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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Unpublished Opinion No. 2021-UP-360 (S.C. Ct. App. filed October 20, 2021)
Appellate Case No. 2021-001497

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

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED FOR REVIEW

I. Does the unpublished opinion of the South Carolina Court of Appeals (the "COA") violate the "Separation of Powers" doctrine when, as in the present case, the COA simply construed the ordinance in light of the stated intent of the City Council of Charleston to authorize the BZA to permit accommodation uses under limited circumstances, while avoiding or minimizing potential negative impacts on residential neighborhoods?

II. Does the COA's unpublished opinion correctly reverse the circuit court's order overturning the BZA's denial of Dewberry's amended special exception permit because Dewberry failed to meet its burden to establish that the new accessory uses on the 8th floor or rooftop of the hotel would avoid or minimize potential negative impacts on residential neighborhoods, including noise, traffic, and parking impacts?

III. Does the COA's unpublished opinion properly apply the doctrine of government estoppel when, as in the present case, the record evidence establishes that Dewberry knew exactly what it was doing?

FACTS[1]

Appellant Dewberry 334 Meeting Street, LLC ("Dewberry") owns and operates a hotel at 334 Meeting Street in the City of Charleston (the "City"). R. p. 229, line 25-p. 230, line 1; p. 230, lines 23-24. The hotel site lies within a block bounded by Meeting Street to the west, Charlotte Street to the north, Elizabeth Street to the east, and Henrietta Street to the south. R. p. 298; p. 365. All other properties within this block are used either as residences or as a parking lot for Citadel Square Baptist Church. R. p. 291, lines 21-24; pp. 364-65.

The hotel property also lies within the City's Accommodations ("A") Overlay Zone. R. p. 230, line 23-p. 231, line 2. The City Council of Charleston ("City Council") expressed its purpose in establishing the A Overlay Zone in Sec. 54-220.a of the City's Zoning Ordinance (the "CZO"), as follows:

> The A Overlay Zone is intended to identify those areas within the City limits where accommodation uses are allowed.

[1] Respondents City of Charleston and the Board of Zoning Appeals-Zoning (collectively, "Respondents") find it unnecessary to include a counter-statement of the case. See Rule 242(f), SCACR (providing that return *may* include counter-statement of the case).

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

R. p. 374. Even within the A Overlay Zone, an applicant must obtain a special exception permit from Respondent Board of Zoning Appeals-Zoning ("BZA" or the "Board") for proposed accommodation uses. CZO § 54-220.b; R. p. 374.

In 2010, Dewberry obtained a special exception permit, subject to certain conditions, for the renovation of the existing building on the site into a seven (7) story, 120-room hotel. R. p. 231, lines 3-23. The plans submitted with this application showed the existing "penthouse" structure on the 8th floor, or rooftop, of the hotel building as being used to store mechanical equipment. R. p. 231, lines 10-15. No access to the rooftop was proposed. R. p. 231, lines 6-7.

In 2011, Dewberry obtained an amended special exception to convert the existing building into a 161-room hotel. R. p. 231, line 24-p. 234, line 2. Dewberry's original application for the special exception included floor plans—required to be submitted with the application—showing that Dewberry would use the penthouse structure as a "SPA/LOUNGE." R. p. 233, lines 2-18; p. 371. These plans also showed an open deck on the exterior of the rooftop, a pool area on the south end, and a green roof along the perimeter of the entire area. R. p. 233, lines 2-18; p. 371.

Prior to the BZA hearing in 2011, Dewberry submitted a revised floor plan for the 8th floor, showing that it would use the penthouse structure for "SPA/FITNESS." R. p. 233, line 19-p. 234, line 22; p. 372. The revised plans also show a pool and pool deck on the south end of the exterior rooftop, with the remaining approximately three-fourths (¾) of the exterior shown as "GREEN ROOF (not accessible)." R. p. 372. Nothing in the revised floor plans mentions use of the

penthouse structure or exterior of the rooftop for a bar, conference/event space, kitchen, or lounge area. R. p. 372. After considering only the revised (SPA/FITNESS) floor plans, the BZA approved the 2011 application and imposed eleven (11) conditions. R. p. 234, lines 2-7; p. 304; p. 372. These conditions include prohibitions on exterior amplified music and outside activity on the rooftop after 10pm. R. p. 304.

In the following years, Dewberry submitted construction drawings to the City's building department. R. p. 242, lines 2-4; p. 242, line 23-p. 243, line 1. The construction drawings approved by the building department include the expansion of the penthouse structure and its division into rooms labeled Function A, Function B, Pantry, and Function C, which included a bar structure. R. p. 243, lines 3-5.

