THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC, Respondent,

v.

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

APPELLANTS' REPLY BRIEF

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In reply to the issues and arguments raised by Respondent Dewberry 334 Meeting Street, LLC ("Dewberry"), Appellant the City of Charleston and the City of Charleston Board of Zoning Appeals-Zoning (collectively, the "City") assert as follows:

1. As a matter of statutory construction, Dewberry had the burden to establish that its special exception request complied with the criteria in section 54-220 of the City's Zoning Ordinance (the "CZO"). The City raised this issue in its brief (p. 19), but Dewberry does not address it.

Section 54-220(b)(1)(f) of the CZO requires the Board of Zoning Appeals-Zoning ("BZA") to make findings based upon "information to be provided by the applicant." (R. p. 374). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

2. Dewberry ignores black-letter law that Dewberry must demonstrate that its proposed special exception uses comply with the conditions in section 54-220.

Even ignoring section 54-220 of the CZO, black-letter law requires an applicant for a special exception permit to establish its right to such permit: "Where a variance or special permit is requested, the applicant must demonstrate the existence of conditions justifying the application . . . ." 8 Zoning and Land Use Controls § 51.05 (2018). "An applicant for a special permit also has the burden of demonstrating that the proposed use complies with the standards prescribed for such use in the ordinance . . . ." Id.; see also People ex rel. Kreda v. Fitzgerald, 338 N.E.2d 76, 79 (Ill. App. 1975) (recognizing that "a party seeking a special use permit has the burden of proving that

the proposed use will meet all the standards required by the ordinance . . . ."). "If one who has the affirmative duty to convince the board of the propriety of the request does not present sufficient evidence to sustain his case, a zoning board is obliged to resolve the matter against him." 8 Zoning and Land Use Controls § 51.05 (2018). Dewberry cites no law for the contrary position.

3. It is unclear whether Dewberry is advocating that a municipality, a zoning board, or the opponents to a special exception permit must establish that the applicant is *not* entitled to the permit during a hearing before the zoning board, but Dewberry cites no authority supporting the proposition that the City, the BZA, or the opponents to the special exception permit were required to carry any such burden. Upon information and belief, there is no such authority.

4. Dewberry's challenge to the burden of proof is especially important where, as here, Dewberry also asserts that a different standard of competency or admissibility applies to evidence proffered by neighbors than to evidence proffered by Dewberry. The City pointed out this disparity in its brief (p. 27), but Dewberry does not address it.

Instead, Dewberry continues to assert that "[n]one of the opponents brought forth anything other than their personal speculation that sound from the rooftop terrace would be audible in the residential area to the east of the Hotel and that it would be loud and disruptive." (Resp.'s Br. p. 38). At the same time, Dewberry complains that Dewberry should not have to comply with any evidentiary standard or burden of proof, instead asserting that Dewberry may rely on its application and the staff report because the standards applicable to "trial proceedings" are not applicable to hearings before the BZA. (Resp.'s Br. pp. 40-41).

To the extent the same standards apply, as set forth in the City's brief (p. 26), Dewberry failed to produce competent evidence one way or another addressing the potential negative impacts from its new accessory uses on residential neighborhoods. As a result, the BZA correctly denied

Dewberry's special exception request. See 8 Zoning and Land Use Controls § 51.05 (2018) ("If one who has the affirmative duty to convince the board of the propriety of the request does not present sufficient evidence to sustain his case, a zoning board is obliged to resolve the matter against him.").

5. Unlike the applicants in Wyndham and Bannum, Dewberry did not support its application with competent testimony in the face of supposedly speculative neighbor complaints. In Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 150-51, 735 S.E.2d 659, 663 (Ct. App. 2012), the Court of Appeals rejected resident testimony that a proposed fireworks business would increase traffic, but noted that the property owner procured competent testimony in support of its applicant by relying upon the City's traffic consultant, who "determined the proposed fireworks business would not generate a significant amount of traffic."

Similarly, in Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205 n.4, 516 S.E.2d 439, 440 (1999), the Supreme Court held that neighbor speculation about traffic was too speculative, but emphasized that the applicant produced competent evidence on traffic impacts in the form of a report by a private investigator and a traffic assessment.

