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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

JUL 19 2022

SC Court of Appeals

R. Markley Dennis, Circuit Court Judge

Case No. 2021-CP-1005255

Teresa Melhado and Dane Neller . . . . . Appellants.

v.

City of Charleston, City of Charleston Board of Zoning Appeals, George Wallace, Erika Wallace, and Erika R. Hayes, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016, . . . . . Respondents,

**PETITION TO CONFIRM AUTOMATIC STAY,  
OR IN THE ALTERNATIVE, FOR WRIT OF SUPERSEDEAS**

This is a zoning appeal, taken under the South Carolina Local Government Comprehensive Planning Act of 1994 (as amended in 1999), pursuant to S.C. Code Ann. § 6-29-850, of the Circuit Court’s order dated May 18, 2022 and subsequent order denying reconsideration dated June 15, 2022. The orders on appeal: (1) affirmed, in the Circuit Court’s appellate capacity, under S.C. Code Ann. § 6-29-820, a decision made by the City of Charleston Board of Zoning Appeals that granted an application for a variance and a special exception from the City’s zoning ordinances, allowing the Wallace Respondents to proceed with an otherwise unpermitted new construction project that adversely impacts Appellants, who live in an abutting L-shaped property to the side and to the rear; and (2) denied, as moot (in footnote 1 of the order), Appellants’ motion, pursuant to S.C. Code Ann. § 6-29-830(B), for supersedeas to stay matters affected by the appeal, which

was supported by an unopposed affidavit, the Affidavit of Teresa Melhado, detailing how the Wallace Respondents have been rushing ahead with their contested construction project that is the subject of this appeal, attempting to suddenly change the status quo that has existed for two centuries, and irreparably prejudicing Appellants. *See* Appendix.

This petition is directed to the issue of whether there should be a stay. That issue is not moot, as the Circuit Court ruled, twice. To the contrary, the purpose of a stay is to prevent the contested issues on appeal from becoming moot, and to preserve the status quo. *See* Rule 241 (c)(2), SCACR; *Graham v. Graham*, 390 S.E.2d 469, 470, 301 S.C. 128, 130 (Ct. App. 1990); *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161, 164 (1946). Appellants cited this law to the Circuit Court in their motion for a stay at the outset of the appeal, and again, later, in their motion for reconsideration, while the Circuit Court continued to retain jurisdiction over the appeal, without a stay in place. Curiously, the Circuit Court ultimately relied on federal case law in its order denying reconsideration, finding Appellants' motion for reconsideration unwarranted under a federal legal standard and federal practice. Our state case law, however, obligated Appellants to move for reconsideration, so as to preserve the issues wrongly decided and raised to but not addressed by the Circuit Court, for appeal to this Court. *See I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716 (2000).

Notwithstanding the Circuit Court's legal error in twice denying a stay, as moot, now that this appeal has been taken to this Court, there is an automatic stay, which should be confirmed by this Court to prevent the Wallace Respondents from expediting their construction and mooting the contested issue in this appeal. Our Supreme Court has given explicit instructions that it is a matter for this Court, not the Circuit Court, to confirm the existence of an automatic stay. *See State v. Cooper*, 536 S.E. 2d 870, 342 S.C. 389, 398 (2000) (citing *Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335, 337 (1985)).

This Court should accordingly confirm the existence of an automatic stay based on the following legal analysis. This appeal triggers an automatic stay under the general rule, Rule 241(a), SCACR, because none of the exceptions apply that are listed under Rule 241(b), SCACR, and the statute enabling this appeal to be taken to this Court, S.C. Code Ann. § 6-29-850, expressly states this Court's rules control this appeal, as follows: "A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal in the manner provided by the South Carolina Appellate Court Rules." Contrast this provision with the discretionary stay provision of S.C. Code Ann. § 6-29-830(B) that applied while this matter was under the jurisdiction of the Circuit Court, which expressly applies to the Circuit Court, only, as follows: "The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper." Thus, the general rule, Rule 241(a), SCACR, is controlling and this Court should confirm the existence of an automatic stay.

