the U.S. Mail, postage prepaid, addressed to Petitioner/Appellant's attorney of record, G. Trenholm Walker, as follows:

G. Trenholm Walker
Walker Gressette Freeman & Linton, LLC
Post Office Drawer 22167
Charleston, SC 29413

I further certify that, on this date, I provided a copy of the Motion to the Honorable J.C. Nicholson, Jr., by depositing a copy in the U.S. Mail, postage prepaid, addressed as follows:

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge
100 Broad Street
Charleston, South Carolina 29401



Frances I. Cantwell

Charleston, South Carolina
December 28, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
DEWBERRY 334 MEETING)
STREET, LLC,)
Appellant-Petitioner,)
v.)
CITY OF CHARLESTON and)
BOARD OF ZONING APPEALS -)
ZONING,)
Respondents.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2017-CP-10-2183

**Appellant-Petitioner's Return
to Respondent's Motion to
Reconsider, Alter, or Amend**

FILED
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JULIE J ARMSTRONG
CLERK OF COURT

Respondents assert mostly the same arguments in their Motion to Reconsider, Alter, or Amend (the "Motion"), that they presented to the Court during oral argument on October 9, 2017, and in their memorandum in opposition to the appeal. Because the Court's determinations in its order of December 15, 2017 (the "Order") are fully supported by the law and Record, Appellant-Petitioner, Dewberry 334 Meeting Street, LLC, requests that the Court deny the Motion.

Appellant-Petitioner will not repeat in this Return the full background and operative facts. The Court is completely familiar with them from the Court's study of the parties' briefs and the Record on Appeal as well as from the arguments presented by counsel at the hearing on the appeal. In addition, the Court's Order provides an extensive recitation of the pertinent facts.

Appellant-Petitioner agrees with Respondent that this appeal is not one from the denial of a zoning permit. The zoning permit that allowed hotel use was the special exception granted by the BZA for accommodations use on April 5, 2011 (the "Special Exception"). As stated at the hearing before the BZA and at the hearing before this Court, Appellant-Petitioner has consistently maintained that the uses it intends for the interior of the eighth floor are accessory uses allowed as

a matter of law. It applied to the BZA only because the City's zoning official took the position that Appellant-Petitioner had to obtain a modification of the Special Exception for the zoning to allow those accommodations uses.

This appeal is not of the zoning administrator's determination, but of the BZA's decision denying this request to modify the Special Exception. Appellant-Petitioner appealed the BZA's decision to the circuit court, as allowed under S.C. Code §6-29-820, on the grounds that the intended uses were allowed as a matter of law, that the BZA's decision was arbitrary and capricious, and that the Respondent City was estopped to deny these uses after approving the building plans in April 2015 that did not show spa and fitness on the interior of the eight floor and instead three function rooms with a pantry-kitchen.¹ The City could have prevented the Appellant-Petitioner at the outset from proceeding with the construction of the eighth floor for any use other than spa and fitness, as it now contends, but instead approved the final construction plans and actual construction through its many inspections all the way to completion of the project.

In the Motion, the Respondents emphasize that hotel use is not a use of right under the Respondent City's zoning. This is not in dispute, nor particularly pertinent to the issues before the Court. In the Order, the Court fully recognized that hotel use required both that the property be located in an accommodations overlay district and that the property owner obtain a special exception for hotel use from the Respondent Board of Zoning Appeals – Zoning (BZA”) in accordance with the process set forth in City Ordinance Section 54-220. Order at p. 1. Through

¹ Contrary to the assertion in the Motion, the Court did consider and rule on the first ground. Order at 17 (“The Court has considered all arguments of Respondents made in their brief as well as at the hearing. The Court rejects them as a basis for sustaining the BZA's decision even though each may not have been specifically addressed herein.”).

those two steps, the property became fully entitled to hotel accommodations use under the City's zoning ordinances. No further actions were necessary to secure the needed zoning.

Instead, the legal question is what, if any, are the limitations and conditions on that hotel use once the BZA granted the Special Exception for accommodations/hotel use. Under City Ordinance Section 54-925, the conditions on that hotel use are those that are specified in the BZA's approval of the Special Exception. Also applicable would be other limitations, if any, in the remaining provisions of the City's zoning ordinances.

As noted by this Court, there are no ordinances that restrict the accessory uses that are available to the hotel operator. The opposite is the case. City Ordinance Section 54-203, the general ordinance providing for uses accessory to the principal use, applies to hotel use just as it applies to other principal uses.² This ordinance does not exclude the principal use of hotel from its grant of accessory uses as a matter of right, nor state that an accommodations use is confined to those accessory uses presented to the BZA in the application for a special exception under Section 54-220.

In arguing that a hotel owner is prohibited both from changing accessory uses and their location within a hotel without obtaining a new special exception, Respondents do not refer to a specific ordinance provision that contains this prohibition. Instead, Respondents point to the provisions in Section 54-220 that they argue seem to suggest this limitation without ever stating the prohibition. But, the sections Respondents reference cannot be reasonably construed to forbid

² "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." City Ordinance Section 54-203.

a hotel operator from ever altering its accessory uses or their location within the hotel structure without obtaining a new special exception, as argued by Respondents.

The provisions in Section 54-220 referenced by Respondents address the application and approval process for seeking a special exception for accommodations use. They do not contain nor express future prohibitions, restrictions, or limitations. Section 54-220(b)(1)(f) requires the applicant to provide “site plans, floor plans, [and] building elevations.” R. 145. Section 54-220(b)(1)(f)(7) states those plans should show “the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation” R. 146. Neither states that the applicant cannot vary from these floor plans or the uses shown in the final building design and approved construction plans. Appellant-Petitioner further notes the Court did not overlook these provisions and repeatedly referred to the conceptual floor plans submitted to the BZA in 2011 and uses shown on them in the Order.

Respondents continually fail to acknowledge the absence of a provision in Section 54-220 that specific uses and their location within the hotel can never vary from what is shown in the preliminary conceptual floor plan presented the BZA. There is no such prohibition in the terms of Section 54-220 nor in any other City zoning ordinance. Rather, the BZA’s mechanism to control or limit uses is Section 54-925. This ordinance authorizes the BZA to impose any conditions it believes warranted as part of its approval of a special exception for accommodations/hotel use, which would necessarily include prohibition of certain accessory uses or their location in the building. And, in fact, the BZA did that back in 2011. Contrary to what the Respondents assert, Section 54-925 does not limit conditions to the proposed uses.³

³ “In granting an exception or a variance, the Board may attach to it such conditions regarding the location, character or other features of the proposed building, structure, or use as the Board may

Here, as the Court discussed in the Order, the BZA imposed eleven conditions in the Special Exception granted on April 5, 2011, including three that were specifically aimed at containing and eliminating any obtrusive noise from the rooftop terrace. Having properly applied for and obtained the Special Exception with the eleven conditions imposed by the BZA in 2011, Appellant-Petitioner proceeded to invest tens of millions of dollars in the development of the property.

Appellant-Petitioner readily agrees that the preliminary conceptual plans before the BZA in April 2011 showed spa/fitness for the interior of the eighth floor and did not show three function rooms and a pantry as were ultimately shown on the final revised building plans the City approved in April 2015, four years later. But, neither the conditions of the Special Exception nor other city ordinances prevented the Appellant-Petitioner from placing other uses accessory to hotel use on the inside of the eighth floor, including a small bar.⁴

Respondents 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.⁵ Respondents' Motion at 3. Putting aside that this provision in

consider advisable to protect established property values in the surrounding area, or to promote the public health, safety, or general welfare." City Ordinance Section 54-925. R. 152.

⁴ Respondents constantly describe the small Citrus Club as a "rooftop bar." That is inaccurate. The Citrus Club is not located on the outside terrace like the bar on the rooftop of Charleston Place. R. 103-104. It is situated *inside* the eighth floor. It has two booths and a bar with approximately 10 stools. R. 91-93.

⁵ "[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 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

the ordinance was not adopted until 2012, a year after the BZA approved the Special Exception, there is no assertion, much less proof, that the addition of the small Citrus Club would cause the hotel to exceed this cap. 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 total square footage for these two particular accessory uses within a hotel. Finally, this ground was neither asserted in the Respondents' brief nor in oral argument and cannot be raised for the first time in their 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.").

Respondents emphasize in their Motion that one of the stated purposes for requiring a special exception for accommodations use is to protect and preserve the character of residential neighborhoods. Appellant-Petitioner agrees that this is one of the reasons for requiring a property owner to obtain a special exception for accommodations use. Here, the only possible "harm" voiced by the public and the board members was the sound they speculated might be generated *outside* from the rooftop terrace. As the Court noted in the Order, the BZA imposed three conditions that dealt with limiting sound from the terrace. These conditions in the Special Exception are in addition to the City's ordinances that outlaw the type of noise they conjectured might occur. In addition to requiring a vegetative screen at the edge of the building, the BZA required all activity to cease at 10 PM seven days a week and prohibited amplified music anywhere outside. R. 78 (Conditions Nos. 4, 9, and 10)

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).

To heighten their plea of protection of the neighborhoods, Respondents state that the hotel is bounded on three sides by residential neighborhoods. That is simply not the case, as the Court remarked in footnote 3 of the Order, and is not supported by the City's zoning map.

At the hearing, the Appellant-Petitioner presented a demonstrative exhibit of the City's zoning map.⁶ Attached to this Return as Attachment 1 is this same zoning map that shows the location of the hotel building in the cross-hatched area. This portion of the property, inclusive of the entire hotel building, is in the General Business district (GB – illustrated in red on the map). The properties adjoining on the South, West, and North sides of the hotel building are all zoned GB as well. To the East of the hotel building on the North side is the hotel's long parking lot, zoned DR 2-F. To the East of the hotel building on the South side is the only adjoining residential district aside from the hotel's parking lot. It also bears noting that the residential district to the north of Charlotte Street opposite the hotel's parking lot is the Second Presbyterian Church, marked on Attachment 1. The Church's only concern was screening of the parking area, which the hotel gladly accomplished, not noise. R. 116 (Letter from Second Presbyterian Church).

Respondents argue that the "burden" was on the Appellant-Petitioner to show that the BZA decision was arbitrary or contrary to law and that the Court improperly shifted the burden to Respondents to prove the BZA decision was supported by the Record. The Court did not do that. Instead, the Court agreed that Appellant-Respondent demonstrated the BZA's decision was based on an error of law and not supported by competent evidence. The Record clearly shows the BZA premised its denial on its finding that the interior use would generate exterior noise that would cause a detrimental effect on the neighborhood. As this Court determined, the BZA's rationale

⁶ A black and white version of the zoning map for the hotel and its immediate surroundings is also part of the Record. R. 72.

and findings based on everyone's conjectural opinions and speculation as to noise from the terrace were not based on competent evidence of harm.

As the Court concluded, the BZA's decision based on such conjectural comments bears a striking similarity to board of zoning appeals' decision in Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012). Order at 12-13. In Wyndham Court of Appeals reversed the circuit court and found the public comments to be entirely speculative and insufficient to sustain the denial of a special exception by the board of zoning appeals of North Augusta. The Court's determination in this case, just as in Wyndham, that there was no competent evidence to support the BZA's decision is not an impermissible shifting of the burden of proof as argued by Respondents.

Further, contrary to the Respondents' assertions, the Court did consider the possible effect of any increase of the usage of the rooftop terrace as a result of the interior accessory uses when the Court determined that there was no competent proof before the BZA to sustain a finding that this activity on the terrace would have a detrimental effect on the neighborhood. The Court also considered activity on the terrace in noting that the conditions of the Special Exception as well as City noise ordinances provided layers of enforcement that protected against intrusive and unreasonable noise from the terrace. Order at 11-12, 15.

Respondents agree with the Court's ruling that the BZA does not approve floor plans and do not dispute that there is no ordinance that explicitly binds an owner forever to the floor plans, elevations, and proposed accessory uses that were in the submission to the BZA. Respondents' Motion at 8. Contrary to Respondents' argument, there is no inconsistency between this determination by the Court and the Court's application of estoppel based on the building department's approval of the revised construction plans for the eighth floor in April 2015. The

final construction plans the City approved then replaced the fitness/spa area on the interior of the eighth floor with three different function rooms and a pantry, and eliminated the pool from the rooftop terrace outside. Respondents' argument of alleged inconsistency in the Court's ruling appears to be that the Court recognized the BZA does not approve floor plans and, using the same rationale, should have concluded the building official has nothing to do with zoning and his actions cannot estop the City on zoning issues. In essence, Respondents argue that the City's administrative functions are "siloed" and the actions of one have nothing to do with the actions of another.

Appellant-Petitioner submits this characterization is inaccurate. First, both are acting on behalf of the City. Further, as this Court commented in the Order, "If the BZA had specific concerns about Dewberry 334's potential uses it should have communicated those concerns to the City's other approval boards or put some other mechanism in place to ensure those concerns never developed." Order at 16-17.

Additionally, the City's administrative permitting functions are not carried out in isolation of each other as the Respondents suggest. The City's ordinances impose responsibility on its different departments to assure that a construction project is in conformity with the applicable ordinances, including zoning. City Ordinance Section 54-901, copy attached as Attachment 2, provides, in pertinent part, as follows:

Sec. 54-901. - Zoning administrator as administrative officer; inspections; enforcing agents.

The duty to administer and to enforce the provisions of this Chapter is hereby conferred upon the zoning administrator, herein referred to as the administrative officer of the Zoning Ordinance. ***The city building inspector shall inspect all construction or alteration*** for which permits are issued by the city engineer or ***as authorized by the Board of Zoning Appeals*** or as authorized by the Board of Architectural Review, as hereinafter provided, ***and shall make a weekly report in writing to the city engineer's office, listing all construction inspected and***

specifying any work observed by him which is not in accordance with permits issued, or which violates this chapter or any other ordinance of the city.

City Ordinance Section 54-901 (double emphasis added).

This ordinance specifically integrates the zoning and building inspection functions and imposes a responsibility on the building inspector to check compliance with the authorization of the BZA.

The decision of our state supreme court in Grant v. City of Folly Beach, 346 S.C. 74. 551 S.E.2d 229 (2001) does not prohibit the application of estoppel to these facts. In Grant, the building official approved the commercial use of an ice cream shop on the ground floor and issued a building permit for renovations for plumbing, HVAC, and additional wiring for electrical circuits for the three ground floor units. The property owner proceeded to also install kitchens and later had residential tenants living in the three ground floor units. The applicable zoning/flood ordinances prevented residential occupancy of the ground floor because it was below the minimum flood elevation. Our Supreme Court held the city was not estopped to require the removal of the kitchens and to prohibit the residential occupancy of the ground floor because the building official never approved either and the property owner conceded that the ordinances plainly prohibited residential use below flood elevation.

In this case, the zoning ordinance of the City of Charleston did not plainly prohibit the accessory uses intended for the interior of the eighth floor. The conditions of the 2011 Special Exception also did not prohibit these accessory uses in this location. The City building official approved the construction plans dated April 24, 2015, showing the three functions rooms and pantry, instead of spa and fitness that were moved to the second floor on the same set of approved plans. After approval of the plans and during the construction phase, the bar feature on the room

designated "Function C," copy attached as Attachment 3 (R. 87-88),⁷ would have been plainly evident. Likewise, the improvements of the two other "Function" rooms for uses that were not spa and fitness were plainly apparent. Yet, the City approved the plans and permitted the owner to proceed, at considerable expense, to construct and complete the upfit and other improvements.

The approval of the building plans and inspection for compliance with the BZA approval was within the authority of the building official. The legal precedent cited in the Order, repeated by Respondents in their Motion, fully supports the application of estoppel as an alternative ground for the court's ruling.

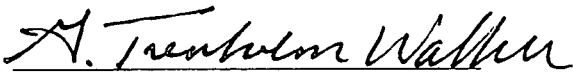
As to the last ground in Respondents' Motion, it is the Court's prerogative to determine whether the conduct of the Appellant-Petitioner under these circumstances amounted to unclean hands that might prevent the application of estoppel in this instance. The balancing of the competing equities associated with the assertion of estoppel and the defense of unclean hands is up to the Court. Straight v. Goss, 678 S.E.2d 443, 457 (S.C. App. 2009) (In 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). It appears the Court fully considered all the equities and determined that the alleged unclean hands of the Appellant-Petitioner four years before the City approved its final building plans did not bar the application of estoppel against the City. The City could have prevented the owner at the outset from proceeding with the extensive construction for any use other than spa and fitness, as it now contends, but instead approved both the plans and all the construction along the way to completion.

⁷ Appellant-Petitioner has substituted a better copy of these two pages as Attachment 3 that are the same as the pages at R. 87-88 and as the poster board blow up referenced at the hearing on October 9, 2017.

For the foregoing reasons, as well as those stated in Appellant-Petitioner's Memorandum in Support of its appeal and enumerated in the Order, Appellant-Petitioner requests that the Court enter a Form 4 order denying the Respondents' Motion.

Respectfully submitted,

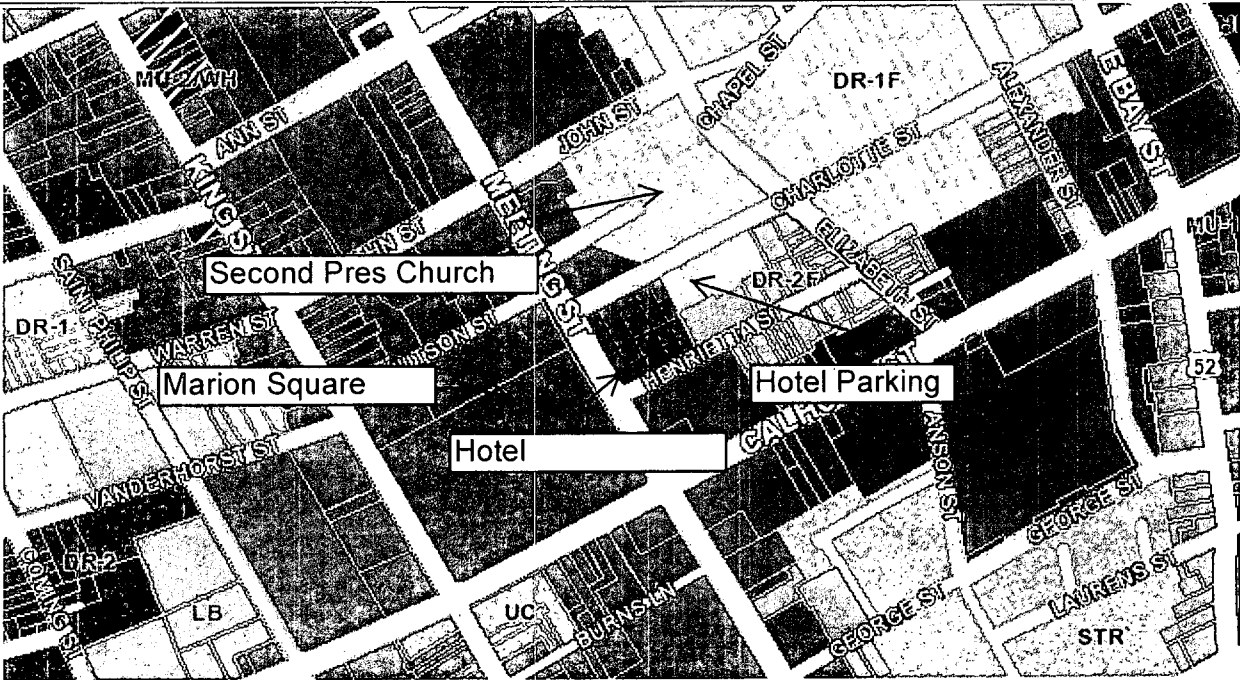
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ATTORNEYS FOR APPELLANT-PETITIONER

December 5, 2017
Charleston, South Carolina

City of Charleston GIS Department
Zoning Map



R. p. 0140

Important Disclaimer Notice

The City of Charleston makes no warranty, representation, or guaranty as to the content, sequence, accuracy, timeliness, or completeness of any information provided herein or derived from the mapping data for any reason. The City of Charleston explicitly disclaims any representations and warranties, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose. The user knowingly waives any and all claims for damages against any and all of the entities comprising the City of Charleston that may arise from the mapping data. **Please contact the City of Charleston GIS department with any technical problems you may have.**

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ATTACHMENT 2

Sec. 54-901. - Zoning administrator as administrative officer; inspections; enforcing agents.

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. The officers and patrolmen of the police department, so far as is practicable, shall inspect daily all construction in progress in the city, and shall report promptly to the chief of police who shall advise the city engineer's office of any construction whereon is not displayed a building permit, as required by ordinance. Any person to whom a building permit is issued shall notify the city engineer's office in writing, twenty-four hours before commencing work of the exact day upon which he intends to begin construction or alteration, so that the proper inspections can be made.

The city electrician, before authorizing the increase of electric meters on any premises or the cutting in of electrical current to be used directly or indirectly for the purposes of lighting or operating signs, shall consult with the administrative officer and see that the application has been approved for additional dwelling units or the application for signs has been applied for and granted as required by this Chapter.

The plumbing inspector, before authorizing the installation of additional sinks or bathrooms, shall consult with the administrative officer and see that the necessary application permits have been granted as required by this Chapter.

(Ord. No. 1999-54, § 4, 4-27-99)

THE DEWBERRY

CHARLESTON
BUILDING PERMIT SET - 06.27.14

BULLETIN #6 - 04.24.15

VOLUME 1: CIVIL, LANDSCAPE, ARCHITECTURAL
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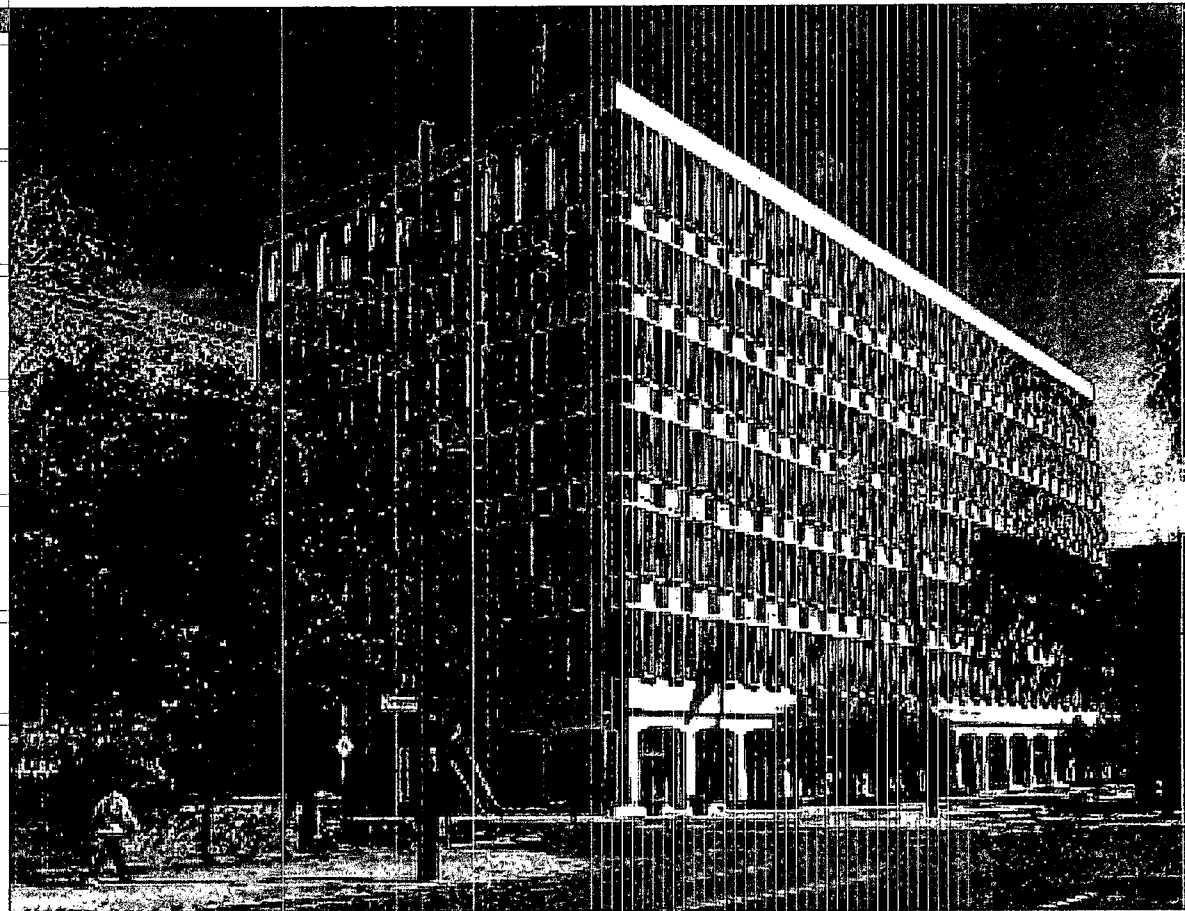
MECHANICAL, ELECTRICAL, PLUMBING ENGINEER

ROBERT L. CONNORS, P.E.
SOUTH CAROLINA LICENSE #22826
1805 WOODLETON PK DR. S.E.
JACKSONVILLE, FL 32256
PROJECT MANAGER: SCOTT KERNMEYER
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STRUCTURAL ENGINEER



4SE, INC.
7 PALOPIRE STREET
SUITE 50
CHARLESTON, SC 29402
P: 843.722.1000
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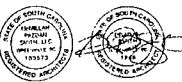
334 MEETING STREET, CHARLESTON, SC 29401



1545 PEACHTREE STREET, SUITE 200
ATLANTA, GEORGIA 30308

THE DEWBERRY
CHARLESTON
334 MEETING STREET, CHARLESTON, SC 29401

NO.	DATE	DESCRIPTION	BY
1	10.17.14	REVISION COMMENTS	ED
2	10.24.14	REVISION COMMENTS	ED
3	11.03.14	BULLETIN 1	ED
4	01.08.15	BULLETIN 2	ED
5	01.08.15	BULLETIN 3	ED
6	03.19.15	BULLETIN 4	ED
7	03.19.15	ASB 40	ED
8	02.20.15	ASB 44	ED
9	04.24.15	BULLETIN 5 & 6	ED



BUILDING PERMIT SET 06/27/14

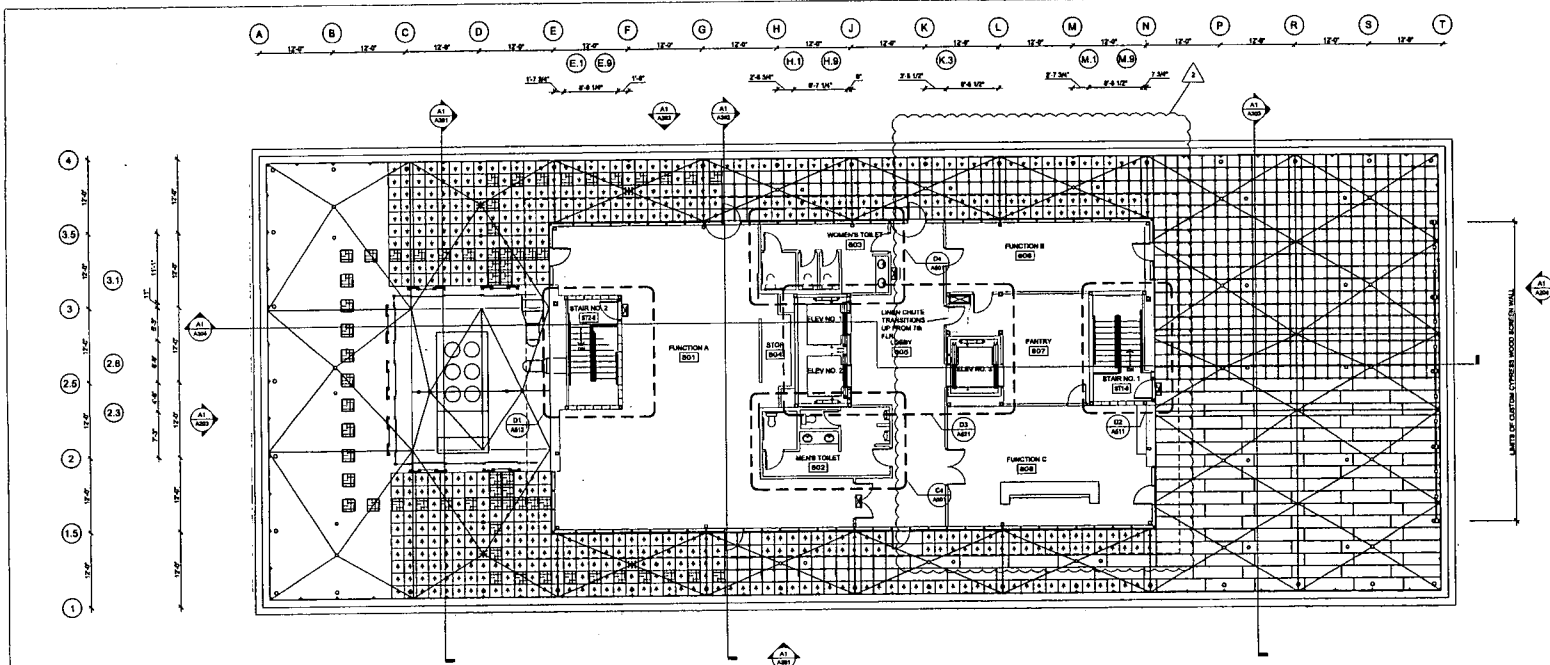
PROJECT NO. 15
PROJECT ARCHITECT: ED
DATE: 06/27/14

SHEET TITLE
COVER SHEET

SHEET NO. 011103.00
DATE 06/27/14

G000-1

C10.6.2



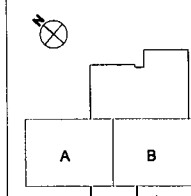
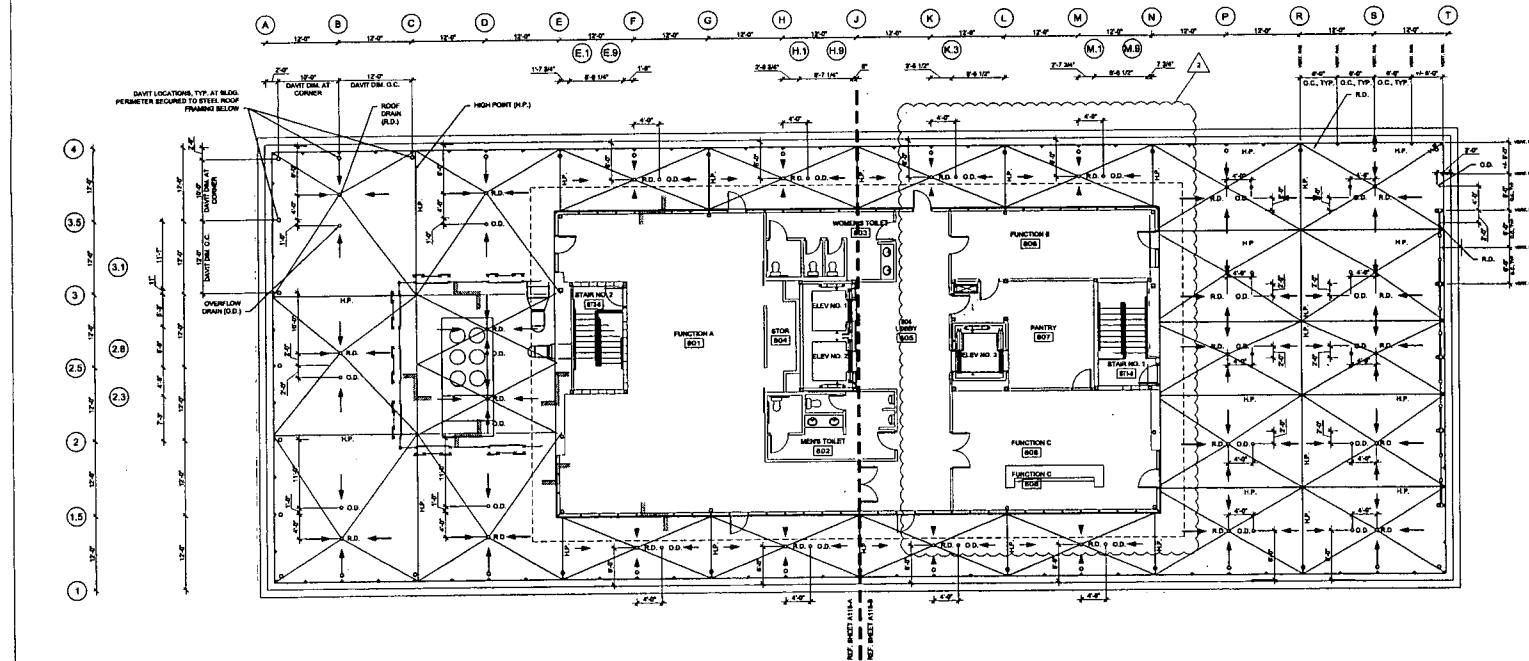
- ROOF SYMBOL LEGEND**
- CONCRETE PEDESTAL PAVES
 - PVC TUBING PEDESTAL PAVES
 - VEGETATED ROOF TRAY
 - PEDESTAL MOUNT WALKING PADS
 - 20 PRE-FINISHED ROOF DRAIN COVER
 - R.D. ROOF DRAIN
 - O.D. OVERFLOW DRAIN
 - H.P. HIGH POINT
 - DAVIT LOCATION

D5 ROOF LEGEND

1. CABLE MARKING SYSTEM TO BE INSTALLED AROUND FULL PERIMETER OF PARAPET WALL. TYP. CORNER CONDITION SHOWN FOR REF. DETAILS FOR BUILDING CONSTRUCTION.
2. PAVES PEDESTAL AND ROOF DRAIN SHALL BE COORDINATED TO AVOID CONFLICTS DURING INSTALLATION. TOP OF PAVES TO BE COORD WITH DOWN THRESHOLD IN EIGHTH LEVEL FUNCTION ROOM.
3. PROVIDE EDGE RESTRAINTS AT PARAPET WALL FOR CONCRETE PAVES TO BE WIND-UP. CONCRETE PAVES SHALL BE APPROPRIATE FOR USE IN HIGH WIND SPEED AREAS AND SECURED AT CORNERS WITH AN INTERLOCKING DEVICE BY THE MANUFACTURER. BASE OF DESIGN LINE WIND-UP TIE-DOWN PEDESTAL DRAIN.
4. WOOD PAVES AS SHOWN SHALL BE BACK PRODUCTS PE WOOD TIES IN A 2" FABRIC WITH THE LAYOUT LINE. TIES SHALL BE WIND-UP INTERLOCKING TO WITHSTAND WIND UPST RESISTANCE. REQUIREMENTS PROVIDE EDGE RESTRAINT AT PARAPET WALL AS NECESSARY TO PREVENT THE DRAINING SYSTEM.
5. VEGETATED ROOF TRAYS SHALL BE SHOWN SUCH THAT THE TOP OF TRAYS ALIGN WITH THE TOP OF ADJACENT CONC. PAVES. VEGETATED ROOF TRAYS SHALL BE INTERLOCKING TYPE.
6. BASE OF DESIGN "GREEN ROOF OUTLET" PROVIDE PRE-FINISHED 30" ROOF DRAIN INSPECTION CHAMBERS WITH DRAINAGE SLOTS IN ROOF AND TOP OVER ROOF DRAIN IN FIELD OF VEGETATED ROOF TRAYS. SELF "GREEN ROOF SOLUTION" FOR BASE OF DESIGN.
7. ALL WIND-UP COPING JOINTS ON TOP OF PARAPET WALL SHALL BE STITCHED AND REINFORCED WITH MORTAR AND WATER RESISTANT ADHESIVE.
8. PROVIDE DAVIT SYSTEM FOR WIND-UP WINDING EQUIPMENT REQUIRED TO ROOF LEVEL. STER. FRAMING AS NECESSARY FOR OVER-DRUMMING ON AN NECESSARY FOR WIND-UP FACTORY REQUIREMENTS. COORDINATE DESIGN AND LOCATION WITH ARCHITECT AND STRUCTURAL ENGINEER THROUGH ROOF DRAINAGE AND SUBMITTALS PRIOR TO FABRICATION.

C1 EIGHTH LEVEL FLOOR PLAN - PAVERS

C5 ROOF NOTES



A5 KEYPLAN

A1 EIGHTH LEVEL FLOOR PLAN - DRAINAGE

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THE DEWBERRY
CHARLESTON
334 MEETING STREET, CHARLESTON, SC 29401

PERMIT NO. 060774
DATE 06/27/14

BUILDING PERMIT SET
06/27/14
SHEET TITLE
EIGHTH LEVEL FLOOR PLAN
SHEET NO. 011103.00
DATE 06/27/14

A108

1 STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT
 2 COUNTY OF CHARLESTON) 2017-CP-10-2183
 3)
 4 DEWBERRY 334 MEETING STREET, LLC,)
 5)
 6 APPELLANT,)
 7)
 8 vs.) TRANSCRIPT OF RECORD
 9)
 10 CITY OF CHARLESTON and BOARD OF)
 11 ZONING APPEALS-ZONING,)
 12)
 13 RESPONDENTS.)
 14)
 15)

Monday, October 9, 2017
 Charleston, South Carolina

B E F O R E:

The Honorable J.C. Nicholson, Jr.

A P P E A R A N C E S:

George Trenholm Walker, Esquire
 Attorney for Appellant

Frances Isaac Cantwell, Esquire
 Daniel Simmons "Chip" McQueeney, Jr., Esquire
 Attorneys for Respondents

Maria Dempsey, RPR
 Official Court Reporter
 Charleston County Circuit Court
 Ninth Judicial Circuit
 Charleston, South Carolina

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E X H I B I T S

(No Exhibits Proffered.)

1 THE COURT: This is a zoning appeal; is that correct?

2 MR. WALKER: That's correct, Your Honor.

3 THE COURT: All right. Who's representing who?

4 MR. WALKER: Your Honor, Tren Walker for the appellant,
5 Dewberry 334 Meeting Street.

6 MS. CANTWELL: Your Honor, Frances Cantwell on behalf
7 of the respondents, City of Charleston and the Board of
8 Zoning Appeals, along with a new member of our --
9 not-so-new-anymore member of our legal department, Daniel
10 Chip McQueeney.

11 THE COURT: Okay. Mr. Walker, I guess it's your
12 appeal, right?

13 MR. WALKER: I'm the appellant.

14 THE COURT: Okay.

15 MR. WALKER: Before I start, may I hand off a brief? I
16 understand it's late, and you don't need to read it now, but
17 it basically incapsulates everything we're saying.

18 THE COURT: It's late, huh?

19 MR. WALKER: And they have one too.

20 MR. McQUEENEY: Your Honor, we got a brief, we've also
21 got the record, it's filed, but we have copies if you need
22 them.

23 THE COURT: That's fine. All right. I'll be glad to
24 hear you.

25 MR. WALKER: Thank you. Your Honor, again, my name is

1 Tren Walker. I'm here today on behalf of Dewberry 334
2 Meeting Street, and with me at counsel table is David Gross.
3 They have a lawyer who is now in house with Dewberry, and
4 has served many capacities over the years as in-house
5 counsel, and we're pleased that he's here. So he is our
6 client representative today. He's admitted in three states,
7 not South Carolina, but he's not practicing. He's here as a
8 client representative.

9 Your Honor, we're here today, as you noted, on an
10 appeal from a decision before the Board of Zoning Appeals
11 that was rendered in April of this year. It's a little bit
12 unusual, because in this instance, we're not talking about
13 the zoning of a property or a variance. We're talking about
14 whether the owner of the property has the right, under the
15 zoning, to use interior rooms.

16 THE COURT: The what now?

17 MR. WALKER: The rooms on the inside of the hotel for
18 their intended purposes. And I don't know that I've had a
19 case like this before, and I'm going to have to give you a
20 little background to set the stage.

21 THE COURT: These rooms inside the hotel?

22 MR. WALKER: That's it.

23 THE COURT: Okay.

24 MR. WALKER: And we will explain why the City is taking
25 that position, what our position is.

1 THE COURT: Okay.

2 MR. WALKER: So the Dewberry Hotel, as you may know, is
3 located -- I'm trying to get this -- let's see what's the
4 best way. This is a zoning map and it's just for
5 illustration. The Dewberry is the old Mendel Rivers Federal
6 Building that's at the corner of Henrietta and Charlotte
7 Street, right across from Marion Square. On one side, as I
8 said, is Charlotte Street, on the other Henrietta. It's
9 largely zoned in GB or general business, including the
10 Dewberry, the front part of the property, but the back is
11 zoned DR-1F, and that is the parking lot. It is now
12 operating as an award-winning hotel, but we've got one major
13 problem, and that deals with what can be done on the eighth
14 floor of that hotel.

15 There's been some suggestion that the eighth floor
16 was never permitted, and if you read the stories in the
17 newspaper, you may think that the contractor went out in the
18 middle of the night and built the eighth floor; that's not
19 true. What happened here is that the Board of Architectural
20 Review approved the eighth floor, was which constructed on
21 top of the old seven-story Federal Building, and the
22 building official issued a building permit. So it is
23 approved from a design standpoint, from a construction
24 standpoint, and what we're here about today is zoning; and
25 this all backs up to the special exception that was issued

1 for this hotel.

2 As Your Honor knows from hearing many zoning cases
3 within the City of Charleston, there are two steps for a
4 property to obtain hotel use. The first is the property has
5 to be in the accommodations overlay zone that allows hotels.
6 And this property was either in the accommodations overlay
7 or was zoned accommodations overlay before the second step,
8 which is a special exception, must be issued by the Board of
9 Zoning Appeals.

10 So a person, even though, or who owns a property in
11 the accommodations overlay district, is not entitled to a
12 hotel use, unless that person completes the second step.
13 The owner of the Dewberry completed that second step back in
14 April of 2011. A exception was issued by the Board of
15 Zoning Appeals for a hotel use, and there were 11 conditions
16 on that special exception, and those 11 conditions appear in
17 various places throughout the record on appeal, but I have
18 them listed on Page 2 of our brief.

19 So the BZA heard the arguments, it issued the
20 special exception, it put in the 11 conditions that it
21 thought were appropriate. Because of certain circumstances,
22 our client could not proceed with the hotel right away, and
23 waited three or four years before submitting the plans for
24 approval and proceeding with construction.

25 The first plan that was submitted by our client had

1 a pool on the outside of the eighth floor. As I'd
2 mentioned, the eighth floor was built on top of the old
3 Federal Building. There's a structure -- and we're talking
4 about the interior of the structure today, but the initial
5 plan, and what was shown on the conceptual floor plan that
6 was disclosed to the BZA, showed the eighth floor as having
7 a pool on the outside with a deck; and on the inside,
8 spa/fitness.

9 The first approved construction drawings for the
10 eighth floor in 2014 were that design, and it included a
11 pool and a large function space on the inside, but it turns
12 out that once the owner looked into what it was going to
13 cost to do a pool on the outside of the eighth floor on the
14 rooftop terrace, and consider such things as cost, and that
15 he would have to actually cool the water because it's up
16 there on the very top, and he also learned he was going to
17 lose the warranties of many people who were underneath that,
18 because if the pool leaked it was a huge problem, decided
19 not to proceed with the hotel -- excuse me -- with the pool.

20 So what he did instead was to come forward with a
21 different design, and this is something that we've attached,
22 I think, as Exhibit 3 to our materials, our brief. And
23 here, and I know you have it and you're not familiar with
24 it, but I'm showing you part of the record before the Board
25 of Zoning Appeals, and these are the final approved

1 construction drawings, floor plan for that eighth floor
2 approved in, I think, April of 2015. The pool, what you see
3 here, this crosshatching out here is the rooftop terrace.
4 And the rectangle on the inside is the actual heating and
5 air to cool the interior space.

6 So when the owner went back and submitted these
7 drawings he showed, on the inside, this room on the north as
8 Function A. He showed a room, small room up here, as
9 Function B, a pantry, and Function C. And you can see here
10 there's a structure or some sort of fixture on the inside
11 that was going to be ultimately turned out to be a bar.
12 City said -- and also as you will see, he planned to do
13 decking all the way around. The City approved based on
14 that. He built the eighth floor. He spent millions on
15 building the eighth floor. Came back to the City after he
16 completed construction, and the City said, yeah, we approved
17 you to do that, we approved it, the BAR, and we gave you a
18 building permit, but you can't occupy parts of this.

19 The City, in August of 2016 said, the City building
20 zoning official, Mr. Batchelder, said that because there
21 were conceptual floor plans submitted with the special
22 exception in 2011, which they have to do, that the owner
23 was, as he put it, set in stone, those plans set in stone,
24 the uses, and since the owner had showed this area as
25 spa/fitness, Mr. Batchelder, on behalf of the City said, you

1 can only use that basically for spa/fitness.

2 And what he did is, this room, the Rivers Room,
3 which you just saw was Function Room A on the north side, he
4 said that can be used for yoga and fitness classes only.
5 This Reading Room closed, can't use. The pantry that was
6 shown on the approved drawings, the City stamped pantry to
7 be closed. The Citrus Club, which is a small bar, around 26
8 seats, it was to have a modest food service, he also said
9 Citrus Club to be closed. We contested that decision,
10 because if one looks at the special exception and the
11 conditions on the special exception, there was no condition
12 that the uses that were shown on the conceptual floor plan
13 four, five years before were the only uses that could be
14 implemented on the eighth floor.

15 And what's important here, Your Honor, is that these
16 uses are accessory uses. If an owner has a principal use,
17 and this is hotel, then the City ordinance allows the owner
18 to do accessory uses, which would be such things as a
19 meeting room or a little gift shop or an office associated
20 with the hotel, and those are admitted as a matter of right.
21 And I'm going to hand the Court, and I've handed opposing
22 counsel the ordinance dealing with permitted principal uses
23 in the City code, which is 54-203.