In 2016, Dewberry applied for a temporary certificate of occupancy for the 8th floor of the building. R. p. 243, lines 13-22. On August 17, 2016, the City's Zoning Administrator granted approval of a zoning permit necessary for the certificate of occupancy, with conditions, including (1) that a function room, called the "Rivers Room," be limited to use for yoga and fitness classes; and (2) that the use of a lounge area as a "Reading Room"; the use of a kitchen area labeled as a "Pantry"; and the use of a bar area called the "Citrus Club," be closed. R. p. 235, line 18-p. 236, line 4; p. 305. The Zoning Administrator later explained to the BZA that he placed such conditions on the permits because the new uses "were not part of the zoning approval [in 2011]." R. p. 236, lines 5-21. By 2017, the City had permitted the remainder of the hotel to open on a floor-by-floor basis. R. p. 235, lines 8-18. Dewberry never appealed the Zoning Administrator's denial of the zoning permit.[2]

[2] See S.C. Code Ann. § 6-29-800 (B) (setting forth procedural and timing requirements for appeal of administrative official's decision to the BZA).

On March 20, 2017, Dewberry sought an amendment to the 2011 special exception by submitting an application to the BZA seeking approval of the new accessory uses for the rooftop. R. pp. 344-363. Dewberry's application did not include documents necessary to show compliance with each of the special exception requirements Dewberry and the BZA were required to address under Sec. 54-220 of the CZO. R. pp. 344-363; pp. 374-76. Instead, Dewberry attached a legal brief and floor plans to the application, arguing that it did not have to obtain a modified special exception, but that, if it did, the modification should be granted. R. pp. 346-363.

The BZA denied the request, citing the incompatibility of the new accessory uses with the adjacent residential neighborhood. R. p. 289, line 8-p. 297, line 22; p. 366. Dewberry appealed the BZA's decision to the circuit court. R. pp. 37-38. The circuit court reversed the BZA. R. pp. 19-36. Respondents moved to alter, amend or reconsider the circuit court's decision. R. pp. 115-127. The circuit court denied the motion through an Amended Final Order. R. pp. 1-18.

Respondents appealed to the South Carolina Court of Appeals (the "COA"). Notice of Appeal. On October 20, 2021, the COA reversed the circuit court through an unpublished opinion. See Dewberry 334 Meeting Street, LLC v. City of Charleston, Op. No. 2021-UP-360 (S.C. Ct. App. Filed Oct. 20, 2021) (the "Opinion"). The Opinion concludes that (1) the CZO required BZA approval for the new accessory uses that Dewberry added to the interior and exterior of the 8th floor, or rooftop, of the hotel building; (2) Dewberry failed to meet its burden of proof, and record evidence supported the BZA's decision to deny Dewberry's request to amend the 2011 special exception; and (3) the circuit court incorrectly applied the doctrine of "government estoppel" in reversing the BZA's decision.

The COA subsequently denied Dewberry's petition for rehearing, and Dewberry now requests that the Supreme Court of South Carolina (the "Supreme Court") grant a petition for a writ of certiorari to review the COA's opinion. Pet. for Rehrg.; Order on Rehrg.; Pet. for Cert.

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. "The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

> (1) Where there are novel questions of law.
> (2) Where there is a dissent in the decision of the Court of Appeals.
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
> (4) Where substantial constitutional issues are directly involved.
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Id. (emphasis added). Dewberry relies on Rule 242(b)(3) and (4).

In reviewing the substance of this matter, the circuit court, COA, and Supreme Court are governed by the same standard: "The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A). "The factual findings of the Board must be affirmed by the circuit court if there is *any* evidence to support them and they are not influenced by an error of law." Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988).

"A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "A reviewing court should not disturb the findings of a zoning board of

adjustment unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority." Massey v. City of Greenville Bd. of Zoning Adjustments, 341 S.C. 193, 197, 532 S.E.2d 885, 886 (Ct. App. 2000).

ARGUMENT

I. The COA exercised *judicial* authority in interpreting the CZO to require Dewberry to obtain an amended special exception from the BZA for the new accessory uses on the 8th floor, or rooftop, of the hotel building.

The COA interpreted the CZO to require BZA approval for the completely new accessory uses installed by Dewberry on the 8th floor of the hotel building, including the kitchen, bar, and conference/event space. The COA stayed well within its judicial function in doing so.

The COA recognized, based on the plain language and manifest purpose of Sec. 54-220, that City Council limited accommodation uses in the A Overlay Zone, with the preservation and protection of residential neighborhoods being of the utmost importance. In this respect, the Opinion does not conflict with a prior decision of the Supreme Court, nor does it involve a substantial constitutional issue, as Dewberry suggests. See Rule 242(b)(3) and (4), SCACR. Dewberry's petition for a writ of certiorari should be denied.

A. The COA exercised judicial, not legislative, authority in construing Sec. 54-220.

Dewberry asserts that the COA infringed upon City Council's authority to enact local ordinances and that the COA violated the doctrine of Separation of Powers by interpreting Sec. 54-220 of the CZO to require that Dewberry obtain BZA approval for completely new accessory uses on the 8th floor, or rooftop, of the hotel building. Neither assertion is correct.

