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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable J.C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-360 (S.C. Ct. App. filed October 20, 2021)
Appellate Case No. 2018-000378

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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December 20, 2021
Charleston, South Carolina

TABLE OF CONTENTS

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed its Petition for Rehearing on November 4, 2021, and that the Court of Appeals denied the Petition by order filed November 18, 2021.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals conflicts with prior decisions of this Court and the constitutional requirement of separation of powers when the Court of Appeals judicially imposed restrictive conditions that are not stated in the City of Charleston's zoning ordinance and construed the ordinance in a restrictive manner contrary to the settled principle that any uncertainty or ambiguity in zoning ordinances must be construed in favor of the free use of property?

2. Whether the decision of the Court of Appeals conflicts with prior decisions of this Court by holding that public comments at the meeting of the Board of Zoning Appeals ("BZA") were competent to support the BZA's denial of the request to allow the accessory uses on the eighth floor of the hotel when those comments were based solely on speculation and opinion or dissimilar circumstances?

3. Whether the decision of the Court of Appeals conflicts with prior decisions of this Court that uphold estoppel against a governmental entity when the representations and actions of the governmental officials were within the scope of their authority and the property owner relied on them in spending millions of dollars to construct improvements approved by the government official that the City later asserted could not be occupied and used by the owner once they were completed?

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

This Court should grant review of the decision of the Court of Appeals because it conflicts with numerous, binding decisions of this Court and the constitutional requirement of separation of powers between legislative bodies and the judiciary. See SCACR 242(b)(3) and (4). It is well-settled that duly elected legislative bodies are tasked with creating laws and courts with interpreting law. In reversing the orders of the Circuit Court, the Court of Appeals judicially imposed on the controlling zoning ordinance a requirement that the legislative body of the City of Charleston (the "City") did not place in the ordinance. This *de facto* legislative action by the Court

of Appeals violates this Court's prior decisions enforcing the fundamental constitutional principle that the judiciary limit its role to interpreting and applying the laws approved by legislative bodies as written rather than modifying them. In so doing, the Court of Appeals also violated this Court's settled precedent establishing the standard for construing any uncertainty in the text of a zoning ordinance in favor of the property owner.

The Court of Appeals' decision further conflicts with prior decisions of this Court that speculative, unsupported opinions as to possible noise and other imagined effects from a proposed activity do not constitute competent proof sufficient to sustain a decision of a board of zoning appeals or other local governmental board. The Court of Appeals erroneously reversed the Circuit Court's finding that the BZA's decision was based upon speculative, unsupported comments during the public comments at the meeting when some voiced their fears that the hotel's accessory uses on the eighth floor and rooftop terrace would generate disruptive noise and injure their property values when none of those remarks was grounded in fact or competent expertise. See Bannum, Inc. v. City of Columbia, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified, they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation). The Court of Appeals' Opinion conflicts with the principle that local boards are to consider competent evidence and not base their decisions on unsupported alarmist comments of the most vocal opponents.

Finally, this Court should grant review of the Court of Appeal's decision because it confused the doctrines of waiver and estoppel and, moreover, erroneously held that the City was not bound by its own approvals of the extensive construction by public officials vested with authority to grant such approvals. The Court of Appeals further erred in holding that Dewberry

334 could not reasonably rely on such approvals based on an implied restriction that the Court of Appeals judicially imposed on the City ordinance that is neither stated in the ordinance nor stated as a condition of the special exception granted by the BZA for accommodations use.

For these reasons, as well as the others to be discussed in this Petition, Dewberry respectfully submits this Court should issue a Writ of Certiorari to review the Opinion.