24 And I don't think the City contests that this is a
25 correct version of the ordinance that was in effect. And

1 I've highlighted the part that says, accessory uses, which
2 for the purposes of this chapter, are defined as uses of
3 land or the building or portion thereof, which are
4 customarily incidental and subordinate to a principal use
5 located on the same lot or parcel are allowed; and that's
6 consistent with the law of the land.

7 The accessory uses are permitted as a matter of
8 right under every zoning code that I've ever come across.
9 The City isn't saying these are not appropriate accessory
10 uses. What the City is saying is that once that floor plan
11 was submitted, it can never be altered. In other words, if
12 the hotel showed the gift shop on a floor plan at the time
13 it got the special exception, it would -- could not move the
14 gift shop. If it showed a hotel room, and it wanted to move
15 an office and create an office, the City is saying you can't
16 do that, because the floor plans approved by the BZA are
17 final, they're basic, and this is before you've even done
18 design on them. They're final, you can't vary from them.

19 Also, I'd like to point out that here, although the
20 floor plan showed fitness/spa on the eighth floor, the final
21 construction drawings that included the drawing I just
22 showed you for the eighth floor, on a separate sheet show
23 the spa is going from the eighth floor to the second floor,
24 and the City had no problem with that, even though that was
25 a variance from the conceptual floor plan in 2011.

1 As one of the board members put it, when the City
2 advances position, even though this board member ended up
3 voting against any modification of the special exception,
4 board member said, well, the plan showed a pool on the top
5 floor. We're going to make them go back and put a pool on
6 the top floor. And we say there's nothing in the City
7 ordinances that in any way suggest or indicate that a
8 conceptual floor plan before the BZA is binding and
9 forevermore dictates the accessory uses --

10 THE COURT: Well, what do you think would be binding?

11 MR. WALKER: What would be binding would be, number
12 one, the conditions in this special exception. They could
13 have put, if they wanted, they could have said these
14 accessory uses are not allowed in these locations. They
15 could have had a condition. In fact, if you look at
16 condition number eight, it said part of the landscaping on
17 the plan had to be done. They could have said anything they
18 wanted to as a condition of the special exception.

19 The binding plans are the approved building
20 drawings, construction drawings, and what was approved by
21 the BAR, that is what's binding. And as member Ross Appel
22 pointed out, he was the only one that voted against the
23 majority here on the decision under appeal. He said,
24 accurately, that the BZA does not approve plans in reviewing
25 an application for an accommodations use. It approves a

1 use, an accommodations use. And under the Ordinance 54-925,
2 can impose conditions on that use, which is exactly what the
3 City did here. Even though we didn't agree with the City,
4 we were not interested in getting into a lawsuit with the
5 City. We could have just gone ahead and sued the City,
6 because the City's position was until you modify that
7 special exception, we can't let you use these rooms up
8 there.

9 To accommodate the City, we filed an application to
10 modify the special exception to allow the accessory uses of
11 the Citrus Room, the Reading Room, and Rivers Room as a
12 function room, just like was approved. Came before the BZA,
13 and as I said, the BZA denied the modification of the
14 special exception to authorize these uses. We think we were
15 legally authorized to these uses to start with, we said so
16 at the BZA hearing, and we're here today to seek a reversal
17 of the BZA, and a determination that the owner is legally
18 entitled to these uses under the special exception zoning
19 law.

20 So the first ground that we have, as outlined in our
21 appeal brief, is that there was no legal basis for
22 insisting, or at least taking the position that the owner
23 can't put an accessory use in the hotel where the owner
24 wants to put the accessory use, unless there was something
25 in a condition in the special exception or some ordinance of

1 the City that prohibits that accessory use, and there are
2 none here. There is no restriction in the special exception
3 or ordinance of the City that says that a hotel owner is
4 prohibited from moving uses around, accessory uses within
5 the hotel. There's nothing that says that a hotel owner is
6 bound or as Mr. Batchelder said, is set in stone by the
7 conceptual floor plans. So, Your Honor, our first legal
8 ground is that the BZA committed a legal error, because
9 there's nothing in the City ordinance or in the special
10 exception that says that the owner can't put a legally
11 permitted accessory use for a hotel on the eighth floor.

12 We also have -- would remind the Court that -- and
13 we'll get to this on the second major ground, that zoning
14 ordinances are a derivation of the common law right to the
15 free use of property. Because of that, under the Rules of
16 Statutory Construction, they're to be strictly construed.
17 Yes, they're allowed to govern the use of property, but they
18 should not be construed to constrict the use of property
19 where not expressly stated. And here, the City can't point
20 to anything that says, well, this ordinance says you can't
21 change accessory uses.

22 What the City says is you showed something on that
23 conceptual floor plan, there were people at the hearing who
24 spoke against it in 2011 who said, we don't want any type of
25 bar up there, and now, you've gone and done it, and because

1 of that, you can't do it. It would be a misrepresentation.
2 But if that was a material concern, then the board had the
3 obligation to state it in the condition. So that's number
4 one. We're legally entitled to these uses; they're
5 permissible accessory uses.

6 Number two, we have an alternative ground that the
7 decision was arbitrary and capricious. It's arbitrary and
8 capricious, because the record on appeal, the transcript of
9 the hearing is clear that the board members did not have a
10 problem with the interior uses. We quote this in our brief.
11 In fact, the chairman said, the interior uses are not what
12 we're here about. Our concern is the noise on the outside.

13 So they're concerned about the people on the rooftop
14 deck, drove their decision to deny the use of the interior
15 of our building for appropriate accessory uses.

16 Mr. Robinson on the board said, I think the use of the
17 interior is fine, but I know it would be a noisy situation
18 outside. And we're going to get to the noise thing in a
19 second. The board is acting arbitrarily and capriciously
20 when it does not allow interior --

21 THE COURT: Let me ask you this: If the bar was not
22 part of the original plan, and no concern about the noise,
23 then you come in at a later date now, and want to put a bar,
24 which is going to obviously, I assume, have access to bar --
25 people using the bar to the outdoors, that's going to

1 increase the noise. Why don't they have the right to
2 address that?

3 MR. WALKER: Well, I think they do, and they did in the
4 conditions.

5 THE COURT: Pardon?

6 MR. WALKER: I think they do, and they did address that
7 in the conditions, and that's going to be a ground-in and
8 not a --

9 THE COURT: All right. Tell me what conditions that
10 are addressed then.

11 MR. WALKER: Well, if you look at, I think, Number 4
12 and Number 9.

13 THE COURT: Number 4, no exterior amplified music, and
14 Number 9, all activity outside stop at 10:00, but that
15 doesn't address drunk patrons. I'm not saying you're going
16 to have drunk patrons, but just -- you've got to address
17 that.

18 MR. WALKER: Well, we're always -- I don't care where
19 the operation is, there's always the drunk patron.

20 THE COURT: Right, inside or outside.

21 MR. WALKER: I mean, that's always a possibility.
22 Everything is a possibility, and this really gets down to
23 the case that we cite.

24 THE COURT: But they never had opportunity to address
25 it in the conditions, because they didn't know the bar was

1 going on the eighth floor, is my problem at this point in
2 time with your argument.

3 MR. WALKER: Well, I would say the way to address it is
4 the way they did it through conditions. There are a couple
5 of things that are at play here, Your Honor, and first is,
6 they already have conditions that say you got to close by
7 10:00, and there can't be any amplified music. That's
8 number one.

9 And number two, the City has ordinances, and I've
10 got them right here, that govern noise. The City noise
11 ordinance says that if somebody is making a lot of noise,
12 that's against the City ordinances, and it is --

13 THE COURT: I'm familiar with it, okay, I'm familiar
14 with the noise ordinance.

15 MR. WALKER: That's Ordinance 2116. I'm happy to say
16 I've never been --

17 THE COURT: I'll be happy to take it.

18 MR. WALKER: I don't have personal experience with it.
19 I try to keep from bellowing and doing the many things that
20 are forbidden in there, but the City has the means to
21 enforce that, and Your Honor, what they're basically saying,
22 if by analogy they're saying, well, we think the worse
23 that's going to happen up there -- well, first, it's a five
24 star hotel. It was just awarded the best in the world in
25 certain categories. So this is not a rowdy group, this is

1 not a biker bar, this is not whiskey or go-go. It's very
2 subdued all the way around. You would say, well, how do we
3 trust them? We may get a bunch of rowdies up there.

4 THE COURT: You're not going to have any Harleys
5 burning rubber, huh?

6 MR. WALKER: I don't think so. I don't think
7 anybody -- I know that if I go up there for a drink, given
8 the price of the drinks, I'm going to have one drink, but
9 maybe somebody's got a Platinum American Express card and
10 they're going to go wild. But just that aside, this is no
11 different from the state licensing, driver's license people,
12 so...

13 THE COURT: But my point is the City zoning approval
14 never had the opportunity to address it until after the
15 fact.

16 MR. WALKER: Well, they addressed it within the
17 conditions on the outside, because we're talking about noise
18 from the outside, and they addressed noise from the outside
19 by putting the conditions on there. The noise on the
20 outside is addressed there. And also, on this whole
21 question of noise, if we look at the Wyndham versus North
22 Augusta case we cite, it's basically a carbon copy here
23 where people got up and said, this is going to destroy our
24 neighborhood, all kinds of apocalyptic assertions about the
25 affects of a fireworks stand. And the Court says, no,

1 that's speculative; and we cite this on Page 11 of our
2 brief.

3 At the hearing, residents testified as to their
4 concerns regarding the proposed fireworks business. These
5 concerns included an increase in traffic, a decline in
6 property values, and a detrimental impact on the character
7 of the surrounding area. The testimony proffered was based
8 on speculation and opinion. Then he goes on to say,
9 moreover, the property owner did not testify about a
10 specific parcel, but rather testified broadly about the
11 undesired fireworks store's possible effect on the
12 neighborhood home values as a whole. This testimony was not
13 competence for the denial of special exception.

14 Well, here the comments of the public is shown in
15 the record where just like this saying, this is going to
16 destroy the neighborhood, this is going to do this, this is
17 going to do that, and they haven't even started yet, and
18 they're making these very drastic assertions that's entirely
19 speculative about what might happen. I mean, the Department
20 of Motor Vehicles can't deny a driver's license to somebody,
21 because they think they might speed. They're entitled to a
22 driver's license. We've got regulations, right? We've
23 got -- just like here, we've got noise regulations that
24 govern noise. We got special exceptions that govern noise,
25 and we would say it's arbitrary and capricious, based on the

1 holding in Wyndham versus North Augusta.

2 And there's another case, which we cite, the Bannum
3 case dealing with a halfway house, where the neighborhood
4 showed up and said it's going to be terrible to us, and
5 basically, the Supreme Court says that's just speculation.
6 There's no proof of that. And so here, this whole noise
7 thing is speculation. I don't know how we got to this point
8 where some -- that rooftop bars are just discouraged. We
9 don't even have a bar rooftop, we have a bar inside. Yes,
10 people can be served to drink outside, but as we showed at
11 the BZA hearing, there are plenty of rooftop bars around
12 this area. There are plenty.

13 The new Bennett Hotel is going to have one right
14 there on Marion Square. The area where we are is on the
15 southwest corner of Marion Square, facing Marion Square,
16 it's not facing the neighborhood. The Restoration Hotel has
17 a bar on the top that's right there on Wentworth Street
18 facing Harleston Village. None of these places have had
19 problems. The Bohemian, the Grand Bohemian, that was before
20 you about three or four years ago, and that one, on the
21 other side, and you ruled against the property owner, and
22 there have been no problems there. So we would submit that
23 all this, this imagined noise is speculative, and that there
24 are procedures in place to contain that, and that denying a
25 legal accessory use on the inside of the building because of

1 feared noise on the outside is arbitrary and capricious.

2 Same for the function room, we can't even go up
3 there and have a meeting unless it's spa and fitness. We go
4 to the Reading Room or the pantry. I don't know why, I
5 don't know how the --

6 THE COURT: Where was your bar originally in the
7 design, original design?

8 MR. WALKER: There is a --

9 THE COURT: Or did it have one?

10 MR. WALKER: Yeah, they've got an open -- as many
11 hotels do -- there's a lobby bar called The Living Room on
12 the entrance and restaurant called Henrietta's. This is a
13 very small facility. I can -- Mr. McQueeney handed you the
14 record, and it might be helpful for you to see exactly what
15 we're talking about. It is on Page 91 at the bottom, Your
16 Honor. There should be some color pictures.

17 THE COURT: Yes, sir.

18 MR. WALKER: All right. So 91, that shows, as you walk
19 in from one side, a little bar and some booths, and then 92
20 is a booth on the other end. Then 93 is the whole area.
21 This is not very large at all. For both reasons, Your
22 Honor, we cite --

23 THE COURT: I assume the deciding factor is with the
24 bar and the noise. So, go ahead.

25 MR. WALKER: No, it's an important point, because

1 that's an alternative reason why we say it was arbitrary and
2 capricious, because they turned down an interior use for
3 fear of outside noise. There are already conditions that
4 govern outside noise, and the Supreme Court, Court of
5 Appeals has found that testimony like this is speculative
6 and cannot be the basis for a decision.

7 Then our last two reasons, Your Honor, are, one is
8 due process, and one is estoppel. Under due process, a
9 person, an ordinary person, should have notice through
10 reviewing the laws or regulations as to what the
11 restrictions are. Here, if you looked at the special
12 exception and you looked at the zoning ordinances, you would
13 not find a single provision that says that a hotel operator
14 must locate all accessory uses in the location shown on the
15 conceptual plans reviewed by the BZA.

16 Now, City counsel could have said that. If that
17 were the law, they certainly should have said it. And if
18 you look at 54-220, which is in the record, they didn't do
19 that. There's nothing in 54-220, which appears at Page 145,
20 that says that the plans submitted are final as to uses and
21 locations of uses. There's no ordinance that says that.
22 Ten years from now, say he had not done this and somebody
23 wanted to put a function room up there, there'd be no way
24 they could see that a function room was barred, because the
25 City is relying on a plan that is not part of the special

1 exception, and it's not a condition of the special
2 exception. So this isn't an as-applied due process
3 violation, because there's no way, when you get the
4 paperwork, an ordinary person would see there is the
5 restriction on use or the limitation that the City is
6 arguing.

7 And final ground, Your Honor, is estoppel. We know
8 that estoppel is not favored with respect to governmental
9 entities. It doesn't have the same breadth as with private
10 in it, however, as we cite in our brief on Page 14, there
11 are numerous cases, we cite four of them, numerous, where
12 the Court has found that a government official speaking with
13 authority, within that authority, can be the basis for
14 estoppel. Here, in 2015, we change the plan, the city
15 approved the Function Room A, B, and C, and the pantry, and
16 I believe that the building official couldn't approve it
17 unless they were zoning anyway, you can't get your building
18 permit.

19 Once it was built, the City took the zoning position
20 when they took the position on zoning, no, you can't use
21 that for Function A, you can't do anything. All you can do
22 is now a spa and fitness, even though we let you build a spa
23 on the second floor. For that reason, You Honor, we spent
24 millions doing it. They should have told us on the front
25 end that you can't have a function room, you can't do what

1 you intend to do, you can't use your pantry, but they
2 didn't. They waited until August 16th, and
3 Mr. Batchelder -- and this is in both our Exhibit 1 to the
4 brief, it's the second page. It was attached to the BZA's
5 decision here. That's when he said you can't use all these
6 things, and you've seen it.

7 So we think if there's ever been a case of estoppel,
8 it's here. And what we ask the Court to do is to rule on
9 all these grounds: That the Board of Zoning Appeals'
10 decision should be reserved, and there should be a
11 determination that the owner can use accessory uses,
12 provided they're within the ordinances and the special
13 exception.

14 But it's important to know, Your Honor, that there
15 was no restriction on people having drinks outside. Even
16 when there was just a pool there, they could order drinks.
17 There's a liquor license. Somebody could bring them a
18 drink. There was not a -- any kind of bar or beverage
19 service shown on that conceptual plan that was before the
20 BZA in 2011, but there is no prohibition at all on people
21 being outside, and the City doesn't contend that the deck
22 terrace can't be used now.

23 They're just saying that, we think there are going
24 to be a bunch of rowdies, but we're not here about use of
25 the terrace, except in one way, and that is that the City

1 has arbitrarily said, you can't go to the northwest portion
2 of your terrace; they haven't told us why. They just said,
3 well, we understand that they think the Second Presbyterian
4 Church doesn't want that. And Second Presbyterian Church,
5 in the letters in the file said, the only thing we would
6 like is a little screening on the parking lot on the ground
7 level across from us, which the hotel owner did.

8 So we're not here today about people being on the
9 deck and having a drink; they do that right now. If they
10 want, they can run up and have a server ring them up and
11 they can have a drink now. So I want the Court to know that
12 the exterior use is not at issue here. We're only here on
13 the interior use, and that's where the disconnect is between
14 the two. Thank you, Your Honor.

15 THE COURT: All right. Thank you. Yes, ma'am.

16 MS. CANTWELL: Thank you, Your Honor. May it please
17 the Court. If you don't mind, I do better standing behind
18 the table, if that's all right with you?

19 THE COURT: That's fine.

20 MS. CANTWELL: Your Honor, hotels in Charleston, as
21 Mr. Walker told you, are heavily scrutinized uses. I
22 think the -- probably the first and foremost point to make
23 is that a hotel is not guaranteed to anyone as a matter of
24 right. You have to bring to the board specific information,
25 and the board judges based upon the information that's

1 presented, whether the hotel is appropriate for that
2 location. And the ordinance is very specific as to what is
3 required.

4 The first thing it says is that City counsel values
5 its neighborhoods, and that when considering a hotel use,
6 negative impacts should be avoided or minimized to the
7 greatest extent possible. That's the premise upon which the
8 whole hotel ordinance is based. Then City counsel says to
9 the Board of Zoning Appeals, we want you to apply a special
10 exception test to a hotel that comes before you for
11 approval, and you look at it based upon the character of the
12 neighborhood. You look at it based upon the traffic
13 generation it could produce. You look at it, among other
14 things, on how it would affect the housing stock. And to
15 assist you in that determination board, every applicant --
16 City counsel says every applicant is to submit a detailed
17 written assessment of the hotel that addresses every one of
18 the criteria that the board is to consider.

19 And that written assessment or report, if you will,
20 includes floor plans, it includes building elevations, it
21 includes site plans. They want to see what uses are going
22 where so that the board can appropriately and responsibly
23 evaluate what effect the hotel might or might not have.

24 THE COURT: Now, my question to you, according to
25 Mr. Walker, the original building plans themselves approved

1 by the BZA show these rooms?

2 MS. CANTWELL: That's --

3 THE COURT: I mean, is that yes? Right or wrong?

4 MS. CANTWELL: Well, I just disagree with how it was
5 characterized.

6 THE COURT: How do you want to characterize it?

7 MS. CANTWELL: Well, what I say is that this is what
8 happens.

9 THE COURT: Are you saying here the board got to
10 approve it? The board approved the construction plans, and
11 I assume that it showed rooms A, B, C, and the --

12 MS. CANTWELL: No, sir, no, sir. The Board of Zoning
13 Appeals, which is the first step to get your special
14 exception --

15 THE COURT: Right.

16 MS. CANTWELL: -- never saw the plans that the building
17 department saw, and I was going to get to that in a minute.

18 THE COURT: Okay. All right. Okay.

19 MS. CANTWELL: So when a hotel comes in --

20 THE COURT: So you're sitting there telling me if I
21 want to build a hotel, I can come to the zoning board and
22 get that approved, and then when I go for my building
23 permit, I can put in something different. It could be
24 different, and the two never communicate?

25 MS. CANTWELL: No, I'm not saying --

1 THE COURT: If the building permit was issued, somebody
2 approved it, filed construction plans.

3 MS. CANTWELL: The building department looks at
4 construction drawings from myopic construction drawings, do
5 these plans conform to the building code? That's what they
6 look at.

7 THE COURT: I understand, but nobody takes a look at
8 what was actually approved.

9 MS. CANTWELL: Your Honor, the applicant knew what was
10 approved.

11 THE COURT: I'm not talking about the applicant, I'm
12 talking about the building, the department that issued the
13 permit to build.

14 MS. CANTWELL: Well, I think it's fair to assume that
15 somebody is going to come in, knowing that they have to get
16 a zoning approval, that they would build in accordance with
17 what that approval is. The building department is not
18 concerned about the use, they're concerned about the
19 technical requirements of the building going to
20 construction.

21 THE COURT: We're just talking about changing it from,
22 I think these rooms -- from a pool to these rooms.

23 MS. CANTWELL: Well, Your Honor --

24 THE COURT: Obviously, he took the pool out and put
25 something else in.

1 MS. CANTWELL: He did, he did, but I think what's
2 important is you didn't get the whole history.

3 THE COURT: Tell me the history.

4 MS. CANTWELL: This hotel was originally approved for
5 120 rooms with no uses on the top at all, no uses on the
6 roof, except for mechanical. A year later, the applicant
7 comes in and says, we would like to put some rooftop uses up
8 there. They came in, and they must have known that they had
9 to get an amendment to their special exception, because they
10 came and they asked for one.

11 In the first plans that they brought, the zoning
12 official showed a pool with a deck. It showed a lounge and
13 a spa, and it showed the roof, the deck, as Mr. Walker
14 showed you, the entire roof deck being opened. Those plans
15 never were presented to the Board of Zoning Appeals. Before
16 it got to the board, and you could read it from the record,
17 but there's all sorts of interaction going on with
18 neighbors, this, that and the other, the applicant changed
19 his plans, and he brought to the board a -- what the Board
20 of Zoning Appeals saw was a pool with a seating area
21 outside. They saw not a lounge, but a spa and fitness room
22 in the little rooms A, B, and C that Mr. Walker was talking
23 about. It showed over three quarters of the out, exterior
24 deck, being inaccessible green roof.

25 So what you had on what the board saw as the

1 accessory uses that were being proposed by the applicant for
2 this area of the hotel was a limited area of the south
3 quadrant open to the public, not to the public, frankly, it
4 was a pool area, probably open just to guests, a spa and a
5 fitness room, it was open just to guests, and the BZA
6 approved it. And even when they approved it, they still put
7 a slew of conditions on it.

8 So then what happens is that, for reasons of his
9 own, if the pool is expensive, I understand that, I get
10 that, but the applicant took it upon himself to change his
11 program, and he built a bar, he built a kitchen, he built an
12 events space, and he opened up the entire deck on the -- the
13 entire deck for accessibility to either his guests or to the
14 general public, who are going to come up and maybe go to an
15 event or go to the bar. He changed the program. The BZA,
16 as you noted, never had a chance to review that.

17 So what I'm hearing is that Mr. Walker is saying
18 there's no legal basis for them to deny us an accessory use.
19 Well, I would respectfully disagree with that, because to
20 follow that argument to its logical conclusion, you have a
21 hotel applicant coming in saying, here's my hotel, here are
22 my accessory uses. This is where I'm going to locate them.
23 This is how big they are. And then the board can adjust and
24 say, okay, we think that's fine, we'll give you -- we'll
25 make some conditions, that's fine, here is your special

1 exception.

2 According to the argument that you're hearing, is
3 then the applicant can say, well, you know what, we're just
4 kidding. We're not really going to do that. We're going to
5 put a bar up there. We're going to put an event space up
6 there and we're going to open up the entire deck that was
7 limited to maybe a handful, you know, hundred people, if
8 that, to three times that. That is a fundamental change in
9 the nature of that floor, it's a fundamental change on how
10 that hotel operates and it could not -- it required BZA, the
11 Board of Zoning Appeals' approval to get that done.

12 The applicant here is not asking to move around uses
13 that were approved. He is asking to add new uses, new
14 accessory uses. We don't want a pool, now we want a bar.
15 We don't want a small deck, now we want the whole deck
16 opened up, the whole entire floor of the Federal Building
17 opened up to the public. We don't want a fitness room for
18 our guests to work out, we now want an events room where we
19 can have luncheons and meetings and whatever. Those are
20 just not the accessory uses that the board saw.

21 Because the board has the discretion to give a
22 special exception to begin with, they are entitled to know
23 the nature of the hotel that's going -- that's coming at
24 them. And what is built there today is not what was asked
25 for, and if there was no objection when the board put the

1 conditions on, and in fact --

2 THE COURT: Let me interrupt you just a second so I
3 understand. This hotel is behind the Federal Building?

4 MS. CANTWELL: No, it is the Federal Building.

5 THE COURT: It is the Federal Building?

6 MS. CANTWELL: Yes, sir.

7 THE COURT: The whole Federal Building?

8 MS. CANTWELL: Yes, sir.

9 THE COURT: All right. Go ahead.

10 MS. CANTWELL: It is the Federal Building.

11 THE COURT: All right.

12 MS. CANTWELL: And so I think that there is every bit
13 of legal basis for the board and the zoning administrator to
14 take the position that they did, that if you're going to
15 change the use, if you're going to change the nature of the
16 floor, particularly the outside, you need to come talk to
17 us. I keep hearing, oh, these are interiors rooms, these
18 are inside rooms. Well, they're rooms, they have walls, but
19 every one of these rooms, and you can look at the exhibits,
20 and it comes home as clear as day, they are connected at the
21 hip to the outside.

22 The outside is going to be used in conjunction with
23 the inside, and as you noted earlier, and talk about
24 competent evidence, is that it's members of the board, but
25 also members of the public said, it's one thing to have a

1 pool out there and a spa, where limited to guests and
2 there's limited number of people that go, and there's a
3 limited area of the roof that you can be on, is far
4 different than opening up a bar to the general public with
5 event space and with a deck that now encompasses the entire
6 roof.

7 You have to remember, Judge, this property is
8 surrounded on three sides by residential uses. That is a
9 primary function of the BZA, is to protect the neighborhoods
10 the City counsel says we prize. So all of that, the
11 conditions of operation and where uses go and where
12 accessory uses are, they're important. We don't ask for
13 plans just as an exercise in futility. The plans serve a
14 purpose, and for whatever reason -- and Mr. Dewberry took it
15 upon himself to change his construction plans, didn't tell
16 anybody that they didn't conform to zoning, and then he
17 feigned surprise, well, I didn't know I couldn't do this.

18 There was nowhere, nowhere in his application or his
19 approval that said he could have a second bar, that he could
20 have event space on the top of the roof or that he could use
21 the entire roof. The board was very specific upon that, and
22 they reacted based on plans that they saw. If the plans
23 don't meet anything, then you're going to have sleight of
24 hand going on all the time, and we just don't think that
25 that is an accurate reading of the ordinance, and we don't

1 think that's an accurate recitation of the law.

2 The evidence that Mr. Walker takes issue with as far
3 as anecdotal, maybe that's a good word that camps come to
4 mind, the way he described it, but it wasn't that at all.
5 The board heard from people who live in the neighborhood,
6 who are affected every day by traffic that comes and goes
7 through the neighborhood, but also to that hotel. They walk
8 their dogs in the park. They hear noise from hotels that
9 ring the park. This hotel, this bar is going to face their
10 neighborhood. There's nothing in between where the rooftop
11 activities are and where these people live, and they were
12 voicing their concerns to the --

13 THE COURT: But it's not going to face Meeting Street.

14 MS. CANTWELL: Part of it is on Meeting Street. It's
15 the whole way around. It's going to be on all four sides.

16 THE COURT: Okay.

17 MS. CANTWELL: That's what the request was. The
18 Wyndham case, the fireworks case, you know, there was all
19 this hoo-ha about how the fireworks are going to affect
20 everything. What the facts were, this was the four corners,
21 three corners already had fireworks stands, and the Court
22 said, you know, how is this going to make -- you know, weigh
23 this evidence in light of the existing conditions.

24 The existing conditions here do not have this --
25 this neighborhood is not ringed with rooftop bars. In fact,

1 this is the only one, that I'm aware of, maybe one other,
2 that predates the review of this, that actually walks into
3 the neighborhood with nothing in between. I mean, it's just
4 open air, and whatever happens up there happens up there,
5 and there's nothing, no barrier between it and the
6 neighborhood.

7 And in the Bannum case, what happened there is that
8 the Supreme Court, I think, was a little bit miffed, because
9 they thought that the reasoning -- they were trying to stop
10 the group home, and they thought that the evidence presented
11 about potential increase in traffic and this and that was a
12 ruse, and they said that there was no evidence to show --

13 THE COURT: But don't you think in them saying there's
14 no traffic -- there's no study, people just walking all
15 the -- this is going to increase traffic with no factual
16 basis, other than just their opinion based on nothing;
17 that's what the Supreme Court was saying. Okay.

18 MS. CANTWELL: Well, and I think here we have a
19 different situation. Here you have a neighborhood that
20 was -- it was represented to, and that they relied on, in
21 which the board relied on, is that the number of people on
22 that roof, at any given time were going to be hotel guests
23 or either at the pool or they're working out in the spa or
24 fitness center, and they're limited to the south quadrant of
25 the roof. That's far different than an application that

1 comes in and says we want events up there, we want a bar up
2 there, we want to open up the entire roof to the public.

3 I think that is credible evidence. I think the
4 board should have taken it into consideration. I think it
5 was right for them to do so, and I also think that as you
6 read comments from the board, they will tell you that the
7 rooftop was a big concern when this hotel was approved in
8 2011. And one member said, I don't even know if I would
9 have voted for it if there had been a rooftop on there. So
10 this is not anything new. That is an aspect of a hotel that
11 requires scrutiny, and ought to require scrutiny, given the
12 effects that it could have. With regard to the --

13 THE COURT: Do the building plans -- I forget what they
14 called them, Cyprus Room, I believe?

15 MS. CANTWELL: Citrus Room.

16 THE COURT: Citrus.

17 MS. CANTWELL: Citrus Club.

18 THE COURT: Citrus Room, excuse me, do the plans that
19 were submitted for building, shows us, i.e., a Citrus Room,
20 i.e., a bar?

21 MS. CANTWELL: I don't know if they labeled it that
22 way, but they labeled it as Function Room A, and they showed
23 a room.

24 THE COURT: Okay. They didn't say what was going to be
25 in it?

1 MS. CANTWELL: Yeah, well, they have a pantry, which is
2 a kitchen.

3 THE COURT: Okay.

4 MS. CANTWELL: They have the Citrus Club. I don't even
5 know what they call them. I think they may have called that
6 Function Room or something else. But the point being, from
7 their perspective that everything --

8 THE COURT: What did it show outside?

9 MS. CANTWELL: Outside, it showed --

10 THE COURT: How would it -- the original plans, how
11 were they going to limit people from going on the rest of
12 the roof?

13 MS. CANTWELL: Well, they were going to have planters.

14 THE COURT: Where people couldn't walk?

15 MS. CANTWELL: And they represented that the roof, the
16 perimeter of the rooms that are up there was all going to be
17 green roof, inaccessible.

18 THE COURT: Tell me, what do you mean when you say
19 green roof?

20 MS. CANTWELL: Well, I have to -- I mean, I'll have to
21 feign a little bit, I'm old school too, but I think --

22 THE COURT: I don't understand that terminology.

23 MS. CANTWELL: It's vegetated roofing. It collects
24 water. It's a green thing, energy efficient sort of
25 technique that is becoming vogue now.

1 THE COURT: Okay.

2 MS. CANTWELL: And a lot of people have them.

3 THE COURT: Looks like roofs?

4 MS. CANTWELL: Yes, and, you know, they don't have to
5 be inaccessible, but this applicant, on his application,
6 said it would be. And in an effort, I think, to win the
7 board's approval to allow a limited use of the rooftop,
8 passive, limited uses of the rooftop, and the board said
9 fine. The board said fine. Now, they want -- and these
10 aren't set in stone. Mr. Walker's client availed himself of
11 the process through him, he can contact the board tomorrow,
12 if he wants to, and ask to change the uses on the top floor,
13 but he just cannot unilaterally do it and then expect the
14 City and the people who are in the position of writing
15 permits just to fold, because they did that, which brings us
16 to the estoppel argument.

17 THE COURT: That's what I want to hear.

18 MS. CANTWELL: You know, what you have is an applicant
19 who knew what his zoning uses were. He knew what he had
20 shown the Board of Zoning Appeals, and he knew that those
21 plans were the basis for his special exception. He knew it.
22 If he didn't know it, he certainly had the means of knowing
23 it, because somebody submitted it on his behalf. He then
24 goes to the building official, he doesn't go back to the
25 zoning official, he goes to the building official and says,

1 here's my construction drawings for the roof.

2 He doesn't say anything about whether or not they
3 comply with zoning or he doesn't represent, oh, by the way I
4 changed this. He just -- it's like divide and conquer; I'm
5 going to tell this division one thing, this division
6 another, and this division something still yet different.

7 But the point is, he doesn't have the right to even
8 occupy the hotel, unless he's compliant with his zoning, and
9 the zoning is the special exception, which were the spa and
10 fitness and the pool, and the limited use of the upstairs
11 floor. And if he submitted something to the building
12 official that was different from that, he should not be
13 held -- he should not now be heard to complain, well, I
14 didn't know. Well, I am so sorry.

15 He knew what was going on, Your Honor. And I think
16 it's telling that the original plans, he wanted to present
17 to the board in 2011, did show the bar, and it did show the
18 function rooms, and it did show the deck being wide open,
19 and I'll give you the page sites in the minute in the
20 record, but when he got to the board, knowing what was
21 coming with the opposition, he changed the plans. He
22 changed the plans. And you so aptly hit it earlier when you
23 said the board never had the opportunity to address the
24 effects of the accessory use that you now want to put up
25 there, because it was never shown to him.

1 And the board should not have to guess what's in
2 somebody's mind. They need to be able to rely on what the
3 plans are that are presented by an applicant, and if the
4 applicant want to change the plans, he's welcome to come
5 back and have that discussion. But just to do it
6 unilaterally, knowing the opposition that he faced with the
7 first plans that he revised, and then saying, well, I didn't
8 know I couldn't do this. Frankly, I think it just lacks
9 creditability.

10 I think that this applicant knew what was going on,
11 and I don't think he has clean hands in this situation. If
12 he didn't know what was going on, all he had to do was ask
13 the zoning administrator; that's where he started. He
14 didn't start with the building department, you know, he
15 started --

16 THE COURT: Do the construction plans show a schematic
17 of what's being placed where when it's approved by the
18 building -- you said the building department? Do they show
19 a schematic of the rooftop?

20 MS. CANTWELL: I think it does. I'm trying to --

21 THE COURT: You're telling me that the building, when
22 they approved -- when they issued the permit to build the
23 building as presented by the plans, that there's no
24 crosscheck with the plans that were approved by the zoning?
25 And I understand your argument, he was hoodooing everybody,

1 but still, there's no -- the building doesn't routinely
2 check to make sure it complies with what was approved by
3 zoning?

4 MS. CANTWELL: Where it comes up is the building
5 department will say, does this have a special exception?
6 And that's the zoning question.

7 THE COURT: Right.

8 MS. CANTWELL: And they say, yes. When you build
9 something, when you go through the process, you're going to
10 have to get sign-offs from everybody. The building
11 department says your clients comply with the building code,
12 but you don't get to occupy until you get the zoning
13 sign-off. And this applicant didn't go back to the
14 zoning --

15 THE COURT: What about the certificate of occupancy,
16 you don't look at that time?

17 MS. CANTWELL: You do look at it, and that's when we
18 said --

19 THE COURT: But nobody looks at what the zoning board
20 has approved? Especially when you're doing a special
21 assessment situation. You know, horse barns, as you and I
22 have well know, you know, but go ahead. I just -- I don't
23 understand that, why there's no crosscheck there, and then
24 the man goes and spends how much money building according to
25 those plans, then you come up after the fact and say, hey,

1 we can't approve it.

2 MS. CANTWELL: Well, I think that, you know, there
3 is --

4 THE COURT: I understand your argument about he
5 originally understood, but he feigned, he changed the plans,
6 and then he changed them again without coming back to the
7 board, but it's sort of like the left hand didn't know what
8 the right hand is doing.

9 MS. CANTWELL: I hope it doesn't appear that bad, Your
10 Honor, I don't want to misrepresent anything, but I do know
11 that when you go to the building department, they will check
12 with zoning to say, is this use approved? The big term, the
13 hotel, is the hotel approved?

14 THE COURT: I understand that, that question.

15 MS. CANTWELL: They don't get into the weeds,
16 necessarily, of the conditions of the occupancy, because
17 frankly, an applicant knows what his conditions are, and the
18 zoning administrator knows what the conditions are, and he's
19 going to catch it, unfortunately, on this end, he went ahead
20 and built it, and then when he came in to get his zoning,
21 they're like, wait a minute, time out here.

22 And I think in fairness to the zoning administrator,
23 he was trying to work with this applicant and actually gave
24 him uses up on the eighth floor that he didn't have to do.
25 He said, you know, why here, oh, he illegally conditioned

1 our occupancy of the eighth floor. No, he didn't. All he
2 did he was, allow the uses that the board authorized, you
3 know, and he said, you can't occupy the whole deck, you
4 can't occupy the Citrus Room or the events room. You could
5 use the space for just as you said you were going to do it.
6 Now, the fact that they got caught late in the game, you
7 know, the applicant wants to put that all on the City, and I
8 just don't think that's --

9 THE COURT: I understand that, that's not my concern.
10 The building, was it building inspector or building -- who
11 was --

12 MS. CANTWELL: Building official.

13 THE COURT: Building official, was anything taken from
14 him at all in this transcript or was that addressed at all
15 by the zoning board of why the building approved it as it
16 sits today?

17 MS. CANTWELL: The board did not address it. I think
18 when Mr. Walker was making his remarks to the board, he
19 referred to the building department as a different arm of
20 the City.

21 THE COURT: Right.

22 MS. CANTWELL: And that's the nut of the problem,
23 because he went to a different arm, knowing that he should
24 have come back, because he came back in 2011 to amend his
25 special exception to get different uses for the roof. He

1 knew he needed to come back, but he didn't.

2 THE COURT: Okay.

3 MS. CANTWELL: He took that risk.

4 THE COURT: It is what it is. Anything else?

5 MS. CANTWELL: My lawyer over here just pointed out,
6 it's in our brief, that the actions of a building official
7 cannot trump or stop or -- yeah, I guess trump the actions
8 of a building official.

9 THE COURT: How about making it trump, but it could
10 make estoppel.

11 MS. CANTWELL: Well, no, because there's a Folly Beach
12 case where somebody got a permit to build an apartment
13 downstairs, and it violated the zoning code as far as FEMA,
14 and went to the Supreme Court, and the City won. It simply
15 said the actions of the building official cannot, you know,
16 I guess curtail or limit the zoning approval.

17 THE COURT: I'm not suggesting that he can. I'm just
18 saying made possible grounds for estoppel, that's all I'm
19 saying.

20 MS. CANTWELL: Well, that was what they argued in the
21 Folly Beach case, and they said no.

22 THE COURT: Did they build the apartment?

23 MS. CANTWELL: I think they did build it.

24 THE COURT: Assuming there's some old cases that
25 involve knowing -- where somebody knows and builds and

1 completes it, and City doesn't do anything about it, it's
2 too late.

3 MS. CANTWELL: Well, I think that he built it, but I
4 just don't think he can occupy it as an apartment.

5 THE COURT: Okay. Never got a certificate of
6 ownership. Okay. Whatever. Anything else?

7 MS. CANTWELL: No, sir. Thank you.

8 THE COURT: Very briefly.

9 MR. WALKER: Thank you, Your Honor. Just to clarify a
10 couple of things. This building is not bound by three sides
11 by residential. The building, as shown here, is in the
12 pink, that which is general business, GB. This is Second
13 Presbyterian Church, no objection. This is Citadel Square
14 Baptist Church, no objection. And Marion Square has had
15 bars on rooftops, and again, the bar is not on the rooftop
16 here, it's inside, but there was one here on the corner of
17 Calhoun and King, and there's going to be one right here
18 that was approved by the City looking onto Marion Square.

19 THE COURT: Show me where the building is on that map.

20 MR. WALKER: All right. This is Calhoun and this is
21 Meeting. If we're going north, we come to the stoplight,
22 whatever it is, Courtyard Suites, we come to Marion Square.

23 THE COURT: Okay.

24 MR. WALKER: And then where I crosshatched.

25 THE COURT: Right there, okay.

1 MR. WALKER: That's the hotel. Now, this area is
2 behind it, that's a parking area, that is not where the
3 building is. That's owned by --

4 THE COURT: Where is the residential?

5 MR. WALKER: The residential would be this.

6 MS. CANTWELL: And this.

7 MR. WALKER: Yeah, this back here.

8 MS. CANTWELL: Yeah.

9 MR. WALKER: It's behind the portions of the hotel
10 we're talking about. It's all behind it back here.

11 THE COURT: Okay. All right. Thank you.

12 MR. WALKER: The other thing to just clarify is that
13 the applicant or the owner is not seeking to use the entire
14 rooftop deck. And you were absolutely right, the only
15 seating that was up there is in the -- this is Meeting
16 Street, I'm pointing to, and this is within the materials
17 that you have. But Meeting Street is here, and they're
18 looking to use the southwest quadrant facing Meeting Street,
19 and they have a few tables set up here along the Meeting
20 Street side. They're not set up in the back.

21 Your Honor, as we said in the beginning, what the
22 applicant did or what the owner did was entirely within what
23 was allowed by the special exception. There was nothing in
24 the conditions of the special exception --

25 THE COURT: But he knew what plans they had approved,

1 and he changes the plan.

2 MR. WALKER: Correct.

3 THE COURT: It's a drastic change.

4 MR. WALKER: He changed them. Actually, the first
5 construction plan he had was the pool, and that was three
6 years later, and he found out about it, and it was a
7 significant change, the Court is absolutely right, but he
8 put accessory uses in there that met the letter of the law.

9 THE COURT: Well, I understand that argument, but now
10 go back to what I asked you before. Didn't the City have
11 the right to look at the new accessories and see what it
12 could be used for? Never had that opportunity to, because
13 your client didn't give them that opportunity until after
14 the fact, the fact of the building. Okay.

15 MR. WALKER: Well, these particular accessory uses in
16 this location, before the Board of Zoning Appeals, the
17 answer is no, because they weren't in there, Judge, that's
18 correct. Whether he can do it later, be it four years later
19 or ten years later, he can do it. There's nothing in
20 Section 54-220, which is at Page 145, which is the
21 exception, this is the special exception rule, and
22 Ms. Cantwell alluded to subpart B-1(f), where it says, in
23 making these findings, the Board of Zoning Appeals shall
24 consider the following information to be provided by the
25 applicant in site plans, floor plans, building elevations,

1 in a detailed written assessment report. It does not say as
2 the City contends or whatever you put in there, that's it.
3 And that's the City's position. That is not in the law.

4 THE COURT: What's the ordinance number?

5 MR. WALKER: It's Ordinance 54-220, and it appears on
6 the record at Page 145 to 147.

7 THE COURT: Okay.

8 MR. WALKER: And we would disagree about the
9 characterization of the Wyndham versus North Augusta
10 fireworks, because Ms. Cantwell is saying the record there
11 show fireworks stands in other locations. Well, here, there
12 are plenty of bars on the inside around Marion Square. So a
13 bar use is not an unusual use.

14 Also, point out that this is 100 feet in the air,
15 which means it's removed from the lower, whatever's going on
16 in the ground, and that we have not just two conditions that
17 I mentioned that were -- the BZA addressed noise on the
18 rooftop terrace, and those were stopping any activity at
19 10:00, and no amplified music, but also required in, I
20 think, Number 8 -- or Number 10, additional buffering around
21 the rooftop deck shall be provided at the roof edge, and my
22 client did that. He put plantings all over and around the
23 rooftop edge. Again, that was the condition of the BZA.

24 So we submit, yes, the accessory use changed, but in
25 terms of a condition addressing noise, there are three

1 conditions in here that address noise, and that to deny the
2 interior use --

3 THE COURT: Well, what about the credibility issue? He
4 comes, has a bar, notices opposition. He changes the plans
5 to a pool and a spa, gets that approved. Arbitrarily takes
6 the pool out, add some -- as you refer to rooms A, B, and C,
7 and the pantry, builds it like that, then comes back and
8 says, hey, approve it?

9 MR. WALKER: Well, the first thing I'm going to say is
10 that the plan that Ms. Cantwell referred to, my recollection
11 is it just showed a spa lounge, and it didn't have a bunch
12 of rooms.

13 THE COURT: Okay.

14 MR. WALKER: It was just a big space.

15 THE COURT: Just showed a spa lounge.

16 MR. WALKER: It just said spa lounge. It was
17 changed --

18 THE COURT: I mean, the original plans, where he had
19 the bar on that floor, I think --

20 MR. WALKER: It just said spa lounge.

21 THE COURT: Okay.

22 MR. WALKER: And that's what Mr. Batchelder testified
23 to.

24 THE COURT: I guess lounge could go either way, huh?

25 MR. WALKER: I guess it means you have easy chairs.

1 THE COURT: I guess you could have alcohol or whatnot,
2 I don't know --

3 MR. WALKER: I don't know what lounge is, but I guess
4 you relax there.

5 THE COURT: You can relax and watch television.

6 MR. WALKER: Whatever, and maybe have a drink, but it
7 changed to spa fitness, that's correct. But we come back to
8 the letter of the law, and also the lack of a factual basis
9 for the findings by the BZA, because we're looking at the
10 transcript, that there's going to be some significant noise
11 problem from the outside terrace. And there's no proof.
12 There's no factual proof to support that.

13 And where we are is that the City is technically
14 saying, even though you've got proper accessory uses, you
15 can't use the inside of your building on the eighth floor;
16 instead of sticking with the conditions in the special
17 exception that address noise. That was the only thing that
18 people complained about, was noise, and it's taken care of
19 within the conditions. Thank you, Your Honor.

20 THE COURT: Okay. Thank y'all very much.

21 MS. CANTWELL: Thank you, Your Honor.

22 (END OF TRANSCRIPT OF RECORD.)

