

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley
Circuit Court Judge

Case No.: 2012-CP-26-9291

Fayrell Furr and Karole Jensen, ... Respondents

v.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT.....	7
STANDARD OF REVIEW	
I. THE LOWER COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE HORRY COUNTY ZONING BOARD AND FAILING TO DEFER TO THE FACTUAL FINDING BY THE HORRY COUNTY ZONING BOARD THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT.....	10
II. BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE ZONING BOARD, THE COURT FAILED TO TREAT THE ZONING BOARD'S DECISION AS A FINDING OF FACT BY A JURY.....	24
CONCLUSION.....	29

TABLE OF AUTHORITIES

CASES

<i>Arceri v. Town of Islip Zoning Bd. of Appeals</i> , 16 A.D.3d 411, 791 N.Y.S.2d 149, (2d Dep’t 2005))	9
<i>Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals</i> , 402 S.C. 57, 62, 737 S.E.2d 863, (S.C.App. 2013)	24
<i>Cellco P’ship v. North Annville Tp. Zoning Hearing Bd.</i> , 939 A.2d 430, (Pa. Commw. Ct. 2007)	9
<i>City of Okoboji v. Okoboji Barz, Inc.</i> , 746 N.W.2d 56 (Iowa, 2008))	9
<i>Heilker v. Zoning Bd of Appeals for City of Beaufort</i> , 346 S.C. 401, 412, 552 S.E.2d 42 (Ct. App. 2001)	8, 10
<i>Laberge Moto-Cross Track</i> , 15 A.3d 590, (Vt. 2011)	9
<i>Peterson Outdoor Advertising v. City of Myrtle Beach</i> , 327 S.C. 230, 489 S.E.2d 630 (1997)	8
<i>Restaurant Row Assocs. v. Horry County</i> 335 S.C. 209, 516 S.E.2d 442, (S.C. 1999)	7, 11
<i>Sterling Dev. Co. v. Collins</i> , 309 S.C. 237, 421 S.E.2d 402, (1992)	8
<i>Subdivisions, Inc. v. Town of Sullivan</i> , 92 A.D.3d 1184, 938 N.Y.S.2d 682, (3rd Dep’t. 2012)	9
<i>Talbot v. Myrtle Beach Board of Adjustment</i> , 222 S.C. 165, 72 S.E.2d 66, (S.C. 1952)	7
<i>Tanis v. Twp. of Hampton</i> , 704 A.2d 62, (N.J. Super. App.Div. 1997)	9
<i>Town of Salem v. Durrett</i> , 125 N.H. 29, A.2d 9, 10 (N.H. 1984)	10
<i>Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals</i> , 342 S.C. 480, ...	8

STATUTES

S.C. Code Ann. § 44-71-20(3).....	17
S.C. Code. Ann § 44-71-20(4).....	17
S.C. Code § 44-7-80	18
SC Code Ann § 44-7-130(12).....	19
S.C. Code Ann § 6-29-840	8, 24
S.C. Code Ann. § 6-29-840(A)	24
S.C. Code Ann Reg. 61-15 § 802(26).....	22
48 C.F.R. § 481.3.....	20

ORDINANCES

Horry County Code of Ordinances §1-2.....	17
---	----

OTHER SOURCES

O.C.G.A. 31-7-172(5).....	21
http://www.merriam-webster.com/dictionary/hospice	21
http://dictionary.cambridge.org/us/dictionary/american-english/hospice?q=hospice	21
http://www.ahdictionary.com/word/search.html?q=hospice	21

STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR WHEN IT FAILED TO ACCORD THE FINDINGS OF FACT OF THE HORRY COUNTY ZONING BOARD THE SAME DEFERENCE AS A FINDING OF FACT BY A JURY?
- II. DID THE LOWER COURT ERR IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE HORRY COUNTY ZONING BOARD AND FAILING TO DEFER TO THE FACTUAL FINDINGS OF THE ZONING BOARD THAT A HOSPICE IS A PERMITTED USE IN THE COMMERCIAL FOREST AGRICULTURE DISTRICT?

STATEMENT OF THE CASE

On or about December 3, 2012, Respondents Fayrell Furr and Karole Jensen (“Respondents”) filed this action in the Horry County Court of Common Pleas appealing the Order of the Horry County Zoning Board that the proposed Mercy Hospice facility is an allowed use in the Commercial Forest Agriculture Zoning District (“CFA”) (R. pp. 20-27). The property in question is located at 3341 Wildhorse Drive, Conway in rural Horry County off of Highway 90 (R. pp. 56-60). The Zoning Board issued its Order, following a hearing, on November 5, 2012, at which Respondents and Mercy Hospice offered evidence, including testimony. (R. pp. 24-27). The Board upheld the interpretation of the zoning ordinance by the zoning administrator, thereby denying Respondents’ appeal of the zoning administrator’s decision.

This matter was heard before the Honorable J. Michael Baxley on February 28, 2013. Prior to the hearing of the appeal, on February 5, 2013, Judge Baxley stayed any actions by Horry County with respect to issuance of a permit for Mercy Hospice. (R. pp. 18-19). 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 Respondents¹.

The lower court issued an Order, dated April 24, 2013², (“Order”) reversing the

¹ On the record, after visiting sites, Judge Baxley stated, on the record, as follows: “We looked at the property. I did ask certain questions of the principals, because with us we had representatives of the Appellants as well as the Respondents about the footprint or the structure on the property, the logistics of ingress and egress, the boundaries of the property, and other matters that I could only ask while we were there, just to have an understanding of the site, and how the site was set out.” (R. p. 279, l. 2-9).

