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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Deadra L. Jefferson, Circuit Court Judge

Civil Action No: 2018-CP-10-00148
Appellate Case No: 2021-000784

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

v.

City of Charleston and City of Charleston Board of Architectural Review - Large, ... Respondents.

FINAL BRIEF OF APPELLANT

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March 9, 2022

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II. Whether the BAR ordinances are unconstitutionally vague as applied to deny Dewberry's illumination of the landscape stairs and certain elements of the historic building where the ordinances contain no provisions addressing the exterior illumination of structures and no standards or criteria for exterior illumination?

III. Whether the circuit court erred and abused its discretion in upholding the BAR's reliance on an unwritten, unadopted policy that purportedly allows exterior illumination of only civic buildings?

STATEMENT OF THE CASE

This action commenced on January 12, 2018, when Dewberry 334 Meeting Street, LLC ("Dewberry" or "Appellant") filed its notice of appeal of a decision of the City of Charleston's Board of Architectural Review – Large ("BAR") pursuant to S.C. Code Ann. Section 6-29-900(B)(2), as amended. **(R. p. 36)**. Dewberry accompanied its appeal with a request for pre-litigation mediation in accordance with S.C. Code Ann. Section 6-29-915. **(R. p. 37)**. The mediation was unsuccessful.

On October 30, 2020, Respondents City of Charleston (the "City") and the BAR (jointly "Respondents") filed the certified record of the BAR proceedings with the circuit court pursuant to S.C. Code Ann. Section 6-29-920(A), as amended. **(R. pp. 41-189)**. On November 30, 2020, Dewberry filed its Petition and Grounds for Appeal with the circuit court pursuant to S.C. Code Ann. Section 6-29-915 (F). **(R. pp. 190-243)**.

The appeal was assigned to Deadra L. Jefferson, circuit judge for the Ninth Judicial Circuit. On December 4, 2020, the Respondents filed their Memorandum in Opposition to the Appeal. On January 4, 2021, Dewberry filed its Memorandum in Support of the Appeal. **(R. pp. 259-270)**.

Because of the complications from the COVID-19 pandemic, Judge Jefferson decided Dewberry's appeal on the briefs, without oral argument.

On February 25, 2021, Judge Jefferson issued her written order (the "Order dated 2-25-2021") dismissing Dewberry's appeal and affirming the decision of the BAR. **(Order dated 2-25-2021, R .p .22)**. Dewberry filed a Motion to Reconsider, Alter, or Amend on March 8, 2021. **(Mot. to Reconsider, R. pp. 271-284)**. The circuit court denied Dewberry's Motion on June 21, 2021. **(Order dated 6-21-21, R. pp. 1-5)**. Dewberry filed its Notice of Appeal to this Court on July 20, 2021.

STATEMENT OF THE FACTS
INTRODUCTION

Justice Kittredge penned: "[i]n South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval." Joseph v. S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 461, 790 S.E.2d 763, 776 (2016). Justice Kittredge noted the following year that "... the separation of powers [is] vital to the proper functioning of our government . . . ." Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 277, 802 S.E.2d 794, 800 (2017). Judge Wilkinson, the former Chief Judge of the Court of Appeals for the Fourth Circuit, expressed similar views regarding the importance of the separation of powers, stating that "[t]he structural restraints of separation of powers are important and serve in their own fashion to safeguard the sacred charter of our rights." Hamdi v. Rumsfeld, 294 F.3d 598, 607 (4th Cir. 2002). Distilled to its purest form, this appeal highlights a fundamental overreaching by a municipal board that violates this separation of administrative and legislative authority.

In November 2016, the City required Dewberry to apply to the BAR, a design review board created by the Charleston City Council, for approval of the exterior illumination of its renowned

hotel, The Dewberry. **(R. at pp. 76-78).** Dewberry installed the lighting during the renovations to convert the former federal building to the hotel. The City's ordinances governing the BAR do not expressly grant it jurisdiction to determine the exterior illumination of buildings, but only changes to the exterior of buildings.

The BAR denied Dewberry's request. In issuing this denial, the BAR exceeded the power explicitly granted to it. There is no ordinance conferring on the BAR the authority to regulate the illumination of structures at night. In making its decision, the BAR relied upon an unwritten, unadopted discriminatory policy that allows the illumination of civic buildings but not other buildings. For these reasons, the BAR acted beyond its purview, committed legal error, and rendered a decision that was arbitrary and capricious.

FACTUAL BACKGROUND

From 2014 to 2016 Dewberry extensively renovated the former L. Mendel Rivers Federal Building at 334 Meeting Street into a premier, award-winning hotel. **(R. pp. 44-47).** In fact, The Dewberry was voted the number one lifestyle hotel in the world by Hospitality Design Magazine. **(R. p. 53:ll. 8-9).** The hotel is located in Charleston's Old and Historic District, at the corners of Meeting, Charlotte, and Henrietta streets, across Meeting Street from historic Marion Square. **(R. p. 44:ll. 9-12)**; **(R. p. 56:ll. 5-10).** Dewberry purchased the former General Services Administration office building in 2008 for $15,000,000; until its renovation by Dewberry, the building sat dark, abandoned, and dilapidated for years. **(R. p. 44:ll. 9-12, and at p. 47:ll. 12-14)** ("Prior to the opening of the hotel in May of 2016, the side of Meeting Street [upon which the property is located] sat dark and neglected for 17 years.").

