

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Opinion No 4914 (S C Ct App Filed November 30, 2011)

Stevens & Wilkinson of South Carolina, Inc ,
Gary Realty Company, Inc , Garfield Traub
Development, LLC, and Turner Construction
Company

Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc
Gary Realty Company, Inc and Garfield Traub
Development, LLC are

Respondents,

vs

City of Columbia, Paul C "Bo" Aughttry III,
Windsor/Aughttry Co , Inc , Vista Hotel Partners,
LLC, and Hilton Hotels Corporation

Defendants,

Of Whom

City of Columbia is

Petitioner

APPENDIX - VOLUME II

Michael W Tighe
D Reece Williams, III
Richard C Detwiler
Kathleen M McDaniel
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone (803) 404-6900
ATTORNEYS FOR PETITIONER

APPENDIX 0501

City of Columbia So. Carolina

City of Milbilla H on Operating Statement Fiscal Year Ending December 31											Revenue	Expenditure	Net Income	Operating Ratio
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015				
Available Rooms (Dy)	300	300	300	300	300	300	300	300	300	300				
A. Table Rooms (An Dy)	109,500	109,500	109,500	109,600	109,500	109,500	109,500	109,500	109,500	109,500				
Occupied Rooms (An Dy)	67	80	75,560	77,750	77,750	77,750	77,750	77,750	77,750	77,750				
Occupancy Percentage	62.00%	69.00%	71.00%	71.00%	71.00%	71.00%	71.00%	71.00%	71.00%	71.00%				
Average Room Rate	\$117.75	\$122.25	\$126.50	\$125.25	\$134.25	\$138.25	\$142.25	\$146.50	\$151.00	\$155.50				
Revenue Per Occupied Room (PAR)	\$73.01	\$84.35	\$89.82	\$92.48	\$95.32	\$98.16	\$101.00	\$104.02	\$107.21	\$110.00				
REVENUE														
Room s	\$7,994	\$9,237	\$9,835	\$10,127	\$10,438	\$10,739	\$11,060	\$11,390	\$11,740	\$12,090				
Food & Beverage	4,627	4,765	4,908	5,056	5,207	5,364	5,524	5,690	5,861	6,037				
Telecommunications	7	168	178	184	189	195	201	207	213	220				
Gas	576	56	700	721	742	765	788	811	836	861				
Other Operating Expenses	257	295	312	322	331	341	352	362	373	384				
Rents and Other Income	73	84	89	92	95	98	100	103	107	110				
Total Revenue	\$13,474	\$15,199	\$16,022	\$16,502	\$17,002	\$17,512	\$18,025	\$18,546	\$19,130	\$19,702				
DEPARTMENTAL EXPENSES														
Room s	\$1,970	\$2,136	\$2,231	\$2,298	\$2,367	\$2,438	\$2,511	\$2,587	\$2,664	\$2,744				
Food & Beverage	3,239	3,336	3,436	3,539	3,645	3,754	3,867	3,983	4,103	4,226				
Telecommunications	88	101	107	110	114	117	121	124	128	132				
Gas	419	80	509	524	540	556	573	590	607	626				
Other Operating Expenses	189	206	219	225	232	239	246	253	261	269				
Total Dept Departmental Expense	\$5,896	\$6,259	\$6,502	\$6,696	\$6,858	\$7,104	\$7,318	\$7,537	\$7,763	\$7,997				
Departmental Profit	\$7,578	\$8,940	\$9,520	\$9,806	\$10,144	\$10,408	\$10,707	\$11,009	\$11,367	\$11,705				
UNDISTRIBUTED EXPENSES														
Admin & Gen	\$1,006	\$1,035	\$1,068	\$1,100	\$1,133	\$1,167	\$1,202	\$1,238	\$1,275	\$1,313				
Marketing	1,087	1,120	1,154	1,188	1,224	1,261	1,298	1,337	1,376	1,418				
Property Operation & Maintenance	576	593	611	630	648	668	688	709	730	752				
Utilities	503	518	534	550	566	583	601	619	637	656				
Total Undistributed of Other Expenses	\$3,172	\$3,267	\$3,367	\$3,468	\$3,571	\$3,679	\$3,789	\$3,903	\$4,020	\$4,140				
GROSS OPERATING PROFIT	\$4,406	\$5,683	\$6,153	\$6,340	\$6,533	\$6,729	\$6,918	\$7,123	\$7,370	\$7,562				
FIXED CHARGES														
Interest	138	142	146	151	155	160	165	170	175	180				
Total Fixed Charges	\$138	\$142	\$146	\$151	\$155	\$160	\$165	\$170	\$175	\$180				
EBITDA BEFORE MGT FEES	\$4,268	\$5,541	\$6,007	\$6,189	\$6,378	\$6,569	\$6,753	\$6,953	\$7,197	\$7,382				
MANAGEMENT FEES														
Base Management Fee	\$273	\$280	\$287	\$294	\$301	\$308	\$315	\$322	\$329	\$336				
Incentive Management Fee (see below)	0	0	0	0	0	0	0	0	0	0				
Total Management Fees	\$273	\$280	\$287	\$294	\$301	\$308	\$315	\$322	\$329	\$336				
EBITDA	\$4,000	\$5,261	\$5,720	\$5,895	\$6,077	\$6,267	\$6,438	\$6,631	\$6,841	\$7,046				
Primary F&E Reserve	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137				
NET OPERATING INCOME (1)	\$3,863	\$5,124	\$5,583	\$5,758	\$5,940	\$6,130	\$6,301	\$6,494	\$6,704	\$6,909				
Add: Incentive Management Fee (see below)	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0				
ADJUSTED NET OPERATING INCOME	\$3,863	\$5,124	\$5,583	\$5,758	\$5,940	\$6,130	\$6,301	\$6,494	\$6,704	\$6,909				
INVESTMENT EARNINGS AND OTHER REV (2)														
Debt Service Reserve Fund Tax Exempt	\$15	\$15	\$15	\$15	\$15	\$15	\$15	\$15	\$15	\$15				
Debt Service Reserve Fund Tax Exempt	280	280	280	280	280	280	280	280	280	280				
Total Investment Earnings and Other Revenue	\$295	\$295	\$295	\$295	\$295	\$295	\$295	\$295	\$295	\$295				
REVENUES AVAILABLE FOR DEBT SERVICE	\$4,158	\$5,435	\$5,898	\$6,073	\$6,235	\$6,425	\$6,596	\$6,789	\$6,999	\$7,204				
TAXABLE LIEN DEBT SERVICE														
Gross Debt Service	\$258	\$258	\$258	\$258	\$258	\$258	\$258	\$258	\$258	\$258				
Capital Gains	\$29	\$29	\$29	\$29	\$29	\$29	\$29	\$29	\$29	\$29				
Net Taxable Debt Service	\$229	\$229	\$229	\$229	\$229	\$229	\$229	\$229	\$229	\$229				
TAX-EXEMPT LIEN DEBT SERVICE														
Gross Debt Service	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082	\$3,082				
Capital Gains	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541				
Net Tax-Exempt Debt Service	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541	\$1,541				
TOTAL NET DEBT SERVICE	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670	\$1,670				
NET CASH FLOW AFTER DEBT SERVICE	\$2,488	\$3,465	\$4,203	\$4,403	\$4,565	\$4,755	\$4,919	\$5,119	\$5,325	\$5,564				
OTHER DEDUCTIONS														
Subordinated Management Fee	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137	\$137				
Subordinated F&E Reserve Fund	\$273	\$273	\$273	\$273	\$273	\$273	\$273	\$273	\$273	\$273				
Total Other Deductions	\$410	\$410	\$410	\$410	\$410	\$410	\$410	\$410	\$410	\$410				
NET CASH FLOW	\$2,078	\$3,055	\$3,793	\$4,003	\$4,155	\$4,345	\$4,535	\$4,725	\$4,915	\$5,144				
APPLICATION OF NET CASH FLOWS														
Supplemental Reserve Fund	\$2,409	\$3,340	\$4,225	\$4,377	\$4,529	\$4,681	\$4,833	\$4,985	\$5,137	\$5,289				
Debt Service Fund 50%	0	1,048	178	198	228	258	288	318	348	378				
City Surplus Fund 50%	0	1,048	178	198	228	258	288	318	348	378				
Remaining Net Cash Flow	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0				
FUND BALANCES														
Supplemental Reserve Fund	\$3,340	\$3,340	\$4,225	\$4,377	\$4,529	\$4,681	\$4,833	\$4,985	\$5,137	\$5,289				
Accumulated Surplus	\$2,409	\$3,340	\$4,225	\$4,377	\$4,529	\$4,681	\$4,833	\$4,985	\$5,137	\$5,289				
Accumulated Bond Redemption Fund	0	1,048	178	198	228	258	288	318	348	378				
Accumulated Surplus Fund	0	1,048	178	198	228	258	288	318	348	378				
AVAILABLE CITY STANDBY SUP. PAYMENT	\$835	\$835	\$1,670	\$2,212	\$2,218	\$2,229	\$2,236	\$2,241	\$2,245	\$2,249				
DEBT SERVICE COVERAGE RATIOS														
Debt Service Coverage Ratio (3)	5.21	6.17	7.25	7.50	7.57	7.65	7.73	7.81	7.89	7.97				
Total Debt Service Coverage Ratio (4)	2.61	3.08	3.62	3.75	3.78	3.82	3.86	3.90	3.94	3.98				

NOTES:
 (1) As provided by F&E through 2015, 3% annual increase thereafter.
 (2) Assume total earnings of 15.00% of Debt Service Reserve Funds.
 (3) Adjusted Net Operating Income plus DSRF earnings divided by Net Debt Service.
 (4) Adjusted Net Operating Income plus DSRF earnings divided by Net Debt Service.

City of Columbia South Carolina
Columbia Hilton
Operating Statement and Financial Review
for the Year Ending December 31

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Average Room Rate (Daily)	300	300	300	300	300	300	300	300	300	300
Average Rooms (Annually)	109,500	109,800	109,500	109,500	109,500	109,000	108,500	109,500	109,500	109,800
Occupied Room (Annually)	78,183	78,397	78,183	78,183	78,183	78,397	78,63	78,183	78,183	78,397
Occupancy Percentage	71.40%	71.40%	71.40%	71.40%	71.40%	71.40%	71.40%	71.40%	71.40%	71.40%
Average Room Rate	\$160.17	\$164.97	\$169.92	\$175.02	\$180.27	\$185.68	\$191.25	\$196.98	\$202.89	\$208.98
Revenue Per Occupied Room (RVPAR)	\$11.36	\$11.79	\$12.32	\$12.93	\$13.71	\$14.57	\$15.55	\$16.65	\$17.87	\$19.21
REVENUE										
Room	\$12,453	\$12,826	\$13,215	\$13,607	\$14,016	\$14,436	\$14,869	\$15,315	\$15,775	\$16,248
Food & Beverage	5,218	5,405	5,597	5,795	5,999	6,208	6,425	6,647	6,877	7,113
Telephone	227	233	240	248	255	263	271	279	287	296
Garage	887	913	941	968	998	1,028	1,059	1,091	1,123	1,157
Other Operating Department	396	407	420	432	445	459	472	486	501	516
Rentals and Other Income	113	117	120	124	128	131	135	139	144	148
Total Revenue	\$20,293	\$20,902	\$21,525	\$22,175	\$22,840	\$23,529	\$24,241	\$24,958	\$25,707	\$26,468
DEPARTMENTAL EXPENSES										
Rooms	\$2,826	\$2,911	\$2,998	\$3,088	\$3,181	\$3,276	\$3,375	\$3,476	\$3,580	\$3,686
Food & Beverage	4,353	4,483	4,618	4,756	4,899	5,046	5,197	5,353	5,514	5,679
Telephone	136	140	144	149	153	158	162	167	172	177
Garage	645	664	684	705	726	747	770	793	817	841
Other Operating Department	277	285	294	303	312	321	331	341	351	362
Total Departmental Expense	\$8,237	\$8,484	\$8,739	\$8,961	\$9,211	\$9,470	\$9,735	\$10,008	\$10,281	\$10,552
Departmental Profit	\$12,056	\$12,418	\$12,786	\$13,214	\$13,629	\$14,059	\$14,513	\$14,950	\$15,426	\$15,916
UNDISTRIBUTED EXPENSES										
Admin & Gen	\$1,352	\$1,393	\$1,435	\$1,478	\$1,522	\$1,568	\$1,615	\$1,663	\$1,713	\$1,765
Marketing	1,462	1,505	1,551	1,597	1,645	1,694	1,745	1,798	1,851	1,907
Property Operation & Maintenance	775	798	822	846	872	898	925	953	981	1,011
Utility Costs	675	696	717	738	760	783	807	831	856	882
Total Undistributed Operating Expenses	\$4,264	\$4,392	\$4,524	\$4,660	\$4,799	\$4,943	\$5,092	\$5,244	\$5,402	\$5,564
GROSS OPERATING PROFIT	\$7,792	\$8,026	\$8,266	\$8,554	\$8,830	\$9,116	\$9,419	\$9,742	\$10,025	\$10,354
FIXED CHARGES										
Insurance	185	191	197	203	209	215	221	228	235	242
Taxes and Charges	\$185	\$191	\$197	\$203	\$209	\$215	\$221	\$228	\$235	\$242
EBITDA BEFORE MGT FEES	\$7,607	\$7,835	\$8,069	\$8,351	\$8,621	\$8,901	\$9,198	\$9,514	\$9,790	\$10,112
Management Fees	\$558	\$575	\$592	\$610	\$628	\$647	\$666	\$686	\$707	\$728
Live Management Fees (1)	0	0	0	0	0	0	0	0	0	0
Total Management Fees	\$558	\$575	\$592	\$610	\$628	\$647	\$666	\$686	\$707	\$728
EBITDA	\$7,049	\$7,260	\$7,477	\$7,741	\$7,993	\$8,254	\$8,532	\$8,828	\$9,083	\$9,384
Primary FFAER Revenue	\$1,015	\$1,045	\$1,076	\$1,109	\$1,142	\$1,176	\$1,212	\$1,248	\$1,285	\$1,324
NET OPERATING INCOME (1)	\$6,034	\$6,215	\$6,401	\$6,632	\$6,851	\$7,078	\$7,320	\$7,583	\$7,798	\$8,058
Adjusted Incentive Management Fees (2)	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
ADJUSTED NET OPERATING INCOME	\$6,034	\$6,215	\$6,401	\$6,632	\$6,851	\$7,078	\$7,320	\$7,583	\$7,798	\$8,058
INVESTMENT EARNINGS AND OTHER REV (2)										
Debt Service Reserve Fund - Taxable	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Debt Service Reserve Fund - Tax-Exempt	280	280	280	280	280	280	280	280	280	280
Total Investment Earnings and Other Revenue	\$280	\$280	\$280	\$280	\$280	\$280	\$280	\$280	\$280	\$280
REVENUES AVAILABLE FOR DEBT SERVICE	\$6,314	\$6,495	\$6,681	\$6,912	\$7,131	\$7,358	\$7,600	\$7,863	\$8,078	\$8,338
TAXABLE LIEN DEBT SERVICE										
General Debt Service	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Capital Expenditures	0	0	0	0	0	0	0	0	0	0
Net Taxable Lien Debt Service	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
TAX-EXEMPT LIEN DEBT SERVICE										
General Debt Service	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Capital Expenditures	0	0	0	0	0	0	0	0	0	0
Net Tax-Exempt Lien Debt Service	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
TOTAL NET DEBT SERVICE	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
NET CASH FLOW AFTER DEBT SERVICE	\$1,908	\$2,030	\$2,186	\$2,363	\$2,551	\$2,748	\$2,955	\$3,173	\$3,393	\$3,616
OTHER DEDUCTIONS										
Subordinated Management Fees	\$254	\$266	\$278	\$291	\$304	\$318	\$333	\$348	\$363	\$379
Subordinated FFAER Revenue Fund	609	627	646	665	685	706	727	749	771	794
Total Other Deductions	\$863	\$893	\$924	\$956	\$989	\$1,024	\$1,060	\$1,097	\$1,133	\$1,173
NET CASH FLOW	\$1,045	\$1,137	\$1,262	\$1,408	\$1,562	\$1,724	\$1,895	\$2,076	\$2,260	\$2,443
APPLICATION OF NET CASH FLOWS										
Supplemental Reserve Fund	\$57	\$51	\$54	\$57	\$55	\$57	\$54	\$60	\$56	\$62
Redemption Fund - 50%	493	545	598	652	709	768	821	874	929	984
City Surplus Fund - 50%	493	545	598	652	709	768	821	874	929	984
Remaining Net Cash Flow	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
FUND BALANCES										
Supplemental Reserve Fund	\$4,465	\$4,516	\$4,570	\$4,627	\$4,682	\$4,739	\$4,793	\$4,853	\$4,909	\$4,971
Accumulated Supplemental Reserve Fund	\$4,465	\$4,516	\$4,570	\$4,627	\$4,682	\$4,739	\$4,793	\$4,853	\$4,909	\$4,971
Accumulated Redemption Fund	\$4,394	\$4,940	\$5,538	\$6,190	\$6,899	\$7,667	\$8,498	\$9,392	\$10,352	\$11,380
Accumulated Surplus Fund	\$4,394	\$4,940	\$5,538	\$6,190	\$6,899	\$7,667	\$8,498	\$9,392	\$10,352	\$11,380
AVAILABLE CITY STANDBY SUP PAYMENT	\$3,085	\$3,125	\$3,161	\$3,199	\$3,239	\$3,277	\$3,317	\$3,355	\$3,393	\$3,436
DEBT SERVICE COVERAGE RATIOS										
Debt Service Coverage Ratio (3)	4.77	4.85	4.93	5.01	5.09	5.18	5.26	5.36	5.44	5.54
Total Debt Service Coverage Ratio (4)	1.43	1.45	1.46	1.50	1.53	1.55	1.58	1.61	1.63	1.66

NOTES:

- (1) As provided by PKF through 2015 3% net income there is
- (2) As measured by net earnings of 50% for the Debt Service Reserve Fund
- (3) Adjusted Net Operating Income Plus DSRF earnings divided by Net Debt Service
- (4) Adjusted Net Operating Income plus DSRF earnings divided by Net Debt Service

Operating Statistic of Revenue Expenditure Net Income and Change Revenue for the Year Ending December 31, 1971

NOTES

(1) As provided by PKF through 2015, 3% net income thereafter.

(2) As amended by the Board of Directors, 5.00% for the Debt Service Reserve Fund.

(3) Additional Operating Income Plus DSRF amount divided by Net Debt Service. Meters Available City Standby Support Payment.

(4) Additional Operating Income Plus DSRF amount divided by Net Debt Service.

APPENDIX 0504

City of Cincinnati
Columbus, Ohio

Consolidation Draw Sheet

[illegible]

Mr. Gifford M. A. I. Jr. S.S. B. (Pr. Lincoln) S. J. at Ch. Ed.

P 45

0496

203

City of Columbia South Carolina
Columbia Hilton
Tax Exempt Bonds

Construction Fund

Date	Beginning Balance	Deposits	Interest 1200000%	Transfer Capital	Drawdowns	Ending Balance
4/1/2004		47,870,828.04				47,870,828.04
4/1/2004	7,370,828.04			4,851,307.00		3,019,521.04
5/1/2004	43,019,521.04		42,912.36	2,553.31		40,509,000.41
6/1/2004	40,509,000.41		40,408.10	1,660,433.00		38,848,975.50
7/1/2004	38,848,975.50		38,792.11	2,362,433.00		36,565,334.41
8/1/2004	36,565,334.41		36,474.26	2,651,433.00		33,950,375.87
9/1/2004	33,950,375.87		33,865.81	2,654,433.00		31,329,808.68
10/1/2004	31,329,808.68		31,251.77	2,470,433.00		28,884,627.45
11/1/2004	28,884,627.45		28,812.68	2,050.31		26,863,007.13
12/1/2004	26,863,007.13		26,796.09	2,105,433.00		24,784,370.22
1/1/2005	24,784,370.22		24,722.64	4,600,433.00		20,208,660.86
2/1/2005	20,208,660.86		20,158.72	2,701.32		17,527,387.18
3/1/2005	17,527,387.18		17,483.73	2,773,432.00		14,771,438.91
4/1/2005	14,771,438.91		14,734.65	2,26,432.00		12,559,711.55
5/1/2005	12,559,711.55		12,538.96	2,193,432.00		10,378,638.51
6/1/2005	10,378,638.51		10,353.28	2,002,432.00		8,386,359.79
7/1/2005	8,386,359.79		8,365.97	2,392,432.00		5,992,093.76
8/1/2005	5,992,093.76		5,977.64	2,152.32		3,855,449.40
9/1/2005	3,855,449.40		3,846.34	2,202,432.00		1,656,663.75
10/1/2005	1,656,663.75		1,653.04	1,233,341.00		224,775.78
11/1/2005	224,775.78		224.22			(0.00)
12/1/2005	(0.00)		(0.00)			(0.00)
1/1/2006	(0.00)		(0.00)			(0.00)
2/1/2006	(0.00)		(0.00)			(0.00)
3/1/2006	(0.00)		(0.00)			(0.00)
4/1/2006	(0.00)		(0.00)			(0.00)
5/1/2006	(0.00)		(0.00)			(0.00)
6/1/2006	(0.00)		(0.00)			(0.00)
7/1/2006	(0.00)		(0.00)			(0.00)
8/1/2006	(0.00)		(0.00)			(0.00)
9/1/2006	(0.00)		(0.00)			(0.00)
10/1/2006	(0.00)		(0.00)			(0.00)
11/1/2006	(0.00)		(0.00)			(0.00)
12/1/2006	(0.00)		(0.00)			(0.00)
1/1/2007	(0.00)		(0.00)			(0.00)
2/1/2007	(0.00)		(0.00)			(0.00)
3/1/2007	(0.00)		(0.00)			(0.00)
4/1/2007	(0.00)		(0.00)			(0.00)
5/1/2007	(0.00)		(0.00)			(0.00)
6/1/2007	(0.00)		(0.00)			(0.00)
7/1/2007	(0.00)		(0.00)			(0.00)
8/1/2007	(0.00)		(0.00)			(0.00)
9/1/2007	(0.00)		(0.00)			(0.00)
10/1/2007	(0.00)		(0.00)			(0.00)
11/1/2007	(0.00)		(0.00)			(0.00)
12/1/2007	(0.00)		(0.00)			(0.00)
1/1/2008	(0.00)		(0.00)			(0.00)
2/1/2008	(0.00)		(0.00)			(0.00)
3/1/2008	(0.00)		(0.00)			(0.00)
4/1/2008	(0.00)		(0.00)			(0.00)
5/1/2008	(0.00)		(0.00)			(0.00)
6/1/2008	(0.00)		(0.00)			(0.00)
7/1/2008	(0.00)		(0.00)			(0.00)
8/1/2008	(0.00)		(0.00)			(0.00)
9/1/2008	(0.00)		(0.00)			(0.00)
10/1/2008	(0.00)		(0.00)			(0.00)
11/1/2008	(0.00)		(0.00)			(0.00)
12/1/2008	(0.00)		(0.00)			(0.00)
1/1/2009	(0.00)		(0.00)			(0.00)
2/1/2009	(0.00)		(0.00)			(0.00)
3/1/2009	(0.00)		(0.00)			(0.00)
4/1/2009	(0.00)		(0.00)			(0.00)
5/1/2009	(0.00)		(0.00)			(0.00)
6/1/2009	(0.00)		(0.00)			(0.00)
7/1/2009	(0.00)		(0.00)			(0.00)
8/1/2009	(0.00)		(0.00)			(0.00)
9/1/2009	(0.00)		(0.00)			(0.00)
10/1/2009	(0.00)		(0.00)			(0.00)
11/1/2009	(0.00)		(0.00)			(0.00)
12/1/2009	(0.00)		(0.00)			(0.00)
1/1/2010	(0.00)		(0.00)			(0.00)
2/1/2010	(0.00)		(0.00)			(0.00)
3/1/2010	(0.00)		(0.00)			(0.00)
Total	47,870,828.04		378,171.96	48,269,000.00		

City of Columbia South Carolina
Columbia Housing
Taxable Bonds

Construction Fund

Date	Beginning Balance	Deposit	Interest 12/00/00/04	Transfer Capital	Drawings	Ending Balance
4/1/2004		1,381,974.22				1,381,974.22
4/1/2004	1,381,974.22					1,381,974.22
5/1/2004	1,381,974.22		1,378.53			1,383,352.75
6/1/2004	1,383,352.75		1,379.91			1,384,732.66
7/1/2004	1,384,732.66		1,381.28			1,386,113.94
8/1/2004	1,386,113.94		1,382.65			1,387,496.59
9/1/2004	1,387,496.59		1,384.04			1,388,880.63
10/1/2004	1,388,880.63		1,385.42			1,390,266.05
11/1/2004	1,390,266.05		1,386.80			1,391,652.85
12/1/2004	1,391,652.85		1,388.19			1,393,041.05
1/1/2005	1,393,041.05		1,389.57			1,394,430.62
2/1/2005	1,394,430.62		1,390.96		200,000.00	1,195,821.58
3/1/2005	1,195,821.58		1,192.84		200,000.00	997,014.42
4/1/2005	997,014.42		994.53		200,000.00	798,008.95
5/1/2005	798,008.95		796.02		200,000.00	598,804.98
6/1/2005	598,804.98		597.31		200,000.00	399,402.29
7/1/2005	399,402.29		398.41		200,000.00	199,800.70
8/1/2005	199,800.70		199.30		200,000.00	(0.00)
9/1/2005	(0.00)		(0.00)			(0.00)
10/1/2005	(0.00)		(0.00)			(0.00)
11/1/2005	(0.00)		(0.00)			(0.00)
12/1/2005	(0.00)		(0.00)			(0.00)
1/1/2006	(0.00)		(0.00)			(0.00)
2/1/2006	(0.00)		(0.00)			(0.00)
3/1/2006	(0.00)		(0.00)			(0.00)
4/1/2006	(0.00)		(0.00)			(0.00)
5/1/2006	(0.00)		(0.00)			(0.00)
6/1/2006	(0.00)		(0.00)			(0.00)
7/1/2006	(0.00)		(0.00)			(0.00)
8/1/2006	(0.00)		(0.00)			(0.00)
9/1/2006	(0.00)		(0.00)			(0.00)
10/1/2006	(0.00)		(0.00)			(0.00)
11/1/2006	(0.00)		(0.00)			(0.00)
12/1/2006	(0.00)		(0.00)			(0.00)
1/1/2007	(0.00)		(0.00)			(0.00)
2/1/2007	(0.00)		(0.00)			(0.00)
3/1/2007	(0.00)		(0.00)			(0.00)
4/1/2007	(0.00)		(0.00)			(0.00)
5/1/2007	(0.00)		(0.00)			(0.00)
6/1/2007	(0.00)		(0.00)			(0.00)
7/1/2007	(0.00)		(0.00)			(0.00)
8/1/2007	(0.00)		(0.00)			(0.00)
9/1/2007	(0.00)		(0.00)			(0.00)
10/1/2007	(0.00)		(0.00)			(0.00)
11/1/2007	(0.00)		(0.00)			(0.00)
12/1/2007	(0.00)		(0.00)			(0.00)
1/1/2008	(0.00)		(0.00)			(0.00)
2/1/2008	(0.00)		(0.00)			(0.00)
3/1/2008	(0.00)		(0.00)			(0.00)
4/1/2008	(0.00)		(0.00)			(0.00)
5/1/2008	(0.00)		(0.00)			(0.00)
6/1/2008	(0.00)		(0.00)			(0.00)
7/1/2008	(0.00)		(0.00)			(0.00)
8/1/2008	(0.00)		(0.00)			(0.00)
9/1/2008	(0.00)		(0.00)			(0.00)
10/1/2008	(0.00)		(0.00)			(0.00)
11/1/2008	(0.00)		(0.00)			(0.00)
12/1/2008	(0.00)		(0.00)			(0.00)
1/1/2009	(0.00)		(0.00)			(0.00)
2/1/2009	(0.00)		(0.00)			(0.00)
3/1/2009	(0.00)		(0.00)			(0.00)
4/1/2009	(0.00)		(0.00)			(0.00)
5/1/2009	(0.00)		(0.00)			(0.00)
6/1/2009	(0.00)		(0.00)			(0.00)
7/1/2009	(0.00)		(0.00)			(0.00)
8/1/2009	(0.00)		(0.00)			(0.00)
9/1/2009	(0.00)		(0.00)			(0.00)
10/1/2009	(0.00)		(0.00)			(0.00)
11/1/2009	(0.00)		(0.00)			(0.00)
12/1/2009	(0.00)		(0.00)			(0.00)
1/1/2010	(0.00)		(0.00)			(0.00)
2/1/2010	(0.00)		(0.00)			(0.00)
3/1/2010	(0.00)		(0.00)			(0.00)
Total	1,381,974.22		18,025.78		1,400,000.00	

City of Columbia South Carolina
 Columbia Hilton
 Key Money

Construct on Fund

D	Beginning Balance	Depos	Interest 0.000000%	Transfer to Capital	Drawdowns	Ending Balance
1/1/2004						
4/1/2004						
5/1/2004						
6/1/2004						
7/1/2004						
8/1/2004						
9/1/2004						
10/1/2004						
11/1/2004						
12/1/2004						
1/1/2005						
2/1/2005						
3/1/2005						
4/1/2005						
5/1/2005						
6/1/2005						
7/1/2005						
8/1/2005						
9/1/2005		1 000 000.00			300 000.00	700 000.00
10/1/2005	700 000.00				300 000.00	400 000.00
11/1/2005	00 000.00				350 000.00	30,000.00
12/1/2005	50 000.00				50,000.00	
1/1/2006						
2/1/2006						
3/1/2006						
4/1/2006						
5/1/2006						
6/1/2006						
7/1/2006						
8/1/2006						
9/1/2006						
10/1/2006						
11/1/2006						
12/1/2006						
1/1/2007						
2/1/2007						
3/1/2007						
4/1/2007						
5/1/2007						
6/1/2007						
7/1/2007						
8/1/2007						
9/1/2007						
10/1/2007						
11/1/2007						
12/1/2007						
1/1/2008						
2/1/2008						
3/1/2008						
4/1/2008						
5/1/2008						
6/1/2008						
7/1/2008						
8/1/2008						
9/1/2008						
10/1/2008						
11/1/2008						
12/1/2008						
1/1/2009						
2/1/2009						
3/1/2009						
4/1/2009						
5/1/2009						
6/1/2009						
7/1/2009						
8/1/2009						
9/1/2009						
10/1/2009						
11/1/2009						
12/1/2009						
1/1/2010						
2/1/2010						
3/1/2010						
Total		1 000 000.00			1 000 000.00	

City of Columbia South Carolina
 Columbia Hilton
 Tax Exempt Bonds

Current Interest Bonds

Yr	Principal	Rate	Yield	Price	Interest	Total Debt Service	Annual Debt Service
4/1/2004					170,419.63	170,419.63	
7/1/2004					1,540,839.25	1,540,839.25	2,311,258.88
7/1/2005		1.300%	1.300%	100.000	1,540,839.25	1,540,839.25	
7/1/2006		1.60%	1.640%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2007		1.940%	1.940%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2008		2.300%	2.100%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2009		2.600%	2.600%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2010		2.840%	2.840%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2011		3.080%	3.080%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2012		3.320%	3.320%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2013		3.560%	3.56%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2014		3.800%	3.800%	100.000	1,540,839.25	1,540,839.25	3,081,678.50
7/1/2015	1,225,000.00	3.830%	3.830%	100.000	1,540,839.25	1,540,839.25	4,306,678.50
7/1/2016	1,320,000.00	3.950%	3.95%	100.000	1,517,380.50	1,517,380.50	4,354,761.00
7/1/2017	1,425,000.00	4.060%	4.060%	100.000	1,491,310.50	1,491,310.50	4,407,621.00
7/1/2018	1,540,000.00	4.170%	4.170%	100.000	1,462,383.00	1,462,383.00	4,464,766.00
7/1/2019	1,655,000.00	4.270%	4.270%	100.000	1,430,274.00	1,430,274.00	4,515,548.00
7/1/2020	1,780,000.00	4.360%	4.360%	100.000	1,394,939.75	1,394,939.75	4,569,879.50
7/1/2021	1,915,000.00	4.450%	4.50%	100.000	1,356,135.75	1,356,135.75	4,627,271.50
7/1/2022	2,065,000.00	4.530%	4.530%	100.000	1,313,527.00	1,313,527.00	4,682,054.00
7/1/2023	2,205,000.00	4.600%	4.600%	100.000	1,266,981.25	1,266,981.25	4,738,962.50
7/1/2024	2,360,000.00	4.660%	4.660%	100.000	1,216,266.25	1,216,266.25	4,792,332.50
7/1/2025	2,530,000.00	4.690%	4.690%	100.000	1,161,278.25	1,161,278.25	4,852,556.5
7/1/2026	2,705,000.00	4.720%	4.720%	100.000	1,101,949.75	1,101,949.75	4,908,899.50
7/1/2027	2,895,000.00	4.730%	4.730%	100.000	1,038,111.75	1,038,111.75	4,973,223.50
7/1/2028	3,090,000.00	4.70%	4.70%	100.000	969,645.00	969,645.00	5,029,290.00
7/1/2029	3,295,000.00	4.730%	4.750%	100.000	896,412.00	896,412.00	5,087,824.00
7/1/2030	3,515,000.00	4.760%	4.760%	100.000	818,155.75	818,155.75	5,151,311.50
7/1/2031	3,745,000.00	4.770%	4.77%	100.000	734,498.75	734,498.75	5,213,997.50
7/1/2032	3,985,000.00	4.780%	4.780%	100.000	645,180.50	645,180.50	5,275,341.00
7/1/2033	4,235,000.00	4.780%	4.780%	100.000	549,939.00	549,939.00	5,334,878.00
7/1/2034	4,505,000.00	4.780%	4.780%	100.000	448,722.50	448,722.50	5,402,445.00
7/1/2035	4,785,000.00	4.780%	4.780%	100.000	341,053.00	341,053.00	5,467,106.00
7/1/2036	5,085,000.00	4.780%	4.780%	100.000	226,691.50	226,691.50	5,538,383.00
7/1/2037		4.780%	4.780%	100.000			
7/1/2038		4.780%	4.780%	100.000			
7/1/2039		4.780%	4.780%	100.000			
7/1/2040		4.780%	4.780%	100.000			
7/1/2041		4.780%	4.780%	100.000			
7/1/2042		4.780%	4.780%	100.000			
7/1/2043		4.780%	4.780%	100.000			
7/1/2044		4.780%	4.780%	99.992			
Total	66,250,000.00				75,889,715.38	142,139,715.38	142,139,715.3

City of Columbia South Carolina
 Columbia Housing
 Tax Exempt Bonds

Capitalized Interest

Date	Day 30/360	Beginning Balance	Deposit	Interest 1.200000%	Import From OSAF Fund	Percentage Capitalized	Interest Capitalized	Ending Balance
1/1/2004			4,839,284.58			100.00%		4,839,284.58
7/1/2004	90	4,839,284.58		54,961.1	69,518.84	100.00%	770,419.73	4,152,879.94
1/1/2005	180	4,152,879.94		24,917.28	139,901.29	100.00%	15,0839.25	2,7,4,859.26
7/1/2005	180	2,776,859.26		16,661.16	139,901.29	100.00%	15,0839.25	1,302,542.46
1/1/2006	180	1,302,542.46		8,355.49	139,901.29	100.00%	1,540,39.25	
7/1/2006	180					0.00%		
1/1/2007	180					0.00%		
7/1/2007	180					0.00%		
1/1/2008	180					0.00%		
7/1/2008	180					0.00%		
1/1/2009	180					0.00%		
7/1/2009	180					0.00%		
1/1/2010	180					0.00%		
7/1/2010	180					0.00%		
1/1/2011	180					0.00%		
7/1/2011	180					0.00%		
1/1/2012	180					0.00%		
7/1/2012	180					0.00%		
1/1/2013	180					0.00%		
7/1/2013	180					0.00%		
1/1/2014	180					0.00%		
7/1/2014	180					0.00%		
1/1/2015	180					0.00%		
7/1/2015	180					0.00%		
1/1/2016	180					0.00%		
Total				64,430.07	489,232.72		5,392,337.38	

City of Columbia South Carolina
Columbia Housing
Tax Exempt Bonds

Debt Service Reserve Fund

Date	D ID/YY	Beginning Balance	Dep	In creas \$ (000000%)	Export Ca pit F d	Export Re venue Fund	Ending Balance
4/1/2004			5,596,051.79				5,596,051.79
7/1/2004	90	5,596,051.79		69,518.84	(69,518.84)		5,596,051.79
7/1/2005	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2006	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2007	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2008	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2009	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2010	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2011	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2012	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2013	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2014	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2015	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2016	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2017	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2018	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2019	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2020	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2021	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2022	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2023	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2024	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2025	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2026	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2027	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2028	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2029	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2030	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2031	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2032	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2033	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2034	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2035	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2036	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2037	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2038	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2039	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2040	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2041	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2042	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2043	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
7/1/2044	180	5,596,051.79		139,901.29	(139,901.29)		5,596,051.79
Tot		5,596,051.79		83,300.00	(83,300.00)		5,596,051.79

City of Columbia South Carolina
Columbia Housing
Taxable Bonds

Current Interest Bonds

Date	Principal	Rate	Yield	Price	Interest	Total Debt Service	Annual Debt Service
4/1/2004					64,558.50	64,558.50	
7/1/2004					129,117.00	129,117.00	193,675.50
1/1/2005		1.750%	1.750%	100.000	129,117.00	129,117.00	
7/1/2005					129,117.00	129,117.00	258,234.00
1/1/2006		2.400%	2.400%	100.000	129,117.00	129,117.00	
7/1/2006					129,117.00	129,117.00	258,234.00
1/1/2007		2.880%	2.880%	100.000	129,117.00	129,117.00	
7/1/2007					129,117.00	129,117.00	258,234.00
1/1/2008		3.380%	3.380%	100.000	129,117.00	129,117.00	
7/1/2008					129,117.00	129,117.00	258,234.00
1/1/2009		3.670%	3.670%	100.000	129,117.00	129,117.00	
7/1/2009					129,117.00	129,117.00	258,234.00
1/1/2010	1,085,000.00	4.000%	4.000%	100.000	129,117.00	1,214,117.00	1,343,234.00
7/1/2010					107,417.00	107,417.00	
1/1/2011	1,140,000.00	4.310%	4.310%	100.000	107,417.00	1,247,417.00	1,354,834.00
7/1/2011					82,850.00	82,850.00	
1/1/2012	1,110,000.00	4.560%	4.560%	100.000	82,850.00	1,292,850.00	1,375,700.00
7/1/2012					55,262.00	55,262.00	
1/1/2013	1,280,000.00	4.730%	4.730%	100.000	55,262.00	1,335,262.00	1,390,524.00
7/1/2013					24,990.00	24,990.00	
1/1/2014	1,050,000.00	4.760%	4.760%	100.000	24,990.00	1,074,990.00	1,099,980.00
7/1/2014							
1/1/2015		5.430%	5.430%	100.000			
7/1/2015							
1/1/2016		5.430%	5.430%	100.000			
7/1/2016							
1/1/2017		5.30%	5.30%	100.000			
7/1/2017							
1/1/2018		5.430%	5.430%	100.000			
7/1/2018							
1/1/2019		5.430%	5.430%	100.000			
7/1/2019							
1/1/2020		5.30%	5.430%	100.000			
7/1/2020							
1/1/2021		5.30%	5.430%	100.000			
7/1/2021							
1/1/2022		5.430%	5.430%	100.000			
7/1/2022							
1/1/2023		5.430%	5.430%	100.000			
7/1/2023							
1/1/2024		5.430%	5.430%	100.000			
7/1/2024							
1/1/2025		5.630%	5.630%	100.000			
7/1/2025							
1/1/2026		5.630%	5.630%	100.000			
7/1/2026							
1/1/2027		5.630%	5.630%	100.000			
7/1/2027							
1/1/2028		5.630%	5.630%	100.000			
7/1/2028							
1/1/2029		5.630%	5.630%	100.000			
7/1/2029							
1/1/2030		5.630%	5.630%	100.000			
7/1/2030							
1/1/2031		5.630%	5.630%	100.000			
7/1/2031							
1/1/2032		5.630%	5.630%	100.000			
7/1/2032							
1/1/2033		5.630%	5.630%	100.000			
7/1/2033							
1/1/2034		5.630%	5.630%	100.000			
7/1/2034							
1/1/2035		5.630%	5.630%	100.000			
7/1/2035							
1/1/2036		5.630%	5.630%	100.000			
7/1/2036							
1/1/2037		0.000%	0.000%	100.000			
7/1/2037							
1/1/2038		0.000%	0.000%	100.000			
7/1/2038							
1/1/2039		0.000%	0.000%	100.000			
7/1/2039							
1/1/2040		0.000%	0.000%	100.000			
7/1/2040							
1/1/2041		0.000%	0.000%	100.000			
7/1/2041							
1/1/2042		0.000%	0.000%	100.000			
7/1/2042							
1/1/2043		0.000%	0.000%	100.000			
7/1/2043							
1/1/2044		0.000%	0.000%	100.000			
7/1/2044							
Total	5,765,000.00				2,025,883.50	7,790,883.50	7,790,883.50

City of Columbia, South Carolina
 Columbia Hite
 Taxable Bonds

Capitalized Interest

Date	Day 30/360	Beginning Balance	Deposits	Interest @ 1000000%	Import F m DSRF Fund	Percentage Capital d	Interest Capital d	Ending Balance
4/1/2004	90	839,284.58	3,641,741.85	14,496.14	3,810.3	100.00%	64,558.50	4,839,284.58
7/1/2004	180	4,152,879.94		24,917.28	7,668.19	100.00%	1,9117.00	2,727,859.26
7/1/2005	180	2,716,859.26		16,661.16	7,668.19	100.00%	129,117.00	1,392,582.46
1/1/2006	180	1,392,582.46		8,355.49	7,668.19	100.00%	12,7117.00	
7/1/2006	180					50.00%	834,978.13	
1/1/2007	180					50.00%	834,978.13	
7/1/2007	180					50.00%	834,978.13	
1/1/2008	180					0.00%		
7/1/2008	180					0.00%		
1/1/2009	180					0.00%		
7/1/2009	180					0.00%		
1/1/2010	180					0.00%		
7/1/2010	180					0.00%		
1/1/2011	180					0.00%		
7/1/2011	180					0.00%		
1/1/2012	180					0.00%		
7/1/2012	180					0.00%		
1/1/2013	180					0.00%		
7/1/2013	180					0.00%		
1/1/2014	180					0.00%		
7/1/2014	180					0.00%		
1/1/2015	180					0.00%		
7/1/2015	180					0.00%		
1/1/2016	180					0.00%		
Total				64,430.07	26,815.01		3,791,822.00	

City of Columbia South Carolina
 Columbia Housing
 Taxable Bonds

Debt Service Reserve Fund

Date	Days 30/360	Beginning Balance	Deposits	Interest 5.000000%	Export Capital Fund	Export to Revenue Fund	Ending Balance
1/1/2004			306,727.70				306,727.70
1/1/2004	90	306,727.70		3.21	(3,310.3)		306,727.70
1/1/2005	180	306,727.70		7,668.19	(7,668.19)		306,727.70
7/1/2005	180	306,727.70		7,668.19	(7,668.19)		306,727.70
1/1/2006	180	306,727.70		7,668.19	(7,668.19)		306,727.70
7/1/2006	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2007	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2007	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2008	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2008	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2009	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2009	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2010	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2010	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2011	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2011	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2012	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2012	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2013	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2013	180	306,727.70		7,668.19		(7,668.19)	306,727.70
1/1/2014	180	306,727.70		7,668.19		(7,668.19)	306,727.70
7/1/2014	180					(314,395.87)	
1/1/2015	180						
7/1/2015	180						
1/1/2016	180						
7/1/2016	180						
1/1/2017	180						
7/1/2017	180						
1/1/2018	180						
7/1/2018	180						
1/1/2019	180						
7/1/2019	180						
1/1/2020	180						
7/1/2020	180						
1/1/2021	180						
7/1/2021	180						
1/1/2022	180						
7/1/2022	180						
1/1/2023	180						
7/1/2023	180						
1/1/2024	180						
7/1/2024	180						
1/1/2025	180						
7/1/2025	180						
1/1/2026	180						
7/1/2026	180						
1/1/2027	180						
7/1/2027	180						
1/1/2028	180						
7/1/2028	180						
1/1/2029	180						
7/1/2029	180						
1/1/2030	180						
7/1/2030	180						
1/1/2031	180						
7/1/2031	180						
1/1/2032	180						
7/1/2032	180						
1/1/2033	180						
7/1/2033	180						
1/1/2034	180						
7/1/2034	180						
1/1/2035	180						
7/1/2035	180						
1/1/2036	180						
7/1/2036	180						
1/1/2037	180						
7/1/2037	180						
1/1/2038	180						
7/1/2038	180						
1/1/2039	180						
7/1/2039	180						
1/1/2040	180						
7/1/2040	180						
1/1/2041	180						
7/1/2041	180						
1/1/2042	180						
7/1/2042	180						
1/1/2043	180						
7/1/2043	180						
1/1/2044	180						
Totals		306,727.70		149,506.04	(26,815.01)	(429,418.78)	

City of Columbia South Carolina
Columbia Hilton

Aggregate Cost of Issuance

Cost of Issuance	Fee
Bond Counsel	300 000
Underwriter's Counsel	100 000
Counsels to the City	300 000
Financial Advisor	65 000
Hotel Consultant	365 000
Trustee / Counsel	15 000
POS/OS Printing	15 000
Ambac	105 000
Ambac Insurance Counsel	17,500
S&P	80 000
Moody's	60,000
Fitch	0
Feasibility Report	60 000
City Issuance Expenses	102 000
Miscellaneous	25 000
Total	1 609 500 00

Confidential

Presentation to



CURRENT HOTEL FINANCIAL ANALYSIS

February 11, 2004

citigroup

0507

C 0173

APPENDIX_0516

Sources and Uses of Funds

February 11, 2004 One Tier Financing Structure

Estimated Sources of Funds	Senior
Par Amount of Bonds	\$69 870 000 00
Key Money	1 500 000 00
Total Sources of Funds	\$71 370 000 00

Estimated Uses of Funds	Senior
Construction Fund	\$ 48 862 461 62
Other Development Costs	0
Other City Uses	1 500 000 00
Capitalized Interest	8 084 995 64
Debt Service Reserve	5 741 363 46
Working Capital	500 000 00
Underwriter's Discount	960 712 50
Cost of Issuance	1 487 000 00
Municipal Bond Insurance	4 229 088 32
Contingency	4 378 46
Total Uses of Funds	\$ 71 370 000 00

Variances in sources and uses of funds from prior analyses result primarily from (i) the reclassification of certain construction fund amounts to working capital (ii) additional capitalized interest to improve debt service coverage and net cash flow in operating years 1 and 2, and (iii) the use of cost effective bond insurance