² Prior to issuing the Order, Judge Baxley sent a letter to counsel, dated March 7, 2013, that stated “please accept this letter as the Court’s decision in the matter” and requested that counsel for the Respondents prepare an order based on the decisions based within the letter. See letter of the Honorable J. Michael Baxley, dated March 7, 2013 (“Decision”). (R. pp. 317-318). The Decision provided that it was “[b]ased upon the arguments of counsel, review of the overall Horry County Zoning scheme and specific provisions at issue, review of the Clerk of Court’s file, analysis of the record below, as well as a visit to the site.” *Id.*

decision of the Zoning Board and held that as a matter of law that a “hospice facility cannot be permitted in the Commercial Forest Agricultural (“CFA”) Zoning District” (R. pp. 12-17).

This Appeal followed by timely Notice of Appeal, dated May 23, 2013.

STATEMENT OF FACTS

This matter arises from an appeal of a decision of the Horry County Zoning Board of Appeals (“Zoning Board”) that a hospice is a permitted use in the Commercial Forest Agriculture (“CFA”) zoning district in Horry County. The property at issue in this case is located at 3341 Wildhorse Drive, Conway, off of Highway 90 in rural South Carolina (the “Property”). The Property is zoned CFA and owned by Mercy Hospice. Mercy Hospice intends to operate a fourteen bed hospice on the Property.

On September 21, 2010, Horry County Council approved Resolution No. R-103-10 stating support for a proposed hospice facility to be located on a parcel of land of 22 acres off of Highway 90. (R. p. 52). On May 3, 2011, Horry County Planning and Zoning Department issued a letter confirming that the proposed hospice house and associates accessory buildings and structures are permitted uses provided that conditional requirements of the Zoning Code are met. (R. p. 54). On March 23, 2012, South Carolina Department of Health and Environmental Control (“DHEC”) issued a Certificate of Need for Mercy Hospice. (R. p. 183)

The Decision noted that the attorney for Horry County was not asked to agree or consent to the proposed Order, but to review it for mistakes of fact. By letter dated April 4, 2013, Horry County Zoning Board of Appeal’s Attorney reserved all objections related to findings of fact and error of law in the draft Order. (R. pp. 319-321). In addition, during the hearing itself, counsel for Horry County Zoning Board of Appeals stated that: “[U]nder the statute the judicial review is confined to the record before the Court that was made before The Zoning Board, and those findings are entitled to be treated in the same manner as findings of facts by a jury. To the extent there is anything ... that either goes beyond the record, or disputes the records, we would object to that because it was not made part of the record before the Board, and it is not within the appropriate scope of review.” (R. p. 280, line 24 – p. 281, line 8).

On July 30, 2012, Mercy Hospice submitted plans for Mercy Hospice House to Horry County for review for compliance and issuance of permits. (R. pp. 49-70). The Horry County Zoning Administrator approved the submittal, consisting, *inter alia*, of a fourteen room hospice house, as an allowed use in the Commercial Forest Agriculture (“CFA”) Zoning District. (R. pp. 328-335).

Respondents, whose property adjoins the Mercy Hospice Property, appealed the decision of the Horry County Zoning Administrator, contending the proposed hospice house is a hospital and is not an allowed use in the CFA zoning district. At the hearing before the Zoning Board, Mercy Hospice introduced extensive evidence supporting the Zoning Administrator’s decision that the 14 room hospice facility was an allowed use. The evidence presented by Mercy Hospice included the following:

Mary Jo Faucher, the Executive Director of Mercy Hospice and Palliative Care, testified with respect to the proposed hospice house – explaining what it is - and its similarity to a nursing home. (R. p. 218, line 23 – p. 236, line 10; p. 242, line 11- p. 243, line 6).

Mercy Hospice also supplied the Zoning Board with evidence in the form of affidavits and other documents that demonstrate that a hospice is more akin to a nursing home and not a hospital. Mercy Hospice submitted an affidavit from Dennis L. Gibbs, who was the Bureau Chief for the Bureau of Health Facilities Regulation at South Carolina Department of Health and Environmental Control (“DHEC”). (R. p. 133, ¶1). Mr. Gibbs opined, 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 previously made a determination that the zoning was appropriate for

the facility when issuing the Certificate of Need. *Id.* at ¶6. 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 in his affidavit that the services provided by Mercy Care would be palliative, in nature, and neither resource nor labor intensive. (R. pp. 134-135, ¶4). Mr. Levitt further opined that inpatient hospice facilities are more similar to a nursing home than a hospital based on the type of care provided. *Id.* at ¶5.

Charles Sasser, M.D., Medical Director of Mercy Hospice and Medical Director of a Palliative Care Program at Conway Medical Center, testified as to the models of care offered by hospitals and hospices and agreed with Messrs. Levitt and Gibbs that a hospice is not a hospital. Hospitals are based on an “acute [health] care model.” ((R. pp. 52, line 24 – p. 53, line 17). “The acute care model ...[is designed] to cure and to restore to some previous state of normal health. ... That’s why they got so many different mechanisms for diagnose (sic) and treatment in hospitals.” (R. p. 252, lines 1-20). A hospice differs from a hospital in that it is based on a “comfort care model.” (R. p. 253, lines 15-25).

Mercy Hospice also presented a letter from J.T. Pegram, President of Pegram Associates, Inc. and an architect involved with Mercy Hospice that highlighted the warm, residential feeling of the proposed hospice, which stands in stark contrast to the cold, institutional feeling of hospitals. Mr. Pegram noted that “the design team has developed an inviting, warm and comforting house design with a “residential” feel both for the patients and their families.” *Id.* Mr. Pegram noted that the hospice would be built to achieve LEED (Leadership in Energy and Environmental Design) Certification which is a

recognition that “the project has complied with sustainable site and building design and construction practices to lessen the project’s environmental impact.” In describing the hospice, he noted that the:

[f]amily spaces in central areas of the building include an open kitchen, dining area, living room with a fireplace, and a playroom for children. All have a comfortable home-like feel. The 14 patient rooms, 7 on each side of the central family area, are designed to have the patient and families feel like they’re in a residential bedroom. Each patient room has its own screened porch and overlooks the Waccamaw River.”