The extensive renovations included adding exterior lighting to feature some of the architectural elements of the historic building and to lightly illuminate the wide landscape stairs

between the building and Meeting Street. The administration of longtime Charleston Mayor Joseph P. Riley, Jr. encouraged Dewberry to add exterior illumination of the building as part of the hotel's beautification. **(R. p. 47:ll. 7-11)** ("The prior administration had always discussed and encouraged Mr. Dewberry to activate the Meeting Street side to create a visual edge to the Meeting Street side of Marion Square, both during the day and in the evening."). This encouragement was not without precedent – other buildings around Marion Square, St. Matthew's Lutheran Church, for example, are illuminated at night. **(R. p. 46:ll. 5-10)**; **(R. pp. 66-67:ll. 22-4).** To ensure that this exterior lighting was aesthetically designed in a manner that featured the building's architectural elements while integrating into its surroundings, Dewberry enlisted the services of Brian Orter Lighting Design ("BOLD"). **(R. p. 49:ll. 20-22).** BOLD is renowned for its lighting plans that are sensitive to a building's architectural integrity and its surroundings; BOLD's exterior lighting plans have been used on historic buildings in both the United States and around the world. **(R. pp. 49-50:ll. 23-9).**

BOLD performed an extensive lighting assessment and prepared a design plan for the exterior lighting. BOLD created three groups of exterior lights: (1) Uplighting (in-ground 6 watt lights, and similar lighting hidden within the floor of the rooftop terrace around the eighth floor) (**R. pp. 96-98**), (2) Downlighting (discreet downlights spaced at intervals across the band around the top of the seventh floor that direct light on the pilasters of the building) (**R. pp. 106-109**); and (3) Step and Wall lighting (minimal lights within exterior landscape stairs between the building and Meeting Street that illuminate the steps at night and small lights equally spaced near the bottom of brick exterior walls) (**R. pp. 119-121**) (**R. pp. 50-53:ll. 10-18).** The lighting of the landscape stairs, which is necessary for the safety of pedestrians at night, is particularly innocuous as shown by the photos. **(R. pp. 119-121).**

The photos of the uplighting and downlighting as well as pages from BOLD's lighting plans speak for themselves and show the measured approach for the illumination of the elements of the building. **(R. pp. 94-114).** The exterior lighting for the front of the hotel on Meeting Street was intended to "create a visual edge to the Meeting Street side of Marion Square" and to illuminate what had been the former dark, dilapidated, and abandoned building, making that side of Meeting Street more "hospitable and inviting." **(R. p. 47:ll. 7-25).** Notably, this lighting was not designed to cast "out" towards the residential areas behind the surface parking lot to the rear of the building.[1] **(R. p. 60:ll. 2-16).**

Dewberry did not seek BAR approval for its exterior lighting design before installing the lights as designed by BOLD. Dewberry was unaware that the BAR considered the degree of illumination of a building at night to be within its jurisdiction even though the BAR ordinances fail to mention any oversight of the illumination of buildings at night. When construction was complete, the City of Charleston declined to issue a certificate of occupancy for the eighth floor of the hotel until the BAR reviewed and approved the exterior lighting. **(R. pp. 76-78).**

As insisted by the City, Dewberry applied to the BAR for after-the-fact approval of its lighting system on October 16, 2016, along with seeking after-the-fact approval of some miscellaneous changes to the exterior of the hotel property that occurred during construction that were not shown on the plans approved by the BAR. **(R. p. 74).**

Along with its application, Dewberry submitted several letters in support of its the lighting system designed by BOLD.

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[1] This is an important point, as one of the primary concerns of nearby residents was light pollution. **(R. p. 55:ll. 17-20)** (". . . and we were concerned about any lighting intrusion . . . .").

David Walker, the Pastor of the Citadel Square Baptist Church that is immediately to the South of the hotel on Meeting Street, wrote a letter complementing the lighting design, stating he "personally think[s] the overall lighting design for your hotel adds class and great taste to the City landscape." **(R. p. 82.)** Pastor Walker noted "there have been no complaints from the membership at Citadel Square Baptist Church regarding your lighting." **(R. p. 82.)**

Cress Darwin, the minister of the Second Presbyterian Church, the immediate neighbor to the north of the hotel on Meeting Street, wrote a letter commending the renovation and stating that "[a]t night the understated lighting renders the building lovely and inviting." **(R. p. 83).**

In addition, Charleston's two long-established preservation organizations – The Historic Charleston Foundation and The Preservation Society of Charleston – submitted letters supporting and complementing the exterior lighting. The Chief Preservation Officer of the Historic Charleston Foundation stated in his letter: "It is our position that the building's exterior, the surrounding streetscape and the neighborhood have all been greatly enhanced by the addition of the entry canopies, the plantings, and the generous exterior lighting. The lighting of the building accentuates the historic features of the facade and make it come alive at night. We completely support the changes that you have made and believe that the city benefits from this project immensely." **(R. p. 80.)** The Executive Director of the Preservation Society of Charleston likewise stated in his letter that the exterior lighting was an enhancement, despite having prior reservations about the Dewberry Hotel's appearance, stating: "As you know, the Society's main concern over the renovation was the grey washing of the brick. In reviewing this issue, I believe that the lighting package actually helps alleviate this concern. The current lighting softens the appearance of the exterior, creates a more interesting visual character and more historic feel by accentuating the craftsmanship of the original materials." **(R. p. 81).**

