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 December 17, 2014)
Supreme Court Case No.: 2015-000271

Fayrell Furr and Karole Jensen ....Petitioners

vs.

Horry County Zoning Board of Appeals ....Respondent

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals apply the correct standard of review in deferring to the Zoning Board's factual finding that a hospice is akin to a permanent overnight residential group home or nursing home under the definitions set forth in the Zoning Ordinance and the record evidence before the Court?

2. Did the Court of Appeals properly consider the statutory definitions of "hospice," "hospice facility," "hospital" and "nursing home" as defined in the South Carolina Code of Laws?

3. Did the Court of Appeals properly apply the reasoning of *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001)?

4. Did the Court of Appeals correctly hold that the Zoning Board had sufficient reasons for finding that a hospice is akin to a permanent overnight group home or nursing home when the term hospice is not specifically defined in the Zoning Ordinance?

5. Did the Court of Appeals properly uphold the Zoning Board's determination—that a hospice can be construed to be a nursing home or group home under the Zoning Ordinance—is supported by the record evidence?

6. Was the Court of Appeals correct in refusing to apply the zoning ordinances of other counties to determine the meaning of hospice?

7. In the event this Court should accept Petitioners' argument that *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) should be overruled, should the decision of the Court of Appeals be affirmed on the additional sustaining ground that a hospice is a permitted use in the Horry County CFA zoning district as a matter of law?

STATEMENT OF THE CASE

This matter arises out of an appeal of a decision of Respondent Horry County Zoning Board of Appeals (the "Zoning Board") finding that the proposed Mercy Care hospice facility ("Mercy Hospice") is an allowed use within a Commercial Forest Agriculture ("CFA") zoning district, thus permitting a Mercy Care House Hospice to be built in Horry County. An appeals hearing before the Honorable J. Michael Baxley was held on February 28, 2013, and on April 24, 2013, the circuit court issued an Order reversing the Zoning Board's decision. The Respondent 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 circuit court's Order and 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 an Order dated January 23, 2015. Petitioners then filed a Petition for Writ of Certiorari, which this Court granted on May 20, 2015.

STATEMENT OF THE FACTS

This case involves the proposed construction of a fourteen-bed Mercy Hospice facility ("hospice") in a Commercial Forest Agriculture ("CFA") zoning district in rural Horry County. Pursuant to the Horry County Code of Ordinances (the "Zoning Ordinance"), some of the denominated permitted and conditional uses in a CFA district in Horry County include ABC stores, office buildings, banks, retail stores, gas stations, gunsmith shops, laundry mats, grocery stores, nursing homes and permanent overnight residential group care homes. (R. pp. 328-331). Petitioners own the property in the CFA

district adjacent to the property boundary line of the proposed hospice location; however, contrary to Petitioners' contention, their residence is not directly adjacent to the proposed location of the hospice building but is well buffered with beautiful oaks and shrubbery.[1] (R. p. 115). Further, the proposed Mercy Hospice has been specifically designed to have a "residential feel," which, in contract with the other allowable uses denominated in the Zoning Ordinance, would maintain the aesthetics of the area.[2] (R. p. 140)

On May 3, 2011, the Horry County Planning and Zoning Department issued a letter confirming that the proposed hospice and associated accessory buildings and structures are permitted uses under the Zoning Ordinance. (R. p. 54); *See Horry County Code of Ordinances* § 703. Pursuant to South Carolina Code of Regulations 61-15 § 802(26), Dennis L. Gibbs, the Bureau Chief of the Bureau of Health Facilities Regulation at South Carolina Department of Health and Environmental Control ("DHEC"), had to make a specific finding of zoning compliance prior to issuing the required Certificate of Need for the construction of the Mercy Hospice. (R. p. 133 ¶ 6) ("The applicable Certificate of Need regulations . . . required as a part of the review of this application [for a Certificate of Need] that DHEC make a determination that zoning is appropriate for this hospice facility."); *See* S.C. Code Reg. 61-15 § 802(26) (2015). After careful review of Mercy Hospice's application, DHEC issued a Certificate of Need for Mercy Hospice on March 23, 2012. (R. p. 183).

On July 30, 2012, Mercy Hospice submitted plans for a hospice to Horry County

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[1]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 Hospice'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 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).

