

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

REPLY BRIEF OF APPELLANT

Emma Ruth Brittain, Esquire
Thomas & Brittain, P.A.
Post Office Box 1290
Myrtle Beach, South Carolina 29578
(843) 692-2628
ATTORNEYS FOR APPELLANT,
HORRY COUNTY ZONING BOARD OF
APPEALS

RECEIVED

JAN 21 2014

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. DID THE LOWER COURT ERR IN DETERMINING THAT WHETHER A HOSPICE WAS A PERMITTED USE IN THE CFA DISTRICT WAS A MATTER OF LAW?.....	1
II. DOES RESPONDENTS' ARGUMENT IGNORE THE EXTENSIVE FACTUAL RECORD, WHICH DEMONSTRATES THAT THE ZONING BOARD PROPERLY DETERMINED THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT?.....	2
A. A Hospital is Not a Hospice	2
B. Hospices and Hospitals are Subject to Different Licensing Standards.....	3
C. The Fact that a Doctor's Authorization is Required for Admission to a Hospice Does Not Transform a Hospice into a Hospital.....	4
D. The Hospice is Not Required to Be Located in Inpatient Medical Services District.....	5
E. A Hospice is Not a Noxious Use of the Property	6
F. The Proposed Hospice is to be Built in an Area Zoned Commercial Forest Agriculture, Which Includes Many Allowed Nonresidential Uses.....	7
G. The Zoning Board is Vested with the Authority by the State of South Carolina and Horry County to Make Factual Determinations Regarding the Instant Matter	8
H. The South Carolina Code's Statutory Definition of Hospice is the Relevant Definition Applicable to the Instant Action	10

CONCLUSION.....	16
-----------------	----

TABLE OF AUTHORITIES

CASES

<i>Collis v. Zoning Hearing Bd of the City of Wilkes-Barre</i> , 465 A.2d 53 (Pa. Cmwlth. 1983).....	12, 13
<i>Diversified Health Assocs, Inc. v Zoning Hearing Bd. of the Borough of Norristown</i> , 781 A.2d 244 (Pa. Cmwlth. 2001)	15
<i>Frax Realty Co., Inc. v. Kleinert</i> , 123 Misc. 455 (Kings Sup. Ct. Special Term 1924).....	14, 15
<i>Friedlander v. Zoning Hearing Board of Sayer Borough</i> , 546 A.2d 755 (Pa. Cmwlth. 1988).....	14
<i>Heilker v. Zoning Bd. Of Appeals for City of Beaufort</i> , 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001)	16
<i>Hispanic Counseling Ctr., Inc. v. Incorp. Vill. of Hempstead</i> , 237 F.Supp. 2d 284, (EDNY 2002).....	15
<i>Manor Healthcare Corp. v. Lower Moreland Township Zoning Bd.</i> , 139 Pa. Cmwlth 206 (Pa. Cmwlth 1991).....	16
<i>Marino v. Town of Smithtown</i> , 61 A.D.3d 761, 877, N.Y.S.2d 183 (2d Dep’t 2009).....	12
<i>Mayor and Council of Wilmington v. Turk</i> , 129 A. 512 (Del.Ch. 1925).....	15
<i>Mercy Hospital v. Bd. of Zoning Appeals of the Town of Hempstead</i> , 511 N.Y.S.2d 886, 887 (2d Dep’t. 1987)	14
<i>People of the City of Mount Vernon ex rel Anthony C. D’Iorio v. Alfa Realty Co.</i> , 330 N.Y.S.2d 403 (N.Y.City Ct. 1972)	15
<i>Scerbo v. Board of Adjustment of the City of Orange</i> , 121 N.J. Super 378, (N.J.Super.L. 1972)	12, 13
<i>State of Washington v. Snohomish County Bd. of Adjustment</i> , 512 P.2d 1114 (Wash. App. Div. 1 1973).....	14