STATEMENT OF THE CASE

This case arises from a decision of the Appellant BZA at its meeting on April 18, 2017. **(R. p. 366).** Petitioner, Dewberry 334 Meeting Street, LLC ("Petitioner" or "Dewberry 334"), seeks a writ of certiorari for this Court to review the decision of the Court of Appeals in Unpublished Opinion No. 2021-UP-360 (S.C. Ct. App. filed October 20, 2021)(the "Opinion"). In the Opinion, the Court of Appeals ruled in favor of Appellants and reversed the orders of the Circuit Court rendered by J.C. Nicholson, Jr., Circuit Judge. In the orders of the lower court overturned by the Court of Appeals, Judge Nicholson reversed and set aside the decision of the BZA denying Dewberry 334's application to amend the special exception approved by the BZA in 2011 for accommodations use for multiple reasons. **(R. pp. 1-36)**

On May 3, 2017, Dewberry 334 filed a notice of appeal of the BZA's decision and a request for pre-litigation mediation. **(R. pp. 37-40)** On June 20, 2017, the mediator declared an impasse. **(R. p. 44)** On June 27, 2017, Dewberry filed its Petition and Grounds for Appeal of the BZA's decision. **(R. pp. 46-68)** The Circuit Court held a hearing on Dewberry 334's appeal on October 9, 2017. On December 15, 2017, Circuit Court entered a Final Order on Appeal (the "Final Order"), reversing the BZA's decision. **(R. pp. 19-36)**

On December 21, 2017, the City and the BZA received written notice of entry of the Final Order on Appeal. **(R. p. 115)**. On December 28, 2017, the City and the BZA filed a motion to

reconsider, alter, or amend the Final Order, simultaneously serving copies of the motion on Dewberry 334 and the Circuit Court. **(R. pp. 115-127)**

On January 10, 2018, the Circuit Court held a hearing on the motion to reconsider, alter, or amend. **(R. pp. 194-224)** On February 9, 2018, the Circuit Court entered an Amended Final Order on Appeal (the "Amended Order"), denying the motion and amending the Final Order. **(R. pp. 1-18)** The Circuit Court held that the BZA committed an error of law in denying Dewberry 334's request for an amended special exception because: (1) nothing in the City Zoning Ordinance ("CZO") prohibited Dewberry 334 from changing or adding accessory uses to a previously-approved accommodations use, and section 54-203 of the CZO permits these accessory uses as a matter of right; (2) nothing in the 2011 special exception prohibited Dewberry 334 from changing or adding accessory uses to the approved accommodations use of hotel; (3) the BZA should have considered only alleged negative impacts from the interior accessory uses on the eighth floor, without regard to their impact on the exterior use of the rooftop; (5) various persons' comments about the potential noise and supposed injury to property values from the meeting space on the interior of the eighth floor and use of the surrounding rooftop terrace for patrons of the small restaurant-bar on the eighth floor were hypothetical and speculative; (6) to the extent noise was a concern, the BZA provided adequate safeguards against such noise as part of the conditions to the 2011 special exception; and (7) the City should be estopped from requiring a special exception permit for accessory uses on the top floor that were different from those shown in the application for the 2011 special exception because the City's building official who is charged with ensuring any construction is compatible with the zoning decision of the BZA approved the plans for the construction of the eighth floor and the rooftop terrace for these accessory uses and further inspected and approved all its entire construction at the cost of millions of dollars. **(R. pp. 1-18)**.

On February 12, 2018, the City and BZA received written notice of entry of the Amended Order and, on March 1, 2018, served their notice of appeal from the circuit court's decision. **(R. p. 393)**

STATEMENT OF THE FACTS

Dewberry 334 is the developer and owner of a hotel located at 334 Meeting Street, Charleston, South Carolina (the "Property" or "the Hotel") that was formerly the abandoned L. Mendel Rivers Federal Building. At the time of its purchase, the seven-story building had been vacant for years and was in a deteriorated condition. Dewberry 334 purchased the Property with the intent of renovating the building into a five-star hotel to be known as "The Dewberry."

The Property is located within the Accommodations Overlay District of the City, the only area of the City where a hotel use is allowed. **(R. p. 230, line 23-p. 231, line 2)**; **(R. pp. 374-376)** (City Ordinance Section 54-220). A property owner within the accommodations overlay district seeking to operate a hotel must take the additional step of obtaining a special exception from the BZA authorizing accommodations use. The BZA can deny the application, approve it, or approve it with conditions. **(R. pp. 381, 386)** (City Ordinance Section 54-925).

