

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Michael Baxley  
Circuit Court Judge

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CASE NO. 2012-CP-26-9291

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Fayrell Furr and Karole Jensen..... Respondents

vs.

Horry County Zoning Board of Appeals..... Appellant

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**INITIAL BRIEF OF RESPONDENTS**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the lower court err when it found an inpatient hospice was not allowable in the Commercial Forest Agriculture District (CFA)?
- II. Did the lower court err in finding as a matter of law that an inpatient hospice was not a permitted use in the Commercial Forest Agriculture District?
- III. Did the lower court err in finding as a matter of law that an inpatient hospice is more similar to a hospital than it is to a residential group home or a nursing home?

## **STATEMENT OF THE CASE**

Furr and Jensen filed this action in the Circuit Court appealing the Order of the Horry County Zoning Board of Appeals that a proposed inpatient hospice facility could be built in their residential neighborhood adjacent to their home. The Board ruled that the inpatient hospice could be built because it was similar to a nursing home or a permanent residential group home under the County's zoning regulations.

Judge Michael Baxley heard this matter on February 28, 2013. He had previously stayed any actions by the County pending his decision in this case. Judge Baxley also visited the site without objection by either party. Thereafter, the Court issued its Order on April 24, 2013 holding as a matter of law that an inpatient hospice facility was not a nursing home or permanent overnight group home by definition and thus could not be built on the subject property. This appeal follows.

## **STATEMENT OF FACTS**

This case is before the Court because the Horry County Zoning Board of Appeals has appealed the decision of the circuit court finding as a matter of law that an inpatient hospice was not an allowable use of real property in the Commercial Forest Agricultural

(CFA) Zoning District.<sup>1</sup> The Respondents, Fayrell Furr and Karole Jensen, live at 3740 Indigo Run, Conway, South Carolina, also known as the Wildhorse Subdivision. Mercy Hospice intends to build a 14 bed (and possibly 28 bed) inpatient hospice facility at 3341 Wildhorse Drive, Conway, South Carolina (which is directly adjacent to their property and within the entrance to the Wildhorse Subdivision). Respondents maintained at the appeal hearing before the circuit court judge that it was an error of law for the Zoning Administrator to allow an inpatient hospice facility in the Commercial Forest Agricultural (CFA) Zoning District because it was not a specifically allowed use. As provided by Horry County's Zoning Code, "It is the intent ... that the Commercial Forest and Agricultural Zoning District be reserved and utilized for agricultural, forestry, residential, commercial, social, cultural, recreational and religious uses. Inpatient medical facilities are not within this definition. (See Horry County Code of Ordinances, Appendix B, Section 703.) At the original hearing before the Horry County Zoning Board of Appeals on November 5, 2012, that Board upheld the Zoning Administrator's opinion that an inpatient 14 room hospice facility was not a hospital and was an allowable use. (See Exhibit \_\_, a picture of the hospice facility). Thereafter, Appellants timely filed their appeal pursuant to S.C. Code Ann. § 6-29-830(a) and S.C. Code Ann. § 6-29-825, et. seq. A mediation was held without resolution on February 21, 2013 and a hearing before the trial judge on respondents' appeal was heard on February 28, 2013. The circuit court reversed the Horry County Board of Zoning Appeals and this appeal follows.

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<sup>1</sup> Horry County has a countywide zoning map which allows medical facilities in the ME-1 or ME-2 Zoning District. It is undisputed that the area in question is not zoned for inpatient medical facilities.

## ARGUMENT

### **I. Standard of Review**

It is well established in this state that the courts have the authority to review decisions of zoning boards. In *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999), the Supreme Court noted that all decisions of municipal zoning boards must not be arbitrary or capricious and must bear a reasonable relationship to a lawful purpose otherwise this court will reverse such a ruling. Further, an appeal to the circuit court is only for a determination of whether the board's decision is correct as a matter of law. Thus a broad and independent review is allowed in the construction of these ordinances. See *Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (2000) and *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 464, 602 S.E.2d 76, 78 (S.C. App. 2004). (Since this matter involves an error of law, the "de novo" standard applies). *N. Am. Rescue Prods., Inc. v. Richardson*, 720 S.E.2d 53, 58 (S.C. Ct.App. 2011).