STATUTES

S.C. Code Ann. § 4-9-10 <i>et. seq.</i>	11
S.C. Code Ann. §§ 44-71-10 <i>et. seq.</i>	3
S.C. Code Ann. § 6-29-800	10
S.C. Code Ann § 6-29-840	10

ORDINANCES

Horry County Code of Ordinances § 1-2	10
Horry County Code of Ordinances Art. VII § 703	5, 6
Horry County Code of Ordinances Art. VII § 709	5, 6
Horry County Code of Ordinances Art. VII § 713	5, 6
Horry County Code of Ordinances Art. VII § 716	5, 6
Horry County Code of Ordinances Art. VII § 724(d)	5, 6
Horry County Code of Ordinances Art. VII § 740	5
Horry County Code of Ordinances Art. VII § 741	5, 6
Horry County Code of Ordinances Art. XIV	9
Horry County Code of Ordinances Art. XIV § 1404	10

OTHER SOURCES

Regulation Number 61-78 Standards for Licensing Hospices	3
Regulation Number 61-16 Minimum Standards for Licensing Hospitals and General Infirmaries	4

STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN DETERMINING THAT WHETHER A HOSPICE WAS A PERMITTED USE IN THE CFA DISTRICT WAS A MATTER OF LAW?
- II. DOES RESPONDENTS' ARGUMENT IGNORE THE EXTENSIVE FACTUAL RECORD, WHICH DEMONSTRATES THAT THE ZONING BOARD PROPERLY DETERMINED THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT?

ARGUMENT

The Appellant Horry County Zoning Board of Appeals (the “Zoning Board”) hereby replies to the brief of the Respondents Fayrell Furr and Karole Jensen (the “Respondents”).

I. THE LOWER COURT ERRED IN DETERMINING THAT WHETHER A HOSPICE WAS A PERMITTED USE IN THE CFA DISTRICT WAS A MATTER OF LAW

Based upon extensive evidence, the Horry County Zoning Board of Appeals (the “Zoning Board”) determined that a hospice is a permitted use in the Commercial Forest Agriculture District (the “CFA District”). The Zoning Board’s determination is a finding of fact that is entitled to be treated in the same manner as a finding of fact by a jury. The lower court erred by not deferring to the Zoning Board’s finding of fact. Respondents argue that the lower court’s Order¹ should be affirmed because the question before the Zoning Board was a “question of law and not a factual matter.” Respondents, however, argue only in conclusory terms that the Zoning Board’s determination was erroneous as a matter of law and fail to cite any binding legal authority for that principal. Instead, Respondents cite a bevy of cases from other jurisdictions without explaining the relevance of these cases to the instant appeal. Perhaps recognizing the dearth of supporting caselaw for its position and in an apparent concession that whether a hospice is a permitted use in the CFA District is a matter of fact, Respondents utilize the vast majority of their brief to extensively argue the facts of this matter. Respondents, however, rarely cite the record for the broad generalizations of fact contained within their brief. Significantly, this is not a case where Respondents merely omitted to cite the

¹ All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them as in the Initial Brief.

record to support their factual statements. Instead, Respondents are unable to cite the record for their “facts” because the record simply does not contain evidentiary support for Respondents alleged “facts.” Accordingly, the Court should reverse the lower court and reinstate the decision of the Zoning Board.

II. RESPONDENTS’ ARGUMENT IGNORES THE EXTENSIVE FACTUAL RECORD, WHICH DEMONSTRATES THAT THE ZONING BOARD PROPERLY DETERMINED THAT A HOSPICE IS A PERMITTED USE IN THE CFA DISTRICT.

A. A Hospital is Not a Hospice

Although throughout their brief, Respondents consistently equate hospices and hospitals, there is no evidence that hospices and hospitals are one and the same. Respondents cite to a single physician’s testimony to support the proposition that the testimony supports a finding that a hospice is a hospital. Citing the testimony of Preston Strosnider, M.D., Respondents argue the hospice is a hospital. Significantly, however, Dr. Strosnider testified to the opposite conclusion. Dr. Strosnider was specifically questioned by the Zoning Board as to whether a hospice is a nursing home or a hospital. He unequivocally responded:

It’s definitely not a hospital.