The BAR considered the Dewberry's request for the after-the-fact approvals at its meeting on December 13, 2017. **(R. pp. 42-73).** Lockie Brown, Dewberry's Vice President of Design, spoke in support of Dewberry Hotel's exterior lighting, providing the background information including an explanation of BOLD's lighting design. Only two community residents, Angela Ransford and Bill Weston, offered comments opposing the Dewberry's lighting system. **(R. pp. 54-58).** Their criticism was primarily based on Dewberry not seeking approval of the plan for lighting of the exterior of the building before installing the lights and their personal view that the lights were too "glitz[y]" and "bright." **(R. p. 56:l. 23); (R. p. 56:ll. 1-4); (R. p. 57:ll. 18-20); (R. p. 58:l. 1).**

Dennis Dowd, the City Architect, presented his comments and recommended that the BAR deny approval of all the uplights and downlights, and mandate a reduction in the quantity of the wall and step lights. **(R. pp. 63-64:ll. 10-9).** Dowd stated:

> I don't believe anybody would argue that they haven't done an elegant job with the building. I think they – they definitely have. However, over the years, the board has consistently denied up and down lighting of buildings viewing it as detrimental to the character of historic structures and the city as a whole and neighborhoods. And each request has been reviewed on a case-by-case basis. Generally, the only buildings allowed to have up or down lighting have been civic buildings.

(R. p. 61:ll. 14-25).

Following these comments, the BAR voted unanimously to adopt Dowd's recommendation, denied Dewberry's application, and mandated that Dewberry remove all lighting features at Dewberry's expense—including many of those necessary for the safety of guests unrelated to the select uplighting or downlighting of the façade. **(R. p. 75); (R. pp. 71-72:ll. 15-14).** Board members expressed their reasons for following Dowd's recommendation, mostly stating that the lights were excessive and that "the board does have a long track record of-discouraging dramatic uplighting and downlighting of architectural features except from a –

(inaudible) . . . . I think that – this sort of dramatic lighting scheme, uplights and down lights, and certain –(inaudible) And things like that does place a detrimental effect on the character of the historic district . . ." **(R. pp. 66-71).**

Dewberry appealed the BAR's decision. In its Petition and Grounds for Appeal, Dewberry asserted that the BAR committed an error of law and acted arbitrarily and capriciously: 1) when it exercised authority over the external illumination of buildings even though the City's zoning ordinances do not contain any explicit provision allowing the BAR to regulate the degree of illumination of the exterior of buildings; 2) by not having any standards governing exterior illumination that inform a property owner that the BAR determines exterior lighting and what criteria the board applies for gauging exterior lighting; 3) by applying an unwritten, unadopted policy that only civic buildings could have exterior lighting; and 4) in construing the Ordinances beyond their clear wording and superimposing unwritten standards that restrict the free use of property. **(R. pp. 205-206).**

On February 25, 2021, by written order (the "Order"), Judge Jefferson, dismissed Dewberry's appeal and affirmed the decision of the BAR. **(R. pp. 6-22).** In the Order, the circuit court found: 1) the City's zoning ordinances give the BAR authority to approve any alterations to the exterior architectural appearance of a building within Charleston's Old and Historic District; 2) the City's zoning ordinances provide sufficient guidance to the BAR for criteria for evaluating such alterations; and 3) record evidence supported the BAR's finding that the lights "overemphasized the size of [the Dewberry] . . . ." **(R. pp. 13-22).**

Dewberry filed a Motion to Reconsider, Alter, or Amend on March 8, 2021. **(Mot. to Reconsider, R. pp. 271-284).** Dewberry's Motion asserted that: 1) the City's BAR ordinances did not give the BAR the authority to review exterior lighting in the City; 2) the BAR ordinances

provide no standards for exterior illumination and are unconstitutionally vague as applied; 3) the BAR improperly applied an unwritten and unadopted policy that exterior lighting was only allowed on civic buildings; 4) the BAR based its decision on the decision of Dowd and cannot add new justifications for its decision after the fact; and 5) some BAR Members' self-stated "special knowledge" does not, in and of itself, convey on their board the authority to review exterior lighting schemes. (**Mot. to Reconsider, R. pp. 283-284**).

The circuit court denied Dewberry's Motion on June 21, 2021. **(R. pp. 1-5)**. Dewberry filed its Notice of Appeal on July 20, 2021.

STANDARD OF REVIEW

Appeals from architectural review boards are governed by South Carolina Code Section 6-29-900 that provides, in pertinent part, as follows: "[a] person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." S.C. Code Ann. § 6-29-900.

South Carolina Code Section 6-29-930 (A) specifies the standard of review for the circuit court:

> ...The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence.... In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law....

South Carolina Code Section 6-29-930 (A); See also, Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) ("In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the

evidence.). This Court is bound by the same abuse of discretion standard. Id.; see also Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach, 294 S.C. 475, 366 S.E.2d 15 (Ct. App. 1988).