The COA did not enact new legislation, attempt to re-write the current legislation, or insert new words into the applicable ordinances, as Dewberry avers. The COA simply applied the plain language of Sec. 54-220 in light of City Council's manifest purpose to protect and preserve

residential neighborhoods when considering applications for accommodation uses. See Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 628, 207 S.E.2d 75, 78 (1974) ("The construction of a statute is a judicial function and responsibility."); CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.").

B. Sec. 54-220 dictates that Dewberry obtain BZA approval for Dewberry's installation of completely new accessory uses on the 8th floor, or rooftop, of the hotel building.

Dewberry fails to recognize the quintessential rule of statutory construction by largely ignoring City Council's intent in adopting Sec. 54-220. Instead, Dewberry only cites rules of statutory construction that it believes further its cause. The COA, however, as courts are bound to do, articulated and applied the "primary" or "cardinal" rule of statutory construction—"to ascertain and effectuate the legislative intent whenever possible." Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). In doing so, the COA correctly concluded that Dewberry should have obtained an amended special exception permit for Dewberry's new accessory uses on the 8th floor, or rooftop, of the hotel building.

Sec. 54-220 of the CZO governs the procedural and substantive requirements applicable to special exception permits for accommodation uses within the A Overlay Zone. As City Council explains:

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

R. p. 374 (emphasis added).

Even within the A Overlay Zone, Sec. 54-220.b.1 requires an applicant to obtain a special exception from the BZA for an accommodation use:

> In any Accommodation overlay zoning district, land may be used and buildings or structures may be erected, altered or used for any purpose allowed by the underlying zoning district as listed in Article 2: Part 3, and the following uses subject to the approval of the Board of Zoning Appeals . . . . 1. Accommodation uses.

R. p. 374 (emphasis added).

The primary issue in this appeal is whether Sec. 54-220 required Dewberry to obtain an amended special exception permit to change the uses shown on the floor plans submitted by Dewberry to the BZA in 2011 to include completely new accessory uses, namely, a bar, kitchen, and conference/event space. Dewberry relies upon remarks by the sole dissenting member of the BZA in support of Dewberry's position that the BZA approves uses, not floor plans. R. p. 294, lines 2-5. Dewberry would necessarily conclude that the floor plans submitted to the BZA in 2011, showing the 8th floor penthouse as being used for SPA/FITNESS, are not binding on Dewberry.[3]

Sec. 54-220.b.1 of the CZO contains an extensive list of criteria the BZA must consider before permitting accommodation uses within the A Overlay Zone, including criteria requiring consideration of floor plans and proposed accessory uses. R. pp. 374-75. For instance, Sec. 54-220.b.1.(c) requires the BZA to consider "the total square footage of interior and exterior floor area for restaurant and bar space in the proposed facility, including restaurant/bar patron use areas, bar areas, kitchen, storage, and bathroom facilities," to ensure that the percentage of such floor area does not exceed the specified maximum. R. p. 374. The total restaurant floor area does not apply to restaurant space meeting certain specified conditions, one of which states that the "exempt

[3] The opinion of one BZA member does not justify ignoring the plain language of the ordinance.

restaurant tenant space" must be "clearly labeled on the floor plans submitted with the application for this zoning exception . . . ." R. p. 374 (emphasis added). Sec. 54-220.b.1.(c) demonstrates that floor plans are not intended to be a mere formality in the application process. Instead, the floor plans are clearly used to show what uses—including accessory uses—the BZA is approving.

Sec. 54-220.b.1.(f).(7) of the CZO goes even further. It requires that the BZA consider, based on information provided by the applicant "in site plans, floor plans, building elevations, and a detailed written assessment report . . . (7) the accessory uses proposed for the facility in terms of size, impact on parking, and impact on traffic generation . . . ." R. pp. 374-75 (emphasis added). Significantly, Dewberry adhered to this very provision in 2011 when it submitted revised floor plans to the BZA to secure approval for the top floor, or rooftop, of the hotel to be as used for "SPA/FITNESS." R. p. 372. The construction of Sec. 54-220 that Dewberry now urges, i.e., that accessory uses do not require BZA oversight, is not just inconsistent with its own behavior, but also necessitates that the provisions of Sec. 54-220.b.1.(f).(7) be ignored and rendered meaningless. See Savannah Bank & Tr. Co. v. Shuman, 250 S.C. 344, 348, 157 S.E.2d 864, 866 (1967) ("The construction urged by the appellant would disregard and treat as surplusage the quoted phrase. We are not at liberty to do so.").[4]

Dewberry's primary argument to this Court is that the COA should have penciled into Sec. 54-220.b a presently nonexistent differentiation between "principal" accommodation uses and "accessory" accommodation uses. There is no such differentiation in Sec. 54-220, and the plain language of the remaining provisions belie Dewberry's argument to the contrary. See Sloan v. Hardee, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) ("Words must be given their plain and

[4] Note that City Council required the impact of proposed accessory uses be shown and evaluated. As it currently stands, there is nothing in the record establishing to what extent the new accessory uses on the 8th floor will impact parking or traffic generation. As to noise, see Argument II, *infra*.

ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.") (emphasis added); Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.").

C. Sec. 54-203 only applies to base zoning districts.

Sec. 54-203 of the CZO provides, in pertinent part:

> Permitted principal uses for each base zoning district shall be as set forth in Part 3: Table of Permitted Uses, and as modified by special provisions, exceptions and conditions contained herein. Principal use means the primary or predominant use or uses of a lot or parcel. The Table is based upon the 1987 Standard Industrial Classification Manual. Accessory uses, which for the purposes of this Chapter are defined as uses of land or of a building or portion thereof which are customarily incidental and subordinate to a principal use located on the same lot or parcel, are allowed, except that communication towers, home occupations, bed and breakfasts, home day care facilities, and limited commercial uses within the GO district are only allowed pursuant to the requirements specified in Part 4: Accessory Uses, of this Article.

R. p. 389 (emphasis added).

Dewberry cites Sec. 54-203 to suggest (1) Sec. 54-203 creates an ambiguity that, according to Dewberry, automatically triggers the rule that the CZO should be construed in favor of the free use of property; and (2) the list of exceptions to the general allowance of accessory uses "customarily incidental and subordinate to a principal use located on the same lot or parcel" requires the CZO to be construed as if there are no other exceptions. By its plain language, *Sec. 54-203* applies to accessory uses within base zoning districts. R. p. 389. By its plain language, *Sec. 54-220* applies to accessory uses within the A Overlay Zone. R. pp. 374-75.

Dewberry argues that Sec. 54-203 is more specific than Sec. 54-220 because Sec. 54-203 governs accessory uses. This argument misses the mark for a couple of reasons. First, the A Overlay Zone is not a base zoning district. Second, the specific section applicable to accommodation uses in the A Overlay Zone is Sec. 54-220, and this section expressly requires review and approval of accessory uses proposed for an accommodation use. The provisions of Sec. 54-220 pertaining to accommodation uses and their accessory uses are more specific and take precedence over those of Sec. 54-203, which generally governs accessory uses in the City's base zoning districts. See Mikell v. Cty. of Charleston, 386 S.C. 153, 160-61, 687 S.E.2d 326, 330 (2009) (recognizing that more specific, but also more limited, density increase in planned development ("PD") ordinance governed over broad statement that variations from other ordinances and regulations are allowed within a PD).[5]

D. The rule of strict construction articulated in Purdy does not apply when, as here, the plain language and express intent in Sec. 54-220 compel the opposite conclusion.

Dewberry advocates that the following rule should apply here notwithstanding contrary legislative intent: "[S]tatutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

[5] Dewberry asserts for the first time that the new accessory uses on the 8th floor of the hotel building are permitted under Sec. 54-220.b, which provides that "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. . . ." R. p. 374. If this argument is preserved, (1) an accommodation use is not one of the uses permitted by Article 2, Part 3; and (2) Sec. 54-220.b.1 clearly directs that the BZA evaluate uses accessory to accommodation uses.

Dewberry cherry picks from the rules of statutory construction to attempt to best serve its interest. The Supreme Court, however, has repeatedly held that the goal of statutory construction is to ascertain legislative intent: "Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the courts in their endeavor to ascertain that intent." Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391-92, 154 S.E.2d 674, 676 (1967) (emphasis added).

In Purdy, 223 S.C. at 305, 75 S.E.2d at 608, the Supreme Court held, with little to guide as to legislative intent, that a zoning ordinance permitting hotels within a residential zoning district should be construed in favor of permitting a "tourist court" or "motor court" in the district. In doing so, the Supreme Court acknowledged that (a) the zoning board's previous interpretation of the ordinance supported the Court's conclusion; and (b) the base zoning district expressly "permitted hotels not involving the conduct of any business other than for the sole convenience of the guests thereof." Id. at 300, 75 S.E.2d at 606.

Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 11, 776 S.E.2d 753, 758 (Ct. App. 2015), another case cited by Dewberry, also highlights the importance of legislative intent in the process of statutory construction. In Hinde, the appellant, who sought a determination that a helicopter sight-seeing business could not legally operate on adjacent property, conceded that the term "sight-seeing facility" referred to "a sight-seeing tour facility operated through a form of 'ground transportation,' such as a 'bus or jeep ride.'" Id. at 12-13, 776 S.E.2d at 759. The COA strictly construed the ordinance against such an interpretation, explaining that appellant "effectively seeks

to add the limiting words 'by ground transportation' or 'by bus or jeep' to the County Ordinance, ultimately restricting the scope of the AC zoning designation.'" Id.