(R. 237, line 18; (emphasis added).

Moreover, extensive evidence was considered by the Zoning Board. The transcript of the testimony before the Zoning Board spanned seventy pages. Over one hundred and fifty exhibits were presented to the Zoning Board regarding the zoning of the proposed hospice. Despite the vast evidence presented to the Zoning Board, Respondents are unable to cite a single piece of evidence to support their theory that a hospice is a hospital. The reason they are unable to do so is simple – a hospice is not a

hospital. *See* Initial Brief, pg. 12 – 24.

Just as Respondents are unable to point to any evidence that would allow a finding that a hospice is a hospital, Respondents are unable to point to any evidence to support their statement that treatment at a hospice is similar to treatment that occurs at a hospital. In fact, the overwhelming majority of the testimony before the Zoning Board establishes that the purpose of and care provided at a hospice is of a markedly different nature than that of the treatment and care provided at a hospital. (Initial Brief, pg. 12-13). The evidence speaks for itself: a hospice is not a hospital and the treatments provided at hospices and hospitals are distinct.

B. Hospices and Hospitals are Subject to Different Licensing Standards

In arguing that a hospice is a hospital, Respondents ignore the relevant regulations and fail to recognize the nature and content of the applicable statutes. For instance, Respondents argue that the decision was legal error “in light of the South Carolina law regarding licensure of hospitals and the Hospice Licensure Act.” Respondents direct the Court to the regulation regarding licensing of hospitals to further their argument that a hospice is a “form of hospital.” (Respondents Brief, pg. 5, fn. 5.) Pursuant to the promulgated regulations in South Carolina for hospices and hospitals, however, the licensing standards for hospices and the licensing standards for hospitals are separate and distinct.

Regulation Number 61-78, Standards for Licensing Hospices, promulgated by the South Carolina Board of Health and Environmental Control (“DHEC”), governs the standards for licensing hospices. The Standards for Licensing Hospices is promulgated pursuant to South Carolina Code Ann. 44-71-10 *et. seq.* (the “Hospice Licensure Act”).

Regulation Number 61-16 Minimum Standards for Licensing Hospitals and General Infirmaries, promulgated by DHEC, governs the standards for licensing hospitals. Pursuant to these regulations, an individual or entity intending to operate a hospice is guided exclusively by the Hospice Licensure Act and Standards for Licensing Hospices; significantly, an entity or individual intending to operate a hospital must consult the more comprehensive Minimum Standards for Licensing Hospitals and General Infirmaries. Respondents' attempt to combine these separate regulations is as transparent as their attempt to combine hospices and hospitals. Respondents' argument that a hospice is a hospital must fail because the governing licensing standards do not support Respondents' position.

C. The Fact that a Doctor's Authorization is Required for Admission to a Hospice Does Not Transform a Hospice into a Hospital

In yet another effort to transform a hospice into a hospital, Respondents contend that a hospice is a hospital based on the fact that a physician's orders are required to be admitted to a hospice. Physician's orders, however, are required for many things that may occur outside of the premises of a hospital. For example, a physician's orders may be required: (i) for laboratory tests such as magnetic resonance imaging, blood work or a sleep studies, (ii) for treatment of various medical conditions utilizing therapies such as chemotherapy and dialysis, (iii) to obtain a prescription medication from a pharmacy, or (iv) to see a specialist in a certain medical area. The presence of a doctor's prescription, referral or "order" for tests, procedures, treatments or medication does not transform a laboratory or other medical facility where patients are seen by medical personnel into a hospital. The nature of the practice of medicine involves many discrete events that require an order or prescription or authorization; however, the requirement of a

physician's "order" clearly does not transform all facilities that require doctor authorization into hospitals. Accordingly, Respondents' position that the factual requirement of a doctor's order for admission to a hospice transfers a hospice facility into a hospital is without merit.