ARGUMENT

I. Because the City's ordinances confer authority on the BAR only to determine changes to the exterior architectural appearance of buildings and do not confer authority to determine the appropriateness of the illumination of structures, the circuit court committed a legal error in determining that the City Council invested the BAR with the authority to determine exterior lighting and the degree of illumination.

a. There is no provision in any of the City's Zoning Ordinances granting the BAR express authority to review and determine exterior lighting, and the circuit court erred in implying this authority into existing ordinances when their meaning is clear and unambiguous.

The circuit court committed an error of law and abused its discretion in holding that Charleston's zoning ordinances grant the BAR authority to review and approve or disapprove exterior lighting plans based on "the expressed intent of City Council" that a "certificate of appropriateness will be required for any ***alteration to a structure*** in the Old and Historic District." **(Order dated 2-25-2021 at p. 10)** (emphasis added). The fundamental legal error is that the *illumination* at night of elements of an historic building and portions of the grounds around the building is NOT an "*alteration* to a structure."

A regulatory or administrative body, such as the BAR, can only apply standards explicitly given to it by the legislative body that created it, and cannot apply standards that have not been approved by the legislature. Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 491, 413 S.E.2d 13, 14 (1991) ("We hold Coastal Council overstepped its statutory authority in formulating and applying this test [its own test for determining if a seawall was less than fifty percent damaged] for purposes of permit evaluations without formalizing it by regulation."). Simply put, an agency or regulatory body like the BAR only has powers expressly conferred upon

it or those implied powers that assist the body in implementing its express powers. Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n, 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978); City of Columbia v. South Carolina Department of Health and Environmental Control, 292 S.C. 199, 355 S.E. 2d 536 (1987)); Beach Jasper, LLC et al v. The City of Charleston and The City of Charleston Board of Architectural Review, Civil Action No. 2015-CP-10-3660. **(Exhibit 3 to Petition and Grounds for Appeal, R. pp. 221-243).**

In this case, City Council exercised its legislative powers to create the BAR and to confer authority on the BAR through its zoning ordinances. The legal analysis of the scope of the BAR's authority strictly turns on the wording of those ordinances.[2] Dewberry and the Respondents agree on the ordinances that are controlling. They disagree as to the meaning and content of those ordinances. Those ordinances unquestionably give the BAR broad authority over changes to the exterior of buildings. They do not, however, expressly or impliedly give the BAR authority over lighting of structures at night that does nothing to alter the exterior architectural appearance of the structure.

Moving to the ordinances, City Ordinance Section 54-232, entitled "Construction or demolition of structures in districts; permit required; certificate of approval" provides in subsections (a) and (c):

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[2] In its Order, the Court found that special knowledge of board members also gave the BAR authority, noting that "one board member supported the BAR's finding that the external lighting overemphasized the size and scale of the building by explaining that he has previously mistaken the hotel for the U.S.S. Yorktown." **(R. p. 12).** The BAR's authority is determined by ordinances not by the so-called expertise of the members. The Court cited Niggel v. Columbia, 254 S.C. 19, 173 S.E.2d 136 (1970) for the proposition that personal knowledge of a board can be used as a basis for a decision. This case is not relevant here. The BAR members did not assert personal *knowledge*, but instead repeated mere observations. Regardless, the individual experience or alleged expertise of individual members of the BAR in a particular area cannot override the ordinances and confer authority on the BAR in the absence of an ordinance granting the BAR authority in that specific area of expertise.

(a) No structure which is within the Old and Historic District[3] shall be erected, demolished or removed in whole or in part, ***nor shall the exterior architectural appearance of any structure*** which is visible from a public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review.

* * *

(c) Evidence of the approval required above shall be a Certificate of Appropriateness issued by the Board of Architectural Review as created herein. Such certificate shall be a statement signed by the chairman of the Board of Architectural Review or administrative officer, as applicable, ***stating that*** the new construction, demolition, relocation or ***the changes in the exterior architectural appearance for which application has been made are approved by the Board of Architectural Review***; provided, however, that repairs and renovations to existing structures which do not alter the exterior appearance and are so exempted by the administrative officer as herein provided need not be approved by the Board of Architectural Review.

(R. pp. 147-148.) (emphasis added).

The lower court also found pertinent Section 54-240(f) that states the following:

The Board of Architectural Review may refuse a permit or Certificate of Appropriateness for the ***erection, reconstruction, alteration, demolition, partial demolition, or removal of any structure*** within the Old and Historic District, which in the opinion of the Board of Architectural Review, would be detrimental to the interests of the Old and Historic District and against the historic character and public interest of the city.

Section 54-240(f) (**R. p. 155**)(emphasis added).

As for the meaning of "exterior architectural appearance," City Ordinance Section 54-231 (b) provides the answer, defining it as follows:

"For the purposes of this article, '***exterior architectural appearance***' shall include architectural character, general composition and general arrangement of the exterior of a structure, its height, scale and mass in relation to its immediate surroundings, the kind, color and texture of the building material and type and character of all windows, doors, light fixtures, signs and appurtenant elements that are visible from a street or public right-of-way."

(R. p. 145) (emphasis added).

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[3] The hotel is within the Old and Historic District.

