THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Opinion No. 5284 (S.C. Ct. App. Filed January 23, 2015)

Fayrell Furr and Karole Jensen .... Petitioners

vs.

Horry County Zoning Board of Appeals.. Respondent

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in reversing the trial court when the Horry County Zoning Ordinances do not define the term hospice?

2. Did the Court of Appeals err in not holding the interpretation of the Horry County Zoning Ordinance is a question of law?

3. Did the Court of Appeals err in holding that the record in this case supports that a hospice can be construed to be a nursing home or a group home under the Horry County Zoning Ordinances?

4. Did the Court of Appeals err in holding that the Zoning Board had sufficient reasons for finding a hospice was akin to a permanent overnight group home or nursing home when none of those terms were defined in the Horry County Zoning Ordinance and in fact the definitions in the state statutes define those terms as mutually exclusive?

5. Did the Court of Appeals err in not using the statutory definitions of hospice, hospital, group home and nursing home as defined in South Carolina law?

6. Did the Court of Appeals err in applying the reasoning of *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct.App. 2001) which was a 2 - 1 decision of that Court?

7. Did the Court of Appeals err in not using the plain and ordinary meaning of hospice, hospital, nursing home and permanent overnight resident group care home in construing the Zoning Board decision?

STATEMENT OF THE CASE

This case is before this Court because the Court of Appeals reversed the circuit court and found the Horry County Zoning Board of Appeals decision was supported by the evidence that an inpatient hospice facility was allowable in the Commercial Forest Agricultural Zoning District (CFA). The Petitioners, Fayrell Furr and Karole Jensen, have lived quietly at 3740 Indigo Run, Conway, South Carolina in the Wildhorse Subdivision for years. The Wildhorse Subdivision is located on the Waccamaw River and their home is directly adjacent to the proposed Mercy Hospice building which is to be built in a residential subdivision. (See picture of the hospice facility, R. p. 115, p. 196).

Further, patients, ambulances, funeral cars, doctors, nurses and support personnel of the hospice facility would enter through the main entrance of the Wild Horse Subdivision to go to the hospice facility. Petitioners appeared before the Horry County Zoning Board of Appeals at a hearing on November 5, 2012. The Board upheld the Zoning Administrator's legal opinion that a 14-bed hospice facility could be built in the Wild Horse Subdivision. (R. p. 45 - "The Board upholds the interpretation of the zoning ordinance by the Zoning Administrator.").[1] Petitioners maintained at the Horry County Zoning Board of Appeals hearing that an inpatient hospice was not an allowable use and that the only allowable use under the Commercial Forest Agricultural Zoning District (CFA) was either a nursing home or a permanent overnight resident group care home and that a hospice did not meet those definitions as defined in the South Carolina Code of Laws or in Horry County Zoning Ordinance Article IV, Section 436.1 or Article IV Section 447.1 (R. p. 45).

[1] Here the Board upheld a "legal determination" by the Zoning Administrator not a "factual determination."

After a mediation without resolution, Petitioners timely filed their appeal pursuant to S.C. Code Ann. § 6-29-830(a) and S.C. Code Ann. § 6-29-825, *et seq.* The circuit court reversed the Horry County Board of Zoning Appeals and the Zoning Board of Appeals filed an appeal with the South Carolina Court of Appeals. The Court of Appeals reversed the circuit court and found: "Horry County ordinances do not specifically permit or prohibit a hospice in a CFA zone. Therefore the parties asked the Board to determine whether the Mercy Hospice facility was more comparable to a nursing home or group housing, permitted uses or a hospital, a prohibited use." Petitioners respectfully disagree with this ruling and assert this is an error of law. (Opinion at p. 2).

Petitioners filed a Petition for Rehearing which was denied by the Court of Appeals on January 23, 2015. This Court granted Certiorari on May 20, 2015 to review the opinion of the Court of Appeals.

ARGUMENT

I. The Court of Appeals applied the wrong standard of review in this case.

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), this 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 by the Zoning Administrator, the "de novo" standard applies). *N. Am. Rescue Prods., Inc. v. Richardson*, 720 S.E.2d 53, 58 (S.C. Ct.App. 2011).

Further, this Court has found in other zoning cases that errors of law mandate reversal of a Zoning Board of Appeals decision. 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.).[2]

In this case, Petitioners assert that the Court of Appeals decision is based on an error of law. Here, the Zoning Administrator was called upon to make a "legal determination" 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 defines or identifies what an inpatient hospice is or whether it is an allowable use in a CFA Zoning District.

