THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2008-CP-23-2255

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated. . . . . Appellants/Respondents.

v.

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants,

Of Whom City of Greenville and Mayor Knox White are the. . . . . Respondents/Appellants,

---

RESPONDENTS'/APPELLANTS' MOTION TO AMEND RECORD ON APPEAL PURSUANT TO RULE 210(c), SCACR

Respondents/Appellants have contacted Appellants'/Respondents' counsel via email and correspondence in attempts to coordinate the documents to be included in the Record on Appeal and to discuss discrepancies regarding the Record on Appeal which was served on Respondents/Appellants on May 8, 2013. These requests to discuss the documents to be included in the Record on Appeal have gone unanswered. Therefore, Respondents/Appellants file this motion pursuant to Rule 210(c), SCACR, in order to

include documents designated in Respondents'/Appellants' Designation of Matter To Be Included In The Record On Appeal filed with this Court on January 11, 2013, and to exclude from the Record on Appeal certain documents which were not presented to the lower court or tribunal.

Respondents/Appellants served their Designation of Matter To Be Included In The Record On Appeal on Appellants'/Respondents' attorneys on January 11, 2013 and filed the Designation along with a Proof of Service with this Court the same day. (Exhibit A)

On April 18, 2013, attorney for Respondents/Appellants received an email from Jennifer Miller, an attorney for Appellants/Respondents, requesting a copy of Respondents'/Appellants' Initial Brief and Designation of Matter because she was compiling the Record on Appeal. (Exhibit B) Counsel for Respondents/Appellants sent a letter via email enclosing a filed copy of Respondents'/Appellants' Initial Brief and Designation of Matter, and in that letter informed opposing counsel that she would be out of town until May 13, 2013, and would like to discuss the documents to be included in the Record on Appeal, which was to be filed May 6, 2013, prior to her departure if possible. (Exhibit C) On April 22, 2013, Appellants'/Respondents' attorney, James G. Carpenter, filed a request for a 10 day extension of time to file the Record on Appeal. (Exhibit D) An order granting the 10 day extension was entered on April 26, 2013. (Exhibit E) On May 1, 2013, Appellants'/Respondents' attorney, Jennifer Miller, submitted a Second Petition of Time to file the Record on Appeal requesting an additional 10 days. (Exhibit F) On May 8, 2013, Respondents/Appellants were served with a copy of the Record on Appeal. (Proof of Service of Record on Appeal Exhibit G) The order granting the Appellants'/Respondents' second extension of time was filed on

May 15, 2013. After reviewing the Record on Appeal, Respondents'/Appellants' attorney sent a letter dated May 13, 2013 to counsel for Appellants/Respondents outlining discrepancies in the Record on Appeal and asking that they contact her to discuss the Record on Appeal. (Exhibit H) On May 17, 2013, Jennifer Miller, an attorney for Appellants/Respondents, sent an email to Kathleen Kempe, attorney for Respondents/Appellants, indicating she had been on vacation and just realized she had served Respondents/Appellants with an unbound copy of the Record on Appeal. (Exhibit I) In a reply email to Ms. Miller on May 17, 2013, Respondents'/Appellants' attorney asked if Ms. Miller had a chance to review the May 13, 2013 letter sent to James Carpenter (attached to email) regarding the Record on Appeal, and if Ms. Miller could contact her on Monday, May 22, 2013 to discuss. (Exhibit J) Ms. Kempe sent another email on May 22, 2013 to both attorneys of record for Appellants/Respondents (James Carpenter and Jennifer Miller) asking for their availability to discuss the Record on Appeal. (Exhibit K) As of the date of this motion, neither counsel for Appellants/Respondents has contacted Ms. Kempe to discuss the documents to be submitted for the Record on Appeal.

Respondents/Appellants respectfully request that the Record on Appeal be amended to include:

1) Respondents'/Appellants' Motion to Alter or Amend Rule 59(e) filed March 12, 2012, and included in Respondents'/Appellants' Designation of Matter to be Included in Record on Appeal # 22 (attached hereto as Exhibit L); and

2) Pages 26 and 27 of the October 26, 2011 transcript prepared by Hollie M. Jenkins (attached hereto as Exhibit M).

Respondents/Appellants object to the following pages of the Record on Appeal, filed May 8, 2013 as these documents were either not submitted to the lower court and/or the document included is not signed, dated, and/or file-stamped copy and are therefore not of record pursuant to Rule 210(c), SCACR, and request that these pages be removed from the Record on Appeal.

1. R. pp. 191-205- copy of Hand Delivered Letter from Steven Buckingham with Nelson Mullins to all parties enclosing draft Opinion and Order with handwritten notes by Plaintiffs' counsel-1/21/09;

2. R. pp. 215-218-Plaintiffs' Response to Motion to Alter or Amend Rule 59(c); unsigned, undated and no file stamp;

3. R. pp. 359-383 fax from E.D. Sloan, Jr. on April 4, 2008

4. R. pp. 384-387 cover sheet for proposed Ordinance and unnumbered, unsigned ordinance

5. R. pp. 401-423 various drawings, maps, and deed not submitted to lower court.

Respondents/Appellants ask this Court to amend the Record on Appeal as requested above, and pursuant to Rule 210(c), SCACR.

DATED: May 24, 2013

Respectfully submitted,

BY: Kathleen G Kempe

Kathleen G. Kempe
Assistant City Attorney
SC Bar # 3382
P.O. Box 2207
Greenville, SC 29602
Phone: (864) 467-4420
Fax: (864) 467-4424
Attorney for Respondents/Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

68647

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2008-CP-23-2255

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated. . . . . Appellants/Respondents.

v.

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants,

Of Whom City of Greenville and Mayor Knox White are the. . . . . Respondents/Appellants,

PROOF OF SERVICE

I certify that I have served **RESPONDENTS'/APPELLANTS' MOTION TO AMEND RECORD ON APPEAL PURSUANT TO RULE 210(c), SCACR** on South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated by depositing a copy of it in the United States Mail, postage prepaid, on May 24, 2013, addressed to their attorney of record, James G. Carpenter, The Carpenter Law Firm, P.C., 819 East North Street, Greenville, SC 29601.

Kathleen G. Kempe

Kathleen G. Kempe
Post Office Box 2207
Greenville, South Carolina 29602
(864) 864-467-4420
Attorney for Respondents/Appellants

city of
greenville

Office of the City Attorney

May 24, 2013

Jenny Abbott Kitchings
Clerk, SC Court of Appeals
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Re: *COMBINED APPEAL (Sloan) SC Pub. Interest, et al. v. City of Greenville, et al.*
2008-CP-23-2255
Appellate Case No.: 2012-212137

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondents'/Appellants' Motion to Amend Record on Appeal Pursuant to Rule 210(c), SCACR, along with an original and one (1) copy of the Proof of Service on counsel for Appellants/Respondents serving the above-referenced document. Please return clocked copies to me in the enclosed, self-addressed, stamped envelope.

Also enclosed is a check in the amount of $25.00 for the cost of this motion.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Kathleen G. Kempe
Assistant City Attorney
KGK/tbg

Enclosures

cc: James G. Carpenter, attorney for Appellants/Respondents
Jennifer J. Miller, attorney for Appellants/Respondents

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2008-CP-23-2255

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.

OF WHOM City of Greenville and Mayor Knox White are the

Respondents/Appellants,

v.

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated

Appellants/Respondents.

RESPONDENTS/APPELLANTS'
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

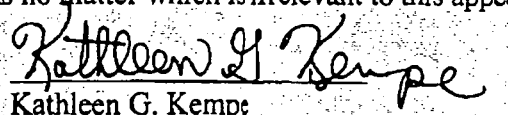
Respondents/Appellants propose the following be included in the Record on Appeal:

1. Order of the Honorable John C. Few dated January 22, 2009
2. Order of the Honorable D. Garrison Hill dated November 11, 2011
3. Order of the Honorable D. Garrison Hill dated March 12, 2012
4. Order of the Honorable D. Garrison Hill dated May 16, 2012
5. Sloan's Summons and Complaint March 24, 2008
6. City's & Mayor's Answer to Complaint April 23, 2008
7. Sloan's Reply to City and Mayor's Defense - Frivolous Lawsuit April 25, 2008

8. Sloan's Motion for Partial Summary Judgment as to Claims Against City and Mayor, May 12, 2008
9. City's Motion for Summary Judgment September 8, 2008
10. Sloan's Motion for Leave to File Supplemental Complaint September 8, 2008
11. Sloan's Supplemental Complaint for Declaratory and Injunctive Relief September 8, 2008
12. Affidavit of Mark B. Ratchford September 30, 2008
13. Sloan's Motion for Leave to File Second Supplemental Complaint October 28, 2008
14. Sloan's Second Supplemental Complaint for Dedaratory and Injunctive Relief
15. Sloan's Motion to Alter or Amend Judgment February 12, 2009
16. Sloan's Reply Memo in Support of Motion to Alter or Amend Judgment February 25, 2009
17. Sloan's Motion for Attorney's fees and costs July 15, 2011
18. Consent Order to Vacated Court Order of January 30, 2009 dated August 18, 2011
19. City's Memo in Opposition to Sloan's Motion for Attorney's Fees and Costs, which includes Exhibit "D," an Affidavit by City Attorney Ronald W. McKinney October 21, 2011
20. Statement of Judgment by the Court November 7, 2011
21. Sloan's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 7, 2012
22. City's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 12, 2012
23. Transcript of Hearing October 26, 2011
24. Transcript of Hearing December 17, 2008
25. Transcript of Hearing October 2, 2008

I certify that this designation contains no matter which is irrelevant to this appeal.

January 11, 2013



Kathleen G. Kempe
Post Office Box 2207
Greenville, South Carolina 29602
(864) 467-4422
Attorney for Respondents/Appellants

EXHIBIT B

Tonya Gramann

From: Kathleen Kempe
Sent: Thursday, April 18, 2013 11:32 AM
To: Nadiya Myers
Subject: FW: Cliffs Case

FYI

Kathleen Kempe
Assistant City Attorney | City Attorney's Office
kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

From: Jennifer Miller [mailto:jennifer.miller@carpenterlawfirm.net]
Sent: Wednesday, April 17, 2013 2:35 PM
To: Kathleen Kempe
Subject: RE: Cliffs Case

Kathleen,

I am having a hard time locating your Initial Brief with Designation attached. (I am compiling the Record on Appeal.) If it's convenient, could you email me another copy? Thanks so much.

Jennifer

Jennifer J. Miller
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Cell: (864) 607-8694
www.carpenterlawfirm.net

WHEN IT'S WORTH FIGHTING FOR!

Email messages sent to and from the City of Greenville may be subject to discovery under the S.C. Freedom of Information Act.

EXHIBIT C

Tonya Gramann

From: Tonya Gramann
Sent: Thursday, April 18, 2013 3:28 PM
To: 'jennifer.miller@carpenterlawfirm.net'
Cc: 'kkempe@greenvillesc.gov'
Subject: Cliffs Case
Attachments: DOC041813.pdf; 66418.pdf; 66419.pdf

Jennifer,

Kathleen asked that I forward the attached documents to you. Attached are 1) Letter from Kathleen regarding record on appeal 2) Filed copy of Respondents'/Appellants' Initial Brief 3) Filed Copy of Respondents'/Appellants' Designation of Matter.

Thank you.

city of greenville

Tonya B. Gramann
Legal Office Administrator | City Attorney's Office
tgramann@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4434 | FAX: 864-467-4424

city of
greenville

Office of the City Attorney

April 18, 2013

Jennifer Miller
Attorney at Law
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601

Re: *COMBINED APPEAL (Sloan) SC Pub. Interest, et al. v. City, et al.*
2008-CP-23-2255
Appellate Case No.: 2012-212137

Dear Jennifer:

Pursuant to your request, I have enclosed a filed copy of Respondents'/Appellants' Initial Brief and Designation of Matter. It is my understanding that the Record on Appeal is due to be served on May 6, 2013, since the last brief was filed with the Court on April 4, 2013. If you have a different understanding please let me know.

I will be leaving the country on April 29, 2013 and will not return until May 13, 2013. Since the Court Rules requires that that you verify that the attorneys both agree on the Record on Appeal, I wanted you to know my schedule. If it is possible to get it done before I leave, that would be wonderful. Please let me know.

Sincerely,

Kathleen G. Kempe
Assistant City Attorney
KGK/tbg

Enclosures

cc: Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals (w/o encls.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2008-CP-23-2255

City of Greenville, Mayor Knox H. White, and the Cliffs at Glassy, Inc. — Respondents/Appellants,

OF WHOM City of Greenville and Mayor Knox White are the

v.

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated — Appellants/Respondents.

APPELLANTS' INITIAL BRIEF OF THE RESPONDENTS/APPELLANTS

Kathleen G. Kempe
P.O. Box 2207
Greenville, South Carolina 29602
(864) 467-4422
Attorney for Respondents/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN AWARDING ATTORNEYS' FEES?

