ORIGINAL

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.

APPELLANTS' FINAL REPLY BRIEF OF THE RESPONDENTS/APPELLANTS

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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 (hereinafter, referred to as Defendants), 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, 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 on December 17, 2008. Sloan attached a revised complaint to his 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. (R. pp. 92-94) 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 (R. pp. 188-189) 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. (R. p. 189, ¶ 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. (R. p. 256, lines 18-22) Sloan then argued that the conveyance was unconstitutional (R. p. 88) and/or there was a technical violation. (R. p. 264, lines 7-8) And that therefore there was still a trespass. After the Judge ruled that the purpresture issue was moot (R. p. 274, lines 3-4), 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. (R. p. 276, 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." (R. p. 279, lines 16-22) 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. (R. p. 281, 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 (R. p. 92-94) 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 anymore 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..." (R. p. 326, 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 ... "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." (R. p. 328, lines 4-8) Further the Court stated that the City Council did exactly what [Sloan] said they did not do, that is, they addressed the encroachment. (R. p. 328, lines 16-19) The City did that on April 28, 2008. Then the Court stated, "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." (R. p. 328, lines 20-25 and R. p. 329, line 1) 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." (R. p. 329, 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 between multiple parties that started long before the filing of the complaint. (R. p. 188-189)

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. (R. p. 340, lines 9-10) He nevertheless asked for attorney fees for fees and expenses (including expenses for boundary line documents that were never put into evidence) that he incurred after the City passed the ordinance on April 28, 2008 settling the matter. It should also be noted that there were no sealed surveys offered into evidence and yet Sloan seeks to have his expenses paid for these documents. 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. THE RESPONDENTS' BRIEF OF APPELLANTS /RESPONDENTS FAILS TO DEMONSTRATE THAT SOUTH CAROLINA PUBLIC INTEREST FOUNDATION IS A PREVAILING PARTY.

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. (R. p. 41) 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. (R. pp. 188-189) 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] were being prepared for the agenda, Sloan filed his lawsuit. (R. p. 354, lines 12-16) 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." (R. p. 328, lines 20-22) 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 a monetary settlement or a transfer of property. He just wanted the road moved. 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. (R. pp. 188-189, ¶ 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 was 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 for any modification of the settlement ordinance. Clearly under the reasoning of *Crenshaw's*, Sloan has not prevailed. In fact, under *Crenshaw's*, the City is the prevailing party.

II. THE RESPONDENTS' BRIEF OF APPELLANTS /RESPONDENTS FAILS TO DEMONSTRATE THAT THE CITY FAILED TO ACT WITHOUT SUBSTANTIAL JUSTIFICATION AND THEREFORE THE CITY DID ACT WITH SUBSTANTIAL JUSTIFICATION

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 (R. pp. 188-189, ¶ 6); 2) Research to determine the property line, the location of which was on a mountain side and depended on outdated descriptions (R. p. 188, ¶¶ 2, 3); 3) Negotiation with both developer and Council to determine a value for that encroachment (R. p. 189, ¶ 7); and 4) Time to carefully craft the ordinance to present for public vote by City Council that document which summarizes the settlement and gives finality to that property line (R. pp. 92-94). 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 (unlike FOIA cases where there is a time limit to comply).

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. (R. p. 328, lines 20-22)

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 of Sloan's litigation, the City's settlement with the Cliffs is the same as the settlement was on April 28, 2008.

III. RESPONDENTS' BRIEF OF APPELLANTS /RESPONDENTS FAILS TO DEMONSTRATE THAT SPECIAL CIRCUMSTANCES MAKE AN AWARD OF FEES UNJUST AND THEREFORE THE AWARD IS UNJUST.

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. (R. p. 280, lines 3-6) Sloan went ahead and paid for boundary line research but never produced a sealed survey that was used either by the Court or by the City. The so called "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 City's 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. (R. p. 263, lines, 1-14) 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. (R. p. 93, Section 4) 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. (R. p. 189, ¶ 8) It is somewhat ironic that he did not even file an FOIA.

IV. RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS FAILS TO DEMONSTRATE THAT SOUTH CAROLINA PUBLIC INTEREST FOUNDATION IS ENTITLED TO RECOVER COSTS IN THIS MATTER.

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.

V. RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS FAILS TO DEMONSTRATE THAT SOUTH CAROLINA PUBLIC INTEREST FOUNDATION'S ACTUAL ATTORNEYS FEES AND COSTS ARE REASONABLE

Sloan argues that he was required to expend to engage a land surveyor because the City failed to commission a survey and one was necessary. This argument fails for four reasons. First, the surveyor who was hired did not submit a sealed plat. It was the surveyor's opinion that there was a genuine dispute as to the location of the line. Sloan's surveyor proved the City's point: There was no way to determine what the boundary line was and that the best way to resolve the issue was by a boundary line agreement.

Secondly, the City's settlement did not require a survey and in fact the settlement agreement in place was done without one. Thirdly, the Court even warned Sloan that if he persisted with surveys, there were to be done at his expense. (R. p. 281, lines 9-14) Finally, no survey was put into evidence and therefore, Sloan is not entitled to any reimbursement of the expense.

Sloan contends that the settlement for $100,000 for the encroachment was the result of his lawsuit. Yet he persisted in litigation to overturn the conveyance and the compensation. (R. p. 263, lines 1-14) It would be unjust and unreasonable to award Sloan fees and expenses from money Sloan litigated against. It clearly was unreasonable for him to spend the funds he did.

Sloan contends that he alone achieved satisfactory results for the City. This is disingenuous as he fought against this settlement for two years. He never proposed any monetary settlement and never raised as an issue whether the monetary settlement was sufficient, and yet, now he claims a portion of it.

VI. RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS FAILS TO DEMONSTRATE THAT THE CIRCUIT COURT ABUSED ITS DISCRETION BY CUTTING OFF FEES BEFORE THE CITY ENDED THE PURPRESTURE.

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. (R. p. 41) 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).

Without conceding that there is no justification for the award of any attorney fees or costs in this matter, the City would argue that it would be within the discretion of the Court to determine the point of time in which Sloan met the three criteria for attorney fees and to use that time to calculate his expenditures. The trial Judge found that Sloan did not prevail in his insistence on overturning the transfer of property and in his insistence on determining what the boundary line was between the City and the Cliffs. The judge who heard the motion for attorney fees found that Sloan only prevailed to the point of the recording of the deed, a deed he argued against in the first hearing. The City would argue that the recording of the deed and the boundary line were provided for in the Ordinance which had first reading two weeks after the Sloan lawsuit was filed and was provided for in the settlement agreement with was arguably reached prior to the lawsuit. And indeed the case that Sloan cites, *Layman v. State*, 376 S.C. 434, 445, 658 S.E. 2d 320, 326 (2008) would better stand for the denial of any attorney fees due to the fact that it relies on the substance and outcome of the matter litigated as relevant to the justification in pressing a claim. In this case, the final result was the Sloan lawsuit had no effect on the terms of the settlement and imposed no duty or timeframe for City Council action.

CONCLUSION

The Respondents' Brief of Appellants/Respondents' fails to demonstrate that Appellants/ Respondents are entitled to attorney fees under the criteria set forth in S.C. Code Ann. Section 15-77-300. The Appellants/Respondents' Brief fails to demonstrate that the June 24, 2008 cutoff for payment of Appellants/Respondents' attorneys' fees was

an abuse of discretion and further fails to demonstrate that any fees were due. Finally, the Appellants/Respondents' brief fails to demonstrate that Appellants/Respondents' attorneys' fees were reasonable.

Therefore, for reasons stated, this Court should reverse the decision of the Circuit Court and determine that attorneys' fees and costs are not available to Sloan in this matter.

Respectfully submitted,

September 26, 2013

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THE STATE OF SOUTH CAROLINA
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Of Whom City of Greenville and Mayor Knox White are the. . . . . Respondents/Appellants.

CERTIFICATE OF COUNSEL

Respondents/Appellants certify that as required by SCACR 211(b), Appellants' Final Reply Brief of the Respondents/Appellants is identical to the Appellants' Initial Reply Brief of the Respondents/Appellants previously served under Rule 208, except for references to the Record on Appeal and the correction of typographical errors and misspellings.

September 26, 2013

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PROOF OF SERVICE

I certify that I have served the **Appellants' Final Brief of the Respondents/Appellants, Respondents' Final Brief of the Respondents/Appellants, and Appellants' Final Reply Brief of the Respondents/ Appellants** on the 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 September 30 2013, addressed to their attorney of record, James G. Carpenter, The Carpenter Law Firm, P.C., 819 East North Street, Greenville, SC 29601.

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