In 2010, Respondent applied to the BZA for a special exception for a seven-story hotel with 120 guest rooms. **(R. 231, lines 3-6).** On March 16, 2010, the BZA granted the special exception subject to eight specific conditions. **(R. p. 231, lines 7-19)**; **(R. p. 300)**.

Within a year of receiving this special exception, Respondent modified the design of the hotel to (i) expand the square footage of the eighth floor, bringing it to about half the square footage of the other floors, (ii) expand the rooftop terrace so that it entirely surrounded the eighth floor, and (iii) convert the seventh floor to additional guest rooms, raising the total number of guest rooms to 161. Because of these changes in the size and number of rooms of the Hotel, Respondent

applied to the BZA in 2011 to modify the special exception issued in 2010 to allow the additional guest rooms on the seventh floor and for a separate special exception to increase the square footage of the eighth floor. **(R. p. 231, line 24-p. 232, line 9).** The preliminary conceptual floor plan for the eighth floor submitted with the application for the special exception in 2011 showed the interior as "spa/fitness" and a pool on the rooftop terrace immediately to the south of the new interior spaces on the eighth floor. **(R. p. 233, line 19-p. 234, line 2); (R. p. 310)**.

The BZA approved the modification of the special exception for accommodations use subject to eleven specific conditions. **(R. pp. 304, 350-352, 355)** (stating the eleven conditions issued by the BZA). None of the eleven conditions the BZA imposed on the approval prohibited Dewberry 334 from using the interior rooms of the eighth floor for permissible accessory uses other than "spa/fitness." None of the eleven conditions required Dewberry 334 to construct the swimming pool or spa as shown on the preliminary conceptual floor plan for the eight floor and the adjoining rooftop terrace.

The special exception granted by the BZA in 2011 (the "2011 Special Exception") imposed three conditions intended to protect against noise or other activity emanating from the rooftop terrace:

* * *

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

(R. p. 368).

Three years later the City reviewed and approved construction permit drawings for the eighth floor dated June 27, 2014, that called for a pool on the outdoor terrace and interior spaces that included restrooms and a large function room. **(R. pp. 311-312); (R. p. 235, lines 1-2)** (City

staff noting that the project "made its way through the permitting process and -- and construction began."); **(R. p. 242, lines 2-12)** ("So Mr. Dewberry still had the idea that there was going to be a pool there" in 2014**).**

Dewberry 334 later determined that constructing and operating the pool on the outdoor terrace on the rooftop would be cost prohibitive and would have invalidated certain warranties related to the renovations on the lower floors under the pool. See **(R. p. 242, lines 12-22)**. For those reasons, Dewberry 334 decided not to proceed with the pool on the rooftop terrace.

In 2015, Dewberry 334 submitted new construction drawings to the City for the inside of the eighth floor and for the surrounding outside terrace. **(R. pp. 313-314); (R. p. 346)**; **(R. p. 236, lines 9-18)**. Specifically, Dewberry 334 "changed the floor plan to include a function room (called the "Rivers Room"), a reading room, a small bar called the Citrus Club, and a pantry area to serve the Citrus Club." **(R. p. 346)**. "In place of the pool and pool deck, [Dewberry 334] created a small outside sitting area on the southwest corner of the rooftop and a small yoga fitness area on the terrace on the southeast corner of the rooftop." **(R. p. 346)**. Dewberry 334 "also installed wood pavers around the entire remaining exterior of the rooftop with this pathway also serving as the exterior means of egress in case of emergency." **(R. p. 346-47).** The spa was moved to the second floor of the hotel. **(R. p.** 347**).**

The City reviewed these revised construction drawings dated April 24, 2015, and approved the drawings without qualification. **(R. p. 243, lines 3-11) (R. p. 314).** The drawings showed the interior of the eighth floor surrounded by an outdoor terrace that was accessible for the full perimeter of the building with the interior facilities comprised of restrooms, a pantry, and three rooms described as Function A, Function B, Pantry and Function C. **(R. p. 243, lines 3-11) (R. p. 314).** The room labeled Function C included a bar feature on the drawings. **(R. p. 243, lines 3-**