STATEMENT OF THE CASE

On March 24, 2008, the South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of others similarly situated (hereinafter, referred to as "Sloan") brought this action for an injunction requiring the City of Greenville (hereinafter, referred to as "City") to end an encroachment by a private entity on City owned land. In May of 2008, Sloan filed a motion for judgment on the pleadings pursuant to Rule 12(C) of the South Carolina Rules of Civil Procedure. In September of 2008, the City and the other Defendant in the case, who is not involved in this appeal, moved respectively for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. On October 2, 2008, a hearing upon these motions was held, at which time the Court granted the Defendants' motions for summary judgment and denied Sloan's motion for judgment on the pleadings. [Prior to the October 2, 2008 hearing, but after the Defendants moved for summary judgment, Sloan filed a motion to supplement the Complaint pursuant to Rule 15(d). With the Defendants' consent, the complaint was amended. Therefore, the Court's order of judgment against the Sloan was based upon the First Amended Complaint.]

On October 28, 2008 the Sloan filed motions to alter or amend the judgment and to again, supplement the complaint. The Defendants opposed these motions. A hearing on the matter was held December 17, 2008. Sloan attached a revised complaint to their motion for leave to supplement. This pleading was captioned as the Second Amended Complaint. However, immediately prior to the hearing on December 17, 2008, Sloan submitted a Third Amended Complaint for the Court's consideration. The Third Amended Complaint formed the basis of the Court's decision of December 17, 2008. After due consideration, the Court declined to alter its previous order granting summary judgment and issued an Opinion and Order on January 22, 2009.

Sloan moved for attorneys' fees. A hearing was held on October 26, 2011 to determine the issue of attorneys' fees. The Order granting partial attorneys' fees and costs was issued on November 23, 2011.

On March 7, 2012, Sloan filed a motion to alter or amend pursuant to Rule 56(e) to request additional attorneys' fees. On March 12, 2012, City filed a motion to alter or amend pursuant to Rule 56 (e) to deny all attorneys' fees. Orders denying these motions were made on March 14, 2012.

On May 23, 2012, Sloan served the Notice of Appeal on the City. On June 8, 2012, the City served the Notice of Appeal on Sloan.

FACTS

This started as a lawsuit involving the location of a common boundary line between the City of Greenville (City) and the Cliffs, a private residential community located along the western boundary of the City's North Saluda water reservoir, land owned by the City but managed by the Greenville Water System (the Greenville Commission of Public Works, a governmental entity with its own elected officials). At some point in time, there was a roadway constructed by the Cliffs for the use of its residents which allegedly encroached upon City property. The surveyor for the Cliffs determined that there was an encroachment of approximately 0.29 acres onto City property. At the same time, it was determined that there was an encroachment of a fire tower owned by the Greenville Water System onto the property of the Cliffs'. Sloan filed this lawsuit on April 24, 2008 based on purpresture. Sloan demanded that the Cliffs remove their road encroachment from City property.

However, after long negotiations and at about the same time that this action was commenced, the City and the Cliffs came to the following agreement: (1) that the Corbin Mountain Line would serve as the boundary line to determine that there was indeed encroachments and the extent of said encroachments; (2) that the 0.29 acres which encroached upon City property would be quitclaimed to the Cliffs; (3) that the 0.04 acres which encroached upon the Cliffs' property would be quitclaimed to the City; (4) that the Cliffs would reconstruct a fire tower on City property; and (5) that the Cliffs would pay the City (and the Greenville Water System and the Nature Conservancy, who held a

conservation easement on the water reservoir) a certain amount in cash. The value of the consideration paid by the Cliffs to the City and related parties totaled $210,166.44.

On April 28, 2008, approximately 30 days after Sloan filed his complaint, the Greenville City Council (City Council) issued an ordinance that authorized the above referenced agreement. (Greenville, SC Ordinance No. 2008-33) Through this ordinance, the City was to "convey its interest in fee simple to approximately 0.29 acre[s] of real property on Mountain Summit Road, a private road, to the Cliffs at Glassy, Inc." (Id. § 2.) "The title conveyance by The City to the Cliffs at Glassy, Inc., [was to] be in consideration of a payment from [T]he Cliff's at Glassy, Inc. . . ." (Id. § 3.) The City and the Cliffs were to "execute mutual releases of claims against one another and mutual acknowledgement of the boundary separating the properties respectively titled in their names." (Id. § 5.) "The identification of the locations of these property transfers and recognition of the mutual boundary [were to] be based upon the same plats and legal descriptions as have been agreed to . . ." (Id. § 7.) Finally, "[t]he City Manager [was] authorized to approve and execute such deeds, acceptances, and agreements as are herein provided for . . . upon receipt of the payment described in Section 3." (Id. § 7.) On June 19, 2008, the City signed a deed for 0.29 acres in favor of the Cliffs and on June 24, 2008 the deed was duly recorded. The roadway remained on the property, now owned by the Cliffs.

The Agreement between the Cliffs and the City that was embodied in the above referenced ordinance was a complex agreement which was negotiated over an extended amount of time (McKinney's affidavit) said period of time started well before the filing of the lawsuit. Further there was evidence that the process to bring this matter to City

Council for resolution was initiated prior to the filing of the lawsuit by Sloan (McKinney's affidavit paragraph 7).

Sloan, however, proceeded with his litigation against the City. At the October 2, 2008 hearing, Sloan argued that there was a purpresture but admitted that since the property was transferred, there is no longer a trespass (Transcript of October 2, 2008, p. 16, lines 18-22). Sloan then argued that the conveyance was unconstitutional and/or there was a technical violation (Transcript of October 2, 2008, p. 24, lines 7-8). And that therefore there was still a trespass. After the Judge ruled that the purpresture issue was moot (Transcript of October 2, 2008, p. 34, lines 4), Sloan then argued that due to an analysis of old surveys, there may be a continuing purpresture. He argued that he had asked for a survey and a fence so that the City could establish where the [property] line was (Transcript of October 2, 2008 p.36 lines 15-21). The Court ruled against Sloan saying that he "could not require the City to go out and spend public funds to do a survey when they [the City] claim that there's no encroachment" (Transcript of October 2, 2008, p.39 lines 19-22). The Court further stated that if Sloan wanted to do a survey to show some encroachment, then he was free to do so at his [Sloan's] expense (Transcript of October 2, 2008 p.41 lines 9-14).

On December 17, 2008, Sloan again proceeded with further litigation against the City, by a 59(e) motion. At that hearing Sloan stated that the only additional cause of action against the City was that the City has failed to protect the City's property against encroachment and purpresture both by road, by lots and by paved spur off of the other road. The City's position was that the ordinance (Greenville, SC Ordinance No. 2008-33) resolved the [property] dispute with finality when the ordinance was passed on April 28,

2008 within weeks of the initial filing of the original Sloan complaint. The Court found that there was a dispute about the where the property line was but that there's not any dispute any more and that the ordinance sets the property line. Sloan went on to argue that he, who is representing the interests of the taxpayers and residents of the City of Greenville, believes that the purpresture is bigger than that [.29 acres] and that you can't "shove this thing under the rug by conveying .29 acres when the real encroachment is three acres" (Transcript of December 17, 2008, p. 43, lines 14-20). However, no surveys were placed into evidence to support that claim. The Court stated that Mr. Sloan does in fact purport to represent the interest of city taxpayers. The Court went on to state, "But Mr. Sloan is not the only person who represents the interest of the city taxpayers. In the first place, it is the city council that represents those interests." (Transcript of December 17, 2008, p. 45, lines 5-8). The Court went on to state that the City Council did exactly what [Sloan] said they did not do, that is, they addressed the encroachment (Transcript of December 17, 2008, p. 45, lines 14-20). And Sloan did that on April 28, 2008. The Court further stated that "Now you [Sloan] say the city did not do that the way I wanted them to do it. They did not do it correctly. They did not do it the way I would have done it. This is a good example of where courts have to draw the line between their roles as courts and the role of executive and legislative entities such as city council." (Transcript of December 17, 2008, p. 45, lines 20-25 and p. 46, line 1). And finally the Court stated, "Getting $100,000 for this piece of property seems to me to be an unquestionably reasonable action taken by an executive and legislative entity." (Transcript of December 17 2008, p. 46 , lines 17-21). Again, let it be noted that this was done by the Ordinance

that was passed just weeks after the filing of the complaint and was based on negotiations that started long before the filing of the complaint. (McKinney Affidavit).

At the third hearing (October 26, 2011) that Sloan initiated against the City, Sloan requested attorney's fees. At that hearing, Sloan said that he filed in March and that the City "cut a deal" with the Cliffs to convey the property in April. (Transcript of October 26, 2011, p.7, lines 9-10). He nevertheless asked for attorney fees for fees and expenses that he incurred after the City passed the ordinance on April 28, 2008 settling the matter. The Court awarded fees through June 24, 2008, the date of filing the deed and the payment for the transfer of .29 acres.

ARGUMENTS

I. DID THE TRIAL COURT ERR IN AWARDING ATTORNEYS' FEES?

Sloan was awarded attorney fees and costs pursuant to S.C. Code Ann. Section 15-77-300 by the Honorable Gary Hill, who was not the judge who heard the case on the merits. (November 23, 2011 Order). An award of attorney's fees under section 15-77-300 will not be overturned unless the complaining party shows that the trial judge abused his discretion in concerning the applicable factors from that section. *Heath v. County of Aiken,* 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

A citizen must prove three elements to claim attorney's fees: (1) the citizen was the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002). Sloan failed to prove any of the three elements.

Sloan was not the prevailing party. Our Supreme Court has defined a "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered. *Crenshaw's TV & Radio Service, Inc., v. Jocassee Partners Holdings, LLC*, 111412 SCCA, 2012-UP-610, *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006) (quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990). This definition was modified by *Sloan v. Friends of the Hunley*, 393 S.C 152, 711 S.E.2d 895 (S.C. 2011).

In order to prevail, Sloan must prove that his actions propelled the City into the action that he wanted. He has failed to do so on two accounts. First, Sloan must prove that his actions were the reason that the City took action. He has failed to do that. The affidavit from the City Attorney, Ron McKinney, clearly states that the City was well on its way to resolving the issue by the time that Sloan filed his lawsuit. It clearly states that the negotiations were difficult and long (McKinney Affidavit). It was argued at trial that at the same time that these negotiations for a settlement between the City and the Cliffs were coming to a head, at the same time that city council was being briefed, and at the same time that the items [ordinance] was being prepared for the agenda, Sloan filed his lawsuit (Transcript of October 26, 2008, p. 45, lines, 20-22). Sloan presented no evidence to the contrary. At best, he had coincidental timing, but coincidence is not the same as proving that your actions caused City Council action. It is far more likely that this matter would have been resolved without the need of a lawsuit by Sloan and he has failed to prove otherwise. Secondly, Sloan should not be allowed to say that he prevailed when he

failed to prove that city council did what he wanted city council to do and when the record clearly states that city council did not. There is the language from the court that states the following: "Now you [Sloan] say the city did not do that the way I [Sloan] wanted them to do it. They did not do it correctly. They did not do it the way I would have done it" (transcript of record December 17, 2008, p. 45 lines 20-22, the Honorable John Few presiding). Sloan did not get the result he wanted and he did not get that result from city council on April 28, 2008, from the court at the October 2, 2008 hearing, or from the court at the December 17, 2008 hearing. Independently from Sloan's lawsuit, the City was involved in a complex negotiation involving four entities (Greenville City Council, the Greenville Water System, the Cliffs and the Nature Conservancy). The negotiations focused on a monetary settlement and transfer of property. Sloan never requested either a monetary settlement or a transfer of property because information received from the Nature Conservancy indicated that "taking up" the road as constructed would be a far more adverse environmental impact than allowing it to remain (McKinney Affidavit Section 6). His lawsuit and subsequent hearings had no impact on the action of city council as outlined in the ordinance that was passed.

Sloan relies on the ruling in *Sloan v. Friends of the Hunley, supra.* In that case, the Friends of the Hunley maintained until oral arguments that the Friends of the Hunley were not a public body under the FOIA. Sloan also cites *Havre Daily News, LLC* v. *City of Havre*, 142 P.3d 864, 878 (Mont. 2006), a case in which a party prevailed when a public entity mooted out a case by turning over the requested documents only after a prolong period of time but before the court hearing and so provided the relief sought without a court order. This is not what happened in this matter before the Court. City

Council passed an ordinance less than a month after the initial filing of the complaint. And there was evidence from the affidavit of the City Attorney that the effort to resolve the encroachment were proceeding prior to the lawsuit and would have reasonably been expected to occur without the filing of a lawsuit.

Recently, this Court in *Crenshaw's, supra* reviewed a situation where a party refused to accept the tendered full amount of a mechanic's lien and then asked for attorney fees for the ensuing litigation in which the Party received that same tendered amount. The Court found that the Party was not entitled to attorney fees. The city settled the property dispute with the Cliffs on April 28, 2008. Sloan refused to recognize that settlement. At the end of all the litigation pursued by Sloan, the existing settlement with the Cliffs is the exact same as the settlement on April 28, 2008. All of Sloan's persistence in litigating was for naught. Sloan lost the case. Clearly under the reasoning of *Crenshaw's*, Sloan has not prevailed. In fact, under *Crenshaw's*, the City is the prevailing party.

