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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Marion County
Court of Common Pleas

The Honorable H. Steven DeBerry, IV, Circuit Court Judge 2771

Appellate Case No. 2024-000868
Civil Action No. 2023-CP-33-00500

Thomas Betancourt, Nicole Betancourt, Jimmy Boatwright, Arnie Boatwright, Norman Whetzel and Kristana Whetzel……...Appellants,

v.

City of Mullins Zoning Board, Dr. Todd Blevins and Blevins Dentistry……..Respondents.

MEMORANDUM OPPOSING SUPERSEDEAS

This is an appeal originally filed with this Court on May 28, 2024 appealing the Order of Circuit Judge H. Steven DeBerry, IV dated May 9, 2024 which affirmed a decision of the City of Mullins Zoning Board. The City of Mullins Zoning Board had approved a variance for the Respondent property owner to allow a non-contiguous commercially-zoned lot to be used for parking for Blevins Dentistry.[1]

The Record in the Circuit Court included a summary of the testimony and findings of the City Building Official, Mr. Curtis Richardson, who "testified as an expert" before the Board providing findings of fact in support of allowing the variance; specifically he gave a summary of

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[1] Judge DeBerry's Order found that "The Zoning Board of Appeals decision in granting the variance substantially [complied] with the requirements found in Section 9.3-2 of the Mullins South Carolina Code of Ordinances which is the subject of the Appeal." Order of May 9, 2024. Notably, the subject of the appeal *was* – and *is* – only the granting of the variance for non-contiguous parking lot *use*; the construction of the parking lot itself does not require a variance – only the non-conforming use of the lot for a non-contiguous business. Nevertheless, construction of the concrete parking pad had been halted after half-completion in compliance with Judge McDonald's Order. (Work was actually halted upon the filing of the Motion to Stay in Circuit Court – upon the advice of trial counsel).

the existing area zoning (AC-1 Residential/Commercial) , testified that this zoning classification was not in conflict with the construction of a parking lot; and, in response to question, he explained that the need for a variance arose from the plan for the parking to serve a non-contagious building (across the street private parking for growing number of employees)(see also ¶ 8(b) of the Complaint); and he testified as to the growth of the dental practice and the consistency of the requested variance with the growth of the City of Mullins businesses.

The Petition for Writ of Supersedeas

This matter is *now* before the Court of Appeals based upon an Appellant's May 29, 2024 letter raising the stay provisions of SCACR 241, which has been leniently construed by this Court as a petition for writ of supersedeas.[2] *See* Order of Judge McDonald acting for the Court, filed May 30, 2024. A corresponding "Motion for Emergency Stay Pending Appeal" was filed by the Appellants in Circuit Court and it has now been heard by that Court, in accordance with the provisions of SCACR 241(d)(1), and as allowed and anticipated by Judge McDonald's Order (noting the June 17th Motion's Roster in Marion County set for Judge Nettles).

Today (July 1, 2024) the Circuit Court (the Honorable Michael G. Nettles) denied any supersedeas and the matter is now back in the Court of Appeals with the anticipation that this Court will now rule on Appellants' concomitant petition for writ of supersedeas. A copy of Judge Nettle's July 1, 2024 Order is attached. Respondents oppose any supersedeas and submit this memorandum in opposition to the same.

No Automatic Stay, No Presumptive Supersedeas

Unlike many cases where an automatic stay is imposed upon the filing of a Notice of Appeal, SCACR 241(a), the legislature has provided that the filing of an appeal in the Circuit Court from the local zoning Board under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 "does not ipso facto act as a supersedeas" but the Circuit Judge may "in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable

[2] Although originally signed and submitted by a singular non-attorney pro se litigant, the group of pro se litigants have submitted corrective documents with additional *pro se* signatures – documents received in the Court of Appeals on June 3, 2024.

and proper." S.C. Code 6-29-830(B); *accord* SCACR 241(c)(3). As noted above, the Circuit Court has determined not to grant Appellants the requested supersedeas.[3]

No Irreparable Harm, No Change of Zoning, No Loss of Jurisdiction without Supersedeas

As noted by Judge Nettles today, SCACR 241(c)(2) provides that "In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." As noted in the footnote above, and in Judge Nettle's Order, the construction of the parking lot did not require a variance and thus is not the subject of the appeals herein – it is only the non-contiguous use of the parking lot.