11) (R. p. 314). These drawings also showed that the spa would be constructed on the second floor, not the eighth floor. **(R. p. 314, lines 3-11).**

In reliance on the City's approval of the construction drawings dated April 24, 2015, Dewberry 334 proceeded to construct the eighth floor and its interior facilities as well as the outdoor terrace. **(R. p. 243, lines 13-22)**; **(R. p. 346)**. Dewberry 334 spent millions of dollars performing its renovations of the building in conformity with the approved construction drawings, and on the associated fixtures, equipment, and furnishings for the second and eighth floors. **(R. p. 243, lines 9-15)**; see also, **(R. pp. 317-325)** (photos of completed 8th Floor).

After passing the many City inspections, completing construction in compliance with the construction plans approved by the City, and installing the fixtures and certain furnishings inside the second and eighth floors, Dewberry 334 applied for a temporary certificate of occupancy for the eighth floor in the summer of 2017. **(R. p. 243, lines 13-22).** On August 17, 2016, the City changed course and refused to approve occupancy of most of the interior facilities on the eighth floor, claiming the 2011 Special Exception did not allow these permissible hotel accessory uses in the locations where the City had approved their construction. **(R. p. 305); (R. pp. 235, line 18-p. 236, line 4); (R. p. 315); (R. p 373).**

In refusing to issue the temporary certificate of occupancy, the City claimed the 2011 Special Exception prevented hotel accessory functions in the locations inside the eighth floor that had not been shown in the preliminary conceptual floor plan for the eighth floor reviewed by the BZA in 2011. **(R. p. 236, lines 5-21).** The City took this position even though it acknowledges that all these particular uses and activities are permissible and lawful accessory uses to the primary accommodations use of hotel. **(R. pp. 74-75)** ("The City admits that hotels have accessory uses,

which may include meeting space, restaurants and bars,...").[1]

In March 2017, at the City's urging and in an effort to avoid litigation, Dewberry 334 applied to the BZA to modify the 2011 Special Exception to allow the functions in the interior rooms that were constructed according to the City-approved construction drawings, specifically asserting that the modification to the 2011 Special Exception was not legally required. **(R. p. 268, lines 1-2)** (". . .we're here, because we were told we needed to be here."); **(R. p. 267, line 20-p. 268, line 2); (R. p. 269, line 23-p. 270, line 5).**

On April 18, 2017, the BZA met and considered the application to modify the 2011 Special Exception to allow Dewberry 334 to utilize the interior of the eighth floor for the hotel accessory uses planned and constructed there. **(R. pp. 227-297).** At the BZA hearing Dewberry 334 explained that it had a legal right to these uses and was seeking the modification to the 2011 Special Exception to allow them in the intended locations only because the City insisted a modification of the 2011 Special Exception was necessary. **(R. p. 267, line 25-p. 268, line 2); (R. p. 269, lines 23-25).**

The BZA received comments against the proposed modification of the 2011 Special Exception from various persons attending the meeting. Most of these comments asserted that in their personal opinions that there would be sound generated from the outdoor rooftop terrace and that this sound would negatively impact their property values or quality of life. **(R. p. 272, lines 13-14)**; **(R. p. 273, lines 14-17)**; **(R. p. 274, lines 15-20)**; **(R. p. 276, lines 16-23); (R. p. 278, line**

[1] Under Section 54-203 of the City Ordinances, "permitted principal uses" include "***[a]ccessory uses, which for the purposes of this Chapter are defined as uses of land or of a building or portion thereof which are customarily incidental and subordinate to a principal use located on the same lot or parcel, are allowed***, ..." **(Mem. in Supp. of Appeal and Determination of Legal Right to Use Interior Spaces, R. p. 85)** (double emphasis added); See also, **(R. pp. 152, line 15-p. 153, line 6**; **R. p. 389).**

17-p. 279, line 6); (R. p. 280, lines 17-20); (R. p. 281, lines 3-4); (R. p. 283, lines 7-10); (R. p. 286, lines 5-10).