Sloan has also failed to prove the second element of the three elements to claim attorney's fees, that is, that the government entity must have acted without substantial justification. The City was justified in pursuing its own remedy for the encroachment. This complex remedy involved: 1) Due diligence to determine the impact of the encroachment on land covered by a conservation easement (McKinney Affidavit, Paragraph 6); 2) Research to determine the property line, the location of which was on a mountain side and depended on outdated descriptions (McKinney Affidavit, Paragraphs 2 and 3); 3) Negotiation with both developer and Council to determine a value for that encroachment (McKinney Affidavit, paragraph 7); and 4) Time to carefully craft the

ordinance to present for public vote by City Council so that the document that summarizes the settlement and gives finality to that property line (Greenville, SC Ordinance No. 2008-33). Ultimately, it is the responsibility of Council to determine what is in the best interest of the citizens of Greenville. There is no legal requirement that they do so within a set period of time.

It is also important to note that in this matter, it was not the city that prolonged the dispute after the filing of the lawsuit. The City intended and the Court concurred, that the matter was settled on April 28, 2008. It was Sloan who persisted in litigation to achieve a different result. If anyone acted without substantial justification, it was Sloan. If the court believes that the March 2008 filing of a lawsuit propelled the City into action, then the ordinance enacted a few weeks later clearly was a rapid response to the request of a citizen to stop an encroachment. But it was Sloan who persisted with litigation: not because the city council did not act but because the city council did not do what Sloan wanted it to do (Transcript of December 17, 2008, p. 46, lines 15-25).

Recently, this Court, in *Crenshaw's, supra,* reviewed a situation where a party refused to accept the tendered full amount of a mechanic's lien and then asked for attorney fees for the ensuing litigation in which the Party received that same tendered amount. The Court found that the Party was not entitled to attorney fees. The city settled the property dispute with the Cliffs on April 28, 2008. Sloan refused to accept that settlement. And at the end of all the litigation, the settlement with the Cliffs is the same as the settlement on April 28, 2008.

Finally, Sloan has failed to prove the third element of the three elements to claim attorney's fees; that is, there are no special circumstances would have made the award of

attorney's fees unjust. There are many circumstances and facts that make the awarding of attorney's fees unjust. There was the statement from the Court at the October 2, 2008 hearing after Sloan asked the Court to make the City survey the property. The Court told Sloan that if he wanted the property surveyed, it would be Sloan who would bear the costs for the survey (Transcript of October 2, 2008, p. 40 lines 3-6). He went ahead and paid for a survey. The survey was never submitted as evidence and had no impact on the final decision of the Court or any settlement with the Cliffs. The City should not be responsible for that expense. Sloan contends that the settlement for $100,000 for the encroachment (presumably Sloan's attorney fees would come from those funds) was somehow due to his lawsuit. Yet he persisted in litigation to overturn the conveyance and the compensation (Transcript of October 2, 2008, p. 23, lines, 1-13). It would be unjust to award Sloan fees and expenses from money Sloan litigated against. Further, Sloan purports to act in the public interest to protect the boundaries of the watershed and yet seeks to deplete the fund designated to be spent for the sole purpose of protecting the watershed property (Greenville, SC Ordinance No. 2008-33). Finally, there is no evidence in the record that Sloan made any effort to determine what if anything the City was doing in regard to this matter before he filed his lawsuit (McKinney affidavit, paragraph 8). It is somewhat ironic that he did not even file an FOIA.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the circuit court and determine that attorney's fees and costs are not available to Sloan in this matter.

January 11, 2013

Respectfully submitted,

Kathleen G. Kempe

Kathleen G. Kempe
Post Office Box 2207
Greenville, South Carolina 29602
(864) 467-4422
Attorney for Respondents/Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2008-CP-23-2255

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.

OF WHOM City of Greenville and Mayor Knox White are the

Respondents/Appellants,

v.

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated

Appellants/Respondents.

RESPONDENTS/APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents/Appellants propose the following be included in the Record on Appeal:

1. Order of the Honorable John C. Few dated January 22, 2009
2. Order of the Honorable D. Garrison Hill dated November 11, 2011
3. Order of the Honorable D. Garrison Hill dated March 12, 2012
4. Order of the Honorable D. Garrison Hill dated May 16, 2012
5. Sloan's Summons and Complaint March 24, 2008
6. City's & Mayor's Answer to Complaint April 23, 2008
7. Sloan's Reply to City and Mayor's Defense - Frivolous Lawsuit April 25, 2008

8. Sloan's Motion for Partial Summary Judgment as to Claims Against City and Mayor, May 12, 2008
9. City's Motion for Summary Judgment September 8, 2008
10. Sloan's Motion for Leave to File Supplemental Complaint September 8, 2008
11. Sloan's Supplemental Complaint for Declaratory and Injunctive Relief September 8, 2008
12. Affidavit of Mark B. Ratchford September 30, 2008
13. Sloan's Motion for Leave to File Second Supplemental Complaint October 28, 2008
14. Sloan's Second Supplemental Complaint for Dedaratory and Injunctive Relief
15. Sloan's Motion to Alter or Amend Judgment February 12, 2009
16. Sloan's Reply Memo in Support of Motion to Alter or Amend Judgment February 25, 2009
17. Sloan's Motion for Attorney's fees and costs July 15, 2011
18. Consent Order to Vacated Court Order of January 30, 2009 dated August 18, 2011
19. City's Memo in Opposition to Sloan's Motion for Attorney's Fees and Costs, which includes Exhibit "D," an Affidavit by City Attorney Ronald W. McKinney October 21, 2011
20. Statement of Judgment by the Court November 7, 2011
21. Sloan's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 7, 2012
22. City's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 12, 2012
23. Transcript of Hearing October 26, 2011
24. Transcript of Hearing December 17, 2008
25. Transcript of Hearing October 2, 2008

I certify that this designation contains no matter which is irrelevant to this appeal.

January 11, 2013

Kathleen G. Kempe

Kathleen G. Kempe
Post Office Box 2207
Greenville, South Carolina 29602
(864) 467-4422
Attorney for Respondents/Appellants

EXHIBIT D

CARPENTER

ATTORNEYS AND COUNSELORS AT LAW

*JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

April 22, 2013

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: **Record on Appeal**
South Carolina Public Interest Foundation et al. v. City of Greenville, et al
Civil Action No. 2008-CP-23- 2255

Dear Ms. Kitchings:

Appellant Respondent requests a 10 day extension to complete the Record on Appeal and encloses a filing fee and proof of service for this petition.

Thank you for your consideration.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosures
CC w/enclosures: City Atty. Kathleen Kempe

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated,..... Appellants/Respondents,

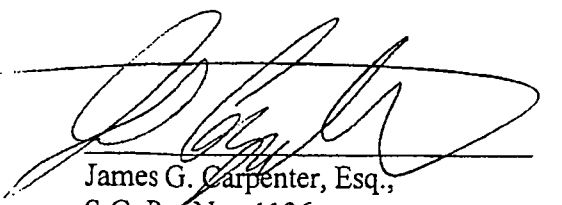
v.

City of Greenville and Mayor Knox H. White .....Respondent/Appellant.

PROOF OF SERVICE

The undersigned attorney hereby certifies that he served the Petition of Appellants/Respondents for 10 day extension to file the Record on Appeal upon counsel for the Respondents by US Mail, postage prepaid this Monday, April 22, 2013, addressed as follows:

Kathleen Kempe
City Attorney's Office
P.O. Box 2207
Greenville, SC 29602
February 11, 2013



James G. Carpenter, Esq.,
S.C. Bar No. 1136
CARPENTER LAW FIRM, PC
819 E. North St.
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for
Appellants/Respondents

EXHIBIT E

The South Carolina Court of Appeals

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as a taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated,
Appellants/Respondents,

v.

City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants,

Of Whom City of Greenville and Mayor Knox H. White are the Respondents/Appellants.

Appellate Case No. 2012-212137

ORDER

After careful consideration, the extension requests are granted.

FOR THE COURT

Columbia, South Carolina

FILED
4/26/13

cc:
James G. Carpenter
Jennifer J. Miller
Kathleen Gayle Kempe

EXHIBIT F

CARPENTER

ATTORNEYS AND COUNSELORS AT LAW

*JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

May 1, 2013

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: **Record on Appeal**
South Carolina Public Interest Foundation et al. v. City of Greenville, et al
Civil Action No. 2008-CP-23- 2255

Dear Ms. Kitchings:

Appellant Respondent requests a second 10 day extension to complete the Record on Appeal and encloses a filing fee and proof of service for this petition.

Thank you for your consideration.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

Jennifer J. Miller

Enclosures
CC w/enclosures: City Atty. Kathleen Kempe

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated,..... Appellants/Respondents,

v.

City of Greenville and Mayor Knox H. White.....Respondent/Appellant.

APPELLANTS/RESPONDENTS' SECOND PETITION FOR EXTENSION TO FILE RECORD ON APPEAL

Appellants-Respondents petition this Court under SCACR 263 (b) for an additional 10 days to file the Record on Appeal May 10, 2013. Appellant-Respondent requested 10 days in its initial petition.

April 30, 2013

Jennifer J. Miller, Esq
S.C. Bar No. 13611
THE CARPENTER LAW FIRM, PC
819 E. North St.
Greenville, South Carolina 29601
(864) 235-1269
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated,..... Appellants/Respondents,

v.

City of Greenville and Mayor Knox H. White .....Respondent/Appellant.

PROOF OF SERVICE

The undersigned attorney hereby certifies that he served the Appellant-Respondents' Second Petition for Extension of Time to File the Record on Appeal upon counsel for the Respondents by US Mail, postage prepaid this Wednesday, May 01, 2013, addressed as follows:

Kathleen Kempe
City Attorney's Office
P.O. Box 2207
Greenville, SC 29602
February 11, 2013

Jennifer J. Miller, Esq.,
S.C. Bar No. 13116
CARPENTER LAW FIRM, PC
819 E. North St.
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for
Appellants/Respondents

EXHIBIT G

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Appellate Case No. 2012-212137

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Robert M. Lloyd, individually and as taxpayers of the City of Greenville, SC, and on behalf of others similarly situated,..... Appellants/Respondents,

v.

City of Greenville and Mayor Knox H. White .....Respondent/Appellant.

PROOF OF SERVICE

The undersigned attorney hereby certifies that she caused to be served the Record on Appeal upon counsel for the Respondents by US Mail, postage prepaid this Wednesday, May 08, 2013, addressed as follows:

Kathleen Kempe
City Attorney's Office
P.O. Box 2207
Greenville, SC 29602
February 11, 2013

Jennifer J. Miller, Esq.,
S.C. Bar No. 13116
CARPENTER LAW FIRM, PC
819 E. North St.
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for
Appellants/Respondents

EXHIBIT H

city of
greenville

May 13, 2013

Office of the City Attorney

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601

Re: The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as a taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated, Appellants/Respondents v. City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants, Of Whom City of Greenville and Mayor Knox H. White are the Respondents/Appellants.

Appellate Case No.: 2012-212137

Dear Mr. Carpenter:

I have had an opportunity to review both volumes of the Record on Appeal brought to my office by Legal Eagle on May 8, 2013 and have found the following missing:

- Number 22 of the Respondents/Appellants' Designation of Matter to be Included in the Record on Appeal dated January 11, 2013, (City's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 12, 2012); and
- Pages 26 and 27 of the October 26, 2011 transcript by Hollie M. Jenkins.

Both documents listed above are enclosed for your reference and inclusion in the Record on Appeal.