The non-contiguous *use* of the parking lot, as approved by the Zoning Board and affirmed by the Circuit Court, has not been shown harmful in any way. *To the contrary*, the City Building Official testified that the proposed use was consistent with the desired growth of City of Mullins businesses. Indeed, as noted by Judge Nettles at the hearing on the Motion for Stay, the adjacent property of Appellant Betancourt is presently used for commercial purposes. (*See* Authenticating Affidavit with Exhibits submitted by Respondents in Opposition to Motion to Stay). ***Moreover, any non-contiguous use of the parking lot (even fully completed)[4] can be enjoined, without intervening harm or loss of jurisdiction, if this Court were to find some defect in the variance process or Judge DeBerry's affirmation thereof.***

. Even before the matter was considered in Circuit Court, significant efforts had been spent addressing the issues. The City Building Official had met with the parties and studied the matter. Dr. Blevins has made his plans, met with persons, and set forth his proposal. Thereafter, the

[3] Although Respondents continue to fully oppose any supersedeas, they did argue in the alternative in the Circuit Court hearing held June 17, 2024 and repeat that alternative argument here – that the property is rendered useless to Respondent owner if a supersedeas is imposed and therefore a bond, at least equal to the purchase price of the property, should be posted by Appellants if a supersedeas is considered at all. The purchase price of $13,249 was disclosed at the Circuit Court hearing on June 17, 2024.

[4] As noted by Judge Nettles in his Order today, part of the proposed parking lot has already had concrete poured. This is also shown in the photographs submitted with authenticating affidavit in the Circuit Court.

Zoning Board heard from each of the Plaintiffs and made their findings of fact. As noted by Judge Nettle's Order, footnote 4, the scope of review in Zoning Appeals is generally narrow where Zoning Board findings of fact are treated like jury findings.

Conclusion

Accordingly, this Court should also refuse the extraordinary step of issuing a supersedeas and should allow the planned parking lot development to continue and allow that non-contiguous parking lot to become operational for the owner's dental practice during the pendency of this appeal. As a result of such a ruling, this Court's jurisdiction will not be usurped and the appellate review of the Zoning Board variance and the Circuit Court will not be rendered moot.

July 1, 2024

Florence, South Carolina

By: /s/ *J. Rene Josey*

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ATTORNEYS FOR RESPONDENTS
DR. TODD BLEVINS AND BLEVINS DENTISTRY

STATE OF SOUTH CAROLINA **COUNTY OF MARION**	**IN THE COURT OF COMMON PLEAS** **C/A # 2023-CP-33-00500**
Thomas Betancourt, Nicole Betancourt, Jimmy Boatwright, Arnie Boatwright, Norman Whetzel and Kristana Whetzel, Plaintiffs, vs. City of Mullins Zoning Board, Dr. Todd Blevins and Blevins Dentistry, Defendants.	**AFFIDAVIT OF DR. TODD BLEVINS**

PERSONALLY, APPEARED before me Dr. Todd Blevins, who, being duly sworn, deposes and says as follows:

1) I am a Defendant in the above-captioned matter.
2) This affidavit is submitted for the sole purpose of authenticating the attached photographs for the Court's use and information.
3) I have attached accurate and authentic recent photographs of the partially completed parking lot directly across the street from my Property, across Main Street (Exhibit A attached), as well as a google map shot (Exhibit B) looking north on Main Street showing both my office (white structure on the left), the adjacent Betancourt Property (the next structure on the left), and the litigated parking lot across the street (on the right).
4) The Betancourt Property is identified by its signage (Exhibit C), signed truck (Exhibit D) and signed van (Exhibit E).

