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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000378

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

v.

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

RESPONDENT'S PETITION FOR REHEARING

November 4, 2021

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LLC

INTRODUCTION

Pursuant to Rule 221(a), SCACR, Respondent, Dewberry 334 Meeting Street, LLC ("Respondent" or "Dewberry 334") hereby petitions for rehearing of the Court's opinion reversing the lower court's order overturning the decision of the Board of Zoning Appeals-Zoning ("BZA") of the City of Charleston (the "City") (Jointly "Appellants"). See Dewberry 334 Meeting Street, LLC v City of Charleston and Board of Zoning Appeals-Zoning, Unpublished Opinion No. 2021-UP-360 (Ct. App. filed October 20. 2021) (the "Opinion"), copy attached hereto.

The decision of the BZA denied Dewberry's request for an amended special exception for accommodations use to allow the interior of the eighth floor of its hotel to be used as a reading room, pantry, small bar/restaurant, and the outside terrace to be used for seating associated with the small bar/restaurant on the inside. All these improvements on the eighth floor were constructed according to plans approved by the building official of the City who, along with the City's zoning official, was charged by ordinance with the authority for determining on a weekly basis whether any of the construction was in violation of the zoning, including the 2011 special exception for accommodations use, and did not note any violations until the construction was complete.

GROUNDS FOR REHEARING

Rehearing is warranted because the Opinion overlooks, misapprehends, and fails to properly apply the applicable ordinances, the law, and the comments at the hearing before the BZA.

1. The applicable ordinance, Section 54-220, neither restricts accessory uses nor does it require a hotel to seek a new special exception for accommodations use every time the hotel implements a new accessory use, adds to an existing accessory use, or changes the location of an accessory use. This Court's

imposition of an implied restriction on changes in accessory uses is not only contrary to rules of statutory construction but also infringes on the exclusive provenance of the legislative body, City Council.

This Court misapprehended the wording of Section 54-220 in interpreting it to require a hotel approved for accommodations use to obtain a new special exception from the BZA for new accessory uses or for changes in accessory uses where there is no such requirement in the ordinance. Neither this Court nor the Appellants are able to refer to any wording in the ordinance imposing this requirement because there is none. Instead, both this Court and the Appellants *imply* this restriction even though this interpretation is contrary to the settled rules of statutory construction applicable to zoning ordinances.

It is undisputed the only reference to accessory uses in the ordinance governing special exceptions for accommodations use is the following:

> (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:
>
> * * *
>
> (7) the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation;...

R. pp. 374-375.

City Council could have drafted Sec 54-220 to require that a hotel return to the BZA to amend its special exception if a new accessory use was later added or an existing one later relocated or expanded, yet Council chose not to place this requirement in Sec. 54-220. This Court's implying the requirement into Sec. 54-220 is contrary to fundamental rules of statutory construction and invades the province of the legislative body. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute . . . where the

statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and **the court has no right to impose another meaning**.") (double emphasis added). Honoring the plain meaning of a statute respects the intent of the legislature; "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The judicial intercession by this Court to impose conditions not stated in the ordinance violates the separation of powers and usurps the role of the legislative body. Our Constitution vests City Council, not the courts, with the authority to write the ordinances. "It is the province of the Legislature to enact laws and of the courts to construe them...." State v. Texas Co., 136 S.C. 200, 213, 134 S.E. 211, 213 (1926).

Sec. 54-220 deals with the requirements for obtaining a special exception for accommodations use. It does not govern architecture (internal or external) or floor plans; these are the province of the City's Board of Architectural Review and the City's Building Inspector, respectively. Once the special exception is granted, there is nothing in the ordinance that confers ongoing jurisdiction on the BZA to police accessory uses and force an application for a new special exception for accommodations use if accessory uses change. The ordinance, in title and substance, governs accommodations uses, not accessory uses.

Rather, accessory uses are governed by a different ordinance. Sec. 54-203 governs principal uses and accessory uses:

> ... 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....

Sec. 54-203. (**R. p. 389**).

Nonetheless, the Court reads Sec. 54-220 to override the specific ordinance on principal use and accessory uses. Sec. 54-303 enumerates a list of specified exceptions to accessory uses as a matter of right for "communication towers, home occupations, bed and breakfasts, home day care facilities, and limited commercial uses within the GO district...." Significantly, it does not contain an exception for accessory uses associated with accommodations uses. It does not say that if an accessory use associated with accommodations use changes, is expanded, or is moved within the hotel, the accessory use is no longer permitted as a matter of right but is conditioned on BZA approval. Sec 54-203's omission of an exception for accessory uses associated with accommodations uses even though it lists specific exceptions to the rule must be interpreted to mean that accessory uses associated with accommodations uses are allowed as a matter of right, according to the canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*." Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000)(The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded).