Multiple BZA members stated that *the interior use was not an issue*; rather, the concern expressed was sound that might emanate from persons or activities on the outdoor terrace. **(R. p. 292, lines 10-11); (R. p. 292, lines 22-23).** As reflected in these statements from the board members, they considered the hypothetical noise from permissible activities that could occur on the *outdoor* terrace to constitute a basis for denying the request to use the *interior* spaces. In fixating on their speculative projections of the sound that might come from the outside terrace, these board members completely discounted and effectively ignored the three conditions in the 2011 Special Exception previously mentioned that are aimed directly at limiting noise and activity on the outdoor terrace: "(4) no exterior amplified music will be permitted; ... (9) All activity outside on the roof shall stop at 10 pm; [and] (10) Additional buffering around the rooftop deck shall be provided at the roof edge ..." **(R. p. 355).**

One Board Member, now City Councilman, Ross Appel, took a different view. He correctly understood the BZA is tasked with determining if a special exception for accommodation uses should be granted for a particular property and that the role of the BZA in considering an application for special exception for accommodation uses does not include approving plans for each accessory use for the hotel as well as its location in the hotel. Board Member Appel observed: "We don't approve plans. We approve uses. We approve accommodations uses. We approved an accommodations use. We approved an accommodations use with 11 restrictions." **(R. p. 294, lines 2-5).** This view is in accord with the City's CZO that does not place the approval of floor plans or building plans under the purview of the BZA. Instead, Section 54-220 limits the BZA to approving accommodations uses, not plans, stating that the BZA "may permit accommodation uses as an

exception where it finds" certain criteria are met. **(R. p. 374)** (City Ordinance §54-220(b)(1)). Plans are approved by the City's Board of Architectural Review, Technical Review Committee, and the Building Official.

In the end, after hearing Board Member Appel's explanation for his position in favor of the modification requested, the BZA Chairman stated that he [Appel] "made a good legal argument and maybe some judge would reverse this." **(R. p. 296, lines 16-17);** see also **(R. p. 289: lines 10-11)** (Member Smith noting that "I think this is a legal question."). The BZA then voted 4-1 to deny the request to modify the 2011 Special Exception to allow the permissible and lawful accessory uses on the interior of the eighth floor that are permitted as a matter of right. **(R. p. 348 297, lines 13-23).**

As covered in the Statement of the Case, supra at pp. 4-6, Judge Nicholson reversed and vacated the Decision of the BZA on multiple grounds in his two orders. **(R. pp. 1-36)**

Three and a half years after the filing of the appeal, and after extensive briefing and oral argument, the Court of Appeals entered its *per curiam* opinion reversing the Circuit Court. **(Opinion).** Dewberry 334 petitioned for rehearing, which was denied on November 18, 2021. **(Order denying rehearing).** Dewberry now seeks this Court's review of the Court of Appeal's decision.

ARGUMENT

1. This Court should grant review of the Court of Appeal's decision because the Court of Appeals interpreted Section 54-220 of the CZO for obtaining a special exception for accommodations use to impose a requirement not found in the ordinance adopted by the City of Charleston and construed Section 54-220 of the CZO against the free use of property, contrary to settled precedent in South Carolina.

The Court of Appeals' decision impermissibly imposes a requirement not found in the City's ordinances. 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 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.

Section 54-220 does not 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—there is simply no such requirement in the ordinance. **(R. 374-376)** The Opinion does not refer to any wording in the ordinance imposing this requirement because there is none. Instead, the Court of Appeals *implied* 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 and floor plans in the Sec. 54-220 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. The Court of Appeals' imposition of such a requirement is contrary to the 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 force an application for a new special exception for

accommodations use if accessory uses in an approved hotel change. The ordinance, in title and substance, governs whether the City will approve accommodations use, such as hotel, in a particular location; the ordinance does not regulate the permissible accessory uses within a hotel nor dictate where those accessory uses may be located within the hotel.