23

24

25

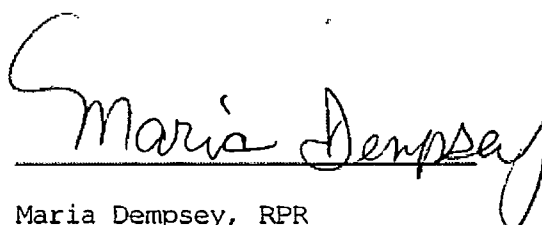
CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Charleston)

I, Maria Dempsey, Official Court Reporter for the Ninth
Judicial Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative to
appeal, in the Circuit Court for Charleston County, South
Carolina, on the 9th day of October 2017.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

May 11, 2018

A handwritten signature in cursive script that reads "Maria Dempsey". The signature is written in dark ink and is positioned above a horizontal line.

Maria Dempsey, RPR
Official Court Reporter
Charleston County Circuit Court
Ninth Judicial Circuit
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Dewberry 334 Meeting Street,	)	
LLC,	)	CASE NO. 2017-CP-10-02183
	)	
APPELLANT,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
City of Charleston and Board	)	
of Zoning Appeal-Zoning,	)	
	)	
RESPONDENTS.	)	
	)	

January 10, 2018

Charleston, South Carolina

B E F O R E:

The Honorable J. C. Nicholson

A P P E A R A N C E S:

G. Trenholm Walker, Esquire
For the Appellant

Frances I. Cantwell, Esquire
For the Respondent

Daniel S. "Chip" McQueeney, Jr., Esquire
For the Respondent

Certified Transcript Provided For: City of Charleston

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I N D E X

HEARING - Motion to Reconsider -- 03

COURT'S EXHIBITS -

No. 1 - Notice of Motion to Reconsider -- 31

No. 2 - Return to Motion -- 31

CERTIFICATION OF TRANSCRIPT -- 31

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: I want to thank both of you for preparing a
2 memo. They were from my prospective they were very
3 informative and very thorough. And I want to thank both of
4 you for submitting them to the court. I have read them.

5 And for the record please state who is here
6 representing who, please.

7 MR. WALKER: Trenholm Walker here on behalf of the
8 initial appellant.

9 MS. CANTWELL: Francis Cantwell and Daniel McQueeney
10 here on behalf of the City of Charleston Board of Zoning
11 Appeals and the City of Charleston.

12 THE COURT: Okay. Thank you so very much.

13 Ms. Cantwell, it is your motion to reconsider. And I
14 really don't -- I have read everything and deliberated on
15 this for a while. And so if you don't mind I am going to
16 try to direct you to some questions rather than rehashing
17 everything.

18 MS. CANTELL: Sure.

19 THE COURT: And when you answer some of my questions I
20 will give you an opportunity to very briefly summarize your
21 position, okay.

22 MS. CANTELL: Okay.

23 THE COURT: I don't want to cut you off; but I don't
24 want to have a whole argument on everything, okay. And let
25 me just sort of tell you some of my concerns.

1 And I want to ask you primarily -- let me find -- I
2 assume from reading the briefs and from having looked that
3 there is no ordinance that addresses what you do when you
4 change an accessory use and it is saying that it has to be
5 approved, the change of the accessory use, by the Zoning
6 Board; is that correct or not correct?

7 MS. CANTELL: I would say that is not correct.

8 THE COURT: All right. But is there an ordinance that
9 specifically addresses change of use of accessory after the
10 building has been built?

11 MS. CANTELL: There is not an ordinance that says that
12 you cannot change an accessory use. But the context of this
13 case, Your Honor, is that there is an ordinance that says in
14 order to get the use to begin with, including the accessory
15 uses, you have to tell us what you want.

16 And that is what happened in this case in the first
17 initial special exception that was approved in 2011, the
18 applicant came forward and says this is the hotel I want and
19 it includes these accessory uses at these locations.

20 Four years forward after -- which we won't get into.
21 But after the plans for the fourth -- the top floor ---

22 THE COURT: The pool change. I remember all of this,
23 okay.

24 MS. CANTELL: Were changed. There is -- our
25 contention -- or our position is that once the initial

1 special exception was approved as presented if you want to
2 change it you can do it but you need to come back to the
3 Board and get ---

4 THE COURT: Well, what if this change occurred five
5 years later do they still have to come back to the Board?

6 MS. CANTELL: Same this, Your Honor. It is ---

7 THE COURT: So you think any time accessory use is
8 changed, whether it is from a spa use or laundry use or
9 whatever use they are putting it to, you have got to come
10 back and get approval for that use?

11 MS. CANTRELL: If it is a new use. If it is a
12 different use. They had approval for a spa ---

13 THE COURT: Even five years, ten years, twenty years
14 down the road?

15 MS. CANTRELL: Yes, sir. And I will tell you why, Your
16 Honor.

17 THE COURT: Okay.

18 MS. CANTRELL: Because if that -- if it weren't the
19 case, if you could come in and show me Plan A today and you
20 build Plan A but all of a sudden you want to do something
21 different and morph into a Plan B if you don't have to come
22 back to the Board of Zoning Appeals for their look at it, if
23 you will, or their approval, you are opening the door to
24 virtually every hotel in the City of Charleston after they
25 build according to their approval or not it is open to

1 having a rooftop bar. And that is clearly not the intent of
2 the ordinance.

3 THE COURT: Well, this is not a rooftop bar, number
4 one.

5 MS. CANTRELL: Well ---

6 THE COURT: Factually it is not a rooftop bar. I know
7 you have been closing in that language. It is inside the
8 building. Now I know your position is they will go outside
9 and take drinks and have tables out there. But the bar
10 itself is located inside; is that correct?

11 MS. CANTRELL: It is.

12 THE COURT: Okay. Well, ---

13 MS. CANTRELL: However, ---

14 THE COURT: --- let's change the terminology from
15 rooftop bar. Because it is not a rooftop bar like on the
16 top of the hotel there on the corner of East Bay and Market.

17 MS. CANTRELL: But it is, Your Honor. Because even the
18 applicant himself when he came in in 2017 his application
19 says we want to change the interior uses and we want to
20 expand the use of the exterior to use in conjunction with
21 the interior uses.

22 THE COURT: Okay.

23 MS. CANTRELL: So to try to parse them I think is sort
24 of a false pretense. You know, they didn't say ---

25 THE COURT: Well, I mean ---

1 MS. CANTRELL: --- we want to be in the rooftop and we
2 are not going outside. They didn't say that.

3 THE COURT: But as far as the noise was concerned and
4 the parking, that was addressed initially.

5 MS. CANTRELL: Not for this use at that location.

6 THE COURT: It was addressed though for a pool. And
7 there would be a lot more people out there in a pool than
8 there would in I think it was nine or twelve stools with
9 three benches and a bar, a small bar.

10 MS. CANTRELL: Well, Your Honor, if -- the record
11 reflects that not only did members of the public but the
12 Board itself said, wait a minute, we have got an issue here;
13 it is one thing to have uses on the top floor that are
14 predominantly patron related; it is one thing to have
15 patrons going upstairs taking a swim, working out, even
16 sitting outside and having a drink; that is a lot different
17 than opening it up to the public where anybody can come at
18 any time, you don't have to be staying at the hotel, you can
19 come -- I mean I could go there, park my car ---

20 THE COURT: But you have got your noise restrictions
21 already in the original approval, i.e., ten o'clock, no
22 outside speakers, and some type of vegetation on one side.
23 That was addressed. Plus you have got your noise ordinances
24 already in place. So you are still protected.

25 MS. CANTRELL: The conditions that were placed in the

1 special exception in 2011 were placed on the accessory use
2 of a pool and a spa. It was not that the positions ---

3 THE COURT: But there is -- I don't mean -- I am sorry;
4 I interrupted you.

5 MS. CANTRELL: That's all right.

6 THE COURT: Excuse me. Go ahead. I apologize for
7 interrupting you. I want to hear what you have got to say.

8 MS. CANTRELL: No, I was just going to say those
9 conditions were accessory use specific conditions. The
10 BA -- the BZA never saw the specter of a terrace that was
11 open to the general public, the entire thing, or the specter
12 of having a small if you want to call it indoor bar or an
13 event center up on that -- up on that top floor.

14 Had they seen that in 2011 there may have been
15 different conditions and it may not have been approved. So
16 the point being is that when an applicant comes in and shows
17 the Board something and then they want to add something new
18 it is incumbent upon him to come in and make his case as to
19 why it is a good or bad thing.

20 THE COURT: All right. Now is there a particular
21 ordinance that requires that, other than the intent as you
22 say of the zoning ordinance in general?

23 MS. CANTRELL: Well, the only ordinance on it that I
24 could point to that says is one of the criteria --
25 criterion -- a criterion if you will of what the BZA has to

1 look at are the proposed accessory uses. And they have to
2 evaluate them. And this -- these accessory uses were never
3 proposed until 2017.

4 THE COURT: All right. You said something about the
5 whole rooftop being a bar. I don't -- if my memory serves
6 me correct that is not correct. Not the whole rooftop.

7 MS. CANTRELL: Well, ---

8 THE COURT: There was just a small portion of the
9 rooftop; yes or no?

10 MS. CANTRELL: No, sir. No, sir.

11 THE COURT: The whole rooftop of the whole hotel is
12 going to be open to patrons from the bar; is that correct?

13 MS. CANTRELL: Sure. Under the proposal -- under the
14 application -- the original plan that was approved only had
15 like a third of the roof, the southern third if you will.

16 THE COURT: I thought that was still the third. Maybe
17 I am wrong.

18 MR. WALKER: No; that is correct, Your Honor. We
19 haven't asked to put any tables anywhere else. It is just
20 on the southwest corner towards Marion Square to ---

21 THE COURT: I don't remember what was in the testimony.
22 But I just remember in arguments that it was still the one
23 third portion, not the whole roof.

24 MS. CANTRELL: Well, he is talking about where he is
25 going to put his tables.

1 THE COURT: I understand.

2 MS. CANTRELL: But -- but the original plan only showed
3 a third of the roof even accessible to the public.

4 THE COURT: Okay. I understand.

5 MS. CANTRELL: Now the entire roof is accessible.

6 THE COURT: Okay. All right.

7 MS. CANTRELL: So if you wanted to walk out there ---

8 THE COURT: So the whole roof is accessible but the
9 tables is one third?

10 MS. CANTRELL: That is correct.

11 THE COURT: Okay. All right. That clarifies it.

12 MS. CANTRELL: That is correct.

13 THE COURT: Thank you very much.

14 MS. CANTRELL: You are welcome.

15 THE COURT: All right. I guess the second question I
16 would like for you to address was the issue of estoppel;
17 i.e., we discussed it briefly at the last hearing. I put it
18 in the order. I am not sure the order was real clear on
19 what the court was trying to say.

20 And since that time Mr. Walker has shown the court
21 Ordinance Sections 54-901 which basically says the building
22 inspector and the -- I am trying to see the name of the -- I
23 guess the zoning administrator referred to as administrative
24 officer of the zoning ordinances city building inspector
25 respect all construction or alteration for which permits

1 were issued and the city engineer -- or as authorized by the
2 Board of Zoning appeals or as by -- authorized by the Board
3 of Architectural Review shall make weekly inspections to the
4 engineer's office which is -- goes to the argument that --
5 you know, the City approved the plans.

6 I know it was a separate section. It wasn't the Zoning
7 Board. But the City approved the plans. It wasn't the
8 Zoning Board. But the Building Commission approved the
9 plans. And they inspected it. And they knew it was there.

10 So how can you isolate that from the Zoning Board?

11 MS. CANTRELL: First, just to protect ---

12 THE COURT: From the estoppel issue is what I am
13 talking about.

14 MS. CANTRELL: All right. And just to protect the
15 record -- because I want to address your question. But I do
16 need to put on the record an objection to admitting new
17 evidence and information ---

18 THE COURT: Well, it is not new evidence. It is a
19 statute.

20 MS. CANTRELL: Well, I just ---

21 THE COURT: It is not argument. You can't -- I think
22 one of his objections was you didn't bring that argument up
23 earlier. But this is not an argument. This is just a
24 section. We made that argument before. It is in the order.

25 MS. CANTRELL: Okay.

1 THE COURT: I just wasn't aware of this particular ---

2 MS. CANTRELL: Well ---

3 THE COURT: But it is according to ordinance. You can
4 bring out new ordinances in the reconsideration, okay.

5 MS. CANTRELL: All right.

6 THE COURT: Not new arguments. But I think -- like the
7 state statute, you can bring out a state statute.

8 MS. CANTRELL: I understand.

9 THE COURT: Okay. That is my point.

10 MS. CANTRELL: Well, if you read that statute what it
11 says is that the building inspector, the building inspector,
12 inspects construction that is authorized by the Board of
13 Zoning Appeals. Inspects. Not approves. Inspects.

14 And he reports back not to the zoning administrator but
15 to the city engineer as to whether or not what has been
16 built is compliant with code.

17 And which has been our point from the beginning is that
18 the Board of Zoning Appeals establishes what you can build
19 and the building official makes sure that you build it
20 appropriately.

21 THE COURT: No, the Zoning Board is a concept of what
22 you can build.

23 MS. CANTWELL: Correct.

24 THE COURT: Not the building plans themselves.

25 MS. CANTWELL: But they -- but the elements of what you

1 can build.

2 THE COURT: Yes, the concept and the elements. I agree
3 with that. But not the plans themselves.

4 MS. CANTWELL: And so the ---

5 THE COURT: The Building Commission does that, right?

6 MS. CANTWELL: The building official. He is ---

7 THE COURT: The building official.

8 MS. CANTWELL: It is not -- it is an employee.

9 THE COURT: Okay. I understand.

10 MS. CANTWELL: And so you come in and you bring this
11 employee your construction plans and they check it against
12 compliance with the code.

13 They don't -- you know, they -- it is not up to the
14 building -- the building official cannot overrule what the
15 Board of Zoning people did.

16 THE COURT: Are you trying to tell me the building
17 commissioner never looks at what the Zoning Board approved
18 or didn't approve?

19 MS. CANTWELL: I am sure they do. I mean I hope they
20 do.

21 THE COURT: Well, I hope they do too.

22 MS. CANTWELL: But in this case, Your Honor ---

23 THE COURT: But apparently they didn't in this case.

24 MS. CANTWELL: But what happened in this case -- and I
25 think that the fundamental premise of estoppel is that the

1 person claiming it does not know the truth or have the means
2 of knowing the truth.

3 In this instance Mr. Newberry or his LLC knew exactly
4 what was required of him to get his special exception, and
5 he knew that it required BZA approval. He knew it required
6 floor plans. Because he showed them floor plans. And he
7 even changed the floor plans to omit the bar -- excuse me,
8 the lounge. And then he brings it back.

9 So he knew what was submitted to the BZA and he knew
10 what was submitted to the BZA was not what he submitted to
11 the building official.

12 So in -- so in short he knew -- he knew what the score
13 was. And, you know, it is almost to honor dishonorable
14 conduct. I mean he knew what he had approved ---

15 THE COURT: Well, ---

16 MS. CANTWELL: --- and he presented to something else.
17 And, you know, guess what; now he is saying gotcha.
18 Well, ---

19 THE COURT: Ms. Cantwell, I understand your argument.
20 I don't know what he knew and didn't know. I am not sure
21 you know. I know you are assuming he knew.

22 MS. CANTWELL: Well, I ---

23 THE COURT: I don't know what he knew and what he
24 didn't know, okay.

25 MS. CANTWELL: Well, I do -- the record reflects, Your

1 Honor, that he followed the rules of the BZA ---

2 THE COURT: I understand.

3 MS. CANTWELL: He had ---

4 THE COURT: I understand. But I don't know what he
5 knew and didn't know. I understand your argument on
6 estoppel.

7 That is a valid point. Let me ask you another question
8 if I may. And I will listen to your summation. On the
9 permitted uses for overlay zones it has -- let me make sure
10 I quote the right code section. It is 1 -- 1(D)17. And it
11 says the accessory use proposed for the facility in terms of
12 the size, impact on parking, and impact on traffic
13 generation. Okay.

14 Now reading the transcript the concern of the Zoning
15 Board was noise. Not traffic. And reading the transcript
16 there is absolutely no testimony about traffic noise or
17 anything else that was presented. It was just assumption on
18 the part of the Zoning Board.

19 MS. CANTWELL: Well, the Board also heard and made
20 comments about the change, the fundamental change if you
21 will, from going from a pool that is patron dominated,
22 hotel-patron dominated, to a facility that is open to the
23 public. And I think that that does have ramifications,
24 justifiable ---

25 THE COURT: Well, was the pool not open to the public

1 previously? I mean I don't know.

2 MS. CANTWELL: He didn't build the pool.

3 THE COURT: I know, but initially was a pool going to
4 be open to the public?

5 MS. CANTWELL: I don't -- I can't say that it was ---

6 THE COURT: Well, I can't say either.

7 MS. CANTWELL: --- or it wasn't.

8 THE COURT: I don't know.

9 MS. CANTWELL: But what I do know is that when you have
10 a third of ---

11 THE COURT: My point was there was no testimony before
12 the Zoning Board other -- about noise, traffic or anything
13 else other than a board member saying, hey, it is going to
14 be more noisy; it is going to cause more traffic problems --
15 or we are concerned about. It didn't say it was going to
16 cause. We are concerned about it. No competent testimony
17 from anybody, either side.

18 MS. CANTWELL: Well, that -- and there you go. And
19 that was the point; it was not incumbent on the zoning
20 administrator or the Board of Zoning Appeals to make the
21 case. It was incumbent on the applicant to say this is why
22 this new proposed use is fine.

23 And what on he -- what did he address? He addressed
24 noise. You know, so the point is if there is no -- there is
25 no evidence on either side that would justify the change, I

1 don't know why the Board would be faulted for that when it
2 wasn't its application. You know, so I think ---

3 THE COURT: The Board has to have some factual basis
4 for making a decision and a denial, okay.

5 MS. CANTWELL: Well, Your Honor, I guess the thing is,
6 you know, lots of times these board and commission I mean
7 they are lay people. They sit on these boards for a number
8 of years. Their common experience ---

9 THE COURT: And they normally do a good job.

10 MS. CANTWELL: They do a great job. They do a great
11 job. And ---

12 THE COURT: I am not trying to bad mouth their job,
13 okay.

14 MS. CANTWELL: No. No. And ---

15 THE COURT: They are conscientious and they do a good
16 job.

17 MS. CANTWELL: And but they don't leave -- they don't
18 check their experience or common sense at the door. You
19 know by virtue of opening up something from a hotel guest to
20 the public you are going to have -- you are going to have
21 noise. But you are going to have traffic concerns. People
22 are going to be parking where ever they can park. It is
23 just it is almost like a given.

24 Having to articulate it perhaps, but the point being is
25 that their common sense told them that this use was not --

1 or they didn't deem it appropriate for that location at this
2 time.

3 THE COURT: Okay.

4 MS. CANTWELL: And it was with -- and I would
5 respectfully submit that it was in their -- within their
6 purview to do that. I don't think it was error for them to
7 hear the application. I think they applied the law because
8 the City Council told them consider proposed accessory uses.
9 This was a new one. It was up -- the burden was on the
10 applicant to show them why.

11 THE COURT: Well, that was passed after the original
12 approval but before the amendment, right?

13 MS. CANTWELL: What is that?

14 THE COURT: The new about the accessory use?

15 MS. CANTWELL: No.

16 MR. WALKER: We pointed out that the limitation, the 12
17 percent on gross floor space, was passed in 2012.

18 THE COURT: Right, that was passed.

19 MS. CANTWELL: But even that ---

20 THE COURT: Is that what you are talking about?

21 MS. CANTWELL: But even if that were passed in 2012 I
22 mean it comes in ---

23 THE COURT: Well, the -- it was in effect when the
24 change came down.

25 MS. CANTWELL: It was in effect.

1 THE COURT: Right. Okay. So that is immaterial..

2 MS. CANTWELL: Yeah. So if he wanted to increase the
3 size of his restaurant, whether it was a bar or not, he
4 would have had to have come in to make sure he meets that
5 requirement because it was in place when he applied.

6 THE COURT: Okay.

7 MS. CANTWELL: So I guess the point that I am making is
8 that I don't think it was any error of law committed by the
9 Board.

10 City Council said you look at applications, you look at
11 floor plans, you access proposed accessory uses, you keep in
12 mind that we want to curve detrimental effects to the
13 neighbors as much as we can. And that is what they did.

14 As far as the evidence is concerned it is a very low
15 standard for the Board of Zoning Appeals. Any evidence --
16 if there is any evidence in the record to support that, it
17 has got to be upheld even if you or I think it is a stupid
18 ruling. If there is any evidence in there you have got to
19 honor it.

20 And then on the third thing, Your Honor, is back to the
21 estoppel. I think that it implies a level of good faith and
22 fair dealing.

23 I think based upon his conduct in the record of
24 changing the spa fitness -- spa lounge to the fitness to get
25 his approval in 2011 and then coming forward in 2016 or

1 wherever to get building plans that are totally different,
2 you know, nothing the City did caused that dilemma. That
3 was his dilemma. He created it.

4 Had he brought to the Building Department what he said
5 he was going to build and had he built it, we wouldn't even
6 be here. So I don't think that he is entitled to the shield
7 of estoppel.

8 And so given that could he realistically justifiably
9 rely on an approval when he knew the approval wasn't
10 consistent with what he had shown another board and then,
11 you know, whether or not he has detrimentally changed his
12 position, I haven't heard anything about, well, we want to
13 use it as a bar or we want to use it as an event center but
14 why can't we use it for spa and fitness like we said we
15 would.

16 THE COURT: Thank you so very much. Now I told you I
17 would give you an opportunity to summarize your position on
18 anything else you want to address. Or do you want to wait
19 until I hear from Mr. Walker?

20 MS. CANTWELL: No, that is -- that was -- I was doing
21 that right now.

22 THE COURT: Okay.

23 MS. CANTWELL: So I don't know if there is anything
24 else that you want to hear from me, but ---

25 THE COURT: No, I have no further questions. You have

1 answered them. Thank you so very much.

2 MS. CANTWELL: And just for the record, I just would
3 rely on our memo we submitted as for our grounds for
4 reconsideration.

5 THE COURT: I understand.

6 MS. CANTWELL: Thank you, Your Honor.

7 THE COURT: Mr. Walker, you heard the questions. I am
8 not going to repeat them.

9 MR. WALKER: I did. And I am going to start with the
10 second round of questions on estoppel first. Because I
11 think that there is this assumption that the applicant owner
12 did a bait and switch with the BZA. And as I explained to
13 the BZA the applicant when he came forward with his first
14 set of construction plans in 2014 three years later did have
15 a pool on the deck. It wasn't something where he
16 represented something to the BZA and then he went out and
17 changed it the next day.

18 And as I brought up in the BZA hearings in the record,
19 those plans were approved. And they are at Pages 85 and 85.
20 And they show the pool outside.

21 What happened was he learned that if you had the pool
22 he was going to have to cool the pool. And we went through
23 that. And his warranty ---

24 THE COURT: We went through all of that.

25 MR. WALKER: Yeah, yeah, all of that. So he withdrew

1 it and he changed it. Now Ms. Campbell and the City and BZA
2 are saying we should have known you couldn't do it. But the
3 special exception had no prohibition or condition. It
4 didn't say you must put the pool here or you must put the
5 spa here or you cannot have this use.

6 And I would like to correct something about the use
7 wasn't contemplated. This hotel had a bar use and it had an
8 event space use. Those were uses in the hotel on the first
9 floor. The question is could he move uses around.

10 The City approved his moving the spa to the first floor
11 and elimination of the pool. And it also approved in the
12 Building Department -- and I say through the Zoning
13 Department as well under 901, 54-901. But these four
14 function rooms they knew when those plans were submitted
15 that there were going to be three function rooms and a
16 pantry and there was not going to be a spa, and they
17 approved it.

18 To the point of Section 54-901, the City was arguing
19 that that only applies to inspections for conformance with
20 the building code.

21 But as Your Honor pointed out, this ordinance is
22 broader. It says that the city building inspector shall
23 inspect all construction or alteration for which permits are
24 issued by the city engineer or as authorized by the Board of
25 Zoning Appeals.

1 And then it goes on to say listing all construction
2 inspected and specifying any work observed by him which is
3 in not in accordance with the permits issued. It doesn't
4 say just building code violations. It says not in accord
5 with the permits issued.

6 So my main point on estoppel is that there has been
7 this assumption of unclean hands. We don't think it is
8 unclean hands.

9 And unlike cases the City is relying upon which largely
10 turned on the lack of authority of the city officials to
11 give opinions of law and the ability of the applicant to
12 look at the ordinances and see that what the building
13 official said was wrong, that is not the case here because
14 there are no ordinances that prohibit an accessory use
15 holder with a special exception from moving the location of
16 the accessory uses in the hotel.

17 To my knowledge this is the first time this has ever --
18 argument has ever been advanced by the City. And the
19 ordinance itself says proposed uses. But it doesn't say
20 that they can never vary either of those uses in their
21 location or change the uses.

22 I would say also Ms. Cantwell -- it is not Ms.
23 Cantwell. But her clients make the argument in their motion
24 that the BZA didn't consider the possibility that there
25 might be a bar on the top floor. In fact I would argue just

1 the contrary, that when they put their special exceptions on
2 there they wanted to make sure if that use ever changed that
3 there would be a curtailment of noise.

4 I don't think we believe that they put a no-amplified
5 music condition on the terrace because of the pool. I don't
6 think they say close it down at 10:00 because people are
7 going to be out there sunbathing at night.

8 They certainly considered that there was going to be
9 activity on the rooftop, and they built in protections. And
10 we went into that in our brief. And Your Honor went into it
11 in the order. So we think it was a use that was considered.
12 And even though it wasn't proposed at that time they wanted
13 to make sure that no matter what went on at the eighth floor
14 design that there were protections.

15 So and the last thing I am going to mention - because I
16 don't want to rehash everything - is one very important
17 aspect of the exterior access is that it is the exit under
18 the firm marshal that the building exits if there were a
19 fire around the edge. And that is one of the reasons that
20 we are saying that it should be open since there is no
21 restriction.

22 And as Your Honor pointed out the seating -- may I
23 approach?

24 THE COURT: Ms. Cantwell, do you want to come up and
25 see?

1 MS. CANTWELL: Sure.

2 THE COURT: He needs to bring it here closer if I am
3 going to see it.

4 MR. WALKER: Listen, I have a hard time seeing it.
5 (WHEREUPON, counselors approached bench.)

6 MR. WALKER: So this was part of the record. But this
7 whole exterior is part of the exits because people need to
8 get down here (pointing). But this is the seating area
9 (pointing).

10 There are actually tables here now (pointing) on this
11 side facing Marion Square and into here (pointing). But
12 there are no tables over there (pointing). And this
13 (pointing) is just so that people can walk around if they
14 want to.

15 And here I didn't realize this until this afternoon
16 when I was looking at -- and it actually has the number of
17 seats in the bar, Your Honor. And it turns out that these
18 booths -- this big booth -- there is one booth that could
19 possibly seat ten at two tables if every seat was taken.
20 One, six. Very crowded. Two and two and seven -- I counted
21 a max of twenty-seven. I think I said something around 20,
22 but it's actually 27 per the plan.

23 But in any event, we come back to where you started;
24 and that is there is no ordinance that says that once the
25 accessory use is granted -- or excuse me, the accommodations

1 use is granted that accessory uses have to remain the same.

2 And it certainly isn't in the ordinance that says that
3 a principal use is allowed accessory use as it is a matter
4 of right. Thank you.

5 THE COURT: Ms. Cantwell, I have just got one more
6 question for you. I asked you earlier if a hotel five or
7 ten years after they built it wants to change accessory use
8 would they have to come back to the Zoning Board; and you
9 said, yes.

10 So my question to you -- I guess maybe this is outside
11 of the record. I will withdraw the question because it is
12 really going outside of the record on that. I will withdraw
13 the question.

14 Anything you want to say very briefly?

15 MS. CANTWELL: Well, I guess what I want to make sure
16 that you understand that when I say yes I mean if it is a
17 use ---

18 THE COURT: Well, I guess ---

19 MS. CANTWELL: --- a use that wasn't proposed before.

20 THE COURT: --- my question is has Omni Hotel or -- as
21 many times as that has transferred I am sure they have
22 changed use since they transferred ownership for the last 20
23 years. Did they always come to the Zoning Board to get the
24 use changes?

25 MS. CANTWELL: I don't ---

1 THE COURT: Has that ever been done with the Zoning
2 Board a hotel that has been there 15, 20 years?

3 MS. CANTWELL: As far as I know, Your Honor -- and I
4 have to be careful because the Omni is a little bit
5 different because it has got all of that retail stuff on the
6 first floor.

7 THE COURT: I understand.

8 MS. CANTWELL: But the ---

9 THE COURT: I am not talking about the retail ---

10 MS. CANTWELL: But the lounge is where it has always
11 been. The pool is where it has always been. The spa
12 fitness area is where it has always been.

13 THE COURT: Well, has any -- do you have any history of
14 any hotel having to come before the Zoning Board to ask for
15 a change of accessory use regardless of what the change was?

16 MS. CANTWELL: I don't -- I can't answer that. I don't
17 know. I don't know.

18 THE COURT: Because I just don't think that is a common
19 practice. Maybe I am wrong. But I know you say it has to
20 be done.

21 MS. CANTWELL: Well, I am saying it has to be done when
22 it is a new use. And I think that is the fundamental
23 disconnect that we have got.

24 THE COURT: Well, any change of accessory in the hotel
25 is going to be a new use for that particular accessory.

1 MS. CANTWELL: Well, not necessarily, Your Honor.

2 Because ---

3 THE COURT: Well, if -- I'm sorry. Go ahead.

4 MS. CANTWELL: --- as Mr. Walker pointed out, there is
5 an event space and there is a restaurant and there is a bar
6 in the hotel that the BZA saw and they signed off on; and
7 they are all on the first floor, and they are all
8 operational. There is no issue with that.

9 THE COURT: Well, if -- I mean if you change a spa or
10 athletic room to I guess a washer and dryer room you are
11 going to have to go back and get that changed according to
12 your argument?

13 MS. CANTWELL: My argument is that if you ---

14 THE COURT: That is a change.

15 MS. CANTWELL: If you are introducing a new use ---

16 THE COURT: Well, that is a new use.

17 MS. CANTWELL: That ---

18 THE COURT: You are taking out the treadmill and the
19 other equipment and the weights and you are putting in
20 washers and dryers.

21 MS. CANTWELL: I think, Your Honor, that you would have
22 to come get the board's -- sign off on that so that they
23 could evaluate it in terms of the criteria for hotels.

24 And it may be fine. It may not be -- it may be
25 innocuous. This is a little bit different -- this is a lot

1 different. This is a fundamental change of what is going on
2 on the roof.

3 And yeah, sure they put -- they put time conditions on
4 when you can, to be outside. But you know what, people --
5 when you are on vacation and you are in a hotel of course
6 you are not going to be in the sun only in the daytime; you
7 are going to be out there at night. You are going to be
8 working out. And the board said, hey, after ten o'clock
9 even these uses that are restricted to primarily hotel
10 patrons you have got to stop.

11 Now what we have is that the nature of the use is
12 totally different. We are not hearing we are going to only
13 have 27 people out there, we are only going to let 27 people
14 sit outside, we are going to have 27 people outside and we
15 don't know how many people are inside and we don't know how
16 many people are outside.

17 THE COURT: Twenty-seven.

18 MS. CANTWELL: They are going to be able to go all over
19 this front top of the roof. But they are not restricting it
20 to 27. The order doesn't do that. What they are allowed
21 is -- you know, any of us can go up there at any point in
22 time.

23 And I have been to rooftop bars in the city. They are
24 nice. I have been to them. But I am not staying at the
25 hotel. It is different if I am going there to work out. I

1 am not going to go there and work out. They are not going
2 to let me. They are not going to give me access to it.

3 So the point being, Your Honor, that in this case given
4 the nature of what was originally approved and what he
5 request I think it respectfully did require the approval of
6 the Board; and I respectfully submit there is evidence to
7 support what they did. Just ask you to rethink it.

8 THE COURT: Thank you so very much.

9 MS. CANTWELL: Thank you.

10 THE COURT: Appreciate it.

11 (WHEREUPON, Court's Exhibit Number 1, Notice of Motion to
12 Reconsider, was marked for identification.)

13 (WHEREUPON, Court's Exhibit No. 2, Return to Motion, was
14 marked for identification.)

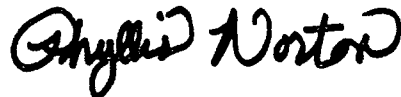
15 (WHEREUPON, the hearing concluded 3:32 p.m.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on January 10, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in black ink that reads "Phyllis Norton". The signature is written in a cursive, flowing style.

PHYLLIS NORTON, CVR

Date: March 16, 2018

Certified Transcript Provided For: City of Charleston
Certification Reference #031618 Original

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC,)
Petitioner-Appellant,)

v.)

City of Charleston and Board of)
Zoning Appeals-Zoning,)
Respondents.)

RECORD ON APPEAL

FILED
2017 SEP 25 PM 2:59
JULIE J. ARMS, JUDGE
CLERK OF COURT

Pursuant to section 6-29-830(A) of the South Carolina Code, the following constitutes the Record on Appeal of the above-referenced matter:

A. Hearing Transcript (04/18/2017).....	pp. 001-071
B. Presentation by Zoning Administrator	pp. 072-079
C. Presentation by Petitioner/Appellant.....	pp.080-117
D. Application to Amend Special Exception (03/20/2017)	pp.118-134
E. Petition in Opposition (04/18/2017).....	pp. 135-136
F. Order on Special Exception Request (04/18/2017)	p. 137
G. Order on Special Exception Request with Condition (04/05/2011).....	pp. 138-139
H. Letter from ETI (04/17/2017)	pp. 140-141
I. Floor Plans (Roof) dated 03/07/2011	p. 142
J. Floor Plans (Roof) dated 04/01/2011	p. 143
K. Decision on Zoning Permit Application (08/17/2016).....	p. 144
L. Zoning Ordinance of the City of Charleston, § 54-220.....	pp. 145-147

M. Zoning Ordinance of the City of Charleston, § 54-120..... pp. 148-149

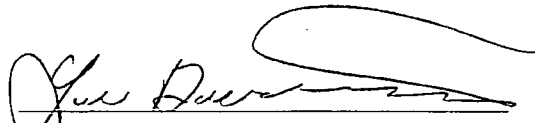
N. Zoning Ordinance of the City of Charleston, § 54-110 pp. 150-151

O. Zoning Ordinance of the City of Charleston, § 54-925 pp.152

P. Zoning Ordinance of the City of Charleston, Chapter 54, Appendix C pp. 153-158

Charleston, South Carolina

August 30, 2017



Lee Batchelder
Zoning Administrator

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STATE OF SOUTH CAROLINA) CITY OF CHARLESTON
) BOARD OF ZONING APPEALS
COUNTY OF CHARLESTON) ZONING APPLICATION
NO. 174-18-B9

IN RE: APPLICATION FOR AMENDMENT)
TO SPECIAL EXCEPTION FOR 334 MEETING STREET,)
BY: DEWBERRY 334 MEETING STREET, LCC,)
APPLICANT.)

AUDIO RECORDING OF BOARD MEETING
APRIL 18, 2017

TRANSCRIBED BY: MELISSA J. LANE, CSR/CCR/RPR

1 (Background noise in audio.)

2 CHAIRMAN KRAWCHECK: We welcome you to this
3 April 18, 2017 meeting of the City of Charleston Board
4 of Zoning Appeals. Present Mr. Appel, Mr. Appel,
5 Mr. Lester, Ms. Smith, Mr. Robinson, and
6 Mr. Krawcheck. On my right from the city staff,
7 Ms. Ashby and Mr. Batchelder.

8 These proceedings are being recorded.
9 Please identify yourself if you speak. This board
10 does three basic things: We hear appeals from the
11 decisions from the zoning administrator, we hear
12 special requests from the zoning ordinance, and we
13 hear requests for zoning variances. A zoning variance
14 test is a hardship test. In order for this board to
15 grant a zoning variance, it has to find that there are
16 exceptional and extraordinary conditions pertaining to
17 the particular piece of property. These conditions do
18 not generally apply to other properties in the
19 vicinity, but because of these conditions, the
20 application of the ordinance to the particular piece
21 of property would affectively prohibit or unreasonably
22 restrict the utilization of the property, and lastly,
23 the board has to find that the authorization of the
24 variance will not be of substantial detriment to
25 adjacent property or the public good and the character

1 So it's my understanding that this -- that
2 this property that -- this applicant has talked to the
3 neighbors and talked to the neighborhood association
4 and everyone's on board. So if that's the case, I'm
5 on board. I'm in support. If that's not the case,
6 I'm not supportive. So we'll find out. But I'm --
7 I'm going to support this request in light of the --
8 my understanding that this is something that the
9 residents are in support of.

10 CHAIRMAN KRAWCHECK: Mr. Batchelder gives a
11 conditional approval. Is anyone present opposed to
12 this application? It is not. Mr. Batchelder
13 recommends approval. Mr. Appel moves for approval.
14 Seconded by Mr. Lester. All in favor to the motion,
15 please say aye.

16 (All said aye.)

17 CHAIRMAN KRAWCHECK: Any opposed? Motion
18 is unanimously carried.

19 Item number nine is 334 Meeting Street.
20 It's for approval to amend an April 5, 2011 special
21 exception for approval of the hotel to add uses on the
22 top floor, rooftop, and change the closing time for
23 rooftop activities from 10:00 p.m. to midnight. Zoned
24 GB-A. Mr. Batchelder.

25 MR. BATCHELDER: This is a request that

1 concerns the Dewberry Hotel at 334 Meeting Street.
2 And what I'm going to do is, I'm just going to run
3 through the history of this project in front of the
4 board. This -- this hotel -- of course, this was an
5 office building for many years. This was the federal
6 office building at 334 Meeting Street. Large parking
7 lot behind it for the employees/visitors to that
8 office building. And in 2008, the federal government,
9 after letting that building sit idle for a few years,
10 put it on the market, and put it out for bid, and
11 people submitted bids, and the winning bid was
12 Mr. Dewberry, who ended up purchasing the property,
13 and I think it was 2008 when he purchased that
14 property. So the next question is, what to do with
15 the property? Tear down that building, that ugly
16 building that nobody likes and build something new
17 or -- or keep it and restore it and turn it into
18 something, either in an office or a hotel. While it
19 was decided that the building should stay, it is
20 historic, and it is an attractive building, and it's
21 zoned right, not everybody will agree, but I think
22 it's turned out very nicely, and then the use, the
23 question was the use, and ultimately, Mr. Dewberry
24 chose to open a hotel here, and so the property was
25 rezoned to be included in the accommodation overlay

1 zone at his request and with the support of the city
2 back then and -- and then plans proceeded.

3 In 2010, an application came before the
4 board for a special exception for a 120-room
5 accommodations use in the seven-story building that
6 existed. There was no rooftop access that was
7 proposed with that proposal, and this request was
8 approved with a series of conditions, and that was to
9 take the existing building, the seven-story office
10 building, and convert it into a hotel. On the eighth
11 floor, there was mechanical space for all of the
12 mechanical stuff that went with that office building,
13 and it was a small penthouse, and then all that
14 equipment was kind of hidden back behind the structure
15 of the building. So these are the conditions. There
16 were eight conditions that were attached to the
17 approval by the board and -- and at the time this went
18 through, I think there was general support and general
19 harmony from various people. There were some concerns
20 from neighbors, a church next door, that sort of
21 thing, but I think, generally speaking, there was
22 favorable response to this request, and it was
23 approved.

24 Then, in 2011, Mr. Dewberry came back to
25 the Board of Zoning Appeals with a new application

57
1 seeking approval for a 161-room accommodations use in
2 an eight-story building with a rooftop, and also a
3 special exception request was -- was part of that
4 submittal to the board to extend the non-conforming
5 height of that penthouse to make it larger, not make
6 it taller, but make it larger horizontally and that
7 required a special exception approval of the building
8 far exceeds the 55-foot height limit that exists for
9 that property. So the whole upper portion of that
10 building is non-conforming in that respect. This
11 request was approved with a series of conditions.
12 There was more -- my recollection is that there
13 were -- there were more concerns voiced in 2011 when
14 this came back to the board. I can remember a few
15 phone calls I had with various people, conversations
16 about this and -- but the city was supportive and --
17 and we recommended approval of the revised plans, and
18 I say that because the plans from the -- when they
19 were initially submitted were revised by the
20 applicant, and I'll go through those details in just a
21 minute. They were revised by the applicant prior to
22 the actual board meeting on the 11 -- or on the 5th of
23 April.
24 So, in that regard, what I have here is an
25 image on the screen. I know this was very difficult



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1 to read so I'm just going to point out what this says.
2 This is the rooftop area and -- and this outline that
3 goes to the shaded area as well as this lighter area
4 on its side, that is the full building. So that's
5 the -- that's the outer wall of the building, and then
6 inside this outer wall of the building is this shaded
7 area, which was identified to be kind of a green roof,
8 not an accessible area of the rooftop but -- but an
9 area that would go -- the pedestrians, the people, who
10 would be on this roof. And the south end of the
11 rooftop was to be a pool, a deck and pool area. This
12 is the pool right here adjacent to this enlarged
13 eight-story, 8th floor penthouse, and then there was
14 going to be a deck over here on this end of the
15 building, and inside the reference on the floor plan
16 says spa/lounge. So that was the initial plan that
17 was submitted with the -- with the application for
18 this April 5th meeting of the board.

19 Prior to the meeting, and I think it was
20 about a week prior to the meeting, the plans were
21 revised and the new plan showed this entire north end
22 of the rooftop being inaccessible, the green roof or
23 the -- was the term used on the plan, and the south
24 end of the rooftop is going to be accessible, still
25 have the pool, this would be the deck area around the

1 pool, the inside space inside of that 8th floor
2 penthouse was labeled spa/fitness, spa/fitness. So
3 those were the uses that were shown on that plan that
4 was actually presented to the board on April 5th, and
5 at that meeting the board did approve the request with
6 a series of conditions, and those conditions -- and
7 I'll pass this out so you have them in front of you.

8 So these are the 11 conditions I want you
9 to have just so you have a complete understanding with
10 what the board's decision was back in -- I'm sorry, I
11 don't have -- sorry, I don't have one for you but --
12 and then these are the floor plans. So I've got
13 copies for everybody that you can refer back to. So
14 this -- this is the first floor plan that was part of
15 the application that came before the board -- or not
16 when it became the board, but when it was submitted,
17 and you'll see it says spa/lounge, and then this is
18 the floor plan that actually was presented to the
19 board, and this is the revision that was submitted by
20 -- (inaudible) -- prior to that board hearing. And
21 then -- so that's what happened back in 2011. The
22 decision was made.

23 Oh, yeah. You have it?

24 So that's the decision that was made back
25 in 2011, and the project eventually got going and --



1 and made its way through the permitting process and --⁶⁰
2 and construction began, and, of course, before they
3 ever could start construction, they had to do the work
4 to remove asbestos and things like that on the inside
5 of the building, and so there was a lot of work that
6 needed to take place before they could actually start
7 the hotel construction. So that was the proceeding
8 and -- and -- and the first spaces within the hotel
9 were allowed to open last year. I believe it was
10 around Spoledo (sic), around that period of time, and
11 then eventually more floors were -- were completed and
12 occupied, and today, the floors, one through seven,
13 have occupancy permits and -- and so the hotel is in
14 operation. The restaurant and the ballroom space and
15 the other uses on the ground floor are in operation.
16 The spa that was installed -- I think it's on the
17 third floor -- I believe that's open. So floors one
18 through seven are completely open. The 8th floor, the
19 rooftop area, has not been opened up because the -- I
20 believe that Mr. Dewberry still has not obtained
21 the -- the temporary CO that the city has approved and
22 so -- but that was -- that was done. That was
23 approved by us with the understanding that -- that he
24 would be basically complying with those conditions
25 that were a part of the site, part of the floor plans

1 that were presented to and approved by the board back⁶¹
2 in 2011 along with those 11 conditions, and the
3 approval for the use of that top floor by the city is
4 shown here.

5 So this is a -- this is the revised site
6 plan that -- that I'll explain after I hand this out.
7 As the construction progressed, some changes were made
8 and the top floor -- the character of that top floor
9 was altered a little bit. So the pool was never
10 installed. Mr. Dewberry, as I understand it, chose
11 not to install that pool, so we've got a large deck
12 area on the south side, and this shows a yoga fitness
13 area, and it shows seating, which you would normally
14 have around a pool, and then we've got the interior
15 building. There's a rivers room identified as the
16 rivers room, which is identified as an interior space
17 for yoga and fitness classes. There's a reading room,
18 pantry and Citrus Club, which is a bar area. Those
19 were shown on this approved site plan to not -- to be
20 closed. In other words, they cannot use them because
21 those were not part of the zoning approval.

22 And so this is the plan that was approved.
23 There's an employees-only area that -- the area that's
24 highlighted in yellow was not to be accessible to the
25 public. The green planter boxes around the outside of

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1 the rooftop, those were part of the conditions -- part
2 of those 11 conditions that were agreed upon back in
3 2011, and those are in place.

4 But that's essentially what's there today.
5 And now my understanding is that the applicant is
6 seeking your approval to allow the reading room, this
7 pantry, which is really more of a kitchen and Citrus
8 Club, bar area, to be occupied and used in addition to
9 the other uses that are shown here, and then I'll let
10 the applicant clarify this if I misspeak, but the
11 other part of their application is to allow this
12 employees-only area that was identified as being not
13 accessible to the public on the approved 2011 plans to
14 now be accessible -- fully accessible to the public as
15 an extension of that rooftop deck area.