Under the rules of statutory construction, a specific statute or ordinance prevails over a general one. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 412-413, 526 S.E.2d 716, 719 (2000) ("Generally, specific laws prevail over general laws . . . ."). Here, Council adopted an ordinance that specifically addresses principal uses and accessory uses. This ordinance prevails over the general statement of "Intent" in Sec. 54-220 (a) that this Court relied upon in its interpretation of Sec. 54-220 (b)(1)(f)(7) to impose a requirement that

accessory uses cannot change after the special exception for accommodations use is granted even though this judicially imposed restriction is entirely absent in the ordinance. **(Opinion at p. 2); (R. pp. 374-375).**

The Court mistakenly holds that under this rule of statutory construction, Sec. 54-220 was the more specific ordinance. **(Opinion at p. 3)** In so doing, the Court misapprehended Sec. 54-220. Sec. 54-220 does *not* contain a specific limitation on accessory uses in hotels or state that a hotel cannot change its accessory uses after obtaining a special exception for accommodations use. The more specific ordinance is Sec. 54-203.

Moreover, this Court's interpretation is directly at odds with the introductory sentence of Sec 54-220(b) that preserves to the owner all the permitted uses of the underlying zoning district. These permitted uses include the accessory uses allowed by Sec. 54-203: "*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..." Sec. 54-220(b) **(R. p. 374)**(emphasis added).

Because zoning ordinances restrict a property owner from the free use of his or her property, the ordinances must be construed strictly against the municipality. This Court discussed this principle in Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015):

> 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.***
>
> Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted) see also Keane/Sherratt P'ship by Keane v. Hodge, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct.App.1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted). Thus, we find the circuit court properly held the Zoning Board made an error of law in construing the County Ordinance to exclude a helicopter sight-seeing tour facility as a permissible use within the AC district.

776 S.E.2d 759 (double emphasis added).

The Court also appears to have misunderstood that that the accessory uses of kitchen, meeting room, restaurant or bar were new accessory uses. They were not. The first floor of the hotel has a ballroom that is a function-meeting room, a restaurant known as Henrietta's, a kitchen, and a bar known as the Living Room. **(R. p. 235:14-15; 245:24-246:2).**

For the foregoing reasons, Dewberry 334 submits the Court misapprehended the limited reference to accessory use in Sec. 54-220, mistakenly imposed a requirement on a hotel to obtain a new special exception for accommodations use if accessory uses later change or are relocated, and mistakenly construed Sec. 54-220 in favor of the City to restrict the rights of the hotel to impose conditions not expressed in the ordinance even though the law requires that the ordinance be construed against the municipality.

2. The Court misunderstood or misapprehended the comments at the hearing that it found supported the BZA's denial of the request to allow the accessory uses on the eighth floor. These comments were also either speculative or did not involve similar circumstances.

This Court held that the BZA's decision to deny Dewberry 334's request was not arbitrary and capricious, as found by the lower court, because "not all of the testimony presented by the residents was speculative as the trial court held." **(Opinion at p. 7).** As the Court acknowledges in this comment, most, if not all, the comments about potential noise that might emanate from the interior of the eighth floor or the rooftop terrace were speculative.

This Court referred to the following facts or comments at the meeting as competent proof that activities on the interior of the eighth floor and outside on the rooftop terrace would generate noise that would disturb the residential neighborhood on the opposite side of the long parking lot behind the hotel:

1. Dewberry had received two tickets from the Livability Court for noise violations involving amplified music from the patio outside the ballroom on the ground floor;
2. A resident who related his observation of the sound intensity at street level from another rooftop bar on the opposite side of Marion Square; and
3. The comment by a resident that he had been invited to a large party of 200 to 250 people on the eighth floor.

(Opinion at pp. 5-6).

With due respect to the Court, none of these is cogent proof that activity in the Citrus Club and the event room inside the eighth floor and on the rooftop terrace outside, elevated approximately 100 feet above street level, will generate sound that will disrupt the neighborhood, particularly considering the conditions of the special exception requiring the rooftop terrace to close by 10 PM, prohibiting amplified sound outside, and requiring the installation of plantings around the perimeter to act as a screen and buffer.