This Court has found in other cases that errors of law mandate reversal of a Zoning Board of Appeals. See *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171 (1995) (Town building inspector erred as a matter of law by severing ground level from the entire structure during his evaluation); *Vulcan Materials Co. v. Greenville County Board of Appeals*, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) (Court of Appeals upholds circuit court's reversal of zoning board based on errors of law.).

### **II. The circuit court was correct as a matter of law in holding that an inpatient hospice facility was not allowable in the CFA Zoning District.**

In this case, the Zoning Administrator was called upon to determine whether an inpatient hospice facility was appropriate under certain Horry County Zoning Regulations. Those regulations were incorporated into an order upholding the decision of the Zoning

Administrator that the inpatient hospice facility could be built at 3341 Wildhorse Drive, Conway, SC. Significantly, none of the Horry County zoning regulations in this case define or identify what an inpatient hospice is or whether it is an allowable use in a CFA Zoning District.

The Zoning Board of Appeals found that an inpatient hospice facility was an allowable use and could be constructed in the CFA Zoning District because of the following Horry County zoning regulations:

1. Article IV, Sec. 436.1 defines “permanent overnight resident group care homes” as “a facility or dwelling unit housing persons unrelated by blood or marriage and operating a group family household. A group care home may include half-way houses, recovery homes, and homes for orphans, foster children, the elderly, battered children and women. It could also include a specialized treatment facility providing less than primary health care.”<sup>2</sup>

2. Article IV, Sec. 447.1 defines a “nursing home” as an “extended or intermediate care facility licensed or approved to provide full-time convalescent or chronic care to individuals who, by reason of advanced age, chronic illness or infirmity, are unable to care for themselves.”<sup>3</sup>

3. Article VII, Sec. 703 Commercial Forest/Agricultural Section 703.2 states that permanent overnight residential group care homes and nursing homes are allowable.

The Zoning Administrator and the Horry County Board of Zoning Appeals found that an inpatient hospice was an allowable use under the CFA and fit within the definition of

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<sup>2</sup> Obviously a 14-bed inpatient facility with 24/7 care by doctors and nurses for the dying is more than primary health care.

<sup>3</sup> Again not applicable for intensive care for those who are close to death. Further, all nursing homes must be licensed as such by the State of South Carolina.

a permanent overnight resident group care home or a nursing home. This ruling was made despite the fact that neither a nursing home nor a permanent overnight residential group care home defined those terms as being an inpatient hospice facility which is specially defined in the South Carolina Code of Laws.

In fact, the Zoning Administrator and the Horry County Board of Zoning Appeals ignored that Horry County's Zoning map had a hospital district and that the County's own interpretation was in violation of South Carolina statutes which define permanent overnight residential group care homes, nursing homes, hospitals and hospice facilities.

This was a question of law for the Zoning Board of Appeals and not a factual matter since the Zoning Board of Appeals normally considers issues such as whether a variance should be granted for a few feet or whether a person had built in a setback area. The Horry County Board of Zoning Appeals in effect found an inpatient hospice to be within the legal definition of permanent overnight group care home and nursing home. This decision by Appellant was a legal error, especially in light of the South Carolina laws regarding licensure of hospitals and the Hospice Licensure Act.<sup>4</sup>

S.C. Code Ann. § 44-71-20(3) provides:

(3) "Hospice" means a centrally administered, interdisciplinary healthcare program. This program must provide a continuum of medically supervised palliative and supportive care for the terminally ill patient and the family including, but not limited to, outpatient and inpatient services provided directly or through a written agreement. The inpatient services include, but are not limited to, services provided by hospice in a licensed hospice facility.