With respect to what is a "structure," Section 54-231 (c) states that "[f]or the purposes of this article, 'structure' shall include, in addition to buildings, walls, fences, signs, light fixtures, steps or appurtenant elements thereof." **(R. p. 146).**

Section 54-236 of the City's ordinances incorporates by reference some external standards by stating that "the Board of Architectural Review shall be guided by the Secretary of the Interior's Standards for Historic Preservation and the 2017 BAR PRINCIPLES FOR NEW CONSTRUCTION AND RENOVATION AND REPAIRS, said Standards and PRINCIPLES being incorporated herein by reference..." **(R. p. 151)**. The Secretary of the Interior's Standards make no mention of exterior lighting of buildings. Respondents do not assert otherwise. Similarly, the 2017 BAR PRINCIPLES FOR NEW CONSTRUCTION AND RENOVATION AND REPAIRS say nothing about the illumination of buildings. **(R. pp. 184-187)**. Nor do the various BAR Policy Statements speak to the illumination of buildings, although they do address the illumination of signs. **(R. pp. 168-183)**.

Consequently, the legal question of the scope of the BAR's authority is determined by reference to Sections 54-231, 54-232, and 54-240(f) of the City's ordinances. **(R. pp. 145-148).** All of these ordinances refer to the alteration of the structure itself. None refers to, much less addresses, the illumination of buildings at night that does nothing to alter the structure itself. They all refer to change to the "exterior architectural appearance" of structures.

Dewberry agrees with the lower court that the ordinances plainly and unambiguously give the BAR purview over alterations to the exterior architectural appearance of structures. The flaw in the lower court's analysis is its ruling that the illumination of a building at night is tantamount to an alteration of its exterior architectural appearance:

> "The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature." Riverwoods, LLC v. Cty. of Charleston,

> 349 S.C. 378, 384, 563 S.E.2d 651, 654 (2002). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).
>
> Dewberry provides no meritorious reason for the Court to ignore the broad authority that the City Council conferred on the BAR, or to create a new, judicially-imposed exception to such authority for exterior illumination. In this respect, the City Council expressly excludes certain areas from the BAR's broad authority. See CZO § 54-232.a (areas not visible from the public right-of-way; see also CZO § 54-242 (expressly stating exemptions to article). The City Council could have proscribing the BAR from exercising authority over exterior architectural appearance in the Old and Historic District except in very limited circumstances. It did not do so, and the Court will not review such an inherently legislative decision.
>
> CZO § 54-231.b defines "exterior architectural appearance" to include "architectural character, general composition and general arrangement of the exterior of a structure, its height, scale and mass in relation to its immediate surroundings, the kind, color and texture of the building material and type and character of all windows, doors, light fixtures, signs and appurtenant elements that are visible from a street or public right-of-way." ***The plain language of this statute does not suggest that the BAR's jurisdiction is limited to only certain structures or appurtenances that alter exterior architectural appearance.*** Rather, the expressed intent of the City Council, as reflected in Sec. 54-230 of the CZO, and as implemented through Sec. 54-232.a and 54-240.f of the CZO, is that a certificate of appropriateness will be required for any ***alteration*** to a structure in the Old and Historic District, unless expressly provided to the contrary.

(Order dated 2-25-2021, R. pp. 14-15) (emphasis added)

The contradictory logic of the lower court is self-evident. The lower court agrees with Dewberry that the clear and unambiguous wording of the operative ordinances refers to the alteration of a structure. Nonetheless, the lower court held these provisions imbued the BAR with authority over the exterior illumination of a building when its illumination does not ***alter*** the structure.

The ordinances confine the BAR's power to regulating *physical* alterations to the exterior architectural appearance of structures within the Old and Historic District. This conclusion is further supported by City Council's choosing to insert a qualifying word – "architectural"- when

drafting Section 54-232(a). Oxford's English Dictionary defines the word "architectural" as "relating to the art or practice of designing and constructing buildings." Architectural, Oxford's English Dictionary (2021). Illumination of a building has nothing to do with the design of the building itself or its construction.

Section 54-240(f), cited by the lower court and Respondents, makes no mention of illumination in listing the alterations to a building that require a Certificate of Appropriateness. It refers to "the erection, reconstruction, alteration, demolition, partial demolition, or removal of any structure." City Council could easily have inserted "exterior illumination" in the list of actions requiring a Certificate of Appropriateness but did not do so.

The circuit court and Respondents also try to rest their hat on Section 54-231(b)'s inclusion of a building's "height, scale and mass" in the definition of "exterior architectural appearance." The lower court refers to that same ordinance's definition of "scale" as supporting the BAR's decision: "('Scale' means 'building elements and details and the relationship of the building to itself, to humans, and to structures in its immediate surroundings, in terms of its visual unity, continuity and proportions.')" (**R. p. 15**). The exterior lighting of a building does not change its physical scale.

