

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

RECEIVED

JAN 12 2015

SC Court of Appeals

Fayrell Furr and Karole Jensen, Respondents

v.

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

APPELLANTS' RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Horry County Zoning Board of Appeals (“Horry County Zoning Board” or “Zoning Board”) respectfully submits the instant return to Respondents’ Petition for Rehearing (“Petition”) in this matter. In its Opinion filed December 17, 2014, this Court specifically upheld the Horry County Zoning Board’s factual determination that a hospice is a permitted use in the Commercial Forest Agriculture (“CFA”) zoning district in Horry County. In their Petition, Respondents articulate no issues for rehearing that this Court has not already considered; the Supreme Court of South Carolina has long emphasized that “the purpose of a rehearing is not just to have the case tried in this Court a second time.” *Arnold v. Carolina Power and Light Co.*, 168 S.C. 163,

167 S.E.2d 234, 238 (1933). For the reasons set forth below, Appellant respectfully submits that the Court should deny Respondents' Petition because Respondents have failed to state with particularity any argument overlooked or misapprehended by the Court, as is required by Rule 221(a), SCACR.

ARGUMENT IN OPPOSITION OF REHEARING

I. The Court neither overlooked nor misapprehended the relevant statutory definitions in holding that the trial court erred in failing to give deference to the Zoning Board's decision. [Petition, ¶¶ 1, 2, 4, 5, 7, 8, 9, 10, 11, 12].

1. In response to the underlying argument repeated throughout Respondents' Petition, and as Respondents concede in their brief, the Horry County Zoning Board (and the trial court) considered the controlling definitions of "hospice," "hospice facility," "residential group care home," "nursing home" and "hospital," as set forth in the relevant South Carolina statutes and regulations, in making its decision. (*See* Brief of Respondents, p. 7). The plain language of the definitions of these terms substantiates the Zoning Board's determination that a hospice is similar to a nursing home and residential group care home, which are allowed uses in the CFA zoning district. This Court properly considered and applied the relevant statutory definitions consistent with South Carolina law in determining that the Zoning Board's findings of fact were supported by the record evidence. Notably, in its Opinion, this Court cited to the following statutory definitions: S.C. Code Ann. § 44-7-130 (12) (defining "hospital"), S.C. Code Ann. § 44-71-20 (3) and (4) (defining "hospice" and "hospice facility"), S.C. Code Ann. Regs. 61-78.504 (2012), and S.C. Code Ann. Regs. 61-17 §§ 605 and 606 (2011).

2. In response to Paragraph 4 of the Petition, this Court properly held that the

hospice facility at issue is more similar to a nursing home, which is a permitted use pursuant to the Horry County Code of Ordinances. As explained above, the Zoning Board considered these statutory definitions in recognizing that a hospice is better analogized to a residential group care home or nursing home than to a hospital, and this Court properly considered and determined the issue in favor of the Horry County Zoning Board; applying the proper governing deference.

II. The Court of Appeals was correct in finding that the Zoning Board's decision in this matter involved a question of fact, not a matter of law. [Petition, ¶¶ 2, 3, 5, 7, 11].

1. Respondents' contention that the Court of Appeals erred in holding that the Zoning Board's determination involved a question of fact, not a matter of law, ignores the well established South Carolina law that findings of fact by a zoning board must be reviewed in the same manner as a finding of fact by a jury. S.C. Code Ann. § 6-29-840 (Supp. 2013); *see also Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001). The mere availability of statutory definitions for the terms "hospice," "hospital," "residential group care home" and "nursing home" does not transform the Zoning Board's inquiry into an interpretation of law; significantly, the Zoning Board utilized these statutory definitions in its factual inquiry when determining that the proposed hospice, as a matter of factual similarities, fell within the permitted uses in the CFA zone.

2. In response to Paragraphs 3 and 7 of the Petition, because the term "hospice" is not specifically defined by Horry County's Code of Ordinances, the Zoning Board was required to make a factual inquiry to determine whether the proposed facility was a permitted use. As argued extensively in Appellant's Brief, courts have uniformly recognized that it

would be difficult, if not impossible, to craft a zoning ordinance that anticipates and provides for every possible issue. (Brief of Appellant, pp. 9-10). Because of the impossibility of drafting an all encompassing zoning statute for every use and the changing or evolving nature of different uses with time, the Horry County Code of Ordinances, pursuant to South Carolina statutory authority and as interpreted by the case law of the Court, empower the Zoning Board as an administrative body to decide issues related to the County's zoning. *See, generally*, Horry County Code of Ordinances Art. XIV; S.C. Code Ann. § 6-29-840 (Supp. 2014). Pursuant to its statutorily prescribed powers, after hearing testimony and reviewing extensive documentary evidence (including the relevant statutory definitions), the Zoning Board properly determined that a hospice was a permitted use in the CFA District. Thus, this Court correctly held that the trial court erred in failing to afford the proper deference to the Zoning Board's decision which was based upon findings of fact supported by the record evidence. *Rest. Row Assocs. v. Horry County*, 355 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (Decision of a municipal zoning board will not be overturned unless it "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.").

3. In response to Paragraph 11 of the Petition, the Court of Appeals properly relied upon *Heilker, supra*, in rejecting Respondents' argument that the trial court's Order should be affirmed because the question before the board "was a question of law and not a factual matter." In *Heilker*, the Court held that a zoning board's determination as to whether the use of the property is consistent with the zoning ordinance is a factual issue, and is thus subject to the narrow standard of review outlined in S.C. Code Ann. § 6-29-840 (Supp. 2014)

and *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536, S.E.2d 892 (Ct. App. 2000). *Heilker*, 346 S.C. at 412. Accordingly, this Court correctly applied the appropriate standard of review and correctly held that the trial court should have given deference to the Zoning Board's decision.

CONCLUSION

Petitioners have failed to demonstrate any reason for a rehearing in this case. This Court has considered and decided all issues raised by Respondents in their Petition, and correctly held that the trial court erred by failing to give deference to the Zoning Board's decision that a hospice is a permitted use in a CFA district. There was no misapprehension of the facts or law by the Court. All arguments were fully briefed and correctly decided. Accordingly, it is respectfully submitted that Respondents' Petition for Rehearing should be denied.

Respectfully submitted,



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January 8, 2015

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vs.

Horry County Zoning Board of AppealsAppellant

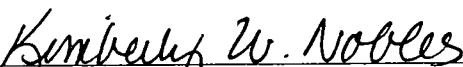
PROOF OF SERVICE

I certify that I have served the Appellants' Return to Petition for Rehearing by depositing a copy of it in the United States mail, postage prepaid, on January 8, 2015, addressed to the attorneys of record:

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SC Court of Appeals

Via Fax Transmission and U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Fayrell Furr and Karole Jensen vs. Horry County Zoning Board of Appeals
Civil Action No.: 2012-CP-26-09291
Appellate Case No.: 2013-001188

Dear Ms. Kitchings:

Our firm represents the Appellant, Horry County Zoning Board of Appeals, in the above-referenced matter. Pursuant to Rule 240(e), SCACR, please find enclosed for filing the original and seven (7) copies of the Appellant's Return to Petition for Rehearing in this case. Please return a clocked copy to our firm in the enclosed self-addressed stamped envelope.

By copy of this letter we are serving the attorneys of record. Please do not hesitate to contact our office if you have any questions.

Sincerely yours,

THOMAS & BRITTAIN, P.A.



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ERB/kwn
Enclosures
cc: Gene M. Connell, Jr., Esquire
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