(4) "Hospice facility" means an institution, place or building in which a licensed hospice provides room, board and appropriate hospice services on a 24-hour basis to individuals requiring hospice care pursuant to the orders of a physician.<sup>5</sup>

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<sup>4</sup> The Hospice Licensure Act is found in the same section of the Code as the statutes construing hospitals.

<sup>5</sup> Clearly a hospice is a form of hospital. See Regulation 61-16, DHEC, Minimum Standards for Licensing Hospitals and Institutional General Information provides:

In the same section of the South Carolina Code, the legislature defined hospital under S.C. Code Ann. § 44-71-30(12) as follows:

(12) "Hospital" means a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury or infirmity and may provide obstetrical care and in which all diagnosis, treatment or care is administered by or under the direction of a person currently licensed to practice medicine, surgery or osteopathy.<sup>6</sup>

The Court in its Order reversing the Board of Zoning Appeals found that the Board of Zoning Appeals was not correct as a matter of law. The Court's ruling was based upon the factual record and legal principals and upon South Carolina statutes. The circuit court noted: "...there is no Horry County zoning ordinance that defines the term 'hospice facility' or 'hospice' nor addresses whether it is allowed in a CFA Zoning District." (Order p., 3).

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1. General Hospital: A "general hospital" is a facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for diagnosis, treatment and care of such persons over a period exceeding 24 hours and provides medical and surgical care of acute illness, injury or infirmity and may provide obstetrical care, and in which all diagnosis, treatment or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the state of S. C.

2. Specialized Hospital: A "Specialized Hospital" is a facility which has an organized medical staff, maintains and operates organized facilities and services to accommodate two or more nonrelated persons for the diagnoses, treatment and/or care of such persons over a period exceeding 24 hours and which provides a specialized service for one type of care, such as tuberculosis, maternity, orthopedics, pediatrics, E.E.N.T., etc. and in which all diagnosis, treatment or care are under the direction of persons currently licensed to practice medicine and surgery in the State of S. C.

3. Institutional General Infirmary: An "institutional general infirmary" is a facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents or inmates with illness, injury or infirmity for a period exceeding 24 hours for the diagnosis, treatment and care of such persons and which provides medical, surgical and-professional medical care, and in which all diagnosis, treatment and care are performed under the direction of persons currently licensed to practice medicine and surgery in the State of S.C.

4. Chronic Hospital: A "chronic hospital" is a facility which has an organized medical staff and provides skilled nursing and other services in facilities designed and equipped for diagnosis and treatment over a period exceeding 24 hours of two or more nonrelated persons who have chronic diseases. This includes, as a minimum, diagnostic, x-ray services, minor surgery, clinical laboratory and rehabilitation services if the licensee does not already operate these services in a physically attached facility)

<sup>6</sup> A hospital does not need an emergency room as the Appellant argues in its brief pursuant to this statute.

Consequently, the Court appropriately looked at the definitions of hospice as defined by the South Carolina General Assembly. Thus, Appellant's argument throughout its brief that the Court inappropriately reversed the Board of Zoning Appeals based on a factual issue is incorrect. The circuit court held as a matter of law that a permanent overnight resident group care home or nursing home was not a hospice based on the statutory definitions.

**III. The court was correct in finding that an inpatient hospice facility by definition or function would not be a nursing home or group home.**

The Court looked at the definition of permanent overnight resident group care homes as found in Horry County's CFA Zoning District Reg. 703.2. The definition of permanent overnight resident group care home is as follows:

A facility or dwelling unit housing persons unrelated by blood or marriage and operating as a group family household. A group care home may include half-way houses, recovery homes and homes for orphans, foster children, the elderly, battered children and women. It could also include a specialized treatment facility providing less than primary health care. (Ord. No. 35-9 § 1, 5-17-94).