Dewberry's only competent evidence on the issue of noise was a letter from Dewberry's contractor stating that the speakers installed on the exterior of the rooftop would not be heard in the adjacent residential neighborhood. (R. pp. 369-70). Dewberry offered no competent testimony addressing the adverse effect on the neighborhood from noise generated by the more intense, new accessory uses in the interior rooftop structure. Likewise, Dewberry offered no competent testimony addressing any other potential adverse effect on the neighborhood from the increased intensity of the use of the exterior of the rooftop caused by the new accessory uses in the interior.

Consequently, the BZA properly denied Dewberry's permit.

6. Even the circuit court disagrees with Dewberry's new argument that section 54-220 provides no authority for the BZA to evaluate accessory uses as part of a special exception application: "[T]he 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.*" (R. p. 8) (emphasis added).

7. While Dewberry relies on isolated words and phrases in the CZO as a whole and section 54-220 in particular to attempt to change the meaning of section 54-220 of the CZO, the plain language of section 54-220 supports the City's assertion that the BZA has the authority to review accessory uses as part of a special exception application for accommodation uses.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland Cty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 570-571, 666 S.E.2d 892, 896 (2008).

Several subsections of 54-220.b emphasize that the BZA should consider the impacts of both principal and accessory uses proposed in a special exception application. See, e.g., § 54-220.b.1(a) (BZA must find no adverse impact of the "proposed facility" on existing housing stock); § 54-220.b.1(b) (BZA must find location of the "facility" will not significantly increase traffic); § 54-220.b.1(c) (BZA must find total square footage for restaurant and bar space does not exceed

specified percentage)[1]; § 54-220.b.1(d) (BZA must find the "proposed use" is in character with immediate neighborhood); § 54-220.b.1(f)(1), (2) (BZA to evaluate number of existing housing units on the property to be displaced and the impact of displacement on total housing stock); § 54-220.b.1(f)(3) (BZA to evaluate number of vehicle trips generated by the "facility" and traffic circulation pattern serving the "facility"); § 54-220.b.1(f)(4) (BZA to consider distance of entrances of "facility" from certain roads); § 54-220.b.1(f)(5) (BZA must evaluate "development pattern and predominant land uses within five hundred feet (500') of the facility"); § 54-220.b.1(f)(6) (BZA shall consider "proximity of residential neighborhoods to the facility"); § 54-220.b.1(f)(7) (BZA shall evaluate "accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation"). (R. pp. 374-375).

Each of these subsections, read separately or as a whole, supports the BZA's conclusion that City Council intended for the BZA to evaluate the impacts of the entire facility, including accessory uses, on residential neighborhoods.

8. With respect to these subsections of 54-220.b.1, Dewberry also fails to address the City's argument (Apps.' Br. p. 13) that Dewberry's interpretation would read much of section 54-220 out of the ordinance. See Home Bldg. & Loan Ass'n v. Spartanburg, 185 S.C. 313, 323, 194 S.E. 139, 143 (1937) ("Full effect must be given to each section, and the words must be given their plain meaning. Where there is no ambiguity, words must not be added to or taken from the statute.").

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[1] The Court respectfully should not accept Dewberry's invitation to reframe the City's argument with respect to section 54-220.b.1(c). The City has never asserted that Dewberry's new accessory uses exceed the square footage limitations for bars and restaurants in section 54-220.b.1(c). Instead, the City contends that section 54-220.b.1(c) is one of the many subsections of 54-220 establishing that City Council intended the BZA to review all accessory uses within an accommodation use to assess their impact on residential neighborhoods.

9. The rules of statutory construction prohibit Dewberry's attempts to interpret subsections of 54-220 in a vacuum. See Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Dewberry's argument that the stated intent behind section 54-220.a applies only to the principal accommodations use exemplifies Dewberry's attempt to circumvent the plain language of section 54-220 by "cherry-picking" certain sentences. Section 54-220.a provides as follows:

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

(R. p. 374) (emphasis added). Nothing in section 54-220.a even hints at a legislative intent to limit the BZA's review of a special exception application to address only impacts from principal uses.[2] From a resident's perspective, it certainly would not matter whether a negative impact arises from the guest rooms in the hotel or the accessory facilities thereto.