0508

C 0174

Interest Rates and Financing Assumptions

Description	February 11, 2004 One-Tier Financing Structure
Construction Costs	\$49,269,000
Working Capital Costs	\$500,000
Interest Rates	2.84% - 4.78%
Bond Insurance Premium	2.90% of Total Debt Service
Arbitrage Yield	5.10%
Dated and Delivery Date	April 1, 2004
Scheduled Hotel Operating Date	October 1, 2005
Guaranteed Hotel Opening Date	January 1, 2006
Guaranteed Construction Period	21 Months
Capitalized Interest Period	Construction period plus one year (50% of operating years 1 and 2)
Debt Service Reserve Fund	Lesser of Maximum Annual Debt Service 10% of Par 125% of Average Annual Debt Service
Costs of Issuance	\$1,487,000
Underwriter's Discount	1.375%
Maturity	January 1, 2036
Debt Service Structure	Ascending
Ratings	Aaa/AAA (Insured)
Reinvestment Rate DSRF Other	5.00% 1.20%

citigroup

0509

2

C 0175

Projected Cash Flow Analysis 2006-2020

Operating Year	Revenues Available for Debt Service	Net Debt Service	Debt Service Coverage (x)	Net Cash Flow After Debt Service	Priority of Funds Available for Debt Service Shortfalls			Debt Service Reserve Fund	Total	Available City Standby Support Payment
					Accumulated Balance - Surplus Fund	Accumulated Balance - Bond Redemption Fund	Accumulated Balance - Supplemental Reserve Fund			
2006	\$4 344 848	\$1 593 806	2.73x	\$2 751 042	\$0	\$0	\$0	\$5 741 363	\$8 492 405	\$796 903
2007	5 143 663	1,593 806	3.23x	3 549 857	0	0	2 477 562	5 741 363	11 768 782	796 903
2008	5 412 858	3 187 613	1.70x	2 225 246	1 191 768	1 191 768	3 187 613	5 741 363	13 537 758	1 593 806
2009	5 525 203	3 982 613	1.39x	1 542 591	1 586 451	1 586 451	3 982 613	5 741 363	14 439 469	1 991 306
2010	5 687 453	4 030 035	1.41x	1 657 419	1 983 368	1 983 368	4 030 035	5 741 363	15 395 552	2 015 017
2011	5 674 008	4 078 393	1.39x	1 595 616	2 426 606	2 426 606	4 078 393	5 741 363	16 268 583	2 039 196
2012	5 823 381	4 127 185	1.41x	1 696 196	2 827 888	2 827 888	4 127 185	5 741 363	17 220 519	2 063 592
2013	5 987 066	4 181 281	1.43x	1 805 785	3 265 906	3 265 906	4 181 281	5 741 363	18 260 247	2 090 640
2014	6 167 793	4 230 322	1.46x	1 937 472	3 749 815	3 749 815	4 230 322	5 741 363	19 408 786	2 115 161
2015	6 145 163	4 279 362	1.44x	1 865 802	4 287 518	4 287 518	4 279 362	5 741 363	20 461 561	2 139 681
2016	6 320 906	4 333 209	1.46x	1 987 697	4 774 828	4 774 828	4 333 209	5 741 363	21 611 925	3 033 246
2017	6 501 921	4 381 369	1.48x	2 120 552	5 313 369	5 313 369	4 381 369	5 741 363	22 870 022	3 066 958
2018	6 688 367	4 433 611	1.51x	2 254 756	5 903 360	5 903 360	4 433 611	5 741 363	24 236 449	3 103 527
2019	6 880 406	4 489 437	1.53x	2 390 969	6 545 335	6 545 335	4 489 437	5 741 363	25 712 440	3 142 606
2020	7 078 206	4 543 355	1.56x	2 534 851	7 242 647	7 242 647	4 543 355	5 741 363	27 304 863	3 180 348

0510

Projected Cash Flow Analysis 2021-2035

Operating Year	Revenues Available for Debt Service	Net Debt Service	Priority of Funds Available for Debt Service Shortfalls					Debt Service Reserve Fund	Total	Available City Standby Support Payment
			Debt Service Coverage (x)	Net Cash Flow After Debt Service	Accumulated Balance - Surplus Fund	Accumulated Balance - Bond Redemption Fund	Accumulated Balance - Supplemental Reserve Fund			
2021	\$7 281 940	\$4 599 917	1.58x	\$2 682 023	\$7 996 441	\$7 996 441	\$4 599 917	\$5 741 363	\$29 016 186	\$3 219 942
2022	7 491 786	4 653 638	1.61x	2 838 149	8 810 681	8 810 681	4 653 638	5 741 363	30 854,512	3 257 546
2023	7 707 928	4 709 278	1.64x	2 998 650	9 687 028	9 687 028	4 709 278	5 741 363	32 823,346	3 296 494
2024	7 930 553	4 766 399	1.66x	3 164 153	10 627 437	10 627 437	4 766 399	5 741 363	34 926 790	3 336 479
2025	8 159 858	4 825 087	1.69x	3 334 771	11 633 904	11 633 904	4 825 087	5 741 363	37 169 029	3 377 561
2026	8 396 042	4 879 771	1.72x	3 516 271	12 711 294	12 711 294	4 879 771	5 741,363	39 559,992	3 415 839
2027	8 639 311	4 940 675	1.75x	3 698 636	13 859 443	13 859 443	4 940 675	5 741 363	42 099,561	3 458 473
2028	8 889 878	4 997 053	1.78x	3 892 825	15 083 652	15 083 652	4 997 053	5 741 363	44 798,547	3 497 937
2029	9 147 962	5 058 628	1.81x	4 089 334	16 384 450	16 384 450	5 058 628	5 741 363	47 658,226	3 541 040
2030	9 413 789	5 119 646	1.84x	4 294 143	17 765 336	17 765 336	5 119 646	5 741 363	50 685 825	3 583 752
2031	9 687 591	5 179 587	1.87x	4 508 004	19 230 167	19 230 167	5 179 587	5 741 363	53 889,289	3 625 711
2032	9 969 607	5 242 928	1.90x	4 726 679	20 780 660	20 780 660	5 242 928	5 741 363	57 272,290	3 670 050
2033	10 260 083	5 304 319	1.93x	4 955 764	22 421 310	22 421 310	5 304 319	5 741 363	60 844 067	3 713 023
2034	10 559 273	5 368 282	1.97x	5 190 991	24 154 457	24 154 457	5 368 282	5 741 363	64 609,551	3 757 797
2035	16 608 803	9 954 100	1.67x	6 654 703	24 154 457	24 154 457	9 091 001	5 741 363	69 795 982	2 948 916

citigroup 

Exhibit "D"

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

JUN 10 2003

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
NONPROFIT CORPORATION
ARTICLES OF INCORPORATION

FILED

JUN 10 2003

Mark Hammond
SECRETARY OF STATE

~~DO NOT PRINT OR SIGN IN BLACK INK~~
SECRETARY OF STATE OF SOUTH CAROLINA

Pursuant to Section 33-31 202 of the South Carolina Code of Laws as amended the Undersigned corporation submits the following information

- 1 The name of the nonprofit corporation is Columbia Convention Center Hotel Corporation
- 2 The initial registered office of the nonprofit corporation is 1737 Main Street
Street Address
Columbia Richland SC 29201
City County State Zip Code

The name of the registered agent of the nonprofit corporation at that office is
Charles P. Austin
Print Name

I hereby consent to the appointment as registered agent of the corporation.
Charles P. Austin
Agent's Signature

- 3 Check a "b" or "c" whichever is applicable Check only one box
 - a ☒ The nonprofit corporation is a public benefit corporation.
 - b ☐ The nonprofit corporation is a religious corporation
 - c ☐ The nonprofit corporation is a mutual benefit corporation.
- 4 Check a or "b" whichever is applicable
 - a ☒ This corporation will have members
 - b ☐ This corporation will not have members
- 5 The address of the principal office of the nonprofit corporation is
1737 Main Street Columbia Richland South Carolina 29201
Street Address City County State Zip Code
- 6 If this nonprofit corporation is either a public benefit or religious corporation (when box "a" or "b" of paragraph 3 is checked), complete either a or "b" whichever is applicable to describe how the remaining assets of the corporation will be distributed upon dissolution of the corporation
 - a ☐ Upon dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code or the corresponding section of any future Federal tax code, or shall be distributed to the Federal government, or to a state or local government, for a public purpose. Any such asset not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located exclusively for such purposes or to such organization or organizations, as said court shall determine which are organized and operated exclusively for such purposes

COLUMBIA 751577v1

0512

1-1625

Columbia Convention Center Hotel Corporation
Name of Corporation

- b ☒ Upon dissolution of the corporation consistent with the law, the remaining assets of the corporation shall be distributed to

City of Columbia South Carolina

- 7 If the corporation is a mutual benefit corporation (when box c of paragraph 3 is checked) complete either "a" or "b" whichever is applicable to describe how the (remaining) assets of the corporation will be distributed upon dissolution of the corporation.

- a ☐ Upon dissolution of the mutual benefit corporation the (remaining) assets shall be distributed to its members, or if it has no members to those persons to whom the corporation holds itself out as benefiting or serving
- b ☐ Upon dissolution of the mutual benefit corporation the (remaining) assets, consistent with the law, shall be distributed to

- 8 The optional provisions which the nonprofit corporation elects to include in the articles of Incorporation are as follows (See 33-31 202(c) of the 1976 South Carolina Code of Laws as amended the applicable comments thereto and the instructions to this form)

See Attachment A

- 9 The name and address of each incorporator is as follows (only one is required)

Charles P. Austin, 1737 Main Street, Columbia, South Carolina 29201

Name Address Zip Code

Name Address Zip Code

Name Address Zip Code

- 10 Each original director of the nonprofit corporation must sign the articles but only if the directors are named in these articles

Name (Only if named in articles) Signature of director

Name (Only if named in articles) Signature of director

Name (Only if named in articles) Signature of director

- 11 Each incorporator must sign the articles

Charles P. Austin
Signature of incorporator

Signature of incorporator

Signature of incorporator

COLUMBIA 751577v1

0513

1-1626

Columbia Convention Center Hotel Corporation
Name of Corporation

1 INSTRUCTIONS

- 1 Two copies of this form, the original and either a duplicate original or a conformed copy must be filed.
- 2 If space in this form is insufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form or prepare this using a computer disk, which will allow for expansion of space on the form.
- 3 This form must be accompanied by the filing fee of \$25.00 payable to the Secretary of State.

Return to Secretary of State
P O Box 11350
Columbia, SC 29211
- 4 If this organization is a Homeowners Association or a Political Association it must also be accompanied by the First Annual Report of Corporations and an additional \$25.00 fee is required.

NOTE

THE FILING OF THIS DOCUMENT DOES NOT IN AND OF ITSELF PROVIDE AN EXCLUSIVE RIGHT TO USE THIS CORPORATE NAME OR IN CONNECTION WITH ANY PRODUCT OR SERVICE. USE OF A NAME AS A TRADEMARK OR SERVICE MARK WILL REQUIRE FURTHER CLEARANCE AND REGISTRATION AND BE AFFECTED BY PRIOR USE OF THE MARK. FOR MORE INFORMATION CONTACT THE TRADEMARKS DIVISION OF THE SECRETARY OF STATE'S OFFICE AT (803) 734-1728.

COLUMBIA 751577v1

0514

1-1627

Attachment A

- A The purpose of the Corporation shall be to (a) engage in all aspects and/or activities related directly or indirectly to the design, development, management, operation, or any other functions pertaining to a hotel (the "Hotel") to operate in conjunction with the Midlands Regional Convention Center (the "Convention Center") to be located in the City of Columbia, South Carolina (the "City"), being developed by Midlands Regional Convention Center Authority, an instrumentality of the City Richland County, South Carolina, and Lexington County, South Carolina, and (b) engage in all other lawful activities
- B The Board of Directors of the Corporation shall consist of such number of directors as determined, and all members of the Board of Directors of the Corporation shall be appointed, by the City
- The City shall have the right to remove any or all of its respective appointees as directors at any time with or without cause and appoint a replacement director for the remainder of each removed director's then current term, and the City is otherwise entitled to exercise all rights of an "owner" permitted in accordance with the south Carolina Nonprofit Act of 1994 as amended.
- C The sole member of the Corporation shall be the City of Columbia, South Carolina.

COLUMBIA 751577v1

0515

1-1628

THE BYLAWS OF
COLUMBIA CONVENTION CENTER HOTEL CORPORATION

ARTICLE I

NAME SEAL AND OFFICES

11 Name The name of this Corporation is Columbia Convention Center Hotel Corporation (the "Corporation")

12 Seal If the Corporation has a seal, the Corporation's corporate seal shall be in such form and bear such inscription as determined by the Board of Directors. The Board of Directors may change the form of the seal or the inscription therein at pleasure

13 Offices The office of the Corporation shall be City Hall 1737 Main Street, Columbia, South Carolina 29201. The Corporation may also have offices at such other places as the purposes of the Corporation may require.

ARTICLE II

OBJECTIVE, PURPOSE, ACTIVITIES AND
DISPOSITION OF ASSETS ON DISSOLUTION

21 Object Its object is to be organized and operated exclusively as a South Carolina public benefit nonprofit corporation existing solely for the benefit of the City of Columbia (the "City"), a municipal corporation of the State of South Carolina.

22 General Purpose The Corporation has not been formed for pecuniary profit or financial gain, and no part of the assets, income or profits of the Corporation shall be distributable to, or inure to the benefit of, its directors or officers except to the extent permitted under the laws of South Carolina relating to nonprofit corporations and the Internal Revenue Code of 1986, as amended (or the corresponding provision of any subsequent United States internal revenue law) (the "IRC"). No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provisions of these Bylaws or Corporation's Articles of Incorporation, the Corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under IRC Section 501(c)(3) or (b) by a corporation, contributions to which are deductible under IRC Section 170(c)(2).

23 Specific Purposes The Corporation is an instrumentality of the City organized and operated to assist the city in the following governmental functions and accomplish the following governmental purposes.

COLUMBIA 738144v6

0516

1-1629

(a) To engage in all aspects and/or activities related directly or indirectly to the design, construction, equipping, management, operation and any other functions pertaining to the establishment of a hotel and related amenities (the "Hotel") to provide for lodging for attendees of events to be held at the Midlands Regional Convention Center (the "Convention Center") and for other visitors

(b) To finance the design, construction, equipping and commencement of operations, and establish necessary reserves, with the net proceeds of bonds issued by South Carolina Jobs-Economic Development Authority ("JEDA")

(c) To enter into such related and ancillary agreements with third parties for the development and management of the Hotel, so long as all such agreements comply with the requirements of Rev Proc 97-13 (or such successor administrative pronouncement) and no net income of the Corporation is distributed to any party other than the City

Furthermore, the Corporation is prohibited from engaging in any business activity other than to own and/or lease property to be used for essential governmental functions in connection with the financing of such facilities for or on behalf of the City

24 **Distribution on Dissolution.** In the event of dissolution of the Corporation, all of the remaining assets and property of the Corporation shall, after necessary expenses thereof, be distributed to the City

ARTICLE III

DIRECTORS

31 **Authority.** The Board of Directors shall have ultimate authority over the conduct and management of the business and affairs of the Corporation, except as may be expressly limited by the South Carolina Nonprofit Corporation Act of 1994 as amended (the "Act") or these Bylaws.

32 **Number, Appointment and Qualifications.** The Board of Directors of the corporation shall initially consist of five (5) Directors, all of whom shall be current members of Columbia City Council (the "Council Directors"). All of the Directors shall be appointed by the City, the sole Member of the Corporation. The City may increase or decrease the number of Directors between three (3) and seven (7) at its discretion.

33 **Classification and Tenure.** Each Director shall hold office from the date of such Director's appointment and qualification until such Director's successor shall have been duly appointed and qualified, or until such Director's earlier removal, resignation, death or incapacity. The term of each initial Director shall be staggered so that approximately one-third (1/3) of the initial Directors serve terms of one (1) year, one-third (1/3) of the initial Directors serve terms of two (2) years and one-third (1/3) of the initial Directors serve terms of three (3) years. Thereafter, all Directors shall serve terms of three years each.

34 **Resignation of Directors.** A Director may resign at any time by delivering written notice to the Board of Directors the President or the Secretary. A resignation is effective when the notice is effective unless the notice specifies a later date.

3.5 **Removal/Vacancies.** The City shall have the right to remove any or all of its respective appointees as Directors at any time with or without cause and appoint a replacement Director for the remainder of each removed Director's then current term. An Council Director who ceases to be a member of City Council shall be deemed automatically removed from the Board of Directors.

36 **Attendance.** All Directors shall be required to attend in person at least seventy-five percent (75%) of the regular meetings of the Board of Directors held during each fiscal year of the Corporation. Failure of any Director to satisfy this attendance requirement shall result in removal of the subject Director upon adoption of an appropriate resolution by the Board of Directors. If so removed by the Board of Directors, the subject Director shall not be reappointed to serve on the Board of Directors for a period of at least three (3) years.

37 **Regular Meetings.** Regular meeting of the Board of Directors shall be at least one time per year for the purpose of transacting all business that may properly come before the Board of Directors at such date, time and place to be specified by the Board of Directors. The meeting shall be held at the principal office of the Corporation or such other location within or without the State of South Carolina as specified by the Board of Directors. The Board of Directors may by resolution provide for the holding of additional meetings without notice other than such resolution, provided, however, the resolution shall fix the dates, times and places (which may be anywhere within or without South Carolina) for these regular meetings. Except as otherwise provided by law, any business may be transacted at any regular meeting of the Board of Directors.

38 **Special Meetings. Notice of Special Meeting.** Special meetings of the Board of Directors may be called for any lawful purpose or purposes by the President, or at least twenty-five percent (25%) of the Directors then in office. The person or persons calling a special meeting shall give or cause to be given, to each Director at his business address, notice of the date, time and place of the meeting by any means of communication acceptable under the Act not less than two (2) days prior thereto. An oral notice is permissible if reasonable under the circumstances and is effective when communicated in a comprehensible manner. Written notice is effective when received.

Written notice shall be deemed received when delivered to the Director's business address shown in the Corporation's current records. If notice is given by facsimile transmission, the notice shall be deemed delivered when the facsimile of the notice is transmitted to a facsimile with acknowledgment of receipt. All notices of a special meeting shall describe the purpose of such special meeting and the only business to be considered at the special meeting shall relate to the purpose so described. Any time or place fixed for a special meeting must permit participation in the meeting by means of telecommunications as authorized below.

39 **Waiver of Notice of Meetings.** Notice of a meeting need not be given to any Director who signs a waiver of notice either before or after the meeting. To be effective the

waiver shall contain recitals sufficient to identify beyond a reasonable doubt the meeting to which it applies. The recitals may, but need not necessarily, include reference to the date and purpose of the meeting and the business transacted thereat. Recital of the proper date of a meeting shall be conclusive identification of the meeting to which a waiver of notice applies unless the waiver contains additional recitals creating a patent ambiguity as to its proper application. The attendance of a Director at a Board of Directors meeting shall constitute waiver of notice of that meeting, except where the Director, upon arriving at the meeting or prior to the vote on a matter not noticed in conformity with the Act, these Bylaws, or the Articles, objects to lack of notice and does not thereafter vote or assent to the objected action.

3.10 Participation by Telecommunications. Any Director may participate in and, for purposes of Section 3.6 above, be regarded as present at any meeting of the Board of Directors by means of conference telephone or any other means of communication by which all persons participating in the meeting can hear each other at the same time.

3.11 Quorum. A majority of the Directors in office immediately before the meeting shall constitute a quorum for the transaction of business at any meeting of the Board of Directors. If a quorum shall not be present at any meeting of the Board of Directors, the Directors present at the meeting may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

3.12 Action. The Board of Directors shall take action pursuant to resolutions adopted by the affirmative vote of a majority of the Directors participating in a meeting at which a quorum is present, or the affirmative vote of a greater number of Directors where required by the Articles, these Bylaws, the Act or otherwise by law.

3.13 Action Without Meeting. To the fullest extent permitted by the Act and the Freedom of Information Act ("FOIA"), the Board of Directors may take action without a meeting by written consent as to such matters and in accordance with such requirements and procedures authorized by the Act and FOIA. Unless otherwise permitted by the Act and FOIA, such written consent must be signed by all Directors and included in the minutes filed with the corporate records reflecting the action taken.

3.14 Presumption of Assent. A Director of the Corporation who is present at a meeting of the Board of Directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless (i) such Director objects at the beginning of the meeting, or promptly upon arrival to holding the meeting or transacting business at the meeting, (ii) the Director votes against the action and the vote is entered in the minutes of the meeting, (iii) the Director's dissent or abstention for the action taken is entered in the minutes of the meeting, or (iv) the Director delivers written notice of dissent or abstention to the presiding officer of the meeting before its adjournment or to the Corporation immediately after the adjournment of the meeting. The right to dissent shall not apply to a Director who voted in favor of such action.

3.15 Committees. The Board of Directors may from time to time by resolution, designate one or more Committees, who shall render advice to the Board of Directors and oversee specified activities designated by the Board of Directors. Any such Committee may be

designated as a *standing Committee* appointed annually or as a special Committee for specific circumstances or transactions with a limited duration. Each Committee shall be composed of at least two (2) Directors and such other persons as specified from time to time by the Board of Directors, who shall all serve at the pleasure of the Board of Directors. The duties, constitution and procedures of any Committee shall be proscribed by the Board of Directors, but no Committee shall be granted authority to act upon any matter without approval from the Board of Directors. The Board of Directors shall designate one member of each Committee as its President. The Board of Directors shall appoint members to Committees as it deems advisable. The President of each Committee shall schedule all Committee meetings and provide appropriate notice to all Committee members and the Secretary. For all Committee meetings, a quorum shall be required consisting of a majority of the members of the Committee. The President of the Committee shall have a vote on all matters coming before the Committee. Minutes of Committee meetings shall be kept and open to inspection by the public. The results of each vote shall be recorded in the minutes. Minutes of all Committee meetings shall be provided to the Secretary within thirty (30) days after any Committee meeting, but shall remain subject to modification by the Committee at its next meeting.

314 Committee Meetings. A majority of each Committee's voting members shall constitute a quorum for the transaction of business by the Committee, and each Committee shall take action pursuant to resolutions adopted by a majority of the Committee's voting members participating in a meeting at which a quorum of the Committee is present. Each Committee may also take action without a meeting by written consent as to such matters and in accordance with such requirements and procedures authorized by the Act for Director action. Unless otherwise permitted by the Act for Director action, such written consent must be signed by all of the Committee's voting members. Special meetings of any Committee may be called at any time by any Director who is a member of the Committee or by any person entitled to call a special meeting of the full Board of Directors, Except as otherwise provided in this section, the conduct of all meetings of any Committee including notice thereof, and the taking of any action by such Committee shall be governed by this Article. Procedures shall be established for all Directors to receive schedules of all Committee meetings, agendas and copies of Committee meeting minutes to keep the Directors informed of matters under consideration by all Committees. In addition, Directors who are not serving on specific Committees are encouraged to attend Committee meetings of interest and participate in such meetings as non voting members. In this manner, Directors can provide guidance and assistance to the Committees during the process of formulating recommendations to the Board of Directors and gain a better understanding of all of the factors considered by the Committee in making such recommendations.

317 No Compensation. Directors shall not receive compensation for serving as a member of the Corporation's Board of Directors. The Board of Directors may by resolution authorize the payment or reimbursement of direct out-of-pocket expenses incurred of each Director related to the Director's service to the Corporation.

318 Order of Business. Unless otherwise determined by the President, the order of business at the annual meeting, to be set as the first regular meeting of the Board of Directors in a fiscal year, and so far as practicable at all other meetings of the Board of Directors, shall be as follows,

- 1 Determination of a quorum,
- 2 Reading and disposal of all unapproved minutes,
- 3 Reports of Officers and Committees, if applicable,
- 4 Appointment of Officers and Committees, if applicable
- 5 Unfinished business, if applicable,
- 6 New business, and
- 7 Adjournment.

Unless, and to the extent determined by the Board of Directors or the President of the meeting, meetings of the Board of Directors shall not be required to be held in accordance with rules of parliamentary procedure

3.19 Agenda. The President of the Corporation shall prepare an agenda for each meeting prior to or during a meeting. Each Director of the Corporation shall receive a copy of the agenda and it shall be available for public inspection which it is distributed to the Directors

Directors shall confine their discussions and comments to only those items that appear on the agenda provided. Any matter which is not on the agenda may be discussed only upon the completion of the agenda. The Board of Directors may not take formal action on any non agenda matter unless all Directors present vote to add the matter to the agenda.

The President may add an item to an agenda at any time provided, however, that if the Member objects to an item added after the agenda was distributed to the Directors no action may be taken at that meeting with respect to that item. Any Director may request the President to place an item on a future agenda by making such a request at a Board of Director meeting

3.30 Election of Officers. Officers shall be elected annually at the Regular Meeting of the Board of Directors. The Board of Directors shall elect a President, Vice President, Treasurer, and Secretary. Officers will be elected by a majority vote of those Directors attending the meeting at which the nominations are made. If the retiring President is not available at such meeting, the Vice President for the Corporation may preside for the purpose of electing Officers only; thereafter, the new President shall preside.

3.21 Freedom of Information Act. The Board of Directors and all Committees shall at all times comply with the South Carolina Freedom of Information Act, which includes satisfying the notice provision for all meetings. The Board of Directors may hold closed sessions as provided by the Freedom of Information Act.

Full and accurate minutes of the Corporation's proceedings shall be kept and shall be open to inspection by the public. The results of each vote shall be recorded in the minutes

3.32 Board Contacts with Public. Directors shall not represent any contacts they have with the media or other members of the public as being representative of the Corporation unless the Corporation has formally taken a position on the matter. Individual Directors shall not release information to the media or the public when that information has been provided to them by the Corporation's attorney as part of a Confidential Attorney-Client memorandum or as part of a Corporation closed session held in compliance with applicable law,

ARTICLE IV

OFFICERS

41 In General. The Officers of the Corporation shall consist of a President, a Vice President, a Treasurer and a Secretary and may also include assistant secretaries and other officers and agents as the Board of Directors deems advisable from time to time. All Officers shall be appointed by the Board of Directors to serve at the pleasure of the Board of Directors. Except as may otherwise be provided by the Act or in the Corporation's Articles of Incorporation, any Officer may be removed by the Board of Directors at any time, with or without cause. Any vacancy, however occurring, in any office may be filled by the Board of Directors for the unexpired term. One person may hold two or more offices. Each Officer shall exercise the authority and perform the duties as may be set forth in these Bylaws and any additional authority and duties as the Board of Directors shall determine from time to time.

42 President. The President shall serve at the pleasure of the Board of Directors. The President shall preside at all meetings of the Board of Directors and shall undertake such additional duties and obligations as may from time to time be specified by the Board. The President shall serve as the chief executive officer of the Corporation and, subject to the authority of the Board of Directors, shall oversee the business and affairs of the Corporation and shall see that the resolutions of the Board of Directors and authorized Committees thereof are put into effect. Except as otherwise provided herein and as may be specifically limited by resolution of the Board of Directors or an authorized Committee thereof, the President shall have full authority to execute on the Corporation's behalf any and all contracts, agreements, notes, bonds, certificates, instruments and other documents. The President shall also perform such other duties and may exercise such other powers as are incident to the office of chief executive officer and as are from time to time assigned to him by the Act, these Bylaws or the Board of Directors.

43 Vice President. The Board of Directors may appoint one or more Vice Presidents to serve in such capacities as specified by the Board of Directors from time to time (but such authority shall not exceed that of the President), with a Vice President designated by the Board of Directors to preside over meetings of the Board of Directors in the absence of the President. Except as otherwise determined by the Board of Directors, each Vice President shall serve under the direction of the President and shall perform such duties and may exercise such powers as are incident to the office of a senior vice president of a corporation.

44 Treasurer. The Treasurer shall serve under the direction of the President and shall be responsible for all financial matters presented to the Corporation, including the establishment and maintenance of the Corporation's bank accounts and all financial accounting related to the oversight of the Corporation's books and records.

45 Secretary. Except as otherwise provided by these Bylaws or determined by the Board of Directors, the Secretary shall serve under the direction of the President. The Secretary shall whenever possible attend all meetings of the Board of Directors, and whenever the Secretary cannot attend such meetings, such duty shall be delegated by the presiding officer for such meeting to a duly authorized assistant secretary. The Secretary shall record or cause to

be recorded under the Secretary's general supervision the proceedings of all such meetings and any other actions taken by the Board of Directors (or by any Committee of the Board of Directors) in a book or books (or similar collection) to be kept for such purpose. The Secretary shall upon proper request give or cause to be given, all notices in connection with such meetings. The Secretary shall be the custodian of the Corporate seal and affix the seal to any document requiring it and to attest thereto by signature. The Secretary may delegate the Secretary's authority to affix the Corporation's seal and attest thereto by signature to any Assistant Secretary. The Board of Directors may give general authority to any other officer or specified agent to affix the Corporation's seal and to attest thereto by signature. Unless otherwise required by law, the affixing of the Corporation's seal shall not be required to bind the Corporation under any documents duly executed by the Corporation and the use of the seal shall be precatory in the discretion of the Corporation's duly authorized signing officers. The Secretary shall properly keep and file, or cause to be properly kept and filed under the Secretary's supervision, all books, reports, statements, notices, waivers, proxies, tabulations, minutes, certificates, documents, records, lists, and instruments required by the Act or these Bylaws to be kept or filed, as the case may be. The Secretary may when requested, and shall when required, authenticate any records of the Corporation. Except to the extent otherwise required by the Act, the Secretary may maintain, or cause to be maintained, such items within or without the State of South Carolina at any reasonable place. The Secretary shall perform such other duties and may exercise such other powers as are incident to the office of Secretary and as are from time to time assigned to such office by the Act, these Bylaws, the Board of Directors or the President. In the absence of the Secretary, an Assistant Secretary may perform any act or exercise any power of the Secretary including, but not limited to, certifying any document pursuant to the authorization of the Board of Directors.

46 Salaries. The salaries and other compensation of the Officers shall be fixed from time to time by the Board of Directors, provided, however, that no compensation shall be paid to members of the Board of Directors who also serve as Officers except for reimbursement of direct out-of-pocket expenses reasonably incurred in the discharge of their respective duties on behalf of the Corporation.

ARTICLE V

INDEMNIFICATION

51 Scope. The Corporation shall indemnify, defend and hold harmless the Corporation's Officers and Directors to the fullest extent permitted by, and in accordance with the Act. This plan of indemnification shall constitute a binding agreement of the Corporation for the benefit of the Officers and Directors as consideration for their services to the Corporation and may be modified or terminated by the Board of Directors only prospectively. Such right of indemnification shall not be exclusive of any other right which such Directors, Officers or representatives may have or hereafter acquire and, without limiting the generality of such statement, they shall be entitled to their respective rights of indemnification under any bylaw, agreement, insurance, provision of law, or otherwise as well as their rights under this Article V.

5.2 Indemnification Plan. The Board of Directors may from time to time adopt and indemnification Plan implementing the rights granted in Section 5.1. This Indemnification Plan shall set forth in detail the mechanics of how the indemnification rights granted in Section 5.1 shall be exercised, provided that the Indemnification Plan shall include that the Directors shall not be indemnified until twenty (20) days after effective written notice is given to the South Carolina Attorney General, as set forth in Section 33-31-855(d) of the Act.

5.3 Insurance. The Board of Directors may cause the Corporation to purchase and maintain insurance on behalf of any person who is or was a Director or Officer of the Corporation or is or was serving at the request of the Corporation as a Director or Officer of another corporation, or as its representative in a partnership, joint venture, trust or other enterprise, against any liability asserted against such person and incurred in any such capacity or arising out of such status whether or not the Corporation would have the power to indemnify such person.

ARTICLE VI

TRANSACTIONS

6.1 Contracts. The Board of Directors may authorize any Officer or Officers, or agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.

6.2 Loans. The Board of Directors may authorize any Officer or Officers or agent or agents to contract any indebtedness and grant evidence of indebtedness and collateral therefor in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.

6.3 Checks, Drafts, Etc. All checks, drafts or orders for the payment of money notes or other evidences of indebtedness issued in the name of the Corporation shall be signed by such Officer or Officers, agent or agents of the Corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors. In the absence of such determination by the Board of Directors, such instruments shall be signed by the President or the Vice President.

6.4 Deposits. All funds of the Corporation shall be deposited from time to time to the credit of the Corporation in such banks, trust companies or other depositories as the Board of Directors may select.

6.5 Gifts. The Board of Directors may accept on behalf of the Corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the Corporation.

6.6 Voting of Shares in Other Corporations Owned by the Corporation. Subject always to the specific directions of the Board of Directors, any share or shares of stock or membership interest issued by any other corporation and owned or controlled by the Corporation may be voted at any shareholders or members meeting of the other corporation.

by the President or by any other Officer specifically designated by the Board of Directors. Whenever, in the judgment of the President, or in his absence, of any designated Officer it is desirable for the Corporation to execute a proxy or give a shareholders' or members' consent in respect to any share or shares of stock or membership interest issued by any other corporation and owned or controlled by the Corporation, the proxy or consent shall be executed in the name of the Corporation by the President without necessity of any authorization by the Board of Directors. Any person or persons designated in the manner above stated as the proxy or proxies of the Corporation shall have full right, power and authority to vote such share or shares of stock or membership interest issued by the other corporation.

ARTICLE VII

RECORDS/ANNUAL AUDIT

7.1 **Forms of Records.** When consistent with good business practices any records of the Corporation may be maintained in other than written form if such other form is capable of reasonable preservation and conversion into written form within a reasonable time.

7.2 **Corporate Records.** The Corporation shall keep as permanent written records a copy of the minutes of all meetings of its Board of Directors, a record of all actions taken by the Directors without a meeting, and a record of all actions taken by Committees of the Board of Directors. The Corporation shall maintain appropriate accounting records. The Corporation or its agent shall maintain a record of the name and address, in alphabetical order, of each Director. The Corporation shall keep a copy of the following records at its principal office:

A its Articles of Incorporation or restated Articles of Incorporation and all amendments thereto currently in effect;

B its Bylaws or restated Bylaws and all amendments thereto currently in effect;

C a list of the names and business or home address of its current Directors and Officers, and

D the Corporation's most recent report of each type required to be filed by the Corporation with the South Carolina Secretary of State.

7.3 **Annual Audit.** Within one hundred eighty (180) days after the close of each fiscal year of the Corporation, the Board of Directors shall cause an audit to be completed regarding the financial condition of the Corporation and an appropriate report issued to the City. Such audit services shall be undertaken in accordance with accounting practices generally applicable to audits of governmental units by the certified public accounting firm then providing audit services to the City for the applicable fiscal year or such other firm of certified public accountants as may be selected by the Board of Directors from time to time.

ARTICLE VIII

MISCELLANEOUS

81 Fiscal Year The fiscal year of the Corporation shall end on June 30 of each calendar year.

82 Amendments These Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by a majority vote of the Board of Directors then in office provided that the notice of any meeting at which the Bylaws are to be amended shall state that the purpose or one of the purposes of the meeting is to consider an amendment to the Bylaws and shall be accompanied by a copy or summary of the proposed change or state the general nature of the change. Irrespective of the foregoing, neither the provisions of Section 3.2 or this Section 8.3 shall be amended without the written consent of the City.

83 Severability If any provision of these Bylaws or the application thereof to any person or circumstances shall be held invalid or unenforceable to any extent by a court of competent jurisdiction, such provision shall be complied with or enforced to the greatest extent permitted by law as determined by such court, and the remainder of these Bylaws and the application of such provision to other persons or circumstances shall be affected thereby and shall continue to be complied with and enforced to the greatest extent permitted by law.

84 Usage In construing these Bylaws feminine or neuter terms and pronouns shall be substituted for masculine forms and Vice versa, and plural terms shall be substituted for singular forms and Vice versa, in any place in which the context so requires. The section and paragraph headings contained in these Bylaws are for reference purposes only and shall not affect in any way the meaning or interpretation of these Bylaws. Terms such as "hereof", "hereunder", "hereto", and words of similar import shall refer to these Bylaws in the entirety and all references to "Articles", "Paragraphs", "Sections", and similar cross references shall refer to specified portions of these Bylaws, unless the context clearly requires otherwise. Terms used herein which are not otherwise defined shall have the meanings ascribed to them in the Act. All references to statutory provisions shall be deemed to include corresponding sections of succeeding law.

8.5 Conflict Between Bylaws, Articles of Incorporation and the Act The Corporation's Articles of Incorporation and the Act (as either may be amended from time to time) are incorporated herein by reference. Any conflict between the terms of these Bylaws, the Corporation's Articles of Incorporation or the Act shall be resolved in the following order: (1) the Act; (2) the Corporation's Articles of Incorporation, and (3) these Bylaws.

The foregoing are certified to be the true and complete Bylaws of the Corporation as adopted by the Board of Directors at a duly called meeting held on June 11 2003


Secretary

Date of Certification _____

(Corporate Seal)

**AGREEMENT BETWEEN
DESIGN/BUILDER AND ARCHITECT/ENGINEER
FOR DESIGN/BUILD PROJECT**

TABLE OF ARTICLES

- 1 RELATED DEFINITIONS
- 2 GENERAL PROVISIONS
- 3 ARCHITECT/ENGINEER S RESPONSIBILITIES
- 4 DESIGN/BUILDER S RESPONSIBILITIES
- 5 SCHEDULE
- 6 ARCHITECT/ENGINEER S COMPENSATION AND PAYMENT
- 7 INDEMNITY INSURANCE AND WAIVER OF SUBROGATION
- 8 TERMINATION
- 9 DISPUTE RESOLUTION
- 10 MISCELLANEOUS PROVISIONS
- 11 SCHEDULE OF EXHIBITS

This Agreement has important legal and insurance consequences. Consultation with an attorney and an insurance consultant is encouraged with respect to its completion or modification.

0528

Harpoottian 0777

AGREEMENT BETWEEN
DESIGN/BUILDER AND ARCHITECT/ENGINEER
FOR DESIGN/BUILD PROJECT

AGREEMENT

This Agreement is made this _____ day of _____ in the year _____
_____ by and between the

DESIGN/BUILDER
(Name and Address)

TURNER CONSTRUCTION COMPANY
3424 Peachtree Road NE
Suite 200
Atlanta GA 30326

and the
ARCHITECT/ENGINEER
(Name and Address)

Stevens & Wilkinson of South Carolina Inc
1501 Main Street Garden Level
Columbia South Carolina 29201

for services in connection with the following
PROJECT

Columbia Convention Center Hotel

(Name-location and brief description)

Design and construction of a 300 room hotel (the Hotel) consisting of approximately 212 000 gross square feet on the block adjacent to the New Convention Center in Columbia South Carolina

This Project is directly connected to and financially dependent on the sale of bonds Therefore the Architect/Engineer understands that Design/Builder has no obligation to pay Architect/Engineer for any services performed pursuant to this agreement unless and until Project financing is secured through the sale of bonds The Architect/Engineer has no obligation to continue performance after completion of the GMP documents Notwithstanding the above the Architect/Engineer is responsible to complete the Work on this Project in accordance with the dates specified in Exhibit A such that the Hotel Project is not delayed

Notice to the parties shall be given at the above addresses

0529

Harpootlian 0778

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

ARTICLE 1
DEFINITIONS

- 1.1 Applicable Laws means all laws statutes ordinances codes building codes regulations rules orders and resolutions of all national administrative state local municipal and other governing bodies relating to the Project or to the performance of the Services or the Work
- 1.2 Architect/Engineer means Stevens & Wilkinson of South Carolina Inc and any successor architect firm that Design/Builder may retain in connection with the Project
- 1.3 Change Order means a written order to Design/Builder executed by the Owner and Development Manager in accordance with the Contract authorizing and directing an addition to deletion from or adjustment or revision to the requirements of the Contract Documents or an adjustment to the compensation payable to Design/Builder or to the time for performance of the Agreement and completion of the Project or any combination thereof
- 1.4 Construction Phase means the phase of the Project commencing upon acceptance of the Construction Documents or upon award of the first Subcontract related to construction of the Project whichever occurs first but in no event prior to the Notice to Proceed being issued by the Owner and ending upon Final Completion The parties acknowledge that the Design Phase and the Construction Phase may overlap
- 1.5 Construction Phase Services means Services rendered during the Construction Phase of the Project
- 1.6 Design Phase means the phase of the Project commencing upon the Effective Date of this Agreement and ending upon completion of the Construction Documents
- 1.7 Design Phase Services means all Services required during the Design Phase of the Project
- 1.8 Final Completion means the completion of all Work required by and in strict compliance with the Contract Documents including start up testing obtaining regulatory approvals from all applicable authorities and all preparations necessary to operate and maintain the Project in accordance with the Contract Documents and includes a Temporary Certificate of Occupancy for 100% of the hotel rooms and 100% of the public spaces subject to the same terms as defined in Article 1.18 regarding disputes and/or other unrelated conditions regarding occupancy
- 1.9 GMP means the Guaranteed Maximum Price for the Project which will be set forth in Amendment No. 1 to the Design/Build Contract A GMP will not exist until acceptance by the Owner
- 1.10 Separate Contractor means any contractor not including Design/Builder Subcontractors or the Architect/Engineer with whom Owner or Development Manager enters into a direct contract for the performance of any matters not covered by the GMP
- 1.11 Owners Representative means the individual named by Owner to act on Owners behalf in the administration of the Contract
- 1.12 Development Managers Representative means the individual named by Development Manager to act on Development Managers behalf in the administration of the Contract
- 1.13 Design/Builders Representative means the individual named by Design/Builder to act on Design/Builders behalf in the administration of this Agreement and the Contract
- 1.14 Services means those services functions roles responsibilities obligations and duties required of Architect/Engineer pursuant to the terms of this agreement as described in 2.2.1
- 1.15 Subcontracts means the contracts between Design/Builder and any Subcontractor
- 1.16 Intentionally Omitted
- 1.17 Subcontractor means any person or entity having a direct contract or purchase order with Design/Builder for the performance or supply of all or any portion of the Work required by the Contract Documents or the supply of any materials services equipment or installation services required by the Contract Documents The Architect/Engineer is not a Subcontractor
- 1.18 Substantial Completion means that stage of completion of the Project when construction is sufficiently complete in accordance with the Contract Documents so that the Owner Development Manager or any Separate Contractor can occupy or utilize the Project or such designated portion thereof for the use for which it is intended and a temporary certificate of occupancy and any other permits and orders necessary for occupancy of 50% of the rooms 100% of the public spaces and all of the back of house spaces deemed necessary by Operator to operate such rooms and public spaces including food service have been issued by the proper governmental authority or would have been issued in the absence of a dispute unrelated to the conditions regarding occupancy between the Owner Development Manager Design/Builder or Architect/Engineer and the proper governmental authority Substantial Completion shall be achieved within 21 months from the date of the Notice to Proceed unless otherwise extended pursuant to the terms of this Agreement or the Contract Warranties called for by this Agreement or by the Contract Documents shall commence on the Actual Substantial Completion Date The date upon which Substantial Completion is achieved shall be referred to as the Actual Substantial Completion Date
- 1.19 Value Engineering means the detailed analysis of systems equipment materials services facilities and supplies required by the Contract Documents for the purpose of achieving the desired and essential function of the Program at the lowest Life Cycle Cost consistent with required and necessary performance reliability quality and safety Value Engineering is to be performed during the

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

Design Phase and as a part of the services required to reach an acceptable GMP Life Cycle Cost means the sum of all costs of the Project over its useful life and includes the cost of design construction acquisition operation maintenance and salvage/resale value

1 20 Work means any and all labor supervision supplies fixtures vehicles equipment tools materials computers utilities items documents and other items required to complete the Design and Construction Phase Services including all permitting required to render the Project and every component thereof operational and usable for its intended purpose

1 21 Construction Contingency means a sum established by the Design/Builder for use at the Design/Builder's discretion to cover costs which are properly reimbursable as a Cost of the Work but are not the basis of a Change Order

1 22 Operator means the party who enters into the Hotel Operating Agreement with the Owner or Development Manager to operate the Hotel

1 23 Subcontractor Change Order means a written order to a Subcontractor executed by the Design/Builder in accordance with the Subcontract Agreement authorizing and directing an addition to deletion from or adjustment or revision to the requirements of the Contract Documents

1 24 Intentionally Omitted

1 25 Program means an initial description of the Work proposed by the Development Manager and accepted by the Owner and Operator

1 26 Notice to Proceed means the date that the Owner provides written notice for the Design/Builder to proceed with the Work

1 27 Architect/Engineer's Representative means the individual named by the Architect/Engineer to act on the Architect/Engineer's behalf in the administration of this Agreement

1 28 Construction Fund means the fund established pursuant to the Bond Financing for the sole use of funding the Design/Builder's GMP

1 29 Intentionally Omitted

1 30 Owner means the Corporation established as a South Carolina not for profit public benefit corporation known as the

1 31 Intentionally Omitted

1 32 Intentionally Omitted

1 33 FF&E means furniture fixture and equipment purchased to be used in the Hotel

1 34 Contract means the Design/Build Agreement between the Design/Builder Owner and Development Manager

1 35 Intentionally Omitted

1 36 Intentionally Omitted

1 37 Site means that certain real property in the City of Columbia South Carolina upon which the Hotel shall be located

1 38 Warranties means warranties obtained from the Design/Builder Subcontractors and all other contractors pursuant this Agreement or the Contract covering the work performed or materials furnished to the Project or any portion thereof by the Design/Builder Subcontractors and other contractors

1 39 Intentionally Omitted

1 40 Effective Date means the date of execution of this Agreement by all parties

**ARTICLE 2
GENERAL PROVISIONS**

The Design/Builder has agreed in its Design/Build Agreement with the Owner (the Contract) to procure the services of licensed design professionals to provide the architectural and engineering services required to design the Project in accordance with the Owner's requirements as outlined in the Program and other relevant data defining the Project. The person or entity providing architectural and engineering services shall be referred to as the Architect/Engineer. The standard of care for architectural and engineering services performed under this Agreement shall be the care and skill ordinarily used by members of the architectural and engineering professions practicing under similar conditions at the same time and locality. It is the intent of this Agreement that the Architect/Engineer provide all of the necessary Services normally and reasonably required to provide a design meeting all of the Owner's Program requirements and in accordance with all applicable laws.

The Architect/Engineer shall prepare all documents and other items required by this Agreement including but not limited to all contract plans and specifications in such a manner that they shall be accurate coordinated and adequate for construction and shall be in conformity and comply with all applicable officially promulgated and published law codes and regulations including all relevant permitting requirements. Services provided by the Architect/Engineer under this Contract will be performed in a manner consistent with that degree of care and skill meeting the standards of the industry. The Architect/Engineer will correct those Services not meeting standards without additional compensation should it be determined those Services do not meet industry standards.

2 1 TEAM RELATIONSHIP The Design/Builder and Architect/Engineer agree to work together on the basis of

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

trust good faith and fair dealing and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely efficient and economical manner including consideration of design modifications and alternative materials or equipment that will permit the Work to be constructed within the GMP by the Substantial Completion Date

2.2 ADDITIONAL DEFINITIONS

- 1 The *Architect/Engineer's Services* shall be to provide the necessary architectural and engineering services required by the Design/Builder for the Project including a reasonable amount of coordination of design services of subcontractors and Separate Contractors who may be procured by the Design/Builder or Owner to provide both design and/or construction services for certain Project elements. The Services include Basic Services provided for the Design and Construction Phases plus Additional Services as may be authorized by the Design/Builder.
- 2 The *Contract Documents* govern the relationship between the Design/Builder and the Architect/Engineer. The Contract Documents consist of this Agreement including the exhibits set forth in Article 11 plus written amendments to this Agreement as agreed to by the parties.
- 3 The term *day* shall mean calendar day unless otherwise specifically designated.
- 4 The *Design/Builder's Work* is the design and construction services required of the Design/Builder to fulfill its obligations pursuant to its agreement with the Owner and Development Manager (the Work). The Architect/Engineer's Services are a portion of the Design/Builder's Work.

2.3 EXTENT OF AGREEMENT This Agreement represents the entire agreement between the Design/Builder and the Architect/Engineer and supersedes all prior negotiations, representations and agreements, either written or oral.

ARTICLE 3 ARCHITECT/ENGINEER'S RESPONSIBILITIES

3.1 OBLIGATIONS DERIVATIVE The Design/Builder and the Architect/Engineer are mutually bound by the terms of this Agreement. To the extent that the terms of the Contract between the Owner, Development Manager and Design/Builder apply to the performance of the Architect/Engineer's Services, then the Design/Builder assumes toward the Architect/Engineer all the obligations, rights, duties and remedies that the Owner and Development Manager assume toward the Design/Builder. In an identical way, the Architect/Engineer assumes toward the Design/Builder all the same obligations, rights, duties and remedies that the Design/Builder assumes toward the Owner and Development Manager. In the event of an

inconsistency among the documents, the specific terms of this Agreement shall govern.

