THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5284 (S.C. Ct. App. Filed December 17, 2014)

Fayrell Furr and Karole Jensen .....Petitioners

vs.

Horry County Zoning Board of Appeals .....Respondent

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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6. Should certiorari be denied because the Court of Appeals properly applied *Heilker v. Zoning Bd. of Appeals for the City of Beaufort,* 346 S.C. 401, 552 S.E.2d 42

(Ct. App. 2001) in upholding the Zoning Board's factual determination that a hospice is a permitted use?

7. Should certiorari be denied because the Court of Appeals correctly considered the plain, ordinary and statutory meanings of "hospice," "hospital," "nursing home," and "permanent overnight resident group care home" in reviewing the Zoning Board's decision?

STATEMENT OF THE CASE

This matter arises out of an appeal of the Respondent Horry County Zoning Board's (the "Zoning Board") decision finding that a proposed hospice is an allowed use within a Commercial Forest Agriculture ("CFA") zoning district and thus permitting the Mercy House to be built in Horry County. An appeals hearing before the Honorable J. Michael Baxley was held on February 28, 2013. On April 24, 2013, the court issued an Order reversing the Zoning Board's decision. Respondent Horry County Zoning Board filed a Notice of Appeal on May 24, 2013. After hearing oral arguments on November 3, 2014, the Court of Appeals issued an opinion reversing the Trial Court's Order and specifically upholding the Zoning Board's determination that a hospice is a permitted use in Horry County's CFA zoning district. Fayrell Furr and Karole Jenson ("Petitioners") filed a Petition for Rehearing on December 29, 2014, which the Court of Appeals denied by Order dated January 23, 2015. Petitioners then filed a Petition for Writ of Certiorari with this Court.

STATEMENT OF THE FACTS

This matter involves the proposed construction of a fourteen-bed Mercy Hospice facility ("hospice") in a CFA zoning district in Horry County.[1] The proposed hospice is to be located on a parcel of land at 3341 Wildhorse Drive, Conway, located 22 acres off of Highway 90 in rural South Carolina.[2] Petitioners own the property adjacent to the

[1] By comparison, a residential hospice house may be a welcome neighbor compared to other permitted and conditional uses in the CFA district such as ABC stores, office buildings, banks, retail stores, gas stations, gunsmith shops, laundromats, restaurants (including drive-ins and drive-throughs), grocery stores, garages for the repair of motor vehicles, and gas stations. (R. pp. 328-331).

[2] Petitioners submitted with their Petition their "Exhibit A," which depicts the original two story proposed hospice facility. This exhibit is misleading, since by the time it was submitted to the Zoning Board for Approval, the proposal had been voluntarily scaled down to one story. (R. p. 242, lines 11-25). A copy of this final proposal is included in the record. (R. p. 196).

property boundary line of the proposed hospice location; however, contrary to Petitioners' Petition, their residence is not directly adjacent to the proposed location of the hospice building.[3]

On May 3, 2011, Horry County Planning and Zoning Department issued a letter confirming that the proposed hospice house and associated accessory buildings and structures are permitted uses under the Horry County Zoning Ordinance ("the Zoning Ordinance"). (R. p. 53); *See Horry County Code of Ordinances* § 703. On March 23, 2012, the South Carolina Department of Health and Environmental Control ("DHEC"), issued a Certificate of Need for Mercy Hospice.[4] *See Regulation* 61-15 (R. p. 183).

On July 30, 2012, Mercy Hospice submitted plans for a Mercy Hospice House to Horry County for review for compliance and issuance of permits. (R. pp. 49-51). Although the Zoning Ordinance does not specifically include the term "hospice" in its list of permitted uses in a CFA district, the Zoning Ordinance provides that "[t]erms used in this Code, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of the state for the same terms." *Horry County Code of Ordinances* § 1-2. (R. pp. 324-326). Thus the Horry County Zoning Administrator relied on the statutory, common and ordinary definitions of hospice, and the language of the Zoning Ordinance in determining that a hospice was similar to a nursing home or group care facility, both of which are permitted uses under the Zoning Ordinance. *See Horry County Code of*