[2]Contrary to the characterization of the property at issue as in a "residential neighborhood," the record evidence establishes that the area is zoned for multiple uses – commercial, forest and agricultural.

for review for compliance and issuance of permits. (R. pp. 50-51). 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 ("Zoning Administrator") relied on the statutory, common, and ordinary definitions of hospice in determining that a hospice is similar to a nursing home or permanent overnight residential group care home, both of which are permitted uses under the Zoning Ordinance. *See Horry County Code of Ordinances* § 703(N). (R. pp. 328-335). The Zoning Administrator also relied on DHEC's finding of zoning compliance as is required by the applicable South Carolina statutes and regulations when issuing a Certificate of Need. (R. pp. 133, 185, 221, lines 12-16) *See* S.C. Code Ann. § 44-7-110, et seq.; S.C. Code Ann. Reg. 61-15 § 802(26) (2015). Accordingly, the Zoning Administrator approved the submittal.

Petitioners appealed the decision of the Zoning Administrator, and a hearing was held before the Zoning Board on November 5, 2012. At the hearing, Mercy Hospice submitted evidence supporting the Zoning Administrator's decision that the fourteen-bed hospice facility was an allowed use in the CFA district. Dr. Charles Sasser, Medical Director of Mercy Hospice and Medical Director of a Palliative Care Program at Conway Medical Center, explained to the Board the difference between the "acute care" model utilized in a hospital and the "comfort care" model of a hospice facility. (R. p. 251, line 24-p. 254, line 2). ("The acute care model . . . [is designed] to cure and to restore to some previous state of normal health. . . . That's why they [have] so many different

mechanisms for diagnose (sic) and treatment in hospitals."). David Levitt, a healthcare consultant that has been certified as an expert in healthcare planning and finance by the South Carolina Administrative Law Court, opined that a hospice facility is more similar to a nursing home than a hospital based on the type of care provided. (R. pp. 134-135 ¶¶ 2-10). Sara Jo Faucher, the Executive Director of Mercy Hospice and Palliative Care, also testified that as to the differences between the comfort care model of the hospice house and the acute care or primary care provided in a hospital. (R. p. 220, lines 4-10). She described a hospice house as

> a home in which patients can be cared for in their own home. The family gets to stay with patients overnight in a homelike setting. Pets can even stay if the family can manage them. Families can even cook the patient's favorite food in the home's kitchen.

(R. p. 220, lines 10-16).

Mercy Hospice presented a letter from J.T. Pegram, President of Pegram Associates, Inc. and an architect involved with Mercy Hospice, that described the warm, home-like feeling of the proposed hospice, which stands in contrast to the cold, institutional feel of hospitals. (R. p. 140). Mr. Pegram explained that "the design team has developed an inviting, warm and comforting house design with a 'residential' feel both for the patients and their families." Mr. Pegram highlighted the family-oriented design, which would include:

> [f]amily spaces in the central areas of the building [with] an open kitchen, dining area, living room with a fireplace and a playroom for children. All have a comfortable homelike feel. [Each room is] designed to have the patient and families feel like they are in a residential bedroom. Each patient room has its own screened porch and overlooks the Waccamaw River. Maintaining peaceful tranquility in and around the house is a Mercy Hospice [H]ouse priority. The caregiving function rooms and spaces are designed to blend in to the house-like feel of the facility.

Id. Mr. Pegram further stated that "a hospice house is essentially a nursing home that specializes in caring for the terminally ill and shares many similarities with a nursing home." *Id.*

Mercy Hospice submitted a letter from Christine Ellis of the Waccamaw Riverkeeper, an environmental protection organization, in which Ms. Ellis expressed her support of the proposed hospice plans. (R. pp. 157-158) ("[I] applaud [Mercy Hospice] for incorporating low impact development practices for infiltrating stormwater onsite and for their tree protection plans, and do not believe that the proposed hospice facility will have a negative impact on the water quality of the Waccamaw River.").