Neither the lower court nor Respondents can point to any wording in the City's ordinances expressly referring to the BAR's authority over exterior illumination of structures. Instead, the lower court implies the right to do so, even though that power is not necessary for the BAR to carry out its authority over the physical alternation of structures and is contrary to the express language of the ordinances. Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n, supra (a regulatory body only has the powers expressly conferred upon it or those implied powers that assist the body in implementing its express powers). The lower court was forced to resort to the

ordinance stating the purpose for creating the Old and Historic District in Section 54-230,[4] that does not even mention the BAR or the scope of its authority. Under the rules of statutory construction, a specific statute or ordinance prevails over a general one. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 412-413, 526 S.E.2d 716, 719 (2000) ("Generally, specific laws prevail over general laws . . . ."). Here, Council adopted ordinances that specifically addressed the scope of the BAR's jurisdiction. These ordinances prevail over the general statement of the purpose of creating the Old and Historic District that make no reference to the BAR.

It is well settled that in interpreting statutes, when the meaning is clear, that plain meaning must be respected. 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.,

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[4] The circuit court suggested Section 54-230 of the City's Ordinances, gave the BAR authority over lighting even though it does not mention lighting or the BAR. It reads:

"In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the city, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be preserved; some of these qualities being the continued existence and preservation of historic areas and structures; continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between structures of historic design and those of more modern design. These purposes are advanced through the preservation and protection of old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation." **(R. pp. 8-9).**

313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). To deviate from this standard would upend the separation of powers. See Smith v. Tiffany, 419 S.C. 548, 553, 799 S.E.2d 479, 482 (2017) (". . . we must honor legislative intent as clearly expressed in the Act, lest we run afoul of separation of powers.").

Had the legislative body of the City wanted to include exterior lighting of structures in the BAR's oversight, it could easily have done so by expressly conferring that responsibility. South Carolina Code Section 6-29-720 (A)(6) of the South Carolina Local Government Comprehensive Planning Enabling Act Of 1994 (the "Enabling Act") expressly authorizes a municipality to adopt zoning ordinances that regulate lighting of buildings: "...Within each district the governing body may regulate:... 6) other aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, ***lighting***..." S.C. Code Ann. § 6-29-720 (A)(6) (emphasis added).

Other South Carolina towns and cities have done just that. For example, the neighboring municipality of Mount Pleasant has no less than seven pages of ordinances that explicitly govern exterior lighting and illumination of commercial buildings, landscaping and signs, that cover every aspect, down to the direction of the light and the intensity of the light. See Town of Mount Pleasant Zoning Ordinance § 156.310. **(Exhibit 2 to Petition and Grounds for Appeal, R. pp. 213-220)**. The same is true of the City of Greenville. See City of Greenville Code of Ordinances § 19-6.4. **(https://library.municode.com/sc/greenville/codes/code_of_ordinances?nodeId=COOR_CH19LAMA_ART19-6DEDEST)**.

The circuit court erred and abused its discretion in holding that the ordinances bestow implied authority on the BAR to regulate the illumination of buildings where the clear and unambiguous wording of those ordinances limits the BAR's authority to proposed *alterations* of the exterior architectural appearance of structures because the illumination of a building does not in any manner alter its architectural appearance.

b. Because the City's Zoning Ordinances restrict property rights, any doubt or ambiguity contained therein must be resolved in favor of the property owner.

In this zoning context, if there is any leeway in statutory interpretation, the law requires that the interpretation favor the property owner, not the City. Zoning statutes are in derogation of the common law right of an owner's free use of her property. Therefore, they must be construed against the zoning authority if there is any question about the scope of their application. This Court discussed this principle in Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015):

> This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that
>
> > ***statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.***
>
> Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (citations omitted); see also Keane/Sherratt P'ship by Keane v. Hodge, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct.App.1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.") (footnote omitted). Thus, we find the circuit court properly held the Zoning Board made an error of law in construing the County Ordinance to exclude a helicopter sight-seeing tour facility as a permissible use within the AC district.

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

Instead of strictly construing the BAR ordinances that restrict the free use of property in favor of the property owner, as the law requires, the circuit court construed the ordinances in favor of Respondents. The lower court went so far as to seek refuge in the preamble ordinance, Section

54-230, stating the "Purpose for creating districts" that does not mention the BAR in its effort to *imply* a power in the BAR that is contrary to the wording of the actual BAR ordinances. **(CZO § 54-230, R. p. 145; Order dated 2-25-2021, R. pp. 8-9).** The lower court committed legal error when it applied the zoning ordinances in a restrictive manner to require a Certificate of Appropriateness for the exterior lighting of a building when the ordinances confine the BAR's authority to changes to the exterior architectural appearance and do not even mention the exterior illumination of buildings.

If there were any doubt as to whether the ordinances apply to exterior illumination of buildings, which there is not, the lower court committed a legal error in failing to construe the ordinances liberally for the benefit of the property owner. The circuit court's ruling suffers from a logical fallacy; that is, because the BAR *wants* to control and decide exterior illumination of structures and has *supposedly done so* in the past, it is authorized to do so again in this case. But the solution rests in the hands of City Council, not the BAR. All Council has to do is amend its legislative grant of authority to the BAR to include *lighting* and specify the standards governing it, as contemplated by the Enabling Act. This result is in accordance with the rules of strict construction and statutory interpretation as well as in keeping with the separation of powers. It would also provide notice and guidance to those seeking BAR approval going forward.

II. Because the BAR ordinances contain no standards for the lighting of buildings at night, they are unconstitutionally vague as applied by the BAR to deny Dewberry's designed illumination of elements of the historic building and the landscape stairs at night.