Todd Blevins DMD
Dr. Todd Blevins

SWORN to before me this 26th
day of June, 2024
Rebecca Buffkin
Notary Public for South Carolina
Print Name: Rebecca Buffkin
My Commission Expires: Jan 20, 2033

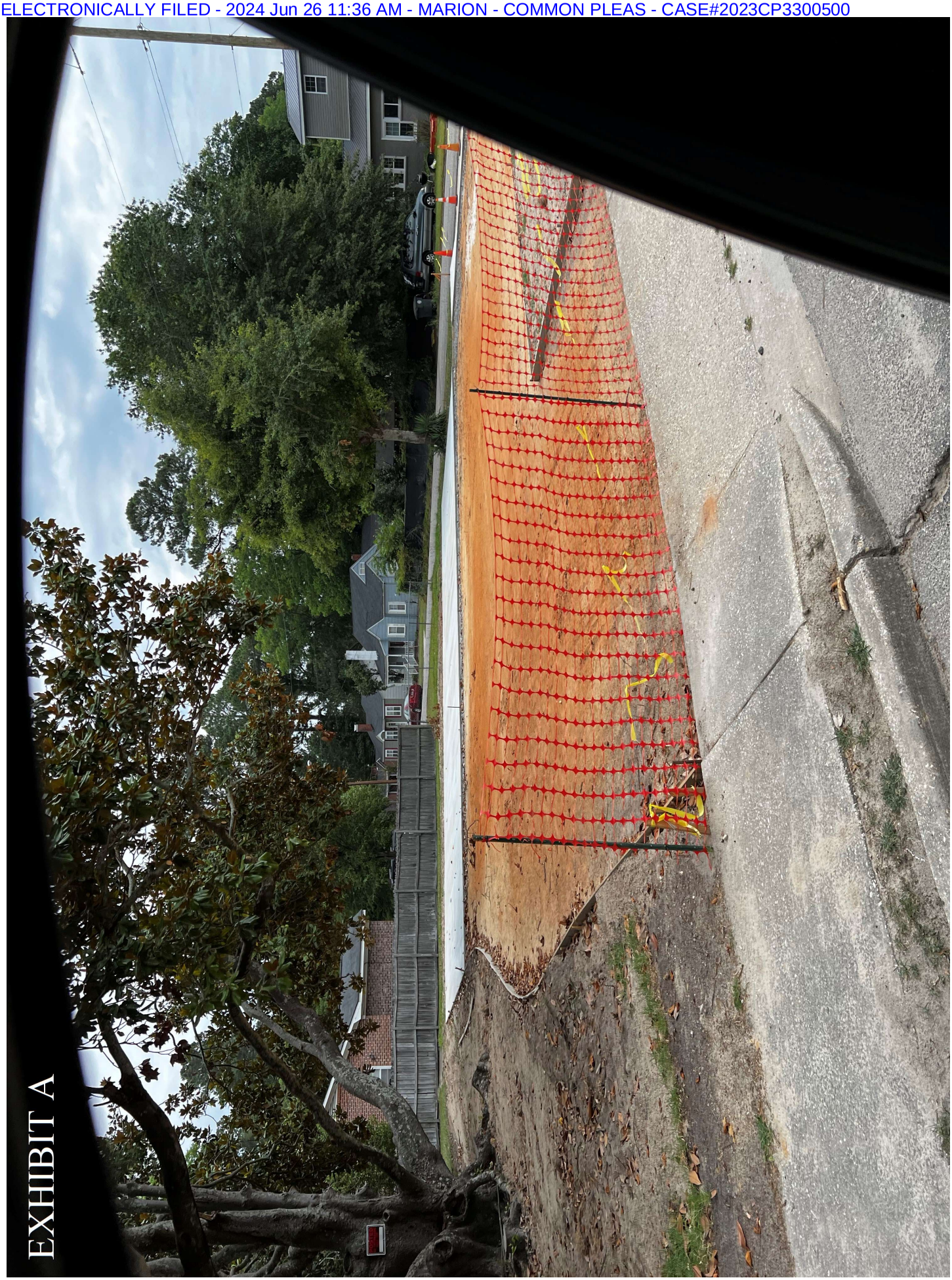


EXHIBIT A

EXHIBIT B

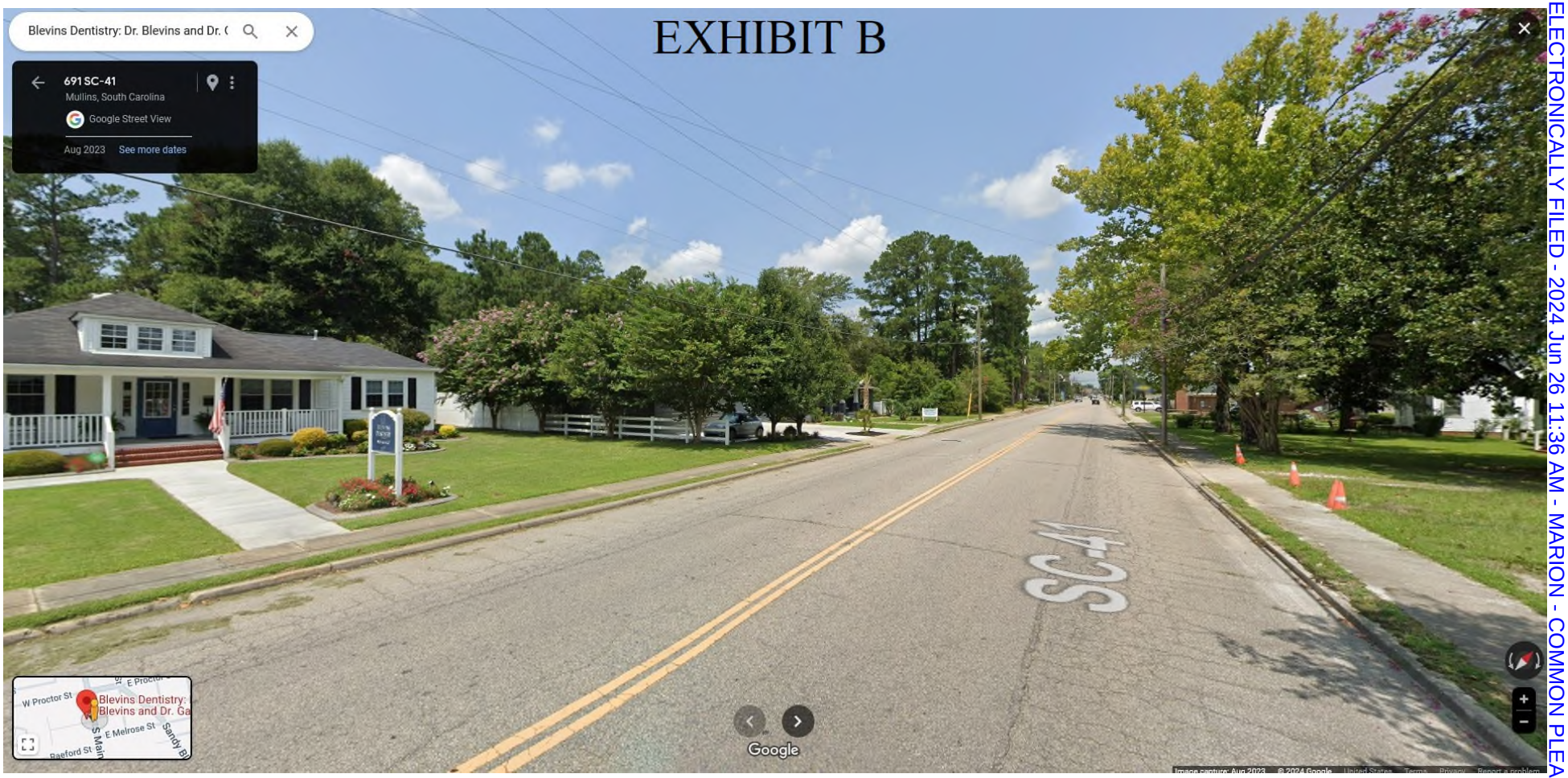