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[3]Sara Jo Faucher testified that "[t]here is a large area of buffer between where the hospice house will end at the edge of [Mercy Care's] property, which is adjacent to Mr. Furr and Ms. Jensen. There's a hundred and twenty feet of buffer with beautiful oaks and all kinds of trees and shrubbery. We plan to keep as much of that as possible. In addition, there happens to be another thirty feet [of] buffer on the other side on the Mr. Furr's side. We are required to have thirty feet. We have one hundred and twenty. We have also agreed to put more trees in to create more of a buffer for Mr. Furr and Ms. Jensen." (R. p. 226, lines 1-14).

[4] DHEC is the State agency that regulates and determines whether new institutional health services are needed.

Ordinances § 703(N). (R. pp. 328-335). Accordingly, the Horry County Zoning Administrator approved the submittal.

At a hearing before the Zoning Board on November 5, 2012, Petitioners argued that a hospice is a hospital, which is not a permitted use in a CFA district. After hearing extensive testimony, including the live testimony of Dr. Charles Sasser, Medical Director of Mercy Hospice and Medical Director of a Palliative Care Program at Conway Medical Center, and expert report of Dennis L. Gibbs, Bureau Chief for the Bureau of Health Facilities Regulation at DHEC, and reviewing the relevant statutory definitions, the Zoning Board upheld the Horry County Zoning Administrator's interpretation, thereby denying Petitioners' appeal.

On December 3, 2012, Petitioners filed a Petition Pursuant to S.C. Code Ann. § 6-29-830(A) (Supp. 2014). (R. pp. 21-23). This matter was heard before the Honorable J. Michael Baxley on February 28, 2013.[5] The trial court issued an Order, dated April 24, 2013, ("Trial Court Order") reversing the decision of the Zoning Board and held that as a matter of law a "hospice facility cannot be permitted in the Commercial Forest Agricultural ("CFA") Zoning District . . . ." (R. pp. 12-17).

Petitioners filed a Notice of Appeal on May 24, 2013. After reviewing the evidence and hearing oral arguments, the Court of Appeals unanimously upheld the Zoning Board's factual determination that a hospice is a permitted use in the CFA Zoning District. *Furr v. Horry County Zoning Bd. Of Appeals,* Op. No. 5284 (S.C. Ct. App. Filed Dec. 17, 2014) (Shearouse Adv. Sh. No. 50 at 32) ("Consequently, we find the circuit court should have given deference to the Board's decision because its decision

[5] During the February 28, 2013, appearance, before arguments on the appeal commenced, Judge J. Michael Baxley visited the property with counsel for Horry County and the Respondents.

was based upon appropriate findings of fact which are supported by the record."). By Order dated January 23, 2015, the Court of Appeals unanimously denied Petitioners' Petition for Rehearing.

Petitioners filed their Petition for Writ of Certiorari on February 12, 2015. Pursuant to Rule 242, SCACR, Horry County Zoning Board of Appeals respectfully submits the instant Return to Petitioners' Petition for Writ of Certiorari. For the reasons fully set forth below, Respondent Horry County respectfully submits that this Court should deny Petitioners' Petition.

STANDARD OF REVIEW
(Reason for Denying Certiorari)

The Court of Appeals' decision does not warrant review by this Court under Rule 242, SCACR. According to the South Carolina Appellate Court rules, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only* where there are special and important reasons." Rule 242(b), SCACR (emphasis added). The rule goes on to list five specific situations in which the granting of a writ of certiorari usually occurs: (1) when there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals conflicts with a prior decision of the Supreme Court; (4) if substantial constitutional issues are directly involved; and (5) where the matter involves a federal question, and the Court of Appeals' decision is in conflict with a decision of the United States Supreme Court. *Id.* The present case does not involve any of those situations, and no other "special and important" reasons exist that merit this Court's review the Court of Appeals' decision.

Three of the situations outlined in Rule 242 are facially inapplicable and do not

require extensive discussion: as to factor two (2), there was no dissent in the Court of Appeals' Order; as to factor four (4), there are no substantial constitutional issues directly involved in this case; and as to factor five (5), no federal question is involved.