It is undisputed the Ordinances contain no standards for illumination of structures. Lacking any standards at all, the ordinances are *per se* unconstitutionally vague and cannot be applied to prohibit Dewberry's implementing BOLD's lighting plan for elements of the building and the external stairs.

To be constitutionally sound, a statute or ordinance must notify the public of the conduct that a statute proscribes. See, e.g., Johnson v. United States, 576 U.S. 591, 595, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015) (finding that statutes are vague when they "fail[] to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."). Vagueness thus implicates the Due Process Clause. City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993) ("The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.").

Courts in this state generally hold that "[a] statute can be impermissibly vague for either of two independent reasons. First, it may fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Or, second, it may authorize or encourage arbitrary and discriminatory enforcement." State v. Houey, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (2007); see also Curtis v. State, 345 S.C. 557, 572, 549 S.E.2d 59, 598 (2001) ("A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.") Consequently, if a zoning ordinance regulates a certain action, it must articulate the

standards being applied with specificity to provide constitutional notice to a property owner who is required to seek approval for the regulated action. As our Supreme Court stated:

> When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. Schloss Poster Adv. Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939) (finding city's denial of permit arbitrary because no objective standards guided the decision; instead, the decision was based on the unfettered will of the city); Hodge, *supra* (finding the grant of the variance was not based on the objective standards of the ordinance).

Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235-6, 489 S.E.2d 630, 633 (1997).

"[Z]oning ordinances must be precise, definite, and certain in expression so as to enable both the landowner and the municipality to act with assurance and authority regarding local land use decisions. This requirement is dictated by due process that requires that an ordinance must provide fair warning as to what the governing body will consider in making a decision." The Kroger Co. v. Plan Com'n of Town of Plainfield, 953 N.E.2d 536, 541 (2011); Accord, Peterson, 327 S.C. at 235-6, 489 S.E.2d at 633 ("The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication."); Schloss, 190 S.C. 92, 2 S.E.2d 392 ("The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes no uniform rule upon which the special permission of the city is to be granted. Thus, the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, the two are applying for precisely the same privileges under the same circumstances.").

The zoning ordinances relied upon by the lower court and Respondents do not pass constitutional muster *if they are applied* to deny the exterior illumination of a building without any

standards in the ordinances informing what is allowed or not allowed as well as the criteria for making that determination. The ordinances are completely silent. They contain no standards for exterior illumination. They do not mention exterior illumination. Thus, *as applied in this case,* they are critically vague and flawed, giving the BAR members unbridled discretion with no constraints at all. They could deny the request for any reason that comes to mind at a meeting, and that is exactly what happened in this case with each board member giving his or her personal opinion of the lighting and what he or she did not like about it. **(R. pp. 66-70).**

A person of reasonable intelligence who reviewed the city's ordinances would not be on notice as to what exterior lighting of a structures is allowed and not allowed as well as the criteria for making that determination. There is nothing in the ordinances or published policies that would alert Dewberry, or a "person of reasonable intelligence," to (i) the authority of the BAR over exterior illumination of buildings in the District (ii) the unstated discriminatory policy on external illumination the BAR used as a basis for denial, i.e., only civic buildings may be illuminated, or (iii) the standards the BAR employs to make aesthetic calls about exterior illumination.

Additionally, the absence of any mention of exterior lighting or standards for allowance and disallowance invites arbitrary enforcement. At the BAR meeting, for instance, Dowd stated that "[g]enerally, the only buildings allowed to have up or down lighting have been civic buildings." **(R. p. 61:ll. 14-25).** Dowd did not refer to any ordinances or formally approved written policies available to the public that express this supposed practice. The BAR is free to employ this unwritten informal approach apparently known to the BAR insiders to some requests for exterior lighting and not to others. This so-called policy is arbitrary by nature since it is not expressed in the ordinances or adopted policies and arbitrary in implementation since the BAR and its staff can pick and choose when they invoke it. The BAR's arbitrary application and

enforcement are keenly highlighted by the BAR's ordering the removal of lighting within the landscape stairs that are for safety and have nothing to do with up lights or down lights on elements of the façade.

Without question the City's zoning ordinances are unconstitutionally vague as applied to Dewberry in this case, thus violating Dewberry's due process rights.

III. The circuit court erred in affirming the BAR's decision to apply an unwritten and unadopted policy that external illumination of buildings is allowed for civic buildings but not private buildings, rendering the BAR's decision arbitrary and capricious.

As stated, Dowd and the BAR members premised their decision to deny Dewberry's request for after-the-fact approval on the alleged unwritten, informal practice that only civic buildings are allowed to have exterior lighting.