D. The Hospice is Not Required to Be Located in Inpatient Medical Services District

Contrary to Respondents' argument, the Horry County Code of Ordinances does not require a hospice (or any medical facility for that matter) to be located in an area zoned as inpatient medical services district. *See* Horry County Code of Ordinances Art. VII § 740. The inpatient medical services district "is intended to provide opportunities to locate and develop businesses providing services that meet general medical needs (inpatient and outpatient) of the public." *Id.* No language in the Horry County Code of Ordinances limits any and all medical facilities to this zoning district. Indeed, there is no language that restricts all medical facilities to the inpatient medical services district and/or outpatient medical services district. *Id.* §§ 740, 741. If the intent of the zoning scheme was to limit all medical facilities to the medical services districts, the drafters could have so limited the location of medical facilities.

Rather, the zoning scheme specifically allows hospitals, medical offices and nursing homes as permitted uses in several zoning districts other than the medical services districts. Medical clinics or office may be located in areas zoned Office/Professional institutional (713), Highway Commercial District (716), Commercial Educational Institution Office (724(d)), or Traditional Neighborhood. *Id.* §§ 713, 716, 724(d). Nursing homes may be located in districts zoned Commercial Forest Agriculture (703), General Residential (709), Office/Professional Institutional (713) or Commercial

Educational Institution Office (724(d)). *Id.* §§ 703, 709, 713, 724(d). Hospitals may be located in areas zoned Office Professional Institutional (713), Highway Commercial District (716), and Commercial Educational Institutional District (724(d)). *Id.* §§ 713, 716, 724(d). Respondents' argument that the proposed hospice can only be located in the medical services district is not supported by the Horry County Code of Ordinances, which clearly provides that a medical use may be permissible in any of several districts, including the CFA District where the proposed hospice is intended to be built.

E. A Hospice is Not a Noxious Use of the Property

There is no record support for Respondents' statement that a hospice would be a noxious use of the Property. Horry County's Zoning Code specifically provides that certain types of uses are considered noxious. These include "halfway houses, residential treatment centers, outpatient clinics for the treatment of drug and alcohol addiction and other facilities of similar nature." Horry County Code of Ordinances § 741. "These uses can have substantial negative impacts on adjacent developments and are often considered noxious uses." *Id.* There is simply no evidence in the record that a hospice is similar in type to the uses listed in § 741 or that a hospice would have substantial negative impacts on adjacent developments. Respondents suggest – without citation to any factual record evidence – that the effects would include "traffic at all hours of the night, ambulances rushing by, funeral cars parked outside and people walking around outside grieving their friends and relatives." The evidence adduced before the Zoning Board directly contrasts with Respondents' bare unsupported statements.

Mary Jo Faucher, the Mercy Hospice and Palliative Care Executive Director, testified that "patients would be received by private car or by ambulance in non-

emergency transport. There will be no lights or sirens for transport of patients...They don't leave [in emergency transport either]." (R. p. 228, line 15 – p. 229, line 5). Ms. Faucher's testimony is supported by Dennis L. Gibbs, the Bureau Chief for the Bureaus of Health Facilities Regulation at DHEC. The uncontradicted testimony of Bureau Chief Gibbs is that patients typically are transferred to "hospice via private vehicle or via non-emergency medical ground transportation." (R. p. 133, ¶3). Bureau Chief Gibbs further testified that if a patient is transported to hospice by an ambulance, the ambulance does not use sirens or lights during the transport. *Id.*

Mercy Hospice also submitted evidence regarding the anticipated traffic and accessibility for emergency services. Solan Associates, P.C., an engineering, planning and land surveying firm, opined that the Mercy Hospice facility would generate an additional 34 trips in the neighborhood per day. (R. p. 145-146). Notably, this minimal increase in traffic is less than would be generated if the property owned by Mercy Hospice was used to accommodate 24 one-half acre residential lots (another permitted use in the Zoning District). By contrast, it was opined that the accommodation of 24 residential lots would generate 230 trips per day, a significant traffic increase *Id.* Accordingly, Solan Associates, P.C.'s un rebutted finding is 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. *Id.* The record evidence provides no support for Respondents' factual contention that the hospice is a noxious use of the Property.