The remaining two factors are similarly lacking. First, this case does not contain any novel legal issues. The Court of Appeals correctly applied the well-established standard of review in making its determination. Petitioners are essentially asking this Court to perform a detailed review of the extensive factual record, which the Court of Appeals has already performed and ruled upon.

Second, the result of the Court of Appeals does not conflict with any prior decision by this Court. In making its decision, the Court of Appeals relied on the standard of review set forth in *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001), which applied this Court's decision in *Stanton v. Town of Pawleys Island,* 317 S.C. 498, 455 S.E.2d 171 (1995).

Moreover, Petitioners, for the first time, set forth an argument for their position based on public policy, an argument that was not raised below. The South Carolina Appellate Court Rules specifically provide that the issue must have been raised in the initial arguments to the Court of Appeals and in the petition for rehearing. Rule 242, SCACR(d)(2); *see Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) ("An issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari."). Because Petitioners failed to raise this public policy argument before the Zoning Board, trial court, or Court of Appeals, it is improper under the Appellate Court Rules and caselaw for them to raise this argument for the first time in the Petition for

Writ of Certiorari.

Accordingly, because the case at hand involves neither of the grounds set forth in Rule 242(b) nor any other "special and important" reasons for this Court to review the decision of the Court of Appeals, Respondent Horry County respectfully submits that this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

I. Should certiorari be denied because the Court of Appeals properly applied the well-established standard of review in affirming the Horry County Zoning Board's decision that a hospice is similar to a nursing home or group care home and therefore constitutes a permitted use in the district?[6]

Denial of Petitioners' Petition for Certiorari is proper because the Court of Appeals correctly utilized the appropriate standard of review in affirming the Zoning Board's decision. This standard of review has been summarized by this Court as follows:

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 215-16, 516 S.E.2d 442, 446 (1999) *citing Talbot v. Myrtle Beach Bd. of Adjustment,* 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952). Our appellate courts have been mindful of the narrow standard of review applicable to local zoning board decisions. In reviewing zoning matters, the findings of

[6] Petitioners' Argument section differs from their Questions Presented to this Court. Petitioners list seven questions for the Court, but only make six arguments in their Argument section. For the Court's clarity, Respondent will respond to each of the seven Questions Presented and refer to the applicable Argument sections when necessary. Petitioners' argument regarding their first Question Presented appears to be set forth in Petitioner's Argument I. (Petition, pp. 6-9).

the zoning board should "not be disturbed unless a review of the record discloses that there is *no evidence* which reasonably supports" the zoning board's findings. *Heilker,* 346 S.C. at 406 (emphasis in the original) *citing Sterling Devel. Co. v. Collins,* 309 S.C. 237, 421 S.E.2d 402 (1992).

Petitioners' contention that the Court of Appeals erred in upholding the Zoning Board's determination 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). Because the Zoning Ordinance does not specifically define the term "hospice," the Zoning Board performed a factual inquiry, relying on the statutory definitions as well as extensive testimony and documentary evidence in determining whether the proposed hospice was more comparable to a nursing home or group home, both allowable uses, or a hospital, which is not an allowable use. *See Horry County Code of Ordinances* § 703(N). Based on the extensive record evidence, the Zoning Board issued a factual determination that a hospice is similar to a permitted use in the CFA District. The Court of Appeals found that this decision "required a factual inquiry to discern the type of care, staffing, and activity that would be involved at the MCH facility along with consideration of the relevant ordinances." *Furr v. Horry County Zoning Bd. Of Appeals,* Op. No. 5284 (S.C. Ct. App. Filed Dec. 17, 2014) (Shearouse Adv. Sh. No. 50 at 32). Accordingly, because the Court of Appeals properly applied the appropriate standard of review, the granting of certiorari is not proper.

II. Should certiorari be denied because the Court of Appeals' determination that the hospice facility was more comparable to a nursing home or group home than hospital is a question of fact and is entitled to deference?[7]

Denial of certiorari is appropriate because the Court of Appeals correctly ruled

[7] Petitioners discussed this second Question Presented in its Argument I as well. (Petition, pp. 6-9).

that the Zoning Board's finding that the proposed hospice facility is more similar to a nursing home or group care home is entitled to deference under *Heilker*, as set forth in Argument I.