Mercy Hospice also submitted the Affidavit of Dennis L. Gibbs, Bureau Chief for the Bureau of Health Facilities Regulation DHEC. (R. p. 133, ¶ 1). Mr. Gibbs testified that based on his familiarity with licensing standards for hospice facilities, nursing homes and hospitals, that a hospice facility is not a hospital. *Id.* at ¶ 5. He further noted that DHEC determined, prior to issuing the Certificate of Need, that the zoning was appropriate for the facility. *Id.* at ¶ 6.

To appease Petitioners' concerns about the possibility of increased traffic on the main entrance of the subdivision, Mercy Hospice submitted the letter of Solan Associates, P.C., an engineering, planning, and land surveying firm, with respect to the anticipated traffic that would be generated by the proposed hospice. (R. pp. 145-146). Solan Associates, P.C. noted that the hospice facility would generate an additional 34 trips a day; however, the property could also accommodate 24 one-half acre residential lots which use would generate 230 trips a day. *Id.* Accordingly, Solan Associates, P.A., found that the proposed hospice would have a "minimal impact on traffic and the

immediate vicinity" and far less impact than other likely uses for this same property in the CFA Zone such as a gas station, ABC store, or grocery store. *Id.*

On December 3, 2012, Petitioners filed a Petition Pursuant to S.C. Code Ann. § 6-29-830(A) (Supp. 2014) appealing the Zoning Board's decision. (R. pp. 21-23). This matter was heard before the Honorable J. Michael Baxley on February 28, 2013.[3] The circuit court issued an Order on April 24, 2013, ("Circuit Court Order") reversing the decision of the Zoning Board, and finding as a matter of law that a "hospice facility cannot be permitted in the Commercial Forest Agricultural ("CFA") Zoning District. . . ." (R. pp. 12-17). The circuit court found the proposed hospice facility to be "more akin to a medical facility than a group home or even a nursing home." (R. p. 16).

Respondents 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 a 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). 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. Respondent filed its Return to Petition for Writ of Certiorari on March 23, 2015. This Court granted Certiorari by Order dated May 20, 2015. For the reasons set forth below, Respondent Horry County respectfully submits that this Court should affirm the decision of the Court of Appeals.

[3] During the February 28, 2013, court appearance, before arguments on the appeal commenced, Judge J. Michael Baxley visited the property with counsel for Petitioners and Respondent.

ARGUMENT

I. <u>The Court of Appeals properly applied the well established standard of review applicable to the instant matter that a zoning board's determination of a finding of fact is entitled to judicial deference.</u>

The well established standard of review of county zoning board decisions annunciated by this Court has been summarized 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)). This Court has been mindful of the narrow standard of review applicable to local zoning board decisions and has cautioned that, in reviewing zoning matters, the findings of 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 v. Zoning Bd. Of Appeals for City of Beaufort,* 346 S.C.401, 406, 552 S.E.2d 42, 45 (Ct. App. 2001) (emphasis in the original) (citing *Sterling Devel. Co. v. Collins,* 309 S.C. 237, 421 S.E.2d 402 (1992)). *See also Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171, 172 (1995) ("The factual findings of the [zoning board] must be affirmed by the Circuit Court if they are supported by any evidence and not influenced by errors of law.").

A "use" in the zoning context is "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied

or maintained." *Heilker*, 346 S.C. at 407, 552 S.E.2d 42, 46 (Ct. App. 2001) (citing *Town of Kingston v. Albert,* 767 A.2d 659 (R.I. 2001). In *Heilker*, the Court of Appeals, relying on this Court's decision in *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171 (1995), held that a determination by a zoning board as to whether a particular purpose constitutes a "use" is a finding of fact. *Id* at 411-12. The standard of review for findings of fact, such as the Zoning Board's determination in this matter, is addressed by statute: "The findings of fact by the [zoning] board of appeals must be treated in the same manner as a finding of fact by a jury . . . ." S.C. Code Ann. § 6-29-840 (Supp. 2013).

Here, the Court of Appeals properly applied this standard of review and reasoned that because the Zoning Ordinance does not specifically define the term "hospice," the Zoning Board was required to perform a factual inquiry—considering the statutory definitions as well as the extensive testimony and documentary evidence presented—to determine whether the proposed hospice was more comparable to a nursing home or group home, both of which are allowable uses denominated in the Zoning Ordinance, or a hospital, which is not an allowable use. *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 was based upon appropriate findings of fact which are supported by the record.").