F. The Proposed Hospice is to Be Built in an Area Zoned Commercial Forest Agriculture, Which Includes Many Allowed Nonresidential Uses

Respondents' consistent referral to the Property at issue as "residential" fails to accurately portray the nature of current and future allowed uses of the Property. The area

is zoned Commercial Forest Agriculture; however no record evidence supports a classification of the Property as merely “residential.” Among the permitted uses specifically allowed in the CFA District are: cemeteries, animal hospitals, office buildings, banks, mobile homes, railroad depots, restaurants, small equipment repair establishments, and retail stores – including grocery stores, pharmacies and ABC stores. (R. pp. 328-335). Conditional uses allowed by the Zoning Code in the CFA District include utility substations, airfields, transmission towers, hardware stores, motor vehicle stations, garages for the repair of motor vehicles, convenience stores, and trade shops. *Id.*

As demonstrated by the list of permissible and conditional uses in this zoning district, the area of the proposed hospice site is not an exclusively residential area, but an area in which many commercial and agricultural uses are allowed, including uses that involve more noise and traffic than a hospice. Respondents’ preference that the area be residential is immaterial. It is undisputed that the area is currently zoned for commercial uses. If Respondents wish to change the zoning code and the zoning of their area, their avenue of change under these circumstances is through the legislative body responsible for its enactment – the Horry County Council. Respondents’ efforts to amend the CFA District through litigation should be denied.

G. The Zoning Board is Vested with the Authority by the State of South Carolina and Horry County to Make Factual Determinations Regarding the Instant Matter

Respondents argue that whether a hospice is a permitted use is a matter of law because the Zoning Boards normally considers “issues such as whether a variance should be granted for a few feet or whether a person had built in a setback area.” (Respondents Brief, pg. 5). Respondents argue that the only “fact” issues that can be decided are “issues of credibility, believability of witnesses and other factual disputes about setbacks

including variances.” (Respondents Brief, pg. 16). Respondents fail to cite legal authority for those propositions nor can they, because the Zoning Board’s duties are not so limited and the Board is empowered to make factual determinations such as in the instant matter. The Horry County Code of Ordinances provides for the broad vestment of power in the Zoning Board. *See, generally*, Horry County Code of Ordinances Art. XIV.

The Horry County Code of Ordinances provide the Zoning Board with broad powers and duties including the following:

- (A) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination by the Zoning Administrator in the enforcement of this act.
- (B) To hear and decide appeals for variance from the requirements of the Zoning Ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes [certain enumerated findings]:...
- (C) In granting a variance, the Board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area, or to promote the public health, safety, general welfare
- (D) To hear and decide special exceptions. In addition to definitive standards in this article, the Board of Zoning Appeals shall consider [enumerated criteria]....
- (E) In granting a special exception, the Board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the Board may consider advisable to protect established property values in the surrounding area, or to promote the public health, safety, or general welfare.

- (F) To decide on other matters where a decision of the Board of Appeals may be specifically required by the provisions of this ordinance.

Accord S.C. Code Ann. § 6-29-800.

As is readily apparent from the language of the Code of Ordinances, the Zoning Board's authority is not limited to making simple decisions about measurements as Respondents argue. Rather, the Code of Ordinances, coupled with South Carolina statutory and case law, provide that the Zoning Board is an administrative body empowered by the State and County to decide issues related to the County's zoning. Significantly, the Board's factual determinations are entitled to judicial deference. *See e.g., Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 215-216, 516 S.E.2d 442, 446 (S.C. 1999); S.C. Code Ann § 6-29-840.