The Court of Appeals upheld the Zoning Board of Appeals decision affirming the Zoning Administrator that an inpatient hospice facility could be constructed in the CFA Zoning District because of the following Horry County Zoning Regulations:

[2] Zoning ordinances must be given a practical, reasonable and fair interpretation consonant with the purposes, design and policy of the law makers. *Charleston County Parks & Recreation Comm. v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995).

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."[3] (R. p. 8)

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."[4] (R. p. 8.)

3. Article VII, Sec. 703 Commercial Forest/Agricultural Section 703.2 states that permanent overnight residential group care homes and nursing homes are allowable. (R. p. 8).

In affirming the Zoning Board of Appeals, the Court of Appeals finds that it is a factual issue as to whether a hospice is a permanent overnight resident group care home or a nursing home under either Article IV, Sec. 436.1 or Article IV, Sec. 447.1. In fact, a hospice by statutory definition adopted by the legislature cannot be a permanent overnight resident group care home or a nursing home.[5]

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[3] Obviously a 14-bed inpatient facility with 24/7 care by doctors and nurses for the dying is more than primary health care – it is intensive end of life care.

[4] 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.

[5] One has to doubt that DHEC would allow a hospice patient to be placed in a permanent overnight residential group care home.

The Petitioners point out that the South Carolina Code of Laws defines each of the terms at issue in this case. 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 of Appeals reasons that because the Horry County Zoning Ordinances do not specifically permit or prohibit a hospice it is a factual question.[6] In South Carolina it is not a factual question but a question of law since hospice, hospital and group care home are all statutorily defined.[7]

II. <u>The Court of Appeals did not follow the rule that undefined terms must be interpreted by first looking to South Carolina jurisprudence.</u>

The Court of Appeals in its opinion relies heavily upon *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* a divided Court of Appeals was called upon to define the term "use" which was not defined by statute or case law in South Carolina. Interestingly, the Court stated: "To resolve this dispute, we must define the term " use" as it applies in the context of zoning. No reported case in South Carolina jurisprudence provides a definition; thus, this Court must look to the law of other jurisdictions for assistance." Petitioner points out that the Court of Appeals did

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[6] Since when is a legal interpretation of an ordinance by a zoning administrator a factual issue?

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

not look to South Carolina statutes first in defining hospice, permanent overnight resident group care home or nursing home in reaching its decision. In fact, the Court of Appeals reasoning is directly contra to *Heilker* which holds that the correct procedure of the Court of Appeals was to look to South Carolina jurisprudence first for a definition of an undefined term . Failure to do so here was legal error by the Court of Appeals.

In fact, the Respondent in its return indicates "...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. p. 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.")." Petitioners point out that if Horry County had followed its own rules, it would have come to the conclusion the circuit court did which is that a hospice is not a nursing home or permanent overnight resident group care home. The Court of Appeals and the Zoning Board need only look to the State statutes for definitions to find as a matter of law that a hospice could not be built in the subject area because it did not meet the State statutory definition. The Court of Appeals and the Zoning Board of Appeals was bound to apply the State statutory definitions to interpret an undefined term since such is required by the rules of the Horry County Zoning Board of Appeals. In sum, the rule which the Court of Appeals misinterpreted can be stated succinctly as follows: When zoning ordinances are silent as to a meaning of a term, the Zoning Board of Appeals is obligated as a matter of law (by its own rules) to apply those undefined terms as defined by State statute. In this case, hospice, nursing home or permanent overnight resident group care home were all defined by State statute and the Opinion of the Court of Appeals fails to consider this crucial issue in reversing the trial court.

III. **The Court of Appeals opinion in this case is premised upon a split opinion of that Court in *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct.App. 2001).**

The opinion in this case is based upon *Heilker, supra.* As is seen above, Petitioners believe that the Court of Appeals did not follow *Heilker* in first looking at South Carolina jurisprudence for an undefined term in a zoning statute. Further, in *Heilker*, a dissent was raised by Judge Shuler. He noted: "[W]hether a landowner's activities on his property constitute a nonconforming use is a question of law for the courts, because it requires an interpretation of the ordinance at issue." This is exactly Petitioners' argument in this case since it involves a legal interpretation by a zoning administrator. In fact, Petitioners fail to see why the Zoning Administrator's opinion carries more weight than a circuit court Judge especially when it ignores state law.