The COA in Hinde focused its attention on the intent of the underlying zoning district: "Section 712 states 'the intent of the [AC] district is to allow for the mixing of certain specified land uses in the county where both residential and limited business uses are competing for land and accelerated transition is in evidence.'" Id. at 11, 776 S.E.2d at 758. "Additionally, Section 712.1(A) sets forth a list of AC district 'permitted uses,' . . . including but not limited to theaters, billiard halls, pool halls, bowling alleys, water slides, skating rinks, dance halls, shooting galleries, gift and novelty shops, taverns, clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, boardwalks, bath houses, and sight-seeing depots. Id.

Moreover, the express purpose of the underlying zoning district in Hinde stands in stark contrast to the express purpose of the A Overlay Zone. In Hinde, the legislative intent was to allow mixed uses in areas undergoing transition. Here, the legislative intent is to preserve and protect established residential areas from adverse impacts of accommodation uses to the greatest extent possible. In the present appeal, there is no need to apply the rule of strict construction articulated in Purdy and Hinde, because section 54-220 unambiguously requires the BZA to evaluate accessory uses before granting a special exception permit for an accommodation use, as set forth in Section I.B, *supra*. As such, this appeal does not involve the "implied extension" of Sec. 54-220 to a case "not clearly within the scope and purpose" of Sec. 54-220. Cf. Purdy, 223 S.C. at 302, 75 S.E.2d at 607.

II. Dewberry failed to meet its burden of establishing that the new accessory uses on the 8th floor, or rooftop, of the hotel would avoid or minimize potential negative impacts on residential neighborhoods, especially as to noise, parking, and traffic generation.

Dewberry challenges the COA's reliance upon so-called "speculative" testimony of neighbors, but the COA correctly recognized that this appeal involves Dewberry's burden, not just the credibility of neighbor testimony:

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

Opinion, p. 7.

Section 220.b.1.(f) of the CZO requires the BZA to make certain findings based upon "information to be provided by the applicant." R. p. 374. This is consistent with case law placing the burden of proof on the applicant in permitting cases: "A party applying or appealing for relief to a zoning board of adjustment or review has the burden of proof of facts entitling the party to that relief." 8A McQuillin Mun. Corp. § 25.267 (3rd ed.). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." Pressley v. Lancaster Cty., 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

Dewberry submitted no evidence addressing traffic or parking impacts from the new accessory rooftop uses, despite the clear language in section 54-220.b.1.(f).(7) requiring the BZA to evaluate these impacts in reviewing accessory uses proposed for a hotel. R. p. 375. As a result, the COA concluded:

> 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.

Opinion, p. 6, quoting § 54-220.b.1.(f).(7).

With respect to other impacts, Dewberry, like the circuit court, ignores neighbor testimony, adopting a blanket presumption that testimony from neighbors is speculative. But the testimony of the neighbors in this case rises well above the speculative and unsupported testimony offered in the case law cited by Dewberry. For example, in Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 150-51, 735 S.E.2d 659, 662-63 (Ct. App. 2012), the COA concluded neighbor testimony about a decline in property values based on the location of a third fireworks store in the same area as two others was speculative because no owner testified as to the impact on the individual owner's property value and because of the proliferation of the same uses in the area. Here, unlike is Wyndham, Dewberry is not constructing a third hotel in a block with two others. Here, Dewberry is constructing a new hotel in the same block as residences.

With respect to traffic, Wyndham noted that speculation on increases in traffic from the fireworks store was inadmissible, but emphasized that the City had procured a traffic study showing the store would not generate a significant amount of traffic. Id. Here, there is no traffic study *or other evidence* proffered by Dewberry relating to traffic, despite the requirement in Sec. 54-220.b.1.(f).(7) that Dewberry address traffic impacts from accessory uses to the hotel. There is also no other relevant expert report submitted by Dewberry.

Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205 n.4, 516 S.E.2d 439, 440 n.4 (1999), also cited by Dewberry, contains similar distinctions. Neighbor testimony about increased traffic was held to be speculative, but the applicant in Bannum had submitted a "Brief Traffic Assessment," which the Supreme Court held the BZA could have relied upon to grant the special exception. Id. Neighbor testimony in Bannum attempted to establish that a proposed halfway house would generate more use of a cut-through than an existing mental health facility on the site. Id. at

206, 516 S.E.2d at 441. The Supreme Court rejected the testimony because it was unsupported by any expert opinion in the form of a traffic study or otherwise. Id.