Additionally, I have noted the following items in the Record on Appeal that were not included in your Designation of Matter to be Included in the Record on Appeal dated January 9, 2013:

- R. pp. 17-25-Order Granting Attorneys' Fees and Costs Under S.C. Code 30-4-100(B)-2/24/09;
- R. pp. 26-28-Plaintiffs' Offer of Judgment-3/4/09;
- R. p. 33 Letter from James Carpenter to Hon. Garrison Hill enclosing proposed Consent Order-6/27/11;
- R. p. 59-Plaintiffs' Reply-4/25/09;
- R. pp. 60-63-Answer and Affirmative Defenses of Defendant The Cliffs at Glassy-5/9/09;

- R. pp. 64-69-Plaintiffs' Motion for Partial Judgment on the Pleadings Against the City and Mayor-5/12/08;
- R. pp. 70-72-Plaintiffs' Motion for Leave to File Supplemental Complaint SCRCP 15(d)-9/8/08;
- R. pp. 73-77-Plaintiffs' Supplemental Complaint-9/8/08;
- R. pp. 78-83-Plaintiffs' Motion for Leave to File Second Supplemental Complaint SCRCP 15(d)-10/28/08;
- R. pp. 125-127-Plaintiffs' Reply Memorandum in Support of Motion to Alter or Amend the Judgment-2/25/09;
- R. p. 190-Email from Tonya Gramann to Judge Hill and Plaintiffs' counsel enclosing City's Memorandum in Opposition to Motion for Attorneys' Fees-10/21/11;
- R. pp. 191-205-Hand Delivered Letter from Steven Buckingham with Nelson Mullins to all parties enclosing draft Opinion and Order with handwritten notes by Plaintiffs' counsel-1/21/09;
- R. pp. 206-208-Plaintiffs' Reply Memorandum in Support of Motion to Alter or Amend the Judgment-2/25/09;
- R. pp. 215-218-Plaintiffs' Response to Motion to Alter or Amend Rule 59(c); unsigned, undated;
- R. pp. 219-220-The Cliffs' Memorandum in Response to the Plaintiffs' Motion to Alter or Amend the Judgment-2/16/09;
- R. pp. 221-225-Plaintiffs' Supplemental Motion for Fees and Costs-7/15/11;
- R. pp. 226-227-Plaintiffs' Affidavit in Support of Motion for Fees and Costs-7/15/11;
- R. pp. 228-240-Response of The Cliffs at Glassy, Inc. to First Set of Interrogatories and Requests for Production of Plaintiffs-7/11/08;
- R. pp. 359-399-City of Greenville Meeting Minutes and Agenda Items, 9/10/07, 4/14/08, 5/12/08;

Concerning the maps and plats (R. pp. 402-423), with the exception of those listed as Exhibits, it is my understanding that they were not included in the Court of Common Pleas record in case number 2008-CP-23-2255. Therefore, they cannot be included in the Record on Appeal.

I request that you contact me at your earliest convenience to discuss the Record on Appeal.

Sincerely,

Kathleen G. Kempe
Assistant City Attorney

KGK/nrm

Enclosures

cc: Jenny Abbott Kitchings,
Clerk, SC Court of Appeals (without enclosures)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NUMBER: 2008-CP-23-2255
	)	
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated,	)	Motion to Alter or Amend Rule 59(e)
Plaintiffs,	)	
v.	)	
City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

The January 22, 2009 order from Judge Few states that there are complex issues involved in determining a boundary line in the mountainous region of the North Saluda Reservoir, issues so complicated that he devoted three pages to the matter (pages 2-4). The affidavit of Mr. McKinney discusses the same complexity and the research he was required to do (paragraphs 2-3) and adds in the political issues as well (paragraph 7).

The order also states that "at about the same time" that [Sloan] commenced this action, the City and The Cliffs had come to an agreement on the complex issue of the boundary line (page 5). The order notes that on April 28, 2008, the Greenville City Council issued an ordinance (second reading) formalizing the agreement. At that point, the pleadings were filed less than 30 days prior. In fact, the City's answer, filed April 23, notes that there was a first reading of the ordinance with the agreement on April 4, 2008. At the point of first reading, Sloan's pleadings were less than one week old. The ordinance at both readings clearly states that the parties have reached an agreement as to the boundary line separating the two properties.

Sloan did not like the agreement reached by City Council as he wanted the encroaching road removed instead of a transfer of property. He persisted in his lawsuit even though it is well established that Courts steadfastly restrain from supplanting their judgment for that of governing bodies which exercise lawful, discretionary authority in a manner that is both reasonable and legitimate.

He maintained his lawsuit along two fronts. The first line of attack was the validity of the transfer of property from the City to the Cliffs. The Court' order found that those claims were not valid (pages 8-11). The second line of attack was that the wrong boundary line was used. The Court stated, "The City and The Cliffs have mutually agreed upon the location of their common boundary. Therefore, the Court will not pass upon the wisdom of the City and The Cliffs. "

The cases cited by Sloan in argument for his attorney's fees all have the basic premise: The plaintiff is pursuing the lawsuit to force the governing body to do want is legally required under a specific law and the governing body refuses to do so until the last minute, thereby causing the plaintiff to expend the money on a lawsuit.

The matter before the Court differs in two very important ways from these cases. First, this is not an FOIA matter. There is not comparable state or local law requiring a governing body to act within a given time frame on a matter involving a property dispute. Second, this is not a case where the governing body was doing nothing. It is not refuted that long before Sloan's action was filed, significant research and negotiations were in progress to resolve the complex matter. A mere week after the lawsuit was filed, the first reading of an ordinance announcing a settlement was passed by City Council, said settlement could credibly have been resolved prior to any filing by Sloan.

It just wasn't the settlement Sloan wanted. And he spent money trying to get a court to get a governing body to adopt his time frame and his boundary line without any statutory authority for the Court to do so. And indeed, the Court refused to grant either, stating instead that this matter lies within the lawful, discretionary authority of City Council. The City Council came to a good settlement without Mr. Sloan's contributing in any way to any variation to that final settlement and therefore should not be awarded any attorneys' fees.

WHEREFORE, Defendant, City of Greenville prays the Court to deny the Plaintiffs' award of attorneys' fees and cost.

CITY OF GREENVILLE

Greenville, South Carolina

Date: March 12, 2012 BY: Kathleen G Kempe

Kathleen G. Kempe
S.C. Bar No. 003382
Attorney for the Defendant
CITY OF GREENVILLE
Post Office Box 2207
Greenville, South Carolina 29602
Telephone: (864) 467-4422
Email: kkempe@greenvillesc.gov

Exhibit A

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, Individually and as Taxpayers of the City of Greenville, South Carolina, and on behalf of Others Similarly Situated,	)	Civil Action No. 2008-CP-23-2255
Plaintiffs,	)	**OPINION & ORDER**
vs.	)	
City of Greenville, Knox H. White, Mayor, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

This matter came before the Court with a brief, but complicated, procedural history. This action was commenced on March 24, 2008. In May, the Plaintiffs filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. That September, the City of Greenville and Mayor White (collectively referred to as "the City") and The Cliffs at Glassy, Inc. ("The Cliffs"), moved respectively for summary judgment pursuant to Rule 56. On October 2, 2008, a hearing upon these motions was held, at which time the Court granted the Defendants' motions for summary judgment and denied the Plaintiffs' motion for judgment on the pleadings.[1]

[1] Prior to the October 2 hearing, but after the Defendants moved for summary judgment, the Plaintiffs filed a motion to supplement the Complaint pursuant to Rule 15(d). With the Defendants' consent, the Complaint was amended. Therefore, the Court's order of judgment against the Plaintiffs was based upon the First Amended Complaint.

On October 28, the Plaintiffs filed motions to alter or amend the judgment and to again, supplement the Complaint.[2] The Defendants opposed these motions. A hearing on this matter was held December 17, 2008.[3] After due consideration, the Court declined to alter its previous order granting summary judgment.

This opinion has been issued in order to explain the disposition of this case.

I. Factual & Procedural Background

This lawsuit involves the location of a common boundary between the City and The Cliffs, and a resulting property transfer that was intended to bring certainty to the location of that boundary. The line in dispute is a portion of the western boundary of the City's North Saluda Reservoir. The northern terminus of the boundary is located at a point on top of Corbin Mountain, which sits along the border between North and South Carolina. From the northern terminus, the boundary runs a southeasterly course to a point approximately two thousand feet away. Throughout this opinion, this southeasterly running line is referred to as "the Corbin Mountain Line."

The earliest known depiction of the Corbin Mountain Line is shown on map of northern Greenville County dating from 1918–1921. (Register of Deeds, Greenville County, S.C., Plat Book Y, Pages 114–18.) The map was drawn by Howard Wiswall, a civil engineer who had been retained by the Saluda Land & Lumber Company to identify

---

[2] Procedurally, the Plaintiffs filed only one motion, which was for leave to supplement the Complaint. However, summary judgment cannot be set aside with a simple Rule 15 motion. Instead, the Plaintiffs must proceed under the more exacting Rule 59(e), which authorizes the filing of motions to alter or amend judgments that have not been reduced to a written order.

[3] The Plaintiffs attached a revised complaint to their motion for leave to supplement. This pleading was captioned as the Second Amended Complaint. However, immediately prior to the hearing on December 17, the Plaintiffs submitted a Third Amended Complaint for the Court's consideration. The Third Amended Complaint formed the basis of the Court's decision of December 17, 2008.

relative timber rights in mountainous portions of Greenville and Pickens Counties. Wiswall shows the Corbin Mountain Line running southeasterly from the top of Corbin Mountain at 20 degrees; however, the Wiswall map does not describe the terminal points of the Corbin Mountain Line with any evidence of or reference to monumentation.

In the 1950s, the City acquired the tract of land to the east of the Corbin Mountain Line. This tract was incorporated into and became a part of the North Saluda Reservoir. At that time, a crew working on behalf of the City attempted to mark the Reservoir's western boundary, which in this case, was the Corbin Mountain Line. The City's crew did this by leaving hacks and blazes on trees. In surveying, a tree with two marks (either hacks or blazes) indicates the course of a property line; a tree with three marks indicates a property corner. A number of trees along the Corbin Mountain Line were marked with two hacks or blazes, witnessing the location of the property boundary. One particular tree bears three markings, which indicates a property corner. This tree is located on a ridgeline approximately 2000 feet southeast of the crest of Corbin Mountain.

In 2000, The Cliffs acquired the tract of land to the west of the Corbin Mountain Line. A local surveying company, Lindsey & Associates, Inc. ("Lindsey"), was commissioned to survey properties acquired by The Cliffs. Lindsey conducted a survey of the Corbin Mountain Line, and identified the tree with three hack marks as its southern terminus. Lindsey created a plat of his survey, and identified the southern terminus of the Corbin Mountain Line as "Station 115."

Lindsey also tried to locate the northern terminus of the Corbin Mountain Line, which was believed to be the crest of Corbin Mountain. However, at some point in time, the mountain's historical crest had been graded and leveled for construction. This

affected the location of the Line in two ways. *First*, grading the crest of Corbin Mountain changed the mountain's geography and created a new crest on the mountain that differed in location from the historical crest. *Second*, the precise location of the historical crest was not preserved for future reference. Using historical evidence, Lindsey identified a location where he believed the historical crest to have been. This point was chosen as the northern terminus of the Corbin Mountain Line.

Lindsey's survey of the Corbin Mountain Line was consistent with the City's understanding of the location of its own property boundary. Lindsey and the City understood Station 115, the tree with three marks, to witness the southern terminus. Lindsey and the City also found that the northern terminus was the crest of Corbin Mountain. Finally, Lindsey's survey of the Corbin Mountain Line resulted in a line that followed the hacks and blazes left by the City's crew. Therefore, in reliance upon the undisputed location of the Corbin Mountain Line, The Cliffs began to develop its properties for residential estates.

In 2004, there was some concern that a roadway constructed by The Cliffs for the use of its residents crossed over the Corbin Mountain Line and encroached upon City property. Lindsey surveyed the alleged encroachment and found: (1) that the roadway did, in fact, encroach onto approximately 0.29 acres of City property, (Register of Deeds, Greenville County, S.C., Plat Book 1069, Page 58); and (2) that a fire tower constructed by the City appeared to encroach onto 0.04 acres of property owned by The Cliffs. At that time, neither the City nor The Cliffs took any action to exclude the other from their encroachments.

Four years later, the Plaintiffs commenced this civil action. The central cause of action alleged is for purpresture, a claim that is more broadly preserved today in the doctrine of public nuisance. Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 573, 614 S.E.2d 619, 620–21 (2005). Simply stated, a purpresture is an encroachment by private use upon public rights and easements. Lowcountry Open Land Trust v. South Carolina, 347 S.C. 96, 109, 552 S.E.2d 778, 785 n.8 (2001). Actions for purpresture are comparable to corporate derivative suits, in that citizens may bring actions on behalf of their government to enjoin unlawful, unrestrained encroachments onto public property. See, e.g., Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959).

However, at about the same time that this action was commenced, the City and The Cliffs came to the following agreement: (1) that the Corbin Mountain Line would be established at the location depicted by Lindsey's 2004 survey; (2) that the 0.29 acres which encroached upon City property would be quitclaimed to The Cliffs; (3) that the 0.04 acres which encroached upon The Cliffs' property would be quitclaimed to the City; (4) that The Cliffs would reconstruct a fire tower on City property; and (5) that The Cliffs would pay the City (and parties related to the City) a certain amount in cash. The value of the consideration paid by The Cliffs to the City and related parties totaled $210,166.44.

On April 28, 2008, the Greenville City Council issued an ordinance that authorized the foregoing agreement. (City of Greenville, S.C., Ord. No. 2008-33.) Through this ordinance, the City was to "convey its interest in fee simple to approximately 0.29 acre[s] of real property on Mountain Summit Road, a private road, to The Cliffs at Glassy, Inc." (Id., § 2.) "The title conveyance by The City to The Cliffs at

Glassy, Inc., [was to] be in consideration of a payment from [T]he Cliffs at Glassy, Inc. . . ." (Id., § 3.) The City and The Cliffs were to "execute mutual releases of claims against one another and mutual acknowledgement of the boundary separating the properties respectively titled in their names." (Id. § 5.) "The identification of the locations of these property transfers and recognition of the mutual boundary [were to] be based upon the same plats and legal descriptions as have been agreed to . . . ." (Id. § 7.) Finally, "[t]he City Manager [was] authorized to approve and execute such deeds, acceptances, and agreements as are herein provided for . . . upon receipt of the payment described in Section 3." (Id., § 7.)