(R. p. 140).

In addition to submitting evidence with respect to the nature of services offered by hospice and the design of the hospice, Mercy Hospice submitted evidence regarding the anticipated traffic and accessibility for emergency services. 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 Mercy Hospice. Solan Associates, P.C. noted that Mercy Hospice facility would generate an additional 34 trips per day. However, the Property could also accommodate 24 one-half acre residential lots, which use would generate 230 trips per day. Accordingly, Solan Associates, P.C. found that the proposed hospice would have a “minimal impact on traffic in the immediate vicinity” and far less than other likely uses for this same property. (R. pp. 145-146).

In addition, Mercy Hospice submitted as evidence correspondence from Horry County Fire Department regarding emergency services access. Kenneth M. Beans, Interim Fire Chief, noted that “there is no issue with apparatus access or water supply at the Wild Horse subdivision.” Chief Beans relied upon the findings of Battalion Chief

Kenny Todd who found that there would be no fire department access issues on the main roadway into Wild Horse subdivision based upon his review of the International Fire Code. Battalion Chief Todd holds a Fire Marshall certification in the state of South Carolina. Indeed, Battalion Chief Todd noted that the entrance gate was tall enough for emergency access. (R. pp. 155-156). Significantly, the photographs in the record, introduced by Respondents, show that the Property is outside the gated entrance and there would be no need for emergency services to access the site utilizing the gate. (R. p. 59). Accordingly, there are no safety issues with respect to building a hospice at the Property.

In sum, the evidence adduced by Mercy Hospice overwhelmingly supports the building of a hospice facility because it is properly zoned within the CFA district.

ARGUMENT

STANDARD OF REVIEW OF COUNTY ZONING BOARD DECISION

The Supreme Court has summarized the applicable standard of review in zoning appeals 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, 215-216, 516 S.E.2d 442, 446 (S.C. 1999) citing *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (S.C. 1952). Even if a court disagrees with the zoning board's decision, it may not substitute its judgment for that of the zoning board unless the decision "is

arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the [zoning] board has abused its discretion.” *Rest. Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (internal citations omitted). *See also Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997).

The standard of review for findings of fact 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 § 6-29-840 Ann. (1976) (Supp. 2013). Our appellate courts have been mindful of the narrow standard of review applicable to local zoning decisions. “In zoning matters, this Court is obligated to apply the extremely narrow standard of review outlined in *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000).” *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001).

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, 552 S.E.2d 42 (Ct. App. 2001) (emphasis in the original) (citing *Sterling Devel. Co. v. Collins*, 309 S.C. 237, 421 S.E.2d 402 (S.C. 1992)). “A “use” in the zoning context is “the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.” *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) (emphasis in the original). Of significance in the instant action, a determination by a zoning board that a particular purpose or activity does or does not constitute a “use” is a finding of fact.” *Id.*

In the present case, both the Horry County Zoning Administrator and Zoning Board determined that a hospice is a conditional allowed use in the CFA district, even though the term “hospice” is not defined in the zoning ordinance. (*See* Horry County Zoning Ordinance). (R. pp. 328-335; R. pp. 7-9) Courts have uniformly recognized that it would be difficult if not impossible to craft a zoning ordinance that anticipates and provides for every possible use. *See Subdivisions, Inc. v. Town of Sullivan*, 92 A.D.3d 1184, 1187, 938 N.Y.S.2d 682, 685-686 (3rd Dep’t. 2012) (noting that when crafting a zoning ordinance, a municipality cannot be expected to anticipate each and every potential use to which a property owner may wish to put his or her property); *Arceri v. Town of Islip Zoning Bd. of Appeals*, 16 A.D.3d 411, 412, 791 N.Y.S.2d 149, 150-151 (2d Dep’t. 2005) (noting the delegation of discretion to an administrative body or official in the interpretation of zoning ordinance because “it would be difficult or impractical for a legislative body to promulgate an ordinance which is both definitive and all-encompassing”); *In re Laberge Moto-Cross Track*, 15 A.3d 590, 594-595 (Vt. 2011) (recognizing that zoning regulations, despite containing restrictive clause, “cannot be considered to be entirely exhaustive, given the breadth of novel land-development possibilities a municipal body may face”); *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 61 (Iowa, 2008) (noting “it is next to impossible for a zoning ordinance to express every possible lawful use of property”) (internal citations omitted). *See also*, *Cellco P’ship v. North Annville Tp. Zoning Hearing Bd.*, 939 A.2d 430, 434 (Pa. Commw. Ct. 2007) (“It is impossible for a legislative body to anticipate every conceivable use of land”); *Tanis v. Twp. of Hampton*, 704 A.2d 62, 68 (N.J. Super. App. Div. 1997) (ruling that restrictive clause alone was not enough to prohibit use not

expressly contemplated in local zoning ordinance in part because of “the impracticality of defining in advance every permissible accessory use”); *Town of Salem v. Durrett*, 125 N.H. 29, 480 A.2d 9, 10 (N.H. 1984) (in an opinion by then N.H. Supreme Court Justice Souter, recognizing “the impossibility of providing expressly by zoning ordinance for every possible lawful use”).