As this Court acknowledged in footnote 3 of the Opinion, the two citations for noise from an amplified band at the ground level patio were because the hotel manager at the time did not realize the special exception prohibited amplified music anywhere on the hotel property, not just on the rooftop terrace. **(R. at p. 257)** ("...Yes, there have been events that, I guess, more recently have been on the ground floor with a wedding there was -- it was in the ballroom, but there was outside music, and it was amplified, and it was against the zoning ordinance. That's been made clear to Scott [the hotel manager] that -- we've got it..."). Noise from amplified music on the patio outside the ballroom on the ground floor because the manager, Scott, mistakenly thought the prohibition on amplified music applied only to the rooftop terrace does not in any way constitute proof that the hotel will violate the condition of the special exception and have loud amplified music from the rooftop terrace when even the manager who made the mistake was not mistaken about the prohibition on the rooftop.

The second comment relied upon by the Court was from Aaron Gilchrist who said: "The funny thing about sound, I walk my dogs regularly in Marion Square, and there's a rooftop bar at the corner of Calhoun and King Street. Directly across the -- all the way over, the sound completely bounces. It -- it hits you. It's -- it's the same -- it's going to be the very same thing. There's nothing to impede the sound from the Dewberry. It's eight stories up." **(R. at p. 276)**. There is no showing of similarity between the bar on the top of the second floor at the corner of Calhoun and King and the rooftop terrace on the eighth floor of the hotel. Specifically, there was no showing the Calhoun and King rooftop business had any limitation on amplified music. In addition, Mr. Gilchrist had no qualifications or expertise to equate the effects of noise at different elevations. The fact that a person walking a dog in

Marion Square could hear noise from a low rooftop bar without any restrictions on amplified music is not competent to prove that the rooftop terrace on the eighth floor of the hotel that cannot have amplified music and must close before 10 PM will generate sound that will be disruptive of the neighborhood. Because of the dissimilarity of circumstance and Mr. Gilchrist's lack of expert qualifications, his testimony was speculative too.

As for the last reference to the record the Court relied upon, there is no factual basis for equating the size of a group that will be on the inside and outside of the eighth floor with the generation of disruptive noise. There is no presumption that a group of 200 people dispersed on the inside and outside of the eighth floor will disrupt the neighborhood. The size of the group does not determine if sound from the group will be heard at the street level below or in the distant neighborhood.

All three record references cited by this Court in its Opinion as proof that there will be disruptive noise from activities on the rooftop terrace and inside the meeting room and Citrus Club on the eighth floor were speculative and not based on the particular circumstances attendant to the use of the interior meeting room, small restaurant, and kitchen on the eighth floor and the rooftop terrace. The existing special exception disallows the amplified music on the rooftop terrace, regardless of the manager's failure to realize it applied to the outside courtyard on the ground level. The rooftop bar across Marion Square is not at all substantially similar to the rooftop terrace of the hotel which has both a vegetative screen and a prohibition on amplified music. The number of people invited to a reception or party that will be held inside the eighth floor and on the outside rooftop terrace is not proof that the event will likely generate noise that will disrupt the neighborhood.

Last, it appears this Court misunderstood the lower court's determination that the City has a noise ordinance that can be invoked to deal with any noise complaints. **(R. at pp. 14-15)**. In the Opinion, this Court stated: "We also reject Dewberry's assertion that the City's noise ordinance would alleviate any concerns about noise. This ordinance did not stop Dewberry from being cited in livability court for parties on the first floor." **(Opinion at p. 7)**. As previously explained, the two citations stemmed from the hotel manager's failure to realize the restriction on outside amplified music applied to the outside patio on the ground level. There was never any misunderstanding as to its application to the rooftop terrace.