16 So I think that sums it up, but I'll --
17 I'll stand to be corrected if -- if I misspoke about
18 anything. Our position -- the city's position is not
19 to be in support of this request. We feel like the
20 decision was made in 2011 for what would happen on
21 this rooftop when we approved the hotel use with the
22 number of rooms that exist today that we've -- we've
23 considered this along with the rest of the hotel
24 operation and don't feel that there's any basis for
25 making any changes to that -- to those conditions to

1 the floor plans, the proposed uses that were agreed
2 upon back in 2011, so -- and I -- I believe that
3 there's a lot of opposition from the neighborhood, and
4 I can understand that, so I won't say anymore, but I
5 will just make it clear that we're not in support of
6 making any changes at this point.

7 CHAIRMAN KRAWCHECK: City recommends
8 denial. I'm going to acknowledge that there's
9 opposition. Is the applicant present?

10 TRENHOLM WALKER: Yes.

11 CHAIRMAN KRAWCHECK: Mr. Walker.

12 TRENHOLM WALKER: Trenholm Walker. Scott
13 Dawson with me. He's the general manager. We gave
14 Penny a PowerPoint that I believe is loaded on Lee's
15 computer, if we can call that up, please.

16 (Inaudible conversation.)

17 TRENHOLM WALKER: There we go. Thank you.

18 Well, there's a lot to say, and the first
19 thing I want to say is, we notified staff last week
20 that we were withdrawing the request to extend the
21 hours from ten to midnight. We've decided that there
22 is -- we sent an e-mail to Lee. I mentioned it --

23 MR. BATCHELDER: Yeah.

24 TRENHOLM WALKER: -- to Lee in a meeting
25 Thursday; didn't I?

1 MR. BATCHELDER: That's right, you did.

2 Sorry, I forgot to mention that.

3 TRENHOLM WALKER: Right. And our thinking
4 is that should this special exception be modified,
5 then we can see how the use works. We don't think
6 there's going to be any problem, and there's no need
7 to take any steps. As Mr. Batchelder said, it's
8 basically a request to be allowed to use the inside of
9 the building. The building that was constructed on
10 the interior pursuant to city building permits that
11 hit a bit of a wall when the zoning permit was sought
12 in August of 2016. There's been a whole lot of
13 publicity. There has been a tremendous amount of
14 negativity. A lot of it is based on misinformation.
15 It's quite startling some of the things that have been
16 said. This as of -- (inaudible) -- in Sunday's paper
17 was singled out as the line in the sand for hotels,
18 which was a little bit of a disconnect, since this was
19 not a building that was built. It was actually a
20 conversion of what was an eyesore to their building,
21 and we're only talking about a use up top. We have a
22 bit of disagreement with staff because the uses up
23 there are accessory uses, and there was no requirement
24 in the conditions that the uses be the same, but be
25 that as it may, we want to take this opportunity to

1 clear the air about a lot of things and let you take a⁶⁵
2 look at it and make a decision whether there's any
3 negative effect.

4 So, Lee, if we can have the first slide,
5 and we can go through this pretty quickly. You've
6 already seen the conditions.

7 Go to the next one, please.

8 The two really that concerns tonight are
9 four and nine, no exterior amplified music shall be
10 permitted and all activity outside on the roof shall
11 stop at ten. We're going to comply with those. There
12 was an additional condition, which I think was number
13 ten, that said there should be additional buffering,
14 plant buffering, and that has been done, I think, as
15 Lee showed you.

16 Lee, if we can go to the next slide,
17 please.

18 Here's the approval. You already seen
19 that.

20 If you can go to the next one.

21 That has, Mr. Chairman, your signature, no
22 activities on the rooftop after ten.

23 One of the things that I mentioned
24 misinformation is, it's been referred to as a rooftop
25 bar. It's not a bar on the rooftop. This is not a

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1 bar where people are going to be on a deck walking out
2 and getting their drinks. A rooftop bar is a highly
3 charged word. This is not like the Vendue or the
4 Market Pavilion where there's a whole bar outside and
5 people can come and get drinks. When you share
6 rooftop parties, you can hear the daiquiris being made
7 and you can hear the background music and all those
8 things of a rooftop bar. This is a bar inside the 8th
9 floor. There's an outside terrace that was approved
10 last time. The hours of that outside terrace were
11 established. That is unaffected. If somebody today
12 wanted to have a drink on that outside terrace, they
13 could have a drink out there. They couldn't have from
14 the Citrus Club because it's not occupied, but they
15 have a liquor license and have room service, and they
16 could sit outside there, and they can have a drink.
17 So we're really talking about the inside. We're
18 really talking about an adverse effect. And I will
19 get to the whole question of accessory use in a
20 minute, but as Lee showed you, this was the original
21 plan that was changed, one more time, I think, Lee,
22 right? Before the board approved to present -- or was
23 that the final one?

24 MR. BATCHELDER: This is the final one.

25 MR. WALKER: Okay. If we go to the next

1 one, please.

2 That was in 2011. And then in 2014,
3 July 2014, the Dewberry -- excuse me -- submitted
4 plans to the building department.

5 If we go to the next slide.

6 And in that slide, you'll see that there is
7 a pool that's shown here, and at this time in 2014 it
8 is still believed to be a pool area, and this is, I
9 think, part of the function room, and there's --
10 (inaudible) -- for the pool to install it and
11 uninstall it. So Mr. Dewberry still had the idea that
12 there was going to be a pool there. When he went to
13 price it with the contractor and we went to design the
14 specifics beyond the floor plan, he realized that it
15 was not a very good idea. First, it was going to cost
16 like a million and quarter dollars to put it there,
17 and then he learned he was going to have to cool the
18 water because it was up on top of the building with
19 full expulsion to the sun and then there were all
20 kinds of caveat from the builder and designer that if
21 this thing starts to leak, you know, we're out --
22 that's the risk you're going to have to have.

23 So a year later, Lee, if we can have the
24 next -- these were approved by the building department
25 by the way. And then, in 2016, I think this is

1 April 25th, another set of plans were submitted.

2 Lee, if we can have next one.

3 And this is where the design was changed
4 and this shows, essentially, three function rooms,
5 function A, function B, function C, and a pantry. It
6 does not show the pool. You'll see here, and we'll
7 see the photograph in a minute, but here is -- the bar
8 structure is shown here on a plan that was approved by
9 the city. The city signed off. Said you can go build
10 it, and the owner went on ahead and built it, built
11 it.

12 Next slide, please.

13 Well, 14 months later -- or actually, it
14 was a good bit later, about two years later, when
15 things had been built, and there wasn't -- the
16 building permit was -- excuse me, the zoning permit
17 was sought to occupy, and we've heard from Lee. Lee
18 would not allow any occupation of this part, the read
19 room, the pantry, and Citrus Club based on his view
20 that the 8th floor had to conform exactly with what
21 was submitted at the time the special conditions were
22 imposed on the special exception.

23 If we can have the next slide, Lee.

24 Here's what we're asking for that was
25 Exhibit 5 to the application. We're asking to be able

1 to occupy the interior of the 8th floor, all of it.
2 None of it's been occupied. The rivers room is going
3 to be a function room. The Citrus Club is a small
4 bar. The pantry is going to serve limited food, and
5 the reading room is off to the side. The complete
6 exterior to the extended glass has Miami/Dade 150-mile
7 an hour glass, almost an inch thick, so we're not
8 talking about interior activity that's going to have
9 much of an effect on the outside.

10 Lee, if we could have the next one, please.

11 All right. Now here is the bar that has
12 been constructed. It has been used. You can see that
13 it's small. It is limited. Lee -- it has two booths
14 -- one booth or -- been kept with multiple seats.
15 Another booth.

16 Lee, if we could have the next one, please.

17 And there is the view looking from -- I
18 guess it would be the south, looking the whole way
19 through the bar. This is not a place where people are
20 going to be rowdy. I would suggest to you, if you've
21 been to the Dewberry, that it continues the whole
22 theme of elegance, an understatement of reserve.
23 There's been some suggestion it's going to be a rowdy
24 place. I would -- to me, it doesn't look like a biker
25 bar, who knows what's going to happen, but it is -- if

1 you've been up -- and I -- you wouldn't have been up
2 there because nobody's allowed up there, but it is
3 very limited in scope. It's subdue.

4 If we can have the next one, please.

5 Okay. Now we're talking about the function
6 room. The idea is that one room that you saw on the
7 floor plan on the north side would be a function room.
8 It's called the rivers room, as you can see both
9 rivers, and this is the entrance. The mens room is on
10 the right.

11 If we can have the next slide, please.

12 Okay. This is the rivers room, and this is
13 an example of how it can be used for a luncheon or a
14 meeting, probably a room for seven or eight -- those
15 are six seat tables, Scott.

16 SCOTT DAWSON: They're six-foot wide tables
17 that can seat seven plus -- (inaudible).

18 TRENHOLM WALKER: All right. So you're
19 seeing about three quarters of the rivers room here.

20 If we can have the next slide.

21 And that's the other side of it, if you're
22 just looking directly east. The Dewberry has an
23 inherent limitation right now, and you can wipe it on
24 the Dewberry, but it's reality for the hotel. They
25 built a hotel with the ballroom, but they didn't for a

1 conference room. They have no secondary meeting
2 space. If you want to go to the Dewberry to have a
3 meeting, you either end up in the ballroom or I guess
4 you can go to Henrietta's, but they don't have a space
5 where they can have functions. So this is an area
6 where they can have functions. They have turned down
7 executive meetings, Boeing executives. Others have a
8 desire to come to the Dewberry, but the group is too
9 small for the ballroom, and there's no other place to
10 put them. In the discussions, there was a
11 neighborhood meeting that was extremely spirited and
12 got, I think -- I -- it was just not a very
13 constructive meeting in the end, and I'm not blaming
14 anybody. There was just a lot of debate, and I'll say
15 it spirited healthy. Strong difference of opinion,
16 but one of the things that was brought out was a
17 concern, well, they might have wedding receptions up
18 here, things would go -- be very loud up there, and I
19 can assure you that in this room it is not -- if you
20 wanted to have a band, the dance floor and a place to
21 sit, this room is not the place. You could have a
22 rehearsal dinner, but anything that's --
23 (inaudible) -- wedding reception to the extent, it's
24 going to have it, it's going to be down in the
25 ballroom, and there's no amplified music on the

1 outside. So it's either -- whatever goes on here,
2 stays here.

3 If we could have the next slide, please.

4 Really, what we're talking about is the
5 rooftop terrace, because that is the only part of this
6 that in any way could possibly affect the
7 neighborhood. I don't think anybody can legitimately
8 say what goes on in the inside of the hotel in a room,
9 in the function space up there that's going to be a
10 detriment to the neighborhood.

11 So this is the view looking out from the
12 Citrus Club looking south. It was set up for you to
13 get an idea of what the seating is. The west side or
14 the planters that were -- that divide this sitting
15 area from the other half, the southeast quadrant, this
16 is on the Marion Square side. It's not on the
17 neighborhood side.

18 Lee, if we can have the next one.

19 It's on the southwest corner of the
20 building. Here, this is on the west side facing
21 Marion Square. Yes, you could say that the east side
22 of what we just looked at was on the neighborhood
23 side.

24 If we could have the next slide, Lee.

25 So the other half of -- this half of the



1 building is open, and you're looking through the
2 planters that the city approved as the additional
3 buffering. These planters are here, and they're
4 around the perimeter.

5 And what I would like to do now is go for a
6 quick little stroll around other places close by that
7 have rooftops.

8 Lee, if we could have the next one.

9 All right. I think we're all familiar with
10 the Bohemian, elevated terrace. This is not a picture
11 that shows the significant size of it, but this gives
12 you an idea of -- of what it is. It's open. It, too,
13 does not have a bar on the outside. We'll get back to
14 its special conditions because I think they're
15 pertinent to the Dewberry.

16 If we can have the next slide, please.

17 And there is the side terrace there, many
18 respects, very similar to the one that the Dewberry
19 would have for seating.

20 Next, please.

21 There's speakers here, too, and we will
22 address those when we get to the special exception.

23 Next, please.

24 All right. Here we have the Omni, and the
25 Omni, if you come down Main Street, you look up, you

1 see a bunch of umbrellas, and there's a rooftop bar,
2 not in the sense that they've got a bar in the inside,
3 but they've got a bar on the outside. If you see that
4 picture there, six chairs, and then a whole row of
5 tables coming towards you, and the sign says food and
6 rooftop bar for hotel guests only.

7 Next slide, please.

8 And here's a picture live of what that
9 looks like there.

10 Next, please.

11 Then the next one we went to is, The
12 Restoration, and The Restoration, they have doors they
13 can throw open so the bar, essentially, flows out into
14 the open space, and it is very popular both as a
15 restaurant and as a bar.

16 Next slide, please.

17 And you will see that they have, like the
18 Dewberry's proposing, outside seating, and it goes
19 around in an L-shape.

20 Next, please.

21 They also have speakers.

22 If we could have the next slide.

23 Now we're -- with the Hotel Bennett that's
24 coming online. It, too, is going to have a rooftop.

25 And I think we can feature that in the next

1 slide, Lee.

2 It says, the hotel will also include a
3 spectacular rooftop pool with cabanas and bar, luxury
4 spa french -- (inaudible) -- and variety grand events
5 like -- (inaudible).

6 Next, please.

7 Now, every one of these uses that we're
8 talking about, function room, small kitchen, a small
9 bar, all those are accessory uses to a hotel. I bring
10 that up -- here's the definition right out of the city
11 code. It says, for use, the use of land or the
12 building or portion thereof customarily, incidental
13 and inordinate to the principal use or the land or
14 building located on the same lot with the principal
15 use. If we wanted to go up to the top and sell auto
16 parts, if we wanted to have a tattoo parlor, that
17 would not be an accessory use. I would submit that
18 54.220, which is the special exception for hotels
19 talks in terms of hotel use, it gives this board
20 authority to determine based on the 18 considerations
21 whether a particular property should be awarded a
22 special exception. In 549.25 says, if you grant that,
23 you can put conditions on it that are appropriate for
24 that property. Nothing in 220 says that a hotel owner
25 can't change the location of accessory uses within its

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1 structure. It doesn't say once you've submitted that
2 floor plan, you can't do anything else. I recognize
3 that this is a higher visibility floor and that's why
4 we're here, because you heard the spa, which was
5 planned for the top, when the pool didn't go on the
6 top, the spa went to the second floor. But did we
7 have to come back to the BZA to do that, I don't think
8 anybody would say that we would have to come back to
9 the -- 220 doesn't say every time a hotel operator
10 wants to change the use within the hotel he has to go
11 to the BZA to get a special exception. If the hotel
12 wanted to change the gift shop from one room to
13 another, they could do it. If a hotel wanted to use
14 some bedrooms to turn them into offices, they could do
15 it. If they wanted to take a restaurant and it met
16 all the other requirements of the ordinances and the
17 special conditions imposed, they could do it. And
18 here, the use is up top or accessory uses on the
19 inside, and we submit that the terrace use is really
20 just a variation of the terrace use that was approved
21 before. Had there been a pool, you would be looking
22 at, basically, the clock top -- the clock tower, the
23 whole setup that you saw at the Charleston Place, but
24 the bar would be on the inside, but people could sit
25 there.

1 Next slide, please.

2 So this brings us to what we think is best
3 analog to this question to the board, because the
4 board really doesn't have any criteria at this point.
5 The board had criteria when it had the 18
6 considerations to look at when it considered the two
7 original applications, and I think the criteria that
8 everybody is imposing is to extract from those 18
9 whether or not they're adverse conditions on the
10 neighborhood and what conditions could be imposed to
11 prevent that.

12 So when this board heard the Bohemian back
13 four years ago, I was on the other side of that
14 representing a neighborhood property owner, and there
15 was intense concerns from Hannah and everybody else
16 that when this got approved, that it would be loud, it
17 would be boisterous, and there would be a significant
18 effect on the neighborhood. That one faced completely
19 Hannah across the street, was the neighborhood.

20 And if we could go to the next slide.

21 And it was a bit of an unusual arrangement
22 because the developer, Kessler, had met with Hannah
23 and had negotiated a treatie, basically, with Hannah
24 that said, we're going to abide by these conditions
25 and the four conditions that are particularly

1 pertinent here -- Lee, if you can go to the next
2 one -- were these, no live outside music, microphones
3 or audio devices or mixture regard to the terrace of
4 the fourth floor of the hotel. We accept that
5 condition. And that makes sense. No televisions or
6 video monitors on the terrace. We accept that
7 condition. No outside bar on the terrace. We accept
8 that. Permanently mounted directional outside
9 speakers on the garden terrace shall be positioned so
10 sound shall be directed back to the building.
11 Speakers shall not emit sound that is higher than
12 normal conversational speech. Currently, there are
13 two speakers that face away from the building that are
14 mounted on the inside of the Citrus Club, and I'm
15 going to have a little more on the sound in a second,
16 but we're perfectly willing to take speakers down and
17 substitute something else or face them towards the
18 building. This has worked out well at the Bohemian.
19 I don't think anybody has said that it's been a
20 problem. The level that they're talking about,
21 speakers shall not emit sound that is higher than
22 normal conversational speech. We're fine with that,
23 because it's meant to be background music. It's not
24 meant to be a disco. It's not meant to be a Whiskey A
25 GoGo.

1 If we can go to the next one, please. And ⁷⁹
2 that's just the second page that really is not so
3 pertinent, Lee. Thank you.

4 Now -- so what we did because sound is the
5 issue, as far as we can tell, is, we sought a letter
6 from the company that designed the sound system up
7 there and their speakers in various locations around
8 the terrace, and I've got a letter that I would ask to
9 be put in the record for the applicant and copies that
10 I'd ask to be circulated. Because there's a
11 misconception about sound, and this is, we think,
12 critical to the consideration of what you have before
13 you, I'm -- this is from Mark Mitchem of ETI, to you,
14 the board, I and my company ETI provided the sound
15 system to the entire Dewberry Hotel. It's come to my
16 attention that there are many questions about the
17 design and nature of the sound system on the 8th floor
18 rooftop area of the Dewberry Hotel. In particular, I
19 understand the neighborhood residents are concerned
20 about the number of speakers and their placement
21 around the 8th floor rooftop terrace. To help clear
22 the air, I wanted to let you know that this system
23 designed by Harman Carman, the designer of the
24 foremost designer of systems like this, is intended to
25 provide for soft, ambient, background music. The

1 patio seating area, which is on the southwest corner
2 of the rooftop terrace contains two sets of speakers
3 with two column speakers on the walls of the Citrus
4 Club and two speakers in the corners of the open area.
5 I told you about the two on the wall of the Citrus
6 Club. The larger speaker on the southeast corner of
7 the terrace, which is off away in that open area and
8 faces the sitting area, is a low volume subwoofer that
9 faces the seating area to offset and balance the music
10 from the other speakers. Additionally, there are two
11 speakers located in each of the walkway areas from the
12 rivers room to the patio room. It is a common
13 misconception that having several speakers equates to
14 a louder sound being produced in an area. That is not
15 necessarily so. That was not the purpose of the
16 design of the speaker system we installed. The design
17 for background music typically adjusted to
18 approximately 40 decibels around the level of the
19 human voice, slightly lower, is accomplished by having
20 several speakers all turned down to a low volume.
21 This provides for an even-flow volume experience
22 without having amplify a handful of speakers to higher
23 volumes in order to provide coverage for a given area.
24 When it comes to background music, the more speakers,
25 the lower the individual volume and the more even

1 sound throughout. Then he goes on to say, this is
2 exactly what we did on the main floor. There are 80
3 speakers on the main floor for background music. Then
4 he says, yet, I doubt, I'd find anyone who's visited
5 to find the music obtrusive or loud. They may not
6 have even noticed it. This is because of the presence
7 of many speakers at low volume. So he talks about it
8 being adjusted, and he concludes by saying, we do not
9 believe under normal circumstances that music at that
10 elevation would be heard at street level, at any of
11 the surrounding buildings or by the residential
12 neighborhood to the east.

13 Getting back to the test. We don't think
14 there's any way that it can be said that the
15 occupation of those rooms harms anybody. It seems
16 that the city's position is that if you put something
17 on a plan you can't change it. We're saying, we don't
18 believe that's accurate, but we heard that to ask
19 permission to be allowed what the city approved, but
20 there's no reason why a hotel owner can't change his
21 plans, if it is not detrimental. In fact, we think
22 it's an enhancement of that property, and when you
23 consider what happened here, it's somewhat ironic.
24 Mr. Batchelder mentioned that this property had been
25 abandoned for ten or a dozen years, and in a strange

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1 twist, the way things go, it was decided that what was
2 one time an eyesore is now worth keeping because it's
3 representative of the architectural in -- (inaudible).
4 So there it was. It was going to be preserved and
5 Mr. Dewberry came in, he -- and he is a very large
6 personality. No question about it. But he's also
7 spent \$75 million to get a first-class hotel. He's
8 done everything one would want. He's basically made a
9 self -- (inaudible). Yes, there have been events
10 that, I guess, more recently have been on the ground
11 floor with a wedding where there was -- it was in the
12 ballroom, but there was outside music, and it was
13 amplified, and it was against the zoning ordinance.
14 That's been made clear to Scott that -- we've got it
15 now, and we're wrestling with these -- (inaudible) --
16 on what to do there, but that was on the ballroom, not
17 on the roof. The roof is not going to have weddings
18 and wedding receptions. It's all -- all that's going
19 to be on us in the inside except for people wanting to
20 have a cocktail on the outside with low music. We
21 would ask you to consider that that does not have a
22 negative effect, and even though we think we're
23 entitled to proceed, we would like you to approve a
24 modification of the conditions earlier with the
25 conditions that were approved for the Bohemian, not

1 only were they reasonable, we think they'll contain
2 the sound, and this is actually about eight stories up
3 and -- instead of four stories up.

4 The last thing I'll say is that I know the
5 plans have changed over time. I think people say,
6 well, they've changed over time, but we aren't getting
7 a straight story. You know, we can't trust this man.
8 I think you're going to hear a lot about noise, trust,
9 and all that, but what I'm saying is that you can
10 trust the quality that's been put in there, you can
11 trust what he did there is not going to be a loud,
12 boisterous place. You saw it. It's important that
13 you see the pictures to see what we're talking about,
14 and we'd ask that you be objective because there's
15 been a little objectivity.

16 When the newspaper wrote these stories,
17 they didn't call anybody to say how big --
18 (inaudible). When Robert Rosen wrote his article, he
19 didn't say, well, is the bar on the inside or outside?
20 We haven't had a chance because people don't care
21 because of the waive of anti hotels that the line in
22 the sand was picked for the Dewberry. He'll be the
23 whipping boy here, but we suggest, what looks at
24 independently, what's before you today, rather than
25 all the -- the certain navigation before and how we

1 got here. So we'd ask for approval of a modified
2 special exception.

3 CHAIRMAN KRAWCHECK: Okay. Mr. Walker,
4 what -- what are you asking for? What -- what
5 additions --

6 TRENHOLM WALKER: No. That's a great
7 question.

8 CHAIRMAN KRAWCHECK: -- do you want us to
9 change and how you want us to change it?

10 TRENHOLM WALKER: Lee, if you can go -- why
11 don't you go forward one more. I'm sorry, go forward.
12 Is there another slide? There we go.

13 MR. BATCHELDER: There we go.

14 TRENHOLM WALKER: This is Exhibit 5 to the
15 application, and what we're asking for is the ability
16 to use the entire area, we're asking for the right to
17 have people circulate, if they want to circulate.
18 We're asking to be allowed to have a sitting area
19 outside the Citrus Room and along here -- this is not
20 shown, but as set up, the sitting area along the west
21 side in the southwest corner of the Marion side, and
22 we want to make sure that the conditions allow that
23 use.

24 Now, there was no condition prohibiting
25 what we did, but vastly, because there was a

1 particular layout up there that -- that use on the
2 inside couldn't change, I don't know of any precedent
3 where this board had said somebody can't -- under 220,
4 a special exception for hotel have said on an interior
5 use can't be done, but in any event, we're asking for
6 what I just said, and also we are willing to do the
7 conditions that were on Bohemian. We're willing to
8 adjust the speakers. We're willing to deal with any
9 concerns through those conditions. That's what we're
10 asking.

11 CHAIRMAN KRAWCHECK: I'm having trouble.
12 I -- the conditions that -- that this board adopted on
13 the original approval that looked applicable to me,
14 condition number four, no exterior amplified music
15 shall be permitted.

16 TRENHOLM WALKER: Right.

17 CHAIRMAN KRAWCHECK: Okay. And condition
18 nine, no activity outside -- says outside -- on the
19 roof shall stop -- excuse me. All activity outside on
20 the roof shall stop at 10:00 p.m.

21 TRENHOLM WALKER: We agree with both of
22 those, and I talked to Mr. Batchelder about amplifying
23 music. Amplified music doesn't mean you can't have a
24 speaker in the background.

25 UNIDENTIFIED FEMALE: What does it mean?

1 MR. BATCHELDER: What -- that's what I've
2 always maintained in all my dealings with people.
3 Speakers are okay, but they can't be -- can't be --
4 the volume level can't be turned up above the normal
5 conversational tones that people have. That's --
6 that's when it becomes amplified in my opinion.

7 TRENHOLM WALKER: And that's what the
8 condition on the Dewberry -- excuse me, on the
9 Bohemian said. You can't have microphones. You can't
10 have this amplification, and your background music
11 needs to be no higher than human voice levels,
12 basically.

13 CHAIRMAN KRAWCHECK: But that's an
14 enforcement issue.

15 TRENHOLM WALKER: Right. And it can be an
16 enforcement issue here. Absolutely.

17 CHAIRMAN KRAWCHECK: It's -- it's -- but
18 this board doesn't -- isn't an enforcement board.

19 TRENHOLM WALKER: But it -- it can be
20 enforced as a zoning violation, which is what happened
21 two weeks ago. This board didn't enforce it. But the
22 condition was violated and the citation was issued.

23 CHAIRMAN KRAWCHECK: But that goes
24 elsewhere. That doesn't come back to us. I mean,
25 we've never -- the enforcement of conditions is not a

1 Board of Zoning Appeals issue.

2 TRENHOLM WALKER: We agree.

3 CHAIRMAN KRAWCHECK: Mr. Batchelder.

4 MR. BATCHELDER: I think we're all in
5 agreement about that. I -- I don't think they're
6 objecting to the enforcement. They're just objecting
7 to the limitations that the city has placed on the use
8 of that 8th floor pursuant to the approval from 2011.

9 CHAIRMAN KRAWCHECK: Well, I question
10 whether that's a Board of Zoning Appeals issue.

11 MR. BATCHELDER: Well, my view is that when
12 an applicant presents plans to a board for a hotel and
13 we address all these conditions including the need to
14 provide floor plans for the board's review and we go
15 through and we look at all these accessory uses that
16 are involved and -- and now we've -- we have an
17 additional analysis about any restaurant or bar areas
18 within the hotel and pursuant to a floor space that
19 they're going to occupy, all those things, but when
20 they present floor plans and we review them and
21 approve them, then those uses that are shown on those
22 floor plans are -- are with respect to these
23 restaurant/bar areas and other -- other accessory uses
24 are pretty much set in stone. Otherwise, you know,
25 where are we? What are we doing when we review these

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1 floor plans in the first place and the neighbors look
2 at them, you know, what's going on then? What are we
3 doing? So I think we're -- we're looking at the full
4 package, and we're approving something, and once we
5 grant an approval for that package and apply whatever
6 conditions we want, those conditions along with the
7 uses shown on those floor plans are -- are set in
8 stone.

9 SCOTT DAWSON: So, Lee, would it be
10 accurate to say that what this really comes down to is
11 that, in your opinion, that the floor plan that was
12 approved says spa, slash, fitness?

13 MS. SMITH: Yes.

14 SCOTT DAWSON: Rather spa, slash, lounge,
15 which was an earlier ideation of the design?

16 MR. BATCHELDER: Correct.

17 SCOTT DAWSON: So we're really not talking
18 about the conditions. The conditions aren't what the
19 zoning administrator last year, you know, cited as
20 their, you know, grounds to -- to not allow occupancy
21 of the Citrus Club and these various others features
22 already built; is that correct?

23 MR. BATCHELDER: Correct.

24 CHAIRMAN KRAWCHECK: So we're really being
25 asked to approve a change of use.

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1 TRENHOLM WALKER: Interior use, because the
2 city reads implies, that if a plan is submitted that
3 those uses are locked, when you get your special
4 exception, that you -- that the hotel agency is locked
5 to the locations of the uses. We disagree that 220
6 grants a hotel use. It doesn't say where you have to
7 have your accessory uses. The restriction that
8 Mr. Batchelder has referred to about 12 percent of the
9 space, I don't think that was in effect, but even if
10 it were in effect now, there's no showing that we
11 would exceed that. Under the city's interpretation,
12 whether we have no place to go to be allowed to change
13 where we want, essentially, as circumstances change,
14 if costs changes, then the city has said, we're locked
15 into that original application. We're back here. We
16 don't think that's right, but we're back here to ask
17 for a modification and saying, all right, take out
18 what was before and let's look at this and modify the
19 special exception. It can't be that a hotel there is
20 forever bound in that hotel use to only use the floor
21 plans that were submitted.

22 MR. APPEL: One possible way to work
23 through this -- and I'm looking at this just like
24 everybody here, is that what this board does when it
25 comes to accommodation uses, we approve or deny

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1 accommodations uses. We approve an accommodation use
2 here subject to a variety of conditions. What is
3 entailed in an accommodations use? I mean, is it --
4 is it what the definition of accommodations use is
5 under the ordinance or is it a specific site plan
6 package that is proposed at the time the application
7 is considered? I think that's really where the
8 dispute is here -- and, Lee, correct me if I'm
9 misinterpreting your interpretation -- and, Trenholm,
10 by all means as well, it seems as though that that's
11 really where the dilemma is here.

12 MR. ROBINSON: Lee, I think it could be
13 beneficial to go back to the very beginning and see
14 what the ordinance says about the approval of the
15 accommodations use when it comes before our board,
16 initially, what is it we are approving.

17 MR. BATCHELDER: I've got a copy of the
18 ordinance if you'd like.

19 CHAIRMAN KRAWCHECK: What does it say?

20 MR. BATCHELDER: I'll grab it. I don't
21 know it by heart, but I can tell you under these
22 circumstances you can grant a special exception and
23 you must consider these 18 findings.

24 SCOTT DAWSON: Yeah. I've got the
25 ordinance up on my computer. I'm not looking at

1 Facebook over here, so -- so everybody knows, and I'm⁹¹
2 happy to pull that up here.

3 CHAIRMAN KRAWCHECK: Okay. It -- it allows
4 accommodations uses. That's for sure.

5 SCOTT DAWSON: That's right.

6 CHAIRMAN KRAWCHECK: And when the board
7 finds -- and then it has the -- the factors that we
8 have to find to allow an accommodation use. So -- so
9 all of the -- we've made those findings. In granting
10 an exception or a variance, the board may attach to it
11 such conditions regarding location, character or other
12 features of the proposed building, structure or use as
13 the board may consider advisable to protect, establish
14 property values in the surrounding area or to promote
15 the public health, safety or general welfare. So we
16 did that, too. We -- we passed 11 conditions in
17 accordance with the ordinance. So it seems to me that
18 we're thrown back to exactly the issue is what an
19 accommodations use. You mentioned -- Mr. Walker, you
20 mentioned accessory uses earlier. Where is that in
21 the ordinance?

22 TRENHOLM WALKER: The accommodations use
23 allows accessory use. The accommodation use is the
24 master use.

25 CHAIRMAN KRAWCHECK: Umbrella.



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1 TRENHOLM WALKER: The umbrella. And under
2 it would be as a matter of right accessory uses. That
3 would be the restaurant, the gift shop. What's
4 normally incidentally to our hotel. We're an
5 accommodation use. That's a hotel. Maybe not a bed
6 and breakfast but an accommodations use of a hotel.
7 So the accommodations use is what we're moving and
8 putting on -- or that's been built on the 8th floor.
9 So we believe that the conditions just as Mr. Chairman
10 said, that the conditions were set. There's -- and I
11 don't mean to be -- I hate to say this because it
12 sounds like I'm parsing conditions. It's not meant to
13 do that, but there's no condition that said that the
14 8th floor must be constructed exactly shown on this
15 plan. There were other conditions that could have
16 been put in here, but that was not put in there so --
17 and I had that conversation with Francis Campwell
18 (sic), and she disagrees with me, and Lee disagrees
19 and -- but I'm here with the application because we
20 don't think that there's harm from these uses, and I
21 don't want to get involved in a legal spat if I can
22 just come through, despite all the opposition, and go
23 to this board and demonstrate to you, to others, that
24 this is not going to be the terrible catastrophic
25 event that people are going to say we don't think

1 we're legally required to do, but we're here, because
2 we were told we needed to be here.

3 CHAIRMAN KRAWCHECK: Ms. Smith.

4 MS. SMITH: Yes. I remember looking at
5 this floor plan and the neighbors and we said, there
6 will be no bar. So we did -- we did do that. And
7 we -- we looked at this, and we used it when we made
8 our decision. I'm not a lawyer, but I remember that
9 clearly.

10 CHAIRMAN KRAWCHECK: Well, I think we
11 adopted a condition, and it said all activity outside
12 on the roof shall stop at 10:00 p.m.

13 MS. SMITH: We did.

14 CHAIRMAN KRAWCHECK: And I think that --
15 and that anticipated that there would be activity on
16 the roof but not after 10:00 p.m.

17 TRENHOLM WALKER: Exactly.

18 UNIDENTIFIED MALE: You're all not here
19 today to talk about that.

20 TRENHOLM WALKER: We abandoned that. No,
21 we are not here today to extend the hours or change
22 any of those conditions.

23 UNIDENTIFIED MALE: So, Trenholm, is it
24 fair to say that what you're all proposing is you
25 believe is consistent all --

1 TRENHOLM WALKER: We do, but we -- what
2 we're proposing, we do not believe is inconsistent at
3 all with the conditions at all and -- and -- we don't.

4 UNIDENTIFIED MALE: The reading room to be
5 closed -- entry to be closed and the Citrus Club to be
6 closed?

7 TRENHOLM WALKER: When we went -- when it
8 was constructed, the city has different arms. One of
9 them is the building permit office. The building
10 permit office allows us to construct -- we went to get
11 the zoning permit necessary for the occupancy of the
12 structure, and you'll see Mr. Batchelder's signature
13 up in the upper --

14 UNIDENTIFIED MALE: He's the one saying
15 that you have --

16 MR. WALKER: Correct. Correct. And he
17 crosshatched that and that's off limits, and that, at
18 the time, the concern of the owner was, we just need
19 to get this hotel open. It's been delayed. We're
20 trying to get the rooms in operation, and we will come
21 back when things settle down. I don't think things
22 will ever settle down, but we will come back later, if
23 that's an issue, and as I said, I talked to Francis
24 and made the case that we don't need to -- to modify
25 the special exception, but she felt differently, and I

1 can understand her supporting staff. I'd probably do
2 the same thing if I were the city attorney. That's
3 what your job is, is to represent your client but that
4 was not our position.

5 CHAIRMAN KRAWCHECK: Okay. Do you have
6 anything further, Mr. Walker?

7 TRENHOLM WALKER: I don't. Thank you.

8 CHAIRMAN KRAWCHECK: Thank you very much.
9 Would anyone like to talk in support of the
10 application? Okay. In opposition? Yes, ma'am.

11 LISA THOMAS: Well, my name is Lisa Thomas,
12 and I'm a resident in the neighborhood on Alexander
13 Street, and I think that -- I wasn't here in 2011, so
14 I don't have the same history that you do with regard
15 to the original application, but there are other
16 people here that do, and what I would say is that when
17 this package was submitted for approval and it was
18 negotiated out with the neighborhood, it was
19 negotiated out with the city and -- and in front of
20 this board, it was a package. It was a whole package.
21 It wasn't just what was going on downstairs in the
22 ballroom or where the -- the little restaurant is
23 downstairs. It was an entire package. And if
24 Mr. Dewberry had brought this to the table back in
25 2011 that he wanted a bar, which I hear you saying

1 that was a no back in 2011, there may have been
2 completely different conditions and -- that would have
3 been put on this property. So I don't think that you
4 can just extract one small piece or two small pieces
5 out of this entire plan and say, we're -- you know, we
6 can do whatever we want to. This is a public bar,
7 mind you. This is not -- the pool, as I understand
8 it, was for residents only. The spa was for residents
9 only. This is going to be open to the public. People
10 are going to go up there and have a drink, and it
11 is -- it is a -- I've been up there. Maybe not
12 legally, but -- (inaudible) -- took me up there.
13 There -- there are -- there are seating all the way
14 around. All of these planters that you see are
15 temporary, and there are speakers up there, and I --
16 I -- you know, in my view, we can -- we can parse
17 words about what's amplified music and what are
18 speakers, but I can tell you that everybody here
19 believes that speakers are amplified music, and if
20 that had been something that was discussed at the
21 time, that would have been a problem, and it was not
22 agreed to, certainly, by the neighborhood or consented
23 to.

24 The next thing I want to point out is, I --
25 I'm trying -- I've lived here all my life. I've tried

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1 to visualize what's around the Bohemian, what is going
2 to be around Mr. Bennett's hotel and the Omni, and I
3 don't believe that any of those bars face the
4 neighborhood. I think they face a public street.
5 There -- they're -- they do not have that wraparound
6 where there -- there is potential for people to hang
7 out there because they're not -- the planters is not
8 going to stop them and -- and look at the cover river
9 bridge and talk and their architect or the project
10 manager -- I'm not sure who he was -- who presented to
11 the neighborhood, said 400 people could come up there.
12 They are permitted to have that many people up there,
13 and I am telling you that kind of sound is going to
14 destroy our neighborhood.

15 CHAIRMAN KRAWCHECK: Yes, ma'am.

16 SUE GLASCO: Yeah. Sue Glasco (sic) on
17 Chapel Street. I just heard from Mr. Walker, who was
18 very eloquent on something which seems to be
19 illogical. Just because a bar has not been expressly
20 forbidden on the space does not mean it's permitted.

21 CHAIRMAN KRAWCHECK: Thank you very much.
22 Yes, sir.

23 BILL WESTON: May I hand something out?

24 CHAIRMAN KRAWCHECK: Sure.

25 BILL WESTON: That's the original.



1 MR. ROBINSON: Give this to Lee.

2 BILL WESTON: I will.

3 Good evening to the board and
4 Mr. Krawcheck, as chairman. My name is Bill Weston.
5 I live on 3 Henrietta Street, which is on the same
6 street as the Dewberry Hotel. I have handed to the
7 board a petition from 100 percent of the people who
8 live on Henrietta Street, and I wish to read it for
9 the record. We are people living and owning property
10 on Henrietta Street. The Dewberry is at the
11 intersection of Henrietta Street and Meeting Streets.
12 Our homes are the closest to the facility. Quality of
13 life is paramount. It is unthinkable a zoning board
14 would approve the use of a rooftop bar capable of
15 holding up to 400 people without neighborhood
16 consensus. This will destroy our quality of life and
17 marginalize the people. All the names on this
18 petition live here. Our entire street is unanimous in
19 requesting denial to any changes to the zoning at 334
20 Meeting Street. The second page on that is from their
21 application, and I circled where all the homes are. A
22 variance request -- a variance request is to show
23 support from the neighborhood. Our streets supports
24 100 percent for no change to the existing zoning.
25 Yesterday, I was at the Charleston

1 livability court. The Dewberry Hotel was issued two
2 tickets for violation of its zoning restrictions. The
3 Dewberry Hotel did not contest the two tickets issued
4 for the outdoor band party on March 25th. There was
5 also a similar outdoor band party on February 25th.
6 That was documented to the City of Charleston. Please
7 see number four on the restrictions. No exterior
8 amplified music. I -- I have a play -- I have a
9 recording here if you would like to hear how noisy it
10 is. It is me walking away from the hotel. You can
11 hear it. It was a band. It was outside. It was
12 lively. It's the second documented one. It's not
13 just so happen.

14 The plan is to make the hotel a bridal
15 center. The building on the rooftop bar will allow
16 music into and noise into the neighborhood. Draw your
17 own conclusions why the Dewberry Hotel has those large
18 speakers up there. Draw the red line and deny any
19 amendments to existing zoning. Protect the
20 neighborhoods that make Charleston famous. Thank you.

21 CHAIRMAN KRAWCHECK: Thank you, sir. Yes,
22 ma'am.

23 UNIDENTIFIED FEMALE: Hi. I'm --
24 (inaudible). I live on Elizabeth Street, so all the
25 houses on Elizabeth Street back up to the Dewberry,

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1 and there's nothing between us and -- and the front of
2 the Dewberry that faces the water. So that rooftop
3 music on the 8th floor, which will be amplified by the
4 water, is coming right into our bedroom, right into
5 our back -- right into our backyards. We have a very
6 small neighborhood. It's not like there's -- there's
7 businesses and commercial properties between us and
8 the Dewberry like there is between the other examples
9 that Mr. Walker gave. However -- and I would also say
10 Mr. Krawcheck, what we anticipated when we talked
11 about the activity on the roof was activity from the
12 people at the pool and the spa, not activity at a bar.
13 I was one of the small number of people that met with
14 Mr. Dewberry. He is an architect. The city, we met
15 over and over and over again to work out the -- this
16 situation, and we didn't get everything we wanted, and
17 they didn't get everything they wanted, but we came up
18 with those 11 conditions, and we trusted him. We
19 trusted that there would not be a rooftop bar.
20 Believe me, there was no idea in our head that there
21 was ever going to be a Citrus Club. That's a bar.
22 And all those people sitting out on those tables, as
23 they are at the Bohemian, where I love to go, but
24 that's in a downtown area with commercial property
25 around, all those people are being served drinks at

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1 their tables, and they're being served food at their
2 tables, and they're talking. It's a different
3 situation, and we never -- there's no question about
4 what we agreed to, what's not going to be on that
5 roof. And to throw that all up at this point to say
6 conditions are changed, so we need a different
7 variance, it just doesn't apply. The conditions are
8 exactly the same as they were back in 2011. Thank
9 you.

10 CHAIRMAN KRAWCHECK: Thank you, ma'am.
11 Yes, sir.

12 AARON GILCHRIST. Hi. I'm Aaron Gilchrist.
13 I live at 9 Elizabeth Street, which is at the corner
14 of Henrietta and -- (inaudible) -- Street. I guess I
15 can claim Henrietta as well because I signed
16 Mr. Weston's letter. The funny thing about sound, I
17 walk my dogs regularly in Marion Square, and there's a
18 rooftop bar at the corner of Calhoun and King Street.
19 Directly across the -- all the way over, the sound
20 completely bounces. It -- it hits you. It's -- it's
21 the same -- it's going to be the very same thing.
22 There's nothing to impede the sound from the Dewberry.
23 It's eight stories up. I appreciate all the examples
24 given by the representation of Mr. Dewberry. None of
25 them were eight stories high, and none of them

1 were unimpeded.

2 Further, I have two children, father of
3 two, children and my wife, you know, we have to have a
4 bedtime. They cannot -- the original -- and I
5 appreciate that you withdrew the ten o'clock -- sorry,
6 the 12 to -- ten to 12 time frame, but one of the
7 things you did say in the very beginning was something
8 about clearing up misinformation. I think that the
9 only misinformation that has -- that we have heard has
10 been sort a series of things that have changed over
11 and over again. I think there is a lack of trust in
12 the neighborhood that that won't happen again.

13 Thanks.

14 CHAIRMAN KRAWCHECK: Thank you, sir. Yes,
15 sir.

16 GLENN GORDON: My name is Glen Gordon
17 (sic). I live at 12 Judith Street. I actually did
18 not plan on speaking because I live further from the
19 Dewberry Hotel than most people who are here. I am,
20 though, a member of the neighborhood association, and
21 I've owned my home for 11 years, and I think I'm one
22 who will say that I appreciate the Dewberry Hotel
23 being there. I think in a lot of ways it's positive
24 additions for our neighborhood especially considering
25 what was there previously, but I hope I speak for my

1 neighbors and friends that we're just asking that they¹⁰³
2 play by the rules of what was approved.

3 The reason I stood up is because I have an
4 invitation on my refrigerator for a wedding rehearsal
5 dinner and after-party that has already been held at
6 the Dewberry, and the plan was for it to be held on
7 the rooftop. There were 80 people seated for dinner,
8 and there were -- actually, was texting with the
9 people who hosted the party, and there were between
10 200 and 250 people present, and every bit of that was
11 intended to be on the rooftop. It was not, because it
12 wasn't allowed to be, but I think it's just very
13 important that the rules and the conditions be
14 applied. What the neighborhood thought they were
15 getting is what they should get, and I have no
16 opposition to someone going on the roof looking at the
17 views. It is absolutely breathtaking. I think it
18 would be hard pressed to go on the roof and think that
19 no one should ever be allowed to go and appreciate it.
20 It's a matter of what it comes down to, and I think
21 that the events with 200 people or amplified music,
22 however -- however you see that.

23 I was in the meetings in 2011 and 2010, and
24 I know for a fact that the neighborhood intended that
25 amplified music, I think, was intended to be



1 electrically-powered music from speakers, and I think¹⁰⁴
2 that rule was not only necessarily for the rooftop,
3 but I also believe that it was probably intended -- or
4 the way I read it in that condition, I think it also
5 seems to apply -- (inaudible) -- ground-floor
6 property. I could be wrong about that, but I -- I
7 thank you all for looking this over, and like I said,
8 we're glad to have the hotel in the neighborhood, but
9 you can't just continue to come back and ask to do
10 more and more and more different and different and
11 different. Thank you.