3.1.1 PROJECT REQUIREMENTS The Architect/Engineer, in order to determine the requirements of the Project, shall review the information in the Program. The Architect/Engineer shall review its understanding of the Project requirements with the Design/Builder. The Architect/Engineer shall perform the obligations in accordance with the GMP schedule which will be attached to this Agreement as Exhibit A. The Design/Builder has provided to the Architect/Engineer an estimate of probable cost of construction based on the Program. Upon reasonable review, the Architect/Engineer shall submit to the Design/Builder in writing its review comments of the estimate of probable cost of construction as prepared by the Design/Builder for constructing the Project. The Architect/Engineer agrees to provide its services so that this Construction Cost Limit, as it may be adjusted for changes in the Project authorized by the Design/Builder, will not be exceeded. The Architect/Engineer will be party to preparation of the GMP and upon completion of the GMP, the Architect/Engineer will agree in writing that the Construction Cost Limit and the GMP are reasonable, provided that should the Architect/Engineer incur additional costs and expenses to redesign as a result of changes authorized by the Design/Builder that were not the fault of the Architect/Engineer and are not for the purpose of reducing costs on the Project to maintain the Construction Cost Limitation, such expenses and costs will be compensated as additional services. If due to the fault of the Architect/Engineer, the estimated cost of constructing the Project in accordance with the Documents prepared by the Architect/Engineer exceeds the Construction Cost Limit, as it may be adjusted, the Architect/Engineer shall at its own cost and expense and subject to the Design/Builder's approval, make such revision to the Documents as are necessary to bring the estimated cost of construction within the Construction Cost Limit and the GMP.

3.2 BASIC SERVICES The Architect/Engineer's Basic Services consist of a review of the Project information furnished by the Design/Builder and the preparation of the Schematic (GMP) Design Documents, Design Development Documents, Construction Documents, bidding or negotiation assistance, Construction Phase Services, and other basic services as may be provided in Subparagraph 3.2.1.9. The Basic Services shall be provided under a lump sum stipulated fee format as described in Article 6.1.1.1 and shall include the following items of Work: normal architectural, structural, mechanical and electrical design; pre-proposal marketing and business development; proposal preparation; interview and presentation material; program interpretation and development; pre-design services; food service design and equipment lists; photo project delivery and inter-project coordination. The Architect shall perform site design as follows:

0532

The Architect/Engineer shall coordinate its services with the services of its design consultants and the Design/Builder's Subcontractors and Separate Contractors retained by the Owner or Development Manager. These services shall be performed in accordance with the schedule established by the Design/Builder pursuant to Article 5 and Exhibit A. It is the intent of this Agreement that the Architect/Engineer provide all of the necessary Services normally and reasonably required to design a completely permitted and functioning project.

3.2.1 SCHEMATIC DESIGN DOCUMENTS Based upon the Preliminary Evaluation and other relevant information, the Architect/Engineer shall prepare for approval by the Design/Builder, Development Manager and Owner Schematic GMP Design Documents consisting of drawings, outline specifications and other conceptual documents illustrating the Project's basic elements, scale and their relationship to the Site. Two printed sets and one reproducible set of these Documents shall be provided to the Design/Builder. When the Architect/Engineer submits the Schematic GMP Design Documents, the Architect/Engineer shall identify in writing all material changes and deviations that have taken place from the Program and the preliminary schedule and estimate. Following completion of the Schematic GMP Design Documents, the Architect/Engineer shall cooperate with the Design/Builder in reviewing the GMP proposal.

3.2.2 GUARANTEED MAXIMUM PRICE (GMP) PROPOSAL The Design/Builder will prepare a GMP Proposal prior to completion of the Design Development Documents. The Design/Builder will include in the Proposal a statement of the assumptions and qualifications on which the GMP is based. Prior to submission of the proposal to the Owner and Development Manager, the Architect/Engineer shall review the Proposal and advise the Design/Builder of any errors, omissions or inconsistencies it may discover. Following acceptance of the Proposal by the Owner and Development Manager, and the sale of bonds to finance the Project, the Architect/Engineer shall complete the Construction Documents incorporating the agreed upon assumptions and clarifications as set forth in the GMP document. The Design/Builder and Architect/Engineer shall work together to monitor the completion of the drawings and specifications so that the Project can be completed within the GMP and by the date of Substantial Completion. Two printed sets and one reproducible set of the drawings and specifications on which the GMP is based shall be provided to the Design/Builder.

The Architect/Engineer acknowledges that an acceptable GMP proposal is critical to the success of the entire team of the Owner, Development Manager, Design/Builder and Architect/Engineer team in receiving financing for the Project and considerable risk to the Architect/Engineer and Design/Builder is associated with preparing the GMP document prior to the completion of the Construction Documents. The Architect/Engineer agrees that it will provide the Documents in accordance with the schedule in Exhibit A.

3.2.3 DESIGN DEVELOPMENT DOCUMENTS Based on the approved Schematic GMP Design Documents and payment to Architect/Engineer for its services after Design/Builder receives payment from the Owner, the Architect/Engineer shall prepare for approval by the Design/Builder, Development Manager, Owner and governmental authorities including revisions necessary to secure such approvals, Design Development Documents. The Design Development Documents shall further define the Project including drawings and outline specifications fixing and describing the Project size and character and other appropriate elements incorporating the structural, architectural, mechanical, electrical and interior components. When the Architect/Engineer submits the Design Development Documents, the Architect/Engineer shall identify in writing all material changes and deviations that have taken place from the approved Schematic Design Documents. Two printed sets and one reproducible set of these Documents shall be provided to the Design/Builder. Following completion of the Design Development Documents, the Architect/Engineer shall cooperate with the Design/Builder in maintaining the cost of the Project within the GMP Amount.

3.2.4 CONSTRUCTION DOCUMENTS Based on the approved Design Development Documents, subject to payments to the Architect/Engineer in accordance with this Agreement and the requirements of Subparagraph 3.2.2, the Architect/Engineer shall prepare for approval by the Design/Builder, Development Manager, Owner and governmental authorities including revisions necessary to secure such approvals, Construction Documents setting forth in detail the requirements for construction of the Project, consisting of drawings and specifications that comply with codes, laws and regulations enacted at the time of their preparation. When the Architect/Engineer submits the Construction Documents to Design/Builder for the purpose of soliciting bids from Subcontractors and suppliers, the Architect/Engineer shall identify in writing and shall bubble Documents as appropriate, all material changes and deviations that have taken place from the approved Design Development Documents. Two printed sets and one reproducible set of these Documents shall be provided to the Design/Builder. Following completion of the Construction Documents and if a GMP has not been prepared and accepted, the Architect/Engineer shall cooperate with the Design/Builder in maintaining the cost of the Project within the GMP Amount.

3.2.5 BIDDING AND NEGOTIATION ASSISTANCE The Architect/Engineer shall assist the Design/Builder in obtaining bids from subcontractors and major suppliers by providing necessary drawings, specifications and addenda, attending pre bid meetings and clarifying the scope and intent of the Construction Documents to the extent required by the Design/Builder. Architect/Engineer will provide one set of reproducible to Design/Builder. Design/Builder will pay for all printing and reproducible costs relating to the obtaining of bids.

3.2.6 CONSTRUCTION PHASE SERVICES The Construction Phase shall commence upon the issuance of a written notice from the Design/Builder to proceed with construction, which shall be based on the Owner's Notice to Proceed. The Architect/Engineer shall furnish interpretations

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

and clarifications of the drawings and specifications by means of additional drawings addenda or otherwise as are necessary for the proper execution and progress of the Project. All such interpretations and clarifications shall be consistent with the intent of the Construction Documents and reasonably inferable from them and all such clarifications or modifications shall be bubbled to show such clarifications.

3 2 7 The Architect/Engineer shall timely review and approve the Design/Builder's submittals including shop drawings, product data and samples. Submittals shall be checked for conformance with the design and scope of the Project and for compliance with the Construction Documents by the Design/Builder prior to forwarding to Architect/Engineer for approval.

3 2 8 Approval by the Design/Builder Development Manager or Owner shall not be deemed to be an assumption of responsibility by the Design/Builder Development Manager or Owner for any error, inconsistency or omission in the drawings and specifications or other documents prepared by the Architect/Engineer, its employees, subcontractors, agents or consultants who shall be responsible for any such error, inconsistency or omission.

3 2 9 The Architect/Engineer shall have reasonable access to the Site at all times.

3 2 10 The Architect/Engineer shall communicate with the Development Manager, Owner and the Design/Builder's Subcontractors only through the Design/Builder.

3 2 11 The Architect/Engineer shall visit the Site at appropriate intervals necessary to keep the Design/Builder's Work flowing smoothly and in accordance with the Project schedule and to become generally familiar with the quality of the construction and to determine in general if the construction is proceeding in accordance with the Construction Documents. (Basic Services site visits shall average twice a month plus attendance at all Project Progress Meetings.) On the basis of these on-site observations, the Architect/Engineer shall endeavor to guard the Design/Builder against defects or deficiencies in the construction. The Architect/Engineer shall be committed to visit the site regularly and/or shall provide an on-site presence if the Work so dictates that requirement to keep the Project flowing smoothly and on schedule. After each Site visit, the Architect/Engineer shall promptly provide the Design/Builder with copies of all notes and field reports. If the Architect/Engineer becomes aware of any such defects, deficiencies or violations, it shall give prompt written notice to the Design/Builder. The Architect/Engineer shall not be responsible for construction means, methods, techniques, sequences and procedures unless they are specified by the Architect/Engineer or for ensuring that the Design/Builder's Work is in accordance with the Construction Documents.

3 2 12 The Architect/Engineer is not responsible for safety precautions and programs. However, if the Architect/Engineer becomes aware of safety violations, the Architect/Engineer shall give prompt written notice to the Design/Builder.

3 2 13 The Architect/Engineer shall assist the Design/Builder Development Manager and Owner in filing required documents with governmental authorities having jurisdiction over the Project including obtaining permits for the Project. Costs of such permits and fees shall be paid for by the Design/Builder.

3 2 14 The Architect/Engineer shall not be responsible for the acts or omissions of the Design/Builder or any of its subcontractors or their agents or employees or any other persons performing work on the Project who are not under the control or authority of the Architect/Engineer.

3 2 15 The Architect/Engineer shall attend meetings with the Development Manager, Owner and Design/Builder upon request of the Design/Builder.

3 2 16 All of the Services to be provided by the Architect/Engineer shall be rendered promptly so as not to delay the Design/Builder.

3 2 17 The Architect/Engineer shall assist the Design/Builder in conducting inspections in a timely manner to assist Design/Builder in meeting the Substantial Completion Date.

3 2 18 Intentionally Omitted.

3 2 19 OTHER BASIC SERVICES The following services shall also be included as part of Basic Services:

- 1 The Architect/Engineer shall transmit to the Design/Builder all manuals, operating instructions, record drawings, warranties, guarantees and other documents and things required by the Contract or this Agreement. The Architect/Engineer will incorporate into final Design Documents the notes and changes kept by him on the field record drawings and transmit two (2) printed copies of such final record drawings to the Design/Builder.

- 2 The Architect/Engineer shall be responsible for the preparation of a set of reproducible record drawings showing significant changes in the Work based on marked up prints, drawings and other data furnished by the Design/Builder or Trade Contractors under the Contract, this Agreement or any Subcontracts.

3 3 ADDITIONAL SERVICES The following services shall be provided by the Architect/Engineer and paid for as Additional Services if they are authorized in advance by the Design/Builder in writing and are not included in Basic Services set forth in Paragraph 3 2:

- 1 Negotiations supporting the procurement of Project financing other than Architect/Engineer support required to generate the financing memorandum document.

- 2 Appraisals of existing equipment, existing properties, new equipment and developed properties.

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

- 3 Soils subsurface and environmental studies reports and investigations required for submission to governmental authorities or others having jurisdiction over the Project
- 4 Artistic models and renderings of the Project
- 5 Inventories of existing furniture fixtures furnishings and equipment which might be under consideration for incorporation into the Project
- 6 Procurement and placement of furniture furnishings artwork and decorations
- 7 Making revisions to the Schematic Design Design Development Construction Documents or documents forming the basis of the GMP after they have been approved by the Development Manager Owner Design/Builder Operator and governmental authorities and which are due to causes beyond the control of the Architect/Engineer subject to normal changes indicated in Article 5.2
- 8 Estimates proposals appraisals consultations negotiations and services in connection with the repair or replacement of an insured loss
- 9 Document reproduction exceeding the limits provided for in this Agreement
- 10 Obtaining service contractors and training maintenance personnel assisting and consulting in the use of systems and equipment after the initial start up
- 11 Services for tenant or rental spaces not apart of this Agreement other than a Hotel room mock up
- 12 Serving or preparing to serve as an expert witness in connection with any proceeding legal or otherwise regarding the Project
- 13 FF&E procurements design and installation
- 14 Extensive coordination or documentation relative to the FF&E package or the Interior Design package

3.4 **QUALIFICATIONS** The Architect/Engineer warrants and represents that the Architect/Engineer and its consultants and subcontractors are duly qualified licensed registered and authorized by law to perform the Architect/Engineer's Services

3.5 **CONSULTANTS AND SUBCONTRACTORS** The Architect/Engineer shall not engage the services of any consultant or subcontractor without first obtaining the Design/Builder's written approval which approval shall not be unreasonably withheld. Such approval by the Design/Builder shall not be deemed to create any contractual relationship between the Design/Builder and any such consultant or subcontractor. The Architect/Engineer shall bind its consultants or subcontractors in the same

manner as the Architect/Engineer is bound to the Design/Builder under this Agreement

3.6 **ARCHITECT/ENGINEER'S REPRESENTATIVE**

The Architect/Engineer's representative is

3.7 **KEY PROJECT PERSONNEL** The Key Project personnel whom the Architect/Engineer will assign both internally and with its subconsultants are as follows. Such personnel shall not be changed without the approval of the Design/Builder which approval shall not be unreasonably withheld

S&W's Project Manager Dean Morr
TVS Project Manager Jack Plaxco

3.8 **ROYALTIES PATENTS AND COPYRIGHTS** The Architect/Engineer shall specify and identify all royalties and license fees which will be due on the inclusion of any patented or copyrighted materials methods or systems selected by the Architect/Engineer and incorporated in the Work. The Architect/Engineer shall defend indemnify and hold the Development Manager Owner and Design/Builder harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The Development Manager Owner and Design/Builder agree to defend indemnify and hold the Architect/Engineer harmless from any suits or claims of infringement of any patent rights or copyrights arising out of any patented or copyrighted materials methods or systems specified by the Development Manager Owner or Design/Builder.

3.9 **CONFIDENTIALITY** The Architect/Engineer shall treat as confidential and not disclose to third parties except as is necessary for the performance of the Services or use for its own benefit any of the Development Manager's Owners or Design/Builder's confidential Documents confidential information confidential know how discoveries production methods and the like that may be disclosed to the Architect/Engineer or which the Architect/Engineer may acquire in connection with the Services provided that Design/Builder has clearly designated and identified the information as confidential. The Architect/Engineer shall treat as confidential information all of the Design/Builder's estimating systems and historical and parameter cost data that may be disclosed to the Architect/Engineer in connection with the performance of this Agreement.

**ARTICLE 4
DESIGN/BUILDER'S RESPONSIBILITIES**

4.1 **INFORMATION AND SERVICES PROVIDED BY DESIGN/BUILDER**

4.1.1 To the extent the Design/Builder has obtained the information and services identified below from the Development Manager and/or the Owner the Design/Builder shall provide them to the Architect/Engineer. The Architect/Engineer shall be entitled to rely on such information and services to the same extent as the Design/Builder.

0535

Harpoottian 0784

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

- 1 All available information describing the physical characteristics of the site including surveys site evaluations legal descriptions existing conditions subsurface and environmental studies reports and investigations

- 2 Inspection and testing services during construction as required by law or as mutually agreed

4.1.2 The Design/Builder shall be responsible for the preparation of budgets cost estimates and schedules

4.1.3 The Design/Builder shall promptly report to the Architect/Engineer errors inconsistencies and omissions it discovers in the Construction Documents however nothing in this Paragraph shall relieve the Architect/Engineer of responsibility for its own errors inconsistencies and omissions

4.1.4 The Architect/Engineer shall have the right upon request to receive from the Design/Builder such information as the Design/Builder has obtained relative to the Owner's financial ability to pay for the Project

4.2 DESIGN/BUILDER'S REPRESENTATIVE The Design/Builder's representative is Mark Alles

**ARTICLE 5
SCHEDULE**

The Architect/Engineer shall provide the Services required by this Agreement at such reasonable times as will enable the Design/Builder to complete the Design/Builder's Work in accordance with the schedules established by the Design/Builder

5.1 DELAYS BY ARCHITECT/ENGINEER If the progress or completion of the Project is delayed by reason of any negligent error or omission of the Architect/Engineer the Architect/Engineer shall compensate the Design/Builder for and indemnify it against all costs expenses liabilities or damages which may accrue as a result of such delay In addition the Architect/Engineer shall provide Services at its own cost including overtime costs required to make up schedule delays as are necessary to make up for time lost by the Design/Builder because of such Architect/Engineer caused delay

5.2 DELAYS BY DESIGN/BUILDER OR OWNER If the Architect/Engineer is delayed in the performance of its Services by any fault neglect error or omission of the Design/Builder or by changes ordered by the Design/Builder which are due to causes beyond the Architect/Engineer's control then the time allotted in the schedule for the Architect/Engineer's Services shall be extended for the period of such delay or the Design/Builder shall authorize the Architect/Engineer to work overtime to make up such lost time The Architect/Engineer fee shall also be equitably adjusted for such delays however normal review and analysis including comments generated from such review by the Design/Builder Development Manager Owner or Operator shall not be considered a cause for delay under this Agreement

5.3 MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

- 5.3.1 Intentionally Omitted

**ARTICLE 6
ARCHITECT/ENGINEER'S COMPENSATION
AND PAYMENTS**

6.1 COMPENSATION FOR BASIC SERVICES

6.1.1 For Basic Services as described in Paragraph 3.2 the Design/Builder shall compensate the Architect/Engineer on the following basis as detailed herein

- 1 Stipulated Base Fee The Architect/Engineer's fee for the Basic Services is hereby established as a Lump Sum Amount within the GMP Proposal in the amount of \$2,053,000.00 ~~add site and FFE dollars~~ and shall remain unchanged to complete the Design and Construction Phase Basic Services regardless of the Project costs This lump sum amount excludes Additional Services including savings participation and any bond Substantial modifications to the Project's design and/or documentation after the GMP is established shall be subject to additional compensation to the Architect/Engineer

- 2 At Risk Work - The Architect/Engineer shall be required to work at risk to provide the Schematic GMP Design Documents in a speculative manner up to and including the point when the Schematic GMP Documents are completed As compensation for the risk described in this Clause 6.1.2 Design/Builder shall pay the Architect/Engineer the sum of \$150,000 as a Risk Fee within 15 days of bond closing The Risk Fee is part of the Design Compensation and is in addition to the Stipulated Base Fee amount in Article 6.1.1

- 3 Reimbursable Expenses taxes insurance including E&O coverage and all other expenses necessary to perform the Design and Construction Basic Services except as otherwise provided in this Agreement are included in the Stipulated Base Fee Costs for reproducing drawings for bid documents shall be reimbursed by the Design/Builder to the Architect/Engineer

- 4 Adjustment In no event whatsoever shall the Architect/Engineer's fee be adjusted unless the Design/Builder receives such an adjustment from the Owner or Development Manager except as otherwise provided to herein

- 5 The cost of services performed directly by the Architect/Engineer is part of the Design Phase Compensation and will be rolled into and become part of the Design/Builder's GMP From the effective date of this Agreement through the time when the project is financed and the Construction

0536

Agreement Between Design/Builder and Architect/Engineer for Design/Build Project

Fund is established the Architect/Engineer shall earn Design Phase Compensation in accordance with provisions of Article 6.3.1. The aforementioned compensation for the Architect/Engineer shall only be due and payable when the project is financed and the Construction Fund is established. If the project is not financed for any reason whatsoever then no compensation will be due or payable to the Architect/Engineer from the Design/Builder for any of the services provided pursuant to this Agreement except to the extent Design/Builder is paid pursuant to the Design/Build Agreement for design services.

6.2 ADDITIONAL SERVICES

6.2.1 The Architect/Engineer shall be compensated for Additional Services as described in Article 3.3 on an hourly rate basis in accordance with the following. Hourly rates include normal reimbursable expenses associated with the Work. It shall be a condition precedent that any such additional work shall be payable by the Owner to the Design/Builder prior to the Design/Builder making payment to the Architect/Engineer. Design/Builder shall act in good faith to pursue all such payments on behalf of the Architect/Engineer.

6.3 PAYMENTS

6.3.1 Subject to the provisions of Article 6.1.1.7, the Architect/Engineer shall submit to the Design/Builder for its approval monthly applications for payment for Basic Services on or about the 25th of the month. Payment shall be made within ten days (10) of the Design/Builder's receipt of payment from the Owner for the amount approved on the Architect/Engineer's application. It shall be a condition precedent that the Design/Builder receives payment from the Owner prior to making payment to the Architect/Engineer. Design/Builder shall act in good faith to pursue all such payments on behalf of the Architect/Engineer. Payments for Basic Services shall not exceed the following percentages of the total Fee at the completion of each Phase of the Architect/Engineer's Services:

Schematic Design GMP Documents	22.5 %
Design Development Documents	12.5 %
Final Construction Documents	40 %
Bid Negotiations	5 %
Construction Phase	20 %
TOTAL	100 %

Upon receipt of interim payments from the Design/Builder, the Architect/Engineer shall promptly make payment to its consultants and subcontractors as appropriate. Architect/Engineer will receive an initial payment after bond closing in the amount of \$1,525,000. After bond closing, Design/Builder will make payments on a monthly basis in accordance with Article 6.3.1.

6.3.2 **RETENTION** If a portion of the Architect/Engineer's compensation is to be retained, the terms of retainage shall be as follows:

Not applicable; no retainage shall be held on the Architect/Engineer.

6.3.3 Prior to final payment to the Architect/Engineer, the Architect/Engineer shall confirm in writing to the Design/Builder that the Architect/Engineer are aware of no claims, obligations, or liens outstanding in connection with the services provided by the Architect/Engineer. Acceptance of final payment shall constitute a waiver of all claims by the Architect/Engineer for compensation for the Architect/Engineer's Services performed.

6.3.4 Should there be any claim, obligation, or lien filed before or after final payment is made that arises from the negligent performance of the Architect/Engineer's Services or from failure to pay debts to third parties, the Architect/Engineer shall reimburse the Design/Builder for any costs and expenses, including attorney's fees, costs, and expenses incurred by the Design/Builder in satisfying, discharging, or defending against any such claim, obligation, or lien, including any action brought or judgment recovered, provided the Design/Builder is making payments or has made payments to the Architect/Engineer in accordance with the terms of this Agreement.

6.3.5 Should the Architect/Engineer or its consultants or subcontractors cause damage to the Project or fail to perform or otherwise be in default under the terms of this Agreement, the Design/Builder shall have the right to withhold from any payment due or to become due or otherwise be reimbursed for an amount sufficient to protect the Design/Builder from any loss that may result, including costs for liquidated damages, extended general conditions, and increased Subcontractor costs. Payment of the amount withheld shall be made when the grounds for the withholding have been removed.

**ARTICLE 7
INDEMNITY, INSURANCE AND
WAIVER OF SUBROGATION**

7.1 INDEMNITY

7.1.1 In addition to any liability or obligation of the Architect/Engineer to the Design/Builder that may exist under any other provision of this Agreement or by law or otherwise, to the fullest extent permitted by law, the Architect/Engineer shall defend, indemnify, and hold harmless the Design/Builder, Development Manager, and Owner and their respective officers, agents, employees, directors, representatives, consultants, and Subcontractors from and against claims, actions, proceedings, liabilities, losses, damages, costs, and expenses, including legal fees, that may arise from the negligent performance of the Architect/Engineer's Services.

7.2 INSURANCE

7.2.1 Before commencing its Services and as a condition of payment, the Architect/Engineer shall purchase and maintain such insurance as will protect it from the claims arising out of its services under this Agreement, whether such services are by the Architect/Engineer or any of its

Development Management Agreement

between

a South Carolina not-for-profit public benefit Corporation

and

EA Columbia Hilton, LLC

a South Carolina limited liability company

0538

GT 3655

DEVELOPMENT MANAGEMENT AGREEMENT

This DEVELOPMENT MANAGEMENT AGREEMENT (the Agreement) is entered into as of the ____ day of February, 2003, by and between _____ CORPORATION A South Carolina not-for-profit public benefit corporation (Corporation) and EA Columbia Hilton LLC a South Carolina Limited Liability Company ("Manager")

RECITALS

A Corporation is pursuing the acquisition of certain real property in the City of Columbia (the "City") more particularly described as the "Site" as shown on **Exhibit A** attached hereto and incorporated herein

B The Corporation desires to develop an upscale first class convention oriented hotel on the Site (the "Hotel") which is adjacent to the location of the Midlands Regional Convention Center which is in the process of being constructed

C The Corporation and Manager desire to enter into this Agreement in order to establish the terms and conditions upon and under which Manager shall as an independent contractor of the Corporation supervise, coordinate and act as the development manager with respect to the planning, development and construction of the Hotel on the Site (the Project) also more particularly set out herein

D In connection with the Project, the Corporation and Manager contemplate entering into a design-build agreement (Design-Build Agreement") with Turner Construction Company (Design/Builder) as to the construction and upfit of the Hotel

E In connection with the Project the Corporation contemplates entering into contracts with Hilton Corporation (Operator") under which Operator will provide services in design and equipping of the hotel marketing, opening and operation of the Hotel

F In connection with the Project the Corporation contemplates utilizing the services of Salomon Smith Barney, Inc (Underwriter") as the Underwriter to structure and issue tax exempt hotel revenue bonds (the Bonds) to cover the development and construction costs of the Project and other related costs

~~G In connection with the Hotel Corporation and Manager contemplate entering into a separate asset management agreement ("Asset Management Agreement") under which Manager will supervise operation of the Hotel by the Operator~~

EA is not Asset Manager

NOW THEREFORE for good and valuable consideration the receipt and sufficiency which are hereby acknowledged and agreed the parties hereto agree as follows

0539

6.1 Manager's Cooperation Relating to Construction Disbursement Requirements Manager shall supervise and approve when appropriate construction disbursements under the Design-Build Agreement in accordance with the terms and conditions thereof and of the Indenture

6.2 Final Payment of and Release of Holdbacks Retainage Manager shall assist Corporation in seeking Trustee approval of final payments and release of such holdbacks retainage as may be provided under the Design-Build Agreement when all conditions precedent to the final disbursement of such holdbacks have been satisfied in full compliance with the terms and conditions hereof of the Design-Build Agreement and under the Indenture and Applicable Law

7 DEVELOPER FEE

7.1 Payment of Developer Fee Corporation shall pay the Developer Fee to Manager for Manager's services in connection with the management of the development of the Hotel and all other services of Manager under this Agreement. ~~Except as provided in Article 9 below with respect to termination of this Agreement a~~ The Developer Fee shall be paid to Manager from the Construction Fund in the amount of four and three quarters percent (4.75%) of the total Project Budget exclusive of the costs of acquiring the Site and any financing related fees Guaranteed Maximum Price One Million Five Hundred Seventy-nine Thousand and NO/100 (\$1,579,000.00) Dollars

The Developer Fee due hereunder shall be paid to the Developer Manager from the Construction Fund as follows: (a) thirty-three and one-third percent (33 1/3%) at closing of the Bonds, and (b) fifty-six and two thirds percent (56 2/3%) on a pro rata basis over the construction period based upon the percentage of completion of the Hotel and, (c) the balance of ten percent (10%) at the issuance of a certificate of occupancy for the Hotel

~~In all cases The sum of Fifty Thousand Dollars (\$50,000.00)~~ Seventy-five Thousand and No/100 (\$75,000) Dollars of the final payment due hereunder shall be withheld as retainage until all "punch list" items are accepted by the Corporation

7.2 Services Included in Developer Fee Manager shall be solely responsible throughout the term of this Agreement and Corporation shall have no responsibility to pay for any and all administrative overhead and other costs incurred by Manager in performing its duties hereunder, and the Developer Fee shall be deemed to compensate Manager for all such costs including ~~without limitation~~ but not limited to

(a) **Compensation of Others** Costs of salaries or other compensation paid to personnel, employees, agents and independent contractors (including consultants and professionals) of Manager as well as overhead (i.e. rent utilities insurance taxes and payroll for employees of Manager)

0540

12.9 Notices Except as provided herein, any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given when personally delivered (including delivery by facsimile or by Federal Express or other reputable courier service) or upon the earlier of actual receipt or refusal of registered or certified mail, postage prepaid, return receipt required, and addressed as follows:

If to Corporation City of Columbia
Attn:
1737 Main Street
Columbia, South Carolina 29201

with copies to

If to Manager	John Lumpkin	or Ray Garfield
	EA Columbia Hilton LLC	EA Columbia Hilton LLC
	900 Bank of America Plaza	15150 Preston Road, Suite 220
	1901 Main Street	Dallas, Texas
	Columbia, SC 29201	FAX 972/991-5150
	FAX 803/254-4983	

with copies to

or such other address as either party may from time to time specify in writing to the other.

12.10 Binding Effect Subject to Section 12.2 above, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, heirs, administrators and assigns.

12.11 Amendments This Agreement may be amended or modified only by a written instrument executed by Corporation and Manager. Nothing herein shall preclude the Manager and the Corporation from entering into memorandum from time to time to clarify the interpretation or administration of this Agreement in order to facilitate and expedite the completion of the Hotel consistent with the terms of this Agreement; such memorandum shall not be amendments to this Agreement provided unless such memorandum specifically

December 17 2003

Mr Mark Alles
Turner Construction
3424 Peachtree Road NE
Suite 200
Atlanta GA 30326

RE Columbia Hilton Hotel
JN 03028 00

Sent Via Email

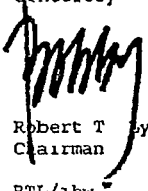
Dear Mark

The Columbia City Council voted today to advance Seven Hundred Five Thousand Dollars (\$705 000 00) to the design team for design services and expenses at cost covering the time period between July 10 2003 to December 15 2003 Since Stevens & Wilkinson and the design team s contract is with Turner Construction the City needs for Turner to (1) agree the City of Columbia will be reimbursed directly at bond closing for the advanced funds and (2) that it is permissible that the advanced funds be paid directly to Stevens & Wilkinson for distribution to the design team instead of through Turner to Stevens & Wilkinson to the design team

Mark I need you to send a letter to John Lumpkin stating that the above meets with Turner s approval as soon as possible so we can receive and distribute the money before the end of the year The City is requiring John Lumpkin to forward your letter and my invoice with back up to the City with an explanation as to how the City will be reimbursed I will send you a copy of my invoices and back up information tomorrow

Your prompt attention to this matter is greatly appreciated

Sincerely


Robert T Lyles AIA
Chairman

RTL/jhw

cc John Lumpkin Edens & Avant
Steve Gantt City of Columbia

0542

1-942

Turner

Turner Construction Company
3424 Peachtree Rd NE
Suite 200
Atlanta Georgia 30326
phone 404 504 3700
fax 404 504 3715

December 18 2003

Mr John Lumpkin
Edens & Avant
1901 Main Street
900 Bank of America Plaza
Columbia SC 29201

Re Columbia City Hilton Hotel

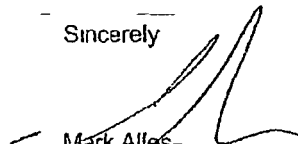
Dear John

We ve received a letter from Mr Bobby Lyles of Stevens & Wilkinson informing Turner Construction Company of the decision by the City to pay the A/E Team design costs incurred from July 10th to December 15th 2003 We approve the direct payment of \$705 000 to Stevens & Wilkinson with the following understanding

- 1 We would reimburse the City after the bonds close
- 2 We have received our initial payment amount from the bond sale which will include these funds
- 3 The amount of the GMP will not be affected
- 4 If for any reason the bonds fail to close we are not obligated to reimburse the City
- 5 Stevens & Wilkinson provide the appropriate back up to meet the City requirements
- 6 We are not obligated to reimburse the City for any costs associated with the use of these funds

If you have any questions concerning the above feel free to contact me on my mobile

Sincerely



Mark Alles
Project Executive
Turner Construction

CC P Little - TCCo
D Butler - TCCo
S Oakes - TCCo
File

A Cen u j E c ellen e

0543

1 - 940



December 18, 2003

Mr. Steve Gantt
City of Columbia
Post Office Box 147
Columbia, South Carolina 29217

Re Columbia Hilton Hotel

Dear Steve

It is our understanding that the City of Columbia has agreed to advance up to Seven-Hundred Five Thousand Dollars (\$705,000.00) to the Columbia Hilton Hotel Design Team for services and expenses incurred by same from the time period between July 10, 2003 to December 15, 2003.

In this connection, we enclose a letter from the Design Builder (Turner Construction) enclosing the subject invoice and supporting documentation acknowledging that (i) the City of Columbia may advance these funds directly to Stevens & Wilkinson for distribution to members of the Design Team, (ii) such funds will be credited against the 'Design Fee' line item contained in the September 9, 2003 Schematic GMP (i.e. the GMP will not increase) and (iii) the City of Columbia will be reimbursed such amount at the closing of the bonds associated with construction of the Columbia Hilton Hotel.

In the event the bonds fail to close however, there would be no obligation from the Design Team, the Design Builder or any of the other members of the Development Team to reimburse the City of Columbia for such amounts.

Sincerely,

A handwritten signature in dark ink, appearing to read 'John H. Bumpkin, Jr.'.

John H. Bumpkin, Jr.
On behalf of the Hotel Development Team

JHL/ehm

Enclosures

BROKERAGE DEVELOPMENT OFFICE INDUSTRIAL HEALTHCARE

900 Bank of America Plaza 1901 Main Street Columbia SC 29201 803 779 4421 FAX 803 779 5111

0544

1-941



JOE E TAYLOR JR
Chairman

ELLIOTT E FRANKS III
President & CEO

February 25, 2004

Mr. Steve Gantt
Assistant City Manager
City of Columbia
1737 Main Street
Columbia, South Carolina 29201

Sent Via Facsimile (803-255-8922)

Re: Columbia Hotel and Convention Center Project

Dear Steve:

We understand that the City Council approved certain aspects of the Hotel and Convention Center Project at its meeting on February 11, 2004. Prior to the issuance of the bonds to finance the construction of the Project, however, both JEDA (through the adoption of a bond resolution) and the Budget and Control Board (through the adoption of a resolution approving the bond issue) will need to approve the final terms of the requested bond financing for the Project.

The JEDA Board's approval of its February 5, 2004 Resolution was conditioned upon further financial review and receipt of complete financial information on the Project. Accordingly, prior to JEDA's approval of this bond financing and adoption of a bond resolution, JEDA's Loan Committee first must meet to examine the financial aspects of the proposed bond financing. The Loan Committee will determine whether this project will be considered by the full JEDA Board. In order to facilitate your request that the Project go forward to the April meeting of the Budget and Control Board, we have scheduled a Loan Committee meeting for March 25, 2004.

For purposes of its deliberations, the Loan Committee will need all of the relevant information at its disposal. Therefore, we respectfully request that the City undertake the following steps in advance of the Loan Committee's March 25 meeting:

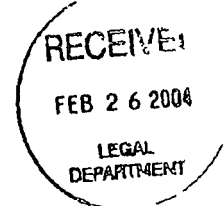
1. On February 12, 2004, JEDA requested a package of financial information from the underwriter of the proposed bonds for the Project. Please ensure we receive the package no later than March 15, 2004.
2. As required under JEDA's regulations, hold a public hearing and adopt a resolution in support of the Project. Please accomplish both of these steps prior to the Loan Committee meeting.

With the cooperation of the City and the City Council in the matters above, we will be able to avoid delays. I would appreciate your advising me of the date(s) of the meeting(s) for the public hearing and resolution.

We look forward to continued cooperation with the City in connection with this Project.

Sincerely,

Elliott E. Franks III



1447 Main Street | Suite 806 | Columbia, South Carolina 29201 | 803-461-3800 | www.sceda.net

0545

2-401

FAX TRANSMITTAL COVER SHEET

TO Bill Corrado (212) 723-8581

FROM John Lumpkin

DATE February 26 2004

PAGES (including cover sheet) 5

Message

Bill

We met yesterday at the City (attending were the Mayor Steve Gantt Shawn Epps, Bill Musser and Dan McLeod (Bond Counsel) and Joel Gottlieb) Discussion focused on the prospect of having either the Not-For-Profit Corporation or the City itself issue Hotel Bonds in lieu of having to continue to proceed through JEDA (and subsequently the State Budget and Control Board) Subject to the numbers being reasonable, the decision was made to pursue one of these other alternates As far as the Non-Profit is concerned Bond Counsel advised that bond monies which were not part of the construction and upfit of the Hotel (hard and soft) would need to be issued via a taxable bond They indicated that this would include approximately 3.2 million (which was the capitalized interest after construction is completed) as well as working capital (and possibly other costs) In this latter regard they asked that I provide to them a breakdown of the operating supplies and equipment piece I am faxing to you the cost breakdown which Hilton had provided earlier to us as to their estimates of the OS&E In addition I am also faxing another copy of the Design Development Combined GMP breakdown You will also note another category entitled Opening Costs I am not sure in which category these "Opening Costs" would fall

The other alternative is to have the City directly issue Certificates of Participation The Bond lawyers have concern that Hilton would have a problem with this approach because it impacts matters like indemnification etc I was frankly not sure what they meant I would like you/Van Duys to review these matters before we get back to the Bond Counsel

It is important moreover to the Mayor that we have this sorted out as best we can so that he can present a solution and recommendation to the Not-For-Profit Board next Wednesday

In all of this the City is no less committed to proceed forward (assuming we can work out the details of having another issuer of the Bonds) The City, in fact is willing to pull the trigger to fund demolition and earthwork prior to Bond Closing (which would save about 6 weeks in the schedule) once we "solve" the matter of the issuer

I look forward to hearing from you

p s Until we sort this out we are having no conversations with JEDA (or its representatives)

0546

JL013955

Ambac Assurance Corporation
One State Street Plaza
New York, NY 10004
212 668 0340

A member of the Ambac Financial Group Inc.

February 17 2004

Bill Musser Esq
McNair Law Firm, P A
1301 Gervais Street
Columbia SC 29201

RE \$63 295 000 City of Columbia South Carolina Senior Bonds (Columbia Hilton)

Ambac

Dear Mr Musser

Enclosed please find the original and one certified copy of the Commitment for Financial Guaranty Insurance Commitment No 26216 (the Commitment) relating to the above captioned obligations (the Obligations). The original of this Commitment should be delivered to or held on behalf of the Obligor of the Obligations and if not exercised should be discarded.

Our Standard Package, which contains the bond legend to appear on the Obligations and Ambac Assurance Corporation's (Ambac) disclosure language to be inserted in the Official Statement, is enclosed with your commitment.

A camera ready specimen of Ambac's Financial Guaranty Insurance Policy (the 'Policy') with any applicable endorsement, and our logo are also attached, with our wire instructions.

Upon the sale and final pricing of the issue sold with Ambac, proceed as follows:

- 1 Please fax your final debt service schedule and a distribution list to our closing department fax number 212 208 3136. Please note that even if a premium has been determined, we still need a final debt service schedule.
- 2 You will be assigned a closing coordinator and a policy number as soon as you have a firm closing date. Please call Danielle Packer at 212 208-3331 with that information and she will assign your transaction to a closing coordinator.
- 3 The Ambac disclosure language in your Preliminary Official Statement and Final Official Statement must be approved by your closing coordinator.
- 4 Please send or fax to your closing coordinator as soon as possible (1) the cover and maturity page the table of contents the Security section the Rating section the Ambac language and the specimen Policy as they appear in your Final Official Statement to ensure their accuracy and (2) the Statement of Insurance as it appears on the form of the bond for our approval.

THREE COPIES of the final OFFICIAL STATEMENT must be sent to your CLOSING COORDINATOR as soon as available for the timely preparation of Ambac's Policy and its prompt submission to the rating agencies

Subject to change with Ambac's approval

0547

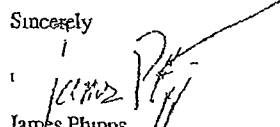
SAG05590

Ambac

- 5 An opinion of Ambac's counsel regarding (a) the validity and enforceability of the Policy and (b) the fairness and accuracy of the language included in the Official Statement describing Ambac and the Policy will be delivered at closing. The delivery of such opinion is dependent upon the prior review of such official statement by our legal department. A Certificate of Bond Insurer will also be delivered. The forms of these documents are included in the Standard Package
- 6 Please refer to this Commitment for conditions which must be satisfied prior to Ambac's release of its Policy. Drafts of all financing documents should be sent to Ambac's Credit Underwriter if you need approval. Final form of documents requested by your closing coordinator should be sent to his/her attention prior to the day of closing.
- 7 In addition as noted in the Commitment, the rating agencies assess separate fees in connection with the issuance of the rating letters. All questions regarding the payment of such fees must be addressed to the applicable agency.
- 8 On the morning of closing bond counsel should call the closing coordinator with a wire reference number for the Ambac premium. Upon receipt of the wire number the closing coordinator will release the Ambac Policy.
- 9 Lastly **TWO** final transcripts, either on CD ROM or printed material as applicable must be sent to the attention of Ambac's CORPORATE RECORDS department as soon as possible after closing.

If you have any questions please do not hesitate to contact your closing coordinator

Sincerely,


James Phipps
Internal Support

Anne Rabin, Ambac's Credit Underwriter

Enclosures

cc Steve Gantt City of Columbia 1737 Main Street Columbia SC 29201	Steve Camp Columbia Metropolitan Convention Center 900 Assembly St Columbia SC 29202
Brenton Robertson Merchant Capital L.L.C. One Buckhead Plaza Suite 950 3060 Peachtree Road NW Atlanta, GA 30305	William M. Corrado Citigroup Global Markets 390 Greenwich Street 2 nd Floor New York NY 10013

0548

SAG05591

Ambac Assurance Corporation
One State Street Plaza
New York NY 10004
212 668 0340

A member of Ambac Financial Group Inc

COMMITMENT FOR FINANCIAL GUARANTY INSURANCE

Obligor **CITY OF COLUMBIA, SOUTH CAROLINA**

Commitment Number 26216

Commitment Date February 17 2004

Expiration Date May 17 2004

Obligations \$63 295 000 Senior Bonds (Columbia Hilton) maturing on September 1 in the years 2008 through 2035 both inclusive

Insurance premium. 2.90% of the total principal and interest due on the Obligations (Fitch, Inc, Moody's Investors Service and Standard & Poor's Credit Markets Services assess separate rating fees which are payable directly to them. Each rating agency will bill separately and all questions regarding the payment of such fees must be addressed to the applicable agency.)

Ambac Assurance Corporation (Ambac[®]), a Wisconsin Stock Insurance Corporation,

hereby commits to issue a Financial Guaranty Insurance Policy (the "Policy") relating to the above-described debt obligations (the Obligations) substantially in the form imprinted in this Commitment subject to the terms and conditions contained herein or added hereto (see conditions set forth herein)

To keep this Commitment in effect after the expiration date set forth above a request for renewal must be submitted to Ambac prior to such expiration date. Ambac reserves the right to refuse wholly or in part to grant a renewal.

-The Financial Guaranty Insurance Policy shall be issued if the following conditions are satisfied

- 1 The documents to be executed and delivered in connection with the issuance and sale of the Obligations shall not contain any untrue or misleading statement of a material fact and shall not fail to state a material fact necessary in order to make the information contained therein not misleading
- 2 No event shall occur which would permit any purchaser of the Obligations otherwise required, not to be required to purchase the Obligations on the date scheduled for the issuance and delivery thereof
- 3 There shall be no material change in or affecting the Obligations (including without limitation the security for the Obligations or the proposed debt service structure for the Obligations) or the financing documents or the official statement (or any similar disclosure document) to be executed and delivered in connection with the issuance and sale of the Obligations from the descriptions or schedules thereof heretofore provided to Ambac
- 4 The Obligations shall contain no reference to Ambac the Policy or the financial guaranty insurance evidenced thereby except as may be approved by Ambac

* Subject to change, with Ambac's approval

0549

SAG05592

5 Ambac shall be provided with

(a) Executed copies of all financing documents the official statement (or any similar disclosure document) and the various legal opinions delivered in connection with the issuance and sale of the Obligations including without limitation the unqualified approving opinion of bond counsel rendered by a law firm acceptable to Ambac. The form of Bond Counsel's approving opinion shall also indicate, if applicable, that the Obligations are exempt from federal income taxation, that the Obligor must comply with certain covenants under and pursuant to the new tax law and that the Obligor has the legal power to comply with such covenants. Such opinion of bond counsel shall be addressed to Ambac or in lieu thereof a letter shall be provided to Ambac to the effect that Ambac may rely on such opinion as if it were addressed to Ambac.

(b) Evidence of a wire transfer in an amount equal to the insurance premium at the time of the issuance and delivery of the Obligations.

6 Unless expressly waived in whole or in part by Ambac, the financing documents and the Official Statement shall contain (a) the terms and provisions provided in Ambac's STANDARD PACKAGE transmitted herewith and (b) any additional oral or written provisions or comments submitted by Ambac.

7 Ambac shall receive a copy of any insurance policy, surety bond, guaranty or indemnification or any other policy, contract or agreement which provides for payment of all or any portion of the debt, the costs of reconstruction, the loss of business income or in any way secures, ensures or enhances the income stream anticipated to pay the Obligations.

8 Any provisions or requirements of the Purchase Contract or Bond Purchase Agreement referencing Ambac must be sent to the attention of Danielle Packer not less than five (5) business days prior to closing. If such provisions or requirements are not received within that time, compliance may not be possible.

Special Conditions

9 Investment grade rating from S&P, but we will require that monies be set so that Ambac can apply for a Moody's rating.

10 All project documents must be satisfactory to Ambac and its outside counsel. Ambac will require the City to pay for outside legal review of documents. Estimated cost is \$90,000-120,000 dollars.

11 All insurance provisions must be satisfactory to Ambac. Ambac will require an insurance consultant to review insurance provisions. Estimated cost is \$15,000-20,000 dollars.

12 Satisfactory review of all environmental reports related to the project.

13 No additional debt allowed under the Indenture.

14 Construction Monitor subject to Ambac consent based upon a mutually agreed upon list of candidates.

15 Ambac's consent to replace Operator.

16 The City's obligation to appropriate monies for debt service is limited to 50% for the initial 10 year operating period and 70% per annum until the debt is fully repaid. The City's obligation to support the annual debt service will always relate to the original amount of Obligations issued, except for redemptions made with monies from outside the transaction.

17 There will be no conditions in the ground lease or Deed of Trust to selling the property or use of the facilities in foreclosure.

18 Ambac can require a Hotel Consultant to be retained if debt service coverage on the Obligations is less than 1.2x, but 1.1x for the initial two years of hotel operations.

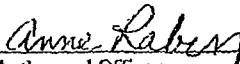
19 Ambac's consent to Hotel Consultant based upon a mutually agreed upon list of candidates.