10. While Dewberry disagrees with the City's assessment of the stated intent behind section 54-220, Dewberry offers no argument challenging the City's assertion that the circuit court

[2] Dewberry's argument to the contrary runs afoul of Dewberry's other assertion that the rooftop bar, kitchen, function room, and lounge are "customarily incidental and subordinate" to the principal accommodations use, such that they should be permitted as a matter of right notwithstanding section 54-220.

failed to apply section 54-220 in light of its stated intent to protect residential neighborhoods.

11. Contrary to Dewberry's unsupported argument, section 54-203 does *not* preclude the BZA from evaluating the proposed accessory uses for a hotel in light of their impact on residential neighborhoods. Section 54-203 provides, in pertinent part:

> 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.

(R. pp. 389-390) (emphasis added).

In Eagle Container Co., LLC v. Cty. of Newberry, 379 S.C. 564, 571, 666 S.E.2d 892, 896 (2008), the Supreme Court of South Carolina explained that a prefatory statement in a zoning ordinance that a particular use is an "allowed use . . . is not the same thing as the term of art 'permitted use.'" "Referring to any allowed use as a 'use permitted' sheds no light on the proper classification of the use [as a permitted use, conditional use or special exception use]." Id. at 571-72, 666 S.E.2d at 896.

Here, even ignoring the plain language of section 54-220 requiring the BZA to evaluate the impact of all uses—principal and accessory—on residential neighborhoods, the term "allowed" in section 54-203 does not evince any intent by City Council to permit any accessory uses as a matter of right notwithstanding any other provision of the CZO.

12. As the City asserts in its final brief (p. 14), the specific provisions of section 54-

220 should govern this case, not the general statements in section 54-203. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). Dewberry does not address this issue.

13. Dewberry's assertion that section 54-220 should be strictly construed to permit the BZA to grant a special exception permit without evaluating the impact of proposed accessory uses on the residential neighborhood ignores the unambiguous contrary language in the ordinance.

"[S]tatutes 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." Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953). "It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner." Id.

This rule of strict construction applies only when the ordinance's terms are ambiguous: "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, *there is no occasion for employing rules of statutory interpretation* and the Court has no right to look for or impose another meaning." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) (emphasis added).

14. The cases cited by Dewberry in support of a strict construction of section 54-220, all of which involve the application of undefined terms in a zoning ordinance, are distinguishable. For instance, in Purdy v. Moise, 223 S.C. 298, 305, 75 S.E.2d 605, 608 (1953), the Supreme Court

held that a zoning ordinance permitting hotels within a residential zoning district should be construed in favor of permitting a "tourist court" or "motor court" in the district, simultaneously recognizing that the zoning board's previous interpretation of the ordinance supported the Court's conclusion.

Similarly, in Keane/Sherratt P'ship v. Hodge, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987), the Court of Appeals held that the undefined phrase "street or highway right of way" must be construed to mean only public streets and highway rights of way for purposes of determining whether a sign was off-premises: "The ordinance in the instant case defines sixty different terms but does not include definitions of the terms street or highway right-of-way." "We construe these terms strictly to mean only public streets and highway rights-of-way and not private easements such as the easement for ingress and egress in the instant case." Id.

Finally, in Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 11, 776 S.E.2d 753, 758 (Ct. App. 2015), the Court of Appeals recognized that the applicable ordinance "on its face, permits the use of a helicopter sight-seeing facility." While the appellant conceded that the term "sight-seeing facility" referred "a sight-seeing tour facility operated through a form of 'ground transportation,' such as a 'bus or jeep ride,'" the Court strictly construed the ordinance against such an interpretation, explaining that appellant "effectively seeks to add the limiting words 'by ground transportation' or 'by bus or jeep' to the County Ordinance, ultimately restricting the scope of the AC zoning designation.'" Id. at 12-13, 776 S.E.2d at 759.

Here, there is no need to apply the rule of strict construction articulated in Purdy, Keane, and Hinde, because section 54-220 unambiguously requires the BZA to evaluate accessory uses before granting a special exception permit for an accommodation use and because these cases, unlike the present one, were decided in the face of undefined terms in the zoning ordinance.