12 CHAIRMAN KRAWCHECK: Thank you very much.
13 Yes.

14 UNIDENTIFIED MALE: My name is David --
15 (inaudible) -- I didn't intend to speak, but I've
16 lived in Charleston for years. For me, Mr. Dewberry
17 came to our neighborhood meeting because --
18 (inaudible) -- the -- he said that he's allowed to
19 have drinks on the rooftop and to have people outside,
20 and that's permitted. The question in my mind is,
21 when you create a bar upstairs that all of a sudden
22 increases the potential for use for the rooftop as a
23 bar. We're not arguing that he can't use the space,
24 which I think Mr. Walker's argument is in order to
25 proceed, that they need to -- they don't need

1 permission, as he says, but what they do need
2 permission is for the bar and having the bar upstairs
3 creates potential for a larger use of the rooftop
4 terrace, and so I disagree for the use of the bar
5 because of the potential that it creates.

6 CHAIRMAN KRAWCHECK: Thank you, sir.
7 Anyone else? Yes.

8 JERRY CHOWER: Jerry Chower (sic) with
9 historic -- (inaudible) -- neighborhood association.
10 (Inaudible) -- neighborhood association and requesting
11 that this application be denied in its entirety. The
12 chronology is plain in the -- (inaudible) --
13 neighborhood concerns and relevant controlling code
14 provisions when it elected to its own profit-motivated
15 volition to construct an offending, unapproved and
16 inappropriate rooftop bar. Now, cynically seeking,
17 after the fact, approval for this offensive use, the
18 applicant has shown no grounds for such a use to be
19 approved. We ask that you deny this in its entirety.
20 Thank you.

21 CHAIRMAN KRAWCHECK: Thank you very much.
22 Anyone else? Yes.

23 UNIDENTIFIED MALE: My name is --
24 (inaudible) -- Watson. I'm representing the East Side
25 Development Corporation, and we're supporting the

1 neighborhoods in that area because we are asking for¹⁰⁶
2 denial of this. We're talking about an eight-story
3 building. Sound travels the higher you have it, and
4 just a normal human voice will travel much further,
5 and we're asking that the neighborhoods and what their
6 concerns are and the binding agreement with them and
7 neighbors be held in place.

8 CHAIRMAN KRAWCHECK: Thank you very much.
9 Anyone else in opposition? Yes, sir.

10 MR. MITCHELL: Mr. Krawcheck --
11 (inaudible) -- board. I think this is my second time
12 here in 14 years. I'm Councilman Robert Mitchell, and
13 I represent -- (inaudible) -- bar, and I have listened
14 to all this. I also have been to the neighborhood
15 meetings. Mr. Dewberry was there, and that was my
16 first time seeing Mr. Dewberry since he came. He
17 was -- mentioned by the staff all the times to talk to
18 the councilman, which he never did. He never did --
19 he never met me. He never came to me. So I never
20 reached out to him either. But for this rooftop --
21 but when we're talking about this rooftop, the City of
22 Charleston, as you know, we wanted the building. But
23 he overbid us. Because we were going to do something
24 different with the building, but he overbid us. But
25 since the building is there now and the hotel is

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1 there, it's fine, but I also advised people when you
2 come into a neighborhood, you need to relate to the
3 community there, and when I heard Mr. Dewberry at that
4 meeting, and I'm going to say this, he was at that
5 meeting, and I mean, the way he was talking to the
6 people at that meeting, it was terrible. He didn't
7 care what he said to them, and I sat in that meeting,
8 and I looked at him a long time. I wanted to say
9 something, but I said, I'll be quiet, you know, but
10 the way he said -- he talked to -- to them at that
11 meeting, it was terrible. And I wish you would go
12 back and tell him that for me. To me, you know, he
13 is in -- in this community, building a community up.
14 It looks good. We have three churches in that
15 community. We have Immanuel church -- (inaudible) --
16 Baptist Church, Second Presbyterian Church.

17 Okay. You give him permission because he
18 has his bar and everything, and everything is going --
19 (inaudible) -- through, but then he looks at that and
20 say -- (inaudible) -- the community, they want a
21 rooftop bar, fine. He has the hotel there. We
22 approved the hotel. That's what it is about, the
23 hotel. So go ahead and run your hotel. Just leave
24 everything else alone. Thank you very much.

25 CHAIRMAN KRAWCHECK: Thank you, sir.



1 Mr. Gurley.

2 ROBIN GURLEY: I'm Robin Gurley with the
3 Preservation Society of Charleston. I --
4 (inaudible) -- as well as the residents --
5 (inaudible) -- Councilman Mitchell, but the
6 preservation society is opposed to this application.
7 We think the quality of life issue, clearly, this
8 application is -- (inaudible) -- quality of life and
9 in the presence of the neighborhood, we'd ask it be
10 denied.

11 CHAIRMAN KRAWCHECK: Thank you. Yes, sir.

12 CHRIS CODY: Chris Cody, Historic
13 Charleston Foundation. We first would like to
14 acknowledge that the Dewberry is a quality
15 rehabilitation, and it is an asset to this community.
16 We are very happy that this building was rehabilitated
17 in the matter it was. With that being said, we
18 completely support the neighborhood and ask we, as the
19 preservation society does, this is a quality of life
20 issue, and we are not as equipped to speak to this as
21 the neighbors have, and we believe are, and we believe
22 that they have. In fact, they have done so
23 unanimously.

24 We would like to speak to a couple of
25 particulars. We are glad that the applicant withdrew

1 the application to change the hours. We felt since
2 those were specifically addressed in -- (inaudible) --
3 nine that was more of a request for consideration than
4 it was for an amendment.

5 In regards to Mr. Walker's display of the
6 wonderfully cozy bar, we would contend that it's not
7 about how cozy and intimate a bar is on the inside.
8 It's about the use on the rooftop that enables.
9 There's a large difference to differ with him on a
10 point. There's a large difference of paying guests of
11 a hotel, getting drinks via room service on a bar and
12 having a publically open bar on the rooftop --
13 (inaudible) -- once you walk up there and get a drink.

14 We also note from Mr. Walker's presentation
15 the reference to accessory uses in 54-120. There are
16 two prongs for accessory use. One being that it's the
17 ordinance. But the other being is customary
18 incidental, and we could argue that while at the bar,
19 food service can be customarily incidental to the
20 hotel. A second bar and rooftop activation, we don't
21 feel meets the customarily incidental to a standard
22 hotel's operations.

23 You know, we also just overall really agree
24 with -- with Lee, with the zoning administrator. We
25 believe that once the package is submitted to a public

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1 hearing, this board approved, that package is
2 approved. We think it's illustrative. When
3 Mr. Krawcheck asked the applicant today, what he was
4 seeking approval for, in fact, the first thing he did
5 was show a roof plan, and at issue here is whether or
6 not the roof plans that were previously approved were
7 binding. We believe like the zoning administrator
8 does they are, and the Historical Charleston
9 Foundation stands with the neighborhoods with counsel
10 in asking this application be denied. Thank you.

11 CHAIRMAN KRAWCHECK: Thank you, Mr. Cody.
12 Anyone else? And -- in the back. And we're going
13 to -- we're going to have to wrap it up soon, but I
14 want to hear everybody that -- that wants to be heard.
15 Yes, ma'am. Ms. Leland.

16 MS. LELAND: Leland. In regards to the
17 building having stayed unused, this is another miracle
18 property with -- (inaudible) -- substances in this
19 case has asbestos, apparently, has disappeared, and
20 I'm not lying. It's happened three or four times in
21 the city. Okay. I do not need another bar especially
22 a rooftop bar. Speakers want to live on the top floor
23 of a three-story building on Cumming Street; okay? I
24 can see the top floor clearly of the Dewberry. My
25 building is approximately 50 feet tall and would be



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1 impacted negatively allowing a bar on your rooftop.
2 Same goes with the hours. We addressed that. When I
3 was coming up, we had a -- (inaudible) -- bar
4 (inaudible) -- and admittedly the hours were --
5 (inaudible) -- but the noise was contained within a
6 building. I cannot remember any rooftop bars, one --
7 (inaudible) -- basement ones anyway. I personally
8 hear loud music from King Street, and I know I would
9 hear loud music from the Dewberry. It's right there.
10 Thank you.

11 CHAIRMAN KRAWCHECK: Thank you, ma'am.
12 Anyone else? Ms. Rainsford.

13 MS. RAINSFORD: (Inaudible) -- anyway, I
14 want to share with the board the plans that were given
15 to me by Reggie Gibson, the architect of the project,
16 and these were with the approval dates on the bottom,
17 and you can pass this around. We have went on a long
18 journey. And this started with the purchase of the --
19 (inaudible) -- building in 2007. We still have open
20 questions and not many answers when we were here, and
21 this was the first document that I am giving you all.
22 We were as -- (inaudible) -- tirelessly meeting after
23 meeting after meeting with all parties present and
24 engaged. And what I feared was a rooftop bar from the
25 beginning just as the board member spoke. What we see

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1 here on these plans -- and this was what was given to
2 us as a promise to our neighborhood. It was approved
3 for the rooftop, then following a mens locker room, a
4 ladies locker room, laundry room, fitness area --
5 (inaudible) -- the outside use was for a large pool
6 and a deck.

7 Our neighborhood feels that the request
8 that the applicant is making is -- does not meet a
9 variance test. It does not meet a special exception.
10 It does not meet anything at this point. Those
11 decisions were made six years ago. The precedence
12 that this board's decision makes tonight affects every
13 single hotel or commercial development that possibly
14 could come before you. I think, though, that it was
15 very telling when we asked Mr. Dewberry, why are we
16 having this -- (inaudible) -- he said, I made a
17 mistake. We didn't make a mistake, as a neighborhood.
18 We went through the -- the due process. We went to
19 these board meetings. We met with city staff. We did
20 all of the things that we think we need to do as a
21 neighborhood. We're not as talented as Mr. Trenholm
22 Walker. And we're not attorneys. We're just people
23 that live in Charleston who look at what boards give
24 the reasoning, then we take acceptances, and at this
25 point we don't want to feel like that our efforts, all

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1 the combined efforts of everyone, are meaningless at
2 this point. I think that we need to leave this with
3 one thought, and I thought about it today. Project
4 ourselves ten years into the future and we've got
5 these drones flying all over Charleston looking at our
6 skyline, which is going vertical, are we going to be
7 looking at rooftop bars or church steeples? And right
8 now I think the responsibility of this board, we are
9 in the historic district of downtown Charleston. That
10 needs to be considered tonight along with everything
11 else that we talked about. So we're going to ask you,
12 as a neighborhood, that the original plans stay, and
13 I'm asking for everyone here that feels like there
14 should be no change to please raise their hands.
15 We're asking the board to deny the request. Thank
16 you.

17 CHAIRMAN KRAWCHECK: Thank you, ma'am. If
18 anyone has something they have to say, I'll give them
19 a chance to say it. Otherwise, I'm going to go to
20 reply. Anyone else in opposition? Okay. Mr. Walker,
21 in response.

22 TRENHOLM WALKER: Mr. Krawcheck, I'm -- I
23 don't have anything more. I think what I said I've
24 already said, and I don't need to plow this in the
25 ground again. I regret that there's been such

1 controversy. I just ask that we look at the specifics¹¹⁴
2 of what we're asking for and not just run away with
3 scenarios. We're willing to live with conditions if
4 the board decides to impose conditions, if you go the
5 route of looking at it as something that can be
6 modified. I think that's the question, but thank you
7 for letting us be here this evening.

8 CHAIRMAN KRAWCHECK: Thank you, sir. Any
9 discussion? Any motions?

10 MS. SMITH: No. I think this is a legal
11 question. And I don't have the answer to that. But I
12 do know that when I voted for those conditions and for
13 the special exception of the Dewberry Hotel, I
14 considered this -- (inaudible) -- I looked at it, and
15 I saw that where it was non-accessible and -- and I --
16 I -- we have not -- I can't say I wouldn't, but I did
17 it based on this -- (inaudible) -- and I looked at it,
18 and I studied it, and it was part of my thought
19 process.

20 CHAIRMAN KRAWCHECK: Me, too. I remember
21 it, and I remember doing it real carefully. And I
22 remember there was a lot of back and forth between the
23 neighborhood and the developer and Ms. Rainsford
24 and -- and others came to us with a -- with a
25 compromise, if you will, and conditions and -- and we

1 adopted -- I remember looking at this real hard.
2 There was an issue in the parking lot, lights going
3 into her house, and we put buffers -- I remember
4 considering that, and the -- and the rooftop thing was
5 first and foremost, probably, in our -- in our
6 considerations. We -- it wasn't something that was
7 done very quickly or haphazardly. It was well
8 considered. I -- we try to be fair, fair as you can.
9 And -- and I really -- at first wasn't sure why -- why
10 this was here, why it came back before this board
11 because this board does not enforce its own rules,
12 somebody else -- the city does that. Mr. Mitchell and
13 his crowd, they do that. We don't. So it's a little
14 bit unusual. It took me a while to figure it out, but
15 I think I've figured it out, and I think
16 Mr. Batchelder is exactly right. I think that when
17 these plans come before us, the -- the ordinance
18 provides that we have to -- we have to approve this
19 accomodation use under the ordinance, and there are
20 things we have to consider -- a number of things that
21 you have to consider, and one of the things is that
22 the board may consider advisable to protect, establish
23 property values in the surrounding area or to promote
24 the public health, safety or general welfare, and a
25 part of our approval process, we approve the plans for

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1 the hotel, and it came to me that we did that on the
2 Bohemian at Wentworth and Meeting Street, and that was
3 carefully considered and -- and -- the amplified
4 music, Mr. McKinney, who was the neighbor, who was the
5 leader of -- of that opposition, and I remember the
6 board finally decided to raise the parapet wall to --
7 to try to buffer the sound that would go out, so it
8 wouldn't go down Wentworth Street and -- and that
9 rooftop bar was a part of the submittal and was
10 approved by the board for the Bohemian. The rooftop
11 bar was not approved for this hotel, and I think that
12 Mr. Batchelder summed it up when he said that -- that
13 we did approve the plans as submitted, and then we put
14 the conditions on that we -- we did, and it changed
15 those plans. I think that it would take board action.
16 So I think that my initial reaction that we weren't in
17 the right place, we didn't have jurisdiction was
18 incorrect. I think we do. I think this -- I think,
19 obviously, this hotel is different from the Bohemian
20 and the hotel that's on the corner of King and
21 Calhoun. It's in the commercial area. This hotel
22 is -- is bounded on the -- on the east by a
23 residential neighborhood, and so the sound will have a
24 profound effect and so will a bar use, and I think
25 that the neighborhoods came to us counting on the

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1 protection that was offered in the approval of the
2 original plan, and I think that that -- I don't see
3 any changed circumstance that would warrant changing
4 the conditions or -- or changing the use. I think you
5 might -- Mr. Walker might make an argument in a case
6 for, you know, interior uses that would be things that
7 would be a plan that could be changed because I think
8 that the concern really is -- is what is going to
9 happen on the out -- on the rooftop outside and that
10 was one of the original conditions. So the concern
11 is -- is outside use, not interior use. So I think
12 that Mr. Batchelder has it exactly right and -- and
13 I -- I think that that -- frankly, we just don't have
14 any choice but to turn this application down. At
15 least that's my view.

16 MR. ROBINSON: I agree with you, but I also
17 want to know, since he didn't put the pool in, the
18 pool is on the approved plan, are you going to turn
19 around and make him put a pool in?

20 CHAIRMAN KRAWCHECK: Good question.

21 MR. ROBINSON: Will you -- (inaudible) --
22 because I think the use on the interior for the bar is
23 fine, but I know that it would be a noisy situation
24 outside. That's the detriment.

25 UNIDENTIFIED MALE: I'd like just to say



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1 from one member of the board, as Mr. Walker has done a
2 wonderful job, but he raised questions through my mind
3 thinking through the process, and I was thinking
4 through the whole time while everyone was speaking,
5 but I remember the case very well because it was aired
6 out very thoroughly. There was no question about it,
7 and I had it in my mind, as Ms. Smith did, that the
8 issue of the bar was very, very important to the
9 neighborhood, and I have that in my mind in the
10 protection of the neighborhood from anything that
11 might be perceived to be a negative influence, and I
12 know I cast my vote because of that particular reason.
13 Mr. Walker had some excellent points, but I've got to
14 tell you how I voted, and it was because of the lack
15 of the bar up on that roof inside or outside.

16 CHAIRMAN KRAWCHECK: Are there any further
17 discussion? Any motions?

18 MR. APPEL: Let me just throw out a couple
19 other ideas that you and -- and as we sometimes deal
20 with them here, they are genuinely difficult decisions
21 just not on a fact policy basis, but also on a legal
22 basis in terms of interpreting these ordinances that
23 as we're charged with making decisions out here.
24 My -- my understanding of our role with respect to
25 accommodations uses is that this is going to be a



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1 little bit of a Gregorian view, but I'm just throwing
2 this out there for full consideration. We don't
3 approve plans. We approve uses. We approve
4 accommodations uses. We approved an accommodations
5 use. We approved an accommodations use with 11
6 restrictions. We have an application -- an applicant
7 right now who is taking a position that I think has
8 some merit that having an interior bar, having an
9 interior -- what they call it, a reading room. I
10 don't know who's doing any reading up there but, you
11 know, that could very easily be considered. I don't
12 even know if you need to go to accessory use. I think
13 that is an incidental use to what it means to be an
14 accommodation use under -- under our ordinance. I
15 just looked at the definition of use under our
16 ordinance. I think when you approve a hotel, when you
17 approve a hotel, you get a lot of stuff that comes
18 with that automatically. The way that this board can
19 delimit that in the face of valid neighborhood --
20 although at times slightly, frankly, overblown and
21 borderline hysterical, you know, we're talking about
22 people having a drink on a rooftop having a
23 conversation. We're not talking about bands or
24 anything like that on a rooftop. I don't think
25 anybody suggested that. The way we delimit what an

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1 accommodations use is, because what an accommodation
2 use is under the ordinance is extraordinarily broad,
3 that's just the ordinance we had nothing to do with.
4 That was councilman's and his colleagues' job with
5 that. We did not include a condition on this approval
6 that there will be no bars up -- upstairs. We didn't
7 make a condition -- and, frankly, I'll respect the
8 folks that work here. I was not on the board in 2011
9 and 2012. So I can't speak to everything that took
10 place there. We didn't restrict to the plans
11 presented. We didn't restrict a reading room, a --
12 any of these other things that have already been shut
13 down.

14 So I think that Trenholm has a very
15 legitimate case that they don't even need to be here
16 to begin with, and if they want to pursue this outside
17 of the BZA's frame work, I think they stand a chance
18 of being successful in that regard, and I'm not a
19 judge but -- but my -- my ears and attention --
20 attention was perking when I was hearing this
21 interpretation, and I want to throw this consideration
22 out for the board. This may be our last chance to
23 revise what we did back in 2011 and 2012. We have an
24 opportunity right now to perhaps fashion and make some
25 conditions in light of what has happened prior,

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1 because if this goes to a judge, the issue may be out
2 of our hands, it may be out of the neighbors' hands,
3 and that's just another thing, I think, we should
4 think about there, is that maybe we need to revisit
5 these conditions, and you know, by coming to us, I
6 think the -- the applicant has, you know, submitted
7 to, frankly, a redo of this. It's the board's
8 decision to put a condition that says, no bar on -- on
9 the -- the rooftop and do that, then that's -- I would
10 imagine, an option as well, but this is not a
11 straightforward legal issue. I think that there are
12 two compelling sides to it, and you know, it's
13 genuinely a difficult issue, so.

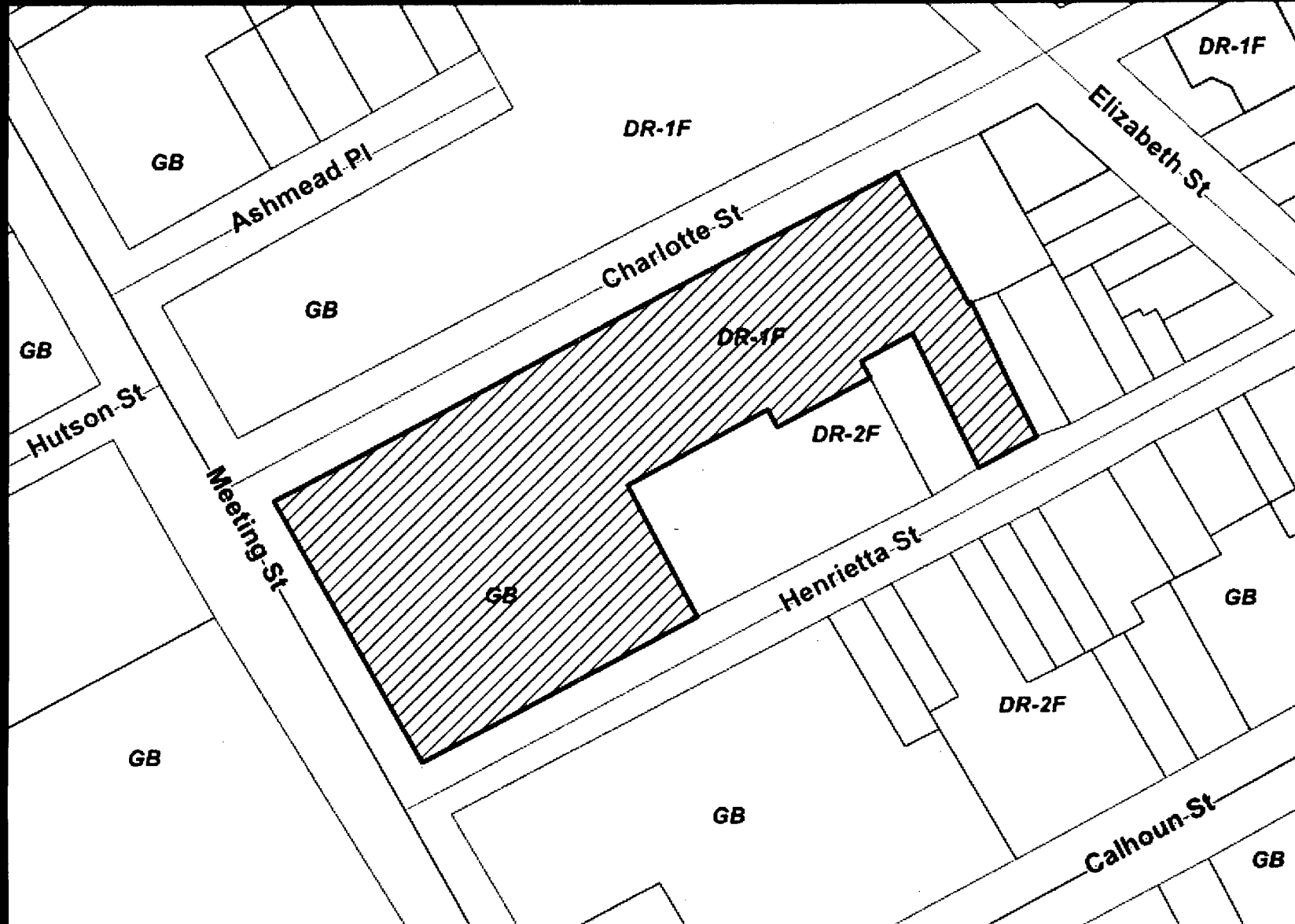
14 CHAIRMAN KRAWCHECK: I -- I -- and I
15 understand where you're coming from, and I think
16 you've made a good legal argument and maybe some judge
17 would reverse this but -- but I do think that -- that
18 what we did approve and what we approve in these
19 accommodation requests is the plan that is submitted,
20 as Mr. Batchelder argues, and I think to flip -- the
21 flip side of the coin would be, had the plan -- had
22 they presented a rooftop bar in the plans, the board
23 would have turned that down --

24 MS. SMITH: Uh-huh.

25 CHAIRMAN KRAWCHECK: -- I think without

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1 question. And I think -- you know, if you look at it
2 positively or negatively, but I -- I think that our
3 approval certainly did not allow a rooftop bar and/or
4 anything like it. I -- I -- I side with -- and I
5 think you make a good point, Mr. Appel. I really do.
6 And maybe some judge will disagree with us. It's
7 possible. But I -- I think that the Batchelder view
8 is the right view. I really do.
9 Okay. We've beaten this around a lot. Are
10 there any motions or any further discussion?
11 MR. SMITH: I'm going to move to deny the
12 application.
13 CHAIRMAN KRAWCHECK: Ms. Smith moves for
14 denial. Is there a second to that motion?
15 MR. ROBINSON: I second the motion.
16 CHAIRMAN KRAWCHECK: Mr. Robinson seconds
17 the motion. Any discussion? All in favor of the
18 motion, please say aye.
19 (All said aye.)
20 CHAIRMAN KRAWCHECK: Any opposed? Okay.
21 By vote of four to one, the motion is carried. We
22 thank you all very much.
23 MS. SMITH: Thank you.
24 (Background noise in audio.)
25 UNIDENTIFIED MALE: How you doing, sir?

334 MEETING STREET



334 Meeting Street

March 16, 2010

- BZA-Z special exception
- 120 room accommodations use in a 7-story building without rooftop
- Approved with conditions

334 Meeting Street
BZAZ Hearing
March 16, 2010

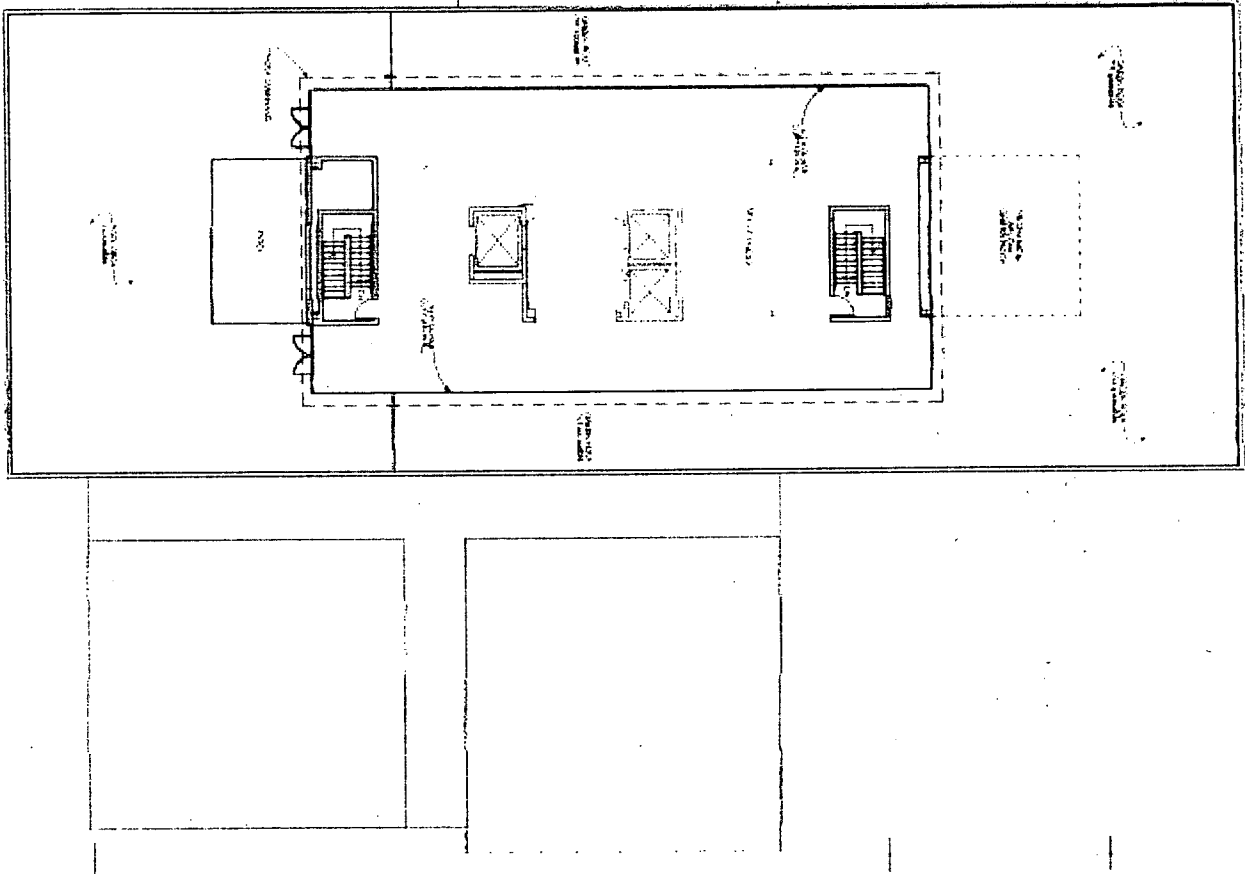
BZA-Z grants approval of the requested special exception with the following conditions:

1. Adequate parking to be provided for employees on site or in a parking garage.
2. Install buffer wall along east side property-line, at option of each neighboring property owner and provide intensive landscaping.
3. No collection of refuse from dumpsters and no commercial deliveries or pick-ups between 10 PM and 6 AM.
4. No exterior amplified music.
5. No valet parking on streets in the neighborhood.
6. No deliveries to be made on Charlotte Street, only in service area on hotel property.
7. Driveway changes shown on plans to be constructed to direct vehicles to Meeting Street.
8. Landscape improvements shown on plans to be installed.

334 Meeting Street

April 5, 2011

- BZA-Z special exception
- 161 room accommodations use in a 8-story building with rooftop
- Special exception to extend non-conf. building height
- Approved with conditions



THE FEDERAL BUILDING

224 MEETING ST
CHARLESTON SC 29403
TMS 4551303022

A102
FLOOR
PLANS

1. NAME OF THE APPLICANT
 2. ADDRESS OF THE APPLICANT
 3. CITY, STATE, ZIP CODE
 4. PHONE NUMBER
 5. FAX NUMBER
 6. E-MAIL ADDRESS
 7. WEBSITE ADDRESS
 8. BUSINESS TYPE
 9. BUSINESS DESCRIPTION
 10. BUSINESS HISTORY
 11. BUSINESS PLAN
 12. FINANCIAL STATEMENTS
 13. CREDIT RECORD
 14. REFERENCES
 15. OTHER INFORMATION

...the ... of ...

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
- (4) No exterior amplified music shall be permitted;
- (5) Valet parking shall continue to be provided for on site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
- (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
- (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
- (8) Landscape improvements shown on plans to be installed.
- (9) All activity outside on the roof shall stop at 10 pm;
- (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and
- (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.

ZONING PERMIT APPLICATION

CITY OF CHARLOTTE

APPROVED ☐ AS SUBMITTED ☒ WITH REVISIONS

APPROVED ☒ DENIED ☐

8/17/16
Zoning Administrator

This does not constitute an official City of Charlotte document.

Motor Court/ Parking/ Neighborhood Side

* Conditions

1. No exterior amplified music to Cooper River

2. All outside activity on this rooftop shall stop @ 10 PM

"RIVERS ROOM", an interior space for yoga and fitness classes.

Moveable Sign 36" high weighted bottom "Employees Only, Emergency Exit"

Motor Court/ Parking/ Neighborhood Side

8th Floor section @ outdoor area

"READING ROOM", to be CLOSED
PANTRY, to be CLOSED

EUROPEAN FAN PALMS in corner planters and middle planter.

6' planters and hedge to 5' high

Hennetta Street Side

8th Floor Roof Plan
26 July 2016

Outdoor Deck, outdoor seating area

"CITRUS CLUB", to be CLOSED

6' high mechanical screen wall and planters on outside of wall.

6' planters @ 12' o.c., hedge to 5' high

Moveable Sign 36" high weighted bottom "Employees Only, Emergency Exit"

Additional Planter to close down access to area

Charlotte Street Side

Meeting Street Side

Meeting Street Side

VIEW to Marion Square

6' planters and hedge to 5' high, typical at 12' o.c.

OUTDOOR YOGA/FITNESS AREA
30'

OUTDOOR DECK AREA
42'

hedge separation

The Dewberry

R. p. 0305

Application of Dewberry 334 Meeting Street, LLC

April 18, 2017

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pick-ups 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.

Conditions for –
BZA Approval
04.25.2011

(4) No exterior amplified music shall be permitted;

Conditions for –
BZA Approval
04.25.2011

R. p. 0308

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



Board of Zoning Appeals - Zoning
- Results -

City of Charleston

EX. 1
Page 1 of 1

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

Request special exception under Section 54-220 to allow a 161-room inn in a GB-A zone district.
(Approval granted on 3-16-10 was for a 120-room inn).

Request special exception under Section 54-110 to allow an addition that extends a non-conforming building height.

Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☐ DENIED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☒ APPROVED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/5/11

Chairman

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ DENIED. The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ APPROVED. The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued

Chairman

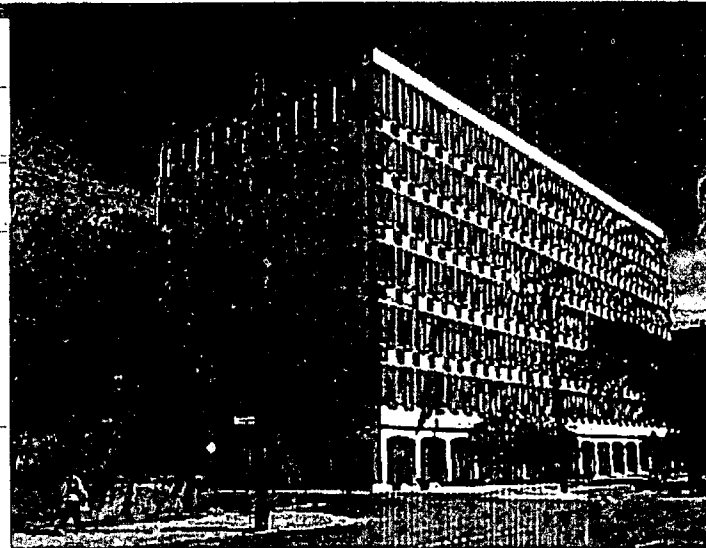
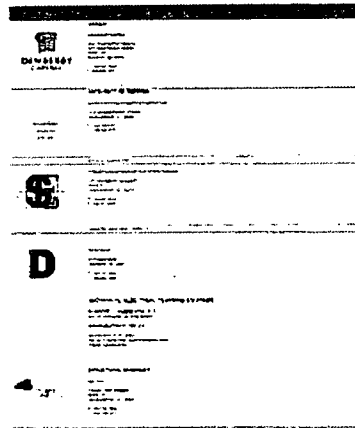
Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

1/09

R. p. 0311

BUILDING PERMIT SET - 06.27.14

**VOLUME 1: CIVIL, LANDSCAPE, ARCHITECTURAL,
INTERIORS, STRUCTURAL**



334 MEETING STREET, CHARLESTON, SC 29401

100

THE DENTISTRY
CHALLENGE

3000-1

06272014 – 8th Floor

mc miller porden smith

R. p. 0312

THE DENBERRY
CHARLESTON

**RIGHT LEVEL,
FLOOR PLAN**

A108

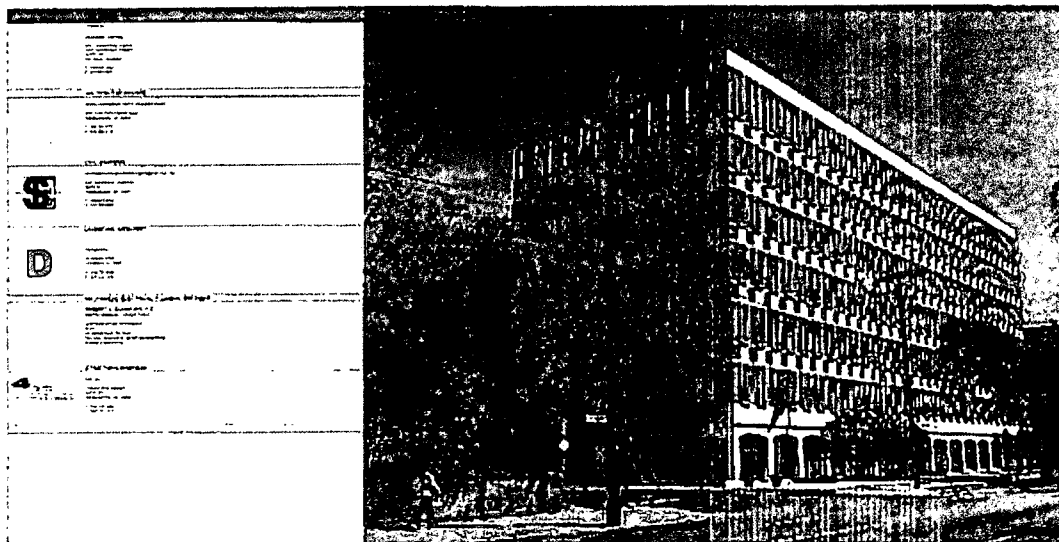
R. p. 0313

CHARLESTON

CHARLESTON
BUILDING PERMIT SET - 06.27.14

BULLETIN #6 - 04.24.15

VOLUME 1: CIVIL, LANDSCAPE, ARCHITECTURAL
AND STRUCTURAL



334 MEETING STREET, CHARLESTON, SC 29401

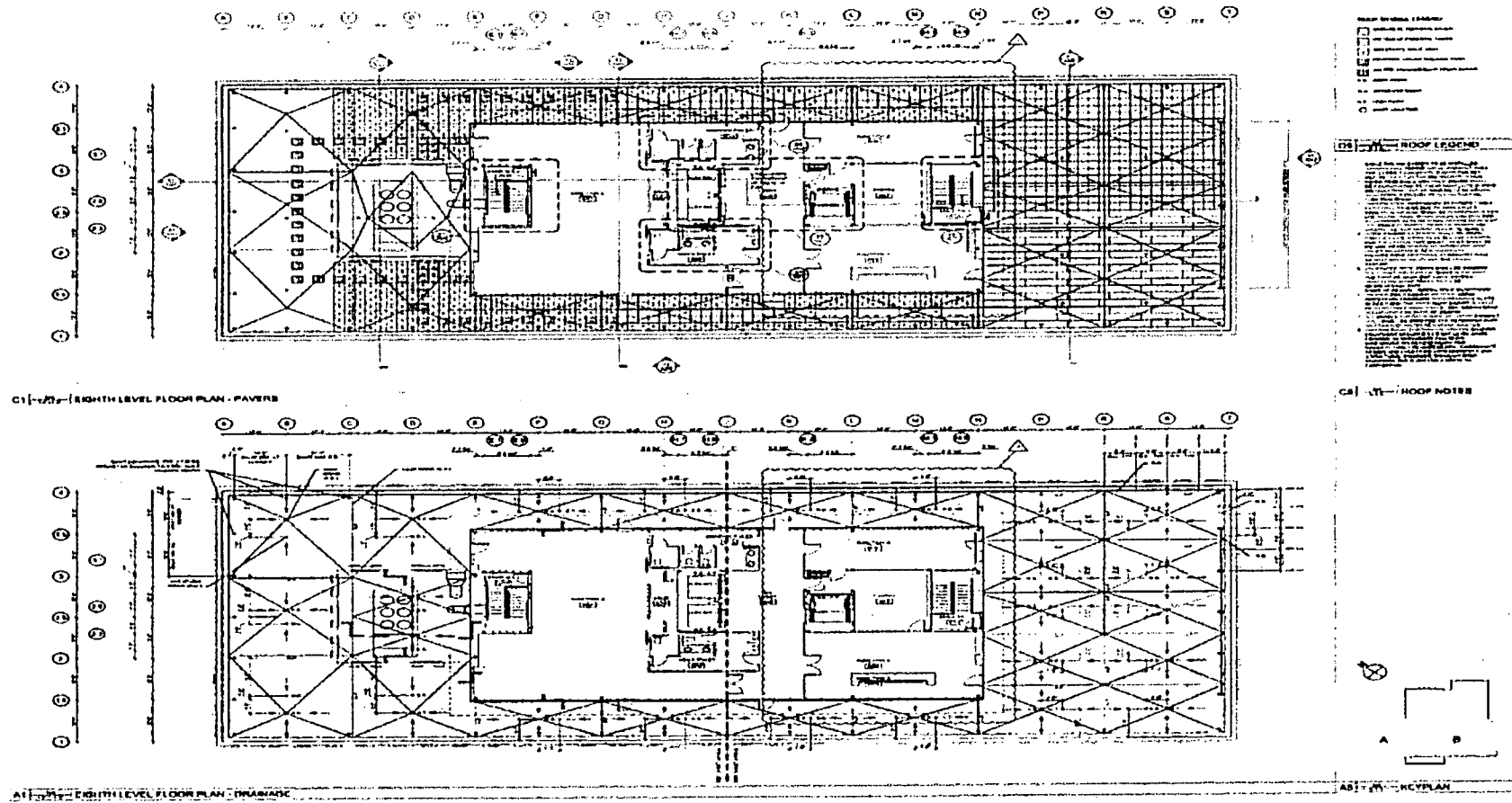
[illegible]

THE D. W. HARRY
ESTABLISHMENT

G000-1

Cover Sheet and 8th Floor Plan

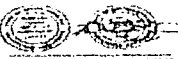
04252015



McMillan/Parsons/Smith
ARCHITECTS
1000 15th Street, N.W.
Washington, D.C. 20004
Tel: (202) 462-1000
Fax: (202) 462-1001

R. p. 0314

THE DOWBERRY
CHURCH
PARTMENT G. AREA P. 10

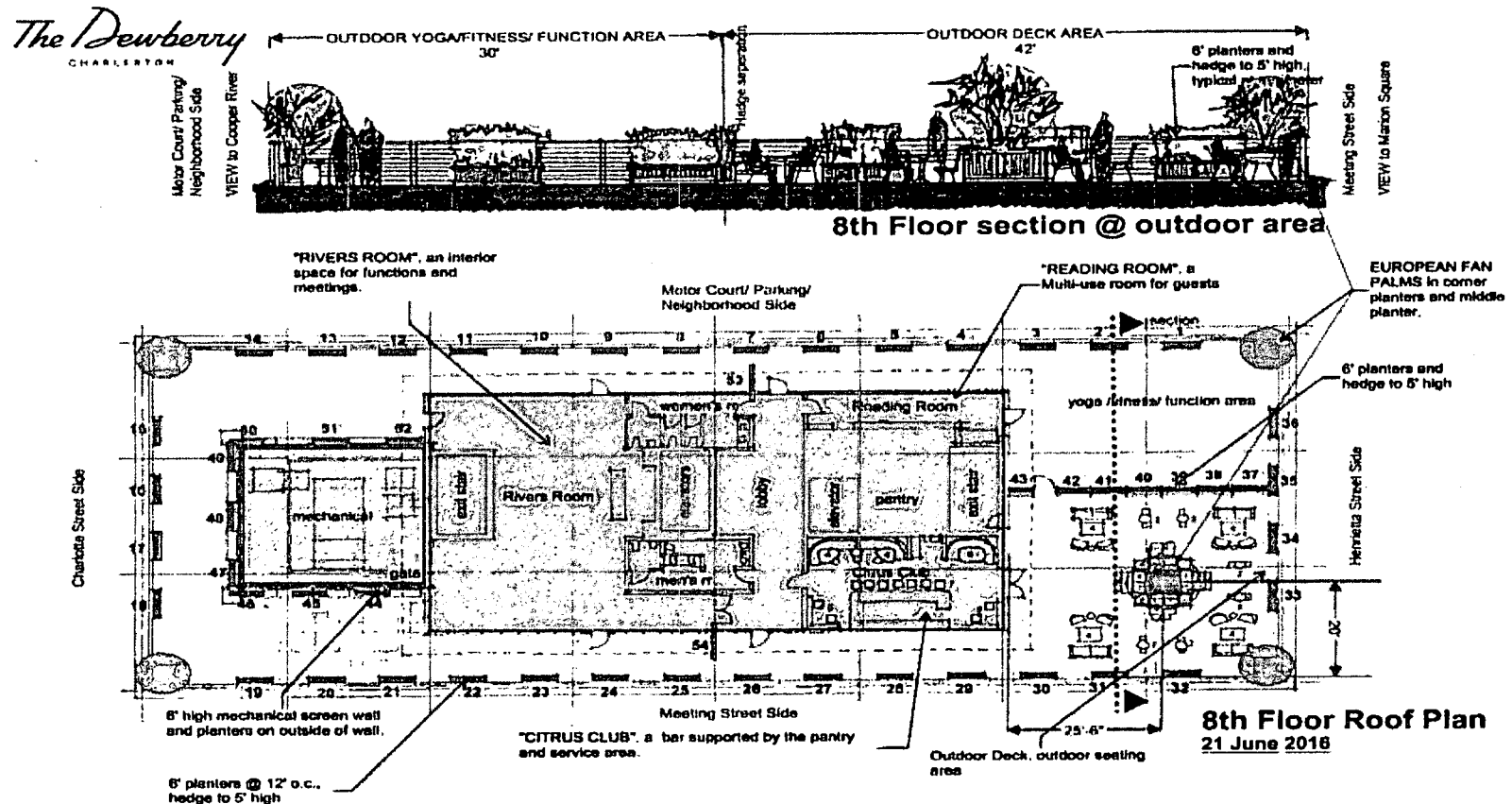


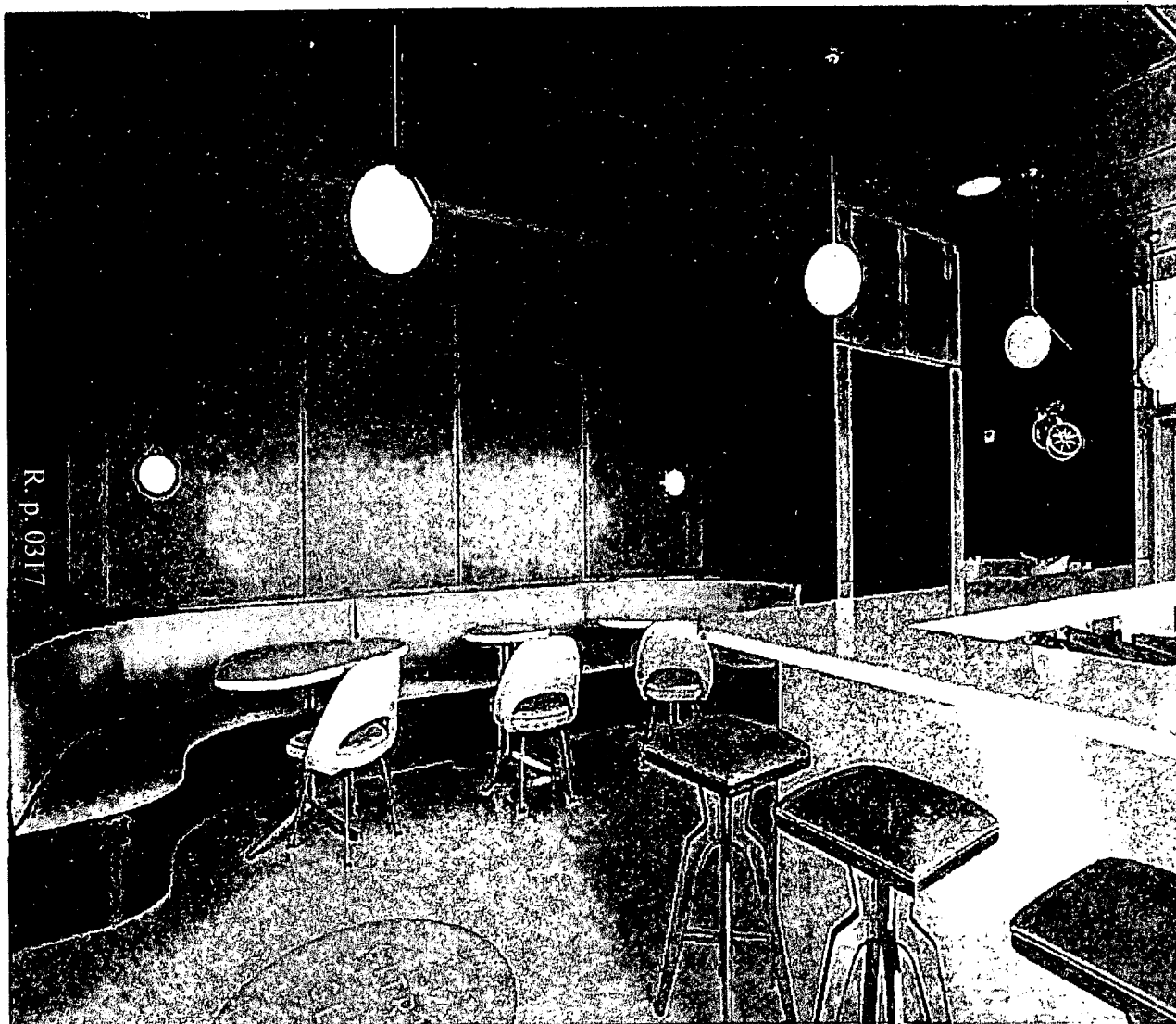
EIGHTH LEVEL
FLOOR PLAN
A108

R. p. 0315

[illegible]