Judge Shuler went on to write that both *Vulcan Materials* , 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) and *Stanton v. Town of Pawleys Island*, 31 S.C. 498, 455 S.E.2d 171 (1995) stand for the proposition that questions of law should be decided by the court.[8]

Judge Shuler noted in his dissent that deciding a definition for a undefined term such as "use" was not a factual matter but a question of law. Petitioners believe the same can be said for this case. Here the Zoning Board of Appeals has undefined terms in the zoning ordinance which are clearly defined by state law. Those terms are hospice, permanent overnight resident group care home, nursing home and hospital. The determination in this case as to whether or not a hospice is a permanent overnight resident group care home or nursing home is not a question of fact but a question of law.

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[8] The decision of the Zoning Board will not be upheld where it is based on errors of law, or fraud or where there is no legal evidence to support it or where the Board acts arbitrarily or unreasonably. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987).

Accordingly, the Court of Appeals should have applied as a matter of law the statutory definitions of hospice, hospital, permanent overnight resident group care home and nursing home. Those terms have been clearly defined in South Carolina. In construing ordinances the (undefined) terms used must be taken in their ordinary and popular meaning. *Charleston County Parks & Recreation v. Sommers*, 319 S.C. 65, 459 S.E.2d 841 (1995). If a statute's language is unambiguous and clear there is no need to employ the rules of statutory construction and the Court of Appeals has no right to look for or impose another meaning. Here the definitions of hospice, hospital, permanent overnight resident group care home and nursing home are unambiguous by statute and the Zoning Board of Appeals could not find as a matter of law that an inpatient hospice was a nursing home or permanent overnight resident group care home. See *Coen v. Allstate Ins. Co.*, 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002) ("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 legislatures language."); *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002) ("when the terms of a statute are clear the Court must apply those terms according to their literal meaning."); *Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E.2d 366 (1995) ("where terms of the relevant statute are clear there is no room for construction by the court.")

What the legislature says in defining words in a statute is the best evidence of the legislative will or intent as to the meaning of those words. Words of a statute must be given plain and ordinary meaning without resorting to subtle or forced construction. In this case, the Court of Appeals tried to place a square peg in a round hole by finding that an inpatient hospice was either a permanent overnight resident group care home or a nursing home.

Such construction defies logic, is forced and not consistent with the plain, popular and ordinary meaning of those terms as found in the Code of Laws.[9]

IV. **The Court of Appeals erred in finding that an inpatient hospice facility by definition or function would be a nursing home or a permanent overnight resident group care home.**

In issuing its order in this case, the Court of Appeals failed to discuss the definition of permanent overnight resident group care home (or nursing home) 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. 35-94 § 1, 5-17-94). (R. p. 14)

None of the examples of a permanent overnight group care home meet the definition of an inpatient hospice facility. The Court of Appeals ignores this in affirming the Horry County Zoning Board of Appeals. Petitioners believe this is error since a person may only be 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 without a doctor being required to admit them. It is without dispute that an inpatient hospice facility does not operate as a group care home as is defined in Horry County's CFA Zoning District Reg. 703.2. Accordingly, the Court of Appeals was remiss in holding that an inpatient hospice facility could be a permanent overnight resident group care home (or nursing home) when by statutory definition a hospice facility requires orders of a physician and 24-hour, 7-day a week, around-the-clock

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[9] Further, this ruling has no basis in the record and is an error of law. *Fontaine, supra.*

care by medical personnel. Obviously, a hospice is not a group home, but an inpatient medical facility to care for dying people.[10]

The Court of Appeals also affirmed the Horry County Zoning Board of Appeals and found it to be a factual matter as to whether a hospice was a nursing home. Horry County's Zoning Ordinances define a nursing home as:[11]

> 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 fact neither of the legal definitions in the Horry County Zoning Ordinance describes an inpatient hospice. The ordinances describe totally different facilities such as permanent overnight resident group care home or a nursing home.

In effect, the Court of Appeals ignores the statutory definitions of hospice, hospital, overnight group care home and nursing home in deciding this case. This was error and will be repeated statewide by Zoning Boards of Appeal who have unfettered authority to interpret zoning ordinances.

In summary, the facts must fit the law. In this case, South Carolina has defined group care home in S.C. Code Ann. § 63-1-40. It has defined hospice in S.C. Code § 44-71-20(3). It has defined a hospice facility in S.C. Code Ann. § 44-71-20(4) and it has defined

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[10] The record shows that various hospitals support the use of hospice facilities in Horry County for end of life care and those facilities are not nursing homes or permanent overnight resident group care homes. (See ROA pp. 194-195 (letter of Dean Carrillo, GSRMC, dated 5/13/01 "patients could be appropriately cared for in an inpatient hospice setting.")