Petitioners find it a fatal error that the zoning ordinance does not specifically define "hospice;" however, our courts have recognized that it is difficult, if not impossible, to craft a zoning ordinance that anticipates and provides for every possible issue. (*See* Brief of Appellant, pp. 9-10). Because of the difficulty of crafting an all-encompassing zoning statute, the failure to denominate a specific use in a zoning statute should not bar all uses not specifically denominated. In fact, the Horry County Council contemplated such a situation when it included Section 1-2 in their Zoning Ordinance. Horry County Code of Ordinances, §§ 1-2 ("All general provisions, terms, phrases, and expressions contained in this Code shall be liberally construed in order that the true intent and meaning of the county council may be fully carried out."). Petitioners, however, argue that if a zoning ordinance is silent as to whether a specific use, such as a hospice, is permitted, the Zoning Board is barred from reaching a determination based on the description, facts, and circumstances that a use not specifically denominated in the ordinance is permitted, as that, according to Petitioners, would involve an interpretation of law.

Petitioners' argument is mistaken. Zoning boards were created for this very reason: to decide issues related to the county's zoning ordinances. *See generally Horry County Code of Ordinances* Art. XIV § 1404(A); S.C. Code Ann. § 6-29-840 (Supp. 2014). Accordingly, 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. Contrary to Petitioners' assertion, this determination did not require a legal interpretation.

Further, Petitioners' argument that this is not a question of fact because the relevant terms are described by statute is erroneous; 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.[8] Thus, certiorari should be denied since the Court of Appeals 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.

III. Should certiorari be denied because the Court of Appeals correctly ruled that the Zoning Board's determination that a hospice is similar to a nursing home or group home under the Horry County Zoning Ordinance is supported by the record evidence?[9]

The Court of Appeals correctly found that the Zoning Board's determination that a hospice is similar to a nursing home or group care home is supported by sufficient record evidence. The record testimony supporting the determination that a hospice is not a hospital is abundant.[10] Dr. Charles Sasser, Medical Director of Mercy Hospice and

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[8] Interestingly, while Petitioners go to great lengths to argue that the Zoning Board erred in finding that a hospice is akin to a nursing home or group care home, Petitioners' whole argument below is based on the fact-based premise that a hospice is a hospital. Thus Petitioners' position that *Heilker* does not apply is flawed by the argument they made at the Zoning Board hearing. (R. p. 208, lines 1-20) ("Hospice is nothing more than a specialized hospital. That's all it is. Any way you look at it, it's a hospital").

[9] This argument is in response to Petitioners' Question Presented number three, which they articulate in their Argument V. (Petition, pp. 13-14).

[10] The evidence presented by Mercy Hospice included the live testimony of Mary Jo Faucher, the executive Director of Mercy Hospice and Palliative Care; Charles Sasser, M.D., Medical Director of Mercy Hospice and Medical Director of a Palliative Care Program at Conway Medical Center; Kenneth M. Beans, Interim Fire Chief; Dr. Preston Strosnider, Vice President for Medical Affairs at Conway Medical Center and board member of Mercy Hospice; as well as Affidavits of David Levitt, a healthcare consultant, and Dennis L. Gibbs, Bureau Chief for the Bureau of Health Facilities Regulation at South Carolina Department of Health

Medical Director of a Palliative Care Program at Conway Medical Center, testified without equivocation that the models of care offered by hospitals and hospices differ substantially. (R. pp. 251, lines 4- 254, line 2). Hospitals are based on an "acute [health] care model," which is designed "to cure and to restore to some previous state of normal health." (R. p. 251, lines 24 – p. 252, line 20). A hospice differs from a hospital in that it is based on a "comfort care model." (R. p. 253, lines 15-25). Sara Jo Faucher, Director of Mercy Hospice and Palliative Care, testified:

> A hospice house is a specialized treatment facility *that provides less than primary health care*. The care a patient receives at a hospice house is not for treatment to make the patient better like in a hospital or to cure them or to keep them alive. Hospice house is comfort care not acute care or primary care like a hospital. Hospice house is like a home in which patients can be cared for in their own home. The family gets to stay with patients overnight in a home-like setting. Pets can even stay if the family can manage them. Families can even cook the patient's favorite foods in the home's kitchen. You can't do that in a hospital.