Exhibit 5 - 8th Floor Plan 06212016-2 Clean Showing Requested Uses and Access

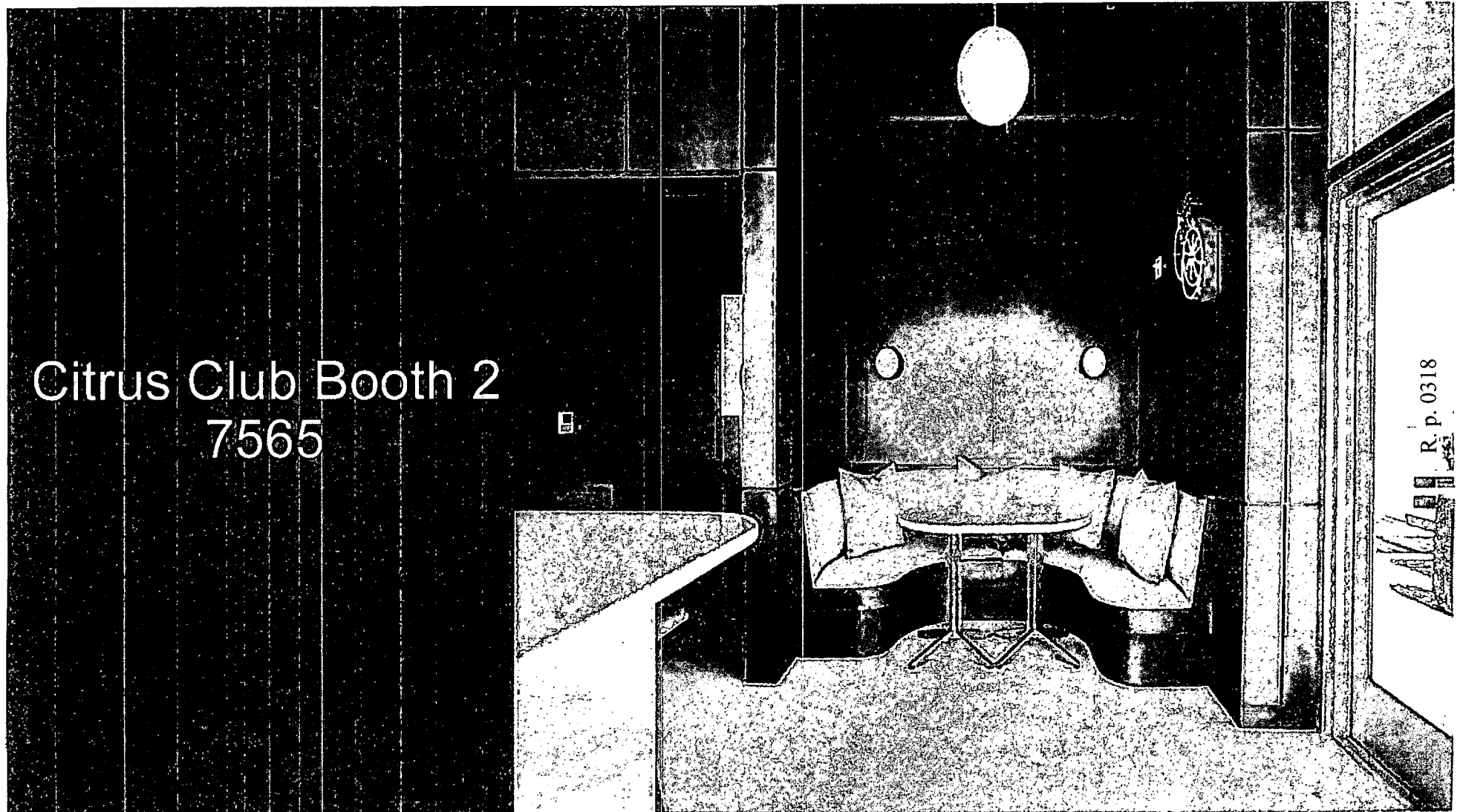




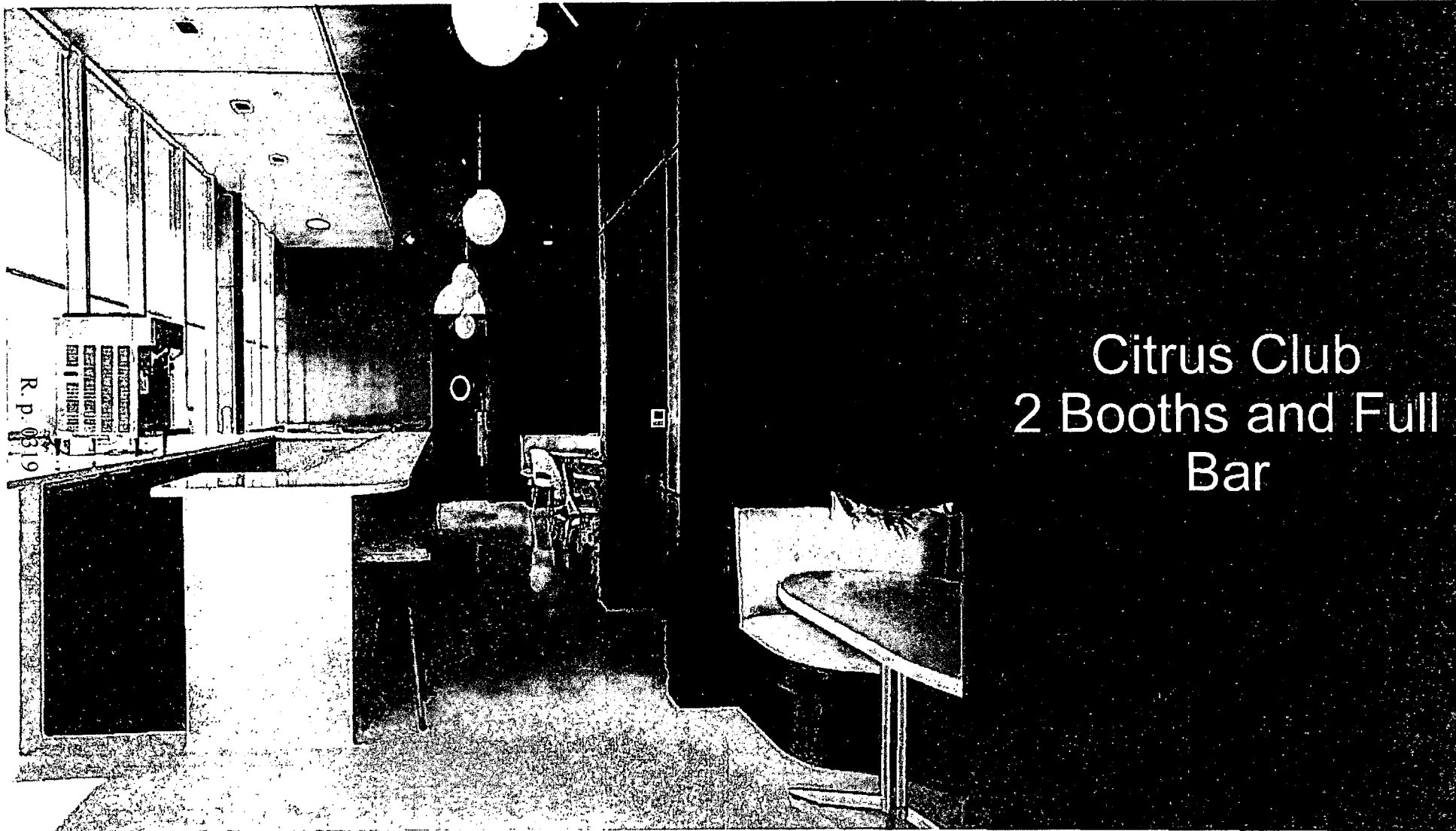
R. p. 0317

Citrus Club Booth 1
and Corner of Bar

Citrus Club Booth 2
7565



R. p. 0318

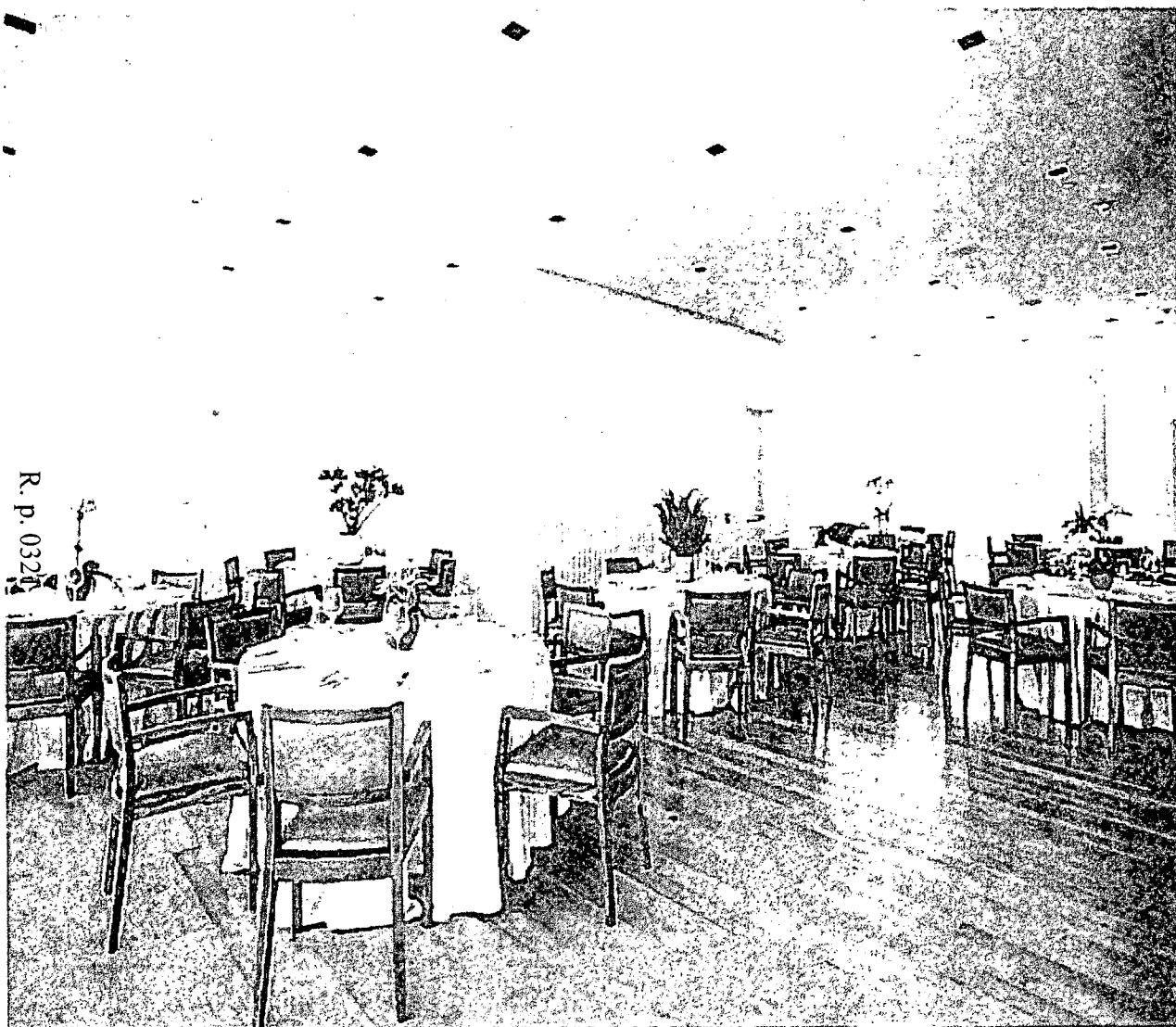


Citrus Club
2 Booths and Full
Bar

Rivers Room
Entrance

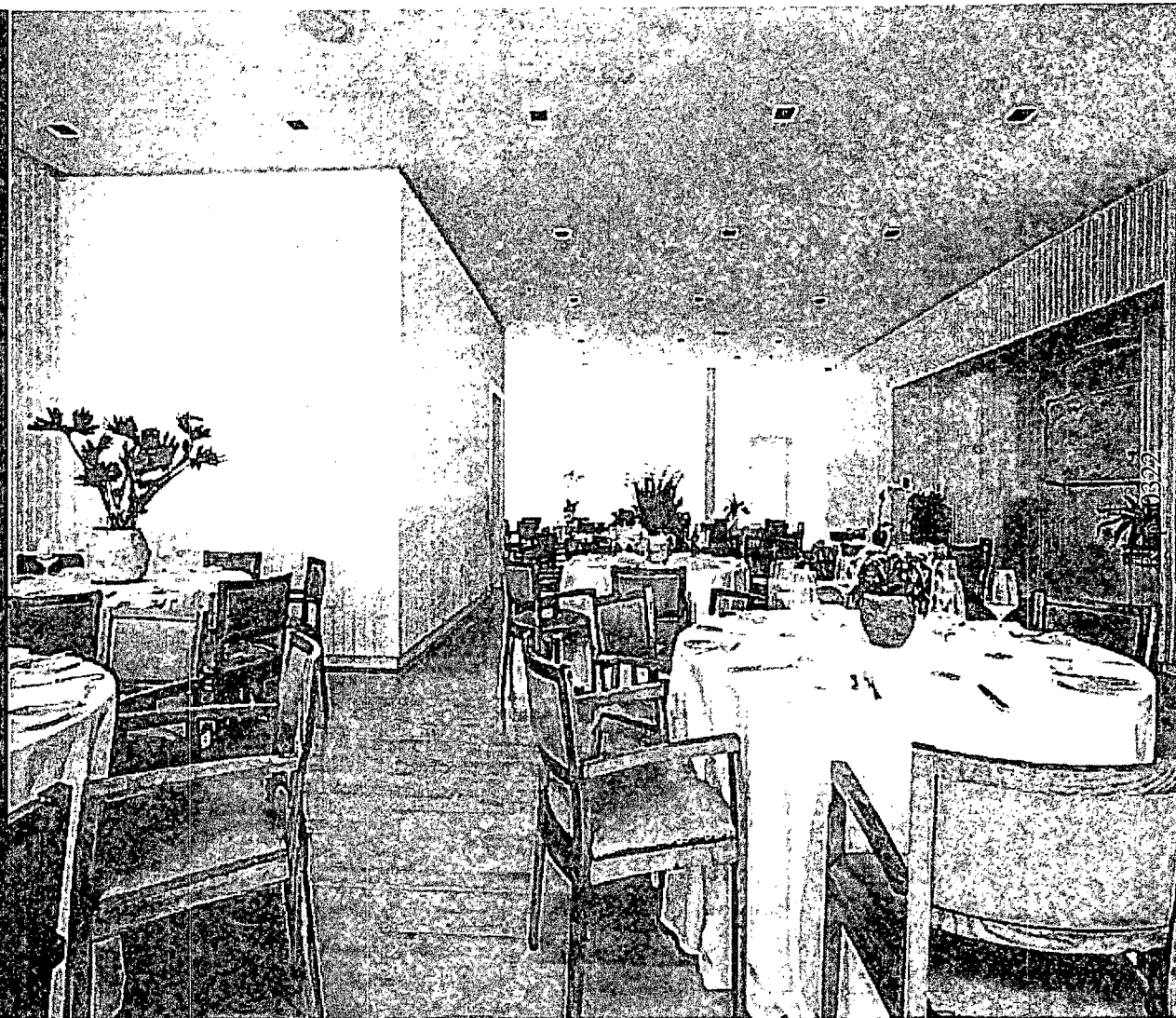
RIVERS ROOM

R. p. 0320



Rivers Room
Facing North from
Entrance

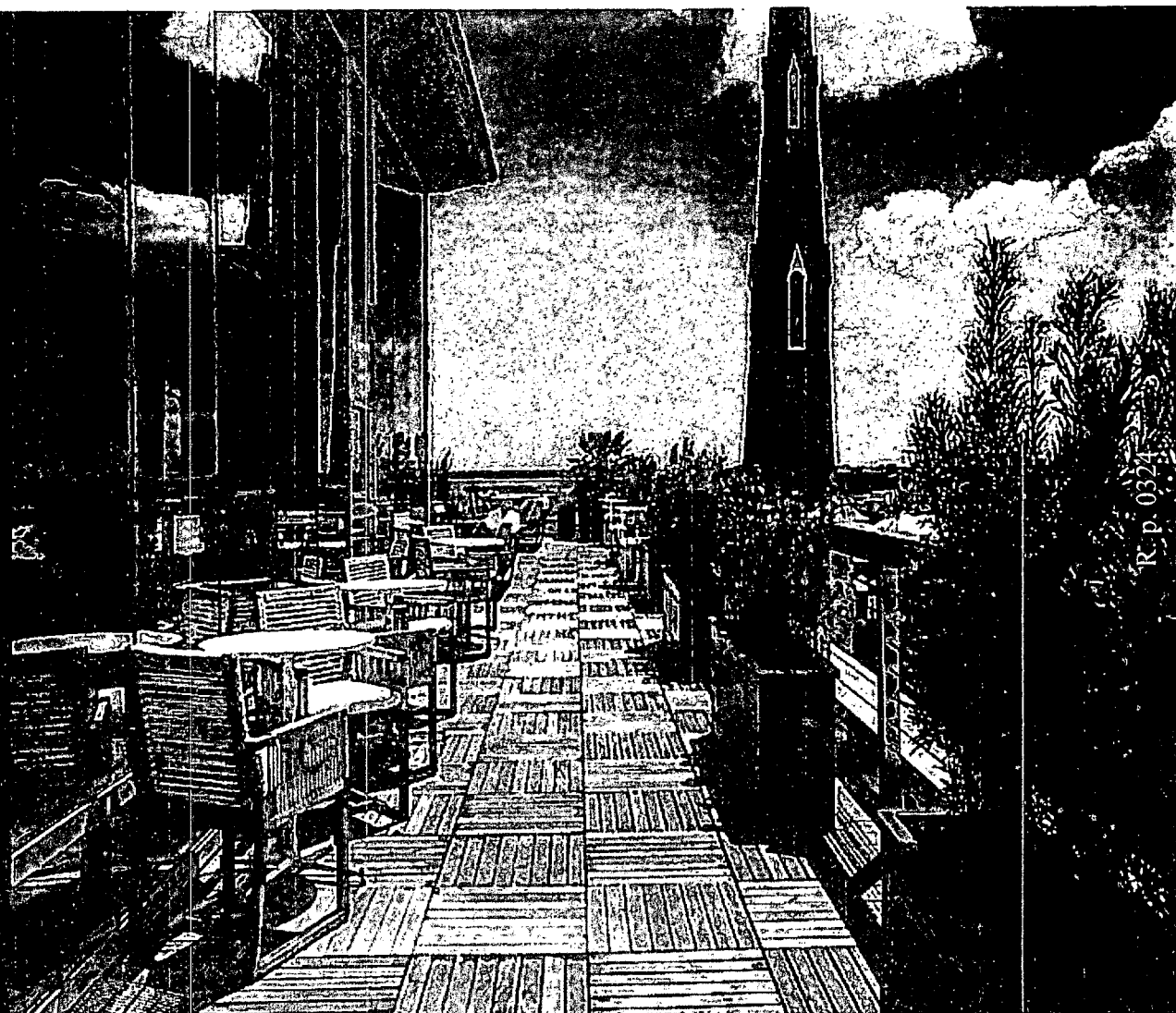
Rivers Room
Facing East from
Entrance

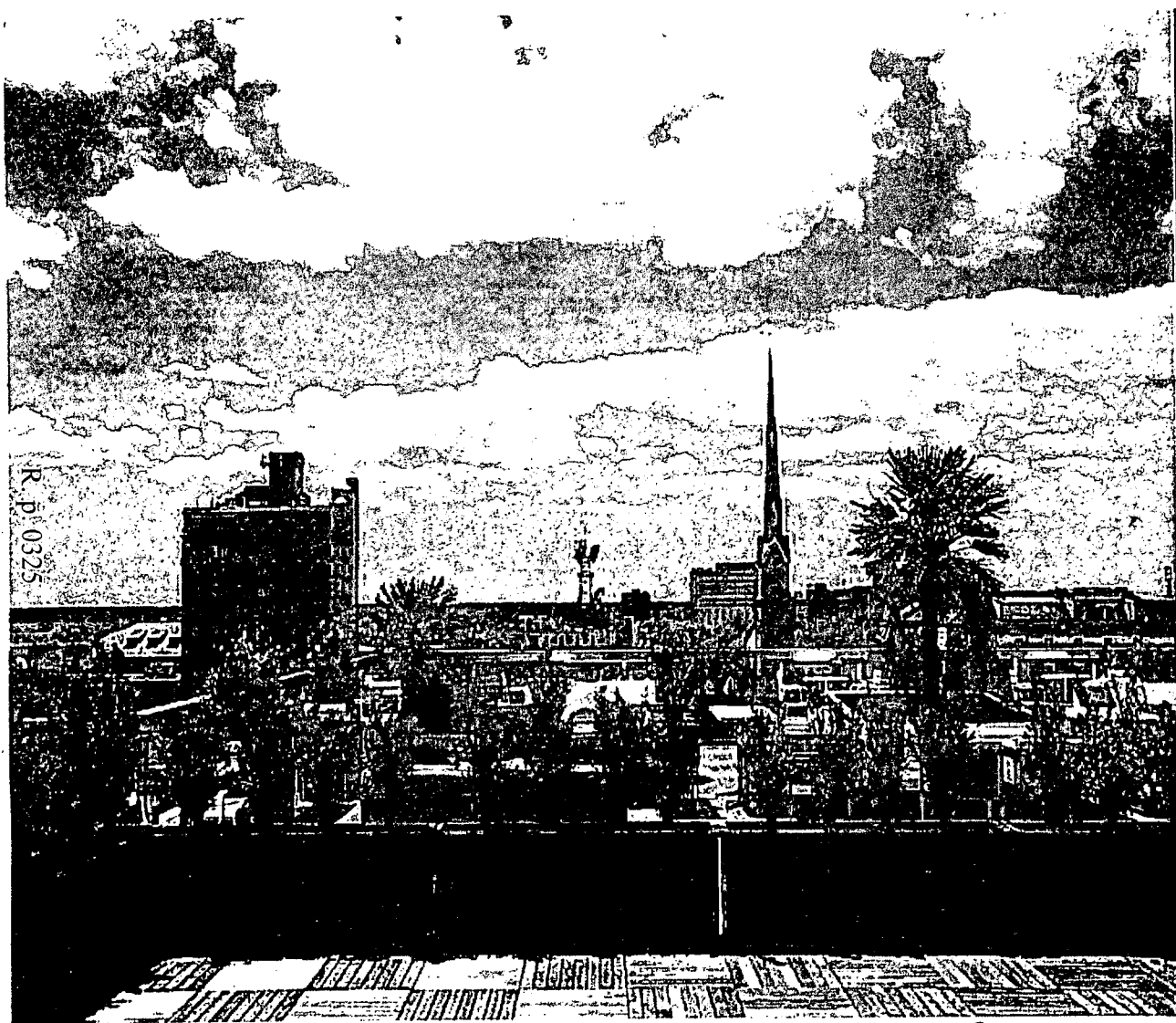




Terrace Southerly
View from Door to
Citrus Club

Terrace West Side





Terrace Looking
West Across
Planters and
Seating Quadrant

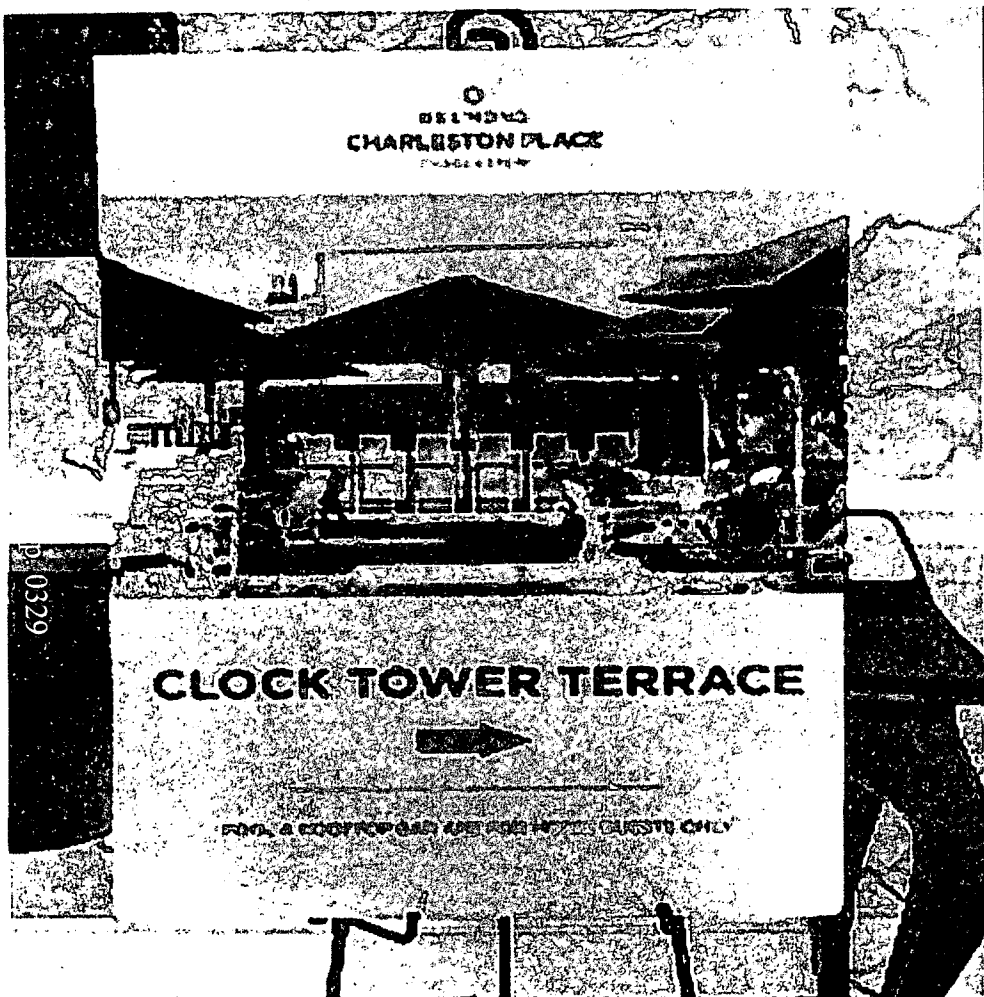
Bohemian –
Eleve Terrace



Eleve Side Terrace

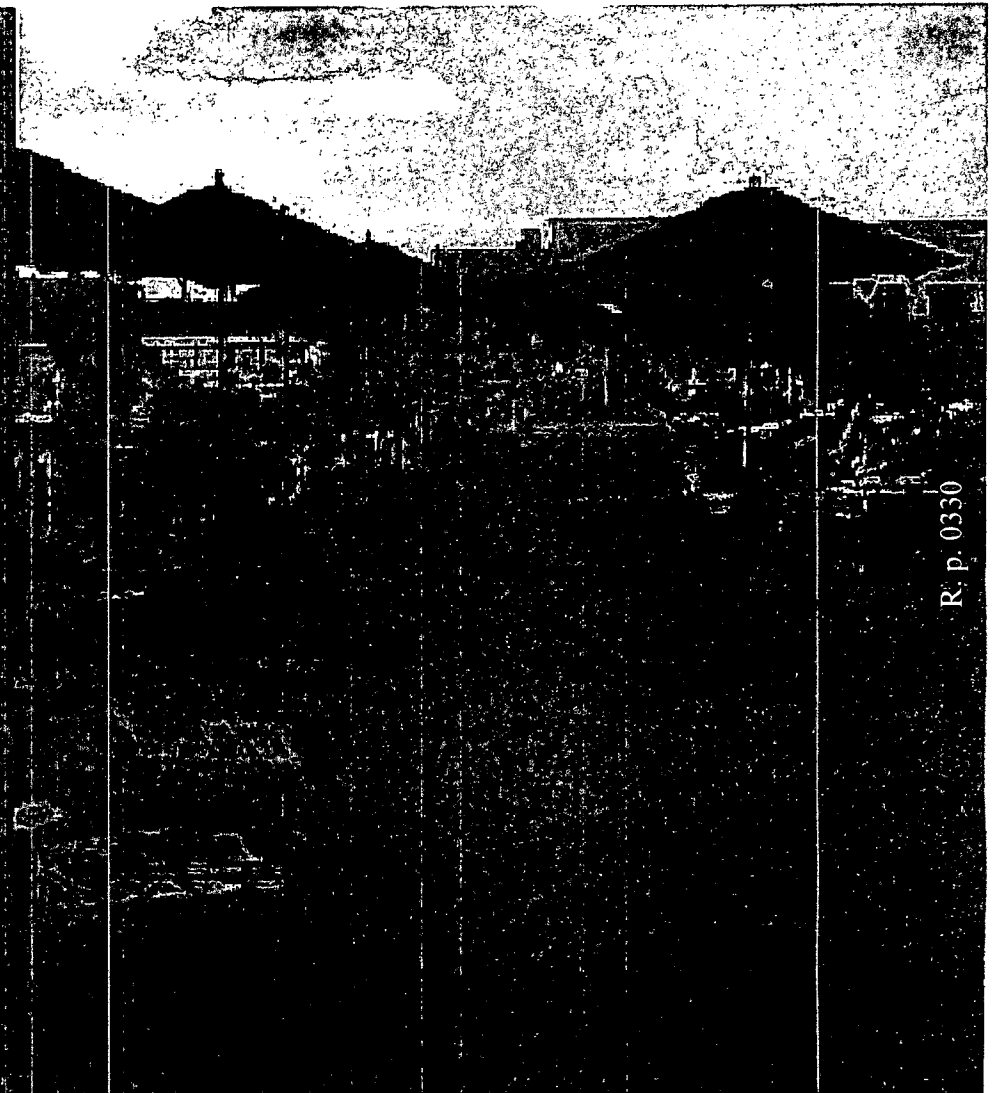


Speaker Eleve



Sign for Clock Tower
Terrace

Charleston Place Clock Tower Terrace



R. p. 0330



Bar to Outside Restoration

Outside Deck Dining Restoration

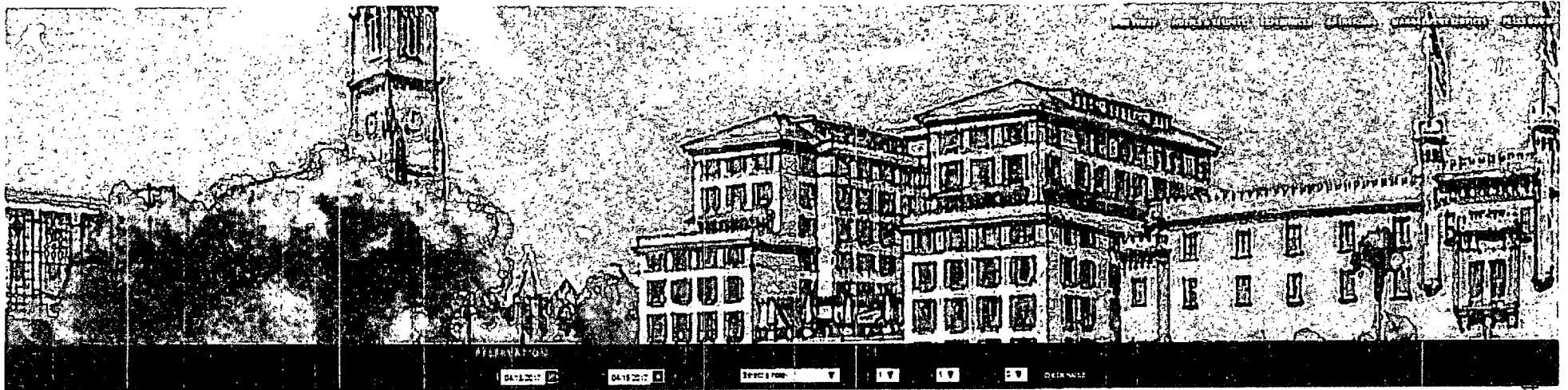


R. p. 0332



R. p. 0222

Outside Lights and Speakers Restoration



HOTEL BENNETT



Hotel Bennett, the South's Grandest New Luxury Hotel, to open in Charleston, SC, in Fall 2017

[View our new press release](#)

views of Charleston's famed park, and a stylish bar and lounge. The hotel will also include a spectacular rooftop pool with cabanas and bar, a luxury spa, a French patisserie, and a variety of grand event and flexible meeting spaces.

Accessory Use Definition

Sec. 54-120. - Definitions.

Accessory Use. A use of land or of a building or portion thereof customarily incidental and subordinate to the principal use of the land or building and located on the same lot with the principal use.

Board of Zoning Appeals-Zoning - 249 Meeting Street
February 5, 2013

At the meeting of the Board of Zoning Appeals-Zoning (BZA) held on February 5, 2013, the Board voted to approve a special exception under Section 54-220 for a 50-unit accommodations use with the following conditions:

1. Parapet wall surrounding the garden terrace on the rooftop, as shown on "Roof Top Restaurant Level" plan, shall be at least 5 feet in height.
2. Hours of operation for the garden terrace (outdoor area) shall be restricted to no later than 12 midnight on Friday and Saturday nights and 11 pm on other nights, and there shall be no exceptions to these restrictions on holidays for federally chartered banks.
3. Conditions submitted by the applicant, The Kessler Collection, in their letter of agreement with the Historic Ansonborough Neighborhood Association (HANA) dated February 4, 2013, except for the restriction on hours of operation listed in Condition #6 of the letter which is modified as described above.

Attachments

Page 2

Page 3 and 4

Board of Zoning Appeals-Zoning Results
The Kessler Collection letter of agreement with the Historic Ansonborough Neighborhood Association (HANA) dated February 4, 2013

BZAZ Decision 249 Meeting Street – Conditions

R. p. 0336



February 4, 2013

TO: Historic Ansonborough Neighborhood Association

1. No live outside music, microphones or other audio devices on the exterior garden terrace on the fourth floor of the hotel. Kessler shall endeavor to keep the doors to the restaurant/bar area closed when there is loud music playing indoors except for normal operational use. Loud is defined as above normal conversational speech levels.

2. No televisions or video monitors on the garden terrace.

3. There shall be no outside bar on the garden terrace.

4. Permanently mounted directional outside speakers on the garden terrace shall be positioned so sound shall be directed back toward the building. Speakers shall not emit sound that is higher than normal conversational speech level. Kessler agrees to keep the sound levels of speakers on the roof at or below a normal conversational level to create background music, even if such music is being played live by a musical group performing in the restaurant/bar area.

~~Thursday through Saturday 10:00 p.m. to 1:00 a.m. (a 1-hour decrease from the allowed ordinance). This means the garden terrace shall be off limits to customers and staff after the above stated hours except for ingress/egress and post-shift up-keep by staff (which will be conducted as efficiently and quietly as possible). Exceptions to these hours may be made on holidays recognized by federally chartered banks. On those excepted days, the applicable ordinance laws shall be followed.~~

Agreed Upon Conditions
February 4, 2013
Page 2

7. Furniture, floor coverings, plantings and other sound absorbing materials shall be used, where feasible. The furniture arrangements shall be such to keep the sound from voices leaving the roof to a minimum. The Kessler Collection shall share details of the sound mitigation with the President of HANA as the project progresses.

8. Applicant shall abide by the City of Charleston noise ordinance as it pertains to the proposed hotel project.

9. Kessler will remain neutral on the matter of two-way vs. one-way traffic flow on Wentworth Street.

10. Kessler shall instruct the contractor to meet with HANA prior to demolition and construction activities to show them the delivery paths and schedules to expect. The contractor shall consider suggestions from HANA and incorporate neighborhood impact mitigation where feasible.

11. Kessler agrees to take appropriate preparatory action prior to demolition to ensure the continued health, safety and welfare of all surrounding property.

Subject to the transfer of 249 Meeting Street to The Kessler Collection or related entity, the conditions underlined above shall be recorded in the County of Charleston RMC office as restrictions that shall run with the land.

This document has been drafted with the continuing dialogue with the HANA Board. It is our understanding that with this document the HANA Board shall not oppose the application by McAlister-Togant Wentworth Meeting LLC/The Kessler Collection of request for special exception to allow a 50 room-unit accommodations use in the GB-A Zone District for 249 Meeting Street. We shall adhere to the above agreed upon restrictions as a condition of approval.

Sincerely,



Mark W. Kessler
President & COO – Western Operations and Asset Management
The Kessler Collection

BZAZ Decision 249 Meeting Street – Conditions

R. p. 0338

Mitchum Letter Dewberry 8th Floor



Charleston Board of Zoning Appeals - Zoning
2 George St
Charleston SC, 29401

April 17, 2017

Re: The Dewberry

Dear members of the Charleston Board of Zoning Appeals,

I and my company, ETI, provided the sound system for the entire Dewberry hotel. It has come to my attention that there are many questions about the design and nature of the sound system on the 8th floor, rooftop area, of the Dewberry Hotel. In particular, I understand that neighborhood residents are concerned about the number of speakers and their placement around the eighth floor rooftop terrace.

To help clear the air, I wanted to let you know that this system, designed by Hammond Kardon, the foremost designer of systems like this, is intended to provide for soft ambient background music. The Patio seating area on the Southwest corner of the rooftop terrace contains two sets of speakers with two column speakers on the wall of the Citrus Room and two speakers in the corner of the open area(s). The larger speaker in the southwest corner of the terrace is a low-volume subwoofer that faces the sitting area to offset and balance the music from the other speakers. Additionally, there are two speakers located in each of the walk way areas leading from the Rivers Room to the Patio Area.

It is a common misconception that having several speakers equates to a louder sound being produced in an area. It is not necessarily so. That was not the purpose of the design of the speaker system we installed. The design for background music, typically adjusted to approximately 40db (around the level of the human voice or slightly lower), is accomplished by having several speakers all turned down to a low volume. This provides for an even, low volume, experience without having to amplify a handful of speakers to higher volume levels in order to provide coverage of a given area. When it comes to background music, the more speakers, the lower the individual volume, and the more even the sound throughout.

This same design of wide coverage with several speakers, all individually producing a low volume, is evident throughout the Dewberry property and provides for part of the pleasant experience one encounters as you stroll from one area of the hotel to another. For instance, we have installed eighty speakers on the main floor yet I doubt anyone who has visited has found the music obtrusive or loud or possibly even noticed it. That is because of the presence of many speakers throughout at low volume - same concept and function as the speaker system on the rooftop terrace.

Each zone is independent and can be adjusted for the type of music and for the level of the sound. Additionally, the 8th floor includes speakers that, due to the raised floor, can very easily be relocated to better accommodate the desires of the client to fine tune the overall ambient

Mitchum Letter Dewberry 8th Floor



music. We understand that The Dewberry intends to agree to keep the volume on the rooftop terrace at these background music levels at all times. We 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Mitchum", is written over a series of horizontal lines.

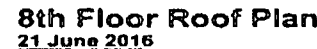
Mark Mitchum
President
ETI

04/17/17

3870 Leeds Ave, Suite 107 North Charleston, South Carolina 29405
843.744.0150 Fax: 843.744.0636 Toll Free 800.968.0461
www.etisc.com

From Idea To Reality

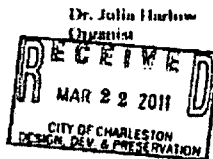
R. p. 0341



**The Second Presbyterian Church
342 Meeting Street
Charleston, South Carolina 29403**

The Rev. Cress Darwin
Pastor

March 18, 2011



Board of Zoning Appeals
City of Charleston
c/o Ms. Penny Ashby
Zoning Division
75 Calhoun St
Charleston, SC 29401

Re: Federal Building/Dewberry Hotel Development

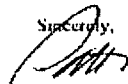
Dear Boardmembers:

Please know I am authorized by the Session of Second Presbyterian Church to represent the Church in matters involving the referenced property adjacent to the Church location of 342 Meeting Street.

Plans for the renovation of the property were presented by Gibson and Guess, Architects, to members of the Second Presbyterian Church on January 20, 2011. The Church had several suggestions and inquires as to the plans presented. However, no update to the presentation has been offered to the Church.

One area of particular concern is the screening of the parking for the development property. The Church is concerned about the negative visual impact of vehicles. The Church front portico is in direct line of site to the proposed parking. We request a solid visual barrier of adequate height to screen parking for the development.

The Church looks forward to working with the responsible parties to facilitate a re-development that is not a detriment to the Church and the adjacent residential neighborhood of Mazyck-Wraggboro.

Sincerely,


Patterson S. Smith

Phone (843)723-9237

Fax (843)723-9244

www.secondpresbyterianchurch.org

Letter from 2nd Presbyterian
03082011

R. p. 0342

Application of Dewberry 334 Meeting Street, LLC

April 18, 2017



Application for Variance, Special Exception, Reconsideration, or Extension
to the Board of Zoning Appeals – Zoning (BZA-Z)

Page 1 of 2

City of Charleston

Instructions – Submit this application, along with the required information and fee, to the Permit Center at 2 George Street. **Applications are due by 12 Noon on the deadline date and must be complete to be accepted and placed on an agenda.** A sign will be posted on the property, and a public hearing will be conducted by the Board of Zoning Appeals – Zoning. **Permits authorized by the Board cannot be issued during a five (5) business day appeal period following the decision of the Board, except for use variances, the appeal period shall be fifteen (15) calendar days.** An appeal to the Board during this appeal period stays all further action on the application.

THE APPLICANT HEREBY REQUESTS:

- ☒ A Variance and/or Special Exception as indicated on page 2 of this application.
☐ Reconsideration of a decision of the Board or action of a zoning official (attach Appeal form).
☐ Extension of an unexpired Variance and/or Special Exception approval.

MEETING DATE REQUESTED: April 18, 2017

Property Address 334 Meeting Street TMS # 459-13-03-022

Property Owner Dewberry 334 Meeting Street, LLC Daytime Phone 843-727-2208

Applicant Dewberry 334 Meeting Street, LLC Daytime Phone 843-727-2208

Applicant's Mailing Address c/o G. Trenholm Walker, PO Box 22167, Charleston, SC 29413

E-mail Address Walker@wgflaw.com

Relationship of applicant to owner (same, representative, prospective buyer, other) Representative/Attorney

Zoning of property BR and DR-1F

Information required with application: (check information submitted)

- ☒ Scaled plans or plats, including elevations, showing the variance(s) or special exception(s) being requested (3 sets)
☐ For new construction or additions within a flood zone, show HVAC units and platform on scaled plans
☒ Scaled floor plans with rooms labeled and the total floor area for each dwelling unit noted are required for all density variances and building additions, unless exempted by the Zoning staff (3 sets)
☐ Plans or documents necessary to show compliance with special exception requirements (3 sets)
☐ Check, credit-card or cash (make checks payable to the City of Charleston)
☐ YES or ☒ NO - Is this Property restricted by any recorded covenant that is contrary to, conflicts with or prohibits the proposed land use encompassed in this permit application? § 6-29-1145 of the South Carolina Code of Laws

Optional but very helpful information:

- ☐ Photographs
☐ Letters or petitions from neighbors or organizations directly affected by your request

I certify that the information on this application and any attachments is correct, that the proposed improvement(s) comply with private neighborhood covenants, if there are any, and that I am the owner of the subject property or the authorized representative of the owner. I authorize the subject property to be posted with a notice of the Board hearing and inspected.