On June 19, 2008, the City Attorney signed a deed for 0.29 acres in favor of The Cliffs, and provided the deed to the closing attorney to hold in trust. Closing occurred on June 23, 2008. On June 24, the deed was duly recorded.

II. Disposition of the First Hearing

The hearing on October 2 was held as to determine: (1) whether the City had allowed an unlawful encroachment onto public property; (2) whether the City had acted without authority in transferring property to The Cliffs; and (3) whether the City's transfer of property had been unconstitutional pursuant to Article III, § 31 of the South Carolina Constitution. Summary judgment was entered against the Plaintiffs as to each of these claims.

A. Standard of Review

Summary judgment is to "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). To rebut a motion for summary judgment, the non-moving party must come forward with specific facts showing the existence of genuine, triable issues, and may not rest merely upon the allegations or denials set forth in his pleading. S.C. R. Civ. P. 56(e). If the non-moving party cannot set forth specific facts showing the existence of genuine, triable issues, summary judgment is proper. Id.

B. Summary judgment was properly granted with respect to purpresture pursuant to the doctrine of mootness.

The Plaintiffs contend that The Cliffs has unlawfully encroached onto municipal property, and that the City has failed to enjoin The Cliffs from continuing in the encroachment. However, the Defendants correctly argue that the issue of purpresture is moot. On June 23, 2008, The Cliffs received a deed for 0.29 acres from the City, thereby terminating any unlawful encroachment upon municipal property. (Register of Deeds, Greenville County, S.C., Book 2329, P. 817–20)

The Court will generally refrain from deciding issues that have become moot. Sloan v. Greenville County, ___ S.C. ___, ___ S.E.2d ___, 2008 WL 4693071, *3 (Ct. App. Oct. 22, 2008); Sloan v. South Carolina Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). A case becomes moot when judgment, if rendered, will have no practical legal effect. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

In this case, the Court was requested to declare that a purpresture existed with respect to the 0.29 acres that were the subject of the June 2008 conveyance. However, whether or not a purpresture may have existed at some point along the Corbin Mountain Line is irrelevant. The Court is concerned only with whether a purpresture continues to exist. The deed by which the City transferred property to The Cliffs removed any

condition of encroachment that may have been occurring. Once The Cliffs came into ownership of the property, it could no longer have been committing an encroachment.

In an action for purpresture, the only relief that can be obtained is an order enjoining further encroachment. However, The Cliffs now owns the very property that was the subject of encroachment. Under these circumstances, the Court will not order the rightful owner of property to quit his possession or surrender his title. Accordingly, summary judgment was properly granted with respect to the Plaintiff's action for purpresture.

C. **The June 2008 conveyance was not ultra vires and will not be rescinded.**

The Plaintiffs also claimed that the June 2008 conveyance was not properly authorized and should be set aside. However, the Defendants persuasively argued that the transaction was not ultra vires and should be sustained.

In relevant part, the enabling ordinance provides that "[t]he City Manager shall be authorized to approve and execute such deeds . . . upon receipt of the payment." (City of Greenville, S.C., Ord. No. 2008-33 ¶ 7.) On June 19, 2008, the City signed the deed regarding the property to be transferred to The Cliffs, and transferred the deed to the closing attorney to hold in escrow. On June 23, The Cliffs transferred the full amount of cash due and owing under the conveyance agreement to the escrow account of the closing attorney, whereupon the attorney made appropriate disbursements of real property and cash incident to closing. All deeds were recorded on June 24, 2008.

It is the Plaintiffs' contention that under the enabling ordinance, the City could not sign any deed until The Cliffs had rendered full performance of its obligations under the agreement. But this interpretation is inconsistent with the language of the ordinance.

The analysis begins with reference to familiar rules of statutory construction. "The cardinal rule of statutory construction is . . . to ascertain and effectuate the actual intent of the legislature," Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989), which in this case is the City Council. It is presumed that the legislature did not insert idle verbiage or superfluous language, but that each word of a legislative enactment is necessary, and that it has its own, independent meaning. Lee v. Thermal Eng'g Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct. App. 2002).

The Plaintiffs contend that the phrase "approve and execute," as it is used in the ordinance, requires the City to withhold any act of approval or execution (such as signing a deed and tendering the deed to a closing attorney) until The Cliffs has rendered full performance. However, to accept the Plaintiffs' interpretation would require the closing between the Cliffs and The City to have occurred in a way that deviated from modern real estate practice. The process of most closings involves an escrow agent receiving consideration from the parties and making an appropriate, simultaneous distribution of cash and property. In fact, this is the way that the closing occurred between the City and The Cliffs on June 23, 2008.

The more credible interpretation is the one provided by the City and The Cliffs. The Defendants distinguish between approval and execution and argue that approval is a condition precedent to execution. For the City to approve the property conveyance, it must lend its assent, which is evidenced by all necessary signatures. Approval was complete upon acquiring all necessary signatures; however, approval and execution were complete only upon the closing agent's simultaneous distribution of cash and property on June 23, 2008.

The Court is persuaded by the Defendants' interpretation. But even if that interpretation were not correct, the violation of the ordinance cited by the Plaintiffs is technical only, and would have no practical effect upon the outcome of an otherwise legitimate transfer of property.

D. The June 2008 conveyance did not violate the South Carolina Constitution.

The Plaintiffs further contend that the property transfer violated the South Carolina Constitution, specifically Article III, § 31, and should be set aside. However, Section 31 does not prohibit municipalities from making transfers of property to private corporations.

In relevant part, Section 31 provides that "[l]ands belonging to or directly under the control of the State shall never be donated, directly or indirectly, to private corporations . . . . Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals." S.C. Const. art. III, § 31. A clear line of precedents establish that Section 31 applies only to the State of South Carolina in its capacity as sovereign proprietor. It does not touch or concern lands owned by other governmental subdivisions, such as cities and counties. E.g., McKinney v. City of Greenville, 262 S.C. 227, 244, 203 S.E.2d 680, 689 (1974) (observing that Section 31 is "inapplicable" where "no lands belonging to or under the control of the State [in its capacity as sovereign proprietor] are involved"); Bobo v. City of Spartanburg, 230 S.C. 396, ___, 96 S.E.2d 67, 70 (1956); Haesloop v. City Council, 123 S.C. 272, 278, 115 S.E. 596, 598 (1923) ("[W]e think[] the reference in this constitutional provision is to public lands belonging to and controlled by the state in its capacity as sovereign proprietor.").

In addition, the Plaintiffs have provided no evidence to suggest that The Cliffs paid anything less than fair market value for the land that was conveyed. The evidence shows that the City was paid a very reasonable amount, over two hundred thousand dollars for less than one-third of an acre in northern Greenville County.

The Court is satisfied that the transaction between the City and The Cliffs was conducted at arms' length in a manner that was both fair and reasonable. The Court is further convinced that Section 31 does not restrict the sale of municipal property to private corporations. Summary judgment was therefore properly granted with respect to the constitutional claim.

III. Disposition of the Second Hearing

After the Court entered summary judgment against the Plaintiffs on October 2, the Plaintiffs filed motions to alter or amend the judgment and to amend the Complaint. This time, the Plaintiffs took the position that the City and The Cliffs had come to an incorrect agreement about the location of the entire Corbin Mountain Line. According to the Plaintiffs, the Corbin Mountain Line should have been placed at a location further west. The Plaintiffs therefore claimed that a continuing encroachment existed along the entire length of the Corbin Mountain Line and should be enjoined.

Motions to alter or amend are made through Rule 59(e). The purpose of this Rule is to provide a means through which the Court may reconsider matters that were encompassed in a decision on the merits. Arnold v. South Carolina, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) (citations omitted). However, this rule cannot be used to inject an issue into the case that was not previously before the Court, id., which the Plaintiffs appear to have attempted. To be specific, the first time that the Plaintiffs took

the position that the City and The Cliffs had come to an incorrect agreement about the location of the Corbin Mountain Line was after summary judgment had already been granted on October 2. This fact alone was more than enough reason to merit summary dismissal on December 17.

However, the Plaintiffs' motion to file an amended Complaint was denied on December 17 pursuant to an alternative procedural basis: claim preclusion. The doctrine of claim preclusion exists to bring a measure of finality to repetitive litigation. See, e.g., Garris v. Governing Bd., 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). It is generally applicable when: (1) the parties in subsequent litigation are the same as those in prior litigation; (2) the subject matter in subsequent litigation is the same as that in prior litigation; and (3) the prior litigation was resolved through a prior adjudication by a court of competent jurisdiction. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250, 452 S.E.2d 832, 833 (1994).

On October 2, the Defendants were awarded summary judgment with respect to purpresture on the procedural grounds of mootness. As previously addressed, the issue before the Court on October 2 was moot because the City had made a proper conveyance of land to The Cliffs which resolved any unlawful encroachment. The conveyance was based on the location of "the common property line," (Register of Deeds, Greenville County, S.C., Deed Book 2329, Page 817–20), which was itself a reference to Lindsey's survey of the location of the Corbin Mountain Line, (id., Plat Book 1069, Page 58). This deed, as well as the ordinance that enabled the City's conveyance, (City of Greenville, S.C., Ord. No. 2008-33), establish a mutual intent to regard Lindsey's survey of the Corbin Mountain Line as the recognized boundary between the City and The Cliffs. This

fact was necessarily decided by the Court on October 2 in determining that any claim of unlawful encroachment had been mooted.

As of the December 17 hearing, the claim remained moot. There were no new or additional facts that occurred which could have changed the legal relationship among the parties to this action. Instead, the Plaintiffs had requested that the Court review the prudence of the City's decision to establish the location of the Corbin Mountain Line according to Lindsey's survey. But to exercise such review would far exceed the scope of the Court's proper judicial function. As a matter of sound judicial policy, the Court steadfastly refrains from supplanting its judgment for that of a governing political body which has exercised lawful, discretionary authority in a manner that is both reasonable and legitimate.

The City and The Cliffs have mutually agreed upon the location of their common boundary. Therefore, the Court will not pass upon the wisdom of the City and The Cliffs in giving preference to Lindsey's survey to establish that line. Instead, the scope of the Court's review is limited to whether an unlawful encroachment exists with regard to the line that was actually agreed to.

In this case, there is no unlawful encroachment. Any purpresture that may have existed was resolved by the transfer of property in June 2008. That transfer mooted the purpresture issue pending before the Court on October 2, and it remained moot on December 17. A claim that has been deemed moot remains moot, and due to the doctrine of preclusion, cannot support a subsequent action without some change in material fact.

IV. CONCLUSION

For the foregoing reasons, summary judgment was entered in favor of the Defendants on October 2, 2008. The Plaintiffs' motion for judgment on the pleadings was denied. Additionally, the Court declines the invitation to reconsider its previous decision, and shall not grant the Plaintiffs leave to amend the Complaint.

It is SO ORDERED.

The Honorable John C. Few
Judge, Thirteenth Judicial Circuit

Entered this 22 day of January 2009

Exhibit B

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF GREENVILLE)

PERSONALLY appeared before me the undersigned who, being first duly sworn, Deposes and says that:

1. He is Ronald W. McKinney, City Attorney for the City of Greenville. He has held the position of City Attorney at all relevant times during the dispute and negotiations relevant to an encroachment upon property on Corbin Mountain near the North Saluda reservoir. The property is titled in the name of City of Greenville and managed by the Greenville Water System. This affidavit is not intended to waive any attorney-client confidentiality but offered for the limited purpose of establishing a time line and the circumstances associated with the resolution of an encroachment.

2. In his capacity as city attorney, the affiant learned that some type of encroachment occurred on the periphery of the North Saluda Reservoir property sometime in 2005, when a proposed settlement agreement was forwarded to the City for signature. The Water System board had settled for $5,000 and a Fire tower. The Nature Conservancy had agreed to accept $50,000 for the encroachment upon its conservation easement. There was no provision at all for the City receiving a settlement in the document forwarded to the City for signature. The City government had not been officially notified by the other parties of the encroachment or of the negotiations for settlement.

3. The affiant began inquiry into the facts, and learned the boundary line was not clearly identifiable, and that there was a genuine issue of fact as to whether there had been *any* encroachment at all. The terrain is very steep, the deed descriptions were those generally used in Northern Greenville County in the 1950's, and the description markers were not clearly decipherable. The affiant met with Water System personnel, studied documents relating to the acquisition of the property with Water system revenue under the terms of a revenue bond issued in the name of the City of Greenville but supported solely by Water System revenue. The affiant studied the underlying boundary descriptions and such plats as were maintained in Water System offices.