Alternatively, this Court should grant supersedeas and impose a stay, under Rule 241(d)(1), SCACR, given the extraordinary circumstances here, where the Circuit Court has legally erred, twice, in denying a stay, as moot. Appellants' unopposed affidavit of record, the Affidavit of Teresa Melhado – detailing how the Wallace Respondents have been rushing ahead with their contested construction project that is the subject of this appeal, attempting to suddenly change the status quo that has existed for two centuries, and irreparably prejudicing Appellants – supports a stay. The Wallace Respondents conceded these affirmed facts by not filing an opposing affidavit, and they advanced no argument in opposition other than the legally incorrect position that the issue of a stay was moot. Appellants will be meritorious in this appeal based on the issues raised in their briefs and preserved in their reconsideration motion below, which will be fully set forth in their opening brief and argued to this Court in accordance with the South Carolina Appellate Court

Rules.<sup>1</sup> In the meantime, Appellants should not lose the fruits of their meritorious appeal.

WHEREFORE, respectfully, this Court should confirm the existence of an automatic stay, or alternatively, grant a supersedeas staying all matters affected by this appeal.

/s/ Brian A. Hellman

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*Attorneys for Appellants*

Charleston, South Carolina  
July 14, 2022

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<sup>1</sup> Among other issues, Appellants raised a novel and important issue, of statewide consequence, in this post-COVID age. Misusing particular features of a new virtual hearing technology, the City of Charleston Board of Zoning Appeals deprived Appellants of a specific and fundamental right, provided for in the City's ordinance itself and duly protected as a constitutional matter, to object to new, unsubstantiated, improper, false, and misleading testimony and evidence offered by the Wallace Respondents during their reply, and later in a question and answer session with the Board, while Appellants were technologically gagged from raising their objections and correcting the confusion that manifested among the members of the Board. The Circuit Court twice avoided this issue in its order and denial of reconsideration, just as it twice found Appellants' motion for a stay moot, leaving it for this Court to decide.

VERIFICATION

Teresa Melhado and Dane Neller, being duly sworn, verify that they are the Petitioners herein, and have read the foregoing Petition to Confirm Automatic Stay, or in the Alternative, for Writ of Supersedeas, and know the contents thereof, and that the same is true to their own knowledge.

SWORN and Subscribed before me )  
this 14<sup>th</sup> day of July, 2022 )  
Notary Public For New York )  
My Commission Expires: 8/5/23 )

Teresa Smith Melhado  
Signature of Petitioner  
Dane Neller  
Signature of Petitioner

[Handwritten Signature]

KIMBERLYN DE JESUS  
NOTARY PUBLIC STATE OF NEW YORK  
NO. 01DE6394737  
Qualified in Suffolk County  
Term Expires August 05, 2023

PROOF OF SERVICE

I, Jason S. Smith, certify that the foregoing Petition to Confirm Automatic Stay, or In The Alternative, For Supersedeas was served on the following counsel of record by e-mail and U.S. Mail on this day, July 14, 2022:

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July 14, 2022

**Via E-Mail and U.S. Mail**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
PO Box 11629  
Columbia, South Carolina 29211  
ctappfilings@sccourts.org

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RE: Melhado v. City of Charleston

Dear Ms. Kitchings:

For filing with the Court, please find the enclosed: (1) Petition to Confirm Automatic Stay, or in the Alternative, for Writ of Supersedeas; (2) Verification; (3) Proof of Service; (4) Appendix to the Petition, including the orders on appeal and other documents; and (5) a copy of the Notice of Appeal and Proof of Service. The motion fee of \$50 is being paid by check, sent by U.S. Mail.

With kindest regards, I am

Sincerely yours,



Jason Smith

Encls.

cc:

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