Dewberry also fails to address why a "double standard" should apply to neighbor testimony vis-à-vis applicant testimony. Dewberry's counsel was the only person who spoke on Dewberry's behalf at the BZA hearing. Cf. DT LLC v. Horry Cty. Zoning Bd. of Appeals (In re Venture Eng'g), 433 S.C. 419, 431, 858 S.E.2d 638, 645 (Ct. App. 2021) ("[T]he circuit court erred in relying on counsel's arguments before the Board as evidence of a nonconforming use."); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Dewberry offers no reason why such testimony should be given more importance than similar testimony from neighbors.

By way of example, during the BZA hearing, Dewberry's representative explained:

> This is not a place where people are going to be rowdy. I would suggest to you, if you've been to the Dewberry, that it continues the whole theme of elegance, an understatement of reserve. There's been some suggestion it's going to be a rowdy place. I would—to me, it doesn't look like a biker bar, who knows what's going to happen, but it is—if you've been up—and I—you wouldn't have been up there because nobody's allowed up there, but it is very limited in scope. It's subdue[d].

R. p. 244, line 19-p. 245, line 3 (emphasis added). Significantly, if neighbor testimony about how patrons of the rooftop bar will act speculates about future patron conduct, then so does applicant testimony about how patrons of the rooftop bar will act. Testimony that the rooftop bar will continue a theme of elegance may contain a statement based on observation of past conduct at the hotel, but it also suggests that this conduct will continue in the future. To paraphrase Dewberry's representative: Who knows what's going to happen? R. p. 244, line 19-p.245, line 3.

In light of this testimony by Dewberry's representative, the COA referenced the *subsequent*, contrary testimony of Bill Weston, who lives on Henrietta Street and personally observed that Dewberry failed to contest two tickets for zoning violations relating to an outdoor party band on the first floor of the hotel on two separate occasions. R. p. 273, lines 4-6; p. 273, line 25-p. 274, line 13. This testimony is based on Weston's personal observation of a past event which tends to rebut the assertion by Dewberry's representative that (1) Dewberry has implemented a theme of elegance, an understatement of reserve, or a subdued atmosphere; and (2) Dewberry intends to ensure that the rooftop bar is not a "rowdy place."

A second example is the COA's citation to testimony from a resident about the sound intensity at street level emanating from another rooftop bar. Opinion, p. 6. Prior to such testimony, Dewberry's representative detailed the layout of the 8th floor and showed slides of other hotels with rooftop bars throughout the City, explaining how they were similar (or not) to Dewberry's. See R. p. 241, lines 2-16 (Vendue/Market Pavilion); p. 248, lines 9-15 (Bohemian); p. 248, line 24-p. 249, line 6 (Omni); p. 249, lines 11-21 (Restoration on King); p. 249, line 23-p. 250, line 5 (Bennett Hotel).

Subsequently, and in response, Aaron Gilchrist, a resident of the adjacent neighborhood, testified, based on his personal observation, that he could hear sound from a rooftop bar on the corner of Calhoun Street and King Street from Marion Square. R. p 276, lines 12-25. Gilchrist explained:

> 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. I appreciate all the examples given by the representation of Mr. Dewberry. None of them were eight stories high, and none of them were unimpeded.

R. p. 276, line 20-p. 277, line 1 (emphasis added). Again, the COA cites non-expert, neighbor testimony in the face of similar comparisons from Dewberry's non-expert witness. Either both are competent, or neither are.[6]

The COA also considers Dewberry's assertion that the penthouse structure would be small and intimate. Opinion, p. 6. A resident of the adjacent neighborhood explained that he received an invitation "for a wedding rehearsal dinner and after-party that has already been held at the Dewberry, and the plan was for it to be held on the rooftop." R. p. 278 lines 3-7. "There were 80 people seated for dinner, and . . . there were between 200 and 250 people present, and every bit of that was intended to be on the rooftop." R. p. 278, lines 3-11.

Dewberry does not challenge this testimony, except to say that "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." Pet. pp. 19-20. The neighbor testimony also occurred *after* Dewberry's representative testified that the 8th floor would be used for wedding rehearsals. R. p.

[6] As to noise, the 2011 special exception permit includes a condition that "[n]o exterior amplified music shall be permitted . . . ." R. p. 368. In 2017, Dewberry submitted a letter from Mark Mitchum, president of Enterprise Technologies, Inc. ("ETI"), explaining "the design and nature of the sound system on the 8th floor, rooftop area, of the Dewberry Hotel." R. p. 369. This letter reveals two things: (1) Dewberry ignored the 2011 conditions by installing speakers around the exterior rooftop; and (2) *if Dewberry chooses to keep the speakers at a low volume*, Mitchum does not believe the music will be heard by the adjacent neighbors. Mitchum addresses what he understands are concerns from adjacent residents about "the number of speakers and <u>their placement around the eighth floor rooftop terrace</u>." R. p. 369 (emphasis added). He explains that the speakers ETI <u>installed on the rooftop</u> would not rise about the level of a normal, conversational level, which "is accomplished by having several speakers <u>all turned down to a low volume</u>." R. pp. 369 (emphasis added). Each "zone is independent and can be adjusted for the type of music and for the <u>level of the sound</u>." R. p. 369 (emphasis added). Based on Dewberry's intent "to keep the volume on the rooftop terrace at these background music levels at all times," Mitchum did not believe "under normal circumstances the music at that elevation will be heard at street level, at any of the surrounding buildings, or by the residential neighborhood to the East." R. p. 370. This letter, like Dewberry's other evidence, relies upon assumptions regarding Dewberry's future conduct. It fails to address any <u>other</u> noise impacts from new uses on the interior or exterior of the 8th floor.