EXHIBIT C

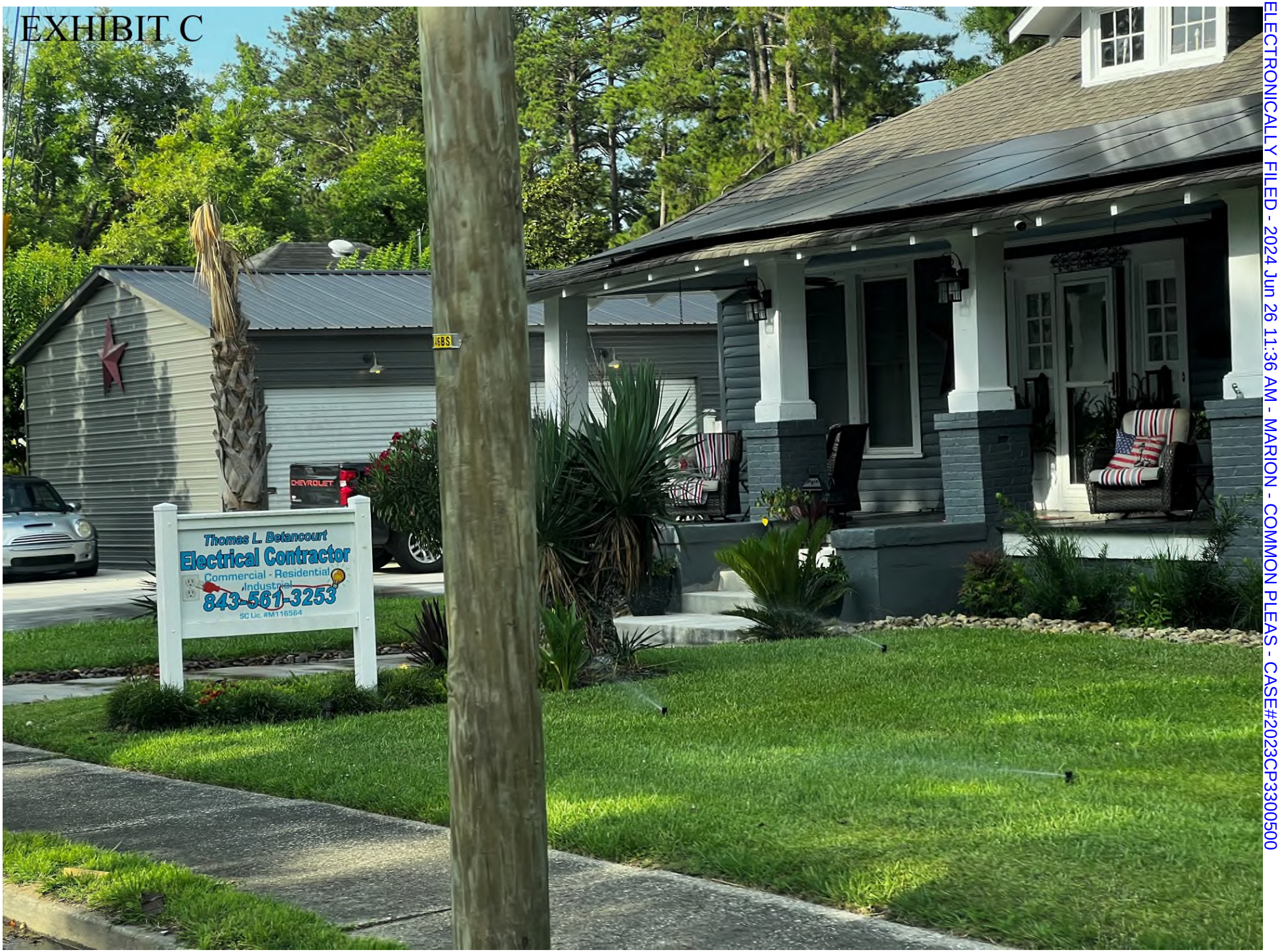
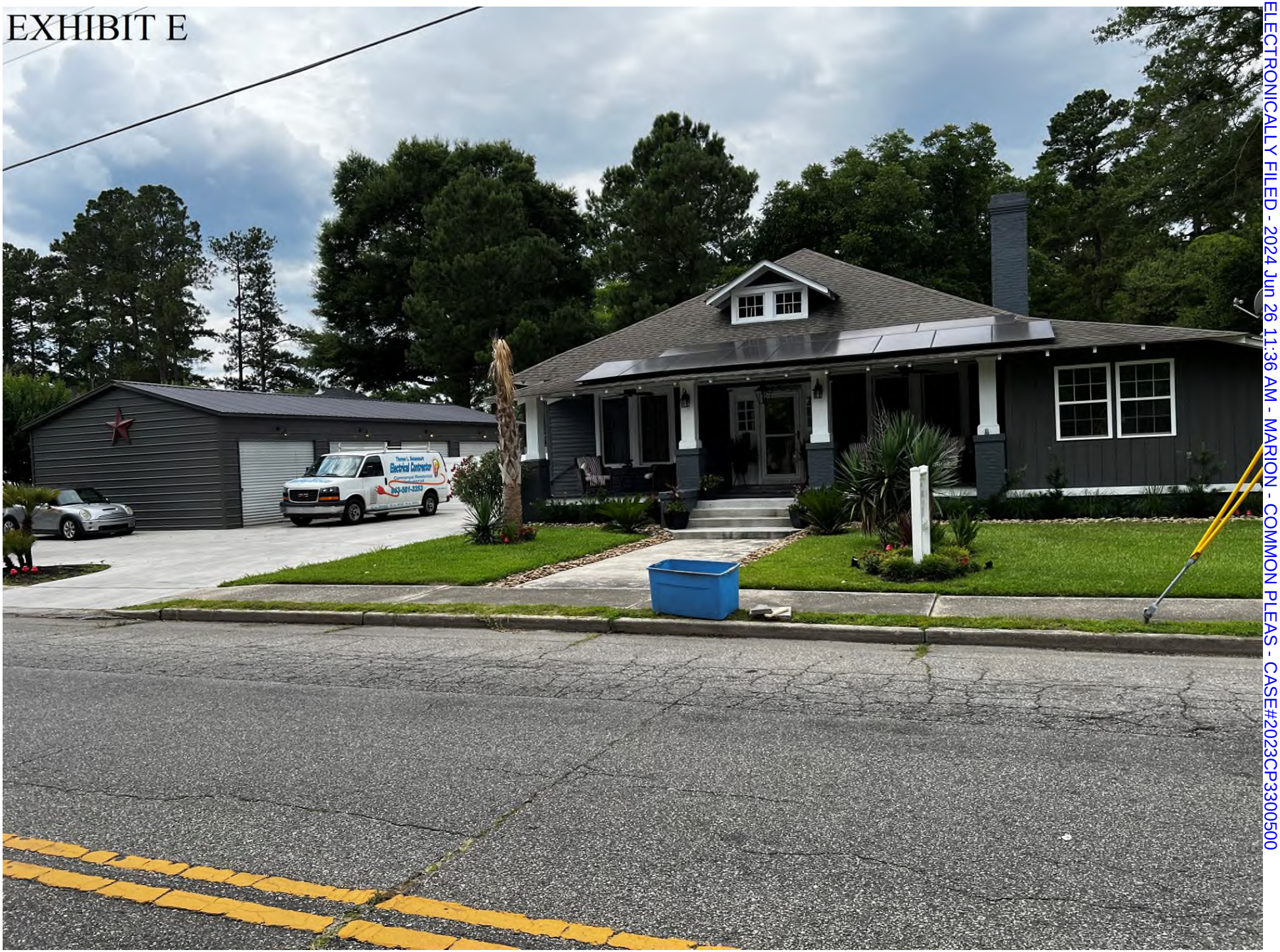