[11] One may go to a nursing home without doctor's orders. However, one may never be admitted to an inpatient hospice facility or hospital without a doctor's order.

nursing home in S.C. Code Ann. § 44-7-80.[12] None of these definitions overlap and none of these definitions include each other as they are separate facilities and are licensed separately. For this reason the Court of Appeals could not find as a matter of law or fact that a hospice was either a nursing home or a permanent overnight group care home.

V. The transcript of record of the Horry County Zoning Board of Appeals supports the circuit court's decision and not the Court of Appeals ruling.

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 (R. p. 237, lines 12-14); that there would be nurses available to assist at this proposed facility because it was an inpatient hospice facility (R. p. 238, lines 14-15); that there would be staff available to assist the patients at the hospice (R. p. 238, lines 16-18); that medical assistants would be on staff (R. p. 238, lines 20-22); that there would actually be the same staffing as there would be in a hospital (R. p. 238, lines 23-25); that doctors would be making rounds (R. p. 239, lines 1-5); that there would be medical staff on a 24/7 basis (R. p. 239, lines 7-12).[13]

This testimony establishes conclusively that the Court of Appeals could not find as a matter of law that the proposed inpatient hospice facility was either a nursing home or a permanent overnight resident group care home. Thus, because this evidence as a matter of

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[12] A nursing home is a facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours, which is operated either in connection with a hospital or as a free standing facility for the express or implied purpose of providing immediate or skilled nursing care for persons who are not in need of hospital care. (S.C. Code of Laws § 44-7-80 (2014)).

[13] Petitioners submit that the doctor was talking about a hospital or a hospice when he described the inner workings of a hospice.

law supports Petitioners contention only, the Court of Appeals should have found as a matter of law that a hospice could not be constructed in the Wild Horse Subdivision.

VI. The Court of Appeals should have looked at other zoning ordinances in this state to determine the meaning of hospice and held a hospice was not a nursing home or a permanent overnight group care home.

The Court of Appeals was required to use the *Heilker, supra*, logic in making this decision. In *Heilker, supra* , as previously cited above, the appellate courts of this state will first look to South Carolina jurisprudence to determine a definition which is undefined in a zoning ordinance or statute. In this case, the Court of Appeals could also look at other zoning ordinances such as Charleston County 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).[14]

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 management as possible." (R. p. 183)[15] 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 very 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

[14] This definition is in accord with the statutory definitions of hospital and hospice.
[15] The proposed hospice facility which was to be built would cost $5,975,000. (R. p. 141).

care needed. Further, Mercy Hospice admits that intensive 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.

The Transcript of Record of the Board of Zoning Appeal also 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." (R. pp. 193, 194, 195 and the Certificate of Need, R. p. 183).

This evidence, along with South Carolina regulations require that patients who are admitted to a hospice must be under the direction of a licensed physician, thus the Court of Appeals should have held 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.

CONCLUSION

Petitioners believe there are significant public policy reasons for reversing the Court of Appeals in this case. First, the Court of Appeals held the issue of whether a hospice facility could be built was a question of fact and not of law even though that term was undefined in the zoning ordinances but defined in State law.[16] Petitioners assert that the terms hospice, permanent overnight resident group care home, nursing home and hospital have all been legally defined in South Carolina and that it was an error of law for the Court of Appeals to reverse the circuit court.

Second, the Court of Appeals by its opinion allows the construction of a hospice facility when the zoning ordinances are silent on this issue which is a dangerous precedent since South Carolina law clearly defines hospice, permanent overnight resident group care home and nursing home. Also, these terms are mutually exclusive under our law.

Third, when a zoning ordinance does not define a term such as hospice, nursing home, permanent overnight resident group care home or hospital, the court must apply the statutory definitions of those terms found in the South Carolina Code of Laws.

Fourth, the Court of Appeals erred as a matter of public policy in not applying the plain, popular and ordinary meaning of hospice, permanent overnight resident group care home, nursing home and hospital.