(R. p. 220, lines 2-17) (emphasis added). Furthermore, the range of services offered by a hospital also vary widely from what a hospice would offer. (R. p. 134, ¶2); *see* also *Furr v. Horry County Zoning Bd. Of Appeals,* Op. No. 5284 (S.C. Ct. App. Filed Dec. 17, 2014) (Shearouse Adv. Sh. No. 50 at 32) ("Dr. Strosnider testified that the MCH facility was more like a nursing home based on the type of care that would be provided and based on the type of staffing.").[11] Hospitals are required to provide emergency services, but

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and Environmental Control ("DHEC"); and a letter from the architect J.T. Pegram, President of Pegram Associates, Inc. Mercy Hospice also presented pictures and written plans depicting the design of the hospice as well as documentary evidence with respect to the nature of services offered by hospice, the anticipated traffic, accessibility for emergency services, and impact on the local environment from Christine Ellis, Waccamaw Riverkeeper. (R. pp. 200-271; 132; 133; 139; 157-158).

[11] Respondent would like to refer the Court to Argument V of the Petition in which Petitioners incorrectly characterize the testimony of Dr. Preston Strosnider by stating that his testimony implied "that there would be nurses available to assist at this proposed facility because it was an inpatient hospice facility." (Petition, p. 14). The citation provided by the Petitioners directs the reader to page 238 of the Record on Appeal,

hospices do not provide emergency services. (R. p. 133, ¶¶ 3,4).

The record evidence also supports the factual finding of the Zoning Board, affirmed by the Court of Appeals, that the nature of the services offered by a hospice are similar to the services provided by a nursing home or group home. In making its decision, the Zoning Board reviewed the Affidavit of David Levitt who testified:

> A[n] inpatient hospice facility is more similar to a nursing home than a hospital. Like inpatient hospice facilities, nursing homes primarily focus on providing nursing care services, with some minimal ancillary services. The end goal is rarely recovery for traditional residents, but rather comfort and care in a residential setting.

(R. p. 134, ¶5). Because the record is replete with evidence that supports the Zoning Board's determination that a hospice is similar to a nursing home or group care home, the Court of Appeals was correct in ruling that the trial court should have given deference to the Zoning Board's decision. Thus, certiorari should be denied.

IV. Should certiorari be denied because the Court of Appeals properly found that the Zoning Board had cogent reasons for its finding that a hospice is akin to a permanent overnight group home or nursing home even though the term "hospice" is not specifically denominated in the Horry County Zoning Ordinances?[12]

Denial of certiorari is proper because the Court of Appeals correctly found that an inpatient hospice facility is similar to a nursing home or permanent overnight resident

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lines 14-15, which states as follows: "Dr. Stro: There would be nurses available to help." (R. p. 238, lines 14-15).

[12] Petitioners' Question Presented number four implies that neither "hospice," nor "group home," nor "nursing home" are defined in the Zoning Ordinance. While the term "hospice" is not defined in the Zoning Ordinance, both "nursing home" and "group care home" are defined in the Zoning Ordinance. Significantly, the 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. This definition is inclusive of a specialized treatment facility providing less than primary care." (R. p. 327). The Zoning Ordinances 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," which is similarly inclusive of facilities such as a hospice. (R. p. 327).

group care home, both of which are defined in the Horry County Zoning Ordinances and are considered permitted uses. Argument II, p. 10 and Argument III in its entirety are hereby incorporated by reference. Because the Court of Appeals had cogent reason for finding that a hospice is similar to other permitted uses under the zoning ordinance, certiorari should be denied.