15. Dewberry continues to reframe the City's argument about accessory uses as one of location, asserting that, if BZA approval is not required to move an accessory use within a hotel, it should also not be required for a completely new accessory use. (Resp.'s Br. p. 23). While the City does not concede that the moving of an accessory use would not require BZA approval, this issue has nothing to do with the present appeal.

The City's concern in this matter arises from the installation of completely new accessory uses in the absence of any evaluation of their impacts on the neighborhood by the BZA. The plain language of section 54-220 requires the BZA to evaluate the impacts of a hotel facility, including accessory uses, in light of the stated purpose of the ordinance to protect residential neighborhoods. The BZA cannot be expected to serve this function if a developer may simply add accessory uses after-the-fact. This would make the BZA's review illusory.

16. For the first time on appeal, Dewberry argues that an approved accessory use may be duplicated anywhere within a hotel without BZA approval. (Resp.'s Br. pp. 25-26). No so. Again, such a reading disserves the purpose behind section 54-220 and its plain language requiring that the BZA evaluate a hotel facility, including accessory uses, in assessing impacts on residential neighborhoods.

17. Dewberry also contends that BZA approval would not be required to remove an accessory use previously approved by the BZA. (Resp. Br. p. 23). This argument is logically irrelevant. Cf. Arthur Ernest Davies, A Text-Book of Logic 573 (1915) ("In order to refute an assertion, Aristotle says we must prove its contradictory; the proof, consequently, of a proposition which stood in any other relation than that to the original, would be an *ignoratio elenchi.*").

The purpose of section 54-220 is to have the BZA evaluate the potential impacts of a proposed hotel, including its accessory uses, on residential neighborhoods. The BZA cannot serve

this purpose without knowing what uses are proposed. As a result, adding a completely new accessory use to an existing hotel warrants BZA review, regardless of the rule applicable to a removal of the same use from the same hotel.

18. Dewberry's comparison of an applicant's removal of an accessory use with the addition of a completely new accessory use is also one of apples to oranges. Requiring the BZA to approve an amended special exception to *remove* a proposed accessory use would not trigger the same concerns about impact on residential neighborhoods as adding a completely new one would.

19. Dewberry argues that the conditions to the 2011 special exception safeguard against impacts to residential neighborhoods. It is difficult to discern how the BZA's 2011 conditions could be interpreted to "safeguard" against impacts from uses not shown in the application. See 8 Zoning and Land Use Controls § 44.03 (2018) ("[T]he impact of a use—in terms of how it may affect traffic flow in the vicinity, for example—plainly is dependent on what type of use is involved, in the context of the particular design shown in the plans.").

20. Contrary to Dewberry's assertions (Resp.'s Br. p. 22), the City does *not* contend that all accessory uses are "permanently locked in" upon the issuance of a special exception under section 54-220.

Instead, the City contends that completely new accessory uses must be approved by the BZA as part of an application for an amended special exception to evaluate their impact on residential neighborhoods, as required under the plain language of section 54-220. In this respect, state law provides that "a vested site specific development plan or vested phased development plan may be amended if approved by the local governing body pursuant to the provisions of the land

development ordinances or regulations . . . ." S.C. Code Ann. § 6-29-1540(8).[3] Again, section 54-220 is the only mechanism by which the BZA can evaluate the impacts of such uses on residential neighborhoods.

Here, Dewberry applied for an amended special exception permit, and the BZA denied the permit. As set forth extensively in the City's final brief (pp. 18-27), this denial is supported by the evidence, requiring the circuit court to affirm the BZA's decision. See S.C. Code Ann. § 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.").

21. With respect to outside uses, Dewberry is incorrect in asserting that Dewberry has the right to conduct accessory uses on the outside of the rooftop facility without BZA approval. Under section 54-220, the BZA must approve new accessory uses to a hotel to evaluate their impact on residential neighborhoods. These include Dewberry's new proposed accessory uses on the interior and exterior of the rooftop.