Accessory uses are governed by a different ordinance in the CZO, namely Sec. 54-203, that specifies, in pertinent part, the following:

> ... 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. p. 389).

Nonetheless, the Court of Appeal erroneously read Sec. 54-220 to override the specific ordinance on principal use and accessory uses. Sec. 54-203 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 established 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 the Court of Appeals 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 more specific ordinance is Sec. 54-203.

Moreover, the Court of Appeals' 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).

The Court of Appeal's decision that Sec. 54-220 impliedly restricts a hotel owner to the specific accessory uses in the specific locations shown on the floor plans submitted as part of the zoning application for a special exception, even though there is no express limitation to this effect in the ordinance, conflicts with this Court's prior decisions on the construction of zoning ordinances. This Court had held that 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. See generally, Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("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.") (citations omitted)); Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) (citations omitted). The Court of Appeals did the exact opposite of what this Court has required—it liberally interpreted and supplemented the City's ordinances to *restrict* the free use of property by imposing conditions that are not stated in the ordinance.

For the foregoing reasons, Dewberry 334 asks this Court to issue of a Writ of Certiorari and grant review of the Court of Appeal's Opinion. In inserting restrictions and conditions in the ordinance that are not contained in its wording, the Opinion violates the constitutional principle of separation of powers. In construing the ordinance to contain a restriction that is not expressed in it, the Court of Appeals violated settled principles of statutory construction that any ambiguity or uncertainty in a zoning ordinance shall be construed in favor of the free use of property.

2. The Court of Appeal's decision conflicts with prior decisions of this Court because the Court of Appeals erroneously found that public comments at the hearing were competent to support the BZA's denial of the request to allow the accessory uses on the eighth floor when those comments were based on speculation and off-the-cuff opinions or involved dissimilar circumstances.

A decision of a municipal zoning board "will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). An abuse of discretion occurs when the BZA's "decision is unsupported by the evidence . . . ." Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting Cty.

of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

When a decision of a local zoning board is based upon speculative comments and fears of those speaking at the meeting, it is unsupported by the evidence and an abuse of discretion. See Bannum, Inc. v. City of Columbia, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified, they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation); Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012) (reversing a circuit court decision affirming a zoning board "because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony.").

The Circuit Court correctly ruled that it was impermissible for the BZA to rely upon unsupported opinions to deny the Special Exception. **(R. pp. 12-14; R. pp. 30-32)** (finding that the BZA's decision was arbitrary and capricious because the comments as to possible noise and its possible detrimental effect on the value of the properties in the neighborhood or its possible destruction of the neighborhood were entirely speculative and not competent evidence.). The Court of Appeals reversed, proclaiming that "***not all*** of the testimony presented by the residents was speculative as the trial court held." **(Opinion at p. 7)**(double emphasis added).

The Court of Appeals identified the following facts or comments at the BZA 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).

These comments are the exactly the type of unsupported speculative comments South Carolina law prohibits a zoning board from relying upon as the factual foundation for its decision. As explained below, none of these is cogent proof that activity inside the Citrus Club, the event room inside the eighth floor, or 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 2011 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.

In footnote 3 of the Opinion, the Court of Appeals acknowledged the two previous citations issued to Dewberry 334 for noise involved an amplified band on the ground level patio, not the rooftop terrace, that was the result of the hotel manager at the time not realizing the condition in the 2011 Special Exception prohibited amplified music *anywhere* outside, 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 does not in any way constitute proof that the Hotel will likely violate the condition of the 2011 Special Exception and generate loud amplified music from the rooftop terrace or that any noise from the eighth floor will have any impact on the neighborhood. Even if it did, which it clearly does not, the remedy would be through issuance of a citation for violation

of the condition of the special exception, not forbidding occupancy and use of the interior of the eighth floor and rooftop terrace. [2]

The second comment relied upon by the Court of Appeals 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 amplified music 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 and incompetent as well.