246, line 5-p. 247, line 2. Dewberry further concedes that there may be "a group of 200 people dispersed on the inside and outside of the eighth floor," but asserts there is no evidence the group will "emit loud sounds into the neighborhood." Pet. p. 20.

Note should be taken that the COA cited the neighbor's testimony in response to *Dewberry's* claim that the bar would be small and intimate. Opinion, p. 6. This premise brings Respondents back to their original point—that it is Dewberry, not the City, not the BZA, and not the neighbors, who bears the burden of establishing that the number of people who could potentially use the interior and exterior of the rooftop would not have an adverse impact on the adjacent residential neighborhood.

As to Dewberry's assertion that the glass installed in the interior of the penthouse structure would prevent noise from escaping to the exterior, the BZA and the COA recognized that the interior and exterior would be used in tandem. Opinion, p. 5. In its special exception application, Dewberry explained it was asking for a modification to the approved uses on the outside of the terrace on the rooftop for a yoga fitness area and a "small outside sitting area associated with the Citrus Club . . . ." R. p. 347. "These two uses are ***both extensions of the uses on the interior of the eighth floor.***" R. p. 347 (double-emphasis added). Additionally, many people at the BZA hearing emphasized the difference between a rooftop terrace where guests may bring drinks up and a rooftop terrace with an adjacent bar. R. p. 271, p. 5-11; p. 284, lines 5-13.

III. The COA properly applied the doctrine of government estoppel when, as in the present case, the record evidence emphasizes that Dewberry knew exactly what it was doing.

Respondents cannot be estopped as to statements of law, and Dewberry's estoppel argument involves, at least in part, the legal issue of whether the CZO required Dewberry to obtain an amended special exception permit to construct the additional accessory uses on the 8th floor of the hotel building, a matter of statutory construction. "Questions of statutory construction are

a matter of law." Boiter v. S.C. DOT, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). As a result, the doctrine of estoppel does not apply. See Quail Hill, 387 S.C. at 238, 692 S.E.2d at 507 ("More importantly, we agree with County's argument that the RU zoning classification was a mistaken statement of law and, thus, could not be used to estop County from enforcing it.").

If, however, the government is to be estopped, the party claiming estoppel must prove the elements of estoppel: "If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 236-37, 692 S.E.2d 499, 506 (2010). "As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Greenville Cty. v. Kenwood Enters., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003). "The burden of proof is upon the party who asserts an estoppel." Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965).

Dewberry failed to meet its burden to prove any of the elements of government estoppel. Dewberry was fully aware of the 8th floor uses approved by the BZA, and Dewberry was fully aware that those uses did not include a bar or a kitchen or an event/conference space or a fully accessible roof deck. The record is clear on these points, as it unequivocally demonstrates that, in 2011, Dewberry revised the floor plans for the 8th floor to delete any inference that a bar, conference/event space, or kitchen would be constructed. R. p. 233, line 6-p. 234, line 22; pp. 371-72. Dewberry showed only a small, accessible, outdoor deck for the exterior. R. p. 372.

Dewberry contends that it relied upon construction drawings approved by the City's building department to justify renovating the 8th floor to include such uses. The issuance of a

building permit does *not* estop a municipality from enforcing its zoning ordinance. See Grant v. City of Folly Beach, 346 S.C. 74, 82, 551 S.E.2d 229, 233 (2001) ("In this case, City issued a building permit for work in 'Downstairs Apt. # 1.' Assuming the permit's reference to an 'apartment' misled Grant into believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor.").

It is simply not credible for Dewberry to claim estoppel on the basis of the building department approving plans that Dewberry knew were not compliant with the zoning approved by the BZA in 2011. Even Dewberry concedes that the BZA approves uses, relying on a statement by the sole dissenting BZA member that: "We [the BZA] approve uses." Pet. p. 10; R. p. 294, lines 2-5.[7] The COA correctly recognized this fact.

Dewberry also faults the City for what is characterized as a "disconnect" between the City's zoning administrator and the City's building official. There is, and was, no disconnect. The zoning administrator performed his job, to wit: enforcing the conditions of the special exception permit issued by the BZA. The building official performed her job, to wit: approving construction plans that complied with the building code. As in Grant, approval of code compliant construction plans for a bar, kitchen, conference/event space, and an accessible outdoor deck cannot serve as a basis for estopping the City from enforcing its zoning ordinance, which curtailed, if not precluded, these uses.