22. The Court of Appeals respectfully should decline Dewberry's invitation to require the BZA to divorce impacts from interior and exterior uses at the hotel in evaluating a special exception application under section 54-220. Dewberry's 2017 application states its proposed amended special exception would permit a modification to the exterior use of the rooftop to facilitate outside seating "associated with the Citrus Club [the bar]." (R. p. 347). Dewberry also emphasizes in its 2017 application that the new exterior rooftop uses are "extensions of the uses

[3] The Vested Rights Act, codified at sections 6-29-1510 to -1560 of the South Carolina Code, defines a "site specific development plan" to include a "conditional use or special use permit plan." S.C. Code Ann. § 6-29-1520(9). It also defines the "local governing body" to include a "county or municipal body authorized by statute or by the governing body of the county or municipality to make land-use decisions." S.C. Code Ann. § 6-29-1520(5).

on the interior of the eighth floor." (R. p. 347). Dewberry does not address this concession in its brief.

23. Dewberry presented no evidence to the BZA addressing the impact from opening up the entire outside walkway, especially in light of Dewberry's new plan to include a bar on the interior of the rooftop and permit exterior rooftop uses as "extensions of the uses on the interior of the eighth floor." (R. p. 347). As a result, the BZA properly denied this request. To the extent Dewberry claims that the BZA did not sufficiently address the reasoning behind this denial (Resp.'s Br. p. 27), the proper procedure would have been to remand the matter to the BZA for additional findings of facts. Instead, Dewberry shifts the burden of proof on this issue to the BZA.

24. Dewberry suggests a 2011 letter submitted by Second Presbyterian Church supports its request to make the entire rooftop accessible. This letter says that the church reviewed floor plans from January 2011, never received any revised or updated plans, and had some suggestions and concerns about the hotel based on what was reviewed. (R. p. 342). The letter lists one concern about screening for parking, but never states what other suggestions were made, and there is no copy of the floor plans reviewed by the Church in the record. (R. p. 342). The letter does not support Dewberry's argument that there would be no adverse impact from permitting use of the full perimeter of the rooftop.

25. In a footnote (Resp.'s Br. pp. 25-26, note 6), Dewberry suggests that it will, as a matter of law, address the impacts of its new accessory uses on parking by complying with the City's minimum off-street parking requirements. (Resp.'s Br. pp. 26-27, note 6). While section 54-220.b.1(f)(9) requires Dewberry to provide certain minimum off-street parking spaces based on the number of sleeping units in the hotel, section 54-220.b.1(f)(8) separately requires the BZA to address the impact of the proposed accessory uses on parking. (R. p. 375). Dewberry has not

done so with respect to the new accessory uses.

26. In this appeal, Dewberry argues, for the first time, that the circuit court had the ability to balance the "competing equities associated with the assertion of estoppel and the defense of unclean hands in the discretion of the judge." (Resp.'s Br. p. 35). This ignores the circuit court's standard of review: "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*." S.C. Code Ann. § 6-29-840(A) (emphasis added).

Nothing in section 6-29-840(A) gives the circuit court, sitting in its appellate jurisdiction, the right or discretion to weigh competing equities. In fact, the circuit court is statutorily proscribed from making findings of fact in an appeal from the zoning board's decision: "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." S.C. Code Ann. § 6-29-840(A).

As result, the BZA's findings on estoppel are entitled to deference, not the circuit court's.

27. The City maintains that section 6-29-840(A) of the South Carolina Code requires *any* appellate court to defer to the factual findings of a board of zoning appeals (or, under Massey v. City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 199, 532 S.E.2d 885, 888 (Ct. App. 2000), remand any matter which does not contain sufficient factual findings by a board of zoning appeals).

Nevertheless, to the extent the appellate court agrees that the circuit court had jurisdiction to make its own findings on the issue of estoppel, the City contends that any such findings must be reviewed by the appellate court under a "preponderance of the evidence" standard. See Gaymon v. Richland Mem'l Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) ("a defense of equitable estoppel interposed in a law case should be tried by the court as an equitable issue."); Rushing v.

McKinney, 370 S.C. 280, 289-90, 633 S.E.2d 917, 922 (Ct. App. 2006) (recognizing that appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence on appeal from an action asserting equitable estoppel).