As for the last reference to the record the Court of Appeals 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

[2] 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.

the generation of disruptive noise.[3] There is no presumption that a group of 200 people dispersed on the inside and outside of the eighth floor a hundred feet above ground will emit loud sounds into the neighborhood. The *size* of the group that may be present on the inside and outside of the eighth floor at any given time 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 the Court of Appeals in its Opinion as competent 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 Court of Appeals ruled against prior decisions of this Court that have held that similar speculative, alarmist comments do not constitute competent proof to support a determination of a local board that the activity subject to the requested approval will be an unacceptable imposition on surrounding properties. 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. 12-14).** For these reasons, this Court should grant review of the Opinion.

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[3] This is particularly true here because, the interior uses will not emit noise into the neighborhood that is set back from the rear of the Hotel because "[t]he complete exterior to the [the extent of the] glass has Miami/Dade 150-mile an hourglass, almost an inch thick, so we're not talking about interior activity that's going to have much of an effect on the outside." **(R. p. 244, lines 5-9).**

3. The Court of Appeal's Opinion conflicts with prior precedent of this Court that holds a local governmental entity may be estopped where the governmental officials whose conduct and representations were relied upon were acting within their authority and there was no wording in the ordinances or other notice to the property owner that would have informed the property owner that it could not rely on such representations and approvals, as found by the lower court.

This Court has applied the doctrine of estoppel in the context of zoning and building permits where a property owner detrimentally relies on the statement of the building official or zoning official acting in the scope of his authority. See Charleston County v. Natl. Advert. Co., 292 S.C. 416, 357 S.E.2d 9 (1987) (finding Charleston County estopped from contending construction permits were erroneously approved when the applicant spent $36,000 erecting an approved billboard and "[t]he interpretation given by [the County Building Inspector and Zoning Regulator] was clearly within the scope of his authority since he is the Building Inspector and is designated in the ordinance as the official charged with its enforcement.")); Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985) ("Government agents, acting within the proper scope of their authority, can by their acts give rise to estoppel against a municipality. . . .To allow the City to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon a re-assessment of the meaning of an undefined term in the ordinance would be unconscionable."); Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (S.C. 1979); Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958).

The essential elements a party claiming equitable estoppel must demonstrate are: (1) the party's lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) the party's reliance upon the conduct of the party estopped; and (3) the action based thereon was of such a character as to change prejudicially the position of the party claiming the estoppel. Landing Dev. Corp., at 219, 329 S.E.2d at 424 (citing Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311, 313 (1980)).

The Court of Appeals reversed the lower court's alternative holding reversing the BZA's decision based on estoppel. **(R. at pp. 15-17, 33-35)**. The Court of Appeals stated two reasons for that 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)**.

As to the first reason, this Court of Appeals 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 BZA, 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.[4] **(R. at pp. 15-17, 33-35)**. The lower court invoked the doctrine of estoppel, not waiver.

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[4] 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

As to the second ground stated by the Court of Appeals for overturning the lower court's legal determination of estoppel, as discussed in the first ground for seeking a writ of certiorari, 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 the Court of Appeals have failed to identify any specific wording in Sec. 54-220 establishing this 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 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 of Appeals misapplied the applicable ordinances to require a new application for special exception if there is any change in the accessory uses discussed in the first ground for issuing a writ, the Court of Appeals erred in holding Dewberry 334 could not rely on the City's approval of its modified plans and the construction of the

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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***.
(R. at p. 388) (double emphasis added).

improvements in those modified plans. Neither Sec. 54-220 nor the conditions of the 2011 Special Exception placed Dewberry 334 on notice that it was required to obtain a new special exception for accommodations use if it changed the allowable accessory uses on the interior of the eighth floor and the rooftop terrace from those proposed four years earlier well before it arrived at its final design and the submission of its building plans.

For these additional reasons, the Court should grant review of the Court of Appeal's decision.

CONCLUSION

For the foregoing reasons, Dewberry 334 requests that this Court grant its Petition, issue a Writ of Certiorari, review the Court of Appeal's Opinion, and issue its decision reversing the Court of Appeals and reinstating the orders of Judge Nicholson holding the BZA committed error of law and its decision was arbitrary and capricious.

Respectfully submitted,

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