20 The City will not be able to receive monies from the Project prior to 2008.

0550

SAG05593

- 21 The City will receive 50% of any excess cash flow provided coverage from Hotel net operating income is at least 1.2x.
- 22 City agrees not to sponsor or support any additional hotel with other than traditional development tools in a defined competitive area without Ambac consent.
- 23 The Convention Center Authority will covenant not to enter into a room block agreement with any other hotel and not to designate any other hotel as affiliated with the convention center



Authorized Officer

0551

SAG05594

Request for Proposals



Convention Center Hotel

0552

1-501

**CITY OF COLUMBIA, SOUTH CAROLINA
REQUEST FOR PROPOSALS
CONVENTION CENTER HOTEL**

I OVERVIEW The City of Columbia, South Carolina (City) is issuing this request for proposals ("RFP") for the development and operation of a full service convention center hotel to support the Columbia Metropolitan Convention Center (Convention Center) The Convention Center is currently under construction and is scheduled to be completed in September 2004 The completion of this facility will represent a substantial investment and the culmination of unprecedented cooperation between many organizations in the area An important factor in the success of convention centers nationwide is the affiliation of the convention center with a hotel For this reason, the City is seeking proposals for the construction ownership and operation of a convention center hotel (Hotel)

II GENERAL INFORMATION AND INSTRUCTIONS

A PROCUREMENT PROCESS The RFP is not a bid In the event the City elects to negotiate a contract with the successful proposer such contract shall contain terms and conditions consistent herewith The City reserves the right, in its sole discretion to reject all submissions reissue a subsequent RFP terminate restructure or amend this procurement process at any time The final selection and contract negotiation rests solely with the City The City shall establish a special committee (Committee') for the purpose of reviewing the proposals and making appropriate recommendations to City Council Where the context permits the term City shall include the Committee and City Council

B QUESTIONS Questions are allowed and encouraged to clarify this RFP All questions or requests for information shall be in writing and addressed to City of Columbia, Attn Steven A Gantt PO Box 147 Columbia, SC 29217 Such written questions may also be transmitted by facsimile to (803) 255 8922 or e-mail to sagantt@columbiasc.net Upon request the City shall provide a copy of its market study prepared by PKF Consulting

Proposers shall not lobby or otherwise contact members of City Council or the Committee with respect to this RFP Such contact shall constitute grounds for rejection of a proposal

C PRE-RESPONSE MEETING A pre-response meeting will be held on Monday April 19, 2004, at 2 00 p m at the City Council Chambers City Hall 1737 Main Street, Columbia, SC Proposers are not required to attend but are encouraged to do so

D REJECTION OF PROPOSALS The City may reject any proposals which do not conform to the essential requirements of the RFP

E CONFIDENTIALITY All information materials or other documents submitted by a proposer shall not be released or made otherwise available to any person or entity except the City's representatives assisting in this procurement process until public opening of the proposals unless required by law or judicial process. Proprietary or financial information submitted to the City by a proposer will not be disclosed if proposer visibly marks each part of the proposal which proposer considers to be confidential financial or proprietary information with the word 'Confidential' unless required by law or judicial process.

F EVALUATION CRITERIA The following shall be used in evaluating proposals and the proposals should include information necessary for such evaluation:

1. **Past Performance** The proposer's satisfactory past experience in developing and operating hotels.

2. **Proposed Investment/Financial Ability** The total capital investment proposed to be made in the Hotel and the financial ability of the proposer.

3. **Performance of Requested Services** Demonstration that proposer currently has the capability, qualifications, and experience to develop and operate the Hotel.

4. **Exceeding Minimum** - Greater consideration will be given to proposals exceeding the Minimum Hotel Specifications.

5. **Maximization of City Incentives** The City has outlined the incentives it is willing to grant for this project below and greater consideration will be given to proposals exceeding Minimum Hotel Specifications and/or requiring less City incentives.

G PROPOSALS FORMAT

1. All proposals must be clearly marked "Proposal for Development and Operation of Columbia Convention Center Hotel".

2. Proposals must be signed by an authorized person and submitted in sealed envelopes and shall include at least ten (10) copies.

3. Proposals must be submitted by hand delivery (including delivery by recognized courier) to Steven A. Gantt, City of Columbia, City Hall, 1737 Main Street, Columbia, SC 29201 or mailed to City of Columbia, Attn: Steven A. Gantt, PO Box 147, Columbia, SC 29217.

4. Proposals must be received on or before May 4, 2004.

H INTERVIEWS/ CONTRACT NEGOTIATIONS The City will evaluate

the proposals and may in its discretion elect to interview meet with and/or require public presentations from one or more of the proposers before making final selection. Once final selection is made a contract will be negotiated with the selected proposer which may include a security deposit requirement. The City intends to make a final selection prior to July 1 2004.

III TERMS AND CONDITIONS The physical characteristics of the Hotel enumerated herein are minimum requirements. The goal of the City is to obtain the largest number of guest accommodations at the highest possible quality as a result of this RFP. Proposers are therefore encouraged to enhance their submissions with respect to all elements of the Hotel including but not limited to numbers of guests rooms size of meeting areas restaurant lounge/bar kitchen facilities and other guest amenities. Preference will be given to size of facility quality of finishes design features including expansion capability and guest services to be provided.

A MINIMUM HOTEL SPECIFICATIONS

- 1 200 guest rooms of not less than 300 square feet / room
- 2 5 000 square feet of meeting space
- 3 Kitchen facility capable of providing service to a restaurant lounge/bar room service catering to meeting space
- 4 Restaurant facilities of not less than 100 seats offering three meals per day seven days per week
- 5 Lounge/bar facility with not less than 50 seats. A lobby bar may be substituted in lieu of dedicated lounge bar
- 6 Swimming pool of sufficient size to provide a pleasing recreational experience for guests
- 7 Fitness room or facility appropriately equipped
- 8 Business center equipped with appropriate modern business equipment and technology
- 9 The building exterior shall be constructed with long lasting aesthetically pleasing materials (e.g., masonry brick precast). Interiors finishes shall be of first class quality
- 10 Mechanical systems shall be designed to maximize efficiency guest comfort, and aesthetics

11 The Hotel must be branded or flagged by a nationally known hotel operator with a nationwide reservation system. Significant weight and preference will be afforded to proposals which offer a First-Class nationally known hotelier it being the intent of the City to attract visitors and groups from across the United States

B ROOM BLOCK AGREEMENT

1 The primary mission of the Hotel will be to provide support for the convention activities of the Convention Center. Consequently the proposers must be willing to enter into a satisfactory long term room block agreement that would generally require committing at least 200 rooms and appropriate hotel meeting space for qualified (city wide) events held at the Convention Center up to 14 nights per month for events that book the Convention Center three years or more in advance. The requirements of the room block agreement would decrease as the booking horizon shortens

2 All reasonable efforts shall be made to allow the Hotel to charge the prevailing room rates to a qualified event. However if a room rate cannot be successfully negotiated between the Hotel and the qualified event the City may at its sole discretion require the Hotel to charge a predetermined rate that would be mutually agreed upon between the City and the Hotel as part of the room block agreement

3 The details of the room block agreement are subject to negotiation between the City and the Hotel and are an integral part of the City offering the incentives outlined below

C HOTEL SITE(S) The Hotel shall be constructed on one of two City owned parcels generally shown or described on the attached Exhibits "A" and "B" respectively. The parcel described on Exhibit "A" is bounded on the north by Senate Street and is called 'Parcel A' and the parcel described on Exhibit "B" is bounded on the south by Senate Street and is called 'Parcel B'. The City intends to construct a public parking garage either along Pendleton Street on property currently owned by the City and on property not yet acquired by the City or on property currently owned by the City which includes Parcel A. If the garage is constructed on Pendleton Street Parcel A will be the preferred Hotel site. If the garage is constructed on land which includes Parcel A then Parcel B will be the Hotel site

D CITY INCENTIVES

1 **GROUND LEASE** The City will ground lease the site for a 50 year term for a rental of One Dollar (\$1.00) per year paid in advance. The ground lease shall not be subordinated to liens

2 **PARKING** The City will provide one parking space per sleeping room in a City parking facility to be constructed nearby to the Hotel site and managed and maintained by the City. These parking spaces will be made available to the Hotel at 50% of the

prevailing market rates (the current daily market rate is \$10.00). The City anticipates entering into a joint use parking agreement related to the parking facility that will allow the City to rent as many spaces as possible to daily visitors. As such, the City envisions working with the Hotel to determine the reasonable number of spaces that will be required for the Hotel on a daily basis and the Hotel will be charged only for the spaces it utilizes. In this way, the Hotel can minimize its parking costs and the City can maximize its parking revenues.

3. The City reserves the right but not the obligation to consider additional incentives to induce a higher quality product. If additional incentives are required, please specify and explain.

E. NON DISCRIMINATION Proposer will take affirmative action in complying with all federal, state, and local requirements concerning fair employment and employment of the handicapped and concerning the treatment of all employees without regard or discrimination by reason of race, color, religion, sex, national origin, or physical handicap. Any contract extended subsequent to this RFP shall require proposers to comply with the City's Commercial Non-Discrimination Policy and Sub-Contractor Outreach Program.

Exhibit "A"



Description of Site

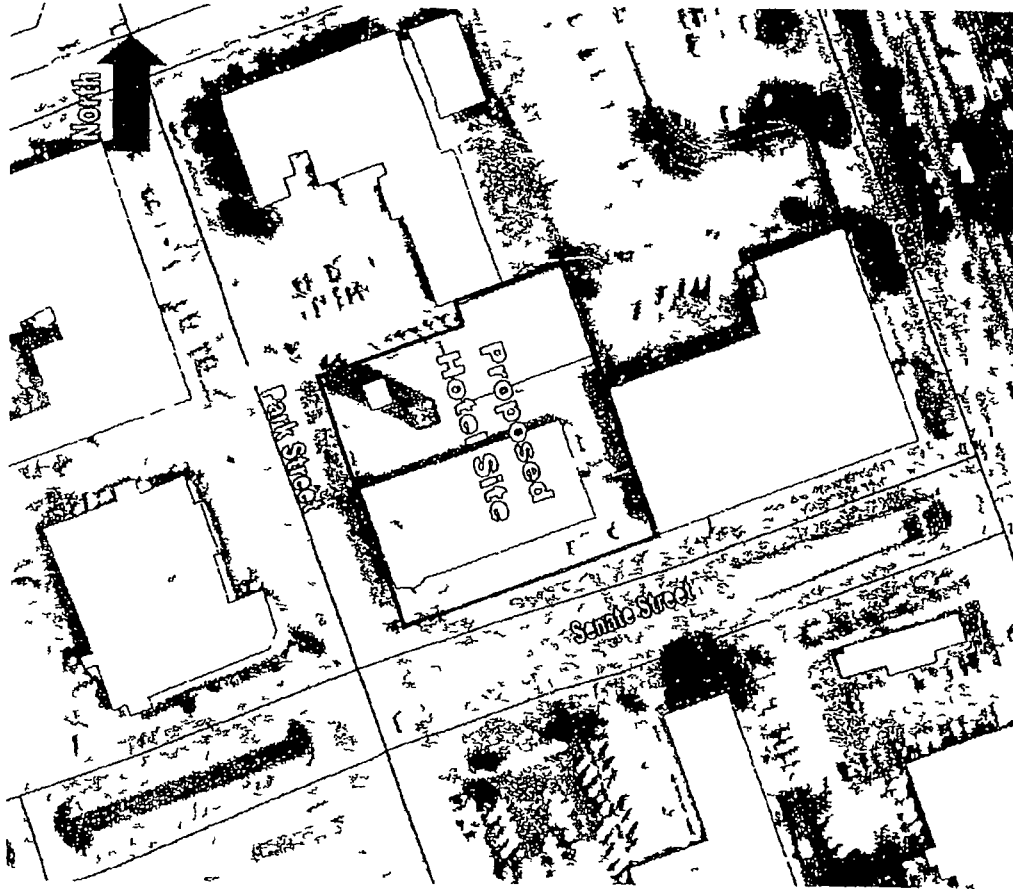
The proposed Hotel site is located at the southwest corner of Senate and Park Streets. The approximate boundaries of the property are as follows: northern boundary (Senate Street) - 207 feet, eastern boundary (Park Street) - 243 feet, western boundary - 243 feet, southern boundary - 210 feet.

0558

227

1-507

Exhibit "B"



Description of Site

The proposed Hotel site is located at the northeast corner of Senate and Park Streets. The approximate boundaries of the property are as follows: southern boundary (Senate Street) - 206 feet; western boundary (Park Street) - 186 feet; northern boundary (irregular line) - 206 feet; eastern boundary - 208 feet.

0559

228

1-508

ADDENDUM #1

April 13, 2004

CITY OF COLUMBIA, SOUTH CAROLINA REQUEST FOR PROPOSALS CONVENTION CENTER HOTEL

- 1 Delete the 'Room Block Agreement' section of the RFP (Subsection B of Section III) submitted on or about April 2 2004
- 2 Insert the following Room Block Agreement section (Subsection 'B' of Section III) into the RFP

B ROOM BLOCK AGREEMENT

1 The primary mission of the Hotel will be to provide support for the convention activities of the Convention Center. Consequently the proposers must be willing to enter into a satisfactory long term room block agreement that would generally require committing at least 200 rooms and appropriate hotel meeting space for qualified (city wide) events held at the Convention Center up to 14 nights per month for events that book the Convention Center one year or more in advance. The requirements of the room block agreement would be eliminated within the one year period.

2 All reasonable efforts shall be made to allow the Hotel to charge the prevailing room rates to a qualified event. However, if a room rate cannot be successfully negotiated between the Hotel and the qualified event, the City may, at its sole discretion, require the Hotel to charge a predetermined rate that would be mutually agreed upon between the City and the Hotel as part of the room block agreement.

3 The details of the room block agreement are subject to negotiation between the City and the Hotel and are an integral part of the City offering the incentives outlined below.

0560

229

1-509

ADDENDUM #2

April 15, 2004

**CITY OF COLUMBIA, SOUTH CAROLINA
REQUEST FOR PROPOSALS
CONVENTION CENTER HOTEL**

Due to the number of people on the selection committee for the convention center hotel
please submit 15 copies of your proposal instead of 10

0561

1-510

230

From Joel Gottlieb [joel@gottliebsmith.com]
Sent Wednesday, November 12, 2003 12:00 PM
To Wu, Kathleen
Cc saganth@columbiasc.net; fgd@nmrs.com; Johnl@edensandavant.com; rosaleh@edensandavant.com; greg_dickens@hilton.com; makoto_yamasaki@hilton.com; jerry_mccleendon@strategicadvisorygroup.net; jeffsachs@strategicadvisorygroup.net; jvanduys@hsblawfirm.com; Corrado, William M [CMB MSDB]; wmusser@MCNAIR.NET; jsmeggs@columbiasc.net; hrstanley@sc.rr.com; MSeezen@MCNAIR.NET
Subject RE: Columbia Hilton Hotel Operating Agreement

Thank you. The negotiation of the design-build docs on behalf of the City has not been completed and it has never been the City's understanding that there would be such a gap.

Joel E. Gottlieb, Esquire
Gottlieb & Smith, P.A.
PO Box 51
Columbia, SC 29202
1901 Main Street, Suite 600
Columbia, SC 29201

Direct Dial: 803-239-4800
Direct Fax: 803-239-4801
Phone: 803-765-9291
Fax: 803-254-2682

- Original Message -

From Smith, Lori [mailto:LoriSmith@andrewskurth.com] On Behalf Of Wu, Kathleen
Sent Wednesday, November 12, 2003 11:44 AM
To joel@gottliebsmith.com
Cc saganth@columbiasc.net; fgd@nmrs.com; Johnl@edensandavant.com; rosaleh@edensandavant.com; greg_dickens@hilton.com; makoto_yamasaki@hilton.com; jerry_mccleendon@strategicadvisorygroup.net; jeffsachs@strategicadvisorygroup.net; jvanduys@hsblawfirm.com; william.m.corrado@citigroup.com; wmusser@mcnair.net; jsmeggs@columbiasc.net; hrstanley@sc.rr.com; MSeezen@MCNAIR.NET
Subject RE: Columbia Hilton Hotel Operating Agreement

The distinction is that the owner entity is delivering Hilton a turn-key project but the design-builder is not. Under the Design/Build Agreement, the design-builder is not obligated to deliver the Hotel in turn-key condition meeting the Hilton Requirements and other standards required for Hilton to operate the Hotel under the Hilton flag. This leaves a significant gap both in terms of funding and recovery in the event of a failure to deliver a turn-key project to Hilton, which I have tried to fill based on the changed language in the HOA. In addition, where traditionally direct obligations would exist between Hilton and the

0562

Confidential

SB City of Columbia 01550

CG_01550

APPENDIX_0571

design/builder in this case those direct contractual obligations are between Hilton and the owner entity I assume I have seen all the development documents and this gap hasn't been otherwise addressed but please advise if that's not the case I hope this clarifies the concern Kathleen

- Original Message -

From Joel Gottlieb [mailto:joel@gottliebsmith.com]
Sent Wednesday November 12 2003 9:30 AM
To Wu Kathleen sagantt@columbiasc.net fgd@nmrs.com
Johnl@edensandavant.com rosalieh@edensandavant.com
greg_dickens@hilton.com makoto_yamasaki@hilton.com
jerry.mcclendon@strategicadvisorygroup.net
jeffsachs@strategicadvisorygroup.net jvanduys@hsblawfirm.com
william.m.corrado@citigroup.com wmusser@mcnair.net
jsmeggs@columbiasc.net hrstanley@sc.rr.com MSeezen@MCNAIR.NET
Subject RE: Columbia Hilton Hotel Operating Agreement

Kathleen Thanks for the memo and revisions I am confused by business item 3 in your memo The City contemplates a turnkey project Could you elaborate

Joel E Gottlieb Esquire
Gottlieb & Smith P A
PO Box 51
Columbia SC 29202
1901 Main Street Suite 600
Columbia, SC 29201

Direct Dial 803 239 4800
Direct Fax 803-239 4801
Phone 803-765 9291
Fax 803-254 2682

- Original Message -

From Wu Kathleen [mailto:KathleenWu@andrewskurth.com]
Sent Tuesday, November 11 2003 5:07 PM
To sagantt@columbiasc.net fgd@nmrs.com Johnl@edensandavant.com
rosalieh@edensandavant.com greg_dickens@hilton.com
makoto_yamasaki@hilton.com jerry.mcclendon@strategicadvisorygroup.net
jeffsachs@strategicadvisorygroup.net jvanduys@hsblawfirm.com
william.m.corrado@citigroup.com wmusser@mcnair.net
jsmeggs@columbiasc.net hrstanley@sc.rr.com joel@gottliebsmith.com
MSeezen@MCNAIR.NET
Subject Columbia Hilton Hotel Operating Agreement

> Attached please find a redline of the revised Hotel Operating Agreement for the Columbia Hilton Hotel (the 'HOA') The redline

0563

Confidential

SB City of Columbia 01551

CG_01551

APPENDIX_0572

reflects those changes from the prior version circulated on 9/23/03 which incorporates the acceptable comments received separately from each of Messrs. Daniels, McNair and McClendon, the last of which we received on Friday and those precipitated by the conference call with the working group on October 7, 2003.

>

> In connection with the attached redline I would note that certain of the comments we received from the various parties were inconsistent and I made every effort to reconcile such inconsistencies. However, there may be instances where no change was made because it was unclear what the city really wanted. Additionally, there were still some global statement type comments as opposed to specific language revisions. Where it was clear what language needed to be changed, I incorporated the change. Where it was either unclear or I did not think that the comment warranted revision, no revision was made.

>

> Furthermore, with respect to the insurance provisions and the indemnification provision, I would respectfully request that the Loan Agreement and the Indenture be conformed to the existing HOA text as I believe this will be the most expeditious approach, particularly since this is the language of which Hilton's risk management has approved. Of course, as to flow of funds or any other loan/indenture issues, once the Loan Agreement, Indenture and Cash Management Agreement are finalized, we will need to ensure all of the provisions of the HOA are consistent therewith.

>

> Based on the comments received and the attached redline, it appears that there are only a handful of principal business points that remain open. I think they are as follows:

>

> 1. Source of recovery to Manager (i.e., \$1M termination fee, city appropriations issues, city enhancement, which funds are available, etc.)

>

> 2. Parking. The attached draft incorporates my understanding of how parking is to be addressed, but I understand that this remains an open issue. Further, I would note that while it was proposed that all references to the Garage be deleted, I have evaluated each reference and have left in those references that are necessary, irrespective of whether the Garage is separately financed and/or managed pursuant to a separate document.

>

> 3. Project Delivery Obligations/Construction Obligations. The attached redline reflects a number of changes that were precipitated by the development documents and the allocation of responsibility set forth therein. I believe my concerns in this regard have been shared on several occasions with the working group. Specifically, traditionally the design/builder would provide the owner and Hilton a finished project in compliance with all of Hilton's requirements and the design/builder enters into a specific contract with Hilton confirming these obligations and assuming the relevant risks if it fails to do so. The HOA was

initially drafted in line with that standard allocation. However, in this instance, we understand that owner and design/builder have agreed that owner will accept from design/builder a project that will then require additional work, which work will be funded by owner, before the project will be Substantially Complete according to Hilton's requirements. Because the owner will be responsible for receiving a non turnkey project from design/builder and then doing additional work so that the project meets all of Hilton's requirements, some additional protections must be incorporated into all of the agreements into which Hilton enters. Of course, if there is an alternative solution which similarly protects Hilton, please so advise and I am happy to bring it to Hilton for Hilton's consideration.

>

> Please provide us with a copy of the proposed ordinance regarding appropriations as soon as possible. We will also need to see a draft of the Non Disturbance Agreement along with continued monitoring of the design/construction documents to which Hilton is not a party.

>

> You will note that certain items remain in brackets including certain of the requested changes. In the interest of time (and based on our turning around a draft of this document over the weekend) we have not yet had an opportunity to discuss the proposed revisions with Hilton. We therefore have left some items in brackets for Hilton's specific approval. Moreover, the entirety of the HOA draft remains subject to review, comment and approval of Hilton. Under no circumstances shall this transmission constitute or be construed as an offer, agreement or offer to agree by or a commitment on the part of Hilton to accept or enter into the HOA or the transactions contemplated thereby. The attached redline is for discussion purposes only and may be submitted for consideration by Hilton's corporate office. No representation, commitment or warranty of any kind is made by such transmission that approval for the HOA or the transactions contemplated thereby will be obtained. No binding agreement shall exist unless and until all corporate approvals have been obtained by Hilton, the document has been fully executed and delivered by Hilton and the owner, and all other requirements of Hilton for acceptance thereof have been fully and timely satisfied.

>

> It is our hope in providing this draft of the HOA to you on such an expedited basis that all the parties will have an opportunity to review it in detail in advance of our meeting on Wednesday, November 19, 2003, so that we are all prepared to hammer out any remaining final issues at that time. Of course, to the extent any of the working group has inadvertently been omitted from the recipient list of this email, please advise so that we can incorporate them in any future distribution.

>

> I look forward to our meeting next week. Should you have any questions, please call Kathleen.

>

> Kathleen J. Wu

> Andrews Kurth LLP

> 1717 Main Street
> Suite 3700
> Dallas Texas 75201
> 214 659 4448 (direct line)
> 214 659 4802 (direct fax)
> 214 659 4401 (general fax)
> kwu@akllp.com
> > <<Redline rtf>>
>

**CITY OF COLUMBIA
CONVENTION CENTER HOTEL CORPORATION
BOARD OF DIRECTORS MEETING MINUTES
February 11, 2004
2 00 PM - Council Chambers
3rd Floor City Hall 1737 Main Street**



The City of Columbia Convention Center Hotel Corporation Board of Directors met on Wednesday February 11 2004 in the City Hall Council Chambers at 1737 Main Street Columbia South Carolina Mayor Robert D Coble called the meeting to order at 2 03 p m Council members present were The Honorable E W Cromartie II The Honorable Anne M Sinclair The Honorable Sam Davis and The Honorable Tameika Isaac Devine Also present were Mr Charles P Austin Sr City Manager and Ms Erika D Moore City Clerk The Honorable Jim D N Papadea and The Honorable Hamilton Osborne Jr are not members of the Convention Center Hotel Corporation Board of Directors

DISCUSSION

1 Design/ Pre construction Presentation - Development Team

Mr John Lumpkin Development Manager / Edens & Avant President and Chief Executive Officer provided the opening remarks relating to the planning development and operations of the Columbia Hilton Convention Center Hotel He said that the process for a Convention Center Hotel began in 2001 and now the design phase of a hotel that meets the Hilton standard is almost complete He stated that the initial average daily room rate will be approximately \$115 00 per night and that the cost compares favorably to other hotels in this area that were built to the same specifications He announced that construction costs have decreased and that additional bonds will be issued for the purpose of providing more financial protection to the City of Columbia and its citizens Mr Lumpkin told the members of Council that there would be enough aggregate net revenues for the Convention Center Hotel to be successful He said that the Development team is taking a conservative approach He stated that an additional \$2 5 million was set aside for debt service bringing the total amount to \$8 3 million to cover operational shortfalls He also described how the Hilton would operate but not own the Convention Center hotel and that Taylor Construction has guaranteed a maximum price which protects the city on the price of the project and the time frame Mr Lumpkin said that the Hilton has approved the design development of this hotel and has provided a letter of support He told the members of Council that the completion date relies heavily on the bond sales

2 Financial Structure - Citigroup Global Markets Inc

Mr William Corrado Director of Citigroup Global Markets Inc said that the financial structure that is being presented does qualify the bonds that are being issued for bond insurance He said that the AAA Bonds could be financed at 5 1% in today's market versus 7% He presented the current financial structure for the Convention Center Hotel He said that he is responsible for taking the hard cost and determining how many bonds should be sold to cover construction cost, interest during construction fund the reserves to pay the bond insurer and other finances associated with the transactions Mr Corrado said the Hilton Corporation will contribute \$1 5 million in key money and that \$68 9 million of Senior Lien Hotel Revenue Bonds will be issued He announced that bond financing would close on April 1 2004 Mr Corrado stated that the project would have a total of \$71 million in funding

Mr. Joel Gottlieb Gottlieb & Smith P.A., told the members of Council that the most significant agreement is the Qualified Management Agreement also known as the Hotel Management Agreement between the Corporation and the Hilton that must reflect the business deal with Hilton and fall within the various tax safe harbors so the bond financing will flow. He said that the Room Block Agreement between the Convention Center and the Convention Center Hotel is also significant. Mr. Gottlieb stated that several agreements and various bond documents are still under negotiation.

Mayor Coble stated that what we are building is economic infrastructure. He said that we need this infrastructure to strengthen the economy and to create jobs. He outlined the following four (4) issues that were associated with the decision making process to build a privately or publicly funded hotel: 1) The Columbia Hilton is the product that we needed to be competitive with conventions and visitors; 2) The incentives for the City of Columbia; 3) He decided against a John Q. Hammond Hotel because of the future unknowns of the corporation; and 4) the use of local contractors that are able to compete in the bid process. Mayor Coble stated that the deal we have today is stronger and a full service hotel is essential.

Upon motion by Mayor Coble, seconded by Mr. Cromartie, the Board of Directors voted unanimously to go into Executive Session at 3:00 p.m. for the discussion of Item 3.

EXECUTIVE SESSION

3 Discussion of negotiations incident to proposed contractual arrangements
Items were discussed in Executive Session; no action was taken.

- Mayor Coble adjourned the Executive Session at 4:10 p.m. to reconvene the meeting.

Upon motion by Mayor Coble, seconded by Mr. Cromartie, the Board of Directors voted four (4) to one (1) to approve the new financing plan for the hotel that requires the Convention Center Hotel Corporation to be legally responsible for 50% of the principal and interest payments on the hotel bonds for the first ten (10) years and from year eleven (11) until the final payment of the hotel bonds; the Corporation's legal responsibility will be 70% of the principal and interest payments for the bond issue. Staff was authorized to proceed with the Hilton Agreement and other contracts as outlined. Voting aye were Mr. Cromartie, Mr. Davis, Ms. Devine and Mayor Coble. Voting nay was Ms. Sinclair.

Ms. Sinclair stated that as this deal grows, her concerns continue to increase. She said that she is concerned because parking is not included in addition to other issues.

Ms. Isaac Devine stated that she concurs with Councilwoman Sinclair's comments. She said that the City of Columbia hasn't gotten where it is today by not taking risks. She stated that we must move forward to fulfill the commitments that have been made.

- Mayor Coble adjourned the meeting at 4:15 p.m.

Respectfully submitted by:

Enka D. Moore
City Clerk

02/11/2004 Page 2

1-3529

0570

Convention Center Hotel Corporation Board
of Directors Meeting, Executive Session
2-11-04

- Joel G. brought up the fact that there
is an issue with whether the
county will require us to pay
property taxes. Richmond County
will decide if taxes are to be
paid or not. None of the other
public hotels in the county pay
property taxes. Joel G. said
the deal would never cash
flow if we had to ~~the~~ pay
property taxes. Bill Shuman
stated the only way to get
around this is if the city makes
the bond as a cash deal. Then
makes the city directly liable for
the debt. Joel G. stated that
once ~~the~~ the Richmond County tax
assessor made their decision that
they could come back in a
few years and change their
mind. The board directed Joel G.
and J. Mayes to pursue
the Richmond County tax assessor

1-3523

0571

regarding this issue

- Joel G. discussed parking revenue. He explained that Hilton was charging for parking. The only way the city would get that money is after it flowed through the reserve fund water fall. Joel G. stated that the city would not be able to use that money to support the parking bond. Brent Robertson agreed with this. The bottom line is that currently we would be building a garage for 300 of the spaces will have to be given to Hilton with no revenue going to the city to support the parking bond.

5. Gault explained that the lack of the revenue for for the 300 spaces adversely affected the bond issue and amount of for parking facilities that we plan to build with the parking revenue bond money.

1. Council requested that he be allowed to have Jack B. be allowed to open negotiations with Victor on the parking to try and get the best deal we can to support the parking bonds Council agreed to open up negotiations.

2. Down Senator asked why Lush was controlling the deal points of the financing. B. Muser explained that the deal was Lush's investment grade in the process of explaining that Lush would have to pay the bond holders in the event of a default.

3. The mayor indicated that if \$200,000 on a parking deal was the hold up on the bonds that he would lend \$200,000 to move the parking work.

4. City Council requested a list of the parking lots.

" JETA → S. Gault stated that when we went to JETA we got approval to do a \$65M bond deal. Now the deal is greater than \$65M. JETA has many questions about the deal and before it can go forward the Budget and Control Board will have to vote to approve the deal. Bill Murrer indicated that JETA ~~does not~~ usually does not ask any questions after they laid out the deal for bond issuance.

- The Mayor requested what they needed to do. S. Gault request that council say the single bond issue is OK. That staff can open up negotiations with Helton regarding parking. - Ann Sanchez stated that she thought this was a matter and she wanted to vote and resign from the board. - Ed stated that he was for it and he knew there would be challenges but he would vote for it.

1-3526

0574

+ Sam Davis - He stated that today he was for it but that if the court continued to rule that he would vote against. He stated she would vote for it today.

Tamecia - He ~~stated that~~ stated that she was 52% in ~~he~~ ~~was~~ for it. She stated she would vote for it today but that just barely. She also stated that

S Gault

Robert Robertson

J. Meigs

S. Epps

B. Hunter

D. McCloud

E.W. Cromette

Ann Gardner

Tennessee Devine

Sam Davis

~~Robert Robertson~~

W. Galt

Larry McCloud

1-3527

0575

CITY OF COLUMBIA
CITY COUNCIL WORK SESSION ACTION REPORT
July 30, 2003
9:00 AM City Council Chambers
3rd Floor City Hall - 1737 Main Street



CITY COUNCIL DISCUSSION / ACTION

- A * Comprehensive Land Use Agreement between The University Neighborhood Organization and The University of South Carolina
ACTION Representatives of the University Neighborhood Association, the University of South Carolina and the National Advocacy Center discussed the impact the proposed agreement and the Inn could have on the community as a whole
- B **The Greater Columbia Hotel & Motel Association – Mr. Tom Sponseller, President/CEO
ACTION Representatives of the hospitality industry presented statistical data supporting their opposition to the University being involved with the development of a hotel
- C Columbia Action Council Budget Request – Mr. Allison Baker, Director of Parks & Recreation
ACTION APPROVED staff recommendations to reduce the Columbia Action Council's budget and AUTHORIZED staff to determine a funding source for the additional \$30,000.00 requested to cover three (3) events during fiscal year 2003/2004
- D Proposal for Collecting and Remitting Hospitality Tax Funding – Ms. Cathy Alexander, Finance Director
ACTION AUTHORIZED staff to continue collecting the Hospitality Tax without offering taxpayer discounts and asked staff to review other taxes and how various jurisdictions handle taxpayer discounts while considering administrative costs. A report should be given to Council within thirty (30) days
- E Underwriter Recommendations – Mr. Steve Gantt, ACM for Development Services
ACTION APPROVED staff recommendations
- F Central Midlands Regional Transit Authority Update – Ms. Dana Turner, Administrative Advisor
ACTION Ms. Dana Turner, Administrative Advisor updated the members of Council on the RTA

ORDINANCE – SECOND READING

- G Ordinance No. 2003-030 – Granting encroachment to The Woman's Club for placement of a plaque near their former clubhouse at 1703 Blossom Street – First reading approval July 23, 2003
ACTION APPROVED on second reading

ORDINANCE – FIRST READING

- H Ordinance No. 2003-067 - Authorizing property exchange between the City of Columbia and South Carolina Department of Transportation
ACTION APPROVED on first reading

**Amendment to the Agenda

WS AR 07/30/2003 Page 1

2-719

0576

APPOINTMENT

H1 *Arts Task Force

ACTION APPROVED the appointment of Ms Stacy Calvert to the Arts Task Force

Council voted to go into Executive Session at 12 02 p m to discuss Items I through K.

EXECUTIVE SESSION DISCUSSION

I Discussion of the evaluation of employees

ACTION This item was held over no action was taken

J **Discussion of negotiations incident to the proposed sale of property

ACTION This item was discussed in Executive Session no action was taken

K Discussion of negotiations incident to proposed contractual arrangements

AquaGrille

ACTION This item was held over no action was taken

- Mr Charles Williams Consultant

ACTION This item was held over no action was taken

Annexation Coordinator

ACTION This item was held over no action was taken

Convention Center Hotel

- Mayor Coble adjourned the Executive Session discussion at 1 54 p m to reconvene the Work Session

ACTION APPROVED \$650 000 for Interim architectural design services for a period of 90 days prior to Bond Closing Mr Papadea and Mr Osborne did not vote due to a conflict of interest

Mayor Coble adjourned the meeting at 1 55 p m

**CITY OF COLUMBIA
CITY COUNCIL WORK SESSION MINUTES
March 17, 2004
9 00 AM City Council Chambers
3rd Floor City Hall 1737 Main Street**

The City of Columbia City Council met for a Work Session on Wednesday, March 17 2004 in the City Hall Council Chambers at 1737 Main Street Columbia, South Carolina Mayor Robert D. Coble called the meeting to order at 9 04 a.m. Council members present were The Honorable E. W. Cromartie II The Honorable Jim D. N. Papadea The Honorable Anne M. Sinclair The Honorable Hamilton Osborne Jr. The Honorable Sam Davis and The Honorable Tameika Isaac Devine Also present were Mr. Charles P. Austin Sr. City Manager and Ms. Enka D. Moore, City Clerk

REVIEW ZONING PUBLIC HEARING AGENDA

****There was a consensus of Council to amend the Work Session agenda to include the discussion of the Disparity Study City Center Master Plan Request for Qualifications and the Convention Center Hotel Request for Proposals**

PRESENTATIONS

A. Greening the Arts Festival 2004 – Ms. Shirley Fields Martin Executive Director

Ms. Shirley Fields Martin presented the Greening the Arts Festival 2004 to the members of City Council. She stated that cultural literacy promotes community development therefore the majority of the events will be free of charge. Greening the Arts Festival will be held from Sunday May 23 2004 until Sunday May 30 2004 in the City of Columbia.

B. Rosewood Community Parks Master Plan – Mr. Bob Amundson Rosewood Community Council President and Mr. Kenneth Simmons Kenneth B. Simmons & Associates

Mr. Bob Amundson Rosewood Community Council President requested approval of the Parks Master Plan for the Rosewood Community. He thanked the City of Columbia for the allocation of Columbia Assisting Neighborhoods Development Opportunities (CANDO) funding. He assured the members of Council that this proposal is what the community wants and that the proposal was approved by the Parks & Recreation Department.

Mr. Kenneth Simmons Kenneth B. Simmons & Associates presented the Rosewood Community Parks Master Plan as it relates to Valencia Rosewood Tyler and Lester Bates Parks. He stated that the community wants each park to have its own character with distinctive walkways connecting one to the other. He stated that Valencia Park has problems with parking and buffers between pedestrians and vehicular traffic therefore they will add a 25 space parking lot a fenced entrance area a new canteen/restroom building and new bleachers. Mr. Simmons described Rosewood Park as a citywide regional park with an existing baseball field and scattered playground equipment. He stated that they would like to install a water feature a maze play area and an amphitheatre at Rosewood Park. Mr. Simmons described Tyler Park as a linear shaped park with four (4) roads running through the park. He proposed to change the pavement on the portion of the roads that run through the park and to create an American Disabilities Act compliant facility with an exercise station plants and gazebo to create a pedestrian friendly environment. Lester Bates Park was also described as a linear park. He stated that the community would like to create a doggie park with a landscaped plaza a dry creek and an exercise

0578

<http://www.columbiasc.net/citygov/031704w.htm>

4/11/2005

2-766

214

trail

Mr Bob Amundson stated that the community voted unanimously in favor of the proposals and that they understand the need to divide this Rosewood Parks Masterplan into phases. He said that they are also applying for grants to assist with funding.

Upon motion by Mayor Coble seconded by Ms Sinclair, Council voted unanimously to endorse the Parks Master Plan subject to the appropriation of funding.

COUNCIL DISCUSSION/ ACTION

B1 **Disparity Study

Upon motion by Mayor Coble seconded by Mr Papadea, Council voted unanimously to endorse and adopt the Proposed Critical Path for Minority Business Enterprise / Women Business Enterprise Policy Development for the City of Columbia along with the proposed implementation schedule and budget. The City Manager was authorized to implement the plan and budget as outlined.

B2 **Greater Columbia Community Relations Council Request for Funding – Mr Preston Winkler Executive Director

Upon motion by Mayor Coble seconded by Mr Cromartie Council voted unanimously to allocate Community Promotions Funding in the amount of \$60,783.25 to cover a budgetary shortfall for fiscal year 2003/2004. The request to add the Greater Columbia Community Relations Council to the City of Columbia's General Fund Budget was deferred.

COUNCIL DISCUSSION/ ACTION

B3 **City Center Master Plan Request for Qualifications

Upon motion by Ms Sinclair seconded by Mayor Coble Council voted unanimously to authorize staff to proceed with a Request for Qualifications for the City Center Master Plan.

Mayor Coble adjourned the Work Session at 10:00 a.m. to convene the Zoning Public Hearing.

Mayor Coble reconvened the Work Session at 11:33 p.m.

B4 **Convention Center Hotel Request for Proposals

Upon motion by Ms Sinclair seconded by Mr Cromartie staff was directed to draft a Request for Proposals for a full service Convention Center Hotel. Mr Papadea and Mr Osborne abstained from voting due to a conflict of interest.

APPOINTMENTS

C Design Development Review Commission

Upon motion by Mr Papadea seconded by Mr Cromartie Council voted unanimously to approve the reappointment of Mr James Byrum, Ms Gardenia Fair, Mr James Mancini and Ms Nancy McCormick for a three year term to expire in April 2007.

0579

<http://www.columbiasc.net/citygov/031704w.htm>

4/11/2005

2-767

215

Upon motion by Mayor Coble seconded by Mr Cromartie Council voted unanimously to go into Executive Session at 11 37 a m for the discussion of Items D through F as amended

EXECUTIVE SESSION DISCUSSION

D Receipt of legal advice which relates to a matter covered by attorney client privilege

****Disparity Study – Mr Richard Geigel Esquire**
This item was discussed in Executive Session no action was taken

****Richland County School District One – Mr Jim Meggs City Attorney**
This item was discussed in Executive Session no action was taken Mr Cromartie abstained from discussions due to a conflict of interest

****East Central City Consortium – Mr Fred Johnson F A Johnson Consulting Group Inc**
This item was discussed in Executive Session no action was taken

****Parkridge Road Relocation**
This item was discussed in Executive Session no action was taken

E ****Discussion of negotiations incident to the proposed sale of property**

****SEC North Lake Drive and Irmo Drive – Mr Shawn Epps Special Projects Administrator**
This item was discussed in Executive Session no action was taken

F ****Receipt of legal advice which relates to a pending threatened or potential claim**
This item was discussed in Executive Session no action was taken

Mayor Coble adjourned the Work Session at 12 50 p m

Respectfully submitted by

Enka D Moore
City Clerk

0580

[http //www columbiasc net/citygov/03704w htm](http://www.columbiasc.net/citygov/03704w.htm)

4/11/2005

2-768

216

CITY OF COLUMBIA
CITY COUNCIL WORK SESSION MINUTES
March 24 2004
9 00 AM City Council Chambers
3rd Floor City Hall - 1737 Main Street



The City of Columbia City Council met for a Work Session on Wednesday March 24 2004 in the City Hall Council Chambers at 1737 Main Street Columbia South Carolina Mayor Robert D. Coble called the meeting to order at 9 04 a.m. Council members present were The Honorable E. W. Cromartie II The Honorable Jim D. N. Papadea The Honorable Anne M. Sinclair The Honorable Hamilton Osborne Jr. The Honorable Sam Davis and The Honorable Tameika Isaac Devine. Also present were Mr. Charles P. Austin Sr., City Manager and Ms. Enka D. Moore City Clerk.

PRESENTATIONS

- A. * Miss South Carolina/USA Amanda Pennekamp – Ms. Paula Miles Executive Director of the Miss SC/USA Pageant

Miss Paula Miles Executive Director introduced Miss Amanda Pennekamp as Miss South Carolina 2004.

Miss Amanda Pennekamp Miss South Carolina 2004 shared her platform with the members of City Council and thanked everyone for their support.

Mayor Coble presented Miss Pennekamp with a Key to the City and roses as a token of the City's support.

- B Retirement Presentation for Chief John Jansen – Mr. Curtis Maffett Mr. Joseph (Rusty) Smith and Mr. Joseph Floyd Assistant Chiefs Columbia Fire Department

Mayor Coble, members of City Council, Mr. Charles P. Austin Sr., City Manager and members of the Fire Department showered Chief John Jansen with words of appreciation. Mayor Coble presented a Proclamation in honor of the Chiefs retirement which declared March 24, 2004 as Chief John Jansen Day in the City of Columbia.

- C Kids Day Columbia 2004 – Ms. Judy Stringer Columbia Action Council Executive Director

Ms. Judy Stringer Executive Director briefed the members of Council on the Kids Day Columbia 2004 Event. She indicated that the event is free, but attendees will pay for food and rides in an effort to raise funds for the Columbia Action Council. Kids Day Columbia is scheduled for Saturday, March 27, 2004 in Finlay Park.

- D Cultural Council of Richland Lexington Counties Update – Ms. Susan Benesh Executive Director

Ms. Susan Benesh Executive Director updated the members of Council on the changes that have occurred within the past nine (9) months within the Cultural Council of Richland – Lexington Counties. She stated that their mission is to raise money for the Arts, to fund organizations, and to promote the Arts. She said that the entire member benefit program was revamped to encourage greater participation. Ms. Benesh announced that the Cancer Survivors Garden is now complete. She also announced that the Cultural Council would enter into fiscal year 2004/2005 with a balanced budget.

E East Central City Consortium Project Update -- Mr. Fred A. Johnson F. A. Johnson Consulting Group, Inc.

Mr. Heyward Bannister, Director of South Carolina Fannie Mae Partnership Office, thanked the members of Council for their strong interest and commitment to the communities that are often underserved and overlooked. He told the members of Council that a group composed of neighborhood leaders, City officials, City staff, representatives of financial institutions and other stakeholders went to Atlanta, Georgia for a site tour and to learn more about Atlanta's housing initiatives. Mr. Bannister stated that their objective is to stop blight in these communities.

Ms. Myrtle Gordon, Edgewood Road Street Community/ Comprehensive Masterplan Committee Chair, stated that the committee did participate in the planning process since the first planning meeting. She said that they all want to see the positive changes continue throughout the communities. Ms. Gordon said that the residents have been outspoken about their concerns and their dreams. She stated that a detailed action plan would be presented soon.

Mr. Fred A. Johnson, III, F.A. Johnson Consulting Group, Inc. Managing Principal, stated that as a practical matter this is a housing initiative, but it's also the dreams, hopes and visions of twelve neighborhoods. He stated that the proposed development plan would address design, the placement of housing, streetscapes, traffic patterns and compatibility of new and existing structures. Mr. Johnson indicated that the focus is on the production of affordable housing opportunities for approximately 1,000 acres and over 3,200 parcels of land. He told the members of Council that the East Central City Consortium Board would forward the final Master Development Implementation Plan to City Council for approval within sixty (60) days of this presentation.

F *Economic Development Strategic Plan -- Mr. Jim Gambrell, Director of Economic Development

Mr. Jim Gambrell, Director of Economic Development, presented the City of Columbia's Collaborative Plan for Economic Development to the members of Council. He explained that this is a collaborative effort to support and promote a strong business community resulting in economic growth for the region while maintaining an excellent quality of life. The following five (5) economic development oriented departments work directly with individuals and businesses to help them obtain their business goals: the Office of Economic Development, the Business Enterprise Office, the Community Development Department, the Planning Department and the Sumter Columbia Empowerment Zone Department. The following five (5) economic development corporations serve specific areas within the City to perform specific development functions within the City for individuals and businesses: the Columbia Development Corporation (serves the Congaree Vista area), the Eau Claire Development Corporation (serves the Eau Claire area), the South Columbia Development Corporation (serves the southern area of the City), the Two Notch Development Corporation (serves the area of the City along Two Notch Road) and the Columbia Housing Development Corporation (serves the entire City with a focus on residential development).

TRAFFIC ISSUES

G Glenwood Road Traffic Control

Upon motion by Ms. Sinclair, seconded by Mr. Osborne, Council voted unanimously to approve the installation of a multi-way stop at the intersection of Glenwood Road and Bagnol Road, contingent upon SCDOT approval.

0582

WSM 03/24/2004 Page 2

2-774

218

APPOINTMENTS

H Planning Commission

Upon motion by Ms. Sinclair seconded by Mr. Osborne Council voted unanimously to approve the reappointment of Ms. Jenny Screen and Ms. Isabelle Mandel for a three year term to expire on March 1 2007

I Election Commission

Upon motion by Mayor Coble seconded by Mr. Cromartie Council voted unanimously to approve the appointment of Mrs. Marsha Duffy on a temporary basis contingent upon Mrs. Duffy acceptance of the appointment. Mrs. Marsha Duffy accepted the appointment to the City of Columbia Election Commission on a temporary basis

STREET III

J Council is asked to approve a request from the University of South Carolina and Global Spectrum to close Greene Street from Gadsden Street to the railroad track where it dead ends and to restrict access from the corner of Gadsden Street and Greene Street to Wayne Street and Gervais Street one hour prior to the following events. Contact Mr. Matt Homan Director of Event Services

Upon motion by Mr. Cromartie seconded by Mr. Papadea Council voted unanimously to approve a request from the University of South Carolina and Global Spectrum to close Greene Street from Gadsden Street to the railroad track where it dead ends and to restrict access from the corner of Gadsden Street and Greene Street to Wayne Street and Gervais Street one hour prior to the following events

Wednesday	March 31 2004	Robotics Move In	8 00 a.m. - 6 00 p.m.
Thursday	April 1 2004	Robotics Show	7 00 a.m. - 7 00 p.m.
Friday	April 2 2004	Robotics Show	7 00 a.m. - 7 00 p.m.
Saturday	April 3 2004	Robotics Show	7 00 a.m. - 7 00 p.m.
Wednesday	April 7 2004	Aerosmith	12 00 p.m. - 12 00 a.m.
Friday	April 16 2004	Disney on Ice	8 00 a.m. - 10 00 p.m.
Saturday	April 17 2004	Disney on Ice	10 00 a.m. - 10 00 p.m.
Sunday	April 18 2004	Disney on Ice	12 00 p.m. - 10 00 p.m.
Wednesday	April 21 2004	Prince	9 00 m. - 12 00 a.m.
Thursday	April 22 2004	Kenny Chesney	9 00a.m. - 12 00 a.m.
Friday	April 23 2004	Urban Youth League	3 00 p.m. - 7 00 p.m.
Saturday	April 24 2004	Urban Youth League	7 00 a.m. - 12 00 a.m.
Sunday	April 25 2004	God is Love	2 00 p.m. - 10 30 p.m.
Wednesday	April 28 2004	Shania Twain	8 00 a.m. - 12 00 a.m.
Thursday	April 29 2004	Jimmy Buffett	8 00 a.m. - 12 00 a.m.