28. The record does not support the circuit court's finding that the City should be equitably estopped from denying Dewberry's 2017 special exception permit. The record evidence supports only the conclusion that Dewberry had knowledge or the means of knowledge of the truth as to the facts in question—namely, that the BZA did not approve his new accessory uses through the 2011 special exception permit. Likewise, there is no evidence supporting the circuit court's finding that Dewberry could have justifiably relied upon the conduct of the building inspector.

"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).

In 2011, Dewberry applied for a special exception to construct a 161-room hotel within the existing building. (R. p. 231, line 24-p. 232, line 2). Dewberry's original application for the special exception included floor plans—required to be submitted with the application—showing the penthouse as used for "SPA/LOUNGE." (R. p. 233, lines 2-18; p. 371). These plans also showed an open deck on the exterior of the rooftop, a pool area on the south end, and a green roof along the perimeter of the entire area. (R. p. 233, lines 2-18; p. 371),

Prior to the BZA hearing in 2011, in response to concerns expressed by neighbors and staff regarding the possibility of a rooftop bar, Dewberry submitted a revised floor plan for the 8th floor, showing the penthouse as being used for "SPA/FITNESS." (R. p. 233, line 19-p. 234, line 22; p. 372). The revised plans continued to show a pool and pool deck on the south end of the property,

with the remaining approximately ¾ of the roof exterior shown on the revised floor plan as "GREEN ROOF (not accessible)." (R. p. 372). Nothing in the revised floor plans mentioned a bar, function room, kitchen, or lounge area. (R. p. 372).

During the hearing in 2017, neighbors and BZA members explained that the primary concern in 2011 was the possibility of a rooftop bar, that Dewberry knew of these concerns, and that the revised plans were submitted to eliminate these concerns. (R. p. 232, lines 13-23; R. p. 233, line 19-p. 234, line 21; R. p. 268, lines 4-9; R. p. 274, line 23-275, line 19; R. p. 293, lines 6-15; R. p. 372).

In fact, the only evidence presented to the BZA or to the circuit court in 2017 is that everyone present in 2011 considered a rooftop bar "off the table" based on Dewberry's conduct at the time. In this respect, BZA member Margaret Smith, who was present during the 2011 proceedings, explained:

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

(R. p. 289, lines 10-19). The chairman of the BZA had the same recollection:

> CHAIRMAN KRAWCHECK: Me, too. I remember it, and I remember doing it real carefully . . . .
>
> [A]nd the rooftop thing was first and foremost, probably, in our—in our considerations.

(R. p. 289, line 20-p. 290, line 6).

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

> and then we put the conditions on that we—we did, and it changed those plans.
>
> . . .
>
> . . . . I think that the concern really is—is what is going to happen on the out—on the rooftop outside and that was one of the original conditions.

(R. p. 290, line 16-p. 291, line 15; p. 292, lines 8-10).

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

(R. p. 293, lines 4-15).

Dewberry was fully aware of the 8th floor uses approved by the BZA, and Dewberry was fully aware that those uses did not include a bar or a kitchen or an events room or a fully accessible roof deck. The record is clear on these points, as it unequivocally demonstrates that, in 2011, Dewberry revised the floor plans for the 8th floor to specifically delete any inference that a bar, function space, or kitchen would be constructed. (R. p. 233, line 6-p. 234, line 7; pp. 371-372). Further, Dewberry showed only a small, accessible outdoor deck for the 8th floor. (R. p. 372).

29. Moreover, as a matter of law, government estoppel does not apply under these circumstances. See Grant v. City of Folly Beach, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) (recognizing that City's issuance of a building permit did not preclude the City from enforcing the plain language of its zoning ordinance); South Carolina Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987) (holding governmental estoppel does not apply when

officer or agent acts outside scope of authority); Carolina Nat'l Bank v. State, 60 S.C. 465, 475, 38 S.E. 629, 633 (1901) ("All men are bound to take notice of the special authority of the State's officers, and when dealing with them outside their authority, they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the State.").

CONCLUSION

For the foregoing reasons, and as further set forth in the City's final brief, the circuit court's order reversing the BZA should be REVERSED, and the BZA's decision should be REINSTATED.

Respectfully submitted,

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November 2, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-CP-10-2183

Dewberry 334 Meeting Street, LLC, Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

November 2, 2018

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