EXHIBIT D

EXHIBIT E



STATE OF SOUTH CAROLINA **COUNTY OF MARION** Thomas Betancourt, Nicole Betancourt, Jimmy Boatwright, Arnie Boatwright, Norman Whetzel and Kristana Whetzel, Plaintiffs, vs. City of Mullins Zoning Board, Dr. Todd Blevins and Blevins Dentistry, Defendants.	**IN THE COURT OF COMMON PLEAS** **C/A # 2023-CP-33-00500** **ORDER**

This Matter – Appeal From A Zoning Variance

This is an appeal from a decision of the City of Mullins Zoning Board. The subject matter of the appeal is the granting of a variance allowing the Defendant property owner to use a parking lot on his property to serve his non-contiguous dental office building; without such a variance, parking must be contiguous to the building served by the parking. Here, the parking lot location was already zoned to allow commercial use – including a possible parking lot. The initial appeal was heard by Judge DeBerry who issued his Order denying the Plaintiffs any relief on May 9, 2024.

Judge DeBerry's Order

Judge DeBerry's order found that "The Zoning Board of Appeals decision in granting the variance substantially complies with the requirements found in Section 9.3-2 of the Mullins South Carolina Code of Ordinances which is the subject of the Appeal." Order of May 9, 2024. As further referenced by Judge DeBerry, a "certified copy of the findings and discussions of the August 20, 2023 hearing [the public hearing on the variance application] were filed and made part of the record …" Those three pages of administrative records include the Chairman's (Spencer Jordan) signed report of the meeting, certified by the Clerk Felicia Sawyer-Norton, and the signed two-page four-point Minutes attested by the Clerk and also signed by Chairman Jordan.

The Record includes a summary of the testimony and findings of the City Building Official, Mr. Curtis Richardson, who "testified as an expert" before the Board providing findings of fact in support of allowing the variance; specifically he gave a summary of the existing area zoning (AC-1 Residential/Commercial) , testified that this zoning classification was not in conflict with the construction of a parking lot[1]; in response to question, he explained that the need for a variance arose from the plan for the parking to serve a non-contagious building (across the street private parking for growing number of employees)(see also ¶ 8(b) of the Complaint); and he testified as to the growth of the dental practice and the consistency of the requested variance with the growth of the City of Mullins businesses.

The following **FINDINGS OF FACT** are therefore clear in the hearing record:

1) The Zoning Classification Would Allow Construction of a Parking Lot;
2) The Variance Was Only Needed To Allow The Parking Lot to Serve a Non-Contiguous Building; and
3) The Dental Practice had grown and the variance was consistent with the growth of City of Mullins businesses. [2]

Within the Administrative Record, it is confirmed that 6 persons spoke in support of the proposed parking lot and 5 of the 6 plaintiffs here spoke in opposition to the parking lot. The record shows that after this presentation and guest speakers, the motion to approve the variance was made, seconded, and approved.

[1] While not discussed in the record of the Zoning Board, it is notable as a matter of judicial notice that the AC-1 classification would allow for other commercial uses of the property -- perhaps more worrisome to adjacent residential neighbors. It is also notable that the present zoning is not a recent development (website version published 2016) and is not, itself, challenged by this litigation.

[2] In contrast to the reasonable and appropriate factual findings testified to by the City Building Official, the Plaintiff's Complaint urged the Circuit Court to second guess the historical growth of the dental practice and its buildings and even question the scheduling of operational hours. Because such is beyond the scope of review contemplated by the Planning Enabling Act of 1994 or numerous case decisions thereunder, see footnote 4 *infra*, Judge DeBerry appropriately did not become a second level fact finder of "non-hardship" versus appropriately planned growth.

The Motion Now Before The Court

This matter is before the Court on a motion filed May 24, 2024 by one of the *Pro Se* Plaintiffs entitled "Motion for Emergency Stay Pending Appeal". Although the motion purports to be filed on behalf of all Plaintiffs, it is only signed by one, and she is not an attorney licensed to 11represent others; accordingly, the motion is being considered on her behalf *only*.

Although a notice of appeal has been filed with the Court of Appeals,[3] this Court finds that it still has jurisdiction to consider the pending motion for that singular plaintiff as contemplated by Rule 241 (d)(1) of the SCACR and expressly recognized by the Court of Appeals Order of Temporary Stay entered in this matter on May 30, 2024 by Judge McDonald for the Court.

Notably, Judge McDonald's Order for the Court characterizes the relief sought by the moving Appellant/Plaintiff as a supersedeas. Under SCACR 241(a), the service of a notice of appeal generally acts to automatically stay matters decided in the lower court's order. In contrast, under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, the filing of an appeal in the circuit court from the Board "does not ipso facto act as a supersedeas" but the Circuit Judge may "in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper." S.C. Code 6-29-830(B); *accord* SCACR 241(c)(3).