4. Over the next several months, he interviewed on more than one occasion Water System personnel who were familiar with the circumstances of the encroachment. He also met at the site key Water System personnel, Mr. Jim Anthony, Mr. Anthony's surveyor, two members of Council, at least one representative of the Nature Conservancy, and concerned environmentalists in order to make judgments about the disputed measurements of the confusing boundary line. He also reported periodically to Council in executive session on the details and the strengths and weaknesses of the parties' respective legal positions. There were divergent views as to the merits on the part of all key participants.

5. The City Attorney's Office retained the professional services of Mark Ratchford, a certified MAI appraiser, to advise on the value impact of the encroachment, which was a small geographical area. After holding discussions with Mr. Ratchford following his study and reaching a conclusion, the affiant realized that the City Attorney's Office was not likely to be able to present any expert evidence that there was any measureable impact on the value of the reservoir proeprty.

6. Information received from the Nature Conservancy, which has a conservation easement on the

land in question, indicated to the affiant that "taking up" the road as constructed would have a far more adverse environmental impact than allowing it to remain.

7. The affiant nonetheless undertook negotiations with Mr. Jim Anthony by telephone and in person on a settlement amount. The negotiations were protracted in part because various financial figures taken to the City Council did not result in a readiness by the affiant to put the settlement document on the agenda for Council action. Eventually the affiant and Mr. Anthony negotiated a settlement of $100,000 payment to the City for the road encroachment. The City Council dedicated the sum to a resolution of future boundary issues on reservoir related proeprty. The affiant's study of the relevant law and detailed facts as well as his negotiations and conversations with Council started long prior to the filing of the lawsuit by Mr. Sloan. Those negotiations and conversations made substantial progress long before Mr. Sloan filed his law suit in March 2008. City Council passed an ordinance settling the matter in April 2008.

8. Mr. Sloan never came to Council with a request to settle or with a suggested settlement. There is no reflection in the pleading s of Mr. Sloan of an understanding of the respective legal interests of the Greenville Water System, the Nature Conservancy, or the City of Greenville.

DATE: Oct. 21, 2011

Ronald W. McKinney

SWORN to before me this
21 Day of October, 2011

Notary Public for South Carolina
My Commission Expires: March 11, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NUMBER: 2008-CP-23-2255
	)	
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated,	)	
	)	Certificate of Service
Plaintiffs,	)	
v.	)	
City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

I hereby certify that the **MOTION TO ALTER OR AMEND RULE 59(e) OF DEFENDANT, CITY OF GREENVILLE,** was served on the Plaintiffs through Plaintiffs' attorney, James G. Carpenter, by placing a copy of the same in the United States Mail with proper postage affixed this 12th day of March, 2012 and addressed as follows:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street, Suite 230
Greenville, SC 29601

BY: Nadiya Myers

Nadiya Myers
Administrative Assistant
City of Greenville
Office of the City Attorney
P.O. Box 2207
Greenville, SC 29602

CERTIFICATE OF REPORTER

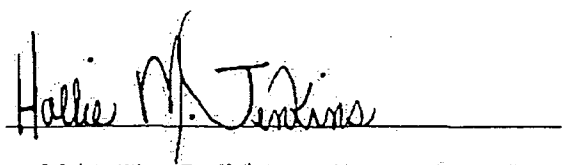
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 26th day of October, 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 15, 2012



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

MR. CARPENTER: For the Court's reference, a lot of the facts I was listing are in a motion to amend filed in February of 2009.

THE COURT: Okay. Thank you all.

**********END OF TRANSCRIPT OF RECORD**********

EXHIBIT I

Tonya Gramann

From: Kathleen Kempe
Sent: Friday, May 17, 2013 3:00 PM
To: Nadiya Myers
Subject: FW: Record on Appeal

city of greenville

Kathleen Kempe
Assistant City Attorney | City Attorney's Office
kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

From: Jennifer Miller [mailto:jennifer.miller@carpenterlawfirm.net]
Sent: Friday, May 17, 2013 2:41 PM
To: Kathleen Kempe
Subject: Record on Appeal

Good afternoon Kathleen. I just returned from vacation and noticed that the bound copy of the Record on Appeal was delivered to me, rather than to your office. I had requested Legal Eagle to deliver the unbound copy to me and the bound copy to you, and am uncertain about what they actually delivered to you. If you have the unbound copy, I apologize. If you don't have a bound copy, I will get this one right over to you.

Please let me know.

Thank you!

Jennifer J. Miller
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Cell: (864) 607-8694
www.carpenterlawfirm.net

CARPENTER
WHEN IT'S WORTH FIGHTING FOR!

EXHIBIT J

Tonya Gramann

From: Kathleen Kempe
Sent: Thursday, May 23, 2013 2:00 PM
To: Nadiya Myers; Tonya Gramann
Subject: FW: record on Appeal
Attachments: DOC051713.pdf

Kathleen Kempe
Assistant City Attorney | City Attorney's Office kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

-----Original Message-----
From: Kathleen Kempe
Sent: Friday, May 17, 2013 3:03 PM
To: jennifer.miller@carpenterlawfirm.net
Subject: FW: record on Appeal

Welcome back,
Did you see the letter we sent Jim? Can we get together on Monday to discuss?

Kathleen Kempe
Assistant City Attorney | City Attorney's Office kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

-----Original Message-----
From: CITSTechs
Sent: Friday, May 17, 2013 3:42 PM
To: Kathleen Kempe
Subject: Scanned from CH9452legal 05/17/2013 14:42

Scanned from CH9452legal.
Date: 05/17/2013 14:42
Pages:3
Resolution:200x200 DPI
---

city of
greenville

May 13, 2013

Office of the City Attorney

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street
Greenville, SC 29601

Re: The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as a taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated, Appellants/Respondents v. City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc., Defendants, Of Whom City of Greenville and Mayor Knox H. White are the Respondents/Appellants.

Appellate Case No.: 2012-212137

Dear Mr. Carpenter:

I have had an opportunity to review both volumes of the Record on Appeal brought to my office by Legal Eagle on May 8, 2013 and have found the following missing:

- Number 22 of the Respondents/Appellants' Designation of Matter to be Included in the Record on Appeal dated January 11, 2013, (City's Motion to Alter or Amend judgment pursuant to Rule 59(e) March 12, 2012); and
- Pages 26 and 27 of the October 26, 2011 transcript by Hollie M. Jenkins.

Both documents listed above are enclosed for your reference and inclusion in the Record on Appeal.

Additionally, I have noted the following items in the Record on Appeal that were not included in your Designation of Matter to be Included in the Record on Appeal dated January 9, 2013:

- R. pp. 17-25-Order Granting Attorneys' Fees and Costs Under S.C. Code 30-4-100(B)-2/24/09;
- R. pp. 26-28-Plaintiffs' Offer of Judgment-3/4/09;
- R. p. 33 Letter from James Carpenter to Hon. Garrison Hill enclosing proposed Consent Order-6/27/11;
- R. p. 59-Plaintiffs' Reply-4/25/09;
- R. pp. 60-63-Answer and Affirmative Defenses of Defendant The Cliffs at Glassy-5/9/09;

- R. pp. 64-69-Plaintiffs' Motion for Partial Judgment on the Pleadings Against the City and Mayor-5/12/08;
- R. pp. 70-72-Plaintiffs' Motion for Leave to File Supplemental Complaint SCRCP 15(d)-9/8/08;
- R. pp. 73-77-Plaintiffs' Supplemental Complaint-9/8/08;
- R. pp. 78-83-Plaintiffs' Motion for Leave to File Second Supplemental Complaint SCRCP 15(d)-10/28/08;
- R. pp. 125-127-Plaintiffs' Reply Memorandum in Support of Motion to Alter or Amend the Judgment-2/25/09;
- R. p. 190-Email from Tonya Gramann to Judge Hill and Plaintiffs' counsel enclosing City's Memorandum in Opposition to Motion for Attorneys' Fees-10/21/11;
- R. pp. 191-205-Hand Delivered Letter from Steven Buckingham with Nelson Mullins to all parties enclosing draft Opinion and Order with handwritten notes by Plaintiffs' counsel-1/21/09;
- R. pp. 206-208-Plaintiffs' Reply Memorandum in Support of Motion to Alter or Amend the Judgment-2/25/09;
- R. pp. 215-218-Plaintiffs' Response to Motion to Alter or Amend Rule 59(c); unsigned, undated;
- R. pp. 219-220-The Cliffs' Memorandum in Response to the Plaintiffs' Motion to Alter or Amend the Judgment-2/16/09;
- R. pp. 221-225-Plaintiffs' Supplemental Motion for Fees and Costs-7/15/11;
- R. pp. 226-227-Plaintiffs' Affidavit in Support of Motion for Fees and Costs-7/15/11;
- R. pp. 228-240-Response of The Cliffs at Glassy, Inc. to First Set of Interrogatories and Requests for Production of Plaintiffs-7/11/08;
- R. pp. 359-399-City of Greenville Meeting Minutes and Agenda Items, 9/10/07, 4/14/08, 5/12/08;

Concerning the maps and plats (R. pp. 402-423), with the exception of those listed as Exhibits, it is my understanding that they were not included in the Court of Common Pleas record in case number 2008-CP-23-2255. Therefore, they cannot be included in the Record on Appeal.

I request that you contact me at your earliest convenience to discuss the Record on Appeal.

Sincerely,

Kathleen G. Kempe
Assistant City Attorney

KGK/nrm

Enclosures

cc: Jenny Abbott Kitchings,
Clerk, SC Court of Appeals (without enclosures)

EXHIBIT K

Tonya Gramann

From: Kathleen Kempe
Sent: Wednesday, May 22, 2013 9:44 AM
To: Nadiya Myers
Subject: FW: 1009-007: COMBINED APPEAL (Sloan) SC Pub. Interest, et al. v. City, et al. / Letter to Jennifer Miller regarding Record on Appeal (sloan)
Attachments: Letter to Jennifer Miller regarding Record on.doc

For pro law

Kathleen Kempe
Assistant City Attorney | City Attorney's Office kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

-----Original Message-----
From: Kathleen Kempe
Sent: Wednesday, May 22, 2013 9:44 AM
To: jennifer.miller@carpenterlawfirm.net; james.carpenter@carpenterlawfirm.net
Subject: FW: 1009-007: COMBINED APPEAL (Sloan) SC Pub. Interest, et al. v. City, et al. / Letter to Jennifer Miller regarding Record on Appeal (sloan)

Good Morning,
Just following up with my earlier request to meet and finalize the Record on Appeal. Let me know when you are available.

Kathleen Kempe
Assistant City Attorney | City Attorney's Office kkempe@greenvillesc.gov | www.greenvillesc.gov
PHONE: 864-467-4422

-----Original Message-----
From: Nadiya Myers
Sent: Wednesday, May 22, 2013 8:28 AM
To: Kathleen Kempe
Subject: 1009-007: COMBINED APPEAL (Sloan) SC Pub. Interest, et al. v. City, et al. / Letter to Jennifer Miller regarding Record on Appeal (sloan)

Letter to Jennifer Miller regarding Record on Appeal (sloan)

EXHIBIT L

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NUMBER: 2008-CP-23-2255
	)	
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated,	)	Motion to Alter or Amend Rule 59(e)
Plaintiffs,	)	
v.	)	
City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

The January 22, 2009 order from Judge Few states that there are complex issues involved in determining a boundary line in the mountainous region of the North Saluda Reservoir, issues so complicated that he devoted three pages to the matter (pages 2-4). The affidavit of Mr. McKinney discusses the same complexity and the research he was required to do (paragraphs 2-3) and adds in the political issues as well (paragraph 7).

The order also states that "at about the same time" that [Sloan] commenced this action, the City and The Cliffs had come to an agreement on the complex issue of the boundary line (page 5). The order notes that on April 28, 2008, the Greenville City Council issued an ordinance (second reading) formalizing the agreement. At that point, the pleadings were filed less than 30 days prior. In fact, the City's answer, filed April 23, notes that there was a first reading of the ordinance with the agreement on April 4, 2008. At the point of first reading, Sloan's pleadings were less than one week old. The ordinance at both readings clearly states that the parties have reached an agreement as to the boundary line separating the two properties.

Sloan did not like the agreement reached by City Council as he wanted the encroaching road removed instead of a transfer of property. He persisted in his lawsuit even though it is well established that Courts steadfastly restrain from supplanting their judgment for that of governing bodies which exercise lawful, discretionary authority in a manner that is both reasonable and legitimate.

He maintained his lawsuit along two fronts. The first line of attack was the validity of the transfer of property from the City to the Cliffs. The Court' order found that those claims were not valid (pages 8-11). The second line of attack was that the wrong boundary line was used. The Court stated, "The City and The Cliffs have mutually agreed upon the location of their common boundary. Therefore, the Court will not pass upon the wisdom of the City and The Cliffs."