OTHER MATTERS

Upon motion by Mr. Cromartie seconded by Mr. Papadea Council voted unanimously to approve on a single motion **Item K** The destruction of 128 Firearms and **Item L** The destruction of 519 Narcotics to include drug paraphernalia as requested by the Columbia Police Department Evidence Unit

K Council is asked to approve the Destruction of 128 Firearms as requested by the Columbia Police Department Evidence Unit. -- Approved

0583

WSM 03/24/2004 Page 3

2-775

219

L **Council is asked to approve the Destruction of 519 Narcotics to include drug paraphernalia as requested by the Columbia Police Department Evidence Unit
Approved

M Tom Joyner Sky Show Request for Funding

Upon motion by Mr. Cromartie seconded by Mr. Papadea Council voted unanimously to approve funding in the amount of \$3 500 00 from the City Council Contingency Fund

Upon motion by Mayor Coble seconded by Mr. Cromartie Council voted unanimously to go into Executive Session at 11 42 a.m. for the discussion of the Convention Center Hotel Memorandum of Understanding and the Commercial Non Discrimination Policy as it relates to the details of a Request for Proposals. Mr. Papadea and Mr. Osborne abstained from discussions relating to the Convention Center Hotel Memorandum of Understanding due to a conflict of interest

11 SESSION DISCUSSION

N Discussion of negotiation incident to proposed contractual arrangements
This item was discussed in Executive Session no action was taken

o Mayor Coble reconvened the Work Session at 12 35 p.m.

CITY COUNCIL DISCUSSION/ACTION

O Convention Center Hotel Request for Proposals

Upon motion by Mayor Coble seconded by Mr. Osborne Council voted unanimously to authorize staff to release a Request for Proposals for a full service Convention Center Hotel. The Request for Proposals should contain the following minimum hotel specifications:

- 1 200 guest rooms
- 2 Restaurant facility to accommodate at least 100 patrons
- 3 Lounge / Bar area
- 4 Swimming Pool and Fitness Room
- 5 5 000 square feet of meeting space
- 6 Business Center
- 7 Building exterior must be approved by the Design Development Review Commission
- 8 Kitchen facility
- 9 Offer 3 meals per day
- 10 Concierge and Bell Services
- 11 Branded by a National Name
- 12 200 Room Block Agreement
- 13 Land available upon negotiation
- 14 City of Columbia will offer a 50% discount on parking
- 15 Site Lease
- 16 Hotel Performance Standards

• Mayor Coble adjourned the meeting at 1 25 p.m.

Respectfully submitted by:

Enka D. Moore
City Clerk

0584

WSM 03/24/2004 Page 4

2-776

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc and)
Garfield Traub Development, LLC,)

CONSOLIDATED CIVIL ACTION
NO 2007-CP-40 1252

Plaintiffs,)
vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP-40-1014))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff)
vs)

City of Columbia, South Carolina,)

Defendant)

(2005-CP-40-3361))

Stevens & Wilkinson of South)
Carolina, Inc)

Plaintiff,)
vs)

Paul C 'Bo' Aughtry, III,)
Windsor/Aughtry Co , Inc , and)
Vista Hotel Partners LLC,)

Defendants)

2006-CP-40-5092)

Gary Realty Company Inc and)
Garfield Traub Development, LLC)

Plaintiff,)
vs)

AFFIDAVIT OF ERIKA SALLEY

FILED
2009 AUG 11 PM 2 51
JEANELL H. HUBBARD
Clerk of Court
FIFTH JUDICIAL CIRCUIT

0585

Paul C Bo Aughty, III,
Windsor/Aughty Co Inc
Vista Hotel Partners LLC and
Hilton Hotels Corporation

Defendants

(2006 CP 40 6488)

Turner Construction Company,
Plaintiff

vs

City of Columbia
Defendant

(2007 CP-40-1252)

PERSONALLY APPEARED BEFORE ME Erika Salley who being duly sworn
testifies

1 The statements in this Affidavit are based upon my personal knowledge unless
otherwise stated

2 I am competent to testify to the details related in this affidavit

3 My title is City Clerk for the City of Columbia, South Carolina

4 I have held this position from July 28 2003 until current

5 During my tenure as City Clerk, I have also used the name Erika D Moore, which
was my maiden name

6 My duties as City Clerk include without limitation, the following

a Attending all meetings of Columbia City Council,

b Recording official actions of Columbia City Council including the enactment
of ordinances and the passage of resolutions

- c Attesting to and certifying to the correctness of documents executed by Columbia City Council and
- d Preparing distributing, and publishing Columbia City Council agenda materials action reports schedule of meetings and approved minutes

7 I was City Clerk during the time that the City of Columbia had under consideration the publicly funded convention center hotel proposed by the Plaintiffs (the "Hotel Project ")

8 The Columbia City Council never enacted an ordinance or passed a resolution committing the City of Columbia to issue bonds to fund the Hotel Project

9 The Columbia City Council never enacted an ordinance or passed a resolution committing the City of Columbia to provide subject to annual appropriation any amount of City Credit Support to the Hotel Project

10 The Columbia City Council never enacted an ordinance or passed a resolution conveying or leasing any real property to the Columbia Convention Center Hotel Corporation for the Hotel Project

The information in this affidavit is true and correct to the best of my knowledge and belief

Executed on August 6, 2009

FURTHER AFFIANT SAYETH NOT

Signature on following page


Erika D Salley

Richland County South Carolina

Sworn and subscribed before me
this 6 day of August, 2009

Valerie R. Smith
Notary Public for South Carolina
My Commission Expires 12/15/10

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Traub Development, LLC)

CONSOLIDATED CIVIL ACTION NO
2007-CP-40 1252

Plaintiffs,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP 40-1014))

Stevens & Wilkinson of South)
Carolina, Inc)

Plaintiff)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP-40-3361))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

Paul C "Bo" Aughtry, III,)
Windsor/Aughtry Co , Inc , and)
Vista Hotel Partners, LLC,)

Defendants)

2006 CP-40-5092)

Gary Realty Company, Inc and)
Garfield Traub Development, LLC)

Plaintiff,)

AFFIDAVIT OF JOEL E GOTTLEB

RICHLAND COUNTY
FILED
2009 AUG 11 PM 2:51
JEANETTE W McBRIDE
C C P & G S

0589

vs)
)
Paul C "Bo" Aughtry III)
Windsor/Aughtry Co , Inc ,)
Vista Hotel Partners LLC, and)
Hilton Hotels Corporation,)
)
Defendants)
)
(2006 CP 40-6488))

Turner Construction Company)
)
Plaintiff,)
)
vs)
)
City of Columbia)
)
Defendant)
)
(2007-CP 40-1252))

PERSONALLY APPEARED BEFORE ME, Joel E. Gottlieb who being duly sworn,
testifies

1 The statements in this Affidavit are based upon my personal knowledge unless
otherwise stated

2 I am competent to testify to the details related in this affidavit

3 I am member of the bar in the State of South Carolina

4 I am currently a Shareholder with McNair Law Firm, P A

5 At the time of the events that gave rise to the above captioned litigation, I was a
Shareholder with Gottlieb & Smith, P A

6 I provided legal advice and representation to the City of Columbia ("the City")
related to the City's consideration of the publicly funded convention center hotel proposed by
the Plaintiffs (the Hotel Project")

0590

7 I am providing this Affidavit at the request of the City

8 On April 17 2003, the City and the Plaintiffs among others, signed a Memorandum of Understanding (MOU) which, among other things set forth an intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions" contained in the MOU

9 At the time the Columbia City Council voted to issue a second Request for Proposals (RFP) for a privately-funded hotel in March of 2004, there remained unresolved issues concerning (1) the payment of property taxes and (2) the numerous contractual agreements necessary to the Hotel Project

10 Whether the Columbia Convention Center Hotel Corporation would have been required to pay real estate and personal property taxes on the hotel was an issue that was never resolved This was an important matter because it raised the question of whether the proposed hotel would be able to generate sufficient revenues to fund the bond debt service if real estate and personal property taxes were assessed against the hotel None of the pro formas that I reviewed took into account the payment of property taxes

11 The MOU contemplated the negotiation and execution of certain definitive written agreements" None of those definitive written agreements were ever executed, and several important agreements that were not yet fully negotiated at the time the City voted to issue a second RFP were, among others (1) the Qualified Management Agreement (also referred to as the 'QMA" or "Hotel Operating Agreement"), (2) the Design Build Agreement, (3) the Development Management Agreement, (4) the Room Block Agreement, and (5) the Technical Services Agreement

12 At least three issues in the QMA remained unresolved at the time the Columbia City Council voted to issue a second RFP

0591

- a First, it had not been determined how executive compensation to the members of Hilton Hotels' upper-level management would be handled in a manner that satisfied Hilton Hotels but that did not violate the requirements of the Internal Revenue Code
- b Second, it had not been determined how parking revenues earned by the proposed Hotel Project would be allocated between the hotel and the parking garage
- c Third, it had not been determined whether reserve funds for furniture, fixtures and equipment (FF&E) would be paid before or after debt service

13 By the time the Columbia City Council voted to issue a second RFP, the Design-Build Agreement had not yet been fully negotiated or executed. The unresolved issue in the Design-Build Agreement was which party would have responsibility for purchasing the initial inventory for the hotel. The City expected the Guaranteed Maximum Price for the Hotel Project would include initial inventory for the hotel necessary for the operation of the hotel. Although I was advised by a third party that the construction company had agreed to this, I was never so advised by the contractor nor was I provided with a contract draft providing for it.

14 To my knowledge, the Room Block Agreement, the Development Management Agreement, and the Technical Services Agreement were not executed as of March 2004.

The information in this affidavit is true and correct to the best of my knowledge and belief

Executed on August 11, 2009

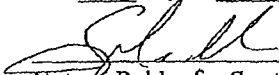
FURTHER AFFLIANT SAYETH NOT



Joel E. Gottlieb

Richmond County South Carolina

Sworn and subscribed before me
this 11 day of August, 2009



Notary Public for South Carolina

My Commission Expires 12-12-16

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Traub Development, LLC,)

Plaintiffs,)

vs)

City of Columbia South Carolina,)

Defendant)

(2005-CP-40-1014))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

City of Columbia South Carolina,)

Defendant)

(2005-CP 40-3361))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

Paul C 'Bo' Aughttry, III,)
Windsor/Aughttry Co , Inc , and)
Vista Hotel Partners LLC,)

Defendants)

2006 CP-40-5092)

CONSOLIDATED FOR DISCOVERY
CIVIL ACTION NO 2007 CP-40-4253

AFFIDAVIT OF WILLIAM M MUSSER

FILED
JULY 11 11 PM 2 51
CLERK OF COURT
CP & GS

2009 AUG 11 PM 2 51

RICHLAND COUNTY
FILED

Gary Realty Company, Inc and)
 Garfield Traub Development LLC,)
)
 Plaintiff)
 vs)
)
 Paul C Bo' Aughtry, III,)
 Windsor/Aughtry Co , Inc ,)
 Vista Hotel Partners, LLC, and)
 Hilton Hotels Corporation,)
)
 Defendants)
)
(2006 CP-40 6488))

Turner Construction Company,)
)
 Plaintiff,)
)
 vs)
)
 City of Columbia)
)
 Defendant)
)
(2007-CP-40 1252))

PERSONALLY APPEARED BEFORE ME William M Musser, who being duly sworn
 testifies

1 The statements in this Affidavit are based upon my personal knowledge, unless
 otherwise stated and are being given at the request of the City of Columbia

2 I am competent to testify to the details related in this affidavit

3 I am a member of the bar in the State of South Carolina

4 I am a Shareholder with the McNair Law Firm, P A

5 McNair Law Firm, P A , as bond counsel provided legal advice and guidance to
 the City of Columbia ("the City') related to its consideration of a plan for a publicly-funded
 convention center hotel proposed by the Plaintiffs (the "Project") McNair Law Firm, P A was

retained as bond counsel in connection with the proposed financing of the Project by the City and the Columbia Convention Center Hotel Corporation

6 McNair Law Firm, P A assisted the City in forming the Columbia Convention Center Hotel Corporation, which was a not-for profit corporation created to own the proposed Project

7 As bond counsel, the scope of our engagement included subject to the completion of the governmental and other legal proceedings to our satisfaction, rendering our legal opinion (the ' Bond Opinion) regarding the validity and binding effect of the bonds issued to finance the Project (the "Bonds")

8 The attached commitment letter of AMBAC Assurance Corporation (' AMBAC) to insure the payment of principal and interest on the Bonds provided for the issuance of the Bonds by the City and required among other things, 'the unqualified approving opinion of bond counsel rendered by a law firm acceptable to Ambac " (Attachment A Ambac Commitment for Financial Guaranty Insurance Commitment No 26216)

9 As bond counsel, we would be unable to deliver our Bond Opinion with respect to the Bonds in the absence of the due enactment by the City Council of a bond ordinance in proper form authorizing the issuance and delivery of the Bonds

10 Notwithstanding the requirement of the AMBAC commitment letter that the City issue the Bonds, if the Bonds were to have been issued by the South Carolina Jobs-Economic Development Authority (the "Authority"), we would have been unable to deliver our Bond Opinion in the absence of (i) the due adoption by the Authority of a bond resolution in proper form authorizing the issuance and delivery of the Bonds and a resolution approving the issuance of the Bonds duly enacted by the South Carolina State Budget and Control Board, and (ii) the

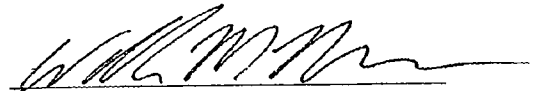
authorization and approval by City Council of the transaction documents to which the City was a party

11 If the financing took the form of the issuance of certificates of participation, we would be unable to deliver our Bond Opinion in the absence of the enactment by the City of an ordinance authorizing the execution and delivery by the City Council of the transaction documents in proper form required to be delivered on the City's part in connection with such financing

11 The information in this affidavit is true and correct to the best of my knowledge and belief

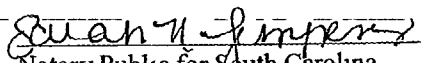
Executed on 8/7, 2009

FURTHER AFFIANT SAYETH NOT


William M. Musser

Richland County South Carolina

Sworn and subscribed before me
this 7th day of August, 2009


Notary Public for South Carolina
My Commission Expires 9-27-2014

Ambac Assurance Corporation
One State Street Plaza
New York, NY 10004
212 668 0340

A member of the Ambac Financial Group Inc.

February 17 2004

Bill Musser Esq
McNair Law Firm, P A
1301 Gervais Street
Columbia SC 29201

RE \$63 295 000 City of Columbia, South Carolina Senior Bonds (Columbia Hilton)

Ambac

Dear Mr. Musser:

Enclosed please find the original and one certified copy of the Commitment for Financial Guaranty Insurance Commitment No 26216 (the 'Commitment') relating to the above-captioned obligations (the 'Obligations'). The original of this Commitment should be delivered to or held on behalf of the Obligor of the Obligations and if not exercised, should be discarded.

Our **Standard Package**, which contains the bond legend to appear on the Obligations and Ambac Assurance Corporation's (Ambac) disclosure language to be inserted in the Official Statement, is enclosed with your commitment.

A camera ready specimen of Ambac's Financial Guaranty Insurance Policy (the 'Policy') with any applicable endorsement and our logo are also attached, with our **wire instructions**.

Upon the sale and final pricing of the issue sold with Ambac, proceed as follows:

- 1 Please fax your final debt service schedule and a distribution list to our closing department fax number 212-208-3136. Please note that even if a premium has been determined, we still need a final debt service schedule.
- 2 You will be assigned a closing coordinator and a policy number as soon as you have a firm closing date. Please call Danielle Packer at 212 208-3331 with that information and she will assign your transaction to a closing coordinator.
- 3 The Ambac disclosure language in your Preliminary Official Statement and Final Official Statement **must be approved by your closing coordinator**.
- 4 Please send or fax to your closing coordinator as soon as possible (1) the cover and maturity page the table of contents the Security section the Rating section the Ambac language and the specimen Policy as they appear in your Final Official Statement to ensure their accuracy and (2) the Statement of Insurance as it appears on the form of the bond for our approval.

THREE COPIES of the final OFFICIAL STATEMENT must be sent to your CLOSING COORDINATOR as soon as available for the timely preparation of Ambac's Policy and its prompt submission to the rating agencies.

Subject to change, with Ambac's approval

0598

SAG05590

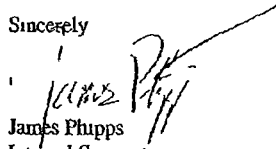
APPENDIX_0607

Ambac

- 5 An opinion of Ambac's counsel regarding (a) the validity and enforceability of the Policy and (b) the fairness and accuracy of the language included in the Official Statement describing Ambac and the Policy will be delivered at closing. The delivery of such opinion is dependent upon the prior review of such official statement by our legal department. A Certificate of Bond Insurer will also be delivered. The forms of these documents are included in the Standard Package.
- 6 Please refer to this Commitment for conditions which must be satisfied prior to Ambac's release of its Policy. Drafts of all financing documents should be sent to Ambac's Credit Underwriter if you need approval. Final form of documents requested by your closing coordinator should be sent to his/her attention prior to the day of closing.
- 7 In addition, as noted in the Commitment, the rating agencies assess separate fees in connection with the issuance of the rating letters. All questions regarding the payment of such fees must be addressed to the applicable agency.
- 8 On the morning of closing, bond counsel should call the closing coordinator with a wire reference number for the Ambac premium. Upon receipt of the wire number, the closing coordinator will release the Ambac Policy.
- 9 Lastly, **TWO** final transcripts, either on CD ROM or printed material, as applicable, must be sent to the attention of Ambac's CORPORATE RECORDS department as soon as possible after closing.

If you have any questions, please do not hesitate to contact your closing coordinator.

Sincerely,


James Phipps
Internal Support

Anne Rabun, Ambac's Credit Underwriter

Enclosures

cc Steve Gantt
City of Columbia
1737 Main Street
Columbia, SC 29201

Steve Camp
Columbia Metropolitan Convention Center
900 Assembly St.
Columbia, SC 29202

Brenton Robertson
Merchant Capital L.L.C.
One Buckhead Plaza, Suite 950
3060 Peachtree Road, NW
Atlanta, GA 30305

William M. Corrado
Citigroup Global Markets
390 Greenwich Street, 2nd Floor
New York, NY 10013

0599

SAG05591

Ambac Assurance Corporation
One State Street Plaza
New York, NY 10004
212 668 0340

A member of Ambac Financial Group Inc

COMMITMENT FOR FINANCIAL GUARANTY INSURANCE

Obligor **CITY OF COLUMBIA, SOUTH CAROLINA**

Commitment Number 26216

Commitment Date February 17 2004

Expiration Date May 17 2004

Obligations \$63 295 000 Senior Bonds (Columbia Hilton) maturing on September 1 in the years 2008 through 2035 both inclusive

Insurance premium 2.90% of the total principal and interest due on the Obligations (Fitch, Inc., Moody's Investors Service and Standard & Poor's Credit Markets Services assess separate rating fees which are payable directly to them. Each rating agency will bill separately and all questions regarding the payment of such fees must be addressed to the applicable agency.)

Ambac Assurance Corporation ('Ambac'), a Wisconsin Stock Insurance Corporation,

hereby commits to issue a Financial Guaranty Insurance Policy (the Policy) relating to the above described debt obligations (the Obligations) substantially in the form imprinted in this Commitment, subject to the terms and conditions contained herein or added hereto (see conditions set forth herein)

To keep this Commitment in effect after the expiration date set forth above a request for renewal must be submitted to Ambac prior to such expiration date. Ambac reserves the right to refuse wholly or in part to grant a renewal.

The Financial Guaranty Insurance Policy shall be issued if the following conditions are satisfied

- 1 The documents to be executed and delivered in connection with the issuance and sale of the Obligations shall not contain any untrue or misleading statement of a material fact and shall not fail to state a material fact necessary in order to make the information contained therein not misleading.
- 2 No event shall occur which would permit any purchaser of the Obligations otherwise required not to be required to purchase the Obligations on the date scheduled for the issuance and delivery thereof.
- 3 There shall be no material change in or affecting the Obligations (including without limitation the security for the Obligations or the proposed debt service structure for the Obligations) or the financing documents or the official statement (or any similar disclosure document) to be executed and delivered in connection with the issuance and sale of the Obligations from the descriptions or schedules thereof heretofore provided to Ambac.
- 4 The Obligations shall contain no reference to Ambac the Policy or the financial guaranty insurance evidenced thereby except as may be approved by Ambac.

* Subject to change with Ambac's approval

0600

SAG05592

- 5 Ambac shall be provided with
 - (a) Executed copies of all financing documents the official statement (or any similar disclosure document) and the various legal opinions delivered in connection with the issuance and sale of the Obligations including without limitation the unqualified approving opinion of bond counsel rendered by a law firm acceptable to Ambac. The form of Bond Counsel's approving opinion shall also indicate, if applicable that the Obligations are exempt from federal income taxation that the Obligor must comply with certain covenants under and pursuant to the new tax law and that the Obligor has the legal power to comply with such covenants. Such opinion of bond counsel shall be addressed to Ambac or in lieu thereof a letter shall be provided to Ambac to the effect that Ambac may rely on such opinion as if it were addressed to Ambac.
 - (b) Evidence of a wire transfer in an amount equal to the insurance premium at the time of the issuance and delivery of the Obligations
- 6 Unless expressly waived in whole or in part by Ambac the financing documents and the Official Statement shall contain (a) the terms and provisions provided in Ambac's STANDARD PACKAGE transmitted herewith and (b) any additional oral or written provisions or comments submitted by Ambac
- 7 Ambac shall receive a copy of any insurance policy surety bond guaranty or indemnification or any other policy contract or agreement which provides for payment of all or any portion of the debt, the costs of reconstruction, the loss of business income or in any way secures ensures or enhances the income stream anticipated to pay the Obligations
- 8 Any provisions or requirements of the Purchase Contract or Bond Purchase Agreement referencing Ambac must be sent to the attention of Danielle Packer not less than five (5) business days prior to closing. If such provisions or requirements are not received within that time compliance may not be possible

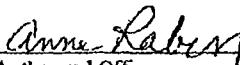
Special Conditions

- 9 Investment grade rating from S&P but we will require that monies be set so that Ambac can apply for a Moody's rating
- 10 All project documents must be satisfactory to Ambac and its outside counsel. Ambac will require the City to pay for outside legal review of documents. Estimated cost is \$90 000 120 000 dollars
- 11 All insurance provisions must be satisfactory to Ambac. Ambac will require an insurance consultant to review insurance provisions. Estimated cost is \$15 000 20 000 dollars
- 12 Satisfactory review of all environmental reports related to the project.
- 13 No additional debt allowed under the Indenture
- 14 Construction Monitor subject to Ambac consent based upon a mutually agreed upon list of candidates
- 15 Ambac's consent to replace Operator
- 16 The City's obligation to appropriate monies for debt service is limited to 50% for the initial 10 year operating period and 70% per annum until the debt is fully repaid. The City's obligation to support the annual debt service will always relate to the original amount of Obligations issued except for redemptions made with monies from outside the transaction
- 17 There will be no conditions in the ground lease or Deed of Trust to selling the property or use of the facilities in foreclosure.
- 18 Ambac can require a Hotel Consultant to be retained if debt service coverage on the Obligations is less than 1.2x but 1.1x for the initial two years of hotel operations
- 19 Ambac's consent to Hotel Consultant based upon a mutually agreed upon list of candidates
- 20 The City will not be able to receive monies from the Project prior to 2008

0601

SAG05593

- 21 The City will receive 50% of any excess cash flow provided coverage from Hotel net operating income is at least 1.2x
- 22 City agrees not to sponsor or support any additional hotel with other than traditional development tools in a defined competitive area without Ambac consent.
- 23 The Convention Center Authority will covenant not to enter into a room block agreement with any other hotel and not to designate any other hotel as affiliated with the convention center



Authorized Officer

0602

SAG05594

Ambac Assurance Corporation
One State Street Plaza
New York, NY 10004
212 668 0340

A member of the Ambac Financial Group

February 2, 2004

**AMBAC ASSURANCE STANDARD PACKAGE FOR AMBAC-INSURED TRANSACTIONS
[NOT FOR USE WITH GENERAL OBLIGATION/LIMITED OR
UNLIMITED TAX TRANSACTIONS]**

TO Obligor Obligor's Counsel Managing Underwriter Obligation Counsel and Underwriter's Counsel

RE Preparation of Financing Documents for Ambac Assurance Insured Issues

Ambac

The attached materials have been prepared to assist you in the preparation of documents for your Ambac Assurance Corporation ("Ambac Assurance") insured issue. Please modify the attached exhibits where appropriate and notify us as to any proposed modifications. If desired, these provisions can be incorporated into one section entitled "Financial Guaranty Insurance" within the applicable Indenture, Resolution, Ordinance, Order or any other operative financing document (such applicable financing document will be referred to herein as the "Financing Document"). Please be advised that the provisions contained in this package are in addition to the conditions listed in the Commitment for Financial Guaranty Insurance and any other comments or changes that may be required by the Ambac Assurance personnel working on this financing. If you have any questions, please call one of the following persons: David N. Abramowitz, Eileen L. Kirchoff or Stephen M. Ksenak (Public Finance) and Kevin J. Doyle, Lee Ann Duffy, Jean Kim, Juan B. Roman or Nicola J. Ryan (Specialized Finance).

- Definitions (Exhibit A)
- Ambac Assurance consent required for changes to underlying documentation and exercise of remedies upon default (Exhibit B)
- Notices/information to be given to Ambac Assurance (Exhibit C)
- Permitted Investments and Valuation Provisions (Exhibit D)
- Defeasance Language (Exhibit E)
- Description of Ambac Assurance Payment Procedure (Exhibit F)
- Trustee related provisions (Exhibit G)
- Ambac Assurance as a third-party beneficiary (Exhibit H)
- Suggested language for (i) Ambac Assurance Official Statement Disclosure, (ii) Notice of Sale, (iii) Bond Legend, and (iv) Cover page of Official Statement (Exhibit I)
- Form of Ambac Assurance Legal Opinion (Exhibit J)
- Form of Ambac Assurance Certificate of Insurer (Exhibit K)
- Ambac Assurance Wiring Instructions (Exhibit L)
- Representations, Warranties and Covenants for Revised Article 9 Collateral (Exhibit M)

0603

SAG05595

EXHIBIT A

DEFINITIONS

The following definitions are those which Ambac Assurance recommends for the Financing Document:

Ambac Assurance shall mean Ambac Assurance Corporation a Wisconsin-domiciled stock insurance company

Financial Guaranty Insurance Policy shall mean the financial guaranty insurance policy issued by Ambac Assurance insuring the payment when due of the principal of and interest on the Obligations as provided therein

EXHIBIT B

AMBAC ASSURANCE CONSENT LANGUAGE

Ambac Assurance requires that the Financing Document include the following consent provisions

A Consent of Ambac Assurance

Any provision of this [Financing Document] expressly recognizing or granting rights in or to Ambac Assurance may not be amended in any manner which affects the rights of Ambac Assurance hereunder without the prior written consent of Ambac Assurance. Ambac Assurance reserves the right to charge the Obligor* a fee for any consent or amendment to the Financing Document while the Financial Guaranty Insurance Policy is outstanding

B Consent of Ambac Assurance in Addition to Holder Consent.

Unless otherwise provided in this Section Ambac Assurance's consent shall be required in addition to Holder consent, when required for the following purposes: (i) execution and delivery of any supplemental [Financing Document] or any amendment, supplement or change to or modification of the [Loan Agreement, Lease Agreement, etc.]; (ii) removal of the Trustee or Paying Agent and selection and appointment of any successor trustee or paying agent [required in those transactions in which the Financing Document provides for a trustee or paying agent]; and (iii) initiation or approval of any action not described in (i) or (ii) above which requires Holder consent.

C Consent of Ambac Assurance in the Event of Insolvency

Any reorganization or liquidation plan with respect to the [Obligor or obligor] must be acceptable to Ambac Assurance. In the event of any reorganization or liquidation Ambac Assurance shall have the right to vote on behalf of all Holders who hold Ambac Assurance insured Obligations absent a default by Ambac Assurance under the applicable Financial Guaranty Insurance Policy insuring such Obligations.

[In transactions for which acceleration is not a remedy for an event of default, the following provision is to be included in the Financing Document.]

D Consent of Ambac Assurance Upon Default.

Anything in this [Financing Document] to the contrary notwithstanding, upon the occurrence and continuance of an event of default as defined herein, Ambac Assurance shall be entitled to control and direct the enforcement of all rights and remedies granted to the Holders or the Trustee for the benefit of the Holders under this [Financing Document].

* or appropriate obligor on the Obligations

[In transactions for which acceleration is a remedy for an event of default, the following two provisions must be included in the Financing Document in lieu of paragraph D above.]

D Consent of Ambac Assurance Upon Default

Anything in this [Financing Document] to the contrary notwithstanding upon the occurrence and continuance of an event of default as defined herein Ambac Assurance shall be entitled to control and direct the enforcement of all rights and remedies granted to the Holders or the Trustee for the benefit of the Holders under this [Financing Document] including without limitation (i) the right to accelerate the principal of the Obligations as described in this [Financing Document] and (ii) the right to annul any declaration of acceleration and Ambac Assurance shall also be entitled to approve all waivers of events of default

E Acceleration Rights

Upon the occurrence of an event of default, the Trustee may with the consent of Ambac Assurance and shall at the direction of Ambac Assurance or ___% of the Holders with the consent of Ambac Assurance by written notice to the Obligor and Ambac Assurance declare the principal of the Obligations to be immediately due and payable whereupon that portion of the principal of the Obligations thereby coming due and the interest thereon accrued to the date of payment shall without further action, become and be immediately due and payable anything in this [Financing Document] or in the Obligations to the contrary notwithstanding

EXHIBIT C

NOTICES/INFORMATION TO BE GIVEN TO AMBAC ASSURANCE

Ambac Assurance requires that the following notice provisions be incorporated in the Financing Document

Notices to be sent to the attention of the SURVEILLANCE DEPARTMENT

- A While the Financial Guaranty Insurance Policy is in effect, the Obligor* or the Trustee [as appropriate] shall furnish to Ambac Assurance upon request, the following
- (a) a copy of any financial statement audit and/or annual report of the Obligor*
 - (b) such additional information it may reasonably request

Upon request such information shall be delivered at the Obligor s* expense to the attention of the Surveillance Department, unless otherwise indicated

- B a copy of any notice to be given to the registered owners of the Obligations including without limitation, notice of any redemption of or defeasance of Obligations and any certificate rendered pursuant to this [Financing Document] relating to the security for the Obligations.
- C To the extent that the Obligor has entered into a continuing disclosure agreement with respect to the Obligations Ambac Assurance shall be included as party to be notified.

Notices to be sent to the attention of the GENERAL COUNSEL OFFICE

- A. The Trustee or Obligor* [as appropriate] shall notify Ambac Assurance of any failure of the Obligor* to provide relevant notices, certificates etc
- B Notwithstanding any other provision of this [Financing Document] the Trustee or Obligor* [as appropriate] shall immediately notify Ambac Assurance if at any time there are insufficient moneys to make any payments of principal and/or interest as required and immediately upon the occurrence of any event of default hereunder

Other Information to be given to Ambac Assurance

The Obligor* will permit Ambac Assurance to discuss the affairs finances and accounts of the Obligor* or any information Ambac Assurance may reasonably request regarding the security for the Obligations with appropriate officers of the Obligor*. The Trustee or Obligor* [as appropriate] will permit Ambac Assurance to [have access to the Project and] have access to and to make copies of all books and records relating to the Obligations at any reasonable time

*or appropriate obligor on the Obligations

Ambac Assurance shall have the right to direct an accounting at the Obligor's expense and the Obligor's failure to comply with such direction within thirty (30) days after receipt of written notice of the direction from Ambac Assurance shall be deemed a default hereunder provided, however that if compliance cannot occur within such period then such period will be extended so long as compliance is begun within such period and diligently pursued but only if such extension would not materially adversely affect the interests of any registered owner of the Obligations

[FOR CALIFORNIA AND INDIANA (ABATEMENT STYLE) LEASES] The Trustee or Obligor [as appropriate] shall annually certify to Ambac that the insurance policies required by Section ____ of the [Lease/Indenture] are in full force and effect and will provide Ambac with copies of such policies upon request.

EXHIBIT D

AMBAC ASSURANCE CORPORATION

Permitted Investment Guidelines *Permitted Investments*

- A Ambac Assurance will allow the following obligations to be used as Permitted Investments for all purposes including defeasance investments in refunding escrow accounts

(Ambac Assurance does not give a premium credit for the investment of accrued and/or capitalized interest)

(1) Cash (insured at all times by the Federal Deposit Insurance Corporation)

(2) Obligations of or obligations guaranteed as to principal and interest by the U S or any agency or instrumentality thereof when such obligations are backed by the full faith and credit of the U S including

- U S treasury obligations
- All direct or fully guaranteed obligations
- Farmers Home Administration
- General Services Administration
- Guaranteed Title XI financing
- Government National Mortgage Association (GNMA)
- State and Local Government Series

Any security used for defeasance must provide for the timely payment of principal and interest and cannot be callable or prepayable prior to maturity or earlier redemption of the rated debt (excluding securities that do not have a fixed par value and/or whose terms do not promise a fixed dollar amount at maturity or call date)

- B Ambac will allow the following Obligations to be used as Permitted Investments for all purposes other than defeasance investments in refunding escrow accounts

(1) Obligations of any of the following federal agencies which obligations represent the full faith and credit of the United States of America, including

Export Import Bank
Rural Economic Community Development Administration
U S Maritime Administration
Small Business Administration
U S Department of Housing & Urban Development (PHAs)
Federal Housing Administration
Federal Financing Bank

- (2) Direct obligations of any of the following federal agencies which obligations are not fully guaranteed by the full faith and credit of the United States of America
 - Senior debt obligations issued by the Federal National Mortgage Association (FNMA) or Federal Home Loan Mortgage Corporation (FHLMC)
 - Obligations of the Resolution Funding Corporation (REFCORP)
 - Senior debt obligations of the Federal Home Loan Bank System
 - Senior debt obligations of other Government Sponsored Agencies approved by Ambac
- (3) U S dollar denominated deposit accounts federal funds and bankers acceptances with domestic commercial banks which have a rating on their short term certificates of deposit on the date of purchase of P 1 by Moody s and A 1 or A 1+ by S&P and maturing not more than 360 calendar days after the date of purchase (Ratings on holding companies are not considered as the rating of the bank)
- (4) Commercial paper which is rated at the time of purchase in the single highest classification P 1 by Moody s and A-1+ by S&P and which matures not more than 270 calendar days after the date of purchase
- (5) Investments in a money market fund rated AAAM or AAAM G or better by S&P,
- (6) Pre refunded Municipal Obligations defined as follows any bonds or other obligations of any state of the United States of America or of any agency instrumentality or local governmental unit of any such state which are not callable at the option of the obligor prior to maturity or as to which irrevocable instructions have been given by the obligor to call on the date specified in the notice and
 - (A) which are rated based on an irrevocable escrow account or fund (the escrow) in the highest rating category of Moody s or S&P or any successors thereto or
 - (B) (i) which are fully secured as to principal and interest and redemption premium, if any by an escrow consisting only of cash or obligations described in paragraph A(2) above which escrow may be applied only to the payment of such principal of and interest and redemption premium if any on such bonds or other obligations on the maturity date or dates thereof or the specified redemption date or dates pursuant to such irrevocable instructions as appropriate and (ii) which escrow is sufficient as verified by a nationally recognized independent certified public accountant, to pay principal of and interest and redemption premium, if any on the bonds or other obligations described in this paragraph on the maturity date or dates specified in the irrevocable instructions referred to above as appropriate [Pre refunded Municipal Obligations meeting the requirements of subsection (B) hereof may be used as Permitted Investments for annual appropriation lease transactions
- (7) Municipal Obligations rated Aaa/AAA or general obligations of States with a rating of A2/A or higher by both Moody s and S&P
- (8) Investment Agreements approved in writing by Ambac Assurance Corporation (supported by appropriate opinions of counsel) and
- (9) other forms of investments (including repurchase agreements) approved in writing by Ambac

C The value of the above investments shall be determined as follows

- a) For the purpose of determining the amount in any fund, all Permitted Investments credited to such fund shall be valued at fair market value The Trustee shall determine the fair market value based on accepted industry standards and from accepted industry providers Accepted industry providers shall include but are not limited to pricing services provided by Financial Times Interactive Data Corporation, Merrill Lynch Salomon Smith Barney Bear Stearns or Lehman Brothers
- b) As to certificates of deposit and bankers acceptances the face amount thereof plus accrued interest thereon and
- c) As to any investment not specified above the value thereof established by prior agreement among the Issuer the Trustee and Ambac

EXHIBIT E

DEFEASANCE LANGUAGE

- A The definition of Outstanding Obligations or obligations or any like concept, should specifically include Obligations or obligations which fall into the category described below
- B The defeasance section of the Financing Document should include the following language

Notwithstanding anything herein to the contrary in the event that the principal and/or interest due on the Obligations shall be paid by Ambac Assurance Corporation pursuant to the Financial Guaranty Insurance Policy the Obligations shall remain Outstanding for all purposes not be defeased or otherwise satisfied and not be considered paid by the Obligor and the assignment and pledge of the Trust Estate and all covenants agreements and other obligations of the Obligor to the registered owners shall continue to exist and shall run to the benefit of Ambac Assurance and Ambac Assurance shall be subrogated to the rights of such registered owners

EXHIBIT F

PAYMENT PROCEDURE PURSUANT TO THE FINANCIAL GUARANTY INSURANCE POLICY

The following language sets out the applicable procedure for payments under the Financial Guaranty Insurance Policy and should be incorporated into the Financing Document

As long as the Obligation insurance shall be in full force and effect, the Obligor the Trustee and any Paying Agent agree to comply with the following provisions

(a) At least one (1) day prior to all Interest Payment Dates the Trustee or Paying Agent, if any will determine whether there will be sufficient funds in the Funds and Accounts to pay the principal or interest on the Obligations on such Interest Payment Date. If the Trustee or Paying Agent, if any determines that there will be insufficient funds in such Funds or Accounts the Trustee or Paying Agent if any shall so notify Ambac Assurance. Such notice shall specify the amount of the anticipated deficiency the Obligations to which such deficiency is applicable and whether such Obligations will be deficient as to principal or interest or both. If the Trustee or Paying Agent if any has not so notified Ambac Assurance at least one (1) day prior to an Interest Payment Date Ambac Assurance will make payments of principal or interest due on the Obligations on or before the first (1st) day next following the date on which Ambac Assurance shall have received notice of nonpayment from the Trustee or Paying Agent, if any

(b) the Trustee or Paying Agent if any shall, after giving notice to Ambac Assurance as provided in (a) above make available to Ambac Assurance and at Ambac Assurance's direction to The Bank of New York, in New York, New York, as insurance trustee for Ambac Assurance or any successor insurance trustee (the Insurance Trustee) the registration books of the Obligor maintained by the Trustee or Paying Agent, if any and all records relating to the Funds and Accounts maintained under this [Financing Document]

(c) the Trustee or Paying Agent if any shall provide Ambac Assurance and the Insurance Trustee with a list of registered owners of Obligations entitled to receive principal or interest payments from Ambac Assurance under the terms of the Financial Guaranty Insurance Policy and shall make arrangements with the Insurance Trustee (i) to mail checks or drafts to the registered owners of Obligations entitled to receive full or partial interest payments from Ambac Assurance and (ii) to pay principal upon

Obligations surrendered to the Insurance Trustee by the registered owners of Obligations entitled to receive full or partial principal payments from Ambac Assurance

(d) the Trustee or Paying Agent if any shall at the time it provides notice to Ambac Assurance pursuant to (a) above notify registered owners of Obligations entitled to receive the payment of principal or interest thereon from Ambac Assurance (i) as to the fact of such entitlement (ii) that Ambac Assurance will remit to them all or a part of the interest payments next coming due upon proof of Holder entitlement to interest payments and delivery to the Insurance Trustee in form satisfactory to the Insurance Trustee of an appropriate assignment of the registered owner's right to payment (iii) that should they be entitled to receive full payment of principal from Ambac Assurance they must surrender their Obligations (along with an appropriate instrument of assignment in form satisfactory to the Insurance Trustee to permit ownership of such Obligations to be registered in the name of Ambac Assurance) for payment to the Insurance Trustee and not the Trustee or Paying Agent, if any and (iv) that should they be entitled to receive partial payment of principal from Ambac Assurance they must surrender their Obligations for payment thereon first to the Trustee or Paying Agent, if any who shall note on such Obligations the portion of the principal paid by the Trustee or Paying Agent, if any and then along with an appropriate instrument of assignment in form satisfactory to the Insurance Trustee to the Insurance Trustee which will then pay the unpaid portion of principal

(e) in the event that the Trustee or Paying Agent if any has notice that any payment of principal or interest on an Obligation which has become Due for Payment and which is made to a Holder by or on behalf of the Obligor has been deemed a preferential transfer and theretofore recovered from its registered owner pursuant to the United States Bankruptcy Code by a trustee in bankruptcy in accordance with the final nonappealable order of a court having competent jurisdiction the Trustee or Paying Agent, if any shall at the time Ambac Assurance is notified pursuant to (a) above notify all registered owners that in the event that any registered owner's payment is so recovered such registered owner will be entitled to payment from Ambac Assurance to the extent of such recovery if sufficient funds are not otherwise available and the Trustee or Paying Agent, if any shall furnish to Ambac Assurance its records evidencing the payments of principal of and interest on the Obligations which have been made by the Trustee or Paying Agent, if any and subsequently recovered from registered owners and the dates on which such payments were made

(f) in addition to those rights granted Ambac Assurance under this [Financing Document] Ambac Assurance shall to the extent it makes payment of principal or interest on Obligations become subrogated to the rights of the recipients of such payments in accordance with the terms of the Financial Guaranty Insurance Policy and to evidence such subrogation (i) in the case of subrogation as to claims for past due interest the Trustee or Paying Agent if any shall note Ambac Assurance's rights as subrogee on the registration books of the Obligor maintained by the Trustee or Paying Agent, if any upon receipt from Ambac Assurance of proof of the payment of interest thereon to the registered owners of the Obligations and (ii) in the case of subrogation as to claims for past due principal the Trustee or Paying Agent, if any shall note Ambac Assurance's rights as subrogee on the registration books of the Obligor maintained by the Trustee or Paying Agent, if any upon surrender of the Obligations by the registered owners thereof together with proof of the payment of principal thereof

EXHIBIT G

TRUSTEE-RELATED PROVISIONS

With respect to transactions involving a trustee or paying agent, Ambac requires that the following provisions be incorporated into the Financing Document. Please note that unless otherwise required by Ambac, if the financing at hand does not contemplate a trustee or paying agent, these provisions may be disregarded.

- 1 The Trustee (or Paying Agent) may be removed at any time at the request of Ambac Assurance for any breach of the Trust set forth herein.
- 2 Ambac Assurance shall receive prior written notice of any Trustee (or Paying Agent) resignation.
- 3 Every successor Trustee appointed pursuant to this Section shall be a trust company or bank in good standing located in or incorporated under the laws of the State, duly authorized to exercise trust powers and subject to examination by federal or state authority, having a reported capital and surplus of not less than \$75,000,000 and acceptable to Ambac Assurance. Any successor Paying Agent, if applicable, shall not be appointed unless Ambac approves such successor in writing.
- 4 Notwithstanding any other provision of this [Financing Document], in determining whether the rights of the Holders will be adversely affected by any action taken pursuant to the terms and provisions of this [Financing Document], the Trustee (or Paying Agent) shall consider the effect on the Holders as if there were no Financial Guaranty Insurance Policy.
- 5 Notwithstanding any other provision of this [Financing Document], no removal, resignation or termination of the Trustee (or Paying Agent) shall take effect until a successor acceptable to Ambac shall be appointed.

EXHIBIT H

INTERESTED PARTIES

In addition to the provisions listed above, Ambac also requires the following provision be incorporated into the Financing Document:

A. Ambac As Third Party Beneficiary

To the extent that this [Financing Document] confers upon or gives or grants to Ambac any right, remedy or claim under or by reason of this [Financing Document], Ambac is hereby explicitly recognized as being a third party beneficiary hereunder and may enforce any such right, remedy or claim conferred, given or granted hereunder.

B. Parties Interested Herein

Nothing in this [Financing Document] expressed or implied is intended or shall be construed to confer upon or to give or grant to any person or entity other than the Obligor, the Trustee, Ambac Assurance, the Paying Agent, if any, and the registered owners of the Obligations, any right, remedy or claim under or by reason of this [Financing Document] or any covenant, condition or stipulation hereof, and all covenants, stipulations, promises and agreements in this [Financing Document] contained by and on behalf of the Obligor shall be for the sole and exclusive benefit of the Obligor, the Trustee, Ambac Assurance, the Paying Agent, if any, and the registered owners of the Obligations.

EXHIBIT I

AMBAC ASSURANCE OFFICIAL STATEMENT DISCLOSURE AND SUGGESTED LANGUAGE
FOR THE NOTICE OF SALE, OBLIGATION LEGEND COVER PAGE OF OFFICIAL
STATEMENT

AMBAC ASSURANCE OFFICIAL STATEMENT DISCLOSURE

Payment Pursuant to Financial Guaranty Insurance Policy

Ambac Assurance has made a commitment to issue a financial guaranty insurance policy (the Financial Guaranty Insurance Policy) relating to the Obligations effective as of the date of issuance of the Obligations. Under the terms of the Financial Guaranty Insurance Policy, Ambac Assurance will pay to The Bank of New York, New York, New York or any successor thereto (the Insurance Trustee) that portion of the principal of and interest on the Obligations which shall become Due for Payment but shall be unpaid by reason of Nonpayment by the Obligor (as such terms are defined in the Financial Guaranty Insurance Policy). Ambac Assurance will make such payments to the Insurance Trustee on the later of the date on which such principal and interest becomes Due for Payment or within one business day following the date on which Ambac Assurance shall have received notice of Nonpayment from the [Trustee/Paying Agent/Bond Registrar]. The insurance will extend for the term of the Obligations and, once issued, cannot be canceled by Ambac Assurance.

The Financial Guaranty Insurance Policy will insure payment only on stated maturity dates and on mandatory sinking fund installment dates in the case of principal and on stated dates for payment in the case of interest. If the Obligations become subject to mandatory redemption and insufficient funds are available for redemption of all outstanding Obligations, Ambac Assurance will remain obligated to pay principal of and interest on outstanding Obligations on the originally scheduled interest and principal payment dates including mandatory sinking fund redemption dates. In the event of any acceleration of the principal of the Obligations, the insured payments will be made at such times and in such amounts as would have been made had there not been an acceleration.

In the event the [Trustee/Paying Agent/Bond Registrar] has notice that any payment of principal of or interest on an Obligation which has become Due for Payment and which is made to a Holder by or on behalf of the Obligor has been deemed a preferential transfer and theretofore recovered from its registered owner pursuant to the United States Bankruptcy Code in accordance with a final nonappealable order of a court of competent jurisdiction, such registered owner will be entitled to payment from Ambac Assurance to the extent of such recovery if sufficient funds are not otherwise available.

The Financial Guaranty Insurance Policy does **not** insure any risk other than Nonpayment as defined in the Policy. Specifically, the Financial Guaranty Insurance Policy does **not** cover:

1. payment on acceleration as a result of a call for redemption (other than mandatory sinking fund redemption) or as a result of any other advancement of maturity;
2. payment of any redemption, prepayment or acceleration premium;
3. nonpayment of principal or interest caused by the insolvency or negligence of any Trustee, Paying Agent or Bond Registrar, if any.