None of the examples of a group care home meet the definition of an inpatient hospice facility. Obviously, you only get admitted to an inpatient hospice or hospital under doctor's orders, whereas, a permanent overnight resident group care home allows for homes for orphans, foster children and the elderly or battered children and women (no doctor is required). Accordingly, the court was correct as a matter of law in finding that an inpatient hospice facility was not a permanent overnight resident group care home because it required orders of a physician and 24 hour, 7 day a week (around the clock) care by medical personnel. Obviously, a hospice is not a group home, but an inpatient medical facility to care for dying people.

The Appellant also argued that a hospice was akin to a nursing home. Again, Horry County's ordinances stated as follows in regard to the definition of a nursing home:<sup>7</sup>

An extended or intermediate care facility licensed or approved to provide full time convalescent or chronic care to individuals who, by reason of advanced age, chronic illness or infirmity are unable to care for themselves. (Ord. No. 35-94, § 1, 5-17-94).

In applying the definitions of the Horry County Zoning Ordinance and in looking at South Carolina's definitions of an inpatient hospice facility in the State statutes, the court was most definitely deciding whether or not the Zoning Board committed an error of law. Neither of the legal definitions of permanent overnight resident group care home or nursing home describes an inpatient hospice. An inpatient hospice facility is very similar to a hospital. It requires doctor's orders to be admitted.<sup>8</sup> A hospital is not a nursing home by definition. It is a special hospital which provides room, board and appropriate hospice services on a 24-hour basis pursuant to the orders of a doctor. In contrast, a permanent overnight resident group care home does not provide care pursuant to the orders of a physician. Further, an inpatient hospice facility provides supportive and palliative health care to patients, which is more than primary health care. Johns Hopkins University has defined primary health care as "the levels of a health services system that provides entry into the system for all needs and problems, provides person-focused (not disease-oriented) care over time, provides care for all but very uncommon or unusual conditions and coordinates or integrates care, regardless of where the care is delivered and who provides it." Primary health care is the care a patient first receives when he has contact for the first time with a

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<sup>7</sup> One may go to a nursing home without doctor's orders. However, one may not be admitted to an inpatient hospice facility or hospital without a doctor's order.

<sup>8</sup> See letters of support for an inpatient hospice facility by Conway Medical Center dated 05/11/2011 and Grand Strand Regional Medical Center dated 05/13/2011.

healthcare facility. In this case, the proposed 14-bed hospice facility would provide 24-hour care by nurses and other staff members, including doctors, for patients at the end of their life and, thus, cannot and is not a primary healthcare facility as the Appellant argues is contained in Article IV, Sec. 436.1 of the CFA Zoning District.

South Carolina's legislature has specifically defined a group care home in S.C. Code Ann. § 63-1-40. The term "group care home" is defined as follows:

It means a staffed residence with a population fewer than 20 people who are in care apart from their parents or relatives or guardians on a full time basis.

This is what the Horry County Zoning Ordinances envisioned allowing in the CFA District, not a hospice facility (i.e., an inpatient medical facility for the dying) as is contemplated in this case. Further, the South Carolina Children's Code has regulations that cite group care homes in its definition no less than seven times and never once mention hospice facilities. See S.C. Reg. 24-15, 24-3, 24-17, 24-25, 24-9, 24-7 and 24-19(3).

For this reason, the circuit court was wholly justified in finding as a matter of law that a hospice facility is not defined in the CFA Zoning District and accordingly was not an allowable use especially in light of Horry County's uniform zoning plan in which there was and is a hospital district for inpatients.<sup>9</sup>

**IV. The transcript of record of the Horry County Zoning Board of Appeals supports the circuit court's decision.**

The Court is directed to the Transcript of Record of November 5, 2012 for support in affirming the circuit court's decision to reverse the Horry County Zoning Board of Appeals. In that hearing, Dr. Preston Stronider was asked to testify. He stated he was the Medical Director of the Conway Hospital (Tr. p. 38, lines 12-14); that there would be nurses

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<sup>9</sup> See Horry County's uniform zoning ordinance and map and zoning districts ME-1 and ME-2 which specifically allow for hospitals and other inpatient facilities.