Because of the impossibility of crafting an all-encompassing zoning statute for every use, the failure to denominate a specific use in a zoning statute should not bar all uses not specifically denominated. As provided by Horry County’s Zoning Code, “[i]t is the intent ... that the Commercial Forest and Agriculture Zoning District be reserved and utilized for agriculture, forestry, residential, commercial, social, cultural, recreational and religious uses.” (R. p. 328). The CFA district is a mixed use district, with requirements much less restrictive than other zoning districts. (R. pp. 328-335, *See* Art. 7. The Zoning Board – the primary entity responsible for planning and development of communities in South Carolina – after hearing extensive testimony and receiving extensive documentary evidence, properly found that a hospice was a permitted use in the CFA district.

I. THE LOWER COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE HORRY COUNTY ZONING BOARD AND FAILING TO DEFER TO THE FACTUAL FINDING BY THE HORRY COUNTY ZONING BOARD THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT

A zoning board determination that a particular purpose or activity does or does not constitute a “use” is a finding of fact.” *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 411, 552 S.E.2d 42, 47-48 (Ct. App. 2001). In this case, the Zoning Board framed the issue before it as whether: “a hospice house is an allowed use in the Commercial Forest Agriculture (CFA) zoning district.” (R. pp. 7-9). The zoning administrator and, ultimately, the Zoning Board found that a hospice was a permitted use

in the CFA district. *Id.* Accordingly, the Zoning Board made a factual finding that a “hospice” is a permitted “use” within the CFA district. *Id.*

Even if the lower court disagreed with the Zoning Board, it was required to uphold that decision unless the Zoning Board’s decision was arbitrary, capricious and had no reasonable relation to a lawful purpose. *Restaurant Row Assocs. v. Horry County*, 334 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). Here, there can be no argument that the Zoning Board’s decision was arbitrary, capricious or had no reasonable relation to a lawful purpose. The Zoning Board considered the evidence of both Mercy Hospice and Respondents. The Respondents’ primary argument is that a hospice is, in fact, a hospital, and thus, is not properly zoned CFA. The Zoning Board rejected their argument and, instead, affirmed the decision of the Zoning Administrator. The Zoning Board accepted the argument of Mercy Hospice that a hospice is akin to a nursing home or permanent overnight group care home (“Group Care Home”) and/or nursing home, both of which are conditional permitted uses in the CFA district.

A. The Record Evidence Supports the Zoning Board’s Decision that Hospitals Offer Different Services From Hospices

The Zoning Board also considered evidence of the services offered by hospice and hospitals, which clearly established that the types of services offered at a hospital are different from the types of services offered at a hospice. Mercy Hospice offered as evidence, *inter alia*, affidavits from David S. Levitt, a healthcare consultant that has worked on 500 Certificate of Need projects in 12 states and has been qualified as an expert in healthcare planning and finance before the South Carolina Administrative Law Court, and Dennis L. Gibbs, the Bureau Chief for the Bureaus of Health Facilities Regulation at DHEC, on the types of services offered by hospices and hospitals. (R. pp.

133-135).

Mr. Levitt opined that the services offered by a hospital are more resource and labor intensive than those offered by a hospice facility. (R. p. 134, ¶2). Thus, hospitals have greater personnel and support activity than an inpatient hospice. (R. p. 134, ¶8).

Hospitals are required to provide emergency services. (R. p. 133, ¶4; p. 134, ¶3). Hospitals are required to receive emergency patients, via ambulance or helicopter transport, on a twenty-four hour a day. (R. p. 134, ¶3). In contrast, hospices do not provide emergency services. (R. p. 133, ¶4). Conversely, “[h]ospices do not send or receive patients via helicopter.” (R. p. 134, ¶3). Moreover, “[p]er Medicare regulations, air ambulance services are not covered for transport to a facility that is not an acute care hospital, [therefore] transport to a hospice inpatient facility would not be covered.” (R. p. 153). Typically, patients are transferred to “hospice via private vehicle or via non-emergency medical ground transportation.” *Id.* If a patient was transported to hospice by ambulance, the ambulance would not use sirens or lights during the transport of the hospice patient. (R. p. 134, ¶3).

Hospitals generally have operating facilities equipped to provide surgical care whereas hospices do not have operating facilities and cannot provide surgical care. (R. p. 133, ¶4). The range of services offered by a hospital also vary widely from what a hospice would offer:

Hospitals provide a much more intensive level of care that involves significantly more resources, space and personnel than a hospice facility. Hospitals provide a wide array of diagnostic and treatment services, [including] radiology, ultrasound, X-ray, PET/CT, MRI and nuclear medicine, cardiopulmonary care services, including EKG monitoring, vascular lab services, angioplasty respiratory therapy, lab services including hematology, chemistry, microbiology,

histology, cytology, pathology and blood bank services.

(R. p. 134, ¶2). Hospices do not offer any of these services. (R. p. 134, ¶2; p. 133, ¶4).

The models of care offered by hospitals and hospice also differ. (*See* Transcript of the Zoning Board of Appeals Hearing dated November 5, 2012, Testimony of Charles Sasser, M.D., Medical Director of Mercy Hospice and Medical Director of a Palliative Care Program at Conway Medical Center). Hospitals are based on an “acute [health] care model.” (R. pp. 52, line 24 – p. 53, line 17). “The acute care model ...[is designed] to cure and to restore to some previous state of normal health. ... That’s why they got so many different mechanisms for diagnose (sic) and treatment in hospitals.” (R. p. 252, lines 1-20). A hospice differs from a hospital in that it is based on a “comfort care model.” (R. p. 253, lines 15-25).

In sum, the scope of services provided by a hospital are significantly different from services offered by a hospice. The Zoning Board’s decision that a hospice is not a hospital was supported by the overwhelming record evidence of professionals, including doctors, an architect, and a DHEC bureau chief, and was not irrational, arbitrary or capricious.