If it becomes necessary to call upon the Financial Guaranty Insurance Policy, payment of principal requires surrender of Obligations to the Insurance Trustee together with an appropriate instrument of assignment so as to permit ownership of such Obligations to be registered in the name of Ambac Assurance to the extent of the payment under the Financial Guaranty Insurance Policy. Payment of interest pursuant to the Financial Guaranty Insurance Policy requires proof of Holder entitlement to interest payments and an appropriate assignment of the Holder's right to payment to Ambac Assurance.

Upon payment of the insurance benefits Ambac Assurance will become the owner of the Obligation appurtenant coupon if any or right to payment of principal or interest on such Obligation and will be fully subrogated to the surrendering Holder's rights to payment.

FOR TRANSACTIONS INVOLVING AUCTION RATE SECURITIES

The Financial Guaranty Insurance Policy does not insure against loss relating to payments made in connection with the sale of Obligations at Auctions or losses suffered as a result of a Holder's inability to sell Obligations

FOR TRANSACTIONS INVOLVING VARIABLE RATE OBLIGATIONS

The Financial Guaranty Insurance Policy does not insure against loss relating to payments of the purchase price of Obligations upon tender by a registered owner thereof or any preferential transfer relating to payments of the purchase price of Obligations upon tender by a registered owner thereof

ADDITIONAL PARAGRAPH FOR CALIFORNIA TRANSACTIONS

In the event that Ambac Assurance were to become insolvent, any claims arising under the Policy would be excluded from coverage by the California Insurance Guaranty Association established pursuant to the laws of the State of California

ADDITIONAL PARAGRAPH FOR NEW YORK TRANSACTIONS

The insurance provided by the Financial Guaranty Insurance Policy is not covered by the property/casualty insurance security fund specified by the insurance laws of the State of New York.

ADDITIONAL PARAGRAPH FOR FLORIDA TRANSACTIONS

The insurance provided by the Financial Guaranty Insurance Policy is not covered by the Florida Insurance Guaranty Association

ADDITIONAL PARAGRAPH FOR CONNECTICUT TRANSACTIONS

In the event that Ambac were to become insolvent any claims arising under the Financial Guaranty Insurance Policy would be excluded from coverage by the Connecticut Insurance Guaranty Association.

ADDITIONAL PARAGRAPH FOR OKLAHOMA TRANSACTIONS

WARNING Any person who knowingly and with intent to injure defrauds or deceives any insurer makes any claim for the proceeds of an insurance policy containing any false incomplete or misleading information is guilty of a felony

ADDITIONAL PARAGRAPH FOR VIRGINIA TRANSACTIONS

The Policy shall not be deemed invalid due to the absence of the required signature or countersignature

Ambac Assurance Corporation

Ambac Assurance Corporation (Ambac Assurance) is a Wisconsin domiciled stock insurance corporation regulated by the Office of the Commissioner of Insurance of the State of Wisconsin and licensed to do business in 50 states the District of Columbia the Territory of Guam the Commonwealth of Puerto Rico and the U S Virgin Islands with admitted assets of approximately \$6,993,000,000 (unaudited) and statutory

capital of \$4 195,000,000 (unaudited) as of September 30 2003 Statutory capital consists of Ambac Assurance's policyholders' surplus and statutory contingency reserve Standard & Poor's Credit Markets Services a Division of The McGraw Hill Companies Moody's Investors Service and Fitch Ratings have each assigned a triple A financial strength rating to Ambac Assurance

Ambac Assurance has obtained a ruling from the Internal Revenue Service to the effect that the insuring of an obligation by Ambac Assurance will not affect the treatment for federal income tax purposes of interest on such obligation and that insurance proceeds representing maturing interest paid by Ambac Assurance under policy provisions substantially identical to those contained in its Financial Guaranty insurance policy shall be treated for federal income tax purposes in the same manner as if such payments were made by the Obligor of the Obligations [THE FOLLOWING MUST BE INCLUDED IN ANNUAL APPROPRIATION LEASE TRANSACTIONS No representation is made by Ambac Assurance regarding the federal income tax treatment of payments that are made by Ambac Assurance under the terms of the Policy due to nonappropriation of funds by the Lessee.]

Ambac Assurance makes no representation regarding the Obligations or the advisability of investing in the Obligations and makes no representation regarding nor has it participated in the preparation of the Official Statement other than the information supplied by Ambac Assurance and presented under the heading

Available Information

The parent company of Ambac Assurance Ambac Financial Group Inc (the Company) is subject to the informational requirements of the Securities Exchange Act of 1934 as amended (the Exchange Act) and in accordance therewith files reports proxy statements and other information with the Securities and Exchange Commission (the SEC) These reports proxy statements and other information can be read and copied at the SEC's public reference room at 450 Fifth Street, N.W. Washington, D.C. 20549 Please call the SEC at 1 800 SEC 0330 for further information on the public reference room The SEC maintains an internet site at <http://www.sec.gov> that contains reports proxy and information statements and other information regarding companies that file electronically with the SEC including the Company These reports proxy statements and other information can also be read at the offices of the New York Stock Exchange Inc (the NYSE) 20 Broad Street, New York, New York 10005

Copies of Ambac Assurance's financial statements prepared in accordance with statutory accounting standards are available from Ambac Assurance The address of Ambac Assurance's administrative offices and its telephone number are One State Street Plaza, 19th Floor New York, New York, 10004 and (212) 668-0340

Incorporation of Certain Documents by Reference

The following documents filed by the Company with the SEC (File No. 1 10777) are incorporated by reference in this Official Statement:

- 1) The Company's Current Report on Form 8 K dated January 23 2003 and filed on January 24 2003
- 2) The Company's Current Report on Form 8 K dated February 25 2003 and filed on February 28 2003
- 3) The Company's Current Report on Form 8 K dated February 25 2003 and filed on March 4 2003
- 4) The Company's Current Report on Form 8 K dated March 18 2003 and filed on March 20 2003

- 5) The Company's Current Report on Form 8-K dated March 19, 2003 and filed on March 26, 2003
- 6) The Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2002 and filed on March 28, 2003
- 7) The Company's Current Report on Form 8-K dated March 25, 2003 and filed on March 31, 2003
- 8) The Company's Current Report on Form 8-K dated April 17, 2003 and filed on April 21, 2003,
- 9) The Company's Quarterly Report on Form 10-Q for the fiscal quarterly period ended March 31, 2003 and filed on May 15, 2003
- 10) The Company's Current Report on Form 8-K dated July 17, 2003 and filed on July 18, 2003
- 11) The Company's Quarterly Report on Form 10-Q for the fiscal quarterly period ended June 30, 2003 and filed on August 14, 2003
- 12) The Company's Current Report on Form 8-K dated October 16, 2003 and filed on October 17, 2003
- 13) The Company's Quarterly Report on Form 10-Q for the fiscal quarterly period ended September 30, 2003 and filed on November 14, 2003
- 14) The Company's Annual Report amendment No. 1 on Form 10-K/A for the fiscal year ended December 31, 2002 and filed on November 19, 2003 and
- 15) The Company's Current Report on Form 8-K dated January 28, 2004 and filed on January 30, 2004

All documents subsequently filed by the Company pursuant to the requirements of the Exchange Act after the date of this Official Statement will be available for inspection in the same manner as described above in "Available Information"

NOTICE OF SALE

Ambac Assurance Corporation ("Ambac Assurance") has issued a commitment for a financial guaranty insurance policy relating to the Obligations. All bids may be conditioned upon the issuance, effective as of the date on which the Obligations are issued, of a policy of insurance by Ambac Assurance insuring the payment when due of principal of and interest on the Obligations. Each Obligation will bear a legend referring to the insurance. The purchaser, holder or owner is not authorized to make any statements concerning the insurance beyond those set out here and in the Bond Legend without the approval of Ambac Assurance.

BOND LEGEND

Financial Guaranty Insurance Policy No. __ (the "Policy") with respect to payments due for principal of and interest on this Bond has been issued by Ambac Assurance Corporation ("Ambac Assurance") The Policy has been delivered to The Bank of New York, New York, New York, as the Insurance Trustee under said Policy and will be held by such Insurance Trustee or any successor insurance trustee. The Policy is on file and available for inspection at the principal office of the Insurance Trustee and a copy thereof may be secured from Ambac Assurance or the Insurance Trustee. All payments required to be made under the Policy shall be made in

13

0615

SAG05607

accordance with the provisions thereof. The owner of this Bond acknowledges and consents to the subrogation rights of Ambac Assurance as more fully set forth in the Policy.

COVER PAGE OF OFFICIAL STATEMENT

Payment of the principal of and interest on the Obligations when due will be insured by a financial guaranty insurance policy to be issued by Ambac Assurance Corporation simultaneously with the delivery of the Obligations.

EXHIBIT J

FORM OF THE AMBAC LEGAL OPINION

Date

Ladies and Gentlemen

This opinion has been requested of the undersigned a Vice President and an Assistant General Counsel of Ambac Assurance Corporation a Wisconsin stock insurance company (Ambac Assurance) in connection with the issuance by Ambac Assurance of a certain Financial Guaranty Insurance Policy and endorsement thereto effective as of the date hereof (the Policy) insuring \$> in aggregate principal amount of the > (the Obligor) > dated > (the Obligations)

In connection with my opinion herein I have examined the Policy such statutes documents and proceedings as I have considered necessary or appropriate under the circumstances to render the following opinion including without limiting the generality of the foregoing certain statements contained in the Official Statement of the Obligor dated > relating to the Obligations (the Official Statement) under the headings > and >

Based upon the foregoing and having regard to legal considerations I deem relevant I am of the opinion that

- 1 Ambac Assurance is a stock insurance company duly organized and validly existing under the laws of the State of Wisconsin and duly qualified to conduct an insurance business in the State of >
- 2 Ambac Assurance has full corporate power and authority to execute and deliver the Policy and the Policy has been duly authorized executed and delivered by Ambac Assurance and constitutes a legal valid and binding obligation of Ambac Assurance enforceable in accordance with its terms except to the extent that the enforceability (but not the validity) of such obligation may be limited by any applicable bankruptcy insolvency liquidation rehabilitation or other similar law or enactment now or hereafter enacted affecting the enforcement of creditors rights
- 3 The execution and delivery by Ambac Assurance of the Policy will not, and the consummation of the transactions contemplated thereby and the satisfaction of the terms thereof will not conflict with or result in a breach of any of the terms conditions or provisions of the Certificate of Authority Articles of Incorporation or By Laws of Ambac Assurance or any restriction contained in any contract, agreement or instrument to which Ambac Assurance is a party or by which it is bound or constitute a default under any of the foregoing
- 4 Proceedings legally required for the issuance of the Policy have been taken by Ambac Assurance and licenses orders consents or other authorizations or approvals of any governmental boards or bodies legally required for the enforceability of the Policy have been obtained, any proceedings not taken and any licenses authorizations or approvals not obtained are not material to the enforceability of the Policy
- 5 The statements contained in the Official Statement under the heading > insofar as such statements constitute summaries of the matters referred to therein accurately reflect and fairly present the information purported to be shown and, insofar as such statements describe Ambac Assurance fairly and accurately describe Ambac Assurance

6 The form of Policy contained in the Official Statement under the heading > is a true and complete copy of the form of Policy

The opinions expressed herein are solely for your benefit, and may not be relied upon by any other person

Very truly yours

Vice President and
Assistant General Counsel

EXHIBIT K

CERTIFICATE OF OBLIGATION INSURER

In connection with the issuance of > in aggregate principal amount of (the Obligor") > (the Obligations") Ambac Assurance Corporation (Ambac) is issuing a Financial Guaranty insurance policy (the Insurance Policy) guaranteeing the payment of principal and interest when due on the Obligations all as more fully set out in the Insurance Policy

On behalf of Ambac the undersigned hereby certifies that

(i) the Insurance Policy is an unconditional and recourse obligation of Ambac (enforceable by or on behalf of the holders of the Obligations) to pay the scheduled payments of interest and principal on the Obligations in the event of a Nonpayment as defined in the Insurance Policy

(ii) the insurance premium of \$ _____ was determined in arm's length negotiations in accordance with our standard procedures is required to be paid as a condition to the issuance of the Insurance Policy and represents a reasonable charge for the transfer of credit risk

(iii) no portion of such premium represents a payment for any direct or indirect services other than the transfer of credit risk, including costs of underwriting or remarketing the Obligations or the cost of insurance for casualty of Obligation financed property,

(iv) we are not co-obligors on the Obligations and do not reasonably expect that we will be called upon to make any payment under the Insurance Policy

(v) the Obligor is not entitled to a refund for the Insurance Policy in the event that the Obligations are retired prior to their stated maturity and

(vi) we would not have issued the Insurance Policy in the absence of a debt service reserve fund of the size and type established by the documents pursuant to which the Obligations are being issued and it is normal and customary to require a debt service reserve fund of such a size and type in similar transactions

IN WITNESS WHEREOF, Ambac Assurance Corporation has caused this certificate to be executed in its name on this > day of > 200_ by one of its officers duly authorized as of such date

AMBAC ASSURANCE CORPORATION

By _____
Vice President and Assistant
General Counsel

17

0619

SAG05611

EXHIBIT L

AMBAC ASSURANCE CORPORATION WIRING INSTRUCTIONS

Citibank N.A.
ABA NO 021000089
For Ambac Assurance Corporation
A/C No 40609486
Attention [Closing Coordinator], 212-208-3---

*** Please indicate Policy Number on wire and call your closing coordinator with your wire reference number on the morning of closing***

EXHIBIT M

**REPRESENTATIONS, WARRANTIES AND COVENANTS
FOR REVISED ARTICLE 9 COLLATERAL**

1 This [Financing Agreement] creates a valid and binding [pledge of/assignment of/lien on and/or security interest in] the [described collateral] in favor of the [Trustee/Bondholders] as security for payment of the [Obligations] enforceable by the [Trustee/Bondholders] in accordance with the terms hereof

2 Under the laws of the [state of issuer] (1) such [pledge of assignment/lien and/or security interest] (2) and each pledge assignment, lien or other security interest made to secure any prior obligations of [Obligor] which by the terms hereof ranks on a parity with or prior to the [pledge/assignment/lien and/or security interest] granted hereby is and shall be prior to any judicial lien hereafter imposed on such collateral to enforce a judgment against the [Obligor] on a simple contract By the date of issue of the [Obligations] the [Obligor] will have filed all financing statements describing and transferring such possession or control over such collateral (and for so long as any [Obligation] is outstanding the [Obligor] will file continue and amend all such financing statements and transfer such possession and control) as may be necessary to establish and maintain such priority in each jurisdiction in which the [Obligor] is organized or such collateral may be located or that may otherwise be applicable pursuant to Uniform Commercial Code §§9 301--9 306 of such jurisdiction

3 The [Obligor] has not heretofore made a pledge of granted a lien on or security interest in or made an assignment or sale of such collateral that ranks on a parity with or prior to the [pledge/assignment/lien and/or security interest] granted hereby [except for the [pledge/assignment/lien and/or security interest] granted to secure the [Party Obligations]] The [Obligor] shall not hereafter make or suffer to exist any pledge or assignment of lien on or security interest in such collateral that ranks prior to or on a parity with the [pledge/assignment/lien and/or security interest] granted hereby or file any financing statement describing any such pledge assignment, lien or security interest except as expressly permitted hereby

Stevens & Wilkinson
ARCHITECTURAL ENGINEERING CONSULTANTS

**Columbia Convention Center Hotel
Architectural & Engineering Fees
Cost Estimate
Revised - July 21, 2003**

Estimated A/E Fees During 90-Day Period \$450,000.00
Ending October 13, 2003

Estimated A/E Fees to be Incurred Weekly
After October 13, 2003 (anticipated
Bond closing date) \$ 60,000.00/Week

Estimated Fees for Special Consultants
During 90-Day Period \$200,000.00

Estimated Fees for Special Consultants
Incurred Weekly after October 13, 2003 \$15,000.00/Week

Stevens & Wilkinson of South Carolina, Inc.
P.O. Drawer 7 Columbia, SC 29202-0007 1501 Main Street Columbia, SC 29201 803 765 0320 Fax 803 254 6209

0621

1-1691



Stevens & Wilkinson

ARCHITECTURE ENGINEERING INTERIORS

December 18, 2003
Invoice No. 384308
Job No. 03028.00

City of Columbia
Attn: Shawn Epps
P.O. Box 147
Columbia, SC 29217

FOR: Columbia Hilton Hotel

PROFESSIONAL SERVICES FOR THE PERIOD JULY 10, 2003 THROUGH
DECEMBER 15, 2003

	<u>Fees</u>	<u>Fee Earned</u>
Basic Project Fee	2,203,000.00	588,006.10
Early Site Work	<u>34,000.00</u>	<u>34,000.00</u>
Subtotal	2,237,000.00	622,006.10
 I.D. Fees	 357,000.00	 <u>75,078.69</u>

TOTAL AMOUNT DUE THIS INVOICE \$ 697,084.79

NOTICE SECTION 29-6-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, AS
AMENDED, APPLIES TO THE PAYMENT REQUESTED HEREIN.

Stevens & Wilkinson of South Carolina, Inc.
P.O. Drawer 7, Columbia, SC 29202-0007 1501 Main Street, Columbia, SC 29201 803.765.0320 Fax 803.254.6209

0622

1-943



CITY OF COLUMBIA
P.O. Box 147
Columbia, South Carolina 29202

VENDOR ID	VENDOR NAME	CHECK DATE	CHECK NO
V003755	STEVENS AND WILKINSON	12/29/03	00011636

INVOICE NUMBER	INVOICE DATE	P.O. NUMBER	OFFICE REFERENCE NUMBER	DESCRIPTION	CF MEMO DISCOUNT	NET AMOUNT
3 18 03	12/22/03	P009728		Columbia Hilton Hotel	0 00	697 084 79

TOTAL 697 084 79



CITY OF COLUMBIA

P.O. Box 147
Columbia, South Carolina 29202

WACHOVIA BANK OF SOUTH CAROLINA N.A.
COLUMBIA, SC

DATE 12/29/03

CHECK NO 00011636

07 778
632

AP ACCOUNT

***697084 79

PAY SIX Hundred NINETY SEVEN thousand EIGHTY FOUR Dollars and SEVENTY NINE Cents

THIS CHECK WILL NOT BE PAID IF PRESENTED TO THE TREASURER AFTER THE EXPIRATION OF NINETY (90) DAYS FROM DATE HEREOF

TO THE
01

STEVENS AND WILKINSON,
POST OFFICE DRAWER 7
COLUMBIA, SC 29202

[Signature]
[Signature]

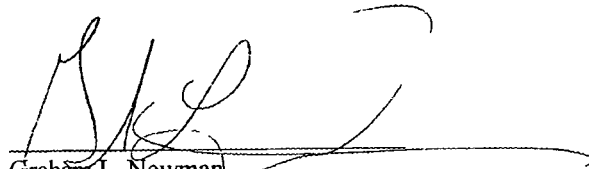
⑈00011636⑈ ⑆053207766⑆ 2000020327622⑈

Harpootlian 0908

0623

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. Further, the undersigned counsel certifies that the Record on Appeal complies with the order of the Supreme Court dated August 13, 2007.



Graham L. Newman
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

November 4, 2010
Columbia, South Carolina

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2005-CP-40-3361

RECEIVED

DEC 13 2010

SC Court of Appeals

Stevens & Wilkinson of South Carolina Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC,
and Turner Construction Company

Plaintiffs,

Of Whom
Stevens & Wilkinson of South Carolina Inc is

Appellant

vs

Paul C 'Bo' Aughtry III, Windsor/Aughtry Co , Inc ,
Vista Hotel Partners LLC Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom
City of Columbia, South Carolina is

Respondent

SUPPLEMENTAL RECORD ON APPEAL

Richard A Harpootlian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Post Office Box 1090
Columbia, SC 29202
Telephone (803) 252 4848

ATTORNEYS FOR APPELLANT

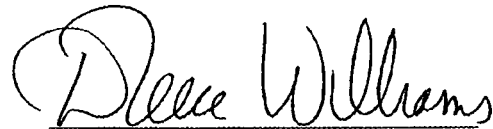
Michael W Tighe
Richard C Detwiler
D Reece Williams, III
Kathleen M McDaniel
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia SC 29202-1390
Telephone (803) 404-6900

ATTORNEYS FOR RESPONDENT

INDEX

Deposition transcript of John Lumpkin, p 70

625

A handwritten signature in cursive script that reads "D. Reece Williams III". The signature is written in black ink and is positioned above a horizontal line.

Michael W Tighe
D Reece Williams III
Richard C Detwiler
Kathleen M McDaniel
CALLISON TIGHE & ROBINSON LLC
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone (803) 404 6900
Facsimile (803) 404 6902
ATTORNEYS FOR RESPONDENT

December 13, 2010
Columbia, South Carolina

1 Q And whose decision would it be to make
2 the determination whether or not the hotel project
3 was feasible?

4 A Well, I think this -- I mean, it says
5 the City, and that's how we understood it But,
6 again, based on going forward to determine the
7 feasibility -- and that's what we were doing Part
8 of what we now began to do is look at the
9 feasibility through a PKF study and Hilton looking
10 at it and us then running real numbers to see if we
11 could get to a real number that did have coverages
12 and the like that made this a feasible project

13 Q But at any point during this process
14 the City had a right to look at it with a critical
15 eye and determine whether or not in its view for
16 its purposes the project was feasible Is that a
17 fair statement?

18 A I think it's a fair statement, but,
19 again, as we said, it moved in good faith I
20 said -- and I don't say -- I don't mean -- I'm not
21 suggesting that the City operated other than in
22 good faith, but in terms of our going forward into
23 this transaction -- and we had -- we had a very
24 positive relationship with the City staff in all
25 the meetings we had We all worked together

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James Jr Circuit Court Judge

Case No 2005-CP 40-3361

Stevens & Wilkinson of South Carolina Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC
and Turner Construction Company

Plaintiffs

Of Whom
Stevens & Wilkinson of South Carolina Inc is

Appellant

vs

Paul C 'Bo' Aughttry III Windsor/Aughttry Co Inc ,
Vista Hotel Partners LLC, Hilton Hotels Corporation and
the City of Columbia South Carolina.

Defendants

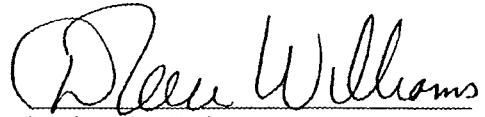
Of Whom
City of Columbia South Carolina is

Respondent

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all
materials proposed to be included by any of the parties and not any other material

[Signature to follow on next page]



Michael W Tighe

D Reece Williams III

Richard C Detwiler

Kathleen M McDaniel

CALLISON TIGHE & ROBINSON LLC

Post Office Box 1390

Columbia, South Carolina 29202-1390

Telephone (803) 404-6900

Facsimile (803) 404-6902

ATTORNEYS FOR RESPONDENT

December 13 2010
Columbia South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 05-CP-40-3361

Stevens & Wilkinson of South Carolina, Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC
and Turner Construction Company

Plaintiffs,

Of Whom
Stevens & Wilkinson of South Carolina, Inc , is

Appellant,

vs

Paul C Bo' Aughttry III, Windsor/Aughttry Co , Inc ,
Vista Hotel Partners, LLC, Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom
City of Columbia, South Carolina is

Respondent

FINAL BRIEF OF APPELLANT

RECEIVED
JUL 16 2010
SC Court of Appeals

Richard A Harpootlian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Post Office Box 1090
Columbia South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	iii
Issues on Appeal	1
I Did the trial court err in finding that there was no scintilla of evidence supporting the existence of a contract between Stevens & Wilkinson and the City of Columbia within the Memorandum of Understanding where material facts were in dispute as to whether the language of the document indicated contractual intent, the parties subsequent acts were consistent with the existence of a contract, and no conditions precedent were present? Issues on Appeal	1
II Did the trial court err in finding that there was no scintilla of evidence giving rise to a claim of promissory estoppel where the City promised to pay Stevens & Wilkinson for architectural services both through the Memorandum of Understanding and a subsequent vote of City Council and Stevens & Wilkinson reasonably and foreseeably relied upon these promises? existence of a contract, and no conditions precedent were present? Issues on Appeal	1
Statement of the Case	1
Statement of the Facts	2
Argument	5
I The trial court erred in finding that there was no scintilla of evidence supporting the existence of a contract between Stevens & Wilkinson and the City of Columbia within the Memorandum of Understanding because material are in dispute as to whether the language of the document indicated contractual intent, the parties subsequent acts were consistent with the existence of a contract, and no conditions precedent were presentArgument	5

- a The trial court erroneously presumed that no facts material to the question of the existence of a contract were in dispute 6
- b The surrounding circumstances of the MOU transaction demonstrate evidence of contractual intent 7
- c Conditions precedent did not exist within the MOU 16
- d All terms material to the contract between the City and Stevens & Wilkinson were agreed upon 22

II The trial court erred in finding there was no scintilla of evidence giving rise to a claim of promissory estoppel where the City promised to pay Stevens & Wilkinson for architectural services both through the Memorandum of Understanding and a subsequent vote of City Council and Stevens & Wilkinson reasonably and foreseeably relied upon those promises 26

a Representations contained within the MOU and the parties' subsequent actions in conformity therewith were unambiguous promises upon which Stevens & Wilkinson reasonably and foreseeably relied 27

b Rule 8, SCRCP, permits Stevens & Wilkinson to take alternative positions as to whether the July 30, 2003 vote of City Council gives rise to contractual rights or a claim of promissory estoppel 34

Conclusion 35

TABLE OF AUTHORITIES

CASES

<i>Aperm of South Carolina v Roof</i> , 290 S C 442, 351 S E 2d 171 (Ct App 1986)	23
<i>Armstrong v Collins</i> , 366 S C 204, 621 S E 2d 368 (Ct App 2005)	5, 35
<i>Ballenger Corp v City of Columbia</i> 286 S C 1, 331 S E 2d 365 (Ct App 1985)	17, 18
<i>Baylor v Bath</i> , 189 S C 269, 1 S E 2d 139 (1938)	7
<i>Benya v Gamble</i> , 282 S C 624, 321 S E 2d 57 (Ct App 1984)	6
<i>Capital City Garage & Tire Co v Electric Storage Battery Co</i> 113 S C 352 101 S E 838 (1920)	6
<i>Carolina Aviation Inc v Glens Falls Ins Co</i> 214 S C 222 51 S E 2d 757 (1949)	22
<i>Caulder v Knox</i> 251 S C 337 162 S E 2d 262 (1968)	7
<i>Conner v City of Forest Acres</i> , 348 S C 454 560 S E 2d 606 (2002)	8 12
<i>Edens v Laurel Hill Inc</i> 271 S C 360, 247 S E 2d 434 (1978)	24 25
<i>Farr v Barnes Freight Lines</i> 97 Ga App 36 101 S E 2d 906 (Ga Ct App 1958)	23
<i>Finger v Finger</i> 270 S C 244, 241 S E 2d 746 (1978)	11
~~<i>Grant v Magnolia Manor-Greenwood Inc</i>, 383 S C 125, 678 S E 2d 435 (2009)~~	~~22~~
<i>Hendricks v Clemson Univ</i> 353 S C 449, 578 S E 2d 711 (2003)	5
<i>HK New Plan Exchange Property Owner I LLC v Coker</i> , 375 S C 18, 649 S E 2d 181 (Ct App 2007)	9
<i>J A Fay & Egan Co v Mims</i> , 151 S C 484, ___, 149 S E 246 (1929)	9
<i>Keith v River Consulting Inc</i> 365 S C 500, 618 S E 2d 302 (Ct App 2005)	22, 25
<i>M & M Group Inc v Holmes</i> , 379 S C 468, 666 S E 2d 262 (Ct App 2008)	8 17
<i>McPeters v Yeargin Const Co Inc</i> , 290 S C 327, 350 S E 2d 208 (Ct App 1986)	7, 24

<i>Ne Drilling Inc v Inner Space Services Inc</i>	243 F 3d 25 (1st Cir 2001)	21
<i>Plantation A D LLC v Gerald Builders of Conway Inc</i>	386 S C 198 687 S E 2d 714 (Ct App 2009)	17 19
<i>Player v Chandler</i>	299 S C 101, 382 S E 2d 891 (1989)	22
<i>Rushing v McKinney</i>	370 S C 280, 633 S E 2d 917 (Ct App 2006)	27
<i>Satcher v Satcher</i>	351 S C 477, 570 S E 2d 535 (Ct App 2002)	28
<i>Sauner v Pub Serv</i>	366 S C 204, 621 S E 2d 368 (Ct App 2005)	5
<i>Silver v Aabstract Pools & Spas Inc</i>	376 S C 585, 658 S E 2d 539 (Ct App 2008)	12
<i>Small v Springs Industries Inc</i>	292 S C 481, 357 S E 2d 452 (1987)	8
<i>Touche Ross & Co v DASD Corp</i>	162 Ga App 438 292 S E 2d 84 (Ga 1982)	23
<i>Valjar Inc v Maritime Terminals Inc</i>	220 Va 1015, 265 S E 2d 734 (Va 1980)	6
<i>W E Gilbert & Associates v South Carolina Nat Bank</i>	285 S C 421, 330 S E 2d 307, (Ct App 1985)	6, 23
<i>Wheeler v Globe Rutgers Fire Ins Co of City of NY</i>	125 S C 320, 118 S E 609 (1923)	10
<i>Woods v State</i>	314 S C 501 431 S E 2d 260 (Ct App 1993)	27
<i>Worley v Yarborough Ford Inc</i>	317 S C 206, 452 S E 2d 622 (Ct App 1994)	17, 18
<i>Wright v Trask</i>	329 S C 170 495 S E 2d 222 (Ct App 1997)	7

OTHER AUTHORITIES

13 <i>Williston on Contracts</i> § 38 9 (4th ed)	9, 20
17 <i>AmJur 2d Contracts</i> § 76 (1964)	23
17 <i>AmJur 2d Contracts</i> § 77 (1964)	23
17 <i>C J S Contracts</i> § 36(2)(c)	24
17A <i>Am Jur 2d Contracts</i> § 471 (1991)	19
17A <i>C J S Contracts</i> § 611a at 1225 (1963)	6

17A C J S Contracts §338 (1963)	18
Restatement (Second) of Contracts § 245 (1981)	21
Rule 8 SCRCF	34

ISSUES ON APPEAL

- I Did the trial court err in finding that there was no scintilla of evidence supporting the existence of a contract between Stevens & Wilkinson and the City of Columbia within the Memorandum of Understanding where material facts were in dispute as to whether the language of the document indicated contractual intent, the parties subsequent acts were consistent with the existence of a contract, and no conditions precedent were present?**
- II Did the trial court err in finding that there was no scintilla of evidence giving rise to a claim of promissory estoppel where the City promised to pay Stevens & Wilkinson for architectural services both through the Memorandum of Understanding and a subsequent vote of City Council and Stevens & Wilkinson reasonably and foreseeably relied upon these promises?**

STATEMENT OF THE CASE

This action commenced on July 12 2005 in the Richland County Court of Common Pleas Within the original complaint, Appellant Stevens & Wilkinson alleged claims of breach of contract quantum meruit and breach of duty of good faith and fair dealing (R pp 34 - 45) Stevens & Wilkinson amended its complaint on November 14, 2005 to add a claim of estoppel (R pp 46 - 54) On August 3, 2009 Stevens & Wilkinson filed a second amended complaint that combined its causes of action of breach of contract and breach of duty of good faith and fair dealing as well as clarified various factual allegations (R pp 55 - 65)

Respondent City of Columbia moved for summary judgment as to all causes of action on December 15, 2008 (R p 73) The parties presented fully briefed arguments to Judge George C James Jr on August 17, 2009 (R pp 73-291, pp 292-328)

The trial court filed an order granting the Respondent's motion for summary judgment on November 20, 2009 (R pp 7 - 29) The Appellant, pursuant to Rule 59(e), SCRCF filed a motion to alter or amend this order on November 30, 2009 (R pp 329-335) The trial court denied this motion on February 1, 2010 and the Appellant received

written notice of this order on February 4, 2010 (R p 30 - 33) The Appellant appealed the trial court's November 20, 2009 and February 1, 2010 orders on March 5, 2010 (R p 1)

During its pendency before the trial court, this case was consolidated with several other related cases for the purposes of discovery and trial. This consolidation introduced several new entities to the litigation. These entities, however, are not parties to this appeal.

STATEMENT OF THE FACTS

Appellant Stevens & Wilkinson is an architectural firm based primarily in Columbia, South Carolina. On April 17th, 2003, Stevens & Wilkinson entered into an agreement with the City of Columbia and various other parties in the form of a 'Memorandum of Understanding' ('MOU') in which all parties would work to design, fund, and construct a publicly-financed hotel in downtown Columbia (the 'Hotel Project') (R pp 458 - 480). However, on April 2, 2004, after nearly a year of working with Stevens & Wilkinson to prepare a complete set of architectural designs of the hotel, the City canceled the hotel project and eventually awarded a privately-financed contract to a separate group of investors (R pp 552 - 561).

The MOU is a 12-page document that was signed by representatives of Stevens & Wilkinson and the City of Columbia (R pp 458 - 480). Within the MOU, Stevens & Wilkinson and the City created what they termed "mutual promises" (R p 459). Among these promises were the following:

- "The Architect shall develop and implement a design review process that is to provide the City, neighborhood and professional staff input into the design of the Hotel" (R p 463, ¶ VIII 2)

- “The Architect is to be paid a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder’s general expenses and fees (R p 463 ¶ VIII 1)
- “The City agrees to acquire the Hotel Site, satisfy any environmental issues, demolish any existing structures, rezone the land for the Hotel (if required) and convey it to the NPC at cost, funded by Hotel Revenue Bond proceeds.” (R p 461 ¶ V 1)
- “The City is to develop a nearby Parking Facility of approximately 800 spaces.” (R p 461, ¶ V 2)
- “The City is to establish a [non-profit corporation] to issue bonds to finance the Hotel, own the Hotel developed by the Project Team, and retain the Operator for the operation of the Hotel consistent with the terms and conditions of this MOU.” (R p 461 ¶ V 3)

Architectural work on the hotel project began almost immediately after the April 2003 execution of the MOU. Under the MOU, Stevens & Wilkinson was to prepare sufficient architectural documents to permit the full development team to formulate a ‘guaranteed maximum price’ (GMP) for the City for its use in obtaining public financing of the hotel project (R p 365 (pages 79-80), R p 376 (pages 22-23), R p 354 (pages 174-175), R p 456). At the same time and pursuant to the terms of the MOU, the City formulated a non-profit corporation and purchased the land upon which the hotel would be built (R p 379 (page 43), R pp 338-339 (pages 9-10)).

Stevens & Wilkinson completed all architectural work necessary to formulate a GMP by June of 2007 (R p 358 (pages 279 – 280), R p 456). However, in order to facilitate a more rapid progression towards the completion of the hotel project, Stevens & Wilkinson offered to complete the architectural renderings for guaranteed compensation regardless of the success of the pending bond closing (R p 349 (pages 67-68), R p 621).

Stevens & Wilkinson submitted two different estimates for this work. The first totaled \$450,000 and \$60,000 per week after October 13th (the projected date of bond closing) and was limited to Stevens & Wilkinson's individual expenses (R. p. 457). The second estimate totaled \$650,000 through October 13, 2003 and \$75,000 per week thereafter and included additional expenses. Stevens & Wilkinson would be required to pay subcontractors (R. p. 621). On July 30, 2003, the City responded to this offer by approving an allocation of \$650,000 to Stevens & Wilkinson "for Interim architectural design services for a period of 90 days prior to Bond Closing" (R. p. 577).

Bond closing did not proceed as projected on October 13th but Stevens & Wilkinson continued to work in conjunction with the City on finalizing the architectural drawings. On December 18, 2003, Stevens & Wilkinson submitted an invoice to the City for \$697,084.79 for services rendered through December 15th (R. p. 622). The City released a check to Stevens & Wilkinson on December 29, 2003 in the amount of \$697,084.79 (R. p. 623).

Subsequent to this initial payment, Stevens & Wilkinson continued to work closely with the City to prepare a final set of architectural drawings for the proposed hotel. With these completed documents in hand, the Convention Center Hotel Corporation approved the financing of the Hotel Project on February 11, 2004 (R. p. 178). On April 2, 2004, however, the City issued a Request for Proposals for a privately-financed hotel, essentially cancelling the hotel project envisioned within the April 2003 MOU (R. pp. 552 – 561). Beyond the single December 29, 2003 payment, Stevens & Wilkinson received no further compensation for its work performed on the hotel project. This litigation ensued.

ARGUMENT

Stevens & Wilkinson appeals the trial court's grant of summary judgment as to its causes of action for breach of contract and estoppel.¹ For the reasons stated herein, the order of the trial court should be reversed as to these claims.

I The trial court erred in finding that there was no scintilla of evidence supporting the existence of a contract between Stevens & Wilkinson and the City of Columbia within the Memorandum of Understanding because material are in dispute as to whether the language of the document indicated contractual intent, the parties subsequent acts were consistent with the existence of a contract, and no conditions precedent were present

The trial court erred by ruling that the MOU executed between the City of Columbia and Stevens & Wilkinson did not constitute a contract. The required elements of a contract are an offer, acceptance, and valuable consideration.¹ *Armstrong v. Collins*, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005) citing *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury." *Armstrong* at 223, 621 S.E.2d at 377, citing *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003).

The trial court erred, first, by presuming there to be no disputes of material fact concerning the existence of a contract and, based upon that presumption, ruling as a matter of law (R. pp. 13-15). As a result of this misstep, the trial court then found—as a matter of law—that the language of the MOU did not give rise to a contract, conditions precedent existed within the MOU that did not occur, and material terms pertaining to the MOU were not resolved. Because genuine issues of fact exist as to each of these findings

¹ Stevens & Wilkinson possesses a second breach of contract action that is not the subject of this appeal (R. pp. 16-18) and is not appealing the trial court's order granting summary judgment to the City on the claim of quantum meruit.

the trial court's order granting the City summary judgment on Stevens & Wilkinson's breach of contract claim should be reversed

a. The trial court erroneously presumed that no facts material to the question of the existence of a contract were in dispute

As an initial matter, the trial court erred by finding that no genuine issues of fact were in dispute as to whether a contract existed between Stevens & Wilkinson and the City of Columbia. "A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Benya v Gamble*, 282 S C 624, 628, 321 S E 2d 57, 60 (Ct App 1984), citing *Capital City Garage & Tire Co v Electric Storage Battery Co*, 113 S C 352, 101 S E 838 (1920). 17A C J S *Contracts* § 611a at 1225 (1963). Consistent with general summary judgment jurisprudence, South Carolina courts have held that the existence of a contract may be ruled upon as a matter of law "[w]here the material facts concerning the formation of an alleged contract are not in dispute." *W E Gilbert & Associates v South Carolina Nat Bank*, 285 S C 421, 423, 330 S E 2d 307, 309 (Ct App 1985), citing *Valjar Inc v Maritime Terminals Inc*, 220 Va 1015, 1018, 265 S E 2d 734, 736 (Va 1980). The trial court relied upon *W E Gilbert & Associates* in granting the City's motion for summary judgment. (R p 13)

The trial court's finding of no dispute of material fact is mistaken in three major respects: first, the language of the MOU is indicative of the parties' contractual intent; second, witness testimony supports the existence of a contract; third, the subsequent acts of the parties are consistent with the existence of a contract. "As to the existence of the contract itself, generally speaking, the essential elements of any contract are a contractual intent, followed by an actual meeting of the minds of the parties and accompanied by a

valid consideration' *Baylor v Bath* 189 S C 269 1 S E 2d 139 140 (1938) The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses, and subsequent acts are relevant to show whether a contract was intended' *Wright v Trask*, 329 S C 170 178 495 S E 2d 222 226 (Ct App 1997), *quoting Caulder v Knox* 251 S C 337, 344-345 162 S E 2d 262, 266 (1968) Due to the conflicting evidence, discussed below the Court erred in ruling as a matter of law and in granting the City's motion for summary judgment

b The surrounding circumstances of the MOU transaction demonstrate evidence of contractual intent

The 'surrounding circumstances' of the MOU transaction demonstrate strong evidence of contractual intent First of all, the language of the MOU establishes mutual obligations on behalf of the City and the plaintiffs

NOW THEREFORE in consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows

(R p 459) The recitation of consideration in the form of mutual promises is a fundamental characteristic of a contractual agreement "An agreement between two or more persons upon sufficient consideration to either do or not do a particular act is a contract' *McPeters v Yeargin Const Co Inc*, 290 S C 327, 331 350 S E 2d 208, 210 (Ct App 1986) The trial court's finding that the MOU was meant to be "an unenforceable non-binding agreement to agree in the future" (R p 14) renders meaningless this clear contractual language found within the opening paragraphs of the document In so doing, the Court's order also runs afoul of the mandate that "documents

will be interpreted to give effect to all of their provisions *M & M Group Inc v Holmes*
379 S C 468 476 666 S E 2d 262 266 (Ct App 2008)

The MOU also speaks in mandatory terms as to what the rights and responsibilities of each are under the agreement

- **'The Architect shall develop** and implement a design review process that is to provide the City neighborhood and professional staff input into the design of the Hotel (R p 463, ¶ VIII 2)
- **"The Architect is to be paid** a fee of 7 25% by the Design/Builder based on hard construction costs together with the Design/Builder's general expenses and fees (R p 463, ¶ VIII 1)
- **"The City agrees to acquire** the Hotel Site satisfy any environmental issues demolish any existing structures rezone the land for the Hotel (if required) and convey it to the NPC at cost funded by Hotel Revenue Bond proceeds" (R p 461, ¶ V 1)
- **"The City is to develop** a nearby Parking Facility of approximately 800 spaces (R p 461, ¶ V 2)
- **'The City is to establish** a [non-profit corporation] to issue bonds to finance the Hotel, own the Hotel developed by the Project Team and retain the Operator for the operation of the Hotel consistent with the terms and conditions of this MOU " (R p 461, ¶ V 3)

The Supreme Court has observed that mandatory language such as ' shall ' and ' will ' has

~~been held to create contractual rights within a document -See Conner v City of Forest~~

Acres, 348 S C 454 464, 560 S E 2d 606, 611 (2002) In the context of employment

contracts, the Supreme Court has recognized that "[i]t is patently unjust to allow an

employer to couch a handbook, bulletin, or other similar material in mandatory terms and

then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of

- general policy' whenever it works to his disadvantage ' *Small v Springs Industries Inc*

292 S C 481 485 357 S E 2d 452, 455 (1987) Here, a similar injustice would work

upon Stevens & Wilkinson where the City has held out the performance of the parties as mandatory—not conditioned upon any contingency

Furthermore, if the parties intended the MOU to be ‘an unenforceable, non-binding agreement to agree in the future (R p 14) it would render the following phrase meaningless “if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU” (R p 459, ¶ 11) ‘The rule of construction is that every word of a contract should be given meaning and effect if possible ’ *JA Fay & Egan Co v Mims* 151 S C 484 __ 149 S E 246, 248 (1929) The clear intent of the language of ¶ 11 is to provide a condition in which—if such condition occurs—the City will suffer no liability under the MOU In the eyes of contract law, this ‘feasibility clause exists as a condition subsequent ’ ‘A condition subsequent has been defined as a future event upon the happening of which the agreement or obligations of the parties would be no longer binding ’ 13 *Williston on Contracts* § 38 9 (4th ed) Here, the mere existence of a condition subsequent evidences the parties intent to be bound by the MOU until which time the condition might occur If the MOU is interpreted as a non binding document however, then the entirety of ¶ 11 would be rendered mere surplusage in violation of South Carolina’s rules of construction

Considered in a light most favorable to Stevens & Wilkinson, the language contained within the MOU is indicative of contractual intent At worst, the MOU is ambiguous as to whether it was to bind the parties referenced therein “Where a contract is unclear, or is ambiguous and capable of more than one construction, the parties’ intentions are matters of fact to be submitted to a jury ’ *HK New Plan Exchange Property Owner I LLC v Coker*, 375 S C 18, 24, 649 S E 2d 181, 184 (Ct App 2007), citing

Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y. 125 S.C. 320, 325, 118 S.E. 609

610 (1923). For these reasons, the trial court erred in granting the City's motion for summary judgment.

The witness testimony provided in this case also demonstrates the parties' intent to be bound to the terms of the MOU. Ray Garfield, Greg Garfield, and Tony Traub have all submitted sworn affidavits testifying to the following:

Each party agreed that they would complete certain duties and tasks necessary for the creation of the Hotel, and the City offered to pay the various members for their work. I considered then and still believe, that this agreement formed a binding contract between and among all parties to the document. Vast amounts of work and attention were put into drafting the MOD; there were many detailed discussions of its provisions, and it was evident that all parties considered the document to be very important. I do not believe that this much attention and interest would have been given to the document if the parties had not considered it to form a binding agreement. GTD, for its part, never would have agreed to put in the effort necessary to develop the Hotel if we did not consider the MOD to form a contract and believe that all signatories felt similarly on the matter.

(R. p. 388, R. p. 412, R. p. 416)

_____ Paul Little, the regional Senior Vice President of Turner Construction, testified _____

that he saw the City as possessing mandatory obligations under the MOU.

Q: As to the MOU, what is your understanding of what the City's responsibilities within that document were?

A: Attend meetings, make decisions related to the program and keep the team moving forward.

Q: When you say "keep the team moving forward," did that involve any type of good faith effort to secure financing for the project?

A: Yes. That's the way I would interpret that.

Q Did you expect the City to use good faith efforts to secure bond financing?

A Of course yes

(R p 367 (page 53 lines 12 – 25))

John Lumpkin, one of the leaders of the hotel project, testified that the MOU was not a 'boundless' document and that "each party had responsibilities under the document in terms of each party's role and responsibility to move forward consistent with the framework of the Memorandum of Understanding (R pp 359 (page 281 lines 18 25) R pp 361 (page 311, lines 13 23)) Lumpkin discussed at length the issue of the 'feasibility' clause within the MOU and described its efficacy consistent with a condition subsequent

Q Now, am I reading that correctly by determining—when I interpret it—interpret this as saying the City will have no liability under the MOU if it determines that it's not feasible to proceed with the hotel project?

A Okay

Q Is that a fair reading?

A That's—that's what it says

(R p 361 (page 307, line 24 – page 308, line 6))

Thus the sworn testimony of five witnesses provides evidence that 1) several parties looked upon the MOU as a binding contract 2) parties recognized mutual obligations within the MOU, and 3) parties recognized the "feasibility" provision as a condition subsequent to the execution of the MOU In the context of a motion for summary judgment "[t]he court must construe all ambiguities, conclusions and inferences arising from the evidence most strongly against the moving party" *See Finger v Finger*,

270 S C 244 241 S E 2d 746 (1978) In view of this testimony substantial evidence supports the existence of a contract

The subsequent acts of the City and Stevens & Wilkinson also support reversal of the trial court's order In recent years both the South Carolina Supreme Court and Court of Appeals have noted that "evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence the meaning of its terms, and whether the contract was breached" *Silver v Aabstract Pools & Spas Inc* 376 S C 585, 593 658 S E 2d 539 543 (Ct App 2008), *quoting Conner* at 473 611 S E 2d at 912 In this case, both Stevens & Wilkinson and the City operated for nearly an entire year under the terms of the MOU before the City chose to abandon the agreement These substantial, subsequent acts provide strong evidence of the existence of a contract

Several witnesses have testified that the members of the development team had completed their work required under the MOU for the breaking of ground on the Hotel project when the City suddenly chose to issue a new request for proposals Bobby Lyles CEO of Stevens & Wilkinson, stated the following

A When the non profit accepted the whole deal in— whenever that was, February 4th, to go to bond closing, is when everything—I mean, the project, my drawings were finished, *everything was done*

Q Okay

A And as far as we were concerned, we had delivered everything that we were supposed to do and it had been approved And so they owed us for our contract for the work performed, all the work performed

(R p 366 (page 82 lines 2 – 12))(emphasis supplied) Paul Little the regional Senior Vice President of Turner Construction concurred with Lyles assessment of the progress of the Hotel project

Q My question is in regard to the February of 2004 time frame Was there anything, any disagreement or other potential roadblocks that you saw at that time that could have potentially derailed this project, speaking of again, February 2004

A No I think that s about when the GMP was approved *I think we were rocking and rolling and ready to go*

(R p 368 (page 78, lines 15 – 23))(emphasis supplied) Shawn Epps the City's Special Projects Coordinator overseeing the Hotel project testified that the City worked to comply with its responsibilities under the MOU

Q Okay And on page 3 of the agreement, you may need to look at it I don't expect you to have memorized it Paragraph V sets out the role of the City in this transaction, is that right?