available to assist at this proposed facility because it was an inpatient hospice facility (Tr. p. 39, lines 14-15); that there would be staff available to assist the patients at the hospice (Tr. p. 39, lines 16-18); that medical assistants would be on staff (Tr. p. 39, lines 20-22); that there would actually be the same staffing as there would be in a hospital (Tr. p. 39, lines 23-25); that doctors would be making rounds (Tr. p. 40, lines 1-5); that there would be medical staff on a 24/7 basis (Tr. p. 40, lines 7-12).<sup>10</sup>

This testimony by this physician clearly establishes that the Horry County Zoning Board of Appeals and the Zoning Administrator erred as a matter of law in finding that an inpatient hospice facility was similar to a permanent overnight resident group care home. In fact, it is a hospital and had none of the characteristics of either a nursing home or overnight resident group care home.

**V. Other zoning ordinances in this state define an inpatient hospice as a hospital.**

At the hearing before the circuit court judge, the Respondents cited County of Charleston Zoning and Land Development Regulations, Chapter 12/Definitions/Article 12.1 Terms and Uses Defined, in which “Hospital” is defined to include general hospitals, specialized hospitals, chronic hospitals, psychiatric and substance abuse hospitals or **hospices** (Chapter 12, page 18). (Ex. 3).<sup>11</sup>

It should also be noted that the Horry County Zoning Regulations do not define hospice. Further, Mercy Care’s Certificate of Need Application for the proposed inpatient hospice it planned had as its stated intent to build a facility to service “patients with two weeks or less to live are admitted to maintain the highest level of comfort and pain

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<sup>10</sup> Respondents submit that the doctor was talking about a hospital or a hospice when he described the workings of a hospice.

<sup>11</sup> This definition is in accord with the statutory definitions of hospital and hospice.

management as possible.” Obviously providing comfort and pain management is not and cannot be part of a permanent resident group home nor is it available at a nursing home. Therefore, Mercy Care has proposed to build a special type of inpatient facility. Patients will require complex round-the-clock care including narcotic drug therapy and will receive intensive inpatient care for the end of their life. All of this cannot be accomplished in the patient’s home or in other facilities other than a hospital because of the specialized care needed. Further, Mercy Hospice admits that close supervision and monitoring will be necessary and nurses and doctors will be on staff 24 hours a day, seven days a week and check frequently on their patients. Treatment typically will include changes in medication, intravenous fluids or medicines, complex wound care or other complicated medical tasks all of which make the inpatient hospice facility similar to a hospital. (If a hospice is not a hospital, it is a first cousin).

It should also be noted that the Transcript of Record of the Board of Zoning Appeal reveals that the medical and community leader statements and the Certificate of Need Application support the proposition that an inpatient hospice facility is a very specialized medical facility. Community medical leaders are quoted as saying “a hospice will benefit patients who may be in the hospital and unable to go home.” (See Tr. of Record, p. 28, lines 1-25 and the Certificate of Need).

This evidence, along with South Carolina regulations requiring that patients who are admitted to a hospice must be under the direction of a licensed physician, required the court to hold as a matter of law that a hospice was similar to a hospital and not a nursing home or permanent resident group overnight home. See S.C. Code Reg. § 61-78.801 which provides “treatment that embraces comfort and improves the quality of an individual’s life during the

last phases of life”. Further, Mercy Care’s own brochures state “the goal of palliative care is to help ease the patient’s pain and distressing symptoms that may arise from any current curative treatments. The palliative care team works with the primary health care provider in determining the best medical plan of care while managing the pain and other symptoms that can nag at a quality of life such as pain, trouble sleeping, nausea, vomiting, constipation and the loss of appetite. See [www.mercyhospice.org/mercy-care-services.cfm?page=12](http://www.mercyhospice.org/mercy-care-services.cfm?page=12).