Analysis

Considerable effort has gone into addressing the issues that were raised before the Zoning Board resulting in a decision. The City Building Official has met with the parties and studied the matter. Dr. Blevins has made his plans, met with persons, and set forth his proposal. The Plaintiffs have been heard. It is perhaps inevitable that an outcome could not satisfy all. Nevertheless, there has been an open adjudicative process with a final outcome and the review of that outcome is necessarily very limited.[4]

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[3] The Court notes that the initial Notice of Appeal was filed by a singular Plaintiff but that has since been corrected by an Amended Notice signed by all of the Plaintiffs as Appellants.

[4] From Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (S.C. App. 2015): "Generally, appeal from a final order of the circuit court following its review of the zoning board's decision is to the court of appeals." Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct.App.2011) ((*citing* S.C. Code Ann. § 6–29–850 (2004); Rule 203(d), SCACR)). "On appeal, the findings of fact by the [Zoning] Board shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct.App.2012) (*citing* S.C. Code Ann. § 6–29– 840(A) (Supp.2011)). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [Zoning] Board is correct as a matter of law." Id. at 147–48, 735 S.E.2d at 661. "Furthermore, '[a] court will refrain

SCACR 241(c)(2) suggest that one factor to consider in determining whether to grant a supersedeas is the possibility that the contested issue may become moot and/or appellate jurisdiction may be lost. *See* Graham v. Graham, 390 S.E.2d 469, 301 S.C. 128 (S.C. App. 1990)(*quoting* 4A C.J.S. Appeal & Error § 662 at 494-97 (1957) ("[T]he purpose ... of a supersedeas ... is to ... stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal ..., and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." … "As a rule, a supersedeas ... does not reverse, annul, or undo what has already been done, or impair the force ... of the judgment, order, or decision of the trial court ... ."); *see also* 83 C.J.S. Supersedeas § 8 at 896 (1953) (a supersedeas suspends the judgment but does not annul the judgment itself).

The Plaintiff's instant motion itself reveals that part of the proposed parking lot has already had concrete poured. Further concrete work was stopped, with equipment still on site, when the instant motion was filed – upon the careful advice of trial counsel. Based upon the testimony of the Mullins Building Official, however, and this Court's own reading of the Municipal Code provisions, it isn't the concrete pouring or even the construction of a hard parking lot that requires a variance at all. It is *only* the use of the parking by a non-contiguous commercial building that triggered the need for the variance. Thus, this Court finds as a matter of law, that even if the Court were to impose a supersedeas, it could *only* be as to the non-contiguous *use* of the parking area – not a prohibition of the physical completion of the concrete parking pad itself.

Moreover, completing the concrete work would not render the appeal moot since future non-contiguous use of the parking area could always be enjoined. Moreover, there has been no showing of irreparable harm by the moving party; if they are successful with their appeal, there is no showing that the non-contiguous use of the parking lot could not be thereafter enjoined while any defect in the variance process is readdressed on remand.

Accordingly, this Court is unwilling to take the extraordinary step of issuing a supersedeas and this Court will allow the planned parking lot development to continue and become operational non-contiguous parking for the owner's dental practice during the pendency of this appeal – with the risk that the lot's use might later have to be altered or abandoned.

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from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.' " Id. at 148, 735 S.E.2d at 661 (*citing* Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

Pursuant to Judge McDonald's Order for the Court of Appeals, this decision shall not take effect for at least five days so that Appellants may notify the Court of Appeals of this decision and that Court may rule on what it has deemed a Petition for Writ of Supersedeas.

AND IT IS SO ORDERED.

_____

The Honorable Michael G. Nettles
Presiding Circuit Court Judge for Marion County

June___, 2024

Marion Common Pleas

Case Caption: Thomas & Nicole Betancourt, Et Al. VS City Of Mullins Zoning Board Et Al. , defendant, et al

Case Number: 2023CP3300500

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Turner, Padget, Graham & Laney, P.A., counsel for the Respondents Dr. Todd Blevins and Blevins Dentistry, does hereby certify that service of the Memorandum Opposing Supersedeas with Exhibits in the above-captioned matter was made upon all Pro Se Appellants and counsel of record by US Mail and/or E-mail on this 1st day of July, 2024:

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