A Yes

Q Okay The Paragraph V or Roman Numeral 5, number 1, says Hotel site assembly, the City agrees to acquire the hotel site and then it goes on to say some other things Did the City acquire the hotel site?

A Yes, sir

Q Did it satisfy the environmental issues?

A Yes

Q Okay Was the land rezoned for the hotel?

A I think it was zoned appropriately at the time for the hotel, is what I recall I don't think it was rezoned

Q Okay Didn't need to be rezoned, is what you're saying?

A Yes sir that s what I recall

Q And was a nonprofit corporation organized?

A By the City?

Q Yes

A Yes

(R p 338 (page 9 line 8) – R p 339 (page 10, line 17))

The City—both its council members and its non-profit hotel corporation—were well aware of the continued work under the memorandum as was memorialized in the hand-written minutes of the October 15 2003 non-profit corporation meeting

Shawn Epps reminded the not for profit that **arch** (sic) **lawyers, and other consultants were working and that a great deal of money was being spent each day** the not for profit board discussed stopping everyone until the rating agencies came to town and responded The not for profit decided not to stop any work at this time

(R p 420)(emphasis supplied) It should be noted that the members of the non-profit corporation present to hear Epps' warning included all five voting members of City Council (Mayor Coble, Councilpersons Cromartie, Davis, Sinclair, and Isaac), City Manager Charles Austin, Assistant City Manager Steve Gantt, and City Attorney Jim Meggs²

John Lumpkin specifically noted that the parties' subsequent performance under the terms of the MOU may have changed what he previously perceived to be the nature of that document In deposition testimony, Lumpkin discusses the parties' subsequent

² Councilmen Osborne and Papadea abstained from all votes on the Hotel project due to conflicts of interest

acts at length perhaps best exemplified in the following exchange with the City's counsel

Q Now you said that that MOU—and I'm going to paraphrase here—

A That's all right

Q —may have been affected by subsequent actions of the City?

A It may have I mean, again, **the facts are the facts and whether—whether the—whether that—they—you know, they demonstrated the actions of the City as it moved forward in certain respects give rise to other rights, I'm not—I can't speak to that I have no opinion about that, but it could have**

Q And exactly what are those actions, if you can identify the ones that you know of that the City took or didn't take that you believe you understand may have affected the MOU?

A Well I guess it would probably be a combination as we started out—we began to have weekly meetings ordinarily at Mr Lyles' office, and the City was there I mean with its staff participating, and we worked through all the iterations of the—particularly of the—of the hotel itself and the construction of the hotel and all the pieces and parts And I think there's a fairly—you know, I say detailed—a thorough paper trail about having that

We went to the City periodically and explained to the City where we were with all of the things we were working on, and—you know, and, again, I think as mentioned earlier there were other things that the City had—was interested in improving coverages and things, and we worked on that

But I guess in the—sort of the grand scheme of things or the overall scheme of things that we were working toward a closing and there was no one at the City—and whether it was the—certainly not the staff, but no one that I had talked with—and I didn't—we were not having ongoing conversations with counsel or the staff or the attorneys that were saying, "Well, gee whiz, Houston,

we've got a problem. There's something here that's not working.'

So you work on that till—you know from whenever the MOU was signed if not before, until after February of 2004 which is close to a year. There could be certain rights that could have arisen by virtue of the City's involvement and participation in moving the project forward maybe I don't—again I don't—that's not for me to, you know, conclude that

(R p 355 (page 235 line 9) – R p 356 (page 237, line 9))

As shown by this lengthy testimony, the parties worked for an extended period of time under the contractual framework established by the MOU. In the months following the execution of the MOU in fact, Stevens & Wilkinson subcontracted with numerous companies to help provide the design services necessary for the hotel project (R pp 421 – R p 455). As a result, Stevens & Wilkinson incurred substantial debt under the reasonable presumption that the City would live up to its promises set forth within the MOU.

c Conditions precedent did not exist within the MOU

Beyond the question of the existence of a contract, the trial court ruled that the MOU was not a binding contract because it contained conditions precedent that failed to occur (R p 15).

A condition precedent entails something that is essential to a right of action as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. In contract law, the term connotes any fact other than the lapse of time which unless excused, must exist or occur before a duty of immediate performance arises. The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ. Generally, a condition precedent may not be implied when it might have been provided for by the express agreement.

Plantation A D LLC v Gerald Builders of Conway Inc , 386 S C 198 207-208, 687 S E 2d 714 719 (Ct App 2009) (internal citations omitted) The trial court found that six future agreements envisioned within the body of the MOU constituted conditions precedent whose completion was necessary to render the MOU binding However because no such express conditions are set forth within the MOU, this ruling is erroneous

‘In contract law, [‘condition precedent] connotes any fact other than the lapse of time which unless excused, must exist or occur before a duty of immediate performance arises” *Worley v Yarborough Ford Inc* , 317 S C 206 210 452 S E 2d 622, 624 (Ct App 1994) citing *Ballenger Corp v City of Columbia* 286 S C 1, 331 S E 2d 365 (Ct App 1985)

In ascertaining intent the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered Parties are governed by their outward expressions and the court is not free to consider their secret intentions

M & M Group Inc at 476 477 666 S E 2d at 266(internal citations omitted) Allegations of a condition precedent within a contract give rise to questions of fact subject to South Carolina’s traditional summary judgment scrutiny *See Ballenger Corp* at 4 331 S E 2d at 367

A close examination of the six agreements cited by the trial court as conditions precedent disproves the basis of its ruling The Court of Appeals has noted that “[w]ords and phrases such as ‘if,’ ‘provided that,’ ‘when,’ ‘after,’ ‘as soon as,’ and ‘subject to’ frequently are used to indicate that performance expressly has been made conditional ” *Ballenger Corp v City of Columbia*, 286 S C 1, 5, 331 S E 2d 365, 368 (Ct App 1985) The trial court found that six separate agreements constituted conditions precedent a

bond underwriting agreement (R p 463 ¶ IX 1) a qualified management agreement (R p 464 ¶ X 2) a joint use agreement relative to parking (R p 461 ¶ V 2) a hotel room block agreement (R p 465, ¶ X 12) a design/build agreement (R pp 462 – 463 ¶ VII 1-2), and a development management agreement (R p 461, ¶ VI 1) None of the agreements cited by the trial court contain the ‘conditional language recognized by South Carolina courts In fact, the “bond underwriting agreement” is not found in the MOU at all

South Carolina courts look skeptically upon claims of inferred “conditions precedent” relating to unexecuted documents In *Ballenger, supra* the City of Columbia attempted to evade performance under a contract by alleging that a condition precedent—in the form of a written Notice to Proceed —was never executed

The Contractor hereby agrees to commence work under the contract on or before a date to be specified in [a] written Notice to Proceed of the Owner and to fully complete the project within 450 consecutive calendar days thereafter The Contractor further agrees to pay as liquidated damages the sum of \$150 00 for each consecutive calendar day thereafter

Id at 5, 331 S E 2d at 368 The Court of Appeals quickly rejected this position with regard to the Notice, holding that ‘its purpose is to fix the date for the completion of the project and nothing more” *Id*

Just as with the “Notice to Proceed” in *Ballenger* here the various “agreements contemplated” carry with them no evidence of express intent to create a contingency to performance However, the courts have made clear that “a condition precedent may not be implied when it might have been provided for by the express agreement” *Worley supra* at 210, 452 S E 2d at 625 (Ct App 1994), quoting 17A C J S *Contracts* § 338

(1963) 17A Am Jur 2d *Contracts* § 471 (1991) However the parties made no effort to make the performance of the MOU expressly contingent upon the completion of the 'agreements contemplated Thus, based upon the evidence before the Court it must be assumed that no such contingency was contemplated

Following the trial court's order granting summary judgment, the Court of Appeals reaffirmed these principles in *Plantation A D LLC v Gerald Builders of Conway Inc* Stevens & Wilkinson brought this new authority to the attention of the trial court via a timely filed Rule 59(e) motion (R p 332) In response the trial court amended its previous order to find that the "feasibility" provision within the MOU provided further evidence that the contemplated additional agreements were conditions precedent (R pp 30 – 33) More specifically the trial court relied upon the following language

(I)(1) General Conditions This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU

(R p 459 ¶ I 1) The trial court found that this language constituted "express language creating a condition precedent of six separate definitive agreements to be executed prior to the defendant's duty to perform" (R p 32)

As an immediate matter, the trial court's reliance upon Section I 1 of the MOU as establishing conditions precedent overlooks the contractual language immediately following

1 2 General Conditions Unless superseded by an amendment to this MOU or the final Development

Management Agreement this MOU identifies the understanding of the parties

(R p 459 ¶ I 2) The language of the MOU expressly envisions that its terms and conditions constitute the agreement between Stevens & Wilkinson and the City barring any decision to amend those terms and conditions at a later date. Thus the document falls far short of the “express language” standard our courts apply to conditions precedent.

The clear intent of the language of ¶ I 1 is to provide a condition in which—if such condition occurs—the City will suffer no liability under the MOU. In the eyes of contract law, this “feasibility” clause exists as a “condition subsequent.” “A condition subsequent has been defined as a future event upon the happening of which the agreement or obligations of the parties would be no longer binding.” 13 *Williston on Contracts* § 38.9 (4th ed.). Here, the mere existence of a condition subsequent evidences the parties’ intent to be bound by the MOU until which time the condition might occur. If the MOU is interpreted as a non-binding document, however, then the entirety of ¶ I 1 would be rendered mere surplusage in violation of South Carolina’s rules of construction. Furthermore, there is no dispute that the “feasibility” condition subsequent never occurred.

Q Has anyone with the City ever told you that the hotel project as envisioned by the original MOU—that the completion of that project was not feasible?

A No, sir.

Q Even to this day you’ve not heard that?

A No, sir.

(R p 357 (page 276, lines 3 – 9))

Furthermore to the extent that these envisioned agreements were conditions precedent, the City's failure to perform resulted in their non-occurrence

Q All right And those—all of those agreements, the management agreement, the parking all those agreements that you talked about with Mr Paul were actively being negotiated in February of 2004 correct?

A Yes sir I believe they were

Q Who—which side quit negotiating?

A I don't know the answer

A I don't know the answer to that

Q Okay At some point were the City's lawyers instructed to stop negotiating the management agreement, the parking agreements and those sort of things?

A I don't—I don't remember whether they were specifically informed to cease and desist or the fact that the RFP went out for another hotel deal indicated to them that they needed to stop work on that and –

Q Okay So they either were told to or they understood from the issuance of the RFP that there was no point in them going forward with those negotiations?

A That would be correct Yes, sir

(R p 380 (page 183, line 21 – page 184, line 21) “Under the so called prevention doctrine, a contractual condition precedent is deemed excused when a promisor hinders or precludes fulfillment of a condition and that hindrance or preclusion contributes materially to the nonoccurrence of the condition ’ *Ne Drilling Inc v Inner Space Services Inc* , 243 F 3d 25, 40 (1st Cir 2001), citing *Restatement (Second) of Contracts* § 245 (1981)

Because there is no such express representation of conditions precedent within the MOU, the trial court's order granting summary judgment should be reversed. Furthermore, the nonoccurrence of any such conditions precedent was the fault of the City—not of Stevens & Wilkinson. As shown by this analysis, to the extent that any evidence exists supporting the court's order, sufficient evidence exists to the contrary so as to preclude summary judgment.

d. All terms material to the contract between the City and Stevens & Wilkinson were agreed upon

As a final basis for granting the City's motion for summary judgment, the trial court found that "[t]he record further demonstrates that there was never any agreement on the material business terms and conditions among the parties" (R. p. 15). "In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009), citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). The trial court found that questions of hotel cost, property tax assessment, and tax treatment of executive compensation rendered the MOU unenforceable (R. pp. 15-16). However, because either framework for establishing such terms was set forth within the MOU or the questions were immaterial to the agreement, the trial court erred in finding the MOU to be unenforceable.

South Carolina law holds that "it is necessary for enforceability that the essentials of the contract be agreed upon but all need not be expressed. They may be implied from custom and usual forms [trade usage] and former course of dealing." *Keith v. River Consulting, Inc.*, 365 S.C. 500, 505-506, 618 S.E.2d 302, 305 (Ct. App. 2005), quoting *Carolina Aviation, Inc. v. Glens Falls Ins. Co.*, 214 S.C. 222, 230, 51 S.E.2d 757, 761

(1949) South Carolina law provides that "[a] contract is not unenforceable simply because its performance is as to particular details left open to subsequent agreement of the parties [and] this is especially true where the contract provides guidelines for subsequent agreement ' *Aperm of South Carolina v Roof*, 290 S C 442 447 351 S E 2d 171, 173 (Ct App 1986) (*citing Touche Ross & Co v DASD Corp*, 162 Ga App 438,292 S E 2d 84 (1982) 17 AmJur 2d *Contracts* § 76 (1964), 17 AmJur 2d *Contracts* § 77 (1964)) "In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation *WE Gilbert & Associates* at 423, 330 S E 2d at 309 *citing Farr v Barnes Freight Lines* 97 Ga App 36, 101 S E 2d 906 (Ga Ct App 1958)

Both the scope of the work Stevens & Wilkinson was to perform and the amount of its compensation were set forth within the body of the MOU As to scope of work the MOU provides a detailed description of the designs Stevens & Wilkinson was to prepare

The Hotel is to include 300 rentable guestrooms including ten 10 suites The Hotel is to also include approximately 12,000 square feet of ballroom and breakout meeting space In addition, the Hotel is to include a casual restaurant and lobby bar that collectively is to provide table seating adequate to serve Hotel guests as well as those utilizing meeting space in the Hotel

(R p 460, ¶ IV 4) The MOU further provided that the 'construction quality and level of amenities is to be similar in all material respects to the Sheraton Overland Park Hotel and/or the Radisson Convention Center Hotel in Myrtle Beach" (R p 460, ¶ IV 6) and that Stevens & Wilkinson would "develop and implement a design review process that is to provide the City, neighborhood and professional staff input into the design of the Hotel " (R p 463, ¶ VIII 2) More specifics as to the scope of Stevens & Wilkinson's

duties were set forth within Attachment 1 of the MOU appropriately titled 'Preliminary Development Management Scope of Services' (R pp 478 – 480)

Based upon these guidelines set forth within the MOU Stevens & Wilkinson worked directly with the City for nearly one year to produce a completed set of architectural renderings of the hotel (R p 366 (page 82))

As to the amount of compensation due Stevens & Wilkinson, the MOU speaks directly to the method of calculating the architect's fee

Fee—The Architect is to be paid a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder's general expenses and fees. This fee is comprised of a 6% basic services fee and 1.25% for special consultants to be retained by the Architect for the project. The fee is to be paid consistent with the normal AIA contractual provisions in terms of timing and amount of payments.

(R p 463, ¶ VIII 1) The percentage fee (rather than a specific dollar amount) does not affect the completeness of the contractual agreement. 'Where a contract does not fix a definite price, there must be a definite method for ascertaining it.' *McPeters* at 331, 350 S E 2d at 211 citing *Edens v Laurel Hill Inc* 271 S C 360, 364 247 S E 2d 434 436 (1978), see also 17 C J S *Contracts* § 36(2)(c)

Not only does the MOU prescribe a definite method for ascertaining Stevens & Wilkinson's compensation, but the MOU's method of payment is consistent with the architectural industry

[O]ne way that architects get paid is a percentage of construction cost. If you bid a job, that number that you get on a bid day includes general conditions overhead and profit, everything. Some contractors try to exclude that when you're negotiating with the contractor. They say, 'Well, that's not construction cost, that's my cost, you know. But I guess generally accepted number that you

multiply a percentage on is—includes those items also
And it doesn't make any real difference. If you don't
include it, your percentage goes up.

(R. p. 363 (page 46, lines 8-18)) (emphasis supplied). As the Court of Appeals noted in *Keith v. River Consulting Inc.*, specific contractual terms may be implied from custom and usual forms [trade usage] and former course of dealing. *Id.* at 505-506, 618 S.E.2d at 305 (Ct. App. 2005). Thus, the calculation of Stevens & Wilkinson's ultimate payment based upon a percentage method common to architectural work is sufficient to complete the "material term" of compensation.³

The trial court did not consider whether Stevens & Wilkinson's scope of work and method of compensation was set forth within the MOU. Instead, it focused upon the increase of the projected cost of the hotel from 'approximately \$60 million' as set forth within the hotel to the March 15, 2004 GMP offered by the project developers of about \$72 million (R. p. 15). Furthermore, any uncertainty surrounding the cost of the hotel at the date of the MOU's execution is common to the trade in which the plaintiffs operate.

When we entered into this MOU at the time, we didn't have floor plans or quantities or anything to take a reasonable estimate from. It was just our guess -- I shouldn't say our guess -- our estimate at that time of hopefully what it was. **Until you start designing a building on the site and understand the site constraints and understand more of the nature of what you have to do, the best you can do is take an estimate and hope they can get there.**

(R. p. 375 (page 255, lines 10-19)) (emphasis supplied). As Traub points out, the trial court's protestations over the lack of a definite price within the MOU belie the nature of

³ In its order granting summary judgment, the trial court states that "nowhere in the record do the Plaintiffs demonstrate what the terms of the purported contract were" (R. p. 16). As is shown by this discussion of Stevens & Wilkinson's duties and manner of compensation, the MOU provides the terms that the trial court failed to discern.

hotel design and development Bobby Lyles further establishes that the designation of percentage fees a traditional method of compensation within the industry For these reasons, the approximate cost of the Hotel project as \$60 million '—taken in conjunction with the definite method for calculating plaintiffs fees within the MOU—does not render the MOU unenforceable

In granting summary judgment, the trial court also relied upon the fact that questions remained regarding the City's tax liability pertaining to the publicly owned hotel and compensation of the hotel s managers remained unresolved (R p 15) Neither issue, however pertained to either the scope of work to be performed by Stevens & Wilkinson or its compensation Nor could Stevens & Wilkinson in its capacity as the architect, offer any expertise on questions of tax liability or managerial compensation At most, these issues were relative only to the ' feasibility of the hotel project—and issue upon which the City never opined and has not raised as a basis for its motion for summary judgment

II The trial court erred in finding there was no scintilla of evidence giving rise to a claim of promissory estoppel where the City promised to pay Stevens & Wilkinson for architectural services both through the Memorandum of Understanding and a subsequent vote of City Council and Stevens & Wilkinson reasonably and foreseeably relied upon those promises

Within its pleadings Stevens & Wilkinson alleges that two separate actions of the City granted it independent grounds for promissory estoppel the execution of the April 2003 MOU and the July 30, 2003 City Council vote (R p 61) The elements of promissory estoppel are

- (1) the presence of a promise unambiguous in its terms (2) reasonable reliance upon the promise by the party to whom the promise is made, (3) the reliance is expected and foreseeable by the party who makes the promise and (4)

the party to whom the promise is made must sustain injury
in reliance on the promise

Woods v State 314 S C 501, 505 431 S E 2d 260 263 (Ct App 1993) The trial court
erroneously ruled that neither the MOU nor the July 30 2003 City Council vote gave rise
to a claim for promissory estoppel Each ruling will be considered in turn

**a Representations contained within the MOU and the parties' subsequent
actions in conformity therewith were unambiguous promises upon which Stevens &
Wilkinson reasonably and foreseeably relied**

The trial court ruled that the nature of the MOU precludes the existence of an
unambiguous promise or any reasonable foreseeable reliance thereupon (R p 22) As to
the question of promise, South Carolina courts have observed that evidence tending to
show an unambiguous promise includes whether a party can 'clearly articulate the
terms of the alleged [] contract how much money would ultimately be [exchanged] or
howth [the parties] would settle up ' *Rushing v McKinney* 370 S C 280 295 633 S E 2d
917, 925 (Ct App 2006)

Within the MOU, the City promised Stevens & Wilkinson that it would
compensate them for their efforts spent designing and developing the convention center
hotel The MOU set forth several unambiguous promises that give rise to this claim

- "The Architect *is to be paid* a fee of 7.25% by the Design/Builder based on hard
construction costs together with the Design/Builder's general expenses and fees" (R p
463 ¶ VIII 1)(emphasis supplied)
- "The City *shall use its best efforts* to approve the issuance of a series of tax-exempt Hotel
Revenue bonds" (R p 461, ¶ V 4)(emphasis supplied)
- "The NPC is to retain the Underwriter and legal counsel to structure and issue
approximately \$60 million in tax-exempt hotel revenue bonds (R. p 461 ¶ V 4)
(emphasis supplied)

These promises made by the City to Stevens & Wilkinson within the MOU are set forth in unequivocal language. The amount of financing involved in the transaction is approximately \$60 million, which, according to the testimony of Tony Traub, is the best estimate of price in such a transaction. (R. p. 375 (page 225)) The method of 'settling up' with the plaintiffs is also specifically stated as a percentage of the project budget and/or construction costs. Thus the promises extended by the City to the plaintiffs are clear cut.

The trial court found that the City's promises within the MOU were not ambiguous because certain contingencies were contained within the document. Specifically, the trial court found that Section VI 3 of the MOU defeats any notion of an unambiguous promise. (R. p. 22) However, these conditions are in no way detrimental to the clarity of the obligations set forth within the MOU—rather the conditions more specifically set forth the relationship between the City and Stevens & Wilkinson as it pertains to the promises made by the City.

As shown above, the terms of the City's promises to the plaintiffs are clearly articulated, the amount of money involved is set forth, and the method of the parties' 'settling up' is spelled out. Thus, evidence exists the assurances given by the City of Columbia to the plaintiffs were unambiguous promises.

The trial court also held that Stevens & Wilkinson 'fails to present evidence of any reliance on the MOU for payment for its work, or that such reliance was reasonable and foreseeable by the City.' (R. p. 22) South Carolina courts hold that parties' actions may influence the reasonableness of reliance upon previous promises. *See e.g., Satcher v. Satcher*, 351 S.C. 477, 486, 570 S.E.2d 535, 540 (S.C. Ct. App. 2002) ("Additionally, we find that Grandfather's actions during the course of the time Chip lived with him

reinforced Chips reliance on that promise) Substantial evidence of the interaction between Stevens & Wilkinson and the City supports the Appellant s reliance upon the City s representations within the MOU

John Lumpkin testified that the members of the project team worked closely with both members of City Council and City staff persons to achieve the goals set forth within the MOU

[W]e did go on a – on two or three or four occasions—and I don’t remember, but established a report ‘Here is where we are Here is where it is’ You know, the bond—the underwriters came into town *The mayor was there Several members of council were there, you know, again, working to get the bond*—getting a—I mean they re working hard to make this work—this transaction happen which is where—you know, where they—we did get favorable letters from underwriters, you know and I think the City s mayor and others involved there—just I think as they do any time they come to look at a—Moody’s and S&P I think were the two that were in maybe Fitch but Moody’s was one and then Ambac, the bond insurer came in and we went through the same drill with them *with the City’s participation*

(R p 356 (page 238 line 18 – page 239 line 10)(emphasis supplied)

Tony Traub testified that the parties reacted to the City s on-going participation and encouragement in the further development of the MOU framework

In fact, when we gave the GMP, the City consistently told us through Steve Gantt, and possibly Shawn Epps but certainly Steve Gantt, that we need to get the project development cost under 50 million, which we did *And then the City not only said, keep going, that’s what we want, but that’s when they authorized payment to the architects for additional plans so that we could refine the cost better and get it to a point where they wanted more finite plans done* although we were willing to sell bonds at an earlier stage It was the City who wanted more drawings done

(R p 375 (page 255 line 19 – page 256 line 5))(emphasis supplied) The trial court rejected representations of city officers as a reasonable basis for reliance ‘[i]t was not within the scope of authority for any individuals to bind the City (R p 23) However, the trial court overlooked the fact that the MOU mandated Stevens & Wilkinson provide the City, neighborhood and professional staff input into the design of the Hotel’ (R p 463, ¶ VIII 2) In other words Stevens & Wilkinson was *required* to interact with the City’s officials by the MOU itself and, thus, was not unreasonable in relying upon the representations of those individuals

Beyond the representations of mere officers of the City Bobby Lyles spoke at length about Stevens & Wilkinson’s dealings with City Council and his reliance thereupon

A It’s my testimony that we would do enough work to get a guaranteed maximum price that’s acceptable to the city which is what we did

Q And so --

A *And I would have never done any more work unless the city asked me to do more work.*

Q Okay

A *Which they did.*

(R p 365 (page 80, lines 7 – 14))(emphasis supplied) Steve Gantt, testifying as a 30(b)(6) witness for the City, agreed that Stevens & Wilkinson reasonably relied upon City Council’s representations

Q Who told them to stop working, that they were at risk again? Because obviously what the Council—you would agree with me, what the Council did in July was not consistent with the MOU, is that correct?

A **That's correct**

Q Their agreement under the MOU was to -- that is Stevens and Wilkinson with the City -- was you are at risk you will not be paid for generating construction drawings to the point drawings that would be sufficient for Turner to generate -- to give an estimate of the guaranteed maximum price That's what they agreed to do at risk

A Yes

Q They did that by July and said, we're putting our pencils down because we've done what we said we would do at risk Isn't that correct?

A That's what they said

(R p 377 (page 33, line 18) – R p 378 (page 34, line 19))(emphasis supplied)

Q Isn't it reasonable for them to believe that they should have been paid for what they did after City Council told them to pick their pencils back up?

A I don't know

Q So you have a question about that? **They could have reasonably expected to be paid**

A **I guess they could have, yes**

(R p 377 (page 32, lines 12 – 19))(emphasis supplied)

As shown above, not only did the MOU provide substantial justification for Stevens & Wilkinson's reliance upon the City's representations, but the City's ongoing interaction with the project team under the MOU and subsequent approval of additional funding for work beyond the MOU both buttressed the reasonableness of Stevens & Wilkinson's reliance and created an independent right of estoppel For these reasons, the trial court erred in finding no evidence of reasonable reliance upon the representations of the City

The trial court also erred in finding that Stevens & Wilkinson's reliance upon the City's representations was not foreseeable (R pp 22-23) In fact, the City's involvement with Stevens & Wilkinson and the other members of the project team throughout the progress of work envisioned within the MOU and beyond rendered the plaintiff's reliance highly foreseeable As noted above, in October of 2003 Shawn Epps specifically brought to the attention of City Council the fact that contractors such as Stevens & Wilkinson were continuing to work on the project envisioned within the MOU Yet the City, despite considering whether it should request the contractors stop work expressly chose not to do so (R pp 419 – 420) During his deposition, Epps described the situation as follows

A The reason I brought it up is because there was a lot of questions about a financing package and the coverages and how it all fit Whether the deal was feasible as it related to the financing and the coverages and *I wanted to remind them, I didn't want them to have any misunderstanding that, you know, people were still working That work was still going on, that those consultants were still expending time and effort as it related to the project.*

Q And it would be—if you knew you weren't going to do this project, it would be fair to stop them from doing any more work, right?

A Yes

(R p 340 (page 44, line 21 – page 45, line 9))(emphasis supplied)

Councilwoman Tameika Isaac-Devine also testified as to her personal knowledge of Stevens & Wilkinson continuing to work above and beyond the terms of the MOU

Q The Stevens & Wilkinson (sic) as you saw continued to work after that period of time described under the MOU and council voted to pay them additional moneys through bond closing?

A We voted to pay them \$650,000 which was the estimate we received through October Yes

Q Right And they ultimately were paid more than that about \$710 000 according to these documents because they continued to work even beyond that beyond the October 10th, isn't that correct?

A I can't recall But I wouldn't disagree with that no

(R p 370, line 25 – R p 371 line 12)(emphasis added)

Perhaps most directly on point, however, is an exchange that occurred between Bobby Lyles and Mayor Bob Coble regarding not only the City's knowledge, but the City's desire for Stevens & Wilkinson to continue working on the hotel project envisioned within the MOU above and beyond the work required for a guaranteed maximum price

Well, that July [of 2003] council meeting, the presentation was made by the various team members of the design the construction cost the financial package, the whole ball of wax And that was approved by council in executive session

At that time if I'm not—I'm going from memory now Mayor Coble asked when the bonds could be sold

And it was—I think the date was like October 13th or sometime in October was the anticipated date for the bonds to be sold

At that point I reminded city council that our job as contemplated under the MOU was complete and we were—and I used the expression we were putting our pencils down until the bonds were sold And they asked the general contractor how did that effect the opening date of the hotel And we said, well it's July that's October So I was asked by council, I think specifically Bob Coble to come up—what it would cost for us to continue working I told him I'd go back to the office and figure it out and get back in touch

I went back and prepared a document that I sent to Shawn Epps that estimated, I think, \$650,000 to get through

October the 13th if I m not mistaken And \$75 000 a week
for each week after that until we contemplated the project I
was told after the next council meeting that we were to—
that that was approved and that we would proceed

(R p 349 (page 67 line 10 – page 68 line 24))

Based upon the testimony of Epps Isaac-Devine, and Lyles it is undisputed that
not only should the City have foreseen that Stevens & Wilkinson was relying upon its
promises within the MOU and subsequent promises in July of 2003, but the City had
actual knowledge of such reliance Due to this substantial evidence the trial court erred
in granting summary judgment to the City on the issue of estoppel as it pertained to the
MOU

*b Rule 8, SCRCP, permits Stevens & Wilkinson to take alternative positions as
to whether the July 30, 2003 vote of City Council gives rise to contractual rights or a
claim of promissory estoppel*

The trial court found that the July 30 2003 decision of the City to authorize
Stevens & Wilkinson to complete the architectural work on the Hotel Project could not be
reasonably relied upon because it ‘presents a position wholly inconsistent with Stevens &
Wilkinson’s other theories of recovery (R p 24) The Rules of Civil Procedure
establish, however, that ‘[r]elief in the alternative or of several different types may be
demanded’ and that ‘[a] party may also state as many separate causes of action or
defenses as he has regardless of consistency and whether based on legal or on equitable
grounds or on both’ Rule 8(a), (e)(2), SCRCP

In reaching this ruling, the trial court pointed to the March 23, 2009 order
granting partial summary judgment to Stevens & Wilkinson as to whether a contract was
formed with the City as a result of the July 30th vote Based upon this ruling the trial
court held that ‘if a contract—separate and apart from the MOU—was formed by the

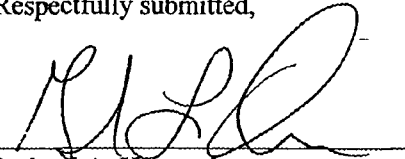
July 30 2003 vote, that vote cannot also create potential liability for the City under the MOU on the basis of estoppel (R p 24) This holding however is inconsistent with both Rule 8 and supporting case law 'Rule 8, SCRPC allows inconsistent causes of action' *Armstrong* at 227 621 S E 2d at 379

Furthermore, the March 23rd order upon which the trial court relied in granting summary judgment is now on appeal If the City is successful in reversing this order then the issue will be remanded to the trial court The trial court did not find, as a matter of law that Stevens & Wilkinson could not demonstrate evidence of the elements of promissory estoppel stemming from the July 30 2003 City Council vote Thus, because the trial court erred in granting summary judgment on grounds of inconsistency with other theories of recover its order should be reversed

CONCLUSION

Due to the facts authority and analysis described herein, the order of the trial court granting the City summary judgment as to the Appellant s claims for breach of contract based upon the Memorandum of Understanding and estoppel as to the Memorandum of Understanding and July 30, 2003 vote of City Council should be reversed

Respectfully submitted,



Richard A Harpootlian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Columbia South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

December 6 2010
Columbia, South Carolina

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2005-CP-40 3361

Stevens & Wilkinson of South Carolina, Inc

Appellant,

v

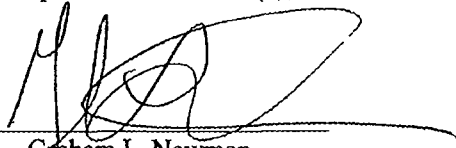
City of Columbia, South Carolina

Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 211(B), SCACR

I certify that the Appellant's brief complies with Rule 211(b), SCACR

By


Graham L. Newman

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 05-CP-40-3361

Stevens & Wilkinson of South Carolina, Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC,
and Turner Construction Company

Plaintiffs,

Of Whom
Stevens & Wilkinson of South Carolina, Inc , is

Appellant

vs

Paul C "Bo" Aughtry III, Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, LLC, Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom
City of Columbia, South Carolina is

Respondent

CERTIFICATE OF SERVICE

I, Beth Craft, Legal Assistant to the attorney for the Appellant, Richard A Harpootlian, P A ,
with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify
that on December 6 2010, served by Hand Delivery, the following documents to the below
mentioned person(s)

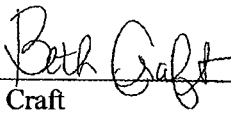
Documents

Final Brief of Appellant

Served

Michael Tighe Esquire
D Reece Williams, Esquire
Kathleen M McDaniel, Esquire
Richard C Detwiler, Esquire
Callison Tighe & Robinson, LLC
Palmetto Armory Office Building

1812 Lincoln Street, Suite 200
Columbia, South Carolina 29201


Beth Craft

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2005-CP 40-3361

RECEIVED
DEC 22 2010
SC Court of Appeals

Stevens & Wilkinson of South Carolina, Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC,
and Turner Construction Company

Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc is

Appellant

vs

Paul C 'Bo' Aughtry III, Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, LLC, Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom

City of Columbia, South Carolina is

Respondent

AMENDED FINAL BRIEF OF RESPONDENT

Michael W Tighe
Richard C Detwiler
D Reece Williams, III
Kathleen M McDaniel
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, SC 29202-1390
Telephone (803) 404-6900
Facsimile (803) 404-6901

ATTORNEYS FOR RESPONDENT

December 22, 2010
Columbia, South Carolina

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Facts	1
Arguments	9
I The trial court properly held that the MOU was not an enforceable, binding contract	9
A The MOU was an agreement to agree and therefore could not be an enforceable binding contract	10
B There was no mutual assent on terms material to the development of a publicly funded convention center hotel	16
II The trial court properly held that as a matter of law the City made no unambiguous promise upon which it was reasonable and foreseeable for Stevens & Wilkinson to rely for payment for all of its architectural services	26
Conclusion	36

TABLE OF AUTHORITIES

CASES

<u>Aperm of South Carolina v Roof</u> , 290 S C 442, 351 S E 2d 171 (Ct App 1986)	13 14
<u>Blanton Enterprises v Burger King Corporation</u> , 680 F Supp 753 770 (D C S C 1988)	13
<u>Davis v Greenwood School District</u> 365 S C 629 634, 620 S E 2d 65, 67 (2005)	27
<u>Electro Lab of Aiken, Inc v Sharp Construction Co of Sumter</u> 357 S C 363 593 S E 2d 170 (Ct App 2004)	12, 13
<u>Gilstrap v South Carolina Budget and Control Bd</u> 310 S C 210 216 423 S E 2d 101 105 (1992)	32
<u>Holliday v Peagram</u> 89 S C 73, 73, 71 S E 367, 370 (1911)	13
<u>Player v Chandler</u> 299 S C 101 105 382 S E 2d 891 893 (1973)	17
<u>Savannah Guano Co v Fogle</u> 112 S C 234 100 S E 59 (1919)	12
<u>Service Mgt, Inc v State Health and Human Services Finance Comm n</u> , 298 S C 234 238 379 S E 2d 442 (Ct App 1989)	27 28
<u>Shipyard Property Owners Ass n v Mangiaracina</u> 307 S C 299 308 414 S E 2d 795 801 (Ct App 1992)	10
<u>State ex rel McLeod v McInnis</u> 278 S C 307, 317, 295 S E 2d 633, 639 (1982)	32
<u>Superior Auto Ins Co v Maners</u> 261 S C 257, 263, 199 S E 2d 719 722 (1973)	10
<u>Trident Construction Co v Austin Co</u> , 272 F Supp 2d 566, 575 (D C S C 2003)	13
<u>W E Gilbert & Assocs v The South Carolina Nat Bank</u> 285 S C 421, 423, 330 S E 2d 307 309 (Ct App 1985)	10

STATUTES

S C Code Ann § 5-7-160	31
S C Code Section 5-7-260	31
S C Code Ann § 5-13-30	31
S C Code Section 5-13-90	32
S C Code Section 6-21-50	31
S C Code Section 6-21-210	31

OTHER AUTHORITIES

16A Am Jur 2d <u>Constitutional Law</u> § 295	32
Columbia City Code Section 2-81	31
Columbia City Code Sections 2-86 and 2-87	33
Columbia City Code Section 2-114	32
Columbia City Code Section 2-207	33
<u>Corbin on Contracts</u> § 2-8 at 133-34	11-16
Rule 8, SCRCF	34
Rule 208 SCACR	36
Rule 220(c) SCACR	34-35

STATEMENT OF FACTS

This case and subsequent appeal arise out of efforts to develop a headquarters hotel to support the Midlands Regional Convention Center located in downtown Columbia South Carolina. In December 2002, the Columbia City Council voted to select a Project Team put together by Edens & Avant to develop and build the convention center hotel. The members of the Project Team included among others Garfield Traub, Gary Realty, and Edens & Avant as Developers; the Appellant Stevens & Wilkinson of South Carolina, Inc (hereinafter S&W) as the Architect; Turner Construction as the Builder; Hilton Corporation as the Operator; and Citigroup Global Markets as the Underwriter. John Lumpkin of Edens & Avant served as the point man for the Project Team. (Deposition of John Lumpkin 40 20 25 R p 345)

On April 17, 2003, the Respondent City of Columbia (hereinafter the City) and the members of the Project Team executed a Memorandum of Understanding (the ' MOU) (R pp 458 480) The MOU set forth a framework for the development of a publicly funded convention center headquarters hotel. The MOU contemplated the formation of a non profit corporation ('Hotel Corporation _) that would issue tax-exempt hotel revenue bonds to finance the development and construction of the hotel and that would own the hotel. The bonds were to be supported by revenues from the proposed hotel as well as by what was referred to in the MOU as ' City Credit Support ' ¹ In the event the hotel revenues were

¹ The City Credit Support is alternately termed the City Standby Support the City Credit Enhancement or the City Credit Support. In this Brief of Respondent the City will refer to this item as the City Standby Support Payment because that is how Citigroup consistently referred to it in their financial models and projections.

insufficient to cover the debt service on the bonds the City would be expected to appropriate money to make up any shortfall but according to the terms of the MOU, the City's tolerance for this risk was something within the City's sole discretion

In pertinent part, the MOU provided

- 4 NPC Financing - The NPC [Non-Profit Corporation] is to retain the Underwriter and legal counsel to structure and issue approximately \$60 million in tax exempt hotel revenue bonds in amounts acceptable to the City (the Bonds ') supported by Hotel revenues and the City Financial Participation
- 5 City Credit Support The City is willing to provide a credit enhancement to support an amount acceptable to the City which would be utilized for any debt service shortfall on the Subordinate Bonds or Hotel Bonds (as the case may be) if project revenues net of expenses are insufficient to provide for the debt service on the Subordinate Bonds or on the Hotel Bonds

(MOU § V 4 and 5 R p 461 lines 15 33) (emphasis added)

In its ' General Conditions the MOU also provided as follows

1 GENERAL CONDITIONS

- 1 This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU
- 2 Unless superseded by an amendment to this MOU or the final Development Management Agreement this MOU identifies the understanding of the parties

(MOU § I 1, R p 459 lines 23 28)

The MOU also set forth that none of the Project Team members would be paid for their services unless and until the bond financing closed. The plain language of the MOU demonstrates that all of the members of the Project Team, including S&W, knew that they were working at risk. Within the section titled "Role of the Developer" the MOU states as follows:

- 3 Pre-Development Funding – The Project Team will be responsible for the costs incurred prior to closing the financing. These costs include, but are not limited to, design, testing, bid packages, legal underwriting, travel, etc. If the Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Agreement, or as a result of an unforeseen catastrophic event not caused by any of the Project Team, the City will reimburse the Project Team for actual, documented costs incurred to that point in time up to an amount to be agreed upon. All studies, tests, plans and the like prepared or obtained by the Project Team will be assigned to and become the property of the City.

(MOU § VI 3 R p 462 lines 10-18) (emphasis added)

With full knowledge that they were working at risk, the Project Team proceeded with work on the hotel project. On June 10, 2003, the Hotel Corporation contemplated by the MOU was incorporated. (Articles of Incorporation and Bylaws for Columbia Convention Center Hotel Corporation R pp 512-527.) The By-laws of the Hotel Corporation state that it was to fund the development, construction, and commencement of operations of the hotel with the "net proceeds of bonds issued by South Carolina Jobs Economic Development Authority (JEDA) (Bylaws § 2.3(b) R p 517 lines 6-8.) Issuance of the bonds by JEDA required approval not only by Columbia City Council and JEDA but also by the State Budget and Control Board. (Letter from Elliott E. Franks, III to Steve Gantt dated February 25, 2004 R p 545.) JEDA never agreed to issue the bonds; in fact, negotiations with JEDA

stalled and as the project evolved the Project Team's proposals evolved a structure requiring either the City or the Hotel Corporation to issue the bonds in order to fund the project (Letter from John Lumpkin to Bill Corrado dated February 26, 2004 R p 546) In addition the bond insurance company Ambac a key player in the Project Team's numerous financing proposals indicated on a Commitment for Financial Guaranty Insurance that the obligor on the bond issue was to be the City of Columbia, South Carolina (Ambac Commitment Letter, dated February 17 2004 R pp 547-551) This further indicates that the Project Team was looking to the City to issue and guarantee the bonds -- something the City had never contemplated under the MOU

Over the twelve months following execution of the MOU, S&W worked with the rest of the Project Team to design a hotel within a budget and financing structure acceptable to the City It was anticipated that the bond closing would occur in the summer of 2003 but the closing was delayed through no fault of the City as the proposed budgets and financing structures changed In July of 2003 S&W declared it had done all of the architectural and engineering work necessary for the bond closing and declined to perform further work on the project without assurance of at least partial payment S&W presented a request for payment to the City in the form of a Cost Estimate indicating fees it would incur on the hotel project from July 21, 2003 through October 13 2003, the latest anticipated date for the bond closing (Cost Estimate-Revised July 21 2003, R p 621) S&W included in its cost estimate "Estimated A/E fees to be incurred weekly after October 13 2003 (anticipated bond closing date) \$60 000/week along with an estimate of fees for special consultants for this subsequent period of \$15 000 per week, for a combined estimate of \$75,000 per week

after October 13 2003 (Id.) The total estimate for architectural and engineering fees and fees for special consultants from July 21 2003 through October 13 2003 was \$650 000 (Id.) S&W agreed that any payment while non-refundable to the City if the bonds did not close would be charged against any fee due to S&W if the bonds did close (Letter from Bobby Lyles to Mark Alles dated December 17, 2003 R p 542, Letter from Mark Alles to John Lumpkin dated December 18 2003 R p 543, Letter from John Lumpkin to Steve Gantt dated December 18 2003 R p 544)

On July 30, 2003 the City Council considered S&W s proposal for interim fees and voted on the proposal The minutes from the July 30 2003 City Council meeting reflect that City Council responded to S&W s proposal as follows

ACTION APPROVED \$650 000 for Interim architectural design services for a period of 90 days prior to Bond Closing Mr Papadea and Mr Osborne did not vote due to a conflict of interest

(Minutes of July 30 2003 Columbia City Council meeting R pp 576-577)

Based upon this vote S&W performed additional work on the hotel project Significantly the bond closing did not occur on October 13, 2003 indeed, there was never a bond closing On December 18, 2003 S&W submitted an invoice to the City for its work in the amount of \$697 084 79 for the limited period of July 10 2003 to December 15 2003 (Invoice from S&W R p 622) The City issued a check to S&W for the full amount of \$697 084 79 on December 29, 2003 (Check from City R p 623)² S&W never sent the City another invoice and the City paid no more money to S&W

²There is nothing in the record to explain the \$47 084 79 difference between the amount approved by the City and the amount invoiced by S&W other than the bill as presented and the fact that the City paid it

Even after the City Council vote on July 30, 2003, the Project Team continued its attempts to put together a hotel development deal that would meet with the City's approval. Although the MOU contemplated \$60 million in bond financing, in less than ten months the Project Team's proposed financing plan rose to approximately \$70 million in bonds and subsequently rose to in excess of \$72 million. (Citigroup Financial Models, R pp 507-511 and R pp 492-506.)

The Project Team made at least two presentations to the Hotel Corporation. Only at the February 11, 2004 meeting did the Hotel Corporation take a recorded vote. On that day, William Corrado, a director with Citigroup Global Markets, presented the most current financing proposal developed by the Project Team. The Hotel Corporation – not the City Council – voted four to one

to approve the new financing plan for the hotel that requires the Convention Center Hotel Corporation to be legally responsible for 50% of the principal and interest payments on the hotel bonds for the first ten (10) years and from year eleven (11) until the final payment of the hotel bonds the Corporation's legal responsibility will be 70% of the principal and interest payments for the bond issue.

(Columbia Convention Center Hotel Corporation Meeting Minutes, February 11, 2004, R pp 569-570) (emphasis added)

Those same minutes from the February 11, 2004 meeting also reflect that the Project Team and the City were still negotiating the key definitive written agreements called for in the MOU.

Mr. Joel Gottlieb, Gottlieb & Smith, P.A., told the members of Council that the most significant agreement is the Qualified Management Agreement, also known as the Hotel

Management Agreement between the Corporation and the Hilton that must reflect the business deal with Hilton and fall within the various tax safe harbors so the bond financing will flow. He said that the Room Block Agreement between the Convention Center and the Convention Center Hotel is also significant. Mr. Gottlieb stated that several agreements and various bond documents are still under negotiation.

(Id.)

After this presentation to the Hotel Corporation, the Project Team continued to alter the financing plan. Whereas the par amount of the bonds presented to the Hotel Corporation on February 11, 2004, was \$69,870,000 (Citigroup Presentation dated February 11, 2004 R pp 507-511) that amount increased to \$72,015,000 in financial models and projections dated March 15, 2004 (Citigroup Financial Model dated March 15, 2004 R pp 492-506). Also as indicated by the March 15, 2004 Financial Model, the Project Team had changed the structure of the transaction to include some portion of taxable bonds rather than all tax exempt bonds. This was a significant deviation from the proposal presented to the Hotel Corporation on February 11, 2004, and is further indication of the ever evolving nature of the hotel project. Significantly, Ambac's so called Commitment Letter for bond insurance issued six days after the February 11, 2004 meeting and one of the key ingredients to make any bond financing proposal acceptable to Wall Street was for only \$63,295,000, over \$6.5 million less than the number presented to the Hotel Corporation.

In March 2004, the City determined that the hotel project was not feasible, as was its prerogative under the MOU. This was evidenced by the City's decision to issue a second Request for Proposals for a privately funded hotel option. The minutes of the City Council meeting on March 17, 2004, state that staff was instructed to draft a Request for Proposals

for a full service Convention Center Hotel (Columbia City Council Meeting Minutes March 17 2004 R pp 578-580) On March 24 2004, the City Council voted unanimously to approve the minimum requirements for the Convention Center Hotel (Columbia City Council Meeting Minutes, March 24, 2004, R pp 581-584) On April 2, 2004 the City issued a Request for Proposals (“RFP ”) for the development of a privately funded convention center hotel (RFP, R pp 552-561) The Project Team was well aware of the City s determination and understood that the City intended to pursue a privately-funded hotel project rather than the publicly-funded hotel project proposed by the Project Team John Lumpkin the Project Team point man testified

Q At some point in time after February 11 2004 you became aware that the City was moving in a different direction is that correct?