With all due respect, Dewberry 334 also submits the syllogism of the Court was incorrect. The noise ordinance is the mechanism for imposing penalties to deter if there is a violation of the conditions of the special exception that causes disruptive noise in the neighborhood, even though there was no competent proof that will occur. Forbidding the use of the interior of the eighth floor and the rooftop terrace because of the speculative possibility of noise is excessive and unnecessary in light of the existing conditions in the special exception and the backstop of the City's noise ordinance in the event there ever was a complaint about noise generated from the rooftop terrace.[1]

For the foregoing reasons, the Court misapprehended and was mistaken in thinking the three fragments from the record cited by it constituted competent proof that the use of the interior of the eighth floor and the rooftop terrace will probably generate disruptive noise, despite the conditions on operation in the special exception intended to eliminate or reduce

[1] In the three years since the lower court issued its order of September 10, 2018, lifting the automatic stay pending final determination of this appeal that allowed the operation and use of the eighth floor - including the meeting room, Citrus Club, and rooftop terrace - it is undisputed that there have been no noise citations issued to the hotel for the rooftop terrace or any other location of the hotel.

noise. The lower court correctly held that the BZA's decision to deny the request to use the eighth floor and rooftop terrace was based on speculative comments and assertions and, therefore, arbitrary and capricious. (R. at pp. 12-13).

3. The Court misapplied the law of estoppel to the facts of this case and erroneously held Dewberry 334 was on notice or should have been on notice that a change in accessory uses at the hotel required an amendment to the special exception when neither Sec. 54-220 nor Sec. 54-203 has any term or provision expressly imposing that requirement.

In the Opinion the Court reversed the lower court's alternative holding reversing the BZA's decision based on estoppel. **(Opinion at pp. 9-10)**. This Court had two reasons for this ruling. First, the Court found that Sec. 54-901 "does not authorize the inspector to waive any zoning ordinance requirements." **(Opinion at p. 9)**. Second, the Court found that Dewberry 334 did not establish the necessary element of justifiable reliance because "Dewberry knew or should have known from the ordinances that it was required to submit an application for an amendment to the 2011 special exception." **(Opinion at p. 10)**. Dewberry 334 respectfully submits the Court misapprehended the law and ordinances in reaching these conclusions.

As to the first reason, this Court mistakenly confused the doctrine of waiver with estoppel. The lower court did not hold the building official "waived" any zoning ordinance, nor did Dewberry 334 argue the building official waived the zoning ordinance. Waiver is different from estoppel. "Often confused with waiver, equitable estoppel focuses on a party's detrimental reliance on another party's conduct while a waiver analysis focuses on a party's 'unequivocal intent to relinquish a known right.'" Strickland v. Strickland, 375 S.C. 76, 85-86, 650 S.E.2d 465, 471 (2007).

Dewberry 334 argued, and the lower court found, that the conduct of the City in approving millions of dollars of construction on the eighth floor and rooftop without communicating that it was in violation of the authorization of the Board of Zoning Appeals, when Sec. 54-901 imposed the building official and administrative officer of the Zoning Ordinance the responsibility to do so, estopped the City from asserting upon completion of construction that all of it was in violation of the special exception.[2] The lower court invoked the doctrine of estoppel, not waiver.

As to the second ground for this Court overturning the lower court's legal determination of estoppel, as discussed in Part 1, supra, there is no term, clause or provision in Sec. 54-220 that states that a hotel must submit an application for an amendment to its prior special exception for accommodations use if the hotel changes the type, location, or number of accessory uses in the hotel in a manner that is different in any way from the preliminary floor plans submitted as part of its previous application to the BZA for the special exception.

The City and this Court do not point to any specific wording establishing this non-existent requirement but instead assert it is implied because Sec. 54-220 (b)(1)(f)(7) says that the factors to be considered by the BZA in considering an application for a special

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[2] Sec. 54-901 states, in relevant 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.***
Sec. 54-901 (emphasis added). **(R. at p. 388).**

exception for **accommodations** use include "the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation." **(R. at p. 375).** Nothing in this ordinance says that if the actual accessory uses vary in any manner from the *proposed* ones, then the applicant must reapply for another special exception to approve the change in accessory use or the location of the accessory use. The conditions of the 2011 special exception also do not impose any similar restriction. **(R. at p. 60).**

For the same reasons that the Court misunderstood or misapplied the applicable ordinances to require a new application for special exception if there is any change in the accessory uses discussed in Part 1, supra, the Court misapprehended those ordinances in construing them to put Dewberry 334 on notice that it was required to obtain a new special exception for accommodations use when it altered the permitted accessory uses on the interior of the eighth floor and the rooftop terrace from those proposed four years earlier at the time of the special exception.

CONCLUSION

For the foregoing reasons, Dewberry 334 requests that this Court grant its Petition for Rehearing.

Respectfully submitted,

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

Appellate Case No. 2018-000378

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-360
Heard September 15, 2020 – Filed October 20, 2021

REVERSED

Frances Isaac Cantwell and Daniel Simmons McQueeney, Jr., both of Charleston, for Appellants.