V. Should certiorari be denied because the Court of Appeals correctly found that the Zoning Board properly considered the statutory definitions of "hospice," "hospital," "group home" and "nursing home" as defined in the South Carolina Code of Laws?[13]

Denial of certiorari is appropriate because the Court of Appeals and the Zoning Board properly considered the statutory definitions of the relevant terms in making its determination that a hospice is an allowable use. Because the term "hospice" is not specifically defined in the Zoning Ordinance, the Zoning Board was required to make a factual inquiry to determine whether the proposed facility was a permitted use. *See* Argument II.

In making its factual determination, the Zoning Board considered all evidence regarding the statutory definitions of nursing home, group care home, hospice and hospital which were presented to the Zoning Board by Petitioners in their Supplemental Outline of Issues. (R. pp. 74-78). As Rennie Mincey, Horry County Zoning Administrator, testified at the appeals hearing, "the word 'hospice' is not mentioned in our ordinance, no, but we feel like *based on those definitions* and what this facility is going to be is allowed in the zoning district." (R. p. 269, lines 11-15) (emphasis added). Therefore, the Court of Appeals properly considered the statutory definitions of these

[13] This argument is in response to Petitioners Question Presented number five; however, Petitioners repeat this argument multiple times in their Petition, specifically in Sections I, II, and IV. (Petition, pp. 8-9, 13).

terms and correctly found that the Zoning Board's determination that a hospice is similar to a nursing home and a permanent overnight resident group care home and is, therefore, an appropriate use in the CFA zoning district. Accordingly, certiorari should be denied.

VI. Should certiorari be denied because the Court of Appeals properly applied *Heilker v. Zoning Bd. of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) in upholding the Zoning Board's factual determination that a hospice is a permitted use?[14]

Denial of certiorari is appropriate because the Court of Appeals correctly applied the holding in *Heilker* that "a zoning board determination regarding whether a particular activity or purpose constitutes a 'use' of property is a finding of fact." *Heilker,* 346 S.C. at 411. Petitioners' reliance on the single dissenting opinion in *Heilker* is misplaced. The majority in *Heilker* relied on this Court's decision in *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171 (1995), in which the issue before this Court was whether the zoning board erred in concluding that the homeowner's use of the lower level of his house constituted a separate "use". *Heilker,* 346 S.C. at 410-11.

In *Stanton*, the Court articulated the following well-cited standard of review for review of county zoning board decisions: "the factual findings of the board must be affirmed by the circuit court if they are supported by any evidence and not influenced by an error of law." *Heilker,* 346 S.C. at 411, *citing Stanton*, 455 S.E.2d at 172. The Court of Appeals in *Heilker* properly relied on *Stanton* for the proposition that "in South Carolina, a zoning board determination regarding whether a particular activity or purpose constitutes a 'use' of property is a finding of fact," and, accordingly, a zoning board's determination is 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*

[14] This is in response to Petitioners' Question Presented number six, which is set forth in Petitioners Argument III. (Petition, pp. 9-11)

Appeals, 342 S.C. 480, 536, S.E.2d 892 (Ct. App. 2000). *Heilker*, 346 S.C. at 412. In this case, as in *Heilker,* the Zoning Board's determination was a finding of fact as to the use; accordingly, the Zoning Board's determination was entitled to deference. Argument II is hereby incorporated by reference.

Moreover, Petitioners' contention that the Court of Appeals' reasoning was contrary to *Heilker* is mistaken. As in *Heilker,* the Zoning Board and Court of Appeals in this case had to look to sources outside of the Zoning Ordinance for assistance in determining whether a hospice is an allowable use. *Heilker,* 346 S.C. at 407 ("No reported case in South Carolina jurisprudence provides a definition; thus, this Court must look to the law of other jurisdictions for assistance.").[15] Arguments V and VII are hereby incorporated by reference.

The Court of Appeals correctly applied the appropriate standard of review set forth in *Heilker* and correctly found that the trial court failed to afford the appropriate deference to the Zoning Board's decision, and should be reversed. Therefore, the Petition for Writ of Certiorari should be denied.