The Court of Appeals properly found that the Zoning Board's determination in this case "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). Petitioners' assertion the Zoning Board was called upon to make a legal determination merely because statutory definitions exist for the terms "hospice," "nursing home," "group care home," and "hospital" is incorrect; the availability of statutory definitions for these terms does not transform the Zoning Board's inquiry into an interpretation of law. Significantly, as noted by the Court of Appeals, the Zoning Board utilized the statutory definitions in its factual inquiry when determining that the proposed hospice, as a matter of factual similarities, fell within the permitted uses of the CFA zone. In its Order, the Court of Appeals specifically cited to the same statutory definitions that Petitioner contends that the Court failed to consider in making its determination: S.C. Code Ann. § 44-7-130(12) (defining "hospital"); S.C. Code Ann. § 44-130(13) (defining "nursing home"); 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. Reg. 61-17 §§ 605-606 (2011). (Appendix pp. 3-6 and Brief of Appellant, filed January 21, 2014, p. 18).

Furthermore, because of the impossibility of drafting an all-inclusive ordinance denominating every potential future use, the failure of the drafters to denominate a specific use in a zoning ordinance should not bar all uses not specifically denominated. It is the responsibility of the Zoning Board to decide whether a use is permitted pursuant to the County's ordinances.[4] This determination requires a review of all relevant evidence, including any statutory definitions. In fact, the Horry County Council contemplated such

[4] The Zoning Board is authorized by the Horry County Code of Ordinances as well as South Carolina law to decide issues related to the County's zoning, including such a factual inquiry as to whether a hospice is an allowable use. *See generally Horry County Code of Ordinances Art. XIV* § 1404(A); S.C. Code Ann. § 6-29-840 (Supp. 2014).

a situation when it drafted the 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.") (emphasis added).

Further, even if this Court were to apply the legal standard asserted by Petitioners, the record is well established that a hospice is an appropriate use in a CFA zoning district as a matter of law. In reviewing Mercy Hospice's application for the Certificate of Need, DHEC specifically looked to the relevant state law in making its determination that the hospice was an appropriate use in that zoning district. (R. p. 133, ¶ 6). It is particularly persuasive that DHEC, the State agency responsible for issuing Certificates of Need for hospices and hospitals, after reviewing the distinctive State regulations and statutes governing hospices, hospitals, and nursing homes, issued a Certificate of Need which included an acknowledgement of zoning compliance that the proposed Mercy Hospice is a permitted use in the CFA district.

Because the Court of Appeals applied the well established standard of review and properly deferred to the Zoning Board's factual finding that a hospice facility is more similar to a nursing home or permanent overnight residential group home based on the record evidence, the opinion of the Court of Appeals should be affirmed.

II. The Court of Appeals correctly considered the controlling statutory definitions of "hospice," "hospice facility," "nursing home," and "hospital," as set forth in the relevant South Carolina statutes and regulations in upholding the Zoning Board's determination.

Contrary to Petitioners' assertion, both the Court of Appeals and the Zoning Board looked to the available South Carolina statutory definitions in determining whether a hospice was more similar to a nursing home or a hospital. This application was

consistent with the *Heilker* decision in which the court held:

> [t]o 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.

Heilker, 346 S.C. at 407. Here, unlike in *Heilker*, the Court of Appeals did not need to look to the law of other jurisdictions because South Carolina statutory law already provides definitions for the terms at issue. *See* S.C. Code Ann. § 44-7-130 (defining "hospital" and "nursing home"), S.C. Code Ann. § 44-71-20 (defining "hospice"), S.C. Code Ann. § 44-7-80 (defining "nursing home").