B. The Record Evidence Supports the Zoning Board’s Decision That The Nature of Services Offered by a Hospice Are Similar to the Services Provided by a Nursing Home

The Zoning Board, having considered evidence regarding the services provided by nursing homes and hospices, correctly determined as a finding of fact, that the services offered by a hospice are similar to the services offered by a nursing home. At hospice facilities, like nursing homes, the primary focus is on providing nursing services, with minimal ancillary services. (R. p. 134, ¶5). “The end goal of both a nursing home and an inpatient hospice facility is rarely recovery for traditional residents, but rather comfort

and care in a residential setting.” (R. p. 133, ¶5; R. p. 134, ¶5). J.T. Pegram, an architect and President of Pegram Associates, Inc. that is involved in the design of Mercy Hospice, noted that a hospice is “essentially a nursing home that specializes in caring for the terminally ill and shares many similarities with a nursing home. The most significant difference is that a hospice house has less of an institutional and more of a home-like feel than a nursing home.” (R. p. 140).

The evidence and testimony offered by Mercy Hospice is that a “[a] hospice house is essentially like a nursing home that specializes in care for the terminally ill and is designed to feel like a home.” (R. p. 224, lines 8-11). Testifying before the Zoning Board, Mary Jo Faucher, the Executive Director of Mercy Hospice and Palliative Care, described the proposed hospice house and the services offered as follows:

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 and 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 home-like settings. Pets can even stay ... Families can even cook the patient’s favorite foods in the home’s kitchen.

(R. p. 220, lines 2-16). The proposed design of the hospice is fourteen rooms. (R. p. 225, line 3).

[The rooms] will be facing the water side of the river. They will have screened-in porches with porch doors so that we can literally take them outside ... A family room and a family kitchen, the children’s playroom. They’ll be able to dine around our endless center and there will be seven beds, seven rooms on either side. There is the family room and the family kitchen and that’s where they can make meals for their loved ones and make their

favorite foods. There is a fireplace in the corner, ... a dining room ... That's not a hospital.

(R. p. 225, lines 3-17).

We will only receive patients by private car or by ambulance in non-emergency transport. There will be no lights or sirens for transport of patients. There will be no fire trucks with sirens unless we're unfortunate enough to have a fire. People don't come to a hospice house in an emergency. They don't leave that way either. They have made their decision. They are not looking for recessive or curative care. They are looking to be in a home-like environment when they can't be at home surrounded by their loved ones that they watch die in comfort, in dignity and they want to experience death in a spiritual sense as well as a physical one. They have made their decision.

(R. p. 228, lines 15 – p. 229, line 5). The testimony of Ms. Faucher was echoed by Preston Strosnider, M.D., Vice President for Medical Affairs at Conway Medical Center and board member of Mercy Hospice. During his testimony, Dr. Strosnider was questioned by the Zoning Board and was specifically asked whether a hospice is a hospital:

Q. In your opinion, is hospice a nursing home or a hospital.

A. It's definitely not a hospital. I don't even think it's a nursing home. It's really just a residential home in the fact that they do not provide what we call meaningful treatment. Comfort care, yes, but they are not being treated in a hospital room. They're not a hospital.

(R. p. 237, lines 15-24).

David Flowers, of Mercy Hospice, similarly testified:

The definition of a group home under the ordinance is defined as a specialized treatment facility that provides less than primary care. That's what a hospice does. It's less than primary care or acute care. As everyone has said, the goal of hospice care is not full treatment and to get

people better and not die. It's end of life comfort care. That is a specialized care that is available in a group home setting by this.

(R. p. 245, lines 12-21).

The testimony offered by Mercy Hospice provides ample evidentiary support for the Zoning Board's factual conclusions that a hospice is similar to a nursing home and Group Care Home and a permitted use in the CFA zoning district. Accordingly, the lower court erred in overruling the Zoning Board's determination and substituting its own judgment as to the factual issues in this matter.

C. Horry County Zoning Board's Decision that a Hospice is Better Analogized to a Nursing Home or Permanent Overnight Resident Group Care Home Than a Hospital is Supported by the Statutory Definitions

The Zoning Board considered evidence presented to it regarding the statutory definitions of nursing home, Group Care Home, hospice and hospital. The plain language, statutory definitions of these terms substantiate the Zoning Board's determination that a hospice is similar to a nursing home and permanent overnight resident group care home and therefore is an appropriate use in the CFA zoning district.

Horry County's 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. It could also include a specialized treatment facility providing less than primary health care.

(R. p. 327). In addition to permanent overnight resident group care homes, nursing homes are also permissible uses in the CFA zoning district.

Horry County's Zoning Ordinance defines "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.” (R. p. 327).

Although “hospice” and “hospice facility,” are not defined terms or uses within the Horry County Zoning Code, they are defined by the South Carolina Code. The Zoning Code endorses reference to the South Carolina statutes to provide meaning for terms not otherwise defined in the Zoning Code. (R. pp. 324-326; *See* Horry County Code of Ordinances §1-2) (“terms used in this Code, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of the state for the same terms”). According to the South Carolina Code, “hospice” is defined as

[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 written agreement. The inpatient services include, but are not limited to, services provided by hospice in a licensed hospice facility.

S.C. Code Ann. §44-71-20(3) (Rev. 2002).

“Hospice facility” is defined as “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 the physician.” S.C. Code. Ann. §44-71-20(4) (Rev. 2002).

