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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

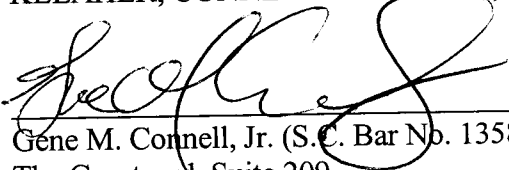
Horry County Zoning Board of Appeals..... Appellant

PETITION FOR REHEARING

The, Respondents, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its Opinion filed December 17, 2014 and received by Respondents' attorney on December 18, 2014. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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December 29, 2014

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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..... Appellants

**MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR REHEARING**

On December 17, 2014, this Court issued its Opinion No. 5284 reversing the Circuit Court Order in this case. Respondents request reconsideration and rehearing pursuant to South Carolina law based on the following grounds:

I. GROUNDS FOR REHEARING

1. The Court of Appeals as a matter of law erred in failing to apply the statutory definitions for hospice, nursing home, permanent overnight resident group care home and hospital.

2. The Court of Appeals erred as a matter of law in holding that the interpretation of the Horry County Zoning Ordinance in this case was a question of fact and not one of law when the definition of hospice, hospital, permanent overnight resident group

care home and nursing home are all defined in this state by statute. See S.C. Code Ann. § 44-71-20 (3) and (4) (hospice); S.C. Code Ann. § 63-1-40 (group care home); S.C. Code Ann. § 44-7-130(12) (hospital); S.C. Code Ann. § 44-7-80 (nursing home).

3. The Court of Appeals erred as a matter of law in holding that the Horry County Zoning Ordinances allowed a hospice in the Commercial Forest Agricultural zone when the term was not defined in the ordinance.

4. The Court of Appeals erred as a matter of law in finding that a hospice was similar to a permanent overnight resident group care home or nursing home when those terms are defined by the South Carolina Code of Laws and are mutually exclusive of each other.

5. The Court of Appeals erred as a matter of law in holding that the Horry County Zoning Board's decision was legally correct when in fact it was not legally correct since hospice, hospital, permanent overnight resident group care home and nursing home are all defined in the statutes.

6. The Court of Appeals erred as a matter of law in affirming the decision of the Zoning Board.

7. The Court of Appeals erred as a matter of law in not applying South Carolina statutory law, specifically the definition of hospice pursuant to S.C. Code § 44-71-20 especially since the zoning rules and regulations were silent on the definition of the term hospice.

8. The Court of Appeals erred as a matter of law in not applying the definitions in the South Carolina Hospital Licensure Act, S.C. Code Ann. § 44-71-20(3) in determining

whether a hospice was appropriate pursuant to Horry County's Commercial Forest Agricultural zoning ordinance.

9. The Court of Appeals erred in not defining the term hospice, hospital, permanent overnight resident group care home and nursing home based on the plain and ordinary meaning in the statutes which define them.¹

10. The Court of Appeals decision is inconsistent with statutes enacted by legislature which define hospital, hospice, permanent overnight resident group care home and nursing home.

11. The Court of Appeals erred in applying *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct.App. 2001) because it has no application since the term "use" is not defined in the South Carolina Code of Laws while the term "hospice" (S.C. Code Ann. § 44-71-20 (3) and (4)), "hospital" (S.C. Code Ann. § 44-7-130 (12)) and "permanent overnight resident group care home" (S.C. Code Ann. § 63-1-40) are all defined in South Carolina. The error being each of these terms is mutually exclusive and based on the facts presented do not allow the Zoning Board of Appeals or this Court to find as a matter of law that a hospice is either a nursing home or a permanent overnight resident group care home.

12. The Court of Appeals erred in failing to construe the term hospital, hospice, nursing home and permanent overnight resident group care home consistent with South Carolina statutory law.²

¹ It could hardly be argued a hospice is a permanent overnight resident group care home. The definition under S.C. law is: "a staffed residence with a population fewer than twenty people who are in care apart from their parents, relatives or guardians on a full time basis."

² In that respect, this Court is given a broader and more independent review when the issue concerns construction of an ordinance. *Charleston County Parks and Recreation Comm. v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995).

II. APPLICABLE LAW

Respondents move the Court for reconsideration. Respondents respectfully take issue with the Court's analysis in this case. This Court's ruling is based on an error of law and is not supported by the law. In South Carolina the term hospice, hospital, permanent overnight resident group care home and nursing home are all statutorily defined. This case is not similar to *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct.App. 2001). In *Heilker*, this Court was called upon to define the term "use" which was not defined by statute in South Carolina. This case is different. The Horry County Zoning Board of Appeals rules and regulations do not define the term hospice, but do define nursing home or permanent overnight resident group care home. However, South Carolina's Code of Law does define each of these terms. In particular a hospice is defined as follows:

See S.C. Code Ann. § 44-71-20(3) and (4):

(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.