Courts generally agree that it is improper to enforce an unwritten and unofficial law or ordinance. See, e.g., Occupy Columbia v. Haley, No. 3:11-CV-03253-CMC, 2012 WL 13128872, at *6 (D.S.C. Aug. 17, 2012) (holding that only a newly enacted, written law mooted the argument that officials could not rely on an unwritten policy); See also Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 561 (D.S.C. 2011) (Plaintiffs sought a preliminary injunction) ("The court finds that Plaintiffs have made a clear showing they are likely to succeed on the merits in challenging the current unwritten policy prohibiting camping and sleeping on the State House grounds."); Saginaw Firefighters Ass'n, Loc. 422, Int'l Ass'n of Firefighters, AFL-CIO v. City of Saginaw, 137 Mich. App. 625, 629, 357 N.W.2d 908, 910 (1984) ("an agency may not enforce unwritten policies, rules or regulations . . ."); Doe v. S.C. Dep't of Health & Hum. Servs., 398 S.C. 62, 68, 727 S.E.2d 605, 608 (2011) ("Thus, because the age-eighteen-onset requirement found in DDSN's policy guidelines has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference.").

Here, the BAR impermissibly applied an unwritten and unadopted rule to deny Dewberry's requests for lighting the building and outside stairs – that only *civic* buildings are permitted to feature exterior lighting like that sought by Dewberry.[5] No ordinance or formally adopted policy contains this alleged distinction elevating civic buildings over other buildings expressed by Dowd in his "Staff Comments" to the board:

> Over the years the Board has consistently denied up and down-lighting of buildings viewing it as detrimental to the character of historic structures and the City as a whole... generally the only buildings allowed to up or down-lighting have been Civic buildings.

(R. p. 143, Comment 1).

Dowd echoed this practice in person at the BAR meeting, stating "[g]enerally, the only buildings allowed to have up or down lighting have been civic buildings." **(R. p. 61:ll. 14-25).** Notably, these comments reflect that there is no express rule limiting exterior lighting to civic buildings and only state that it is the BAR's "general" policy to apply such limitations.

The BAR relied upon this 'made up' rule in making its decision. Section 54-240(e) of the City's Zoning Ordinances obligates the BAR to reduce its decision to writing and "state the reasons therefore in [its] written statement to the applicant...." **(R. p. 155.)** Once an appeal is filed, the secretary of the BAR must file with the clerk a transcript of the hearing, if any, and the decision of the BAR including the BAR's findings of fact and conclusions of law. S.C. Code Ann. § 6-29-920(A). The BAR listed the following as reasons for its decision:

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[5] It bears noting that The Dewberry *was* constructed and used as a civic building – the L. Mendel Rivers Federal Building – for over forty years before Dewberry converted it to a hotel. **(R. pp. 44-47).** Under the informal policy Dowd relied upon, the building could have been illuminated at night for the entire time it was owned by the government, but the instant the deed conveyed the property to Dewberry the night lights would have to be turned off and removed.

For Office Use Only Below this Point

X The Board of Architectural Review has reviewed this request. Its findings are as follows: ☐ The Urban Design and Preservation Staff has reviewed this request. Its findings are as follows:
☐ Approval ☐ Denial ☐ Deferral ☐ Approval with the following conditions: MOTION IN ACCORDANCE WITH STAFF RECOMMENDATIONS AND THAT THE DENIED FIXTURES BE REMOVED.

BOARD OF ARCHITECTURAL REVIEW

CP1004-14

APPLICATION # H12-13-OF REQUEST: After-the-fact approval for exterior building lighting; metal sliding gates and pathway mech. eq. screen

☒ APPROVED ☐ AS SUBMITTED ☐ NEW CONSTRUCTION

☒ DENIED ☒ WITH CONDITIONS ☒ ALTERATION

☐ DEFERRED ☐ DEMOLITION

NOTES: Motion in accordance with staff recommendations and that the denied fixtures be removed

12/13/17

DATE

THIS APPROVAL EXPIRES IN TWELVE MONTHS

(R. pp. 74-75).

As confirmed by the above excerpt, the BAR made its decision "in accordance with staff recommendations," including the Comment discussed above. The BAR thereby impermissibly based its decision on an unwritten, unadopted policy.

Even if City Council had legally adopted an ordinance addressing exterior illumination of buildings, which it has not, the BAR would not have the authority to decide which kinds of buildings could receive exterior illumination unless the distinction invoked were embedded in the ordinance itself. The BAR is legally prohibited from treating civic buildings in a zoning district differently from other buildings in that district unless specifically authorized to do so in the ordinance. S.C. Code Ann. §6-29-720 (B) of the Enabling Act requires equal treatment in zoning ordinances unless the ordinance states otherwise: "The regulations ***must be made in accordance***

with the comprehensive plan for the jurisdiction, and be made with a view to promoting the purposes set forth throughout this chapter. Except as provided in this chapter, ***all of these regulations must be uniform for each class or kind of building, structure, or use throughout each district***, but the regulations in one district may differ from those in other districts." S.C. Code Ann. § 6-29-720(B) (emphasis and bold added). Here, the "district" is the Old and Historic District in which the hotel is located that was established by Sections 54-230 and 54-231 of the zoning ordinances. **(R. pp. 145-146).**

Because the BAR based its decision on an unadopted unwritten policy that would have been invalid even if it were written and adopted, the circuit court erred and abused its discretion in upholding the BAR's decision.

CONCLUSION

For the reasons stated above, this Court should reverse the orders of the circuit court and vacate the BAR's decision to deny Dewberry's application for exterior lighting of the outside landscape stairs in front of the hotel and elements of the façade of the historic building.

Respectfully Submitted,

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March 9, 2022
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Certificate of Counsel

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

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March 9, 2022
Charleston, South Carolina