The Record abounds with evidence that the Zoning Board and Court of Appeals considered these statutory definitions of "nursing home," "hospice" and "hospital." (R. pp. 74-78;. 205, lines 6-24; 217, lines 15-16). At the hearing before the Zoning Board, Petitioners submitted a supplemental outline which included the statutory definitions of "hospice" and "hospital." (R. pp. 75-77). Rennie Mincey, Zoning Administrator, read these definitions aloud to the Zoning Board at the hearing. (R. p. 205, lines 6-24). In issuing the Certificate of Need, Mr. Gibbs, DHEC Bureau Chief, considered the separate and extensive State regulations regarding the licensing standards for hospice facilities and hospitals; the fact that DHEC has separate detailed regulations governing hospices and hospitals further establishes that they are not the same. (R. p. 133, ¶ 3). *See* S.C. Code Ann. Reg. 61-78 (governing hospice facilities) and S.C. Code Reg. 61-16 (governing hospitals). Mr. Levitt also noted the distinct regulatory licensure requirements for a hospice and hospital, testifying that the "standards [for licensure of a hospice] are more similar to nursing home licensure requirements than hospital licensure requirements." (R. p. 134, ¶ 6). The Zoning Board considered both DHEC Bureau Chief Gibbs and Mr.

Levitt's Affidavits in making its decision.

Accordingly, the ruling of the Court of Appeals should be affirmed since both the Zoning Board and the Court of Appeals correctly considered the applicable statutory and regulatory definitions in making its determination that a hospice is similar to a nursing home and is therefore a permitted use in a CFA district.

III. <u>The Court of Appeals correctly applied the rules set forth in *Heilker v. Zoning Board of Appeals for the City of Beaufort*, 346 S.C. 401, 552 S.E.2d (Ct. App. 2001).</u>

In *Heilker*, the Court of Appeals relied on this Court's decision in *Stanton* for the proposition that "in South Carolina, a zoning board determination regarding whether a particular activity or purpose contributes a 'use' of property is a finding of fact." *Heilker*, 346, S.C. at 411. In *Stanton*, this Court set forth the appropriate standard of review of zoning board decisions: a board's factual finding must be affirmed "if they are supported by any evidence and not influenced by an error of law." *Stanton,* 317 S.C. at 502. As explained in Argument I, the Court of Appeals correctly applied this standard of review established in *Stanton* and set forth in *Heilker*. *See* Argument I. Further, as set forth in Argument II, the Court of Appeals correctly applied the holding in *Heilker* by first looking at looking to South Carolina jurisprudence for an undefined term in a zoning statute. *See* Argument II. Petitioners are forced to resort to relying on Judge Shuler's dissenting opinion because the established case law supports the Court of Appeals' ruling.

Moreover, Petitioners erroneously argue that the circuit court's opinion should have more weight than the Zoning Administrator's determination because the Zoning Administrator "ignore[d] State law." As explained in Argument II, the Court of Appeals

appropriately applied the well established standard governing standard or review under State statutory and case law; it upheld the Zoning Board's determination which was based in part on the statutory definitions of terms. *See* Argument II. Further, the record contains the Affidavit of DHEC Bureau Chief Gibbs who testified that he looked to the relevant South Carolina regulations before issuing the Certificate of Need to Mercy Hospice for the proposed hospice. (R. p. 133, ¶ 6).

Interestingly, Petitioners' position that *Heilker* does not apply directly contradicts the argument Petitioners made at the Zoning Board hearing and continue to make on appeal based on the fact-based premise that a hospice is a "hospital" and is therefore not an allowable use. (R. p. 208, lines 1-20) (As Petitioner Fayrell Furr testified at the Zoning Board hearing, a "[h]ospice is nothing more than a specialized hospital. That's all it is. Any way you look at it, it's a hospital."); Final Brief of Respondents, dated January 15, 2014, p. 10 ("In fact it is a hospital and [has] none of the characteristics of either a nursing home or overnight resident group care home."); *Id.* at p. 11 ("Treatment typically will include changes in medication . . . all of which make the inpatient hospice facility similar to a hospital, [and] [i]f a hospice is not a hospital, it is a first cousin).").

Moreover, Petitioners incorrectly assert that the Court of Appeals failed to give the terms at issue their ordinary and popular meaning.[5] The record is replete with examples of the terms' ordinary and popular meanings, including the regulatory, statutory, and dictionary definitions of the terms. (R. pp. 64; 75-87; 120-21; 133 ¶¶ 4-5; 134-135 ¶¶ 2-5; 140; 202, line 22– p. 203, line 25; 205, lines 5-24).