In this case, the Court reasons that because the Horry County Zoning Ordinances do not specifically permit or prohibit a hospice it is a factual question. In South Carolina this is

not a factual question but a question of law since hospice, hospital and group care home are all statutorily defined.³

Respondents believe that the Court erred in not applying the statutory definitions based on the plain language of those statutes. The Court need only review the definitions of hospice, hospice facility, nursing home and hospital to determine as a matter of law that a hospice facility or hospice is not a permanent overnight resident group care home or a nursing home since only a nursing home or a permanent overnight resident group care home are allowed in the CFA. It follows logically that a hospice is not allowed as a matter of law. As has been explained earlier, both the term hospice and hospital are found in the South Carolina Hospital Licensure Act. The terms permanent overnight resident group care home and nursing home are not found in that Act, but are statutorily defined.

In deciding how to apply the law in this case this Court and the Zoning Board need only review the language of the statutes which define hospice, hospital, permanent overnight resident group care home and nursing home. Those statutes must be harmonized in accordance with their general purpose. Once the legislature has made a choice there is no room for the courts to impose a different judgment based upon their own notions of public policy. See *South Carolina Farm Bureau Mutual Insurance Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App. 1989).

In this case, the Court is not faced with an undefined statutory term (such as use), but is in fact faced with terms of art which are statutorily defined. Hospice, hospital, nursing home and permanent overnight resident group care home are all defined in South Carolina

³ It goes without saying that a zoning ordinance may not have a definition different than one found in the South Carolina Code of Laws.

law. Thus, the Court must interpret those terms in accordance with the usual and ordinary customarily meaning defined in those statutes.

The Court must as a matter of law apply the statutory definitions of hospice, hospital, permanent overnight resident group care home and nursing home. Those terms have been clearly defined in South Carolina law. If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Paschal v. State Election Commission*, 317 S.C. 434, 454, S.E.2d 890 (1995); *Cohen v. Allstate Insurance Company*, 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct.App. 2002); see also *Brassell*, 326 S.C. at 561, 486 S.E.2d at 495 ("where the language of the statute is clear and explicit the Court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). When the terms of a statute are clear the Court must apply those terms according to their literal meaning. *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); *Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E.2d 366 (1995) (where the terms of a relevant statute are clear there is no room for construction).

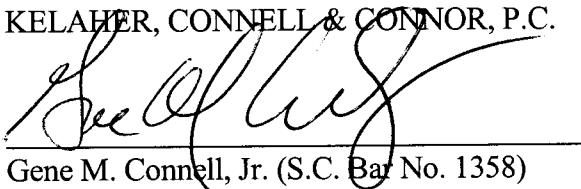
What the legislature says in the text of a statute is considered the best evidence of the legislative will or intent. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Bayle v. S.C. Dept. of Transportation*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001).

In this case, the Court of Appeals erred as a matter of law in not applying the statutory definitions of hospice, hospital, nursing home and permanent overnight resident group care home. It follows that a hospice by definition can't be a nursing home nor can it be a permanent overnight resident group care home. Each of these definitions as defined by

the South Carolina legislature are mutually exclusive, and because the Horry County Zoning ordinances define the term nursing home or permanent overnight resident group care home, both of which are statutory defined as a matter of law, a hospice can be neither and as a result the circuit court was legally correct in ruling that a hospice could not be built in the Commercial Forest Agricultural zoning area. In sum, it is an error of law to hold that a hospice is a nursing home or permanent overnight resident group care home when the Legislature has specifically defined those terms as mutually exclusive under South Carolina law. Thus, Respondents request this Court reverse its ruling and affirm the circuit court.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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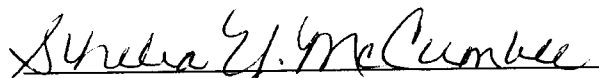
Horry County Zoning Board of Appeals..... Appellant

PROOF OF SERVICE

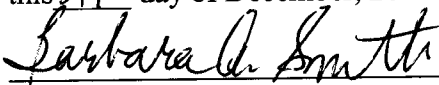
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Appellant, through 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: December 29, 2014


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 29th day of December, 2014


Notary Public for South Carolina
My Commission Expires: 3/12/24

KELAHER, CONNELL & CONNOR, P.C.

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December 29, 2014

VIA FEDERAL EXPRESS

Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Fayrell Furr and Karole Jensen v. Horry County Zoning Board of Appeals*
Appellate Case No. 2013-001188
Our File No. 2012-0301C

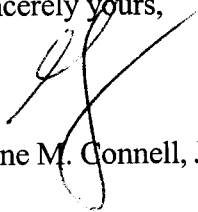
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondents **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing and Proof of Service** of same in the above-captioned matter. I enclose our check for \$25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Appellant through counsel of record.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Emma Ruth Brittain, Esquire
O. Fayrell Furr, Jr./Karole K. Jensen