**VI. Other courts are in accord with the circuit court judge’s ruling in this case.**

While it is true that no South Carolina cases are available regarding the definition of a nursing home or hospital in the context of a zoning ordinance, other states around the country have had the opportunity to consider this issue. The Court’s attention is directed to the following cases:

1. *Frax Realty Co. v. Kleinert*, 123 Misc. 455, 205 NYS 728 (1924) (“home for aged” is place where persons of advanced age go to live and is not a hospital within zoning resolution, prohibiting garages for more than five cars within 200 feet of charitable hospital, ordinary meaning of hospital being an institution to provide a place to which people report for medical or surgical treatment.

2. *Hispanic Counseling Center Inc. v. Village of Hempstead*, 237 F.Supp. 2d 284, (EDNY 2002) (village code prevented clinic and substance abuse treatment centers from relocating to village’s residential area when code specifically permitted in those areas only hospitals, sanatoriums, clubs or lodges except when conducted as a business that authorizes a special exception and thus did not include clinic or substance abuse treatment as a permitted use.

3. *Marino v. Town of Smithtown*, 61 A.D.3d 761, 877, N.Y.S.2d 183 (2d Dept 2009) (town zoning board of appeals rationally concluded that in-home hospice and rehabilitation center for approximately 200 terminally ill and disabled animals did not constitute customary, accessory use of premises or lawful preexisting nonconforming use, board relied in part on table of use regulations in town's zoning code, which expressly recited that animals, hospitals, veterinarians, and kennels were not permitted in residential zone and that any land use not listed or used in table was not permitted in any district.)

4. *Scerbo v. Orange Board of Adjustment*, 121 N.J. Super 378, 297 A.2d 207 (LawDiv. 1972) (residential narcotic rehabilitation and treatment center under supervision of Commissioner of Health was hospital and qualified as institutional use under local zoning ordinance.)

5. *Diversified Health Associated Inc. v. Norristown Zoning Hearing Board*, 781 A.2d 244 (Pa. Commonw. Ct. 2001) (proposed substance abuse treatment center was a hospital within meaning of zoning ordinances stating that a hospital was "a place for the diagnosis, treatment or other care of humans including such establishments as a sanitarium.")

6. *Collis v. Wiles-Barre Zoning Hearing Board*, 465 A.2d 53 77 Pa. Commonw. 4. (1983) (term hospital for zoning purposes, includes facility for treatment of any illness, whether etiology is physical or mental.)

7. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 139 Pa. Commonw. 206 (1991) (skilled care facility was hospital or sanatorium and not group home within meaning of township zoning ordinance that permitted hospitals or sanitariums within residential district when authorized by special exception.)

8. *Friedlander v. Sayre Borough Zoning Hearing Board*, 119 PA Commonw. 164, 546 A.2d 755 (1988) (hospital offices constituted hospitals for zoning purposes since hospital offices are just as much a hospital as patient room).

9. *State ex. Rel. Lyon v. Snohomish County Board of Adjust.*, 9 Wash. App. 446, 512 P.2d 1114 (1973) (proposed alcoholic recovery rehabilitation intermediate care center was a hospital because patients were there either by court order or by order of physician, were supervised 24 hours a day and were treated for observation, detoxification, intensive care and outpatient therapy).

10. *City of Wilmington v. Turk*, 14 Del. CH 392, 129 A. 512 (1925) (residents were trained nurses who treated private patients for diseased tonsils and maternity cases with a room fitted for minor operations was held to be a hospital within the zoning ordinances).

11. *People ex rel. D'Iorio v. Alfa Realty Co.*, 69 Misc. 2d 475, 479-80, 330 N.Y.S.2d 403, 407-08 (N.Y. City Ct. 1972) (words "general hospital" as used in zoning ordinance included and embodied all accessory uses customary and appurtenant to general hospital such as outpatient clinics; "clinics" were thus permissible in any district in which hospitals were permitted; center where drug addicts were examined and daily given doses of methadone was "clinic" carrying on "hospital" operation, which was not permissible in B-3 zone in city; "*Black's Law Dictionary* (1951 Fourth Edition, Page 871) defines 'Hospital' as an 'Institution for the reception and care of sick, wounded, infirm, or aged persons \* \* \* also the building used for such purpose.' *Webster's Third New International Dictionary of the English Language Unabridged*, defines 'Clinic' as: '1. An institution connected with a hospital \* \* \* where diagnosis and treatment are made available to out-patients.' The

preamble to the agreement between the Mount Vernon Hospital and the County of Westchester refers to the 14 East Prospect Avenue operation as an 'experimental pilot Clinic.' (Emphasis the Court's). The fact is, and this Court takes judicial notice of such fact, that drug addicts are sick or infirm persons.");<sup>12</sup>