Even if Dewberry's actual knowledge is disregarded, Dewberry certainly had the means of knowing the applicable law by simply asking the zoning administrator if the new uses shown in

[7] Dewberry utilized this statement to suggest that the BZA had no authority to approve floor plans, which Respondents address in Argument I, *supra*.

its building plans fell within the parameters of the special exception. In light of these circumstances, be it actual knowledge or having the means of ascertaining the truth, if there was any reliance by Dewberry, such reliance was not justified.

Dewberry relies upon Sec. 54-901 of the CZO to support the application of estoppel. This reliance is misplaced. Sec. 54-901 devolves upon the zoning administrator the duty of enforcing and administering the zoning ordinance. R. p. 388. Sec. 54-901 imposes on the building inspector the duty to inspect construction "authorized by the Board of Zoning Appeals." R. p. 388. Based on the ordinance, the circuit court concluded " . . . at some point in time, prior to the completion of construction, there should have been some form of communication between the building officials and the zoning officials." R. p. 17.

Even if correct, this circumstance does not give rise to estoppel. The government is not estopped by erroneous conduct of its agents, even if there has been reliance on that conduct: "A governmental body is not immune from the application of estoppel where its officers or agents act within the proper scope of their authority . . . ." South Carolina Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987) (emphasis in original). "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.

The authority devolved upon the building inspector by Sec. 54-901 is the inspection of construction authorized by the BZA. The BZA never authorized the uses Dewberry chose to construct on the 8th floor of the hotel, and there is no disagreement between the parties on this point.

Dewberry asserts that the COA confused the doctrines of waiver and government estoppel by finding that Sec. 54-901 "does not authorize the [building] inspector to waive any zoning

ordinance requirements." Opinion, p. 8. The COA did not apply the doctrine of waiver. Reading this statement in context, it is clear that the COA emphasizes that no action (or inaction) of the building inspector could suspend the operation of the CZO because such an action (or inaction) would be unauthorized. Under state and local law, the ability to suspend the operation of a zoning ordinance in a particular situation is expressly delegated to zoning boards of appeal. See S.C. Code Ann. § 6-29-800(A)(2) (authorizing the boards of zoning appeals to grant variances when particular conditions are met).

The cases relied on by Dewberry to support the application of estoppel involved circumstances where the act giving rise to estoppel was carried out by an official acting within the scope of his authority. See Charleston v. Nat'l Advert. Co. 292 S.C. 416, 417, 357 S.E.2d 9, 10 (1987) (County officer issuing the permit was "designated in the ordinance as the official charged with [the zoning code's] enforcement); Landing Dev. Corp. v. Myrtle Beach, 285 S.C. 216, 220, 329 S.E.2d 423, 425 (1985) (City estopped to change its interpretation of zoning ordinance where zoning director previously issued contrary interpretation); Kerr v. Columbia, 232 S.C. 405, 412, 102 S.E.2d 364, 367 (1958) ("The officials of Eau Claire had previously told the interested inquirers concerning the property that it was zoned for business. Upon the ordinance and those assurances, they acted."). None of these cases stand for the proposition that a building permit, which only connotes compliance with building code specifications, trumps the application of a zoning ordinance.

Estoppel should not lie against the City for the further reason that Dewberry does not have clean hands. It is well settled that one who seeks equity must do equity. See Norton v. Matthews, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967) ("He who seeks equity must do equity."); Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 (2000) ("Unclean hands precludes a

plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."). The Supreme Court need not go beyond Dewberry's conduct in submitting a revised floor plan in 2011, changing the proposed use of the 8th floor from "SPA/LOUNGE" to "SPA/FITNESS," then constructing facilities more in keeping with the uses shown on the original floor plan, to arrive at such a conclusion.

CONCLUSION

There is no support for Dewberry's contention that the Opinion conflicts with a prior decision of this Court, nor are any substantial constitutional issues involved in this matter. The COA did what appellate courts are supposed to do—construed the applicable ordinance in accordance with its plain language and in light of the express legislative intent. The COA also correctly held that Dewberry failed to meet its burden to produce evidence parking impact or traffic generation from the new accessory uses on the 8th floor, or rooftop. The COA appropriately relied on neighbor testimony exclusively to rebut almost identical testimony from Dewberry's representative.

There is no basis for government estoppel. Statutory construction is a matter of law, and there is no estoppel as to matters of law. Dewberry knew exactly what it was doing—it went through the process twice before, but still accepted the risk of obtaining approval for one set of accessory uses, but constructing facilities to support a different set.

For each of these reasons, the Supreme Court should deny Dewberry's petition for a writ of certiorari and dismiss this appeal.

Respectfully submitted,

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