Respondents' argument for narrow interpretation of the Zoning Board's duties and power would render the Zoning Board functionally powerless, resulting in an increase in challenges to zoning board decisions. Because the Zoning Board acted within the scope of its statutorily defined role in upholding the factual determination of the Zoning Administrator that a hospice was a permitted use within the CFA District the lower court's decision in this matter should be reversed.

H. The South Carolina Code's Statutory Definition of Hospice is the Relevant Definition Applicable to the Instant Action

(i) The Zoning Code and South Carolina Code Provide the Controlling Definitions of Hospice and Hospital

The Horry County Zoning Code endorses reference to the South Carolina statutes to provide meaning for terms not otherwise defined in the Zoning Code. *See* Horry County Code of Ordinances § 1-2. Both "hospice" and "hospice facility" are defined in the South Carolina Code. (See Initial Brief pg. 18). Similarly, the South Carolina Code

defines “hospital.” *Id.* at pg. 20. The definitions of hospice, hospice facility and hospital contained in the South Carolina statutes are the controlling definitions for purposes of this matter. Accordingly, the Zoning Board (and the lower court) appropriately considered these definitions – as Respondents concede in their brief. (See Respondents Brief, pg. 7.)

Respondents, however, are not content to utilize the definitions that are required by statute to be used by the Zoning Board. Instead, Respondents refer this Court to a definition of hospital utilized by Charleston Zoning and Land Development Regulations. The definition of “hospital” contained in the Charleston Zoning and Land Development Regulations is simply immaterial to the instant action. Charleston’s zoning code is of no jurisdictional authority in Horry County; pursuant to Home Rule, this authority is vested in Horry County Council. See S.C. Ann. § 4-9-10 *et seq.* Moreover, the Charleston Code was neither entered into the record evidence nor otherwise made a part of Respondent’s submission to the Zoning Board. Charleston’s definition of hospital is clearly irrelevant to the instant analysis because, pursuant to the terms of Horry County’s Zoning Code, South Carolina statutes provide the relevant definitions of hospital, hospice and hospice facility.

**(ii) Respondents’ Citation to Case Law From Other Jurisdictions
is Neither Relevant to the Instant Action Nor in Accord with
the Lower Court’s Ruling**

While Respondents spend considerable effort listing cases from other jurisdictions as supportive of their position, these cases are cited in cursory fashion by way of a parenthetical as to alleged relevance. While the citation of such cases provides examples of different definitions of hospitals and how other zoning authorities have interpreted their respective zoning codes, they are, for the most part, not of precedential value herein.

The issues before this Court are whether a hospice is a permitted use in the CFA district under the specific provisions of the Horry County Zoning Code and whether the lower court erred in overruling the Zoning Board's finding of fact that a hospice is an allowed use in the CFA District as such District is defined in the Horry County Ordinance.

The decisions cited by Respondents from other jurisdictions are not instructive in the analysis before this Court. (Respondents Brief pg. 12-15). As a general matter, the cases from the other jurisdictions reference zoning codes that are neither before this Court nor included in the record or otherwise provided. Moreover, these decisions are not binding precedent on this Court. Finally, while some of the cases actually appear to support Appellant's position in this matter, the others are readily distinguishable from the instant case.