John Phillips Linton, Jr. and George Trenholm Walker, both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Respondent.

PER CURIAM: The City of Charleston (City) and Board of Zoning Appeals-Zoning (BZA) (collectively, Appellants) appeal the order of the circuit court vacating the BZA's decision and declaring Dewberry 334 Meeting Street, LLC

(Dewberry) has the legal right to certain accessory uses on the eighth floor of its hotel. We reverse.

1. We agree with Appellants' argument that the circuit court erred in holding the City's zoning ordinances did not prohibit Dewberry from adding new accessory uses to the hotel building without first obtaining BZA approval.

"Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Id.* "When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." *Id.* "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id.* "The statutory language must be construed in light of the intended purpose of the statute." *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). The appellate court "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Id.* "[I]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). "[W]here two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." *Mikell v. County of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009).

According to section 54-220 of the City of Charleston Code of Ordinances (2016),[1] accommodation uses were only allowed in the A Overlay Zone[2] and only with approval of the BZA. The ordinance explained the intent of the City as follows: "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." Section 54-220 required an applicant to provide site plans, floor plans, building elevations, and a detailed written assessment report to the BZA for its consideration. This information must have included "the proximity of residential neighborhoods to the

[1] The City of Charleston has revised these ordinances since this matter arose. We refer to the ordinances as they appear in the record on appeal.
[2] The ordinance permits some exceptions not relevant to this case.

facility" and "the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation[.]" In addition, section 54-925 of the City of Charleston Code of Ordinances (2016) provided, "In granting an exception or a variance, the [BZA] may attach to it such 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."

The zoning ordinances clearly authorized the BZA to consider all of the plans for a hotel, including all of the accessory uses. In addition, the ordinances authorized the BZA to place conditions on accessory uses. This authorization would have been meaningless if a hotel could add or change accessory uses without seeking BZA approval for such alterations. Under the circuit court's interpretation of the ordinances, a hotel, such as Dewberry, could submit plans for a special exception that did not include any objectionable accessory uses and then, after receiving BZA approval, include in the construction a use the BZA would not have approved. We find such an interpretation does not comport with the intent of the zoning ordinance, which had the stated goal of preserving the character of the City's residential neighborhoods and sought to avoid or minimize potential negative impacts affecting residential neighborhoods to the greatest extent possible.

We find the circuit court erred in holding that a property owner was entitled to all accessory uses that accompanied a principal use. The circuit court relied on section 54-203 of the City of Charleston Code of Ordinances (2016), which addressed permitted principal uses and provided, "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 . . . ." This definition was in the general ordinance concerning permitted principal uses. The more specific ordinances concerning special exceptions for accommodation uses and granting the BZA authority over accessory uses prevail over this general definition. *See Mikell*, 386 S.C. at 160, 687 S.E.2d at 330 (stating "where two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails").

We agree with Appellants' argument that the circuit court erred in interpreting the 2011 special exception permit and conditions contained therein as tacit permission for Dewberry to add new accessory uses to the eighth floor and rooftop. The circuit court stated, "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." As stated above, the zoning ordinance charged the BZA with the authority to review site plans, floor plans, building elevations, and a detailed written assessment report. This information must include "the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation." The BZA evaluated an application based on the detailed information the applicant provided to it. It was not charged with anticipating any and all possible accessory uses and prohibiting uses it was not asked to consider.

While the circuit court correctly found that a hotel would not be irrevocably bound by the conceptual floor plans presented to the BZA, Appellants never advocated such an inflexible position. Appellants explain in their brief to this court that although "the Zoning Administrator referred to the approved uses shown on the floor plans as being 'set in stone,' . . . this comment was qualified several times with explanations that changes would be locked in unless Dewberry received an amended special exception for the completely new accessory uses." The BZA's approval of a rooftop pool did not require Dewberry to complete an unfeasible project. However, before Dewberry could construct alternative accessory uses, it was required to submit its revised plans to the BZA to allow the BZA the opportunity to exercise its authority as granted in the ordinances. We find Appellants' interpretation reasonable. *See Mitchell*, 411 S.C. at 634, 770 S.E.2d at 392 ("An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.")

We therefore hold the circuit court erred in finding the zoning ordinances did not require Dewberry to submit a new application to the BZA upon its revision of its plans for the eighth floor and rooftop.

