

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-CP-26-9291

Fayrell Furr and Karole Jensen Respondents,

vs.

Horry County Zoning Board of Appeals Appellant.

**BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT,
HORRY COUNTY ZONING BOARD OF APPEALS
SUBMITTED BY**

MERCY CARE

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INTEREST OF AMICUS

Amicus Curiae (“Mercy Care”) was founded in 1980 to bring a special program of caring and outpatient services to the chronically ill and dying patients and their families in Horry County and surrounding areas. Organized by the Franciscan Sisters of Mary and initially funded by both the Sisters and the Catholic Diocese of Charleston, Mercy Care was welcomed into the Horry County community. Through the guidance and active support of local persons serving on its community board, Mercy Care has gained wide acceptance among medical professionals and within the broader communities it serves. The mission of Mercy Care is to comfort the body and heal the heart through competent care that focuses on supporting and nurturing the human spirit and preventing and relieving suffering — one person, one family and one community at a time.

Mercy Care is the applicant for a permit to construct a fourteen (14) bed hospice house located on twenty-two (22) acres of riverfront property adjacent to Respondents’ property. The central issue in this appeal is whether the proposed hospice house is a permitted use under the Horry County Zoning Ordinance. As such, Mercy Care has a vested interest in the legal issues addressed herein. Despite its limited financial resources as a non-profit corporation, Mercy Care has incurred substantial fees in the planning, design and approval for the proposed hospice facility. Given its limited resources, Mercy Care would like to assert its position to this Court by way of *amicus* brief on the matters addressed by the parties in this appeal.

Mercy Care also files this brief as an advocate for the citizens of Horry County and surrounding areas. The proposed hospice house would be the only such facility within Horry County. While most people prefer to live their final days in the comfort

of their own homes, for many reasons, this may not always be possible or practical. A hospice house provides a place for patients and their families to receive physical, emotional, social and spiritual end-of-life care. Given the fact that Horry County has a higher percentage of elderly residents compared to most other counties within South Carolina, a hospice house is desperately needed in Horry County. However, the Circuit Court's ruling effectively prevents construction of a hospice house anywhere within Horry County as the zoning administrator has no discretion to approve such a facility when the local zoning ordinances do not include the terms "hospice house" or "hospice facility."

STATEMENT OF THE ISSUES ON APPEAL

Mercy Care adopts the Statement of Issues on Appeal set forth by Appellant Horry County Zoning Board of Appeals.

STATEMENT OF THE CASE

Mercy Care adopts the Statement of the Case set forth by Appellant Horry County Zoning Board of Appeals.

STATEMENT OF FACTS

Mercy Care adopts the Statement of Facts set forth by Appellant Horry County Zoning Board of Appeals.

ARGUMENT

STANDARD OF REVIEW FROM A ZONING APPEAL

In reviewing decisions of local planning and zoning boards, such local boards, "and not the courts, are the primary entities responsible for the planning and development of our communities." *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401,

412, 552 S.E. 2d 42, 48 (Ct. App. 2001). The standard of review from a zoning appeal is very deferential to a board's decision, and its findings are equated to a jury's findings. S.C. Code Ann. §6-29-840. This standard has been interpreted to require that a court not disturb a board's findings and decision unless there is no evidence which reasonably supports the board's decision. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000).

A court must refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). A decision of a zoning board will be overturned only if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (1991) and *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995). Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances. *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), *aff'd*, 372 S.C. 230, 642 S.E.2d 565 (2007).

I. THE LOWER COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE HORRY COUNTY ZONING BOARD AND FAILING TO DEFER TO THE FACTUAL FINDING BY THE HORRY COUNTY ZONING BOARD THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT

Even if a lower court disagrees with the decision of a zoning board, it is required to uphold that decision unless the zoning board's decision was arbitrary, capricious and had no reasonable relation to a lawful purpose. *Restaurant Row Assocs.*

V. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). A zoning board's determination that a particular purpose or activity does or does not constitute a "use" is a finding of fact." *Heilker v. Zoning Bd of Appeals for City of Beaufort*, 346 S.C. 401, 411, 552 S.E.2d 42, 47-8 (Ct. App. 2001). The findings of a zoning board should "not be disturbed unless the record discloses that there is no evidence which reasonably supports" the zoning board's finding. *Heilker v. Zoning Bd of Appeals for City of Beaufort*, 346 S.C. 401, 411, 552 S.E.2d 42, 47-8 (Ct. App. 2001).

A. The Record Supports the Zoning Board's Determination that Services Provided by a Hospice House Are Similar to the Services Provided by a Nursing Home or Group Home

The Horry County Zoning Board of Appeals ("Zoning Board") made a factual finding that a hospice house is a permitted use within the Commercial Forest Agriculture Zoning District ("CFA"). (Order of the Board dated November 6, 2012). The term "hospice" or "hospice house" is not defined in the zoning ordinance for Horry County. (See Horry County Zoning Ordinance). However, the CFA allows for a nursing home or permanent overnight group care home. (Horry County Zoning Ordinance Art. IV §436.1). Mercy Care argued before the Zoning Board that a hospice is akin to a nursing home or group home and is therefore permitted within the CFA.

In support of its argument, Mercy Care introduced affidavits from Dennis L. Gibbs, the Bureau Chief for the Bureaus of Health Facilities Regulation at DHEC and David S. Levitt, a healthcare consultant, that the services provided by a hospice and a nursing home are very similar. (See Affidavit of Dennis L. Gibbs and Affidavit of David S. Levitt). At hospice houses, like nursing homes, primary

focus is on providing nursing services, with minimal ancillary services. (Levitt Aff. ¶ 5). "The end goal of both a nursing home and an inpatient hospice facility is rarely recovery for traditional residents, but rather comfort and care in a residential setting." (Gibbs Aff. ¶ 5, Levitt Aff. ¶ 5). Sara-Jo Faucher, Executive Director of Mercy Care, testified before the Zoning Board that "[a] hospice house is essentially like a nursing home that specializes in care for the terminally ill and is designed to feel like a home." (Tr. of the Zoning Board of Appeals Hearing dated November 6, 2012, Faucher, Tr. pg. 21, lines 2-16).