Focusing on the above referenced definitions of Group Care Home, nursing home and hospice, the Zoning Board correctly recognized that a hospice is better analogized to a Group Care Home than to a hospital. Nursing homes and hospices focus on a specific type of patient. A hospice focuses on “terminally ill patient[s]” and nursing homes focus

on individuals who are “unable to care for themselves.” Similarly, each Group Care Home focuses on a specific type of resident – each home focuses on a specific group of individuals, such as “orphans, foster children, the elderly, battered children and women” or those receiving “specialized care.” The residents at Group Care Homes, nursing homes and hospices stay for an extended period of time at their respective facility. The main difference is that a patient staying in a hospice is terminally ill and, thus, by definition, has a briefer life expectancy than a patient residing at a nursing home or permanent overnight resident care group home.

In addition, nursing homes and hospices provide care only for their residents; they do not provide care for the general population. In nursing homes, a patient receives convalescent or chronic care and, in hospice, a person receives palliative care. Moreover, at both nursing homes and hospices, the focus of treatment is not recovery or a cure.

According to the South Carolina Code, nursing homes may be operated in conjunction with a hospital. The South Carolina Code defines a “nursing home” as 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 freestanding 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 §44-7-80 (Rev. 2002) (emphasis added). The South Carolina Code, while distinguishing a hospital from a nursing home, provides that a nursing home may be operated in conjunction with a hospital or as a free-standing facility with immediate or skilled nursing care for persons who are not in need of hospital care. The mere operation of a nursing home in conjunction with a hospital, however, does *not* transform a nursing

home into a hospital.³

The South Carolina Code defines hospital as:

[A] facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury or infirmity and may provide obstetrical care and in which all diagnosis, treatment or care is administered by or under the direction of a person currently licensed to practice medicine, surgery or osteopathy.

S.C. Code Ann. §44-7-130(12) (Rev. 2002).⁴

³ There is admittedly a commonality between nursing homes, hospices, and hospitals in that all require some level of medical care over the course of at least twenty four hours. Even the Group Care Home's definition encompasses facilities providing "less than primary health care" services. As a corollary of providing medical care, all of these facilities are staffed, in part, by members of the medical profession. In addition, at these facilities patients may be seen by medical staff and provided with medical treatment, including pharmacological treatment. But these similarities do not transform a hospice into a hospital, any more than a nursing home or Group Care Home is a hospital.

⁴ A second definition provided by DHEC, in its Minimum Standards for Licensing Hospitals and Institutional General Infirmaries of hospital is:

General hospital:...a facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for diagnosis, treatment and care of such persons over a period exceeding 24 hours and provides medical and surgical care of acute illness, injury or infirmity and may provide obstetrical care, and in which all diagnosis, treatment or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the state of S.C.

DHEC also provides definitions for specific types of hospitals:

Specialized hospital:...a facility which has an organized medical staff, maintains and operates organized facilities and services to accommodate two or more nonrelated persons for the diagnoses, treatment and/or care of such persons over a period exceeding 24 hours and which provides a specialized service for one type of care, such as tuberculosis, maternity, orthopedics, pediatrics, E.E.N.T., etc. and in which all diagnosis, treatment or care are under the direction of persons currently licensed to practice medicine and surgery in the State of S.C.

Intuitional General Infirmary:...a facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents or inmates with illness, injury or infirmity for a period exceeding 24 hours for the diagnosis, treatment and care of such persons and which provides medical, surgical care and professional medical care, and in which all diagnosis, treatment and

A hospital differs from a hospice, Group Care Home and nursing home in that it alone provides emergency and surgical services and a host of diagnostic services. (R. pp. 133-135; *See generally* Gibbs Aff., Levitt Aff.). In addition, only hospitals treat the general population. Hospitals treat infirm, ill and injured patients. Nursing homes, Group Care Homes and hospices only treat their patients. Thus, the statutory definitions support the analogy of a hospice to a nursing home or Group Care Center as opposed to a hospital.

Accordingly, the Zoning Board's factual finding is supported by the statutory definitions applicable to the various uses considered by the Zoning Board.

D. The Zoning Board's Decision that a Hospice is Similar to a Nursing Home is Supported by Definitions from Other Jurisdictions.

Other governmental bodies, including the federal government, have defined hospice care in a manner similar to the definition utilized by South Carolina. The federal government defines "hospice care" as "a comprehensive set of services described in 1861(dd)(1) of the [Social Security] Act, identified and coordinated by an interdisciplinary group to provide for the physical, psychosocial, spiritual, and emotional needs of a terminally ill patient and/or family members, as delineated in a specific patient plan of care." 48 C.F.R. § 481.3. The State of Georgia defines "Hospice" as:

... a public agency or private organization or unit of either
providing to persons terminally ill and to their families . . .

care are performed under the direction of persons currently licensed to
practice medicine and surgery in the state of S.C.

Chronic Hospital:...a facility which has an organized medical staff and
provides skilled nursing and other services in facilities designed and
equipped for diagnosis and treatment over a period exceeding 24 hours
of two or more nonrelated persons who have chronic diseases. This
includes a minimum, diagnostic, x-ray services, minor surgery, clinical
laboratory and rehabilitation services if the licensee does not already
operate these services in a physically attached facility.

a centrally administered and autonomous continuum of palliative and supportive care, directed and coordinated by the hospice care team primarily in the patient's home but also on an outpatient and short-term inpatient basis and which is classified as hospice by the department. In addition, such public agency or private organization or unit of either may also provide palliative care to persons with advanced and progressive diseases and to their families, directed and coordinated by the hospice care team.

O.C.G.A. 31-7-172(5). Both of these definitions accord with South Carolina's definition of hospice and focus on providing interdisciplinary care for the terminally ill and his or her family members.