2. Appellants argue the circuit court erred in holding the BZA's decision to deny Dewberry an amendment to the 2011 special exception was arbitrary and capricious. We agree.

"On appeal, the findings of fact by the [Zoning] Board shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 8-9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration in original) (quoting *Wyndham Enters., LLC v. City of North Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012)); *see* S.C. Code Ann. § 6-29-840(A) (Supp. 2020) ("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 reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [Zoning] Board is correct as a matter of law." *Helicopter Sols., Inc.*, 414 S.C. at 9, 776 S.E.2d at 757 (alteration in original) (quoting *Wyndham Enters.*, 401 S.C. at 147-48, 735 S.E.2d at 661). "However, a decision of a municipal [Z]oning 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.* (alteration in original) (quoting *Wyndham Enters.*, 401 S.C. at 148, 735 S.E.2d at 661). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

"The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Furr v. Horry Cnty. Zoning Bd. of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014) (quoting *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007)). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster County*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

Dewberry asserts the City's concerns about noise emanating from the eighth floor are unfounded because the thickness of the glass on the exterior of the building would prevent any noise from being heard from the outside. Although Dewberry contends the Citrus Club is not a rooftop bar, it admitted in its brief that "guests visiting the interior accessory uses are free to go on the terrace, and, to that extent, their presence on the terrace might be considered an extension of the uses on the interior or facilitated by the accessory uses[.]" Dewberry also claims the Citrus Club would continue Dewberry's theme of elegance and would not be a rowdy place "like a biker bar." However, one of the neighborhood residents who opposed Dewberry's application for an amendment of the special exception testified at the BZA hearing Dewberry had already been ticketed twice due to noise generated

from activities on the first floor.[3] Another resident related his observation of the sound intensity at street level emanating from another rooftop bar. Although Dewberry portrays the uses of the Citrus Club and function rooms as small and intimate, one neighborhood resident testified he had been invited to a large party, which was attended by 200 to 250 people, and had been planned to be held on the rooftop before the City closed the eighth floor.

We find a letter from the designer of the sound system for the hotel asserting the music would not be heard from street level does not contradict the concerns about noise. The concern was not only about the volume of music but also the sounds of conversations emanating from large groups on the rooftop. We also reject Dewberry's assertion that the City's noise ordinance would alleviate any concerns about noise. This ordinance did not stop Dewberry from being cited in livability court for parties on the first floor.

Dewberry contends the conditions the BZA set forth in the 2011 special exception would serve to alleviate any of the issues raised by the City. However, the accessory uses shown in the 2011 application—the spa/fitness area and pool—would have been used by patrons of the hotel. Under Dewberry's current plans, the general public can use the Citrus Club and the events held in the function rooms are not limited to hotel patrons. As a representative of the Historic Charleston Foundation testified at the BZA hearing, "There's a large difference [between] paying guests of a hotel[] getting drinks via room service [or] a bar and having a publically open bar on the rooftop." In addition, Dewberry did not simply move accessory uses approved in the 2011 special exception to the eighth floor from other locations in the hotel. The hotel still has a ballroom and restaurant operating on the first floor. The proposed uses for the eighth floor would draw additional people to the hotel. Dewberry, however, failed to provide the BZA with information about the "impact on parking[] and impact on traffic generation" as required by the zoning ordinance.

We find the neighborhood residents expressed valid concerns. One testified about his own experiences hearing noise from rooftop bars and another related being invited to a large party that was to have been held on the rooftop. The residents testified about how Dewberry broke their trust by gaining their approval with the 2011 plans and then changing those plans to include a bar, which had been their

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[3] Dewberry explained the violations were due to its misunderstanding that the restriction prohibiting outdoor amplified music applied just to the roof while in fact it applied to the entire hotel.

biggest concern during the original application time. Thus, not all of the testimony presented by the residents was speculative as the trial court held. Furthermore, unlike as in *Wyndham Enterprises* upon which the trial court relied, the record does not contain any direct evidence contradicting the residents' concerns. *See Wyndham Enters.*, 401 S.C. at 149-50, 735 S.E.2d at 662 (explaining city staff determined the proposed use would not generate a significant amount of traffic, which contradicted the residents' speculative concerns about increased traffic).

Dewberry bore the burden of showing that the new uses of the eighth floor and rooftop would avoid or minimize potential negative impacts on the neighborhood. We hold the record contains evidence to support the BZA's decision that Dewberry failed to meet this burden.