The cases cited by Sloan in argument for his attorney's fees all have the basic premise: The plaintiff is pursuing the lawsuit to force the governing body to do want is legally required under a specific law and the governing body refuses to do so until the last minute, thereby causing the plaintiff to expend the money on a lawsuit.

The matter before the Court differs in two very important ways from these cases. First, this is not an FOIA matter. There is not comparable state or local law requiring a governing body to act within a given time frame on a matter involving a property dispute. Second, this is not a case where the governing body was doing nothing. It is not refuted that long before Sloan's action was filed, significant research and negotiations were in progress to resolve the complex matter. A mere week after the lawsuit was filed, the first reading of an ordinance announcing a settlement was passed by City Council, said settlement could credibly have been resolved prior to any filing by Sloan.

It just wasn't the settlement Sloan wanted. And he spent money trying to get a court to get a governing body to adopt his time frame and his boundary line without any statutory authority for the Court to do so. And indeed, the Court refused to grant either, stating instead that this matter lies within the lawful, discretionary authority of City Council. The City Council came to a good settlement without Mr. Sloan's contributing in any way to any variation to that final settlement and therefore should not be awarded any attorneys' fees.

WHEREFORE, Defendant, City of Greenville prays the Court to deny the Plaintiffs' award of attorneys' fees and cost.

CITY OF GREENVILLE

Greenville, South Carolina

Date: March 12, 2012 BY: Kathleen G Kempe

Kathleen G. Kempe
S.C. Bar No. 003382
Attorney for the Defendant
CITY OF GREENVILLE
Post Office Box 2207
Greenville, South Carolina 29602
Telephone: (864) 467-4422
Email: kkempe@greenvillesc.gov

Exhibit A

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, Individually and as Taxpayers of the City of Greenville, South Carolina, and on behalf of Others Similarly Situated,	)	Civil Action No. 2008-CP-23-2255
Plaintiffs,	)	**OPINION & ORDER**
vs.	)	
City of Greenville, Knox H. White, Mayor, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

This matter came before the Court with a brief, but complicated, procedural history. This action was commenced on March 24, 2008. In May, the Plaintiffs filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. That September, the City of Greenville and Mayor White (collectively referred to as "the City") and The Cliffs at Glassy, Inc. ("The Cliffs"), moved respectively for summary judgment pursuant to Rule 56. On October 2, 2008, a hearing upon these motions was held, at which time the Court granted the Defendants' motions for summary judgment and denied the Plaintiffs' motion for judgment on the pleadings.[1]

[1] Prior to the October 2 hearing, but after the Defendants moved for summary judgment, the Plaintiffs filed a motion to supplement the Complaint pursuant to Rule 15(d). With the Defendants' consent, the Complaint was amended. Therefore, the Court's order of judgment against the Plaintiffs was based upon the First Amended Complaint.

On October 28, the Plaintiffs filed motions to alter or amend the judgment and to again, supplement the Complaint.[2] The Defendants opposed these motions. A hearing on this matter was held December 17, 2008.[3] After due consideration, the Court declined to alter its previous order granting summary judgment.

This opinion has been issued in order to explain the disposition of this case.

I. Factual & Procedural Background

This lawsuit involves the location of a common boundary between the City and The Cliffs, and a resulting property transfer that was intended to bring certainty to the location of that boundary. The line in dispute is a portion of the western boundary of the City's North Saluda Reservoir. The northern terminus of the boundary is located at a point on top of Corbin Mountain, which sits along the border between North and South Carolina. From the northern terminus, the boundary runs a southeasterly course to a point approximately two thousand feet away. Throughout this opinion, this southeasterly running line is referred to as "the Corbin Mountain Line."

The earliest known depiction of the Corbin Mountain Line is shown on map of northern Greenville County dating from 1918–1921. (Register of Deeds, Greenville County, S.C., Plat Book Y, Pages 114–18.) The map was drawn by Howard Wiswall, a civil engineer who had been retained by the Saluda Land & Lumber Company to identify

---

[2] Procedurally, the Plaintiffs filed only one motion, which was for leave to supplement the Complaint. However, summary judgment cannot be set aside with a simple Rule 15 motion. Instead, the Plaintiffs must proceed under the more exacting Rule 59(e), which authorizes the filing of motions to alter or amend judgments that have not been reduced to a written order.

[3] The Plaintiffs attached a revised complaint to their motion for leave to supplement. This pleading was captioned as the Second Amended Complaint. However, immediately prior to the hearing on December 17, the Plaintiffs submitted a Third Amended Complaint for the Court's consideration. The Third Amended Complaint formed the basis of the Court's decision of December 17, 2008.

relative timber rights in mountainous portions of Greenville and Pickens Counties. Wiswall shows the Corbin Mountain Line running southeasterly from the top of Corbin Mountain at 20 degrees; however, the Wiswall map does not describe the terminal points of the Corbin Mountain Line with any evidence of or reference to monumentation.

In the 1950s, the City acquired the tract of land to the east of the Corbin Mountain Line. This tract was incorporated into and became a part of the North Saluda Reservoir. At that time, a crew working on behalf of the City attempted to mark the Reservoir's western boundary, which in this case, was the Corbin Mountain Line. The City's crew did this by leaving hacks and blazes on trees. In surveying, a tree with two marks (either hacks or blazes) indicates the course of a property line; a tree with three marks indicates a property corner. A number of trees along the Corbin Mountain Line were marked with two hacks or blazes, witnessing the location of the property boundary. One particular tree bears three markings, which indicates a property corner. This tree is located on a ridgeline approximately 2000 feet southeast of the crest of Corbin Mountain.

In 2000, The Cliffs acquired the tract of land to the west of the Corbin Mountain Line. A local surveying company, Lindsey & Associates, Inc. ("Lindsey"), was commissioned to survey properties acquired by The Cliffs. Lindsey conducted a survey of the Corbin Mountain Line, and identified the tree with three hack marks as its southern terminus. Lindsey created a plat of his survey, and identified the southern terminus of the Corbin Mountain Line as "Station 115."

Lindsey also tried to locate the northern terminus of the Corbin Mountain Line, which was believed to be the crest of Corbin Mountain. However, at some point in time, the mountain's historical crest had been graded and leveled for construction. This

affected the location of the Line in two ways. *First*, grading the crest of Corbin Mountain changed the mountain's geography and created a new crest on the mountain that differed in location from the historical crest. *Second*, the precise location of the historical crest was not preserved for future reference. Using historical evidence, Lindsey identified a location where he believed the historical crest to have been. This point was chosen as the northern terminus of the Corbin Mountain Line.

Lindsey's survey of the Corbin Mountain Line was consistent with the City's understanding of the location of its own property boundary. Lindsey and the City understood Station 115, the tree with three marks, to witness the southern terminus. Lindsey and the City also found that the northern terminus was the crest of Corbin Mountain. Finally, Lindsey's survey of the Corbin Mountain Line resulted in a line that followed the hacks and blazes left by the City's crew. Therefore, in reliance upon the undisputed location of the Corbin Mountain Line, The Cliffs began to develop its properties for residential estates.

In 2004, there was some concern that a roadway constructed by The Cliffs for the use of its residents crossed over the Corbin Mountain Line and encroached upon City property. Lindsey surveyed the alleged encroachment and found: (1) that the roadway did, in fact, encroach onto approximately 0.29 acres of City property, (Register of Deeds, Greenville County, S.C., Plat Book 1069, Page 58); and (2) that a fire tower constructed by the City appeared to encroach onto 0.04 acres of property owned by The Cliffs. At that time, neither the City nor The Cliffs took any action to exclude the other from their encroachments.

Four years later, the Plaintiffs commenced this civil action. The central cause of action alleged is for purpresture, a claim that is more broadly preserved today in the doctrine of public nuisance. Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 573, 614 S.E.2d 619, 620–21 (2005). Simply stated, a purpresture is an encroachment by private use upon public rights and easements. Lowcountry Open Land Trust v. South Carolina, 347 S.C. 96, 109, 552 S.E.2d 778, 785 n.8 (2001). Actions for purpresture are comparable to corporate derivative suits, in that citizens may bring actions on behalf of their government to enjoin unlawful, unrestrained encroachments onto public property. See, e.g., Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959).

However, at about the same time that this action was commenced, the City and The Cliffs came to the following agreement: (1) that the Corbin Mountain Line would be established at the location depicted by Lindsey's 2004 survey; (2) that the 0.29 acres which encroached upon City property would be quitclaimed to The Cliffs; (3) that the 0.04 acres which encroached upon The Cliffs' property would be quitclaimed to the City; (4) that The Cliffs would reconstruct a fire tower on City property; and (5) that The Cliffs would pay the City (and parties related to the City) a certain amount in cash. The value of the consideration paid by The Cliffs to the City and related parties totaled $210,166.44.

On April 28, 2008, the Greenville City Council issued an ordinance that authorized the foregoing agreement. (City of Greenville, S.C., Ord. No. 2008-33.) Through this ordinance, the City was to "convey its interest in fee simple to approximately 0.29 acre[s] of real property on Mountain Summit Road, a private road, to The Cliffs at Glassy, Inc." (Id., § 2.) "The title conveyance by The City to The Cliffs at

Glassy, Inc., [was to] be in consideration of a payment from [T]he Cliffs at Glassy, Inc. . . ." (Id., § 3.) The City and The Cliffs were to "execute mutual releases of claims against one another and mutual acknowledgement of the boundary separating the properties respectively titled in their names." (Id. § 5.) "The identification of the locations of these property transfers and recognition of the mutual boundary [were to] be based upon the same plats and legal descriptions as have been agreed to . . . ." (Id. § 7.) Finally, "[t]he City Manager [was] authorized to approve and execute such deeds, acceptances, and agreements as are herein provided for . . . upon receipt of the payment described in Section 3." (Id., § 7.)

On June 19, 2008, the City Attorney signed a deed for 0.29 acres in favor of The Cliffs, and provided the deed to the closing attorney to hold in trust. Closing occurred on June 23, 2008. On June 24, the deed was duly recorded.

II. Disposition of the First Hearing

The hearing on October 2 was held as to determine: (1) whether the City had allowed an unlawful encroachment onto public property; (2) whether the City had acted without authority in transferring property to The Cliffs; and (3) whether the City's transfer of property had been unconstitutional pursuant to Article III, § 31 of the South Carolina Constitution. Summary judgment was entered against the Plaintiffs as to each of these claims.

A. Standard of Review

Summary judgment is to "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). To rebut a motion for summary judgment, the non-moving party must come forward with specific facts showing the existence of genuine, triable issues, and may not rest merely upon the allegations or denials set forth in his pleading. S.C. R. Civ. P. 56(e). If the non-moving party cannot set forth specific facts showing the existence of genuine, triable issues, summary judgment is proper. Id.

B. Summary judgment was properly granted with respect to purpresture pursuant to the doctrine of mootness.

The Plaintiffs contend that The Cliffs has unlawfully encroached onto municipal property, and that the City has failed to enjoin The Cliffs from continuing in the encroachment. However, the Defendants correctly argue that the issue of purpresture is moot. On June 23, 2008, The Cliffs received a deed for 0.29 acres from the City, thereby terminating any unlawful encroachment upon municipal property. (Register of Deeds, Greenville County, S.C., Book 2329, P. 817–20)

The Court will generally refrain from deciding issues that have become moot. Sloan v. Greenville County, ___ S.C. ___, ___ S.E.2d ___, 2008 WL 4693071, *3 (Ct. App. Oct. 22, 2008); Sloan v. South Carolina Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). A case becomes moot when judgment, if rendered, will have no practical legal effect. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

In this case, the Court was requested to declare that a purpresture existed with respect to the 0.29 acres that were the subject of the June 2008 conveyance. However, whether or not a purpresture may have existed at some point along the Corbin Mountain Line is irrelevant. The Court is concerned only with whether a purpresture continues to exist. The deed by which the City transferred property to The Cliffs removed any

condition of encroachment that may have been occurring. Once The Cliffs came into ownership of the property, it could no longer have been committing an encroachment.

In an action for purpresture, the only relief that can be obtained is an order enjoining further encroachment. However, The Cliffs now owns the very property that was the subject of encroachment. Under these circumstances, the Court will not order the rightful owner of property to quit his possession or surrender his title. Accordingly, summary judgment was properly granted with respect to the Plaintiff's action for purpresture.

C. **The June 2008 conveyance was not ultra vires and will not be rescinded.**

The Plaintiffs also claimed that the June 2008 conveyance was not properly authorized and should be set aside. However, the Defendants persuasively argued that the transaction was not ultra vires and should be sustained.

In relevant part, the enabling ordinance provides that "[t]he City Manager shall be authorized to approve and execute such deeds . . . upon receipt of the payment." (City of Greenville, S.C., Ord. No. 2008-33 ¶ 7.) On June 19, 2008, the City signed the deed regarding the property to be transferred to The Cliffs, and transferred the deed to the closing attorney to hold in escrow. On June 23, The Cliffs transferred the full amount of cash due and owing under the conveyance agreement to the escrow account of the closing attorney, whereupon the attorney made appropriate disbursements of real property and cash incident to closing. All deeds were recorded on June 24, 2008.