12. *Mercy Hosp. v. Hempstead Bd. of Zoning Appeals*, 127 A.D.2d 659, 660, 511 N.Y.S.2d 886, 887 (2d Dept 1987) (hospital's proposed use of building for purpose of providing outpatient medical services and programs for treatment of mentally disabled patients fell under category of "hospital" eligible for issuance of special-use permit under town building zone ordinance; a "hospital" under section of ordinance was defined as any lawful "hospital" under Public Health Law article, and proposed facility was within statutory definition; "The term 'hospital' under Public Health Law article 28 includes a much broader range of institutions, providing more limited services, such as nursing homes, diagnostic centers, treatment centers, and out-patient departments (Public Health Law § 2801[1] ). Since the petitioner's proposed facility in effect, would be an out-patient department, it fell under this definition of 'hospital.'").

In summary, Courts around the country have been asked as a matter of law to define hospice, hospital, nursing home and permanent overnight group residential home. This circuit judge did nothing different than what has been done by other judges around the country. He reviewed the South Carolina Code for their legal definitions. Appellant's assertion that this is a factual matter akin to a jury decision is not correct. The question in this case is one of law which this court has said the circuit courts of this state are authorized to hear and correct if necessary. Issues of credibility, believability of witnesses and other

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<sup>12</sup> Respondents suggest the Court take judicial notice that hospice patients are sick and should only be treated in a hospice or hospital under physician supervision.

factual disputes about setbacks including variances are clearly factual issues. The issue of whether or not an inpatient hospice facility is an allowed use under a zoning regulation which does not define hospice is a legal question which requires review of S.C. Code § 44-71-20(3). Thus, the circuit court correctly found as a matter of law that “a hospice facility cannot be properly analogized as either ‘a permanent overnight resident group care home’ or a ‘nursing home’. The court further noted “specifically the sophistication and level of care including the providing of primary medical care if needed required in a hospice facility is greater than that of both permanent overnight resident group care home and nursing home.” (See Order of Judge Baxley dated April 24, 2013, p. 4).

**VII. The Horry County zoning ordinances must define allowable uses.**

Appellant argues that the zoning ordinance in this case should be upheld even though the term hospice is not found in the CFA zoning regulation. Respondents reply that Horry County has a unified zoning map and that there is a hospital zoning district (ME1 and ME2) in which a hospice could be built. Further, a hospice is not an unusual type of healthcare facility and those inpatient facilities have been built around the country. Here, Appellant’s interpretation of its own zoning laws is not only irrational but arbitrary. This case presents a pure legal interpretation of the term hospice, nursing home and permanent resident overnight group home. It is wholly arbitrary and unreasonable to find as a matter of law that inpatient hospice facility is encompassed within overnight residential group home and nursing home. Respondents also report that Horry County had established in its zoning laws specific zoning for inpatient medical services (See § 740 Inpatient Medical Services District (ME1)). It is not disputed that the proposed hospice facility is not within the boundaries of the Inpatient Medical Services District. Further, §740 provides, “uses in this

district are generally concentrated into a single area....” Also § 741, Outpatient Medical Services District (ME2) which allows for “other facilities of similar nature as might be required to serve a growing population. These uses can have substantial negative impact on adjacent developments and are often considered noxious uses, ... to avoid possible negative impact upon adjacent development, these uses are not allowed to locate directly adjacent to existing residential development.” Respondents suggest that an inpatient hospice facility adjacent to a residential subdivision would have a similar negative impact. In this case, a 14-bed hospice facility would be built directly adjacent to Furr and Jensen’s home in a residential neighborhood. One can only imagine the traffic at all hours of the night, ambulances rushing by, funeral cars parked outside and people walking around outside grieving their friends and relatives.