Various dictionaries also provide definitions for "hospice" which accord with South Carolina's definition of hospice care. Merriam-Webster defines hospice as "a facility or program designed to provide a caring environment for meeting the physical and emotional needs of the terminally ill." See <<http://www.merriam-webster.com/dictionary/hospice>>. Oxford Dictionaries defines hospice as "a home providing care for the sick, especially the terminally ill." <http://oxforddictionaries.com/us/definition/american_english/hospice>. Cambridge Dictionary defines hospice as "a place or an organization that provides care for people who are dying." <<http://dictionary.cambridge.org/us/dictionary/american-english/hospice?q=hospice>>. American Heritage Dictionary defines hospice as "a program that provides palliative care and attends to the emotional and spiritual needs of terminally ill patients at an inpatient facility or at the patient's home." <http://www.ahdictionary.com/word/search.html?q=hospice>.

Significantly, none of these dictionaries define "hospice" by reference to a "hospital." Instead, almost universally, the dictionary definitions focus on the provision

of care for the emotional and physical needs of the terminally ill.

E. The South Carolina Department of Health and Environmental Control Determined that the Zoning of the Hospice was Appropriate

Mercy Hospice presented evidence establishing that DHEC determined that the CFA zone is appropriate for Mercy Hospice. (R. p. 133, ¶ 6). Mercy Hospice introduced an affidavit from Dennis L. Gibbs, the Bureau Chief for the Bureau of Health Facilities Regulation at DHEC. *Id.* Mr. Gibbs is familiar with the licensing standards for hospice facilities, nursing homes and hospitals. *Id.* As part of the review of Mercy Hospice's application for a Certificate of Need, DHEC was required to make a determination that Horry County's zoning was appropriate for the facility. (R. p. 133, ¶6) S.C. Code Ann. Reg. 61-15 § 802(26). In issuing the Certificate of Need, DHEC must make a finding that the proposed site complies with the local zoning regulations. *Id.* Accordingly, in issuing the Certificate of Need, DHEC determined that the CFA zone is appropriate for Mercy Hospice. (R. p. 183; *See* Certificate of Need, dated March 23, 2012, stating "This Certificate is being issued in accordance with the Code of Laws of South Carolina").

Further, the regulatory and statutory scheme adopted by South Carolina is further evidence that South Carolina considers a hospice a distinct medical facility from a hospital. DHEC licenses, regulates and oversees the design and construction of medical facilities. "Each type of medical facility that DHEC licenses and regulates in [South Carolina] (that must apply for a Certificate of Need) has its own specific rules and regulations." (R. p. 140). Regulation Number 61-78 Standards for Licensing Hospices" is issued by DHEC specifically for hospice licensure. Conversely, hospitals must be licensed according to Regulation Number 61-66. Mercy Hospice applied for and obtained a Certificate of Need pursuant to the former regulation – Regulation 61-78 – for

hospice licensure. (R. p. 183).

In sum, South Carolina adopted a regulatory scheme that provides for the licensing of hospices as distinct from hospitals. DHEC issued a license for Mercy Hospice pursuant to this statutory scheme confirming that Mercy Hospice is indeed a hospice. (R. p. 133).

F. The Lower Court Erroneously Failed to Consider the Evidence That The North American Industry Classification System Classifies Hospices as a Nursing Facilities

It is unrefuted in the record that the North American Industry Classification System (NAICS) considers a “hospice” a “nursing care facility.” (R. p. 147). The NAICS⁵, which was developed under the auspices of the Office of Management and Budget to classify business establishments, classifies a hospice as a nursing care facility (“[s]killed nursing facilities”). Nursing care facilities are classified as NAICS code 623110. <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=623110&search=2012> NAICS Search. The hospice facilities code is also 623110. *Id.* The NAICS code description for nursing care facilities, also known as skilled nursing facilities, is as follows:

This industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed nurses who, along with other staff, provide nursing

⁵ NAICS “was developed as the standard for use by Federal statistical agencies in classifying business establishments for the collection, tabulation, presentation, and analysis of statistical data describing the U.S. economy. Use of the standard provides uniformity and comparability in the presentation of these statistical data. NAICS is based on a production-oriented concept, meaning that it groups establishments into industries according to similarity in the processes used to produce goods or services....” <http://www.census.gov/eos/www/naics/faqs/faqs.html#q1>

and continuous personal care services.

(R. p. 147).

Significantly, NAICS specifically includes “inpatient care hospices” as an illustrative example of a nursing care facility. (R. p. 147). Also of significance, the NAICS codes for General Medical and Surgical Hospitals (622110), Psychiatric and Substance Abuse Hospitals (622210) do not reference hospice at all. Thus, utilizing these codes, federal statistical agencies classify inpatient hospices as nursing homes as opposed to hospitals. Accordingly, the evidence establishes that the NAICS considers hospices to be part of a separate industry from hospitals.

II. BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE ZONING BOARD, THE COURT FAILED TO TREAT THE ZONING BOARD’S DECISION AS A FINDING OF FACT BY A JURY

“The findings of fact by the board of [zoning] appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.” *Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 62, 737 S.E.2d 863, 866 (S.C. App. 2013) citing S.C. Code Ann. §6-29-840(A) (Supp. 2012). “In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing.” S.C. Code Ann. §6-29-840(A) (Supp. 2012). *Id.*

In this case, the lower court improperly disregarded the findings of fact by the Zoning Board and considered additional evidence not before it in violation of the S.C. Code Ann. §6-29-840(A) (Supp. 2012). The lower court improperly determined that whether a hospice is a permitted use is an issue of law as opposed to an issue of fact. As stated above, whether a given use is permitted is a question of fact.