The testimony offered by Mercy Care provides ample evidentiary support for the Zoning Board's factual conclusions that a hospice house is similar to a nursing home and group care home and a permitted use within the CFA. As such, the lower court erred in overruling the Zoning Board's determination and substituting its own judgment as to the factual issues in this matter. The factual determinations of the Zoning Board should not be overturned.

B. The Record Supports the Zoning Board's Determination that Hospitals Offer Different Services From Hospices

Respondents' argue that a hospice is a hospital and, therefore, not permitted within the CFA. However, the Zoning Board considered the evidence submitted by the parties and concluded that a hospice is in fact not a hospital. The testimony of Mr. Levitt provides that the services offered by a hospital are more resource and labor intensive than those offered by a hospice facility. (Levitt Aff. ¶ 2). Hospitals are required to provide emergency services, but hospice facilities are not. (Gibbs Aff. ¶ 4; Levitt Aff. ¶ 2). Hospitals have operating facilities with surgical care, but hospice houses do not have such facilities. (Gibbs Aff. ¶ 4).

The treatment or care provided by hospitals and hospices are quite different. According to the testimony of Charles Sasser, M.D., Medical Director of Mercy Care, hospitals provide acute care to restore health whereas hospice houses provide comfort care. (Tr. Pg. 52, line 24 - Pg. 53, line 17). Likewise, the testimony of Ms. Faucher described the treatment of hospitals and hospices as follows:

The care a patient receives at a hospice house is not for treatment to make a patient better like in a hospital or to keep them alive. Hospice house is comfort care and not acute care or primary care like a hospital.

(Transcript of the Zoning Board of Appeals Hearing dated November 6, 2012, Tr. Pg. 21, lines 2-16).

The evidence submitted to the Zoning Board was not irrational, arbitrary or capricious. There is ample evidentiary support for the Zoning Board's factual conclusions that a hospice house is different than a hospital. As such, the Zoning Board made the correct determination that a hospice house is a permitted use within the CFA. Based on the evidence submitted, Mercy Care requests that the Court overturn the lower court's decision.

C. Statutory Definitions Support the Zoning Board's Determination that a Hospice House is Akin to a Nursing Home or Group Home.

As addressed above, the Horry County Ordinance does not define a "hospice" or "hospice house." However, the Zoning Board considered the statutory definitions of a hospice to conclude that a hospice house is akin to a nursing home or group care home. Nursing homes and group care homes are permitted under the CFA. The Horry County Zoning Ordinance defines a "nursing home" as "[a]n 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." (Horry County Code of Ordinances, Appendix B, Zoning Art. IV §447.1). Likewise, Horry County's Zoning Ordinance defines a "group care home" 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.

(Horry County Code of Ordinances, Appendix B, Zoning, Art. IV §436.1). According to these definitions, both nursing homes and group care homes are providing less than acute care to specific types of patients.

The South Carolina Code defines "hospice" as:

[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 written agreement. The inpatient services include, but are not limited to, services provided by hospice in a licensed hospice facility.

S.C. Code Ann. §44-71-20(3) (Rev. 2002). In the South Carolina Code, a "hospice facility" is defined as "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 the physician." S.C. Code. Ann. §44-71-20(4) (Rev. 2002). Although "hospice" and "hospice facility" are not defined terms within the Horry County Zoning Code, the Zoning Code

endorses reference to South Carolina statutes to provide meaning for terms not otherwise defined in the Zoning Code. (See Horry County Code of Ordinances Ch. 1, §1-2) ("terms used in this Code, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of the state for the same terms").

The Zoning Board properly concluded that a hospice is akin to a nursing home or group care home. Nursing homes, group care homes and hospice houses provide less than acute care to patients "unable to care for themselves." In nursing homes, group care homes and hospice houses, a patient receives palliative care that focuses on treatment and comfort and not recovery. Based upon the evidence submitted, the factual determinations of the Zoning Board should not be overturned.

II. BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE ZONING BOARD, THE COURT FAILED TO TREAT THE ZONING BOARD'S DECISION AS A FINDING OF FACT BY A JURY

"The findings of fact by the board of [zoning] appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." *Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 62, 737 S.E.2d 863, 866 (Ct. App. 2013) citing S.C. Code Ann. §6-29-840(A). "In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." S.C. Code Ann. §6-29-840(A).

In this case, the lower court improperly disregarded the findings of fact by the Zoning Board and considered additional evidence not before it in violation of the S.C. Code Ann. §6-29-840(A). The lower court improperly determined that

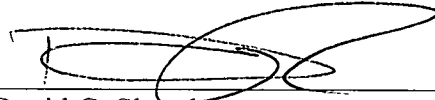
whether a hospice is a permitted use is an issue of law as opposed to an issue of fact.

As stated above, whether a given use is permitted is a question of fact.

CONCLUSION

For all of the foregoing reasons, Mercy Care respectfully requests that the Court reverse the lower court's decision and reinstate the decision of the Horry County Zoning Board of Appeals.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT, HORRY COUNTY ZONING BOARD OF APPEALS SUBMITTED BY MERCY CARE by depositing a copy of it in the United States mail, postage prepaid, on November ____, 2013, addressed to:

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