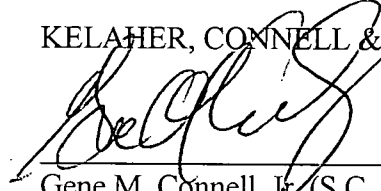
Further, the plain and unambiguous language of the zoning ordinance defines permanent group resident overnight group home and nursing home and those definitions in and of themselves exclude inpatient hospice facilities which requires a physician’s orders to be admitted under South Carolina’s statutory scheme. For that reason alone, the court correctly found that an inpatient hospice facility could not be built in the Wildhorse subdivision.

### **CONCLUSION**

Accordingly, Respondents request this Court affirm the Circuit Court.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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**Attorney for Respondent**

October 18, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Michael Baxley  
Circuit Court Judge

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CASE NO. 2012-CP-26-9291

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Fayrell Furr and Karole Jensen..... Respondents

vs.

Horry County Zoning Board of Appeals..... Appellant

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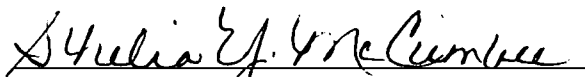
**PROOF OF SERVICE**

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PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served **Initial Brief of Respondents** on the Appellant, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Emma Ruth Brittain, Esquire  
Thomas & Brittain, P.A.  
Post Office Box 1290  
Myrtle Beach, South Carolina 29578

DATE OF MAILING: October 18, 2013

  
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,  
this 18<sup>th</sup> day of October, 2013

  
Notary Public for South Carolina  
My Commission Expires: 2-25-19

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**RESPONDENTS' DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL**

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Respondents propose the following to be included in the Record on Appeal:

1. Order Reversing Horry County Zoning Board of Appeals of The Honorable J. Michael Baxley filed May 1, 2013
2. Transcript of Hearing before The Honorable J. Michael Baxley February 28, 2013
3. Transcript of Hearing Horry County Zoning Board of Appeals November 5, 2012
4. Certified Record on Appeal (and all attachments thereto) filed December 5, 2012
5. Horry County Official Zoning Map
6. Notice of Appeal dated November 30, 2012
7. Notice of Motion and Motion to Stay dated December 6, 2012

**RECEIVED**

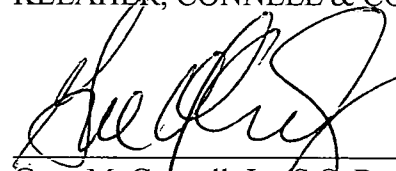
OCT 21 2013

**SC Court of Appeals**

8. Answer of the Respondent Horry County Zoning Board of Appeals dated December 19, 2012
9. Form 4 issued by the Court dated February 5, 2013
10. Notice of Motion and Motion to Intervene dated February 28, 2013
11. Letter from The Honorable J. Michael Baxley dated March 7, 2013

We certify that this designation contains no matter which is irrelevant to this appeal.

KELAHER, CONNELL & CONNOR, P.C.



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**Attorney for Respondents**

October 18, 2013

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Horry County Zoning Board of Appeals..... Appellant

**PROOF OF SERVICE**

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served **Respondents' Designation of Matter** on the Appellant, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Emma Ruth Brittain, Esquire  
Thomas & Brittain, P.A.  
Post Office Box 1290  
Myrtle Beach, South Carolina 29578

DATE OF MAILING: October 18, 2013

*Shelia Y. McCumbee*  
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,  
this 18<sup>th</sup> day of October, 2013

*Sharon M. Tyler*  
Notary Public for South Carolina  
My Commission Expires: 2-25-19

**RECEIVED**  
OCT 21 2013  
**SC Court of Appeals**