The lower court improperly considered evidence that was not within the record and that was contrary to the clear record evidence. In its Order, the lower court detailed its opportunity to view the proposed hospice site with counsel, as a result of the Court's request. Based upon its viewing of the proposed site, the lower court stated as follows, in its Order:

...the Court would be remiss in failing to comment that while there seems to be an economic development push by County authorities to support the building of this hospice facility, the chosen location is not a good one, completely inconsistent with the current use of that location, which while zoned CFA, is clearly a residential neighborhood. More importantly, the proposed facility's lack direct access to Highway 90 is a significant impediment to the function of the proposed facility. The brick entrance columns and roads within the Wildhorse subdivision are narrow, and there is no plan or consensus to alter them. Lack of Highway 90 access is a substantial infrastructure deficiency that creates a tremendous logistical problem for emergency responders. This is particularly true where multiple infirm residents are intended to live communally, and where the passage of seconds may make the difference in savings lives and property.⁶

(R. pp. 12-17).

Each of the factual findings cited in the above passage from the Order are improper and not supported by the record as demonstrated below:

Court Finding: The Court found that there was an economic development push by Horry County authorities to support the building of Mercy Hospice. (R. pp. 12-17).

Record Evidence: There is no evidence in the record that Horry County is advocating for the building of a hospice. The Horry County Council passed a

⁶ Although the lower court cautioned that these "facts" were technically not an issue on appeal, the lower court's discussion indicates that several improper factual findings were made which likely impacted the Court's review of the record.

resolution in support of the hospice stating that “Horry County Council believes that the project will have no adverse impact on any other facilities and hereby states its support for this project” Horry County Council Resolution, dated September 21, 2010. (R. pp. 190-191). In a “whereas clause,” the resolution references that the wages of the “majority of the staff should be well above the average salaries for both Horry and Marion counties” (R. pp. 190-191). Representative Alan D. Clemmons submitted a letter of support of the project stating that the proposed project would “provide some employment to an area that is in need of jobs.” (R. p. 192). The Horry County Council resolution and letter from Rep. Clemmons merely support the building of the hospice, but cannot be considered an “economic development push.”

Court Finding: The proposed location for Mercy Hospice is a residential neighborhood despite being zoned CFA. (R. pp. 12-17).

Record Evidence: There is no evidence in the record that the neighborhood is a “residential neighborhood.” The neighborhood is a mixed use neighborhood, zoned CFA and the proposed hospice sits on 22 acres of wooded land in a rural setting in that zoning district. (R. pp. 56-60; pg. 204, lines 6-8; p. 268, lines 15-17). CFA Zoning Regulations permit the building of, *inter alia*, railroad depots, motor vehicle service stations, airfields, and office buildings in the district. (R. pp. 328-335).

Court Finding: Mercy Hospice’s proposed location, which lacks direct access to Highway 90 is a substantial infrastructure deficiency that creates a tremendous logistical problem for emergency responders. (R. pp. 12-17).

Record Evidence: The record evidence directly contradicts this statement. Interim Fire Chief Kenneth M. Beans of Horry County Fire Rescue Department stated that there was “no issue with apparatus access or water supply at the Wild Horse subdivision.” Chief Beans referred to the email of Battalion Chief Kenny Todd of Horry County Fire Rescue Department. Chief Todd holds Fire Marshal certification in the state of South Carolina and noted there are “no fire department access issues on the main roadway into Wild Horse subdivision.” (R. pp. 155-156).

Court Finding: Lack of Highway 90 access creates logistical issues for emergency responders where multiple infirm residents are intended to live communally and “where the passage of seconds may make the difference in saving lives.” (R. pp. 12-17).

Record Evidence: As noted directly above, there is no evidence of a logistical problem for emergency responders.

Despite the lower court’s attempt to frame these issues as “not on appeal,” the recitation of these facts, even in *dicta*, demonstrate that the lower court substituted its own judgment for the Zoning Board. Further, the lower court specifically based its Decision⁷ upon its review of the Property in a manner that completely disregarded the factual record and the proper standard of review. The lower court clearly disagreed with the decision made by the Zoning Board; the lower court’s substitution of its own findings of fact is inappropriate and conflicts with the record evidence as to the ability of emergency responders as set forth in the correspondence of the Horry County Fire Department (R. pp. 155-156). Moreover, to the extent that the Court determined that the record before it was insufficiently incomplete, the Court’s only permissible recourse was

⁷ See Footnote 1, *infra*.

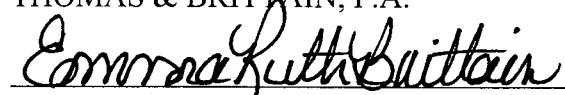
to remand for further review. Having failed to apply the appropriate standard of review, the lower court's decision should be reversed and the decision of the Horry County Zoning Board of Appeal's affirmed.

CONCLUSION

For all of the foregoing reasons, Horry County Zoning Board of Appeals respectfully requests that the Court reverse the lower court's decision and reinstate the decision of the Horry County Zoning Board of Appeals.

Respectfully submitted,

THOMAS & BRITTAIN, P.A.

A handwritten signature in black ink, reading "Emma Ruth Brittain", written over a horizontal line.

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January 16, 2014

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Civil Action No.: 2012-CP-26-09291

Fayrell Furr and Karole Jensen..... Respondents

vs.

Horry County Zoning Board of Appeals Appellant

PROOF OF SERVICE

I certify that I have served the Brief of Appellant Horry County Zoning Board of Appeals by depositing a copy of it in the United States mail, postage prepaid, on January 16, 2014, addressed to the attorneys of record:

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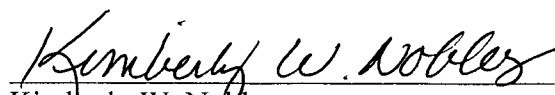
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