As an initial matter, Respondents have cited several cases that in fact support Appellant's position in certain aspects. See e.g., *Marino v. Town of Smithtown*, 61 A.D.3d 761, 877, N.Y.S.2d 183 (2d Dep't 2009), *Collis v. Zoning Hearing Bd. of the City of Wilkes-Barre*, 465 A.2d 53 (Pa. Cmwlth.1983), and *Scerbo v. Board of Adjustment of the City of Orange*, 121 N.J. Super. 378 (N.J.Super.L. 1972). In *Marino v. Town of Smithtown*, 61 A.D.3d 761, 877, N.Y.S.2d 183 (2d Dep't 2009), the appellate court held that the trial court "improperly substituted its judgment for that of the Zoning Board." *Id.* The Zoning Board had rationally concluded under the applicable zoning code that an animal hospice had been maintained in violation of a zoning ordinance and the animal hospice did not constitute a "customary accessory use of the premises or a lawful preexisting use" *Id.* In reversing the trial court's order, the appellate court noted that "[l]ocal zoning boards have broad discretion in considering applications for variances and

interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal or an abuse of discretion.” *Id.* Appellant contends the same deference should be accorded to its decision that the challenged hospice is an allowed use in the instant matter.

In *Scerbo v. Board of Adjustment of the City of Orange*, 121 N.J. Super. 378 (N.J. Super. L. 1972) the court determined that the zoning board had properly granted a special exception and variance to a narcotic and drug abuse rehabilitation and treatment center and that the board’s action was “not arbitrary, capricious or unreasonable or in manifest abuse of its discretionary authority.” *Id.* The Court stated that “public bodies because of their peculiar knowledge of local conditions must be allowed wide latitude in their delegated discretion ... [T]here is attached to a decision of the board a presumption of correctness, fairness and proper motive and the burden of providing otherwise is on the party attacking it.”

In *Collis v. Zoning Hearing Bd of the City of Wilkes-Barre*, 465 A.2d 53 (Pa. Cmwlth. 1983), the zoning board concluded that the intervenors, who sought to use premises previously used as a hospital to treat individuals suffering from mental illness, had requested a continuation of a non-conforming pre-existing use and approved the application. *Id.* The appellants in that case argued that the proposed facility was not a hospital but a separate use – treatment for the mentally disturbed. *Id.* The appellants urged the court to consider two statutory definitions that excluded mental health establishments from the definition of hospitals. *Id.* The court noted that its scope of review was limited to whether the zoning authorities abused their discretion or committed an error of law. *Id.* The court agreed with the zoning board, and construed the term

hospital to include facilities for the treatment of any illness, whether physical or mental. *Id.* See also *State of Washington v. Snohomish County Bd. of Adjustment*, 512 P.2d 1114 (Wash. App. Div. 1 1973) (affirming trial court and zoning board's finding that an alcoholic recovery-rehabilitation-intermediate care center was permitted in a rural use zone for hospitals, sanitariums, rest homes and institutions which provide care for those incapable of independent living and holding that the board had not acted arbitrarily in issuing conditional use permit); *Mercy Hospital v. Bd. of Zoning Appeals of the Town of Hempstead*, 511 N.Y. S.2d 886 (2d Dep't 1987) (noting that the zoning board failed to consider the appropriate statutory definition of hospital and thus finding that the board had acted arbitrarily and contrary to law).

Although the above-referenced cases cited by Respondents support Appellant's position in whole or in part, in general, many of the cited cases do not provide enough detail for this court to consider them of any persuasive value. First, some of the cases cited by Respondents do not enunciate the applicable standard of review, and, as such, do not provide a complete analysis of the issues at bar in the case. See *Frax Realty Co., Inc. v. Kleinert*, 123 Misc. 455 (Kings Sup Ct. Special Term 1924) (not enunciating a standard of review). Second, certain of the cases do not detail the applicable zoning code or the duties and powers of the board of appeals. See e.g., *Frax Realty*, 123 Misc. 455 (Kings Sup Ct. Special Term 1924) (not identifying who is charged with applying or interpreting the ordinance in the first instance, not detailing the zoning ordinance); *Friedlander v. Zoning Hearing Board of Sayer Borough*, 546 A.2d 755 (Pa.Cmwlth 1988) (holding that a hospital offices are part of a hospital, but not defining hospital in the applicable zoning code or otherwise).