It is the Plaintiffs' contention that under the enabling ordinance, the City could not sign any deed until The Cliffs had rendered full performance of its obligations under the agreement. But this interpretation is inconsistent with the language of the ordinance.

The analysis begins with reference to familiar rules of statutory construction. "The cardinal rule of statutory construction is . . . to ascertain and effectuate the actual intent of the legislature," Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989), which in this case is the City Council. It is presumed that the legislature did not insert idle verbiage or superfluous language, but that each word of a legislative enactment is necessary, and that it has its own, independent meaning. Lee v. Thermal Eng'g Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct. App. 2002).

The Plaintiffs contend that the phrase "approve and execute," as it is used in the ordinance, requires the City to withhold any act of approval or execution (such as signing a deed and tendering the deed to a closing attorney) until The Cliffs has rendered full performance. However, to accept the Plaintiffs' interpretation would require the closing between the Cliffs and The City to have occurred in a way that deviated from modern real estate practice. The process of most closings involves an escrow agent receiving consideration from the parties and making an appropriate, simultaneous distribution of cash and property. In fact, this is the way that the closing occurred between the City and The Cliffs on June 23, 2008.

The more credible interpretation is the one provided by the City and The Cliffs. The Defendants distinguish between approval and execution and argue that approval is a condition precedent to execution. For the City to approve the property conveyance, it must lend its assent, which is evidenced by all necessary signatures. Approval was complete upon acquiring all necessary signatures; however, approval and execution were complete only upon the closing agent's simultaneous distribution of cash and property on June 23, 2008.

The Court is persuaded by the Defendants' interpretation. But even if that interpretation were not correct, the violation of the ordinance cited by the Plaintiffs is technical only, and would have no practical effect upon the outcome of an otherwise legitimate transfer of property.

D. The June 2008 conveyance did not violate the South Carolina Constitution.

The Plaintiffs further contend that the property transfer violated the South Carolina Constitution, specifically Article III, § 31, and should be set aside. However, Section 31 does not prohibit municipalities from making transfers of property to private corporations.

In relevant part, Section 31 provides that "[l]ands belonging to or directly under the control of the State shall never be donated, directly or indirectly, to private corporations . . . . Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals." S.C. Const. art. III, § 31. A clear line of precedents establish that Section 31 applies only to the State of South Carolina in its capacity as sovereign proprietor. It does not touch or concern lands owned by other governmental subdivisions, such as cities and counties. E.g., McKinney v. City of Greenville, 262 S.C. 227, 244, 203 S.E.2d 680, 689 (1974) (observing that Section 31 is "inapplicable" where "no lands belonging to or under the control of the State [in its capacity as sovereign proprietor] are involved"); Bobo v. City of Spartanburg, 230 S.C. 396, ___, 96 S.E.2d 67, 70 (1956); Haesloop v. City Council, 123 S.C. 272, 278, 115 S.E. 596, 598 (1923) ("[W]e think[] the reference in this constitutional provision is to public lands belonging to and controlled by the state in its capacity as sovereign proprietor.").

In addition, the Plaintiffs have provided no evidence to suggest that The Cliffs paid anything less than fair market value for the land that was conveyed. The evidence shows that the City was paid a very reasonable amount, over two hundred thousand dollars for less than one-third of an acre in northern Greenville County.

The Court is satisfied that the transaction between the City and The Cliffs was conducted at arms' length in a manner that was both fair and reasonable. The Court is further convinced that Section 31 does not restrict the sale of municipal property to private corporations. Summary judgment was therefore properly granted with respect to the constitutional claim.

III. Disposition of the Second Hearing

After the Court entered summary judgment against the Plaintiffs on October 2, the Plaintiffs filed motions to alter or amend the judgment and to amend the Complaint. This time, the Plaintiffs took the position that the City and The Cliffs had come to an incorrect agreement about the location of the entire Corbin Mountain Line. According to the Plaintiffs, the Corbin Mountain Line should have been placed at a location further west. The Plaintiffs therefore claimed that a continuing encroachment existed along the entire length of the Corbin Mountain Line and should be enjoined.

Motions to alter or amend are made through Rule 59(e). The purpose of this Rule is to provide a means through which the Court may reconsider matters that were encompassed in a decision on the merits. Arnold v. South Carolina, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) (citations omitted). However, this rule cannot be used to inject an issue into the case that was not previously before the Court, id., which the Plaintiffs appear to have attempted. To be specific, the first time that the Plaintiffs took

the position that the City and The Cliffs had come to an incorrect agreement about the location of the Corbin Mountain Line was after summary judgment had already been granted on October 2. This fact alone was more than enough reason to merit summary dismissal on December 17.

However, the Plaintiffs' motion to file an amended Complaint was denied on December 17 pursuant to an alternative procedural basis: claim preclusion. The doctrine of claim preclusion exists to bring a measure of finality to repetitive litigation. See, e.g., Garris v. Governing Bd., 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). It is generally applicable when: (1) the parties in subsequent litigation are the same as those in prior litigation; (2) the subject matter in subsequent litigation is the same as that in prior litigation; and (3) the prior litigation was resolved through a prior adjudication by a court of competent jurisdiction. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250, 452 S.E.2d 832, 833 (1994).

On October 2, the Defendants were awarded summary judgment with respect to purpresture on the procedural grounds of mootness. As previously addressed, the issue before the Court on October 2 was moot because the City had made a proper conveyance of land to The Cliffs which resolved any unlawful encroachment. The conveyance was based on the location of "the common property line," (Register of Deeds, Greenville County, S.C., Deed Book 2329, Page 817–20), which was itself a reference to Lindsey's survey of the location of the Corbin Mountain Line, (id., Plat Book 1069, Page 58). This deed, as well as the ordinance that enabled the City's conveyance, (City of Greenville, S.C., Ord. No. 2008-33), establish a mutual intent to regard Lindsey's survey of the Corbin Mountain Line as the recognized boundary between the City and The Cliffs. This

fact was necessarily decided by the Court on October 2 in determining that any claim of unlawful encroachment had been mooted.

As of the December 17 hearing, the claim remained moot. There were no new or additional facts that occurred which could have changed the legal relationship among the parties to this action. Instead, the Plaintiffs had requested that the Court review the prudence of the City's decision to establish the location of the Corbin Mountain Line according to Lindsey's survey. But to exercise such review would far exceed the scope of the Court's proper judicial function. As a matter of sound judicial policy, the Court steadfastly refrains from supplanting its judgment for that of a governing political body which has exercised lawful, discretionary authority in a manner that is both reasonable and legitimate.

The City and The Cliffs have mutually agreed upon the location of their common boundary. Therefore, the Court will not pass upon the wisdom of the City and The Cliffs in giving preference to Lindsey's survey to establish that line. Instead, the scope of the Court's review is limited to whether an unlawful encroachment exists with regard to the line that was actually agreed to.

In this case, there is no unlawful encroachment. Any purpresture that may have existed was resolved by the transfer of property in June 2008. That transfer mooted the purpresture issue pending before the Court on October 2, and it remained moot on December 17. A claim that has been deemed moot remains moot, and due to the doctrine of preclusion, cannot support a subsequent action without some change in material fact.

IV. CONCLUSION

For the foregoing reasons, summary judgment was entered in favor of the Defendants on October 2, 2008. The Plaintiffs' motion for judgment on the pleadings was denied. Additionally, the Court declines the invitation to reconsider its previous decision, and shall not grant the Plaintiffs leave to amend the Complaint.

It is SO ORDERED.

The Honorable John C. Few
Judge, Thirteenth Judicial Circuit

Entered this 22 day of January 2009

Exhibit B

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF GREENVILLE)

PERSONALLY appeared before me the undersigned who, being first duly sworn, Deposes and says that:

1. He is Ronald W. McKinney, City Attorney for the City of Greenville. He has held the position of City Attorney at all relevant times during the dispute and negotiations relevant to an encroachment upon property on Corbin Mountain near the North Saluda reservoir. The property is titled in the name of City of Greenville and managed by the Greenville Water System. This affidavit is not intended to waive any attorney-client confidentiality but offered for the limited purpose of establishing a time line and the circumstances associated with the resolution of an encroachment.

2. In his capacity as city attorney, the affiant learned that some type of encroachment occurred on the periphery of the North Saluda Reservoir property sometime in 2005, when a proposed settlement agreement was forwarded to the City for signature. The Water System board had settled for $5,000 and a Fire tower. The Nature Conservancy had agreed to accept $50,000 for the encroachment upon its conservation easement. There was no provision at all for the City receiving a settlement in the document forwarded to the City for signature. The City government had not been officially notified by the other parties of the encroachment or of the negotiations for settlement.

3. The affiant began inquiry into the facts, and learned the boundary line was not clearly identifiable, and that there was a genuine issue of fact as to whether there had been *any* encroachment at all. The terrain is very steep, the deed descriptions were those generally used in Northern Greenville County in the 1950's, and the description markers were not clearly decipherable. The affiant met with Water System personnel, studied documents relating to the acquisition of the property with Water system revenue under the terms of a revenue bond issued in the name of the City of Greenville but supported solely by Water System revenue. The affiant studied the underlying boundary descriptions and such plats as were maintained in Water System offices.

4. Over the next several months, he interviewed on more than one occasion Water System personnel who were familiar with the circumstances of the encroachment. He also met at the site key Water System personnel, Mr. Jim Anthony, Mr. Anthony's surveyor, two members of Council, at least one representative of the Nature Conservancy, and concerned environmentalists in order to make judgments about the disputed measurements of the confusing boundary line. He also reported periodically to Council in executive session on the details and the strengths and weaknesses of the parties' respective legal positions. There were divergent views as to the merits on the part of all key participants.

5. The City Attorney's Office retained the professional services of Mark Ratchford, a certified MAI appraiser, to advise on the value impact of the encroachment, which was a small geographical area. After holding discussions with Mr. Ratchford following his study and reaching a conclusion, the affiant realized that the City Attorney's Office was not likely to be able to present any expert evidence that there was any measureable impact on the value of the reservoir proeprty.

6. Information received from the Nature Conservancy, which has a conservation easement on the

land in question, indicated to the affiant that "taking up" the road as constructed would have a far more adverse environmental impact than allowing it to remain.

7. The affiant nonetheless undertook negotiations with Mr. Jim Anthony by telephone and in person on a settlement amount. The negotiations were protracted in part because various financial figures taken to the City Council did not result in a readiness by the affiant to put the settlement document on the agenda for Council action. Eventually the affiant and Mr. Anthony negotiated a settlement of $100,000 payment to the City for the road encroachment. The City Council dedicated the sum to a resolution of future boundary issues on reservoir related proepnty. The affiant's study of the relevant law and detailed facts as well as his negotiations and conversations with Council started long prior to the filing of the lawsuit by Mr. Sloan. Those negotiations and conversations made substantial progress long before Mr. Sloan filed his law suit in March 2008. City Council passed an ordinance settling the matter in April 2008.

8. Mr. Sloan never came to Council with a request to settle or with a suggested settlement. There is no reflection in the pleading s of Mr. Sloan of an understanding of the respective legal interests of the Greenville Water System, the Nature Conservancy, or the City of Greenville.

DATE: Oct. 21, 2011

Ronald W. McKinney

SWORN to before me this
21 Day of October, 2011

Notary Public for South Carolina
My Commission Expires: March 11, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NUMBER: 2008-CP-23-2255
	)	
The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., and Robert M. Lloyd, individually and as taxpayers of the City of Greenville, South Carolina, and on behalf of all others similarly situated,	)	
	)	Certificate of Service
Plaintiffs,	)	
v.	)	
City of Greenville, Mayor Knox H. White, and The Cliffs at Glassy, Inc.,	)	
Defendants.	)	

I hereby certify that the **MOTION TO ALTER OR AMEND RULE 59(e) OF DEFENDANT, CITY OF GREENVILLE,** was served on the Plaintiffs through Plaintiffs' attorney, James G. Carpenter, by placing a copy of the same in the United States Mail with proper postage affixed this 12th day of March, 2012 and addressed as follows:

James G. Carpenter, Esquire
The Carpenter Law Firm, P.C.
819 East North Street, Suite 230
Greenville, SC 29601

BY: Nadiya Myers

Nadiya Myers
Administrative Assistant
City of Greenville
Office of the City Attorney
P.O. Box 2207
Greenville, SC 29602

EXHIBIT M

MR. CARPENTER: For the Court's reference, a lot of the facts I was listing are in a motion to amend filed in February of 2009.

THE COURT: Okay. Thank you all.

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

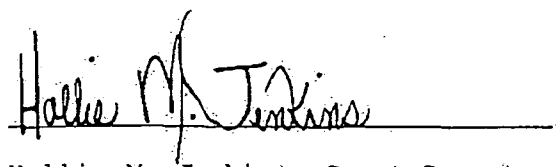
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 26th day of October, 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 15, 2012



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20