VII. Should certiorari be denied because the Court of Appeals correctly considered the plain, ordinary and statutory meanings of "hospice," "hospital," "nursing home," and "permanent overnight resident group care home" in reviewing the Zoning Board's decision?[16]

Denial of Certiorari is proper because the Court of Appeals correctly considered the ordinary and statutory meanings of "hospice," "hospital," "nursing home," and "permanent overnight resident group care home" in upholding the Zoning Board's

[15] In fact, the Bureau Chief of DHEC, Dennis L. Gibbs, provided an affidavit that specifically states that "as part of the review of this application . . . DHEC [made] a determination that zoning is appropriate for this hospice facility." (R. p. 133, ¶ 6).

[16] This argument is in response to Petitioners' Question Presented number seven, and their Argument VI. (Petition, pp. 14-16).

determination. South Carolina law is well established that in construing zoning ordinances, undefined terms "must be taken in their ordinary and popular meaning." *Charleston County Parks and Rec. Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995).

The Court of Appeals properly rejected Petitioners' contention that the Zoning Board should have adopted the definition of "hospice" provided in the ordinances of other counties, such as Charleston County. By statute, each South Carolina County is vested with the power under the "home rule" to provide for land use pursuant to Home Rule, this authority is vested in Horry County Council. *See* S.C. Code Ann. § 4-9-30(9) ("[E]ach county government . . . shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: . . . to provide for land use and promulgate regulations pursuant thereto . . . . ").

Petitioners are not content to utilize the definitions that are required by the Zoning Ordinance to be used by the Zoning Board, or concede that the Zoning Board's factual findings as to such definitions are entitled to deference, but argue instead that the Court of Appeals erred in failing to look to the Charleston County Zoning and Land Development Regulations for the definition of hospital. (Petition, pp. 14-15). While the Zoning Board may consider zoning ordinance interpretation of other zoning bodies, by statute, the provisions of Charleston's zoning code are not jurisdictionally binding in Horry County. *See* S.C. Code Ann. § 6-29-330 ("A county may exercise the powers granted under the provisions of this chapter in the total unincorporated area or specific parts of the unincorporated area."). Rather, the applicable Horry County Ordinance endorses reference to the South Carolina statutes to provide meaning for terms not

otherwise defined in the Zoning Code. (R. pp. 324-326) ("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 Court of Appeals correctly considered the ordinary and statutory meanings of the terms at issue to the instant analysis because, pursuant to the terms of Horry County's Zoning Code, South Carolina statutes provide the relevant definitions of hospital, hospice and hospice facility. Since the Court of Appeals correctly considered the applicable statutory definitions, certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS & BRITTAIN, P.A.

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March 18, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Opinion No. 5284 (S.C. Ct. App. Filed December 17, 2014)

Fayrell Furr and Karole Jensen .....Petitioners

vs.

Horry County Zoning Board of Appeals .....Respondent

CERTIFICATE OF SERVICE

I certify that I am an employee of Thomas & Brittain, P.A., and that I have served the Return to Petition for Writ of Certiorari on the Petitioners, through their attorney of record, by depositing a copy of it in the United States mail, postage prepaid, on March 18, 2015, addressed to:

Gene M. Connell, Jr., Esquire,
Kelaher, Connell & Connor, P.C.,
Post Office Drawer 14547
Surfside Beach, South Carolina, 29587.

March 18, 2015

Kimberly W. Nobles

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March 18, 2015

Via Fax Transmission and U.S. Mail
Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Fayrell Furr and Karole Jensen vs. Horry County Zoning Board of Appeals
Appellate Case No.: 2015-000271

Dear Mr. Shearouse:

Our firm represents the Respondent, Horry County Zoning Board of Appeals, in the above-referenced matter. Pursuant to Rule 242(f), SCACR, please find enclosed for filing the original and six (6) copies of the Respondent's Return to Petition for Certiorari in this case. Please stamp the enclosed copy and return it to our firm in the enclosed self-addressed stamped envelope.

Also enclosed for filing is the Notice of Appearance for Leah Montgomery Cromer. Please stamp the enclosed copy and return it 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.

Emma Ruth Brittain

Emma Ruth Brittain

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