Because the Court of Appeals correctly applied the well established standard of

[5] 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).

review as set forth in *Heilker, Restaurant Row Assocs.*, and other appellate decisions in finding that the circuit court failed to afford the appropriate deference to the Zoning Board's decision, we respectfully submit that this Court affirm the opinion of the Court of Appeals.

IV. The Court of Appeals correctly affirmed the Zoning Board's determination found that Mercy Hospice's inpatient hospice facility by definition or function is similar to a nursing home or permanent overnight residential group care home.

As explained in Argument III above, the Court of Appeals' decision that the proposed Mercy Hospice facility is similar to a group care home or nursing home was based on an extensive review of the evidence presented and all applicable statutory and regulatory definitions. Although "hospice" is not specifically listed in the Zoning Ordinance as an example of a permanent overnight residential group care home, the examples of potential group home uses denominated in § 703.2 are just that—examples—and are not inclusive of all types of potential group homes. The Zoning Ordinance specifically states that a group care home "could also include a *specialized treatment facility providing less than primary health care*." *Horry County Code of Ordinances, Art. VII*, § 703.2 (emphasis added). Ms. Faucher, Director of Mercy Hospice and Palliative Care, testified before the Zoning Board that "[a] hospice house is a *specialized treatment facility that provides less than primary health care*." (R. p. 220, lines 2-10) (emphasis added). Dr. Sasser explained that a hospital, unlike a hospice or nursing home, utilizes the acute care model, which is not appropriate for patients who are chronically ill. (R. p. 54, lines 5-11). Mr. Levitt testified that "hospitals provide a much more intensive level of care" than a hospice. Because the evidence establishes that a hospice provides less than primary health care, the Court of Appeals correctly found that

a hospice can be construed to fit within the definition of a permanent overnight residential group care home set forth in the Zoning Ordinance.

Moreover, the Court of Appeals gave proper consideration to the statutory definition of nursing home in finding that a hospice is similar to a nursing home. *See* Argument II. DHEC Bureau Chief Gibbs, testified that a hospice facility shares the same "end goal" as a nursing home. (R. p. 133, ¶ 5). Thus, because the Court of Appeals had cogent reasons for its ruling that the proposed Mercy Hospice facility is similar to a group home or nursing home, this Court should affirm the Order of the Court of Appeals.

V. <u>The Court of Appeals' ruling is supported by the transcript of record</u>.

The Court of Appeals' ruling—upholding the Zoning Board's determination that a hospice is similar to a nursing home or group care home—is overwhelmingly supported by the transcript of record.[6] Dr. Sasser testified without equivocation that the models of care offered by hospitals and hospices differ substantially. (R. p. 251, line 4-p. 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, line 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).

As Mr. Levitt testified, the range of services offered by a hospital also vary

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[6] The evidence presented by Mercy Hospice included the live testimony of Sara 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 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).

widely from what a hospice offers. (R. p. 134, ¶2). Hospitals are required to provide emergency services, but hospices do not provide emergency services. (R. p. 133, ¶¶ 3,4). DHEC Bureau Chief Gibbs, by Affidavit testimony, explained that unlike hospitals, "hospice facilities do not have operating rooms" and do not offer such medical services as "x-ray, MRI, labs, CT scanners, [and] other imaging equipment and services." (R. p. 133, ¶ 4). ("Based on my experience and the referenced regulations, it is my opinion that a hospice facility is not a hospital."). Contrary to the assertion implied by Petitioners, Dr. Strosnider, Vice President of Medical Affairs at Conway Medical Center, testified that the hospice is "definitely not a hospital." (R. p. 237, line 18). While Dr. Stosnider alluded to the fact that there would be doctors on staff who would make rounds, he explained that in a hospice do not make rounds on a daily basis, as in a hospital. (R. p. 239, lines 5-7).

The record evidence also supports the Zoning Board's factual finding, affirmed by the Court of Appeals, that the nature of the services offered by Mercy Hospice are similar to the services provided by a nursing home or group home. In his Affidavit presented to the Zoning Board, Mr. Levitt 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). As further explained in Argument IV, the record is replete with evidence that supports the Zoning Board's determination that the proposed Mercy Hospice facility is similar to a nursing home or group care home; accordingly, the Court of Appeals' ruling deferring to the Zoning Board's decision should be affirmed based on the

governing statutes and well established caselaw.