Fifth, the decision in this case relies on a split decision of the Court of Appeals in *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct.App. 2001). In that case Judge Shuler found in his dissent as a matter of law that "use"

[16] Significantly, this appeal arises from an interpretation by the Zoning Administrator of zoning ordinances. Petitioners have trouble understanding why the Zoning Administrator's opinion is an issue of fact and not of law since he (she) had to read and apply the zoning ordinances to the proposed hospice.

of a particular piece of real property is a question of law not fact. Also, the opinion in this case is violative of the principles in *Heilker* which requires a court to look to South Carolina jurisprudence to determine undefined terms prior to reviewing cases from other jurisdictions.[17] (52 S.E.2d at 42) Here, this Court only needed to look at the definition of nursing home, hospice, hospital and permanent overnight resident group care home as defined by the South Carolina Code of Laws to find as a matter of law that a hospice is not allowed to be built in the CFA Zoning District.

Petitioners assert that the Court of Appeals opinion opens Pandora's door to Zoning Boards of Appeal throughout the state to adopt zoning ordinances which are deliberately vague (or refuse to use definitions defined in South Carolina law if it does not suit their purpose) and then turning a blind eye to the statutory definitions as found in the South Carolina Code of Laws. In effect, if zoning ordinances do not prohibit or permit a hospice (or any other structure) the Court of Appeals would allow the Zoning Board of Appeals to call a hospice a nursing home or a permanent overnight resident group care home. This is legal error since those terms are mutually exclusive under South Carolina law. In effect, the Zoning Board of Appeals statewide would have unfettered discretion to make decisions contrary to the statutory scheme in South Carolina which clearly defines that hospice and permanent overnight resident group care home are separate legal entities.

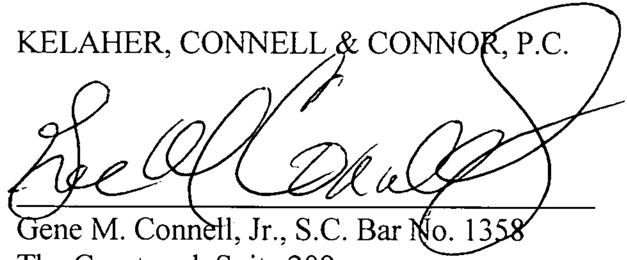
It was legal error to refuse to review South Carolina law regarding the definitions of hospice, nursing home and permanent overnight resident group care home in making its decision. The law and the record compel only one result – a hospice is not a nursing home or permanent overnight resident group care home. The Zoning Administrator, Zoning

[17] Legislative intent of an ordinance is a question of law. *Sea Island Scenic Parkway Coalition v. Beaufort County Board of Adjustments and Appeals*, 316 S.C. 231, 449 S.E.2d 254 (1994).

Board of Appeals and the Court of Appeals cannot graft hospice into those definitions as these terms are mutually exclusive as a matter of law. Accordingly, Petitioners request this Court reverse the Court of Appeals opinion and reinstate the circuit court opinion in this case as the law in South Carolina.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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Attorney for Petitioners

June 17, 2015
Surfside Beach, South Carolina.

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 January 23, 2015)

Fayrell Furr and Karole Jensen .... Petitioners

vs.

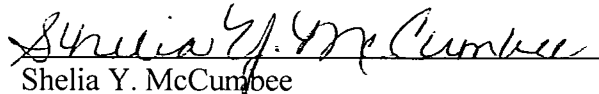
Horry County Zoning Board of Appeals... Respondent

PROOF OF SERVICE

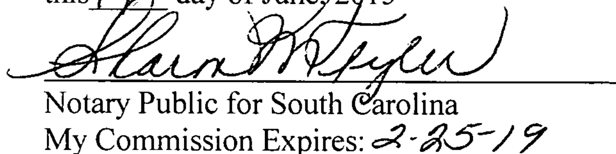
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Brief of Petitioners** on the Respondent, through counsel of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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

DATE OF MAILING: June 17, 2015


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 17th day of June, 2015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My Commission Expires: 2-25-19

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RECEIVED
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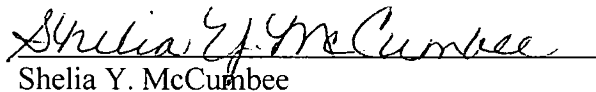

Shelia Y. McCumbee

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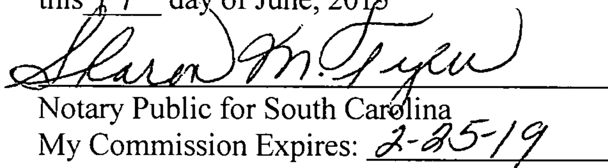

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