Third, some of the actions appear to have been initiated in court without an appeal from a board of appeals. *See Frax Realty*, 123 Misc. 455 (Kings Sup Ct. Special Term 1924) (petition for peremptory mandamus order as opposed to an appeal). *People of the City of Mount Vernon ex rel Anthony C. D'Iorio v. Alfa Realty Co.*, 330 N.Y.S.2d 403 (N.Y. City Ct. 1972) (this case concerned a zoning law prosecution and held that defendants were guilty of operating a methadone treatment in violation of the city's zoning ordinance; the zoning ordinance was attacked in court by defendants as opposed to being challenged before a zoning board of appeals); *Mayor and Council of Wilmington v. Turk*, 129 A. 512 (Del.Ch. 1925) (the court heard an injunction bill to restrain defendant from violating a zoning ordinance and determined factual issues presented to court).

Fourth, at least one of the cases were not properly contested by the party so that the issue was not fully litigated. *Hispanic Counseling Ctr., Inc. v. Incorp. Vill. of Hempstead*, 237 F. Supp.2d 284 (E.D.N.Y. 2002) (defendants failed to present evidence at the preliminary injunction hearing and waived judicial review of the magistrate's decision by failing to timely object). Fifth, at least one case was primarily concerned with the intersection of the zoning ordinance and another body of law as opposed to the interpretation of the zoning ordinance in and of itself. *Hispanic Counseling Ctr., Inc. v. Incorp. Vill. of Hempstead*, 237 F. Supp.2d 284 (E.D.N.Y. 2002) (determining that sections of the zoning code violated the Americans with Disabilities Act).

Sixth, and finally, certain of the cases utilize a standard of review that does not apply in South Carolina. *Diversified Health Assocs, Inc. v Zoning Hearing Bd. of the Borough of Norristown*, 781 A.2d 244 (Pa. Cmwlth. 2001) (holding that "whether a

proposed use ... falls within a given categorization contained in the zoning regulations is a question of law”) (internal citations omitted); *Manor Healthcare Corp. v. Lower Moreland Township Zoning Bd.*, 139 Pa. Cmwlth 206 (Pa. Cmwlth 1991) (same). See *Heilker v. Zoning Bd. Of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) (a determination by a zoning board that a particular purpose or activity constitutes a use is a finding of fact). Accordingly, the cases Respondents cite from other jurisdictions are not of persuasive value and should be disregarded.

CONCLUSION

For the reasons set forth herein, the 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 in this matter.

Respectfully submitted,

THOMAS & BRITTAIN, P.A.



Emma Ruth Brittain

S.C. Bar No. 5298

Post Office Box 1290

Myrtle Beach, South Carolina 29578

Phone: 843-692-2628

E-mail: erbrittain@myrlaw.com

Attorneys for the Appellant

January 16, 2013

CERTIFICATE OF COUNSEL

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

January 16, 2014



Emma Ruth Brittain
Thomas & Brittain, P.A.
Post Office Box 1290
Myrtle Beach, South Carolina 29578
Attorneys for the Appellant

RECEIVED

JAN 21 2014

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 Reply 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:

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

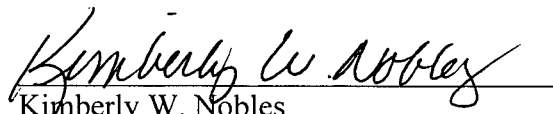
David C. Slough, Esquire
Nexsen Pruet, LLC
1101 Johnson Avenue, Suite 300
Myrtle Beach, South Carolina 29577

January 16, 2014

RECEIVED

JAN 21 2014

SC Court of Appeals


Kimberly W. Nobles
Thomas & Brittain, P.A.
Post Office Box 1290 (zip 29578)

1314 Professional Drive (zip 29577)
Myrtle Beach, South Carolina
Telephone: 843-692-2628
Fax: 843-692-0928