3. Appellants argue the circuit court erred in reversing the BZA's decision to deny Dewberry an amended special exception based on the doctrine of governmental estoppel. We agree.

As the defense of estoppel is equitable in nature, "[i]n reviewing the trial court's decision, this court may make findings of fact according to its own view of the preponderance of the evidence." *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996). 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. *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). "No estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of . . . one of its officers or agents." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (omission in original) (quoting *DeStefano v. City of Charleston*, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). "A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority*." *Id.* (quoting *DeStefano*, 304 S.C. at 258, 403 S.E.2d at 653). "*The public cannot be estopped, however, by the unauthorized or erroneous conduct* ***or*** *statements of its officers or agents which have been relied on by a third party to his detriment.*" *Id.* (quoting *DeStefano*, 304 S.C. at 258, 403 S.E.2d at 653). In addition, "administrative officers of the state cannot estop the state through mistaken statements of law." *Id.* (quoting *Greenville County v. Kenwood Enters., Inc.*, 353 S.C. 157, 172, 577 S.E.2d 428, 436 (2003), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005)). "Specifically, '[e]stoppel will not lie against a government entity where a

government employee gives erroneous information in contradiction of statute. Simply stated, equity follows the law.'" *Id.* (alteration in original) (quoting *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319, 659 S.E.2d 263, 267 (Ct. App. 2008)).

In order for estoppel to be applicable against a government agency, the asserting 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." *Id.* at 236-37, 692 S.E.2d at 506; *see Grant v. City of Folly Beach*, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) (holding the city was not estopped from excluding the residential use of a unit because even if the property owner had been misled by the permit's reference to an "apartment," he could have reviewed the zoning/flood ordinance to ascertain the limitations on his building).

Section 54-901 of the City of Charleston Code of Ordinances (2016) provided,

> 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.

While this ordinance charges the building inspector with reporting to the city engineer's office any work not in accordance with permits or in violation of ordinances, it does not authorize the inspector to waive any zoning ordinance requirements. The building inspector has limited authority. There is no evidence in the record the building inspector told Dewberry it did not have to submit an amended application to the BZA. The inspector simply never stopped construction. Furthermore, as stated above, the City's ordinances clearly require applicants to submit all plans to the BZA and authorize the BZA to evaluate all

accessory uses. Dewberry was required by the ordinances to submit an application for an amendment.

We find Dewberry knew or should have known from the ordinances that it was required to submit an application for an amendment to the 2011 special exception. It could not rely on the building division's approval of its plans or on the building inspector's failure to stop the construction to justify its decision to proceed with the construction without first submitting the application to the BZA.

For the above stated reasons, the order of the circuit court vacating the BZA's decision and declaring Dewberry has the legal right to continue the accessory uses on the eighth floor is

REVERSED.

HUFF, WILLIAMS, and GEATHERS, JJ., concur.

RECEIVED
Nov 04 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000378

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

v.

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

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have served on this 4th day of November 2021, a copy of the **Respondent's Petition for Rehearing** on counsel of record by electronic mail only.

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fcantwell054@gmail.com
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Nancy Jane Dennis

From:	Nancy Jane Dennis
To:	mcqueeneyd (mcqueeneyd@charleston-sc.gov)
Cc:	Frances Cantwell (cantwellf@charleston-sc.gov); Trenholm Walker; John P. Linton, Jr.
Subject:	Dewberry 334 v City of Charleston BZA Appellate Case No. 2018-000378
Date:	Thursday, November 4, 2021 6:01:00 PM
Attachments:	11-04-21 Petition for Reheairing.pdf 11-04-21 GTW LT COA.pdf

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Attached for service please find Respondent's Petition for Rehearing with opinion and proof of service by electronic mail only.

Nancy Jane Dennis
Paralegal

WALKER GRESSETTE FREEMAN LINTON LLC

G. Trenholm Walker
Thomas P. Gressette, Jr.
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November 4, 2021

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

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

Dear Ms. Kitchings:

Attached please find Respondent Dewberry 334 Meeting Street's Petition for Rehearing with Proof of Service . Our firm's check in the amount of $50.00 to cover the filing fee is being mailed to you today as well. Your courtesies and consideration of this matter are greatly appreciated.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC

G. Trenholm Walker

Enclosure (Check)
cc: Frances I. Cantwell, Esq. (email only)
Daniel S. McQueeney, Esq. (email only)