Applicant [Signature] Date March 20, 2017

For office use only		
Date application received	<u>3/20/17</u>	Time application received <u>11:42</u>
Staffperson	<u>[Signature]</u>	Receipt # <u>513878</u>

RECORD P. 118

R. p. 0344

For **Variance** requests, applicants should list the specific variance(s) being requested and, if possible, explain how the variance test that follows is met (add as an attachment if necessary):

Variance Test: The Board of Zoning Appeals-Zoning is authorized to approve a variance from the requirements of the Zoning Ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the Board makes the following findings:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. The authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

In granting a variance, the Board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare. (SC Code of Laws § 6-29-800)

For **Special Exception** requests, applicants should list the specific approval(s) being requested and include documentation to demonstrate compliance with the relevant special exception requirements of the Zoning Ordinance, such as § 54-110, § 54-206, or sections in Article 5 (add as an attachment if necessary):

Applicant seeks to amend existing special exception for hotel to add small bar to limited uses on top floor and to change closing time from 10 PM to midnight. See attached explanation.

All approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Article 9, Part 5 of the zoning ordinance. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

Attachment to Application for Amendment to Special Exception
The Dewberry – TMS 459-13-03-022

On April 5, 2011, the Board of Zoning Appeals – Zoning granted the Applicant a special exception under Section 54-220 to allow a 161-room inn in a GB-A zone district and a special exception under Section 54-110 to allow an addition that extends a non-conforming building height. A copy of this BZA approval is attached hereto as Exhibit 1. The special exceptions were subject to the list of conditions attached to the approval, including the additional handwritten condition that any activities to occur on the open rooftop must end at 10 PM. The floor plan for the rooftop that was approved showed the entire interior area as “Spa/Fitness” with the exterior rooftop to the South shown as a swimming pool and pool deck and the remainder of the exterior rooftop shown as primarily an inaccessible green roof. A copy of this initial floor plan for the rooftop that was approved is attached hereto as Exhibit 2.

Amendment to Special Exception to Add Uses to Rooftop

After receiving the engineering and cost estimates for the swimming pool, the Applicant decided to eliminate the swimming pool and to modify the floor plan for most of the rooftop, also called the eighth floor. The Applicant 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. In place of the pool and pool deck, the Applicant 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. The Applicant 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. The Applicant moved the spa to the second floor of the hotel.

The Applicant constructed the eight floor and rooftop area according to the modified floor plan. A copy of the modified floor plan is shown on the zoning permit for the eighth floor attached hereto as Exhibit 3. According to the terms of the zoning permit (Exhibit 3 hereto) the Applicant was prohibited from using the Citrus Club, pantry, and reading room since their uses vary from those uses in the 2011 special exception approved by the BZA-Z. Also, the Applicant has been prohibited from using the paver pathway in the Northeast corner of the rooftop.

This Application seeks to modify the 2011 special exception to allow the existing floorplan and proposed uses for these three areas on the interior of the eighth floor. The proposed modified uses for the eighth floor are all accessory to hotel use, are typical uses for a hotel of this nature, and completely conform to these same uses already in operation in other locations in the hotel. Rather than expanding the uses already approved for the hotel, the application simply devotes three small areas on the eighth floor to those same existing uses.

This application also seeks to modify the approved uses of the exterior terrace on the rooftop. The Applicant seeks approval to use the terrace on the South side of the rooftop for an exterior yoga fitness area and for a small outside sitting area associated with the Citrus Club rather than for a pool and pool deck. These two uses are both extensions of the uses on the interior of the eighth floor. Applicant will not allow any amplified music on the rooftop terrace in either location nor allow any activities in these two outside terrace areas that might be disruptive in any way.

The Applicant also seeks permission for access to the exterior paver walkway around the remaining portions of the exterior rooftop that has been restricted to "Employees Only Emergency Exit," as shown on Exhibit 3. At this time there is no reasonable basis for the restriction. Upon information and belief, the prohibition of use of the Northeast corner was the result of concerns about Second Presbyterian Church. The Applicant has been in touch with the pastor and believes there is no objection to allowing persons on this area of the rooftop.

Amendment to Special Exception to Extend Hours of Operation until Midnight

The Applicant also seeks to amend its Special Exception to allow the entire exterior area of the rooftop terrace to be opened until midnight rather than 10 PM as specified in the conditions to the Special Exception. The sitting area for the Citrus Club is on the Marion Square side of the building. Planters and a hedge that are five feet tall separate this outside sitting area from the outside yoga fitness area on the Southeast corner of the terrace. Since there are no immediate residential neighbors on the Southwest corner of the rooftop and there will be no amplified music, there will be no impact to the residential areas far to the East of the hotel. Allowing the Citrus Club and associated sitting area to be open until midnight will be more in keeping with the hours for this type of use and would avoid having to run hotel guests off the rooftop terrace prematurely at 10 PM. Additionally, allowing pedestrian access to the walkway around the remainder of the building will not have any impact on the neighborhood as well. The extension of the hours until midnight for the exterior of the rooftop will not result in any harm to the residential neighborhood since there will be no negative impact from any of the limited activities on the exterior rooftop at any hour.

Building elevations: For purposes of completing the application, attached hereto as Exhibit 4 are the elevations of the building that were submitted with the 2011 application. These remain unchanged.

EXH 1



City of Charleston
South Carolina

Joseph P. Riley, Jr.
Mayor

Timothy J. Keane
Director

Department of Planning, Preservation and Sustainability

April 25, 2011

Gibson Guess Architecture
12-B Vanderhorst Street
Charleston, SC 29403

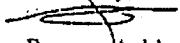
Re: 334 Meeting Street (TMS# 459-13-03-022)

Dear Mr Wingfield:

Please see attached documents of the decision from the April 5, 2011 meeting of the Board of Zoning Appeals-Zoning concerning the above referenced application.

If I may be of any further assistance, please do not hesitate to contact me at (843) 724-7177.

Sincerely,


Pennyc Ashby
Zoning Planner

Enclosures

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pickups shall be limited to between 8 am and 6 pm;
- (4) No exterior amplified music shall be permitted;
- (5) Valet parking shall continue to be provided for on site parking of cars as long as this building is operated as a hotel and no valet parking of cars on streets in the neighborhood shall be permitted;
- (6) No deliveries to be made on Charlotte Street, only in service area on hotel property;
- (7) Parking lot driveways on Charlotte Street and Henrietta Street shall be modified and signed to direct vehicles to Meeting Street;
- (8) Landscape improvements shown on plans to be installed.
- (9) All activity outside on the roof shall stop at 10 pm;
- (10) Additional buffering around the rooftop deck shall be provided at the roof edge; and
- (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.



City of Charleston

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

Request special exception under Section 54-220 to allow a 161-room inn in a GB-A zone district.
(Approval granted on 3-16-10 was for a 120-room inn).

Request special exception under Section 54-110 to allow an addition that extends a non-conforming building height.

Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions

☐ DENIED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☒ APPROVED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/5/11 Chairman [Signature]

8 AM - 6 PM

actual - meeting 10 PM

Public Hearing approved. (See attached)

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ DENIED. The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ APPROVED. The Board concludes that:

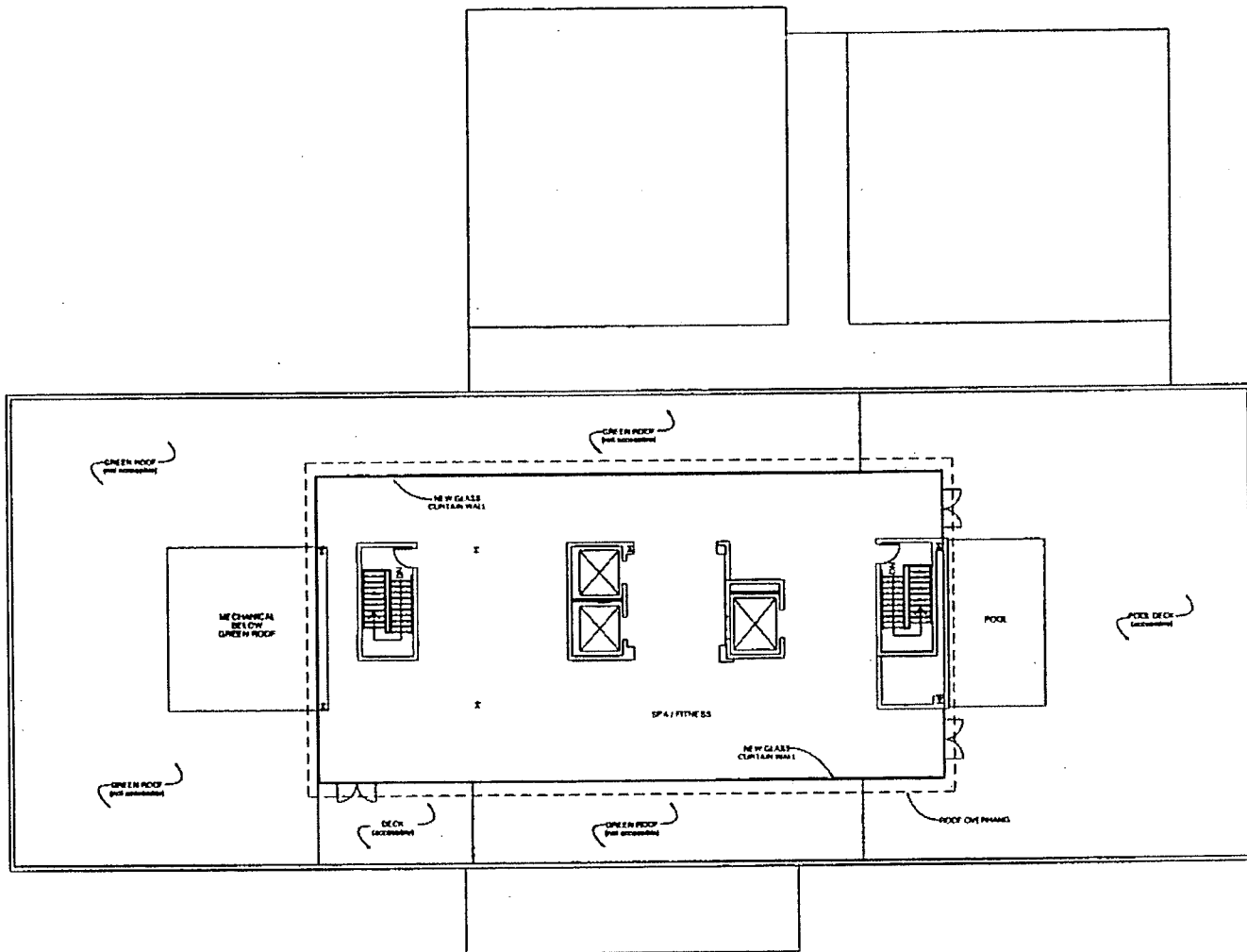
1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

R. p. 0352



ROOF PLAN - PROPOSED
SCALE: 1/8" = 1'-0"

Customer: Federal Reserve Bank
1100 Washington Street
Charleston, SC 29403
703.775.0000 / 703.775.0100
www.frbcharleston.org

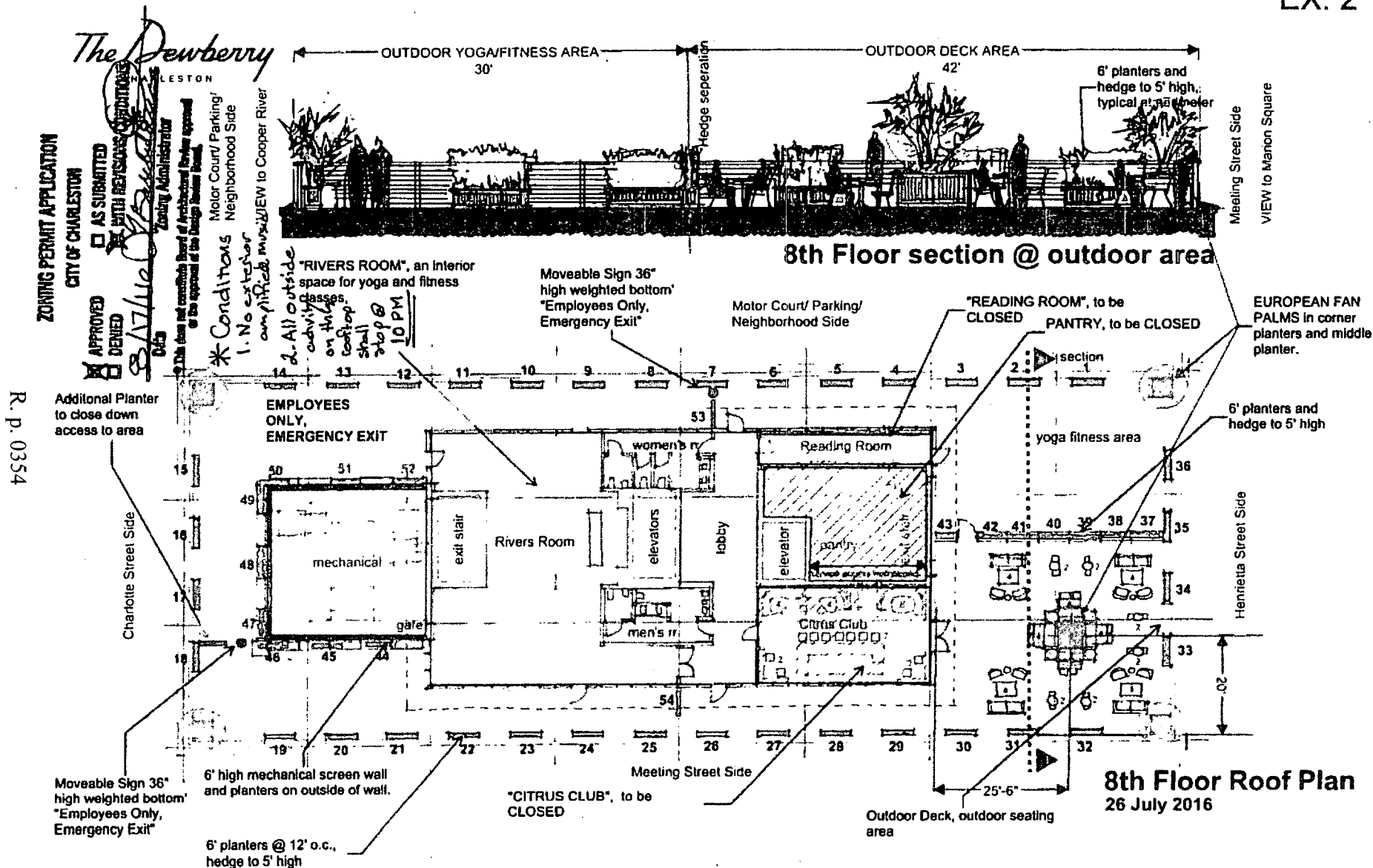
ISSUED DATE: 10/20/2010
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06.24.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00
11.26.10 012:00:00

THE FEDERAL BUILDING
334 MEETING ST
CHARLESTON SC 29403
TMS 489130302

R. p. 0353

**A102
FLOOR
PLANS**

1. This drawing is a proposed plan and is not to be used for construction without the approval of the architect.
2. All dimensions are to be taken from the centerline of the building unless otherwise noted.
3. The owner is responsible for obtaining all necessary permits and approvals for this project.
4. The architect is not responsible for the accuracy of the information provided by the owner.

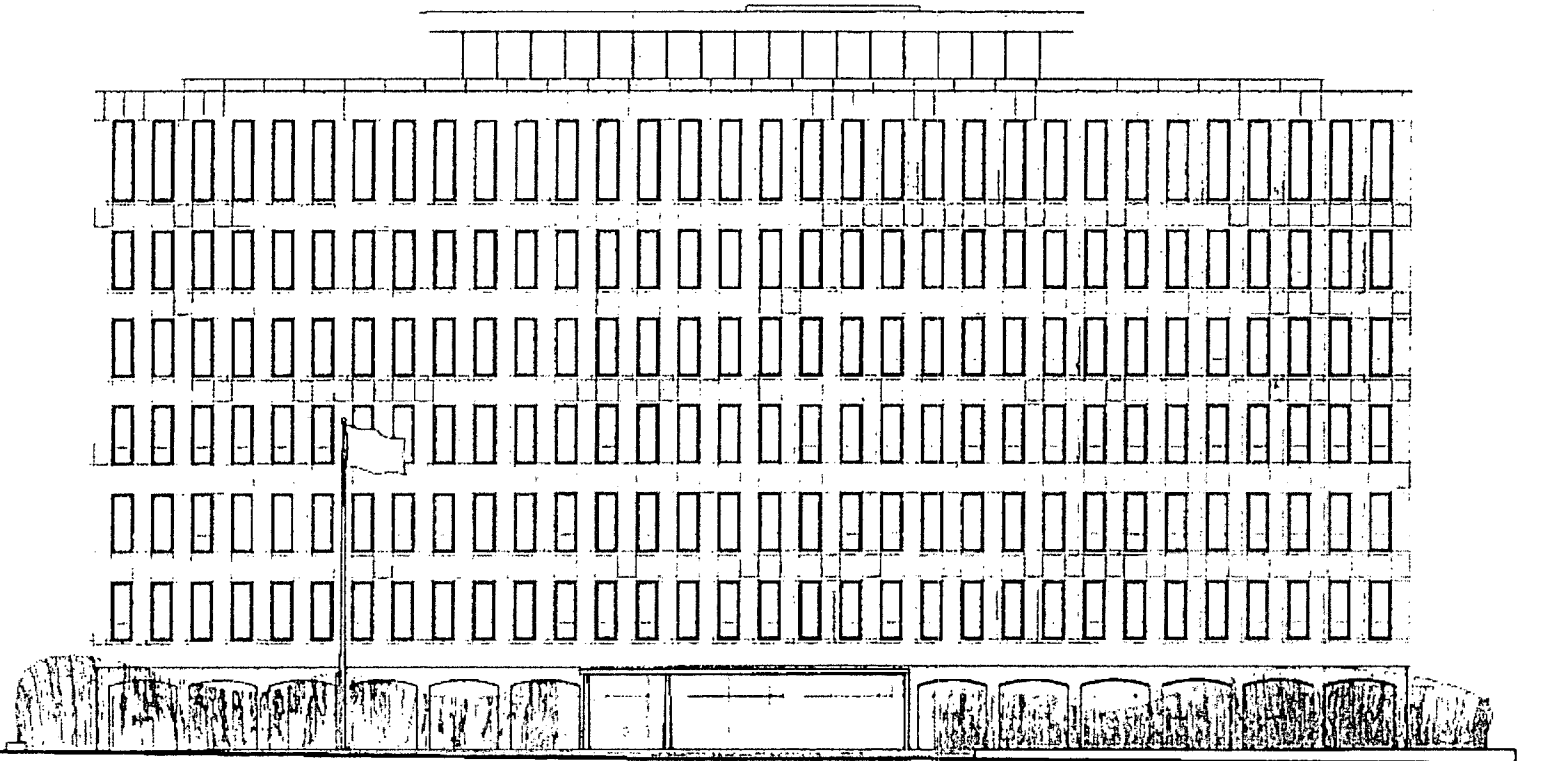


334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pick-ups 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. p. 0356



WEST ELEVATION - PROPOSED

THE FEDERAL BUILDING
334 MEETING ST
CHARLESTON SC 29403
TMS 4891303012

A201
PROPOSED
WEST
ELEVATION

NOTES: 1. SEE ARCHITECT'S SPECIFICATIONS FOR MATERIALS AND FINISHES. 2. SEE ARCHITECT'S SPECIFICATIONS FOR MECHANICAL AND ELECTRICAL SYSTEMS. 3. SEE ARCHITECT'S SPECIFICATIONS FOR STRUCTURAL SYSTEMS. 4. SEE ARCHITECT'S SPECIFICATIONS FOR INTERIORS. 5. SEE ARCHITECT'S SPECIFICATIONS FOR EXTERIORS. 6. SEE ARCHITECT'S SPECIFICATIONS FOR SPECIALTIES. 7. SEE ARCHITECT'S SPECIFICATIONS FOR EQUIPMENT. 8. SEE ARCHITECT'S SPECIFICATIONS FOR FURNITURE. 9. SEE ARCHITECT'S SPECIFICATIONS FOR FIXTURES. 10. SEE ARCHITECT'S SPECIFICATIONS FOR ACCESSORIES. 11. SEE ARCHITECT'S SPECIFICATIONS FOR SIGNAGE. 12. SEE ARCHITECT'S SPECIFICATIONS FOR LANDSCAPE ARCHITECTURE. 13. SEE ARCHITECT'S SPECIFICATIONS FOR TRAFFIC ENGINEERING. 14. SEE ARCHITECT'S SPECIFICATIONS FOR ENVIRONMENTAL ENGINEERING. 15. SEE ARCHITECT'S SPECIFICATIONS FOR HISTORIC PRESERVATION. 16. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL RECORDS. 17. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL PHOTOGRAPHY. 18. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL RENDERING. 19. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL MODELING. 20. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL CONSTRUCTION. 21. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL MAINTENANCE. 22. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL REPAIRS. 23. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL RESTORATION. 24. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL PRESERVATION. 25. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL MONITORING. 26. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL EVALUATION. 27. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL RESEARCH. 28. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL STUDIES. 29. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL ANALYSIS. 30. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL SYNTHESIS. 31. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL DESIGN. 32. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL CONCEPTS. 33. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL IDEAS. 34. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL VISIONS. 35. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL DREAMS. 36. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL HOPES. 37. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL DREAMS. 38. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL HOPES. 39. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL DREAMS. 40. SEE ARCHITECT'S SPECIFICATIONS FOR ARCHITECTURAL HOPES.

[illegible]

THE FEDERAL BUILDING
324 MEETING ST.
CHARLESTON SC 29403
TMS 4891303022

**A202
PROPOSED
EAST
ELEVATION**

[illegible]

R. p. 0357

EAST ELEVATION - PROPOSED

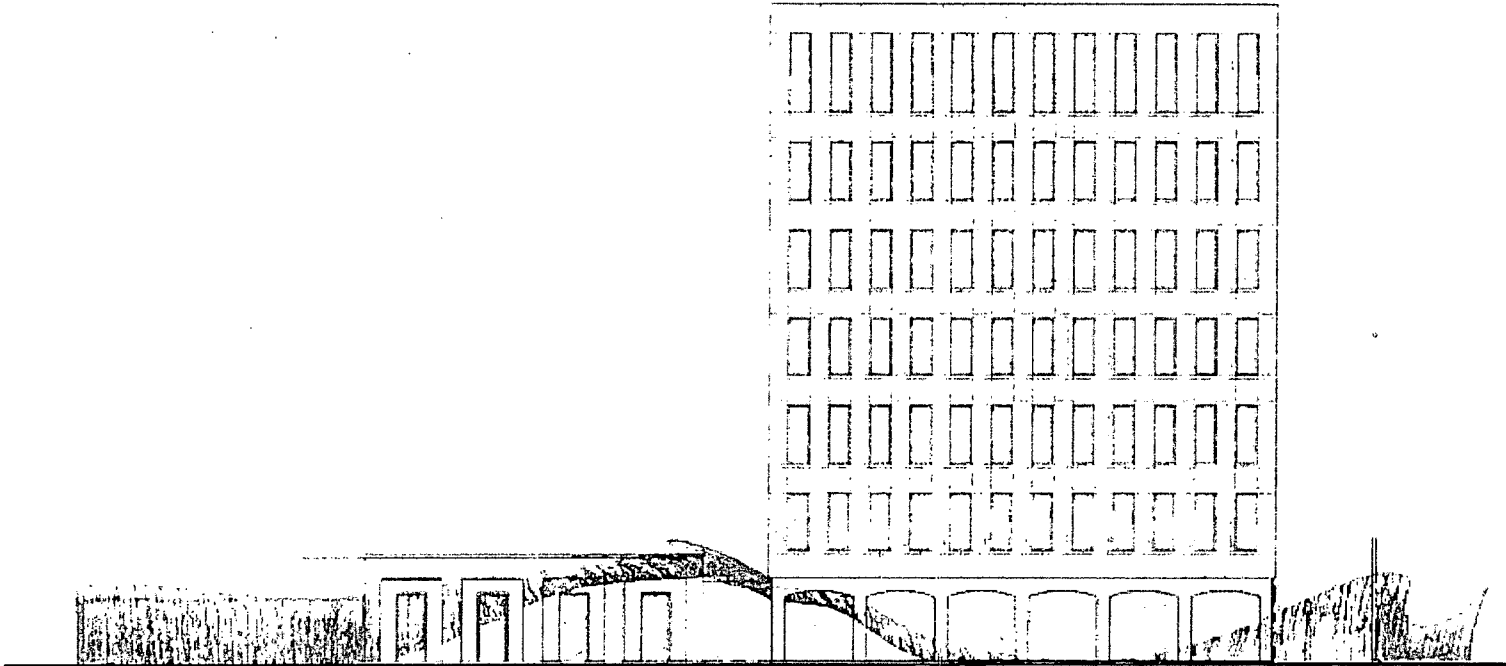
100 Washington Group
 100 Washington, N.W.
 Phone 202-462-7100
 Fax 202-462-7101

REVISION DATE / DESCRIPTION
 06.01.10 304 Supplement
 06.11.10 304 Supplement
 12.06.10 304 Supplement
 12.06.10 304 Supplement
 01.06.11 304 Supplement
 06.06.11 304 Supplement
 06.06.11 304 Supplement

THE FEDERAL BUILDING
 334 MEETING BY
 CHARLESTON SC 29403
 TNR 489130322

**A203
 PROPOSED
 NORTH
 ELEVATION**

100 Washington Group
 100 Washington, N.W.
 Phone 202-462-7100
 Fax 202-462-7101



NORTH ELEVATION - PROPOSED
 SCALE: 1/8" = 1' - 0" (NOT TO SCALE)

[illegible]

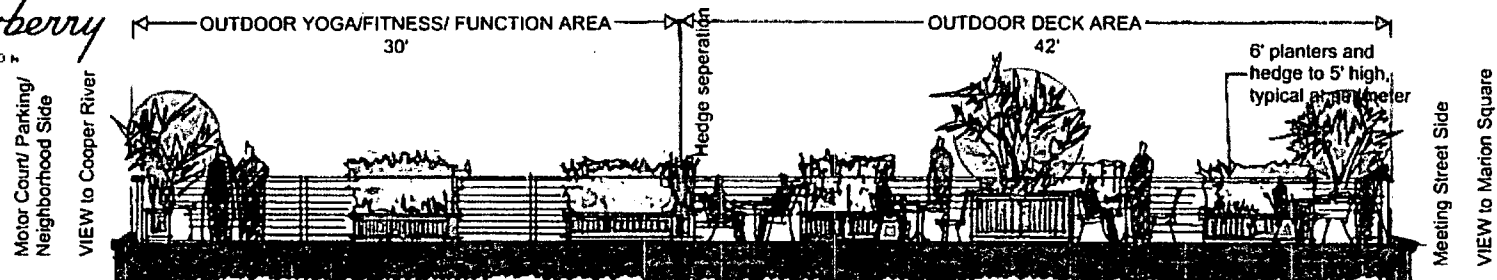
THE FEDERAL BUILDING
324 WESTING ST
CHARLESTON SC 29403
TMS 4891303022

**A204
PROPOSED
SOUTH
ELEVATION**

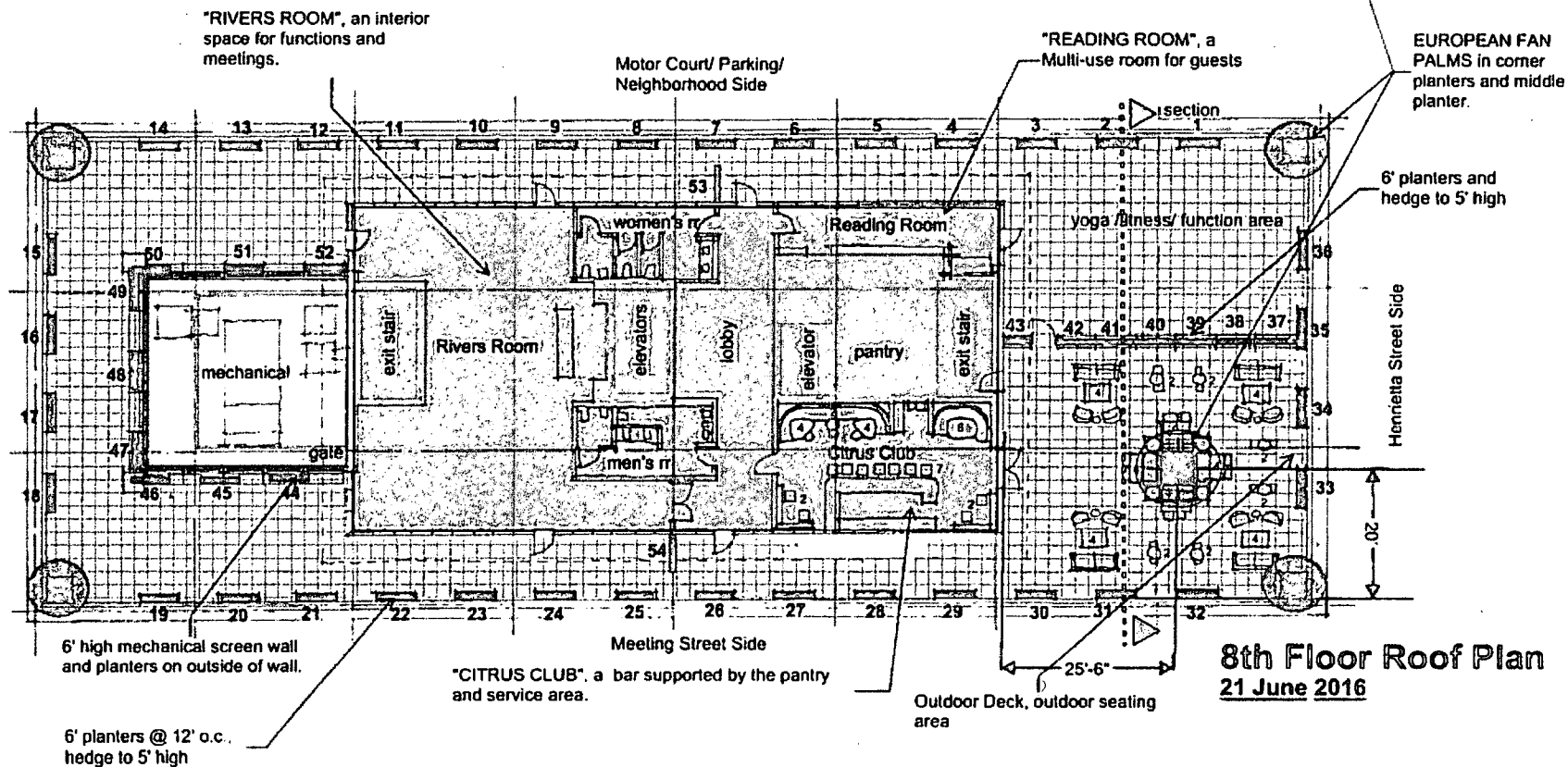
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SOUTH ELEVATION - PROPOSED

The Dewberry
CHARLESTON



8th Floor section @ outdoor area



R. p. 0360

8th Floor Roof Plan
21 June 2016

[illegible]

THE FEDERAL BUILDING
334 MEETING ST
CHARLESTON SC 29403
TMS 4591303022

**A102
FLOOR
PLANS**

[illegible]

ROOF PLAN - PROPOSED

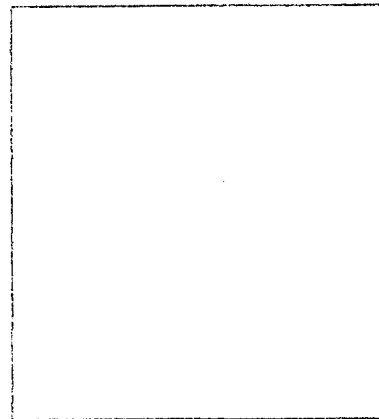
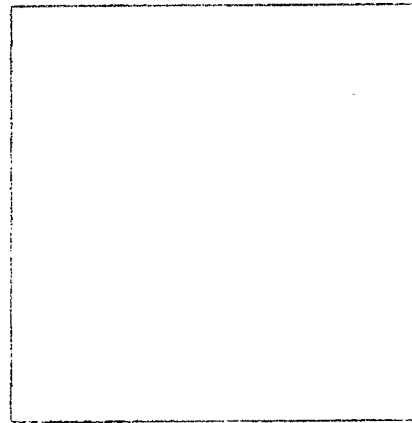
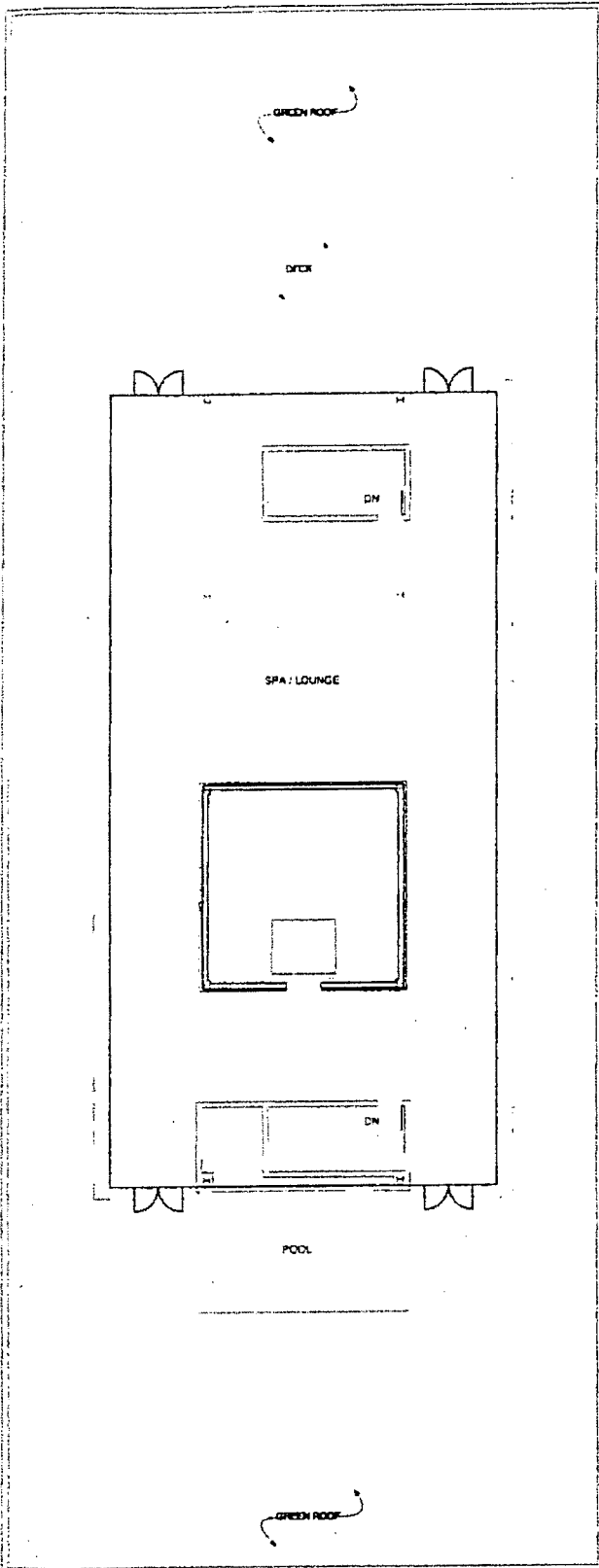
A152

SCALE: 250' = 1" 0

R. p. 0361

THE FEDERAL BUILDING
334 MEETING ST
CHARLESTON SC 29403
TMS 4591303022

**A102
FLOOR
PLANS**



Presented at the April 18, 2017 to

Board of Zoning Appeals – Zoning (BZA_Z)

We are people living and owning property on Henrietta St. The Dewberry is at the intersection of Henrietta St and Meeting. Our homes are the closest to the facility.

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.

All the names on this petition live here. Our entire street is unanimous in requesting denial to any changes to zoning at 334 Meeting Street.

Henrietta St

1.

2&4.

3.

5&7

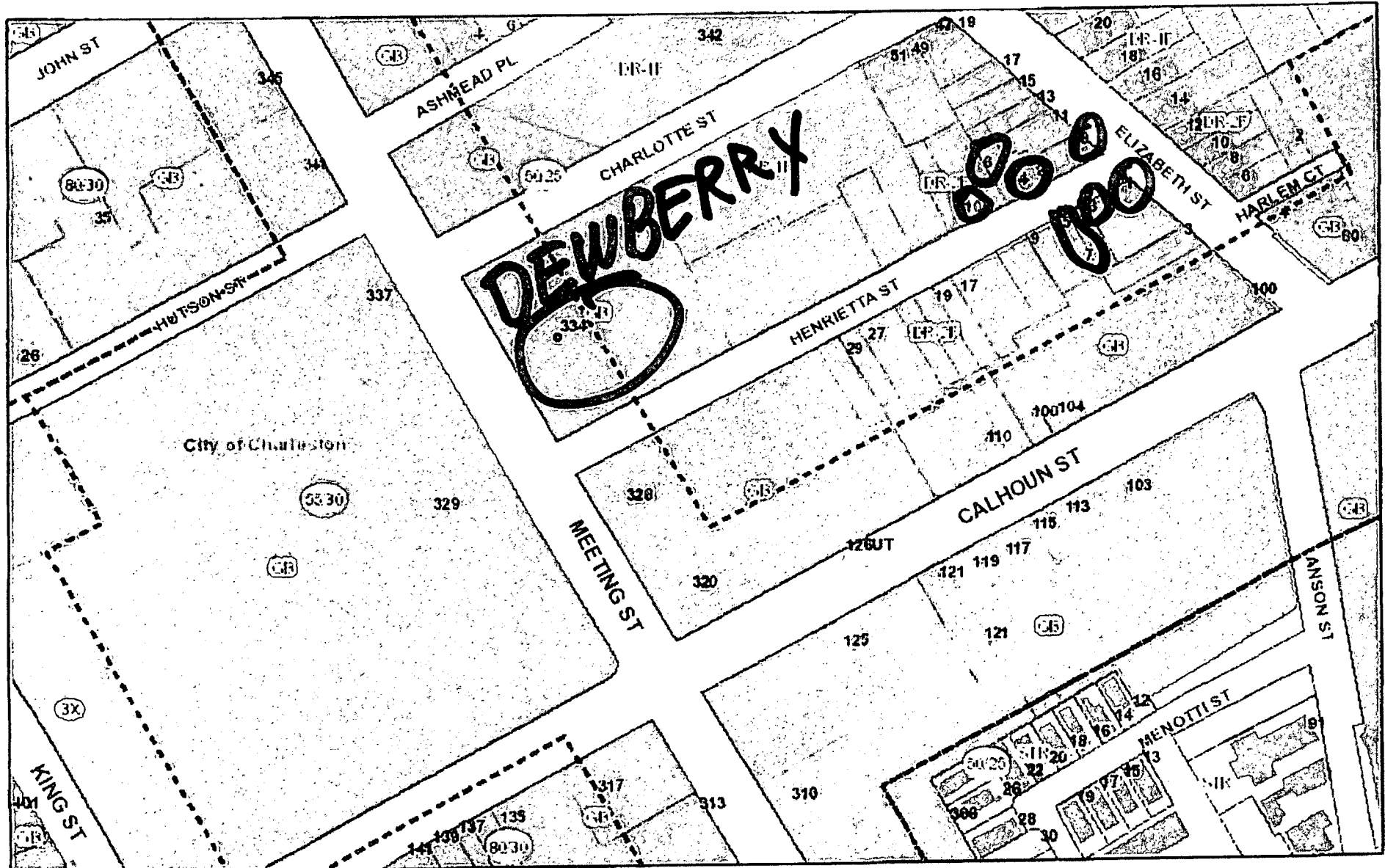
6.

8.

10.

ELIZABETH
9. Alexander St with garages and front door on Henrietta St

334 Meeting Street



R. p. 0365

March 23, 2017

pointLayer

Addresses = 2 5 9

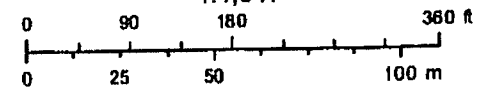
• Override 1

Streets Display 3 6 Streets

Old City Height Districts 1

4 7

1:1,947





Board of Zoning Appeals – Zoning
- Results -
City of Charleston

Page 1 of 1

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK/WRAGGBOROUGH) (459-13-03-022)

Request approval to amend the April 5, 2011 special exception approval for a hotel to add uses on the top floor/rooftop and change the closing time for rooftop activities from 10pm to midnight.
Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☒ **DENIED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☐ **APPROVED.** The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/18/17 Chairman *[Signature]*

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ **DENIED.** The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ **APPROVED.** The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

1/09



City of Charleston

PROPERTY LOCATION, TMS NUMBER(S) AND DESCRIPTION OF REQUEST(S):

334 MEETING ST. (MAZYCK-WRAGGBOROUGH) (459-13-03-022)

Request special exception under Section 54-220 to allow a 161-room inn in a GB-A zone district.

(Approval granted on 3-16-10 was for a 120-room inn).

Request special exception under Section 54-110 to allow an addition that extends a non-conforming building height.

Zoned GB-A.

Order on Special Exception Request

The Board of Zoning Appeals-Zoning held a public hearing to consider the above appeal for a special exception which may be permitted by the Board pursuant to the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of fact and conclusions.

☐ DENIED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have not been met and therefore orders that the special exception(s) be denied.

☒ APPROVED. The Board concludes that the standards in the Section(s) of the Zoning Ordinance listed above, which are applicable to the requested special exception(s), have been met and therefore orders that the special exception(s) be granted, subject to the following conditions, if any:

Date issued: 4/5/11 Chairman

*8:00-6:00 PM
actuals - no meeting 10 PM
Building Department approved.
(See attached)*

Order on Variance Request

The Board of Zoning Appeals-Zoning held a public hearing to consider an appeal for a variance from the strict application of the Zoning Ordinance for the property described above. After consideration of the evidence and arguments presented, the Board makes the following findings of facts and conclusions.

☐ DENIED. The Board concludes that the requirements for granting a variance have not been met and, therefore, orders that the variance be denied.

☐ APPROVED. The Board concludes that:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

THE BOARD, THEREFORE, finds that the applicant has an unnecessary hardship and orders that the variance be granted, subject to the following conditions, if any:

Date issued: _____ Chairman _____

Approvals of the Board shall remain valid for two (2) years from the approval date, unless extended in accordance with the provisions of Section 54-962. Applicants may not apply for the same request that has been denied by the Board until a period of six (6) months has lapsed.

334 Meeting Street
BZA-Z Decision and Conditions
April 5, 2011

At the meeting of the Board of Zoning Appeals-Zoning held on April 5, 2011, the Board voted to approve the special exception under Section 54-110 for the extension of a non-conforming building height and the special exception under Section 54-220 for a 161 room hotel with the following conditions:

- (1) Adequate parking for employees who drive is to be provided on site or in some other parking facility;
- (2) Install wall along east side property line as shown on the plans at the option of each neighboring property owner and provide intensive landscaping;
- (3) All collection of refuse from dumpsters and commercial deliveries or pick-ups 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.



Charleston Board of Zoning Appeals - Zoning
2 George St
Charleston SC, 29401

April 17, 2017

Re: The Dewberry

Dear members of the Charleston Board of Zoning Appeals,

I and my company, ETI, provided the sound system for the entire Dewberry hotel. It has come to my attention that there are many questions about the design and nature of the sound system on the 8th floor, rooftop area, of the Dewberry Hotel. In particular, I understand that neighborhood residents are concerned about the number of speakers and their placement around the eighth floor rooftop terrace.

To help clear the air, I wanted to let you know that this system, designed by Hammond Kardon, the foremost designer of systems like this, is intended to provide for soft ambient background music. The Patio seating area on the Southwest corner of the rooftop terrace contains two sets of speakers with two column speakers on the wall of the Citrus Room and two speakers in the corner of the open area(s). The larger speaker in the southwest corner of the terrace is a low-volume subwoofer that faces the sitting area to offset and balance the music from the other speakers. Additionally, there are two speakers located in each of the walk way areas leading from the Rivers Room to the Patio Area.

It is a common misconception that having several speakers equates to a louder sound being produced in an area. It is not necessarily so. That was not the purpose of the design of the speaker system we installed. The design for background music, typically adjusted to approximately 40db (around the level of the human voice or slightly lower), is accomplished by having several speakers all turned down to a low volume. This provides for an even, low volume, experience without having to amplify a handful of speakers to higher volume levels in order to provide coverage of a given area. When it comes to background music, the more speakers, the lower the individual volume, and the more even the sound throughout.

This same design of wide coverage with several speakers, all individually producing a low volume, is evident throughout the Dewberry property and provides for part of the pleasant experience one encounters as you stroll from one area of the hotel to another. For instance, we have installed eighty speakers on the main floor yet I doubt anyone who has visited has found the music obtrusive or loud or possibly even noticed it. That is because of the presence of many speakers throughout at low volume – same concept and function as the speaker system on the rooftop terrace.

Each zone is independent and can be adjusted for the type of music and for the level of the sound. Additionally, the 8th floor includes speakers that, due to the raised floor, can very easily be relocated to better accommodate the desires of the client to fine tune the overall ambient



music. We understand that The Dewberry intends to agree to keep the volume on the rooftop terrace at these background music levels at all times. We 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.