VI. **Pursuant to the "Home Rule" provision set forth in S.C. Code Ann. § 4-9-30(9), the Court of Appeals was not required to look to the zoning ordinances of other counties to determine the meaning of hospice.**

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, specifically, Charleston County. By statute, each county in South Carolina is vested with the authority to provide for land use pursuant to the Home Rule Act. *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 . . . . "). *See Brown v. County of Horry*, 308 S.C. 180, 184, 417 S.E.2d 565, 566 (1992) (emphasizing the importance the Home Rule in realizing local county autonomy since "different counties will have different problems which will require different solutions."); *See also Centaur, Inc. v. Richland County*, 301 S.C. 374, 378, 392 S.E.2d. 165, 168 (1990). While the Zoning Board may consider the 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.").

The applicable Zoning Ordinance endorses reference to the South Carolina statutes to provide meaning for terms not otherwise defined in the Ordinance. ("Terms used in this Code, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of the state for the same terms."). (R. pp. 324-326). Consistent

with the Zoning Ordinance and the governing standard of review, the Court of Appeals correctly considered the applicable statutory definitions in reviewing the Zoning Board's factual determination that the hospice is an allowable use; accordingly, the opinion of the Court of Appeals should be affirmed.

VII. **As an additional sustaining ground, the decision of the Horry County Zoning Board, affirmed by the Court of Appeals, is correct as a matter of law.**

Even if this Court should accept Petitioners' contention that the Zoning Board's determination involves a question of law, this Court should affirm the Court of Appeals' decision on the additional outstanding ground that the Zoning Board's decision is correct as a matter of law. The record is replete with evidence supporting an analysis of the decision under the question of law standard.

Horry County Zoning Administration Rennie Mincey testified that the Mercy Hospice is a permitted use in the CFA district. (R. p. 206, line 25-p. 207, line 7). DHEC Bureau Chief Gibbs, responsible for determining compliance with State regulations for issuing Certificates of Need for hospices, considered the applicable State regulatory and statutory law in determining that the Mercy Hospice was an appropriate use in the CFA district. (R. p. 133 ¶ 6). As set forth in Argument II, the record evidence establishes that the Zoning Board considered the relevant South Carolina laws and Horry County ordinance provisions in making their decision. Accordingly, because substantial evidence exists to support the Zoning Board's determination under both analyses, this Court should affirm the decision of the Court of Appeals on the additional sustaining ground that a hospice is a permitted use in the Horry County CFA zoning district as a matter of law.

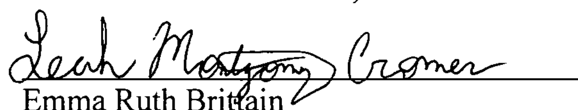
CONCLUSION

Petitioners raise a public policy argument in their conclusion which was not raised in the prior proceedings; although this Court need not address such an argument,[7] public policy favors the construction of a hospice in the CFA district since there is a critical need in the area for end-of-life care (as demonstrated by the Certificate of Need issued by DHEC). Accordingly, public policy considerations support the determination of the Zoning Board, affirmed by the Court of Appeals..

For the reasons set forth above, Respondent respectfully submits that the Court of Appeals properly applied the well established standard of review in deferring to the Zoning Board's determination and that the Order of the Court of Appeals affirming the Zoning Board's determination that the proposed Mercy Hospice facility is a permitted use in the Horry County CFA Zoning District should be affirmed.

Respectfully submitted,

THOMAS & BRITTAIN, P.A.



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July 17, 2015

[7] *See* Rule 242, SCACR(d)(2); *See Kleadey 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 Court of Appeals is not properly preserved for review by the Supreme Court on Certiorari.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 20 2015
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 December 17, 2014)
Supreme Court Case No.: 2015-000271

Fayrell Furr and Karole Jensen .... Petitioners

vs.

Horry County Zoning Board of Appeals .... Respondent

PROOF OF SERVICE

I certify that I am an employee of Thomas & Brittain, P.A., and that I have served the Respondent's Brief on the Petitioners, through their attorney of record, by depositing a copy of it in the United States mail, postage prepaid, on July 17, 2015, addressed to:

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July 17, 2015

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