Sincerely,

Mark Mitchum
President
ETI

04/17/17

3870 Leeds Ave. Suite 107 North Charleston, South Carolina 29405
843.744.0150 Fax: 843.744.0636 Toll Free 800.968.0461
www.etisc.com

From Idea To Reality

R. p. 0370

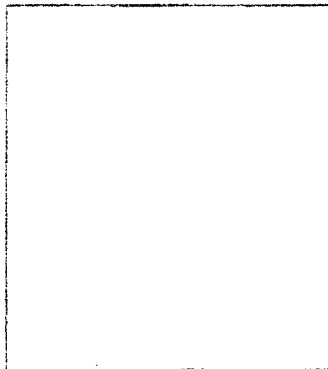
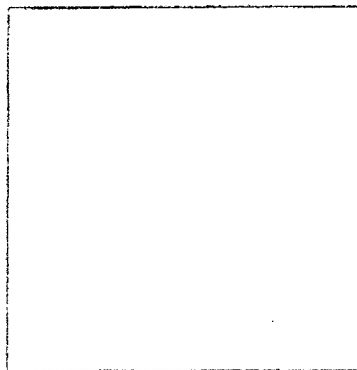
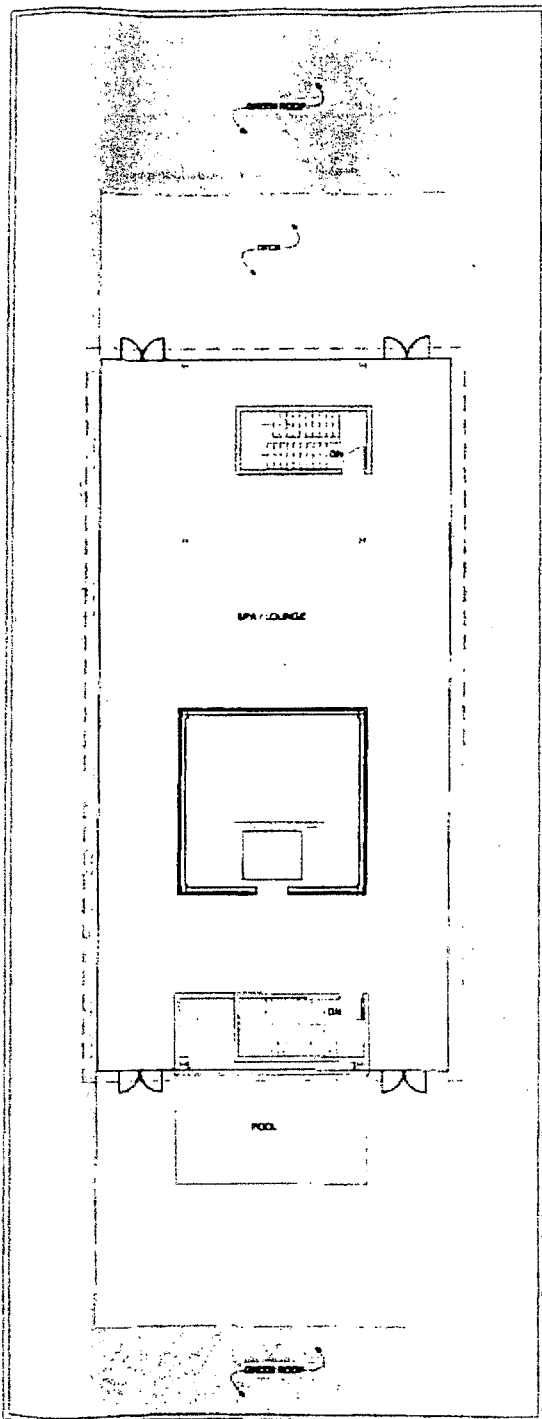
G. P. O. Box 614
 138 VANDER
 CHAMBERS
 7 843-722-4
 www.gpob.com

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THE FEDERAL BUILDING
 334 MEETING ST

**A102
 FLOOR
 PLANS**

18.00.00
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 01.01.00
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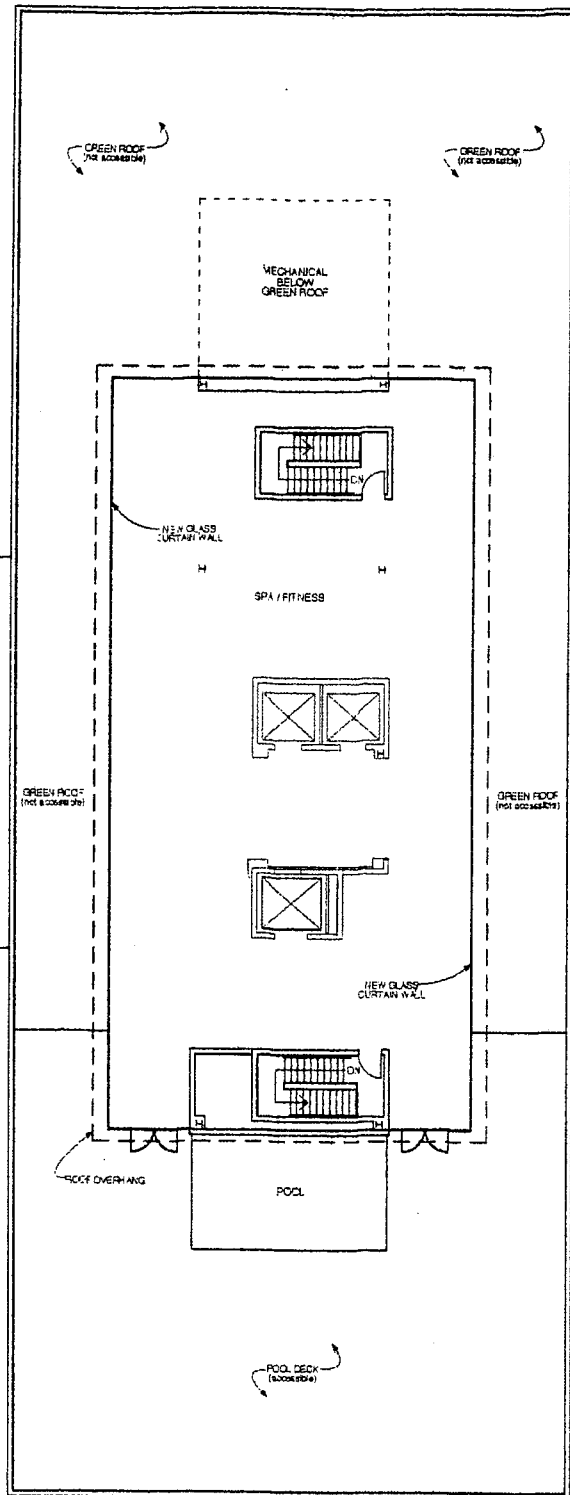
1
 AND 1
ROOF PLAN - PROPOSED
 SCALE: 3/32" = 1'-0"

GIBSON QUINN ARCHITECTS
 128 VANDERBILT STREET
 CHARLESTON, SC 29403
 T 843-722-8030 F 843-722-4140
 WWW.GIBSONQUINNARCHITECTS.COM

ISSUED DATE / REVISIONS
 02.01.10 STA SUBMITTAL
 02.11.10 PLAN REVISIONS
 11.20.10 PLAN REVISIONS
 12.18.10 PLAN REVISIONS
 01.02.11 STA SUBMITTAL
 02.04.11 PLAN REVISIONS
 02.07.11 STA SUBMITTAL
 04.01.11 STA UPDATE

THE FEDERAL BUILDING
 334 MEETING ST
 CHARLESTON SC 29403
 TMS 4591303022

**A102
 FLOOR
 PLANS**



ROOF PLAN - PROPOSED
 A102 SCALE: 3/32" = 1'-0"

R. p. 0372



DRAWINGS AND THE DESIGN ARE THE PROPERTY OF THE ARCHITECT. WHEN IN THE PROJECT FOR WHICH THEY ARE PREPARED, NO PART OF THEM SHALL BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT THE WRITTEN PERMISSION OF THE ARCHITECT.

ZONING PERMIT APPLICATION

CITY OF CHARLESTON

☐ AS SUBMITTED
☒ WITH REVISIONS/CONDITIONS

☒ APPROVED
☐ DENIED

8/17/16
Date

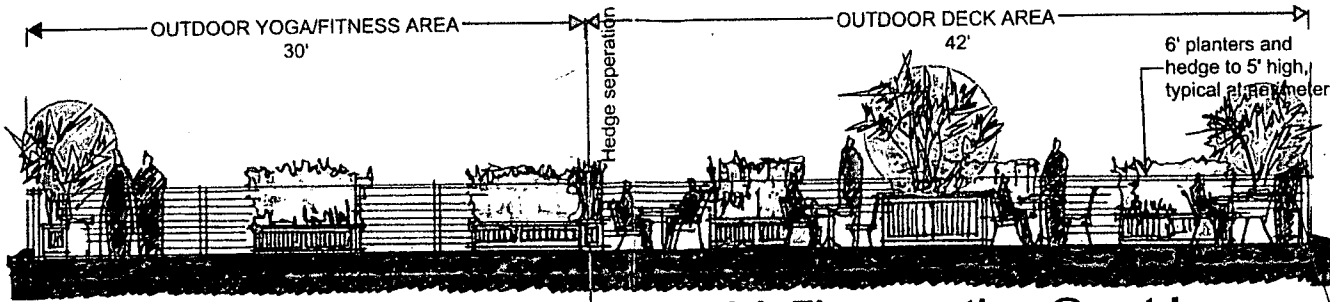
[Signature]
Zoning Administrator

This does not constitute Board of Architectural Review approval or the approval of the Design Review Board.

Motor Court/ Parking/
Neighborhood Side

*** Conditions**
1. No exterior amplified music VIEW to Cooper River
2. All outside activities on the rooftop shall stop @ 10 PM

The Dewberry



8th Floor section @ outdoor area

R. p. 0373

Additional Planter to close down access to area

Charlotte Street Side

EMPLOYEES ONLY, EMERGENCY EXIT

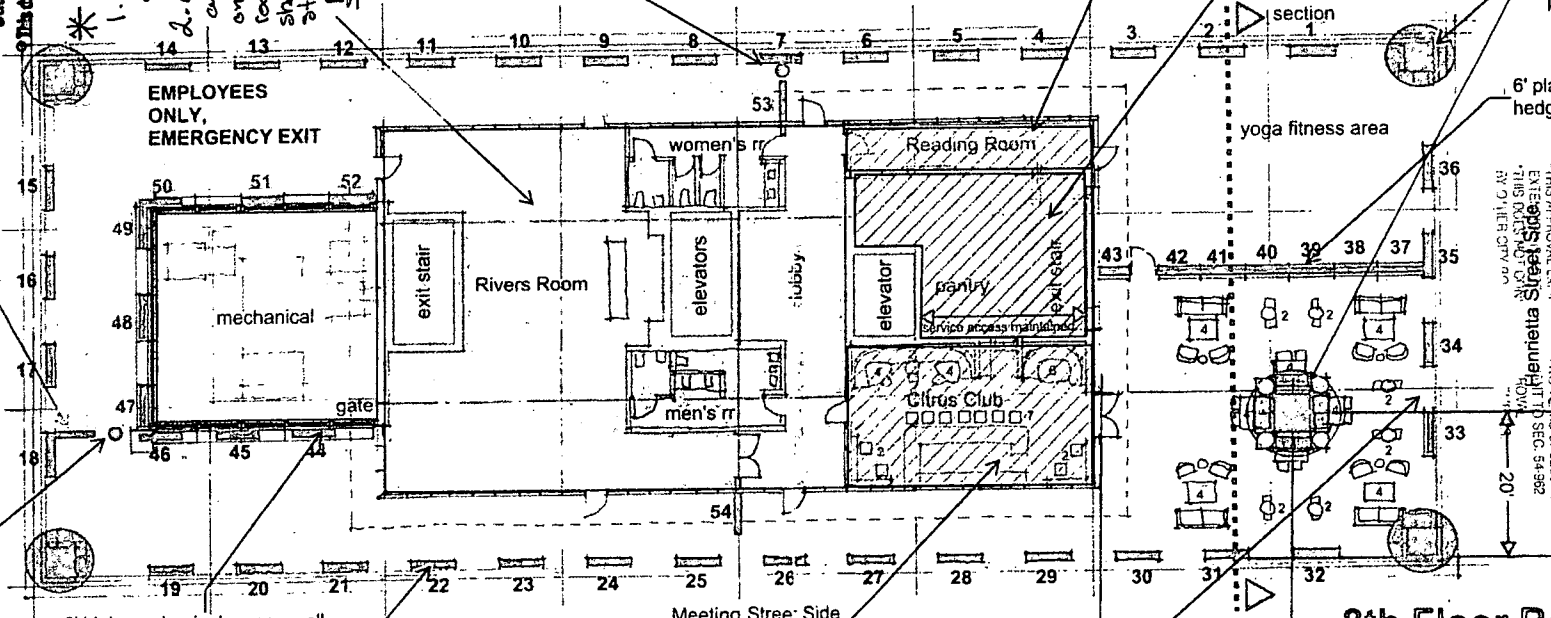
Moveable Sign 36" high weighted bottom "Employees Only, Emergency Exit"

Motor Court/ Parking/
Neighborhood Side

"READING ROOM", to be CLOSED
PANTRY, to be CLOSED

EUROPEAN FAN PALMS in corner planters and middle planter.

6' planters and hedge to 5' high



Moveable Sign 36" high weighted bottom "Employees Only, Emergency Exit"

6' high mechanical screen wall and planters on outside of wall.

6' planters @ 12' o.c., hedge to 5' high

"CITRUS CLUB", to be CLOSED

Meeting Street Side

Outdoor Deck, outdoor seating area

8th Floor Roof Plan
26 July 2016

DATE: 4/16/17
OFFICIAL: [Signature]
THIS APPROVAL EXPIRES TWO YEARS UNLESS AN EXTENSION IS GRANTED BY THE BOARD OF ARCHITECTURAL REVIEW.

BOARD OF ZONING APPEALS — ZONING
ADDRESS: 324 Meeting Street
☒ APPROVED FOR SET BACK
☐ DENIED
☐ WITHDRAWN
☒ AS SUBMITTED
☐ W/CONDITIONS
☐ RUSSEUR SPECIAL EXCER
☐ OTHER

PART 5
PERMITTED USES FOR OVERLAY ZONES

Sec. 54-220. Accommodations overlay zone.

- 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.
- b. Permitted uses. In any Accommodation overlay zoning district, land may be used and buildings or structures may be erected, altered or used for any purpose allowed by the underlying zoning 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. The Board of Zoning Appeals may permit accommodation uses as an exception where it finds that:
 - (a) the elimination of housing units by the proposed facility will not adversely affect the existing housing stock;
 - (b) the location of the facility will not significantly increase automobile traffic on streets within residential neighborhoods;
 - (c) the total square footage of interior and exterior floor area for restaurant and bar space in the proposed facility, including restaurant/bar patron use areas, bar areas, kitchen, storage, and bathroom facilities, 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 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;
 - (d) the proposed use is otherwise in character with the immediate neighborhood;
 - (e) the location and design of the proposed facility will facilitate pedestrian activity and encourage transit system usage within the peninsula; and
 - (f) in making these findings, the Board of Zoning Appeals shall consider the following information to be provided by the applicant in site plans, floor plans, building elevations, and a detailed written assessment report to be submitted with the application:
 - (1) the number of existing housing units on the property to be displaced by type of unit (rental or owner-occupied; single-family, duplex or multi-family; occupied or unoccupied), by income range and by physical condition (sound, deficient, deteriorated or dilapidated);

- (2) the effect of the displacement on the total available housing stock and on the housing stock of a particular type and income range in the service area;
- (3) the number of vehicle trips generated by the facility and the traffic circulation pattern serving the facility and efforts made to minimize traffic impacts;
- (4) the distance of the main entrance and parking entrance of the facility from a road classified as an arterial or collector road;
- (5) the development pattern and predominant land uses within five hundred feet (500') of the facility;
- (6) the proximity of residential neighborhoods to the facility;
- (7) the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation;
- (8) the demonstrated provision of off-street parking at the rate of two spaces for each three sleeping units;
- (9) the presence of industrial uses and uses which use, store, or produce toxic or hazardous materials in quantities in excess of those specified by the EPA listing of toxic and hazardous materials, within five hundred feet (500') of the facility;
- (10) the commitment to environmental sustainability and recycling;
- (11) the distance of the facility from major tourist attractions;
- (12) the distance of the facility from existing or planned transit facilities;
- (13) the long term provision of on- or off-site parking for employees who drive vehicles to work;
- (14) the location of the proposed facility will contribute to the creation of a diverse mixed-use community;
- (15) the number of rooms in the facility; provided however that the number of rooms in a facility shall not exceed 50 in areas designated "A-1" on the zoning map; 180 in areas designated "A-2" on the zoning map; 225 in areas designated "A-3" on the zoning map; 100 in areas designated "A-4" on the zoning map; 150 in areas designated "A-5" on the zoning map; and 69 in areas designated "A-6" on the zoning map; and further provided that within the portion of the area designated "A-1" bounded by King Street on the west, Meeting Street on the east, Mary Street on the south and Line Street on the north, the number of rooms in a facility may exceed 50 if the facility is a full-service hotel that provides 20,000 or more square feet of meeting and conference space, and an on-site restaurant that serves breakfast, lunch and dinner seven days a week;

- (16) the provision of shuttle bus services to and from the historic district by facilities with more than 50 rooms located outside the area designated "A-1" on the zoning map and not served by public transit;
- (17) the commitment to make affirmative, good faith efforts to see that construction and procurement opportunities are available to DBEs (disadvantaged business enterprise) and WBEs (women business enterprise) as outlined in Section 2-267 (D)(1), (2), and (3) of the Code of the City of Charleston;
- (18) the commitment to make affirmative, good faith efforts to hire personnel, representative of the population of the Charleston community, at all employment levels.

(Ord. No. 1998-76, § 2, 4-28-98; Ord. No. 1999-02, §§ 3—5, 1-12-99; Ord. No. 1999-54, § 4, 4-27-99; Ord. No. 2006-428, §§ 6—8, 9-26-06; Ord. No. 2007-204, § 1, 11-20-07; Ord. No. 2012-41, § 5, 1-24-12; Ord. No. 2013-93, §§ 1—6, 9-24-13; Ord. No. 2013-93, §§ 1—6, 9-24-13)

Sec. 54-221. Tour boat overlay zone.

- a. Intent. The intent of the tour boat overlay zone is to restrict tour boat facilities on the peninsula to appropriate locations.
- b. Defined. A tour boat facility is the use of land, the structures thereon, docks, wharfs, or other such appurtenances for the purpose of embarking or disembarking of passengers for hire aboard boats for transportation to and from historic sites, or for the purpose of viewing, in Charleston harbor or the rivers or lands adjacent thereto.
- c. Restrictions. In the peninsula of the City of Charleston in the area bounded by the Ashley River, the Cooper River, and U.S. Highway 17, land may be used and buildings or structures may be erected, altered, or used for tour boat facilities only in districts delineated on the zoning grid maps of the City of Charleston as Tour Boat Overlay Zones.

Sec. 54-222. Johns Island Overlay Zone.

In any Johns Island Overlay Zone, 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.

Sec. 54-223. Amusement and Recreation Services, AR Overlay Zone.

- a. In the Amusement and Recreation Services, AR Overlay Zone, land may be used and buildings or structures may be erected, altered or used for any purpose allowed by the underlying zoning district, except that the use of buildings, structures or land for the short term rental of amusement and recreational vehicles or for providing sightseeing services by air are prohibited.

Sec. 54-120. - Definitions.

For the purpose of this chapter, certain terms and words are herein defined.

Accessory Building. A subordinate building on the same lot as the principal building(s) or use. Accessory buildings may include but not be limited to pool houses, additional living space, storage sheds, garages, and additional dwelling units in zoning districts that permit additional dwelling units. Accessory buildings in SR (Single-family Residential) zone districts shall not include kitchens.

Accessory Use. A use of land or of a building or portion thereof customarily incidental and subordinate to the principal use of the land or building and located on the same lot with the principal use.

Accommodations Uses. Commercial uses to provide living or sleeping units, for remuneration, to one or more individuals where the intended and/or usual occupancy would not exceed twenty-nine (29) consecutive days, including hotels, motels, inns, bed and breakfasts, short term rental units, rooming and boarding houses, hostels, lodging units, resort units, condominiums, cooperatives, apartments, units that are included in a "Vacation Timesharing Plan" as defined in S.C. Code Ann. § 27-32-10(7), and/or in a "Vacation Timesharing Lease Plan" as defined in S.C. Code Ann. § 27-32-10(8), as each may be amended from time to time, as well as any and all similar uses where the intended and/or usual occupancy is for periods not to exceed twenty-nine (29) consecutive days, and residence club uses. For purposes hereof, individual(s) mean a person, one who owns or receives an undivided interest in a premises, a partner in a partnership that owns a premises, a beneficiary in a trust that owns a premises, a shareholder in or member of a corporation that owns a premises, a beneficiary in a trust that owns a premises, a holder of a leasehold interest in a premises or a member of a residence club or other organization that owns a premises.

Adult Uses:

Adult Book /Video Store. An establishment having as a substantial or significant portion of its stock in trade books, magazines, videos, and/or other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical area" (as defined herein) or an establishment with a segment or section devoted to the sale, rental or display of such material. Adult Book/Video Store uses as defined herein, operating as legal nonconforming uses, shall be amortized and discontinued three (3) years after the effective date of Ordinance No. 1999-08.

Adult Drive-In Motion Picture Theater. Any outdoor theater requiring an automobile for admittance used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein) for observation by patrons therein. This use when operated as a lawful non-conforming use shall be amortized and discontinued one year after the effective date of Ordinance No. 2003-50.

Adult Media/Novelty Store. An establishment with (1) ten percent or more of its retail sales area or (2) ten percent or more of its gross revenues from the sale or rental of any one or more of the following or combination thereof: (a) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, DVD, slides, computer programs, or other visual representations which are distinguished or characterized by their emphasis on the exhibition or display of "specified sexual activities" or "specified anatomical areas" (sometimes hereinafter "adult media material") or (b) instruments, devices, or paraphernalia which are designed for use or marketed for stimulation of human genital organs (sometimes hereinafter "adult novelty").

Adult media/novelty store is a non-exclusive classification that may include adult book/video stores, adult drive-in motion picture theaters, adult mini-motion pictures theaters, adult motion picture theaters, or other adult uses, combinations thereof and combinations of adult uses and non-adult uses. The amortization period for adult media/novelty stores operated as a legal non-

Sorority House. See Fraternity House.

Special Exception. A departure from a general provision of this chapter which, by the expressed terms of such provision, may be permitted by the Board of Zoning Appeals upon application only after the Board finds the existence of facts and circumstances detailed in such provision.

Specified Anatomical Areas. "Specified Anatomical Area" means: a) less than completely and opaquely covered: i) human genitals, pubic region; ii) buttocks, and iii) female breast below a point immediately above the top of the areola; b) human male genitals in a discernibly tumid state, even if completely and opaquely covered; and c) a covering or device that when worn, simulates genitals, pubic region, buttocks, or any part of the female breast below the top of the areola.

Specified Sexual Activities. "Specified sexual activities" means: a) human genitals in a state of sexual stimulation or arousal; b) acts of human masturbation, sexual intercourse or sodomy; c) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breast.

Specimen Tree. A tree listed in any of the categories in Section 54-331, that is healthy, undamaged, disease free and shows exceptional form and growth habits for that specific species.

State. The words "state" or "this state" shall mean the State of South Carolina.

Story. That portion of a building included between the surface of any floor and the surface of the next floor above, or if there be no floor above it, then the space between such and the ceiling next above it.

Street. The word "street" shall mean the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular traffic and shall be taken to include any public way, road, highway, street, avenue, boulevard, parkway, alley, lane, viaduct, bridge and approaches thereto within the city. The word "street" shall also mean a private street within a subdivision.

Street, Public. A dedicated public right-of-way which affords the principal means of access to abutting property and which has been accepted for maintenance by the city, county or the S.C. Department of Transportation. For the purposes of these regulations, the term street or streets shall also mean avenues, boulevards, roads, lanes and all other public rights-of-way.

Local Street. A public street used primarily for providing direct access to abutting property.

Collector Street. A public street designed primarily to connect private ways serving multi-family complexes or other local streets with arterial streets and may be expected to carry a significant volume of traffic having neither origin nor destination on the street.

Arterial Street. A federal or state highway designed primarily for the movement of large volumes of traffic from one area to another.

Structure. Anything constructed or erected, the use of which demands its permanent location on the land; or anything attached to something having a permanent location on the land. The word "structure" shall include the word "building."

Structural Alteration. Any change or replacement in the supporting members of a building or structure, such as bearing walls, columns, beams or girders.

Subdivision. Means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, lease, or building development, and includes all division of land involving a new street or change in existing streets, and includes re-subdivision which would involve the further division or relocation of lot lines of any lot or lots within a subdivision previously made and approved or recorded according to law; or, the alteration of any

Sec. 54-110. - Non-conforming uses shall be governed by the following provisions.

- a. The lawful use of land existing at the time of the adoption of this chapter, or of an amendment thereto, although such use does not conform to the provisions thereof, may be continued, except for rental of amusement and recreational vehicles, which shall be governed by Section 54-223; but if such nonconforming use is discontinued, as evidenced by lack of use for a period of at least three years or by substitution of a conforming use, any future use of said land shall be in conformity with the provisions of this chapter.
- b. The lawful use of a building or structure, existing at the time of the adoption of this chapter, or an amendment thereto, although such use does not conform to the provisions hereof, may be continued except for signs, which shall be governed by Article 4, and rental of amusement and recreational vehicles which shall be governed by Section 54-223, and establishments located within 500 feet of a residential zoning district and which allow for on-premise consumption of alcohol, beer or wine after midnight, which shall be governed by Section 54-206, and such use, with the exception of accommodations uses, bed and breakfast uses, two-family dwelling uses and multi-family dwelling uses, may be extended throughout the building or structure provided such extension does not displace a conforming use and provided no structural alterations are made, other than those necessary to assure the safety of the building or structure.
- c. A non-conforming use of a building or lot cannot be changed to another non-conforming use unless the Board of Zoning Appeals, after a duly advertised public hearing, finds that the proposed use is equally appropriate or more appropriate to the district than the existing non-conforming use. In permitting such change, the Board of Zoning Appeals may impose reasonable and appropriate conditions and safeguards for the protection of the public interest and the value of neighboring properties, including, but not limited to, limitations on the days and hours during which the proposed use may be open to the public.
- d. Whenever a non-conforming use of a building has been changed to a conforming use, such use shall not thereafter be changed back to a non-conforming use.
- e. Whenever a non-conforming use of a building, or a portion thereof, has been discontinued, as evidenced by the lack of use, or vacancy for a period of at least three years, or by substituting a conforming use, such non-conforming use shall not thereafter be re-established and the future use shall be in conformity with the provisions of this chapter.
- f. The non-conforming use of a building or structure cannot be physically extended to provide more area for the non-conforming use, and the number of bedrooms in a non-conforming two-family dwelling or multi-family dwelling use cannot be increased, unless the Board of Zoning Appeals—Zoning, after a duly advertised public hearing, finds that the extension or increase of the non-conforming use is: (1) limited to extending or increasing the non-conforming use then in existence; and (2) would not result in an unreasonable intensification of the non-conforming use. In considering the reasonableness of the intensification of the extension or increase, the Board shall consider the effect of the extension or increase on properties in the vicinity to include traffic impacts; vehicular and pedestrian safety; parking impacts; potential impacts of noise, lighting, fumes or obstruction of air flow or light on adjoining property; impacts on the aesthetic character of the environs, to include the possible need for screening. If an extension or increase is permitted, the Board may imposed reasonable and appropriate

conditions and safeguards for the protection of the public interest and neighboring properties, including but not limited to, limitations on the days and hours during which the proposed use may be operated, and shall require, for properties located in the Old and Historic District, that exterior alterations be approved by the Board of Architectural Review, regardless of whether said alterations are visible from a public street or thoroughfare.

(Ord. No. 1996-125, § 3, 7-16-96; Ord. No. 1999-54, § 4, 4-27-99; Ord. No. 1999-129, §§ 1, 2, 9-20-99; Ord. No. 2002-77, §§ 2, 3, 6-11-02; Ord. No. 2009-54, § 1, 4-14-09; Ord. No. 2010-240, § 1, 10-12-2010; Ord. No. 2015-125, § 3, 9-22-2015; Ord. No. 2016-051, §§ 1, 2, 4-26-16)

Sec. 54-925. - Variances; authority of Board to impose conditions.

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

(Ord. No. 1999-54, § 3A, 4-27-99)

APPENDIX C - Rules and Regulations of the BOARD OF ZONING APPEALS—ZONING
BOARD OF ZONING APPEALS—SITE DESIGN^[1]

Footnotes:

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Editor's note— The Rules and Regulations of the Board of Zoning Appeals—Board of Zoning Appeals—Site Design were last amended at a regular public meeting on Aug, 6, 2008.

Article I. - Organization

Section 1. - Rules.

These rules of procedure are adopted pursuant to S.C. Code 6-29-790 for the City of Charleston Board of Zoning Appeals—Zoning and Board of Zoning Appeals—Site Design, which consist of seven members each, appointed by City Council.

Section 2. - Office of the Boards.

The office of the Boards of Zoning Appeals shall be the Zoning Division office in the Department of Design, Development and Preservation, 3rd floor, 75 Calhoun Street, Charleston, South Carolina 29401.

Section 3. - Officers.

The Board shall elect one of its members chairman, who shall serve one year or until he or she is re-elected or his or her successor is elected and qualified. Each Board shall appoint a staff member of the City as secretary of the Board.

Section 4. - Chairman.

The chairman or, in his or her absence, the acting chairman, shall be a voting member of the Board and shall:

- a. Call meetings of the Board;
- b. Preside at meetings and hearings; and swear in witnesses;
- c. Act as spokesperson for the Board;
- d. Sign documents for the Board;
- e. Have orders of the Board served on parties; and
- f. Perform other duties approved by the Board.

Section 5. - Secretary.

The secretary shall:

- a. Provide and publish notice of appeals and meetings;
- b. Prepare the agenda;
- c. See that property involved in appeals for variances or special exception is properly posted;
- d. Keep recordings and minutes of meetings and hearings;
- e. Maintain Board records as public records;
- f. Serve Board decisions on parties;
- g. Attend to Board correspondence; and
- h. Perform other duties normally carried out by a secretary.

Article II. - Meetings

Section 1. - Time and Place.

The Board of Zoning Appeals—Zoning shall meet on the first and third Tuesdays of each month at 5:15 p.m., except for January and July when no meeting shall be held on the first Tuesday, and the Board of Zoning Appeals—Site Design shall meet on the first Wednesday of each month at 5 p.m., unless such day is a recognized holiday or election day. An annual schedule of regular meetings and submittal deadlines shall be published and posted at the Zoning Division office by December of each year. Special meetings may be called by the chairman upon 24 hours notice, posted and delivered to all members and local news media. Meetings shall be held at the place stated in the notices, and shall be open to the public. Board members shall not discuss the merits of appeals or applications pending before the Board with applicants or other interested parties prior to properly noticed meetings of the Board.

(Amendment of 2-16-16)

Section 2. - Agenda.

A written agenda shall be furnished by the secretary to each member of the Board and the news media, and shall be posted at least five (5) days prior to each regular meeting and at least twenty-four (24) hours prior to a special meeting. Items may be removed from the agenda or deferred at a meeting by majority vote.

Section 3. - Quorum.

A majority of the members of the Board shall constitute a quorum. A quorum shall be present before any business is conducted other than rescheduling the meeting.

Section 4. - Rules of Order.

Robert's Rules of Order shall govern the conduct of meetings except as otherwise provided by these Rules of Procedure.

Article III. - Appeal and Application Procedure

Section 1. - Appeal or Application Requirements, Time Limits and Fees.

Appeals from administrative or Board decisions, applications for variances, and applications for special exceptions shall be filed on forms approved by the Board and available to applicants in the Zoning Division office. The Board may require additional information deemed necessary. The failure to submit adequate information may be grounds for dismissal. Meeting agendas are limited to no more than twenty-five (25) new applications and appeals. Each application or appeal shall require a fee as set by City Council.

Section 2. - Time Limit for Appeal of an Administrative Decision.

An appeal from an administrative decision must be filed within ten (10) business days after actual notice of the decision by delivery of the approved appeal form and fee to the Zoning Division office.

Section 3. - Time Limit and Procedure for Appeal for Reconsideration of a Board Decision to the Board.

An appeal for reconsideration of a decision of the Board must be filed within five (5) business days from the date of the Board's decision, order, requirement or determination by delivery of the approved appeal form and fee to the Zoning Division office. To grant the appeal for reconsideration, the Board must find that it misapprehended or misconceived the question or questions involved, or that it erred in its finding or disposition of the appeal, application or matter. If such appeal is granted by the Board, the decision shall be withdrawn and the matter heard and considered de novo, as if no hearing, consideration or determination had been previously made or heard.

Section 4. - Agenda.

Appeals and applications shall be marked with the date of receipt and placed on the hearing agenda in the order in which received. Appeals and applications shall be heard in the order on the calendar unless otherwise set by the Board for good cause shown.

Section 5. - Withdrawal of Appeal or Application.

Any appeal or application may be withdrawn by written notice delivered to the secretary prior to action by the Board. An appeal which is withdrawn, may not be refiled after the time limit for appeal has expired.

Section 6. - Deferrals.

Parties filing appeals or applications may, after the application has been advertised as part of a meeting's agenda, request that the application be deferred, except in the case of an appeal for reconsideration of a Board decision, which may not be deferred after the application has been advertised as part of an agenda. A request for deferral must be in writing, signed by the applicant or agent, and must identify the meeting date when the application should be heard. Without an extraordinary and compelling reason only one (1) such deferral will be permitted.

Section 7. - Notice.

Public notice of a hearing of the Board shall be published in a local newspaper at least fifteen (15) days prior to the hearing. The notice shall contain a description of each matter to be heard and identify the property affected. Notice shall also be posted on or adjacent to the property affected at least five (5) days prior to the hearing. Such notice shall contain a description of the request, the identity of the property affected, the date, time and place of the hearing, and a phone number to call for more information.

Article IV. - Hearing Procedure

Section 1. - Appearances.

The applicant or any party in interest may appear in person or by agent or attorney. The Board may postpone or proceed to dispose of a matter on the records before it in the absence of an appearance on behalf of an applicant.

Section 2. - Witnesses.

Parties in interest may present testimony under oath. Witnesses may be compelled to attend by subpoena requested at least ten (10) days prior to a hearing and signed by the chairman. The Board may call its own witnesses when deemed appropriate.

Section 3. - Evidence.

Relevant documents, photographs, maps, plans, drawings, etc., will be received in the record without authentication in the form of legible copies. Relevant testimony, which is not cumulative, or hearsay will be received. The chairman will rule on all evidentiary matters. Evidence may be placed in the record with an objection noted.

Section 4. - Conduct of Hearing.

The normal order of hearing, except for motions for reconsideration of a Board decision, subject to modification by the chairman, shall be:

- a. Presentation by the secretary or designated member of City staff of matter to be heard with a recommendation of the zoning administrator or his/her designated staff member (if the recommendation of the zoning administrator or his/her designated staff member is in favor of the application and no objection has been filed with the Board and no one is

- present to oppose the matter, the Board may approve the matter without further presentation);
- b. Presentation by applicant or appellant and others in support of the application or appeal (10-minute limit);
 - c. Presentation by opponents (10-minute limit);
 - d. Rebuttal by applicant (3-minute limit);
 - e. The Board may question participants at any point in the hearing;
 - f. Matters in which additional time is granted may be moved to the end of the agenda.

The normal order of hearing for motions for reconsideration of a Board decision, subject to modification by the chairman, shall be:

- a. Presentation by the secretary of the matter to be heard with an explanation of the requirements that must be met by the applicant or appellant for the Board to grant the motion for reconsideration;
- b. Presentation by the applicant or appellant of the motion for reconsideration.
- c. The Board may question the applicant or appellant at any point in the hearing.

Section 5. - Disposition.

The Board may deliberate and make a final disposition of a matter by majority vote of members present at the hearing and qualified to vote; provided that not less than a quorum are present and qualified to vote. The vote may be taken at the same or a subsequent meeting. A member may not vote on a matter which the member has not heard. Deliberations shall be conducted and voting shall be in public. When a member has a conflict of interest in a matter being heard, that member shall complete a conflict of interest form for that matter, abstain from voting and leave the room until the matter is disposed of.

Section 6. - Form of Order.

An order shall be issued disposing of a matter by granting or denying relief with such conditions as may be deemed necessary; or affirming, modifying, or reversing an administrative decision; or granting or denying an appeal for reconsideration of a Board decision. If an appeal for reconsideration of a Board decision is approved, the decision shall be withdrawn and the matter shall be heard de novo, as if no hearing, consideration or determination has been previously made or heard. A matter may be dismissed for lack of jurisdiction or prosecution. Findings of fact and conclusions of law shall be separately stated in an order.

Section 7. - Service of Order.

The secretary shall delivery a copy of an order to each party in interest by certified mail immediately after the five (5) business day appeal period of the Board's decision has expired.

Article V. - Records

Section 1. - Minutes.

The secretary shall record all meetings and hearings of the Board on tape which shall be preserved until final action is taken on all matters presented. The secretary shall have minutes of each meeting prepared and maintained as public records.

Section 2. - Orders and Documents.

The secretary shall assist in the preparation and service of all orders of the Board in appropriate form. Copies of all notices, correspondence, documentary evidence, orders and forms shall be maintained as public records.

Article VI. - Adoption and Amendment

Section 1. - Adoption.

These rules were adopted by vote of a majority of the members of the Board of Zoning Appeals—Zoning at a regular public meeting on December 7, 1999. These rules were amended by a vote of a majority of the members of the Board of Zoning Appeals—Zoning at a regular public meeting on November 16, 2004, and were further amended by a vote of a majority of the members of the Board of Zoning Appeals—Zoning at a regular public meeting on August 5, 2008.

These rules were adopted by vote of a majority of the members of the Board of Zoning Appeals—Site Design at a regular public meeting on March 1, 2000. These rules were amended by a vote of a majority of the members of the Board of Zoning Appeals—Site Design at a regular public meeting on January 5, 2005, and were further amended by a vote of a majority of the members of the Board of Zoning Appeals—Zoning at a regular public meeting on August 6, 2008.

Section 2. - Amendment.

These rules may be amended at any regular meeting of the Board by majority vote of the members of the Board at least seven (7) days after the written amendment is delivered to all members.

Sec. 54-901. - Zoning administrator as administrative officer; inspections; enforcing agents.

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. The officers and patrolmen of the police department, so far as is practicable, shall inspect daily all construction in progress in the city, and shall report promptly to the chief of police who shall advise the city engineer's office of any construction whereon is not displayed a building permit, as required by ordinance. Any person to whom a building permit is issued shall notify the city engineer's office in writing, twenty-four hours before commencing work of the exact day upon which he intends to begin construction or alteration, so that the proper inspections can be made.

The city electrician, before authorizing the increase of electric meters on any premises or the cutting in of electrical current to be used directly or indirectly for the purposes of lighting or operating signs, shall consult with the administrative officer and see that the application has been approved for additional dwelling units or the application for signs has been applied for and granted as required by this Chapter.

The plumbing inspector, before authorizing the installation of additional sinks or bathrooms, shall consult with the administrative officer and see that the necessary application permits have been granted as required by this Chapter.

(Ord. No. 1999-54, § 4, 4-27-99)

Sec. 54-203. - Permitted principal uses.

Permitted principal uses for each base zoning district shall be as set forth in Part 3: Table of Permitted Uses, and as modified by special provisions, exceptions and conditions contained herein. Principal use means the primary or predominant use or uses of a lot or parcel. The Table is based upon the 1987 Standard Industrial Classification Manual. Accessory uses, which for the purposes of this Chapter are defined as uses of land or of a building or portion thereof which are customarily incidental and subordinate to a principal use located on the same lot or parcel, are allowed, except that communication towers, home occupations, bed and breakfasts, home day care facilities, and limited commercial uses within the GO district are only allowed pursuant to the requirements specified in Part 4: Accessory Uses, of this Article.

- a. Symbols used in the Table are as follows:
 1. *bull; means that the indicated use is permitted by right in the indicated district;
 2. † means that the indicated use is permitted in the indicated district, subject to the granting of a special exception by the Board of Zoning Appeals;
 3. ‡ means that the indicated use is permitted in the indicated district as a conditional use, subject to a finding by the Zoning Administration that the use satisfies specific conditions listed herein.
 4. H means that the indicated use is permitted but the hours of operation for that use are restricted to normal business hours for that district as listed in Section 54-204.
- b. Any use not permitted in a district is expressly prohibited.
- c. A section number following the use category means that the special exception or conditional use is allowed where indicated on the Table but must meet the conditions and requirements set forth in the referenced section of this Article.

- d. The Zoning Administration may utilize the Standard Industrial Classification Manual to determine the appropriate classification of a land use.

(Ord. No. 1999-54, § 4, 4-27-99)

Sec. 21-16. - Loud and unnecessary noises restricted.

- (a) Findings of fact: City council finds and declares that excessive noise is a serious hazard to the public health, welfare, peace and safety and the quality of life of its residents and visitors; that a substantial body of science and technology exists by which excessive noise may be substantially abated; that people have a right to and should be insured an environment free from excessive sound that may jeopardize their public health, welfare, peace and safety or degrade the quality of life or diminish property values; and therefore, city council finds that it is the policy of the city to prevent such excessive sound.
- (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.
- (c) It shall be unlawful for any person to ride, drive, propel or otherwise operate a motorized vehicle in a manner which emits loud and unnecessary noise or long continued noise, either in the day time or at night, which disturbs the peace and quiet of the city, whether in the public street or on private property, or within enclosures, public or private. The prohibitions of this subsection shall include operating a motorized vehicle by rapid throttle advancing (revving) of an internal combustion engine resulting in increased noise from the engine.
- (d) For purposes of this section, motorized vehicle includes but is not limited to cars, trucks, vans, buses, motorcycles, motor scooters, motorized skateboards, mopeds, and low speed neighborhood electric vehicles.
- (e) Nothing in this section shall be construed to extend to the blowing of a motorized vehicle horn or other signal device by the operator of either a public or private motorized vehicle for the purpose of notifying passengers or other persons of the presence of such motorized vehicle or as a safety precaution in the actual operation of the motorized vehicle.
- (f) 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 the amplified device or apparatus making or reproducing musical or other sounds within a privately owned or controlled courtyard or outdoor area after 11:00 p.m. and before 7:00 a.m. in such a manner as to be audible in any public street or right-of-way.
- (g) It shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated any musical instrument or other device or apparatus making or reproducing musical or other sounds without amplification within a privately owned or controlled courtyard or outdoor area after midnight and before 7:00 a.m. in such a manner as to be audible in any public street or right-of-way.

This subsection expressly prohibits the playing of brass or drum instruments in privately owned or controlled courtyards or outdoor areas after 11:00 p.m. and before 7:00 a.m.

- (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.
- (i) Except as provided in subsection (f) 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 when the said sounds are transmitted through a speaker which

is mounted on an exterior wall or surface of the structure in such a manner as to be audible in any public street or right-of-way.

- (j) This section shall not be construed to apply to sound trucks as defined in section 21-26 of the Code of the City of Charleston.
- (k) Nothing herein shall be construed to prevent the mayor or his designee from issuing temporary permits for outdoor events sponsored by public, non-profit, educational or religious entities on such terms and conditions as are in the public interest.

(Code 1975, §§ 36-1, 36-3; Ord. No. 1993-51, § 1, 3-23-93; Ord. No. 1993-52, § 1, 3-23-93; Ord. No. 1994-120, § 1, 4-26-94; Ord. No. 2003-36, § 1, 4-8-03; Ord. No. 2004-60, § 1, 6-15-04; Ord. No. 2011-44, § 1, 6-21-11)

Note— See the editor's note to § 21-17.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-CP-10-2183

FILED
2018 MAR -2 PM 3:45
JULIE A. NICHOLSON
CLERK OF COURT
PX

Dewberry 334 Meeting Street, LLC,

Respondent,

v.

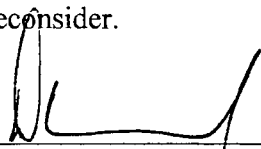
City of Charleston and Board of Zoning Appeals-Zoning,

Appellants.

NOTICE OF APPEAL

Appellants City of Charleston and City of Charleston Board of Zoning Appeals-Zoning ("Appellants") appeal the orders of the Honorable J.C. Nicholson, Jr. filed on December 15, 2017, and February 9, 2018. On December 21, 2017, Appellants received written notice of entry of the order filed on December 15, 2017. On December 28, 2017, Appellants timely served and filed a motion to alter, amend, or reconsider such order. On February 12, 2018, Appellants received written notice of entry of an amended final order on appeal, filed on February 9, 2018, which also denied Appellants' motion to alter, amend or reconsider.

March 1, 2018



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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J.C. Nicholson, Jr., Circuit Court Judge

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Respondent,

v.

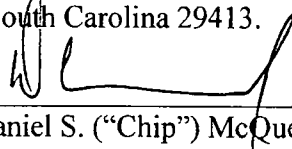
City of Charleston and Board of Zoning Appeals-Zoning,

Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent Dewberry 334 Meeting Street, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on March 1, 2018, addressed to its attorney of record, G. Trenholm Walker, Walker Gressette Freeman & Linton, LLC, Post Office Drawer 22167, Charleston, South Carolina 29413.

March 1, 2018


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FILED
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CLERK OF COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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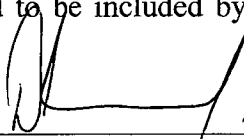
City of Charleston and Board of Zoning Appeals-Zoning,

Appellants.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), SCACR, the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 2, 2018


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