A I became aware that the City Council had met and had - had decided that it was going to open the process up in some way shape or form to entertain a private solution a private - approach you know, versus this public private approach that we had been pursuing with the City

(Deposition of John Lumpkin 84 10 18, R p 351)

A I’m assuming the City Council voted to move forward on an alternative

(Deposition of John Lumpkin 86 18-19 R p 352)

Notably members of the Project Team – including S&W – made alternative proposals under the new RFP, but were not selected Windsor/Aughtry Co Inc owned by Paul C Bo Aughtry was selected as the hotel developer in this second selection process

Thereafter Windsor/Aughtry Co Inc successfully developed and constructed a full service Hilton Hotel to support the Midlands Regional Convention Center

ARGUMENTS

I The trial court properly held that the MOU was not an enforceable, binding contract

The crux of this appeal is whether the MOU was an enforceable binding contract. The trial court found that the MOU was not and never was intended to be a contract. The nature of this complex transaction was such that it involved intricate Wall Street bond financing, a developer from Dallas, Texas, an international hotel operator, and general contractors from Atlanta, Georgia. The MOU was insufficient to provide a contractual basis for a transaction of this size and sophistication. The MOU merely provided the initial framework for the development of a publicly-funded convention center hotel, but the MOU was not itself a contract.

As a matter of law, the MOU was not a contract for two reasons. First, by its unambiguous terms, the MOU represents the parties' intention to continue to negotiate toward the execution of subsequent contracts that would be binding upon the parties as to the terms and conditions outlined in the MOU. No such understanding can form a contract in South Carolina. Second, there was no meeting of the minds as to all of the essential business terms and conditions that were loosely described in the MOU. Because there was no meeting of the minds or mutual assent to the essential terms, the MOU is not a binding, enforceable contract.

A The MOU was an agreement to agree and was not an enforceable, binding contract

The determination of whether the MOU is a contract is a question of law Where as here, the material facts concerning the formation of an alleged contract are not in dispute, the issue of contract *vel non* is a question of law W E Gilbert & Assocs v The South Carolina Nat Bank 285 S C 421 423 330 S E 2d 307, 309 (Ct App 1985) Where an action presents a question as to the construction of a written document and the language is clear and unambiguous the question is not one of fact but one of law Shipyard Property Owners Ass n v Mangiaracina 307 S C 299 308 414 S E 2d 795 801 (Ct App 1992) Whether the court is asked to determine the existence of a contract or to construe the terms of a document the same rule applies -- if the language of the written document is unambiguous that language determines the force and effect of the instrument Superior Auto Ins Co v Maners 261 S C 257 263, 199 S E 2d 719 722 (1973) (Determining that the express language of an instrument demonstrated the parties intent that the document should modify a former contract rather than create a new contractual obligation)

The plain language of the MOU evidences that neither the City nor any member of the Project Team including S&W intended to be bound by the MOU Instead, the language of the MOU demonstrates that the MOU was to serve as a framework for continuing to negotiate and execute numerous different operative contracts specifically contemplated by the MOU which contracts would then define the terms of the transaction The MOU states in pertinent part

This MOU reflects the intent to proceed in good faith
to execute definitive written agreements with respect
to the business terms and conditions herein contained

(MOU § 1, R p 459 lines 23 24)

Some of the specific definitive written agreements contemplated by the MOU were
the Development Management Agreement the Design Build Agreement the Hotel Operating
Agreement, and the Room Block Agreement all of which were essential to the transaction
Because the MOU looked toward the execution of these operative contracts the MOU is
nothing more than a framework for the parties to negotiate an agreement – an agreement to
make an agreement which is not a contract As one leading authority on contracts explains

It is quite possible for parties to make an enforceable contract
binding them to prepare and execute a subsequent final
agreement In order that such may be the effect it is
necessary that agreement shall have been expressed on **all
essential terms** that are to be incorporated in the document
That document is understood to be a mere memorial of the
agreement already reached If the document or contract that
the parties agree to make is to contain **any material term** that
is not already agreed on no contract has yet been made the
so called contract to make a contract is not a contract at all

Arthur L Corbin et al Corbin on Contracts § 2 8, at 133-34 (footnotes omitted) (emphasis
added)

In this case there were numerous **material terms** left unexpressed in the MOU
concerning the proposed contractual relationships among the City and the Project Team
members Indeed, most of the significant terms defining the relationships and responsibilities
of the parties were left open to be negotiated and defined by the subsequent operative
contracts The MOU therefore fits squarely into Professor Corbin s definition of a contract

to make a contract such that the MOU is not a contract itself

Several South Carolina cases recognize that oral or written agreements to agree are not themselves contracts. One of the earliest such cases is Savannah Guano Co. v. Fogle, 112 S.C. 234, 100 S.E. 59 (1919). In Savannah Guano, the South Carolina Supreme Court held that where there was a promise to make a contract there could be no actual contract until the material terms had been agreed upon. Id. at 112, 100 S.E. at 60.

A more recent case emphasizes the point that an agreement to agree represents negotiations only and not the formation of a contract. Electro Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004). In Electro Lab, a general contractor used an electrical subcontractor's bid in its bid to build a school. Id. at 366, 593 S.E.2d at 171. When the general contractor was subsequently informed that another company could do the same work for a lower bid, the general contractor asked the subcontractor if it could do the work for the lower price. Id. at 267, 593 S.E.2d at 172. The subcontractor agreed to do so. The general contractor sent a signed confirmatory fax to the subcontractor stating the agreed-to price and instructing the subcontractor to begin the necessary preparations for the electrical work, including obtaining a performance and payment bond. The fax also stated, 'A subcontract is forthcoming.' According to the contractor, the subcontractor indicated six weeks later that he would not be able to obtain the bond and asked to withdraw from the project, and the general contractor hired another company to do the electrical. The subcontractor then sued the general contractor for breach of contract. Id.

The Court of Appeals held that the writing sent to the subcontractor was insufficient

to create a contract Id at 370, 593 S E 2d at 174 The general contractor s statement that a subcontract was forthcoming demonstrated that the parties were engaged in negotiations Id They had agreed to agree but were not yet bound in contract Id

The MOU is even less like a contract than the confirmatory fax in Electrolab The MOU described some of the business terms and conditions but expressly contemplated that the final negotiated terms would be incorporated into the subsequent binding contracts Here, even more so than in Electrolab such a document although in writing signed and containing the boilerplate recitation of consideration cannot itself form a contract

This conclusion is in accord with other South Carolina state and federal authorities applying South Carolina law that have held that an agreement to make an agreement does not form a contract Holliday v Peagram 89 S C 73 73, 71 S E 367, 370 (1911), Blanton Enterprises v Burger King Corp 680 F Supp 753 770 (D C S C 1988) Trident Constr Co v Austin Co 272 F Supp 2d 566 575 (D C S C 2003) Relying on Aperm of South Carolina v Roof 290 S C 442 351 S E 2d 171 (Ct App 1986) S&W asserts that the MOU contains such detailed guidelines for the development of the subsequent agreements that the MOU itself should be considered a contract However the contract at issue in Aperm is

readily distinguished from the MOU In Aperm, the parties entered into a license agreement that allowed Roof to terminate the agreement within a certain time frame after which the contract would become “fixed ’ if not terminated Id The license agreement provided for a schedule of minimum royalty payments that Roof was to make to Aperm Id Roof did not exercise its option to terminate the license agreement Id The Court of Appeals held that the license agreement then became a continuing contract and was not unenforceable for

indefiniteness the payment of minimum royalties was the *sine qua non* of the agreement and a schedule for payment of minimum royalties was provided for in the license agreement Id.

This is in contrast to the MOU. As explained in further detail below, although the MOU did provide a framework for subsequent contracts, these guidelines were insufficient to complete the negotiation of the subsequent definitive agreements. In fact, the parties including S&W were never able to reach agreement on many of the terms that were essential to those subsequent agreements. The tortured and ultimately unsuccessful process of negotiating these definitive agreements belies the argument that all that was left to do following execution of the MOU was to simply memorialize the terms of the MOU in subsequent contracts.

Furthermore, these subsequent definitive written agreements were interdependent. As just one simple example, the developer's fees were to be set forth in the Development Management Agreement as a percentage of certain elements of the Guaranteed Maximum Price ("GMP") (Excerpt of draft Development Management Agreement R pp. 538-541). The GMP, however, was to be enumerated in a separate agreement – the Design-Build Agreement. Only when all subsequent definitive agreements were fully negotiated and taken together as a whole would they have formed the basis for binding contractual obligations among the City and the Project Team members.

Because the plain language of the MOU demonstrates the parties' intent that the MOU was to be a non-binding framework for the negotiation of subsequent operative contracts, it is unnecessary to examine extrinsic evidence of the parties' intent, such as the subsequent acts of the parties as detailed by S&W in its Brief of Appellant. However, the

overwhelming evidence contained in the record does support the legal conclusion that as a matter of law the parties to the MOU did not interpret the MOU as a binding contract and did not intend to be bound by its terms

John Lumpkin, the "point man" for the project and not a party to this litigation, testified repeatedly that the MOU had no binding effect

Q Going into this MOU, though, getting everybody to sign it unquestionably you understood - the project team understood that this document was going to require City Council approval?

A What I understood was that this document did not obligate the City at the point and that there were certain actions and requirements the document spelled out that needed to be taken to move forward

(Deposition of John Lumpkin 53 3 12 R p 346)

A I think the Memorandum of Understanding is like a letter of intent

(Deposition of John Lumpkin 67 8 9, R p 349)

A No I think it's much like a letter of intent that you say that Here is what we intend to do and the steps we intend to take but you, you know once -- until we get all the stuff together neither party using a letter of intent has you know, obligations under this letter of intent

(Deposition of John Lumpkin, 68 17 22 R p 349)

Q The Memorandum of Understanding I think you've - you have said **that this did not create a binding contract**

A That in and of itself --

Q Right

A that's correct Yes, sir

Q Right And as of June 26, 2003, you understood that under the terms of the MOU members of the development team agreed to be effectively at risk up to the date of the bond closing That s what you stated to Mr Steve Gantt?

A That s correct That s correct

(Deposition of John Lumpkin 287 22 288 8 R p 360) (emphasis added)

The plainly stated and clearly understood intent of the parties was to work in good faith ultimately to enter into subsequent contracts that would fully flesh out the essential business terms and conditions addressed in the MOU The express language of the MOU is an unambiguous statement that the parties did not intend to be bound by the MOU The only reasonable inference that can be drawn from this language is that it was the parties intent that the definitive written agreements and not the MOU were the contracts that would ultimately bind the parties Such an agreement to agree cannot form a valid binding contract in South Carolina

B There was no mutual assent on terms material to the development of a publicly-funded convention center hotel

The MOU also cannot be construed to be a binding contract because there was no mutual assent as to the essential terms of the transaction As Professor Corbin states "If the document that the parties agree to make is to contain any material term that is not already agreed on no contract has yet been made Arthur L Corbin et al Corbin on Contracts § 2 8 at 133-34 (footnotes omitted) Our own Supreme Court has held

In order to have a valid and enforceable contract there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the

agreement

Player v. Chandler 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1973) (emphasis in original)

In this case, the City frames the issue in terms of lack of mutual assent, S&W frames the issue as whether the MOU is void for indefiniteness. Both arguments boil down to a dispute over what were the essential and material terms of the transaction and whether negotiations on those points concluded with the MOU. S&W asserts that the essential terms of the MOU were those related to its own compensation and that because a formula was provided for the calculation of their fees, all of the material terms of the transaction were set forth within the MOU. S&W's argument avoids the many material terms left unaddressed by the MOU, most particularly the budget and financing structure for the hotel. However, material terms of its compensation were to S&W; its financial gain was not the essential term of the transaction. Two of the essential matters relating to this transaction, and which represent the potential ultimate cost to the City's taxpayers, were

1. The par amount of the bonds to be issued and
2. The amount of City Standby Support Payment that would be necessary in order for the bonds to obtain an investment grade rating.

Neither of these issues was ever resolved. That there was no mutual assent to either of these essential terms is evidenced by the fact that both terms continued to increase dramatically up until the time the City issued a second Request for Proposals for a privately-funded hotel.

The MOU contemplated that approximately \$60 million in tax-exempt hotel revenue bonds would be issued (MOU § V 4, R p 461, lines 16-29). However, as the Project Team's proposals evolved, the total amount to be financed by the bond issue increased.

dramatically While the MOU executed in April 2003 contemplated a \$60 million bond issue, by September 24 2003 the projected bond issue necessary to fund development and construction of the hotel had increased to \$62 785 000 (Citigroup Financial Model dated September 24 2003 R pp 481 491) In February 2004 the bond issue had increased even further to \$69 870 000 (Citigroup Presentation dated February 11 2004 R pp 507-511) At the time the City issued a Request for Proposals on a privately-funded hotel project the Project Team s estimate had sky-rocketed to over \$72 000 000 \$12 million more than contemplated in the MOU (Citigroup Financial Model dated March 15 2004 R pp 492 506) Thus the par value of the bonds that the Project Team proposed to be issued increased more than 20% over the amount estimated in the MOU The record is devoid of any evidence that the Columbia City Council properly convened as City Council with authority to bind the City ever voted to approve this increase This tremendous increase in the par value of the bonds indicates that there was never a meeting of the minds as to this material business term the *sine qua non* of the project, in the MOU

The MOU also contemplated that the City would undertake to provide City Standby Support Payments in an amount acceptable to the City to make up any shortfall in debt service if the hotel revenues were insufficient (MOU § V 5 R p 461, lines 30 34) This was an essential term and perhaps the most critical term because it represented the amount of money that the City s taxpayers would have to pay out of the City s general fund should the hotel not produce enough revenue to pay the debt service on the bonds The MOU only states in vague terms that

The City is willing to provide a credit enhancement to support an **amount acceptable to the City** which would be utilized for any debt service shortfalls on the Subordinate Bonds or

Hotel Bonds (as the case may be) if project revenues net of expenses are insufficient to provide for the debt service on the Subordinate Bonds or Hotel Bonds

(MOU § V 5 R p 461, lines 30-34) (emphasis added) The MOU provided no estimate and not even a manner for calculating the necessary City Standby Support Payment demonstrating the MOU's failure to set forth a definitive term on this material issue

Further indicating that there was never any mutual assent on this material issue, the City Standby Support Payment was constantly a moving target and continued to increase exponentially throughout the project negotiations. In September 2003, the maximum City Standby Support Payment was estimated to be \$53,135,000 (Citigroup Financial Model dated September 24, 2003, R pp 481-491). By March of 2004, that number had increased to \$89,735,000, an almost 70% increase (Citigroup Financial Model dated March 15, 2004 R pp 492-506). In fact, as the Project Team's plan ultimately evolved, the City faced the potential risk of bailing the entire project out if the hotel revenues failed to cover debt service.

A A portion of those bonds are not credit enhanced by the City. They're - they're purely -- those bonds are paid by the financial performance of the hotel. So as to that portion - and I believe it was the majority of the bonds. If the hotel did not perform, then the bondholder's recourse was to come back and take the hotel back and had no recourse to the City.

Q **Do you believe that if that were to occur the City of Columbia would have left those nonrecourse bondholders standing and not paid that debt?**

A **I do not** I think the City just as - just as they would have in a private transaction would not allow - would allow a private developer to go -- you know, to go under. It would necessarily need to step in and pick up the - pick up the -- you know the -- the hotel and

it could not afford to have this hotel go into a situation where it would be taken back by a lender, whether it's bondholders or -- or a private lender

(Deposition of John Lumpkin, 60 11 61 7, R pp 347-348) (emphasis added)

Columbia City Council never voted to approve any amount of City Standby Support Payment (Affidavit of Erika Salley ¶ 9 R p 587 lines 10 12) Without the City of Columbia s commitment to fund the City Standby Support Payment, the bonds could not have obtained bond insurance or the investment-grade rating necessary to sell the bonds (Deposition of William Corrado 41 5-42 20, R pp 372-373)

It cannot be disputed that there was a complete lack of mutual assent as to the ever-increasing par amount of the bonds and as to the City Standby Support Payment It defies logic to assert there could be mutual assent to an ever-increasing cost the ultimate magnitude of which was completely unknowable at the time the MOU was executed Such a position would give no meaning at all to the plain terms of the MOU which allow for the City to determine the City Standby Support Payment in an amount acceptable to the City not an unlimited amount (MOU § V 5 R p 461 lines 30-34)

As further evidence of the failure of the MOU to represent a meeting of the minds sufficient to form a binding contract the MOU specifically contemplated the negotiation and execution of subsequent agreements that **would** define the parties contractual relationships It remained necessary, under the express terms of the MOU, for the parties to 'execute definitive written agreements in order for those business terms and conditions to become binding in contract upon any of the parties to the MOU Not only were the terms of the mandatory agreements not fully set forth in the MOU, none of these agreements was ever completely negotiated or executed Because of the interdependence of these agreements the

failure to execute any one meant the project would not go forward

Gary Realty and Garfield Traub S&W s co-appellants, and other key members of the Project Team have admitted that no agreements contemplated by the MOU were ever executed

REQUEST NO 2 Admit that no Qualified Management Agreement or other agreement under which Hilton was to manage the convention center hotel was ever executed

RESPONSE Admitted

(Plaintiffs Responses to Defendant Hilton Hotels Corporation s Second Request for Admissions dated October 29, 2007 R p 337 lines 2-4)

The testimony of other parties to the MOU further evidences the fact that none of these essential agreements was ever finalized or executed

Q Okay And there were no other agreements with the city?

A No other signed agreements

(Deposition of Charles Gary 23 23 25 R p 369 lines 23-25)

Q And, in fact basically what this indicates is moving forward exactly in accordance with the MOU, moving forward in an effort to try to come up with some definitive written agreements?

A Well we had -- in certain respects had come up with the agreements There were other agreements that had certain -- certain provisions that were still in discussion, as I recall

(Deposition of John Lumpkin, 158 3 11, R p 353)

Q So in other words there was still -- there was still agreements left to be put in place and negotiated and

and finalized and signed?

A Well, I think that there was still piece there was still provisions in the documents that were necessarily, you know, central to the transaction I m not sure because in the hotel operating agreement they were still dealing with the tax issues and there were, you know - again theoretically if there was a tax issue that the tax law changed in Washington and you could not - no longer to do these kinds of deals, then golly, Houston, we have a problem

(Deposition of John Lumpkin 83 5-17 R p 351) (emphasis added)

John Lumpkin also testified specifically that the Development Management Agreement was never executed (Deposition of John Lumpkin 74 11-13 R p 350)

Within these inchoate agreements there were significant open issues that were not resolved even at the time that the City decided to issue a second Request for Proposals These open issues were critical financial considerations

One key financial consideration that was never resolved was whether the Hotel Corporation which was to own the hotel would be required to pay property taxes for the hotel or whether it would be exempt from property taxes This was a material term, which none of the financial projections for the hotel ever took into account (Deposition of William Corrado, 99 20-24, R p 374, Affidavit of Joel Gottlieb ¶ 10 R p 591) Under the financial projections developed by the Project Team, the hotel would not have generated sufficient revenues to pay its anticipated expenses and property taxes i e the project would not have cash flowed (Handwritten minutes from February 11 2004 meeting of Columbia Convention Center Hotel Corporation R pp 571 575) Jeff Sachs a financial advisor to the City concerning the economic and financial aspects of the hotel project testified

A There was an outstanding item as it related to property taxes. We had to have approval from the county. The cash flows - **everything was predicated on a property tax exemption** and we had not - we, the development team, had not gotten that exemption. It was a material exemption that would have made that coverage go to all in coverage again, with all the payments to a negative number.

Q The property tax exemption, is that an exemption that other public hotels have received?

A Yes.

Q Do you know of any public hotels that did not receive a property tax exemption from their county?

A No, but we had indication that this one was going to be a challenge.

Q What was that indication?

A The preliminary discussions. I can't remember which attorney was working on that, but said that this is not going to be a slam dunk. Because every - in South Carolina, I understood it that every county made that decision, it wasn't a state level decision, that the county tax appraiser had the authority to grant it or not to grant it.

Q That was a conversation you had with an attorney working on the case?

A I believe it -- I don't know if Gottlieb was handling that or not. I just remember it being communicated back. We did, we like everyone thought it was not going to be an issue, and then we had heard that it's not a slam dunk as I recall it.

Q And there was no resolution of that to your --

A Not that I know of, no. Not that I know of.

(Deposition of Jeff Sachs 96 5-13 97 11-98 13 R pp 381-383) (emphasis added)

Another significant open issue remaining in the Design-Build Agreement related to payment for the initial inventory or the so-called "steaks in the freezer" issue. (Affidavit of

Joel Gottlieb ¶ 13 R p 592, Email chain between Joel Gottlieb and Kathleen Wu R pp 562-566) The City expected that the GMP would include payment for initial inventory however, there is no evidence in the record that a final agreement satisfactory to the City was ever reached concerning how the initial inventory would be funded (Id.)

Yet another unresolved issue was how executive compensation to the members of Hilton Hotels' upper level management would be handled in a manner that satisfied Hilton Hotels but that did not violate the requirements of the Internal Revenue Service Revenue Ruling that allowed for the issuance of tax-exempt bond to fund the hotel (Affidavit of Joel Gottlieb ¶ 12 a R p 592 Email chain from Kathleen Wu, dated January 6, 2004 R pp 567 568) If not resolved, the tax-exempt nature of the bond issue would be in jeopardy

The failure of the parties to reach an agreement on these issues relating to financing and operating the hotel indicates that even at the time that the City issued a second Request for Proposals there was no meeting of the minds as to all essential terms of the transaction much less at the time the parties entered into the MOU

Instead of focusing on the financial terms critical to the overall transaction S&W argues that the only essential terms of the MOU are those related to its compensation and that because the MOU provided a method for calculating their payment, all essential terms of the transaction were provided for in the MOU

The fee for S&W was contemplated in Article 6 1 1 1 of the document entitled ' Agreement Between Design/Builder and Architect/Engineer For Design/Build Project not the MOU (Excerpt of Agreement Between Design/Builder and Architect/Engineer for Design/Build Project, Article 6 1 1 1 R p 536) That document was never executed, but the last known draft showed the following

Design/Builder shall compensate the Architect/Engineer on the following basis, as detailed herein Stipulated Base Fee- The Architect/Engineer s fee for the Basic Services is hereby established as a Lump Sum Amount within the GMP Proposal in the amount of \$2,053,000 ????????add site and FFE dollars

(Id.) (internal commentary in original)

Ultimately, it was this definitive written agreement that was to provide a contractual basis for the payment of S&W s fees out of the bond proceeds This agreement was never finalized and the bonds never closed Furthermore the fact that this proposed ‘definitive written agreement along with the Design-Build Agreement and Qualified Management Agreement, was never finalized or executed indicates that there was no mutual assent whether in the MOU or the ‘definitive written agreements to the essential terms of the transaction

S&W raises several additional issues in its Brief of Appellant regarding its contention that the MOU is a contract First S&W argues that the boilerplate recitation of consideration evidences the parties intent that the MOU be a binding contract (Brief of Appellant p 10) As explained above consideration is but one element of a contract and without mutual assent to all material and essential terms no contract is formed

S&W also argues that the MOU provides a remedy in the event the City does not comply with the terms of the MOU and that this alleged remedy demonstrates that the MOU is a contract In fact the MOU does not bind the City to provide a remedy to S&W The MOU provides

The Project Team will be responsible for the costs incurred prior to closing the financing These costs include but are not

limited to design testing bid packages legal underwriting travel etc If the Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Agreement or as a result of an unforeseen catastrophic event not caused by any of the Project Team, the City will reimburse the Project Team for actual documented costs incurred to that point in time up to an amount agreed upon

(MOU § VI 3, R p 462, lines 10-18) Importantly the parties understood that they were working at risk unless and until the bonds closed Further reimbursement up to an amount agreed upon is no contractual remedy because it allows the City complete discretion to determine what amount, if any, to reimburse S&W

As the foregoing demonstrates the MOU was merely an agreement to agree to negotiate future contracts and there was no mutual assent as to the material and essential terms of the transaction S&W has failed to demonstrate even a scintilla of probative evidence that the MOU is a contract Thus as a matter of law the trial court properly determined that the MOU was not a binding and enforceable contract and this Court should affirm that determination

II The trial court properly held that as a matter of law the City made no unambiguous promise upon which it was reasonable and foreseeable for S&W to rely for payment for all of S&W's architectural services

The trial court properly held that S&W failed to produce even a scintilla of evidence that S&W reasonably and foreseeably relied upon an unambiguous promise made by the City The trial court also properly held that as a matter of law a claim of estoppel would not lie against the City because the City officials upon whose statements S&W based their estoppel claim lacked the necessary authority to bind the City

S&W asserted three bases for recovery under a theory of estoppel

- 1 Alleged promises contained within the MOU
- 2 Alleged actions taken or statements made by City staff officers or individual council members and
- 3 The Columbia City Council's vote on July 30, 2003, to approve payment to S&W of \$650,000 in interim architectural fees

When a party asserts a claim of estoppel against a governmental entity, that party must meet the general requirements of estoppel in order to prevail. Davis v. Greenwood School District, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). These elements are

- a The presence of an unambiguous promise
- b The promisee's reasonable reliance upon the promise
- c That the reliance was expected or foreseeable by the promisor and
- d The promisee was injured as a result of reliance on the promise

Id.

In addition, a party asserting an estoppel claim against a governmental entity must prove that the alleged conduct of a government employee or officer is within the authority of that individual. If the employee or officer did not have authority to make the decision or statement, then no estoppel will lie against the governmental entity. Service Mgt., Inc. v. State Health and Human Services Finance Comm'n., 298 S.C. 234, 238, 379 S.E.2d 442 (Ct. App. 1989). In Service Management, a nursing home entered into a contract for reimbursement for services provided pursuant to the Medicaid program. Id. at 236, 379 S.E.2d at 443. The terms of the contract provided for a particular rate of reimbursement for capital expenses. Id. A rate sheet attached to the front of contract and not incorporated by reference therein provided for a higher rate of reimbursement. The plaintiff sought to recover

the higher rate of reimbursement Id at 237 379 S E 2d at 443

The employee who supervised rate setting testified that he calculated the higher rate of reimbursement based upon the existing practice of the agency Id at 236, 379 S E 2d at 443 The Court of Appeals denied the plaintiff's claim of estoppel against the state commission Id at 238 379 S E 2d at 444 The court held that the agency's governing board had never approved the rate setting practice Id at 237, 379 S E 2d at 443 Because the employee was without authority to make such changes to the rates, the agency was not bound by that employee's unauthorized actions Id , 379 S E 2d at 444 The fact that the employee's conduct was unauthorized defeated the estoppel claim Id at 238 379 S E 2d at 444

The trial court properly determined that S&W's claim of estoppel upon its first basis – the language of the MOU – failed as a matter of law because the MOU did not contain an unambiguous promise for the City to pay S&W S&W argues that several portions of the MOU relating to its own compensation form an unambiguous promise for payment (Brief of Appellant, p 29-30) However additional provisions not addressed fully by S&W demonstrate that the portions of the MOU relied upon by S&W do not create an unambiguous promise

Most importantly the MOU informs S&W that it “will be responsible for the costs incurred prior to closing the transaction (MOU § VI 3, R p 462, lines 10 18) This language cannot support the assertion that the City promised to pay S&W for all of its work because it clearly demonstrates that the Project Team was to bear the cost of its own performance unless and until the bonds closed This section goes on to state that [i]f the

Hotel financing fails to close as a result of the City not meeting its obligation outlined in the Development Agreement or as a result of an unforeseen catastrophic event not cause by any of the Project Team the City will reimburse the Project Team for actual documented costs incurred to that point in time up to an amount to be agreed upon (Id.) The conditional and discretionary nature of this sentence cannot support the assertion that it is an unambiguous promise The Development Agreement was one of the numerous “definitive written agreements that was never finalized or executed, and S&W was aware it was working without the protection of the Development Agreement Because the Development Agreement was never executed this paragraph contains no unambiguous promise to pay S&W for any of its work Any work that S&W did it did with full knowledge that it did so at risk and without the protection of a Development Agreement Such knowledge vitiates S&W s assertion that its reliance upon this paragraph was reasonable

Furthermore whether the transaction presented by the Project Team was feasible was a determination for the City to make and the MOU makes clear that if the City made a determination that the project was not feasible then it would have no liability to reimburse S&W for any costs The Project Team recognized the sole authority of the City to determine the feasibility of the project (Deposition of John Lumpkin 70 12 22 Supplemental R p 625) The presence of this provision providing the circumstances under which the City could end the deal with no liability makes it patently unforeseeable to the City that S&W would rely to its detriment on Paragraph VI 3 In the face of these express terms, it is impossible for the MOU to be construed as containing an unambiguous promise for the City to compensate S&W for all of their work on the project

S&W's second basis for estoppel must also fail because no person or entity other than the Columbia City Council had the authority to bind the City. S&W asserts as a basis for its estoppel claim statements made by the mayor, the city manager, and the City's manager of the hotel project. Even if a City official, employee, or the non-profit hotel corporation made statements to the project team or took some action relative to the ongoing work of S&W, those statements or actions would exceed that individual or entity's authority to bind the City, and as a matter of law cannot form a basis for an estoppel claim against the City. Only actions taken by the Columbia City Council convened as the city council are binding on the City and can form the basis of an estoppel claim against the City.

Ultimately, the Columbia City Council would have had to enact an ordinance or pass a resolution committing itself to issue the bonds to fund the hotel or committing to pay the necessary amount of City Credit Support Payment subject to annual appropriations (Affidavit of Bill Musser ¶ 10, R. pp. 596-597). The Columbia City Council never enacted any such ordinance or passed any such resolution (Affidavit of Erika Salley, R. pp. 585-588). Only the Columbia City Council could take legislative action sufficient to form a basis for estoppel, and no such legislative action ever took place. The City, therefore, cannot be bound in estoppel by the actions of individuals without the authority to bind the City.

In addition, this project hinged upon the issuance of hotel revenue bonds. Regardless of whether those bonds were going to be issued by JEDA, the City, or the Hotel Corporation, the City was going to be required to provide some amount of City Credit Support Payments, but only in an amount the City, in its sole discretion, deemed acceptable (MOU § V 4 and 5, R. p. 461, lines 17-35). As explained below, the City could not have authorized either

the bond issue or the approval of any amount of City Credit Support Payment without a vote of the City Council convened as City Council and following all statutory requirements

As a matter of state statute the City can only take action through the City Council S C Code Ann § 5-7 160 states All powers of the municipality are vested in the council, except as otherwise provided by law and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law S C Code Ann § 5 13 30 reiterates that [a]ll legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council

State law and the Columbia City Code require that the City acting through the City Council, enact an ordinance to issue bonds or appropriate funds The Columbia City Code addresses the necessity of an ordinance for the issuance of bonds or appropriation of funds in Section 2-81 wherein the code states

The council shall act by ordinance in all matters required by law to be done by ordinance including (3) Appropriate funds and adopt a budget (5) Authorize the borrowing of money or the issuance of bonds

South Carolina Code Section 6 21 50 authorizes municipalities to issue revenue bonds for the construction of a hotel, however, pursuant to S C Code Section 6 21 210 City Council must authorize that bond issue by an ordinance or resolution No such ordinance or resolution authorizing the issuance of the bonds was ever even brought before the City Council for a vote South Carolina Code Section 5-7 260 requires adoption of a budget by an ordinance enacted by City Council

Not only must the City Council act by ordinance or resolution to issue bonds or appropriate funds but the City Council cannot delegate this legislative authority to take

either action because they are non-delegable duties of the City Council. As stated in 16A Am. Jur. 2d Constitutional Law § 295, "A legislature's budget-making responsibilities may not be delegated. It cannot delegate its power to appropriate money unless specifically authorized by the federal or state constitutions. This fundamental doctrine is recognized in South Carolina in particular reference to the General Assembly's authority to delegate budgeting and appropriations to another entity. 'Legislative authority may not be delegated.' State ex rel. McLeod v. McInnis, 278 S.C. 307, 317, 295 S.E.2d 633, 639 (1982); Gilstrap v. South Carolina Budget and Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992).

Likewise, the power of individual officers and agents to bind the City in contract is limited by state statute and municipal ordinance. As described in S.C. Code § 5-13-90, the City Manager is the CEO and head of the administrative branch of the City government; however, his authority is limited to hiring and firing city employees, preparing the annual budget, preparing the annual financial report, advising the city council on financial condition and needs of the City, and performing any other duties prescribed by law or required of him by the council.

The Columbia City Code restates the general duties of the City Manager provided for by state statute: "The city manager shall be the chief executive officer of the city and head of the administrative branch of city government. The city manager shall perform and exercise the duties and responsibilities prescribed by law for this office and such other duties and responsibilities as prescribed by the city council." Columbia City Code § 2-114.

Although the City Council can authorize the City Manager to take actions not specifically enumerated in the statute or ordinance, the City Council cannot delegate to the

City Manager the authority to enter into contractual arrangements of the amount that was going to be necessary to fund the hotel project. The Columbia City Code specifically provides that the City Manager is authorized to bind the City in contract without City Council approval for contracts of \$10,000 or less. For contracts in excess of \$10,000, the city council must approve award of the contract. Columbia City Code Section 2-207. Neither State statute nor city ordinance provides any other officer or employee of the City with authority to bind the City in contract.

To the extent that S&W asserts that actions taken by the Columbia Convention Center Hotel Corporation form the basis for a claim of estoppel against the City, such assertion fails as a matter of law. Such action could only be taken by City Council convened as City Council. The Columbia Convention Center Hotel Corporation would have no authority to bind the City to enter into a contract to issue the necessary bonds or to appropriate funds for the City Standby Support Payments without the requisite formal vote of City Council, something that never occurred. One of the key differences between the Columbia Convention Center Hotel Corporation and the City Council, despite the overlap in membership, is the opportunity for public input into the passage of resolutions or ordinances by the City Council. Columbia City Code §§ 2-86 and 2-87. There was no such opportunity for public input into any decisions made by the Columbia Convention Center Hotel.

An essential element of an estoppel claim against a municipality is that the entity alleged to have taken some action forming the basis of the estoppel claim must have been acting within the scope of its authority. Because the City would ultimately have been

required to enact an ordinance to issue the bonds or appropriate funds for the City Standby Support Payment, the Hotel Corporation acting alone would not have had authority to bind the City Council. Thus, an estoppel claim against the City based upon actions of the Hotel Corporation will not lie.

As a third basis for its estoppel claim, S&W argues that the July 30, 2003 Columbia City Council vote was an unambiguous promise for payment for all of its architectural services. On that date, the Columbia City Council voted to approve \$650,000 in interim architectural fees to be paid to S&W. (Minutes of July 30, 2003 Columbia City Council meeting, R pp. 576-577.)

The trial court held that S&W could not assert an estoppel claim based upon this vote because such a claim was inconsistent with S&W's primary argument that the July 30, 2003 vote formed a contract between S&W and the City, separate and apart from the MOU. Originally, S&W argued that based upon that vote, the City was liable for payment of fees from the date of the vote onward. In contrast, S&W now argues in its estoppel claim that this vote renders the City liable for payment of all of S&W's fees from the beginning of the hotel project. Pursuit of such inconsistent theories may be possible at the trial court level in accordance with Rule 8, SCRCF (although the City does not so concede), but such inconsistent claims cannot be maintained in this appeal because of the possibility of a double recovery in these separate un-consolidated appeals. S&W must elect a remedy.

Although the trial court did not explicitly make a ruling on the elements of estoppel as to this basis of S&W's claim, this Court has the authority to affirm the trial court's decision based on any grounds appearing in the Record on Appeal. Rule 220(c), SCACR.

The additional basis for this Court's affirmance of the trial court's grant of summary judgment in favor of the City is stated below, and the City therefore will address the substance of S&W's estoppel claim. The record is more than sufficient for this Court to determine as a matter of law that S&W is unable to meet the legal elements for an estoppel claim based upon the Columbia City Council's vote. First, the council vote does not represent an unambiguous promise to compensate S&W for all of its purported work on the hotel. The minutes from the July 30, 2003 City Council meeting state as follows:

ACTION APPROVED \$650,000 for Interim architectural design services for a period of 90 days prior to Bond Closing. Mr. Papadea and Mr. Osborne did not vote due to a conflict of interest.

(Id.) By its terms, the council vote approved only a payment of \$650,000 for work within a limited period of time; therefore, the vote could not have created an unambiguous promise to compensate S&W for all of its purported work on the hotel from the beginning of the hotel project.

It was also not reasonable or foreseeable that S&W would rely upon the council vote for payment for all of the work it claims to have done on the hotel project because the City has complied completely with its obligations arising therefrom. On December 18, 2003, S&W submitted an invoice to the City in the amount of \$697,084.79 for the period July 13, 2003 to December 15, 2003. (Invoice from S&W, R. p. 622.) The City issued a check to S&W for \$697,084.79 on December 29, 2003, fully satisfying any obligation arising from the July 30, 2003 vote. (Check from City of Columbia, R. p. 623.) If S&W had believed at the time of the vote that the request encompassed payment for all previous services, it would

have included those on the invoice submitted to the City in December 2003. It therefore would be unreasonable for S&W to rely upon the City Council vote for its estoppel claim because the City would have no reason to foresee that S&W would rely upon what was a concluded obligation.

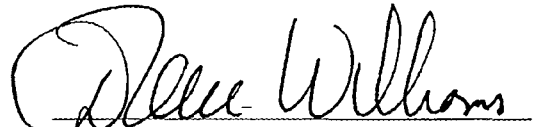
For the foregoing reasons, S&W failed to provide even a scintilla of evidence to meet each of the requirements of an estoppel claim against the City. The City, therefore, is entitled to summary judgment in its favor on S&W's estoppel claim.

It should finally be noted that S&W presented a claim for quantum meruit in its Second Amended Complaint filed on August 3, 2009. The trial court granted summary judgment in favor of the City on all of S&W's claims, including quantum meruit. In its Brief of Appellant, S&W does not address dismissal of its claim for quantum meruit. Thus, S&W has abandoned its appeal on the issue of quantum meruit. Rule 208, SCACR.

CONCLUSION

Based upon the foregoing, this Court should affirm the trial court's rulings that the MOU was not a binding contract and that S&W was not entitled to recovery under a theory of estoppel.

Respectfully submitted,



Michael W. Tighe
Richard C. Detwiler
D. Reece Williams III
Kathleen M. McDaniel
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, SC 29202-1390
Telephone (803) 404-6900
Facsimile (803) 404-6901
ATTORNEYS FOR RESPONDENT

December 22, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2005-CP-40-3361

Stevens & Wilkinson of South Carolina Inc , Gary
Realty Company, Inc , Garfield Traub Development, LLC
and Turner Construction Company

Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina Inc is

Appellant

vs

Paul C 'Bo Aughtry III Windsor/Aughtry Co Inc
Vista Hotel Partners LLC, Hilton Hotels Corporation and
the City of Columbia South Carolina

Defendants

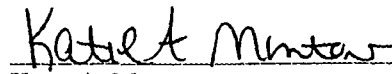
Of Whom

City of Columbia South Carolina is

Respondent

PROOF OF SERVICE

I Katie A Minton an employee of the law firm of Callison Tighe & Robinson LLC certify that I have served the **Amended Final Brief of Respondent** on the Appellant herein, by causing copies of same to be hand-delivered to its attorneys of record, Richard A Harpoothian, Esquire and Graham L Newman Esquire 1410 Laurel Street Columbia South Carolina 29202, on December 22 2010


Katie A Minton

December 22, 2010
Columbia South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James Jr Circuit Court Judge

Case No 05-CP-40-3361

Stevens & Wilkinson of South Carolina, Inc , Gary
Realty Company Inc , Garfield Traub Development LLC,
and Turner Construction Company

Plaintiffs

Of Whom

Stevens & Wilkinson of South Carolina, Inc is

Appellant

vs

Paul C "Bo" Aughtry III, Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, LLC, Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom

City of Columbia South Carolina is

Respondent

FINAL REPLY BRIEF OF APPELLANT

RECEIVED

DEC 16 2010

SC Court of Appeals

Richard A Harpootlian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Post Office Box 1090
Columbia South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	ii
Argument	1
I	In arguing that the question of whether contract existed between Stevens & Wilkinson and the City may be decided as a matter of law the City incorrectly presumes that there is no conflicting evidence on that issue 1
II	In an attempt to render the MOU void for indefiniteness the City incorrectly points to issues that were never envisioned as a part of the contractual negotiations 3
III	Estoppel—The existence of conditions within the Memorandum of Understanding does not render the promises contained therein ambiguous 5
IV	Estoppel—The City's argument that viewing the July 30, 2003 City Council vote as evidence supporting estoppel threatens double recovery and requires election of remedies is misplaced in this appeal 5

TABLE OF AUTHORITIES

Cases

<i>Benya v Gamble</i> 282 S C 624, 321 S E 2d 57 (Ct App 1984)	1
<i>Capital City Garage & Tire Co v Electric Storage Battery Co</i> 113 S C 352 101 S E 838 (1920)	1
<i>Grant v Magnolia Manor-Greenwood Inc</i> 383 S C 125 678 S E 2d 435 (2009)	3
<i>L&W Wholesale Inc v Gore</i> , 305 S C 250, 407 S E 2d 658 (Ct App 1991)	2
<i>Rushing v McKinney</i> , 370 S C 280, 633 S E 2d 917 (Ct App 2006)	5
<i>T W Elec Serv Inc v Pacific Elec Contracors Ass n</i> 809 F 2d 626 (9 th Cir 1987)	2
<i>W E Gilbert & Associates v S C Nat Bank</i> 285 S C 421, 330 S E 2d 307 (Ct App 1985)	1 2 3

Other Authorities

17A C J S <i>Contracts</i> § 611a at 1225 (1963)	1

ARGUMENT

Appellant Stevens & Wilkinson reiterates the points of fact and law set forth within its Appellant's Brief in support of its contention that the trial court erred in granting summary judgment to Respondent City of Columbia. In brief reply to the City's Respondent's Brief, however, Stevens & Wilkinson offers the following argument:

I In arguing that the question of whether contract existed between Stevens & Wilkinson and the City may be decided as a matter of law, the City incorrectly presumes that there is no conflicting evidence on that issue.

'A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference. *Benya v Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984), citing *Capital City Garage & Tire Co. v. Electric Storage Battery Co.* 113 S.C. 352, 101 S.E. 838 (1920) 17A C.J.S. *Contracts* § 611a at 1225 (1963). The Appellant's and Respondent's briefs portray, at length, the conflicting evidence and inferences pertaining to whether Stevens & Wilkinson and the City formed a contract for the performance of architectural services. These conflicts end the matter because there are genuine issues of material fact as to whether the parties created a contract; the trial court erred in ruling as a matter of law.

The Respondent's reliance upon *WE Gilbert & Associates v. South Carolina Nat. Bank*, 285 S.C. 421, 330 S.E.2d 307 (Ct. App. 1985) is fundamentally flawed in that it presumes a dispute "[w]here the material facts concerning the formation of an alleged contract are not in dispute." *Id.* at 423, 330 S.E.2d at 309. In this case, witness testimony, the acts of the parties subsequent to the formation of the MOU, and the language of the MOU itself all present evidence that—when considered in the light most

favorable to the Appellant—support the existence of a contract. Of course, the Respondent disputes this evidence, but this evidentiary dispute is precisely what removes this case from the parameters for *W E Gilbert & Associates* and mandates the case be submitted to the jury for consideration.

Likewise, the City insists that the evidence extrinsic from the MOU is “overwhelming” in favor of no contract (Respondents’ Brief at 15). Obviously, Stevens & Wilkinson disputes that contention, as set forth at length in its Appellant’s Brief. Nevertheless, by pointing to contradictory testimony and documentary evidence, the City underscores precisely why the trial court erred in granting summary judgment. As the Court of Appeals has noted, even in the face of inconclusive and to some extent conflicting evidence:

[W]e do not think it proper for the trial court to have granted summary judgment based on it. We note that at the summary judgment stage of litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact. Nor does the judge make credibility determinations with respect to statements made in affidavits, or depositions.’

L & W Wholesale Inc v Gore, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991), quoting *TW Elec. Serv. Inc v Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). In this case, whereas the evidence as to whether a contract existed between Stevens & Wilkinson and the City was, at a minimum, conflicting, the trial court erred in ruling on the issue as a matter of law.

II In an attempt to render the MOU void for indefiniteness, the City incorrectly points to issues that were never envisioned as a part of contractual negotiations

In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract *Grant v Magnolia Manor Greenwood Inc* , 383 S C 125, 130 678 S E 2d 435 438 (2009) “In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation” *W E Gilbert & Associates* at 423 330 S E 2d at 309 The City does not dispute that the MOU provides the scope of the work to be performed by Stevens & Wilkinson as well as the industry standard framework by which its compensation was to be determined Rather in attempting to identify ‘material terms’ of the contract between the Appellant and Respondent the City identifies several issues that were never envisioned as a part of the contractual negotiations between the parties

First and foremost the City cites outstanding questions pertaining to the bond financing of the hotel project as being ‘material terms’ left unresolved by the parties There is no dispute however, that bond financing was not an issue negotiated between Stevens & Wilkinson and the City or any other party to the MOU In fact, obtaining such financing was specifically delineated as a duty of the City within the MOU (R p 461, ¶ V 4) Because the questions pertaining to bond financing were never intended to be negotiated between the parties to the MOU one must ask how it is the City now insists such questions required “mutual assent” in order to form a contract with Stevens & Wilkinson But rather than insisting (or even contemplating) mutual assent to terms of financing, the MOU provided the City with a condition subsequent designed to absolve it

from liability if such financing proved to be ‘not feasible ’ (R p 459 ¶I 1) As noted in the Appellant s Brief the City never sought to invoke this condition subsequent and feasibility ’ has not been touted by the City as a defense to this claim

Another financial consideration that was not contemplated as a term to be negotiated between the parties—but which the City now insists was “unresolved ’ and ‘ material —is the question of property tax liability on the hotel property There can be no dispute that Stevens & Wilkinson as the project architect had no ability to determine whether Richland County would charge the City property taxes for its hotel In fact the same must be said for all signatories to the MOU Like those referenced pertaining to bond financing the City’s concerns regarding ‘cash flow’ and its affect on property tax exemption do not create an unresolved material term but rather go to the condition subsequent of feasibility that the City has chosen to abandon

Unlike the ultimate terms of bond financing the MOU did indeed envision additional agreements to be executed between various parties to the MOU in order to finalize all minute details of the hotel transaction Stevens & Wilkinson notes in its Appellant’s Brief—and the City does not dispute—that Stevens & Wilkinson was not to be a signatory to any of those additional agreements Indeed many of those additional agreements (such as the Room Block Agreement and Qualified Management Agreement) had nothing to do with architectural services at all Nevertheless, the City asserts that the “interdependence of these agreements” necessitated that all be completed in order for the project to proceed This assertion is without basis either in the record or in law

III Estoppel—The existence of conditions within the Memorandum of Understanding does not render the promises contained therein ambiguous

South Carolina courts have observed that evidence tending to show an unambiguous promise' includes whether a party can 'clearly articulate the terms of the alleged [] contract how much money would ultimately be [exchanged] or how [the parties] would 'settle up '” *Rushing v McKinney*, 370 S C 280, 295 633 S E 2d 917 925 (Ct App 2006) The City does not dispute that the terms of the MOU and the method of 'settling up' were unambiguously set forth within the document

In arguing that the MOU did not constitute an unambiguous promise the City cites three portions of the MOU 'the conditional and discretionary nature of which renders any promises contained therein presumably ambiguous [Respondent's Brief at 29-30] Most notably, the City asserts that the feasibility condition subsequent contained within page one of the MOU defeats Stevens & Wilkinson's estoppels claim "Conditional and discretionary" terms, however have never been held to defeat a claim for estoppels In fact the detail the MOU set forth in discussing the various conditions of performance liability, or lack thereof is evidence that the parties 'clearly articulated the terms ' of their agreement *Id* Thus the City's argument fails

IV Estoppel—The City's argument that viewing the July 30, 2003 City Council vote as evidence supporting estoppel threatens double recovery and requires election of remedies is misplaced in this appeal

The City insists that the July 30 2003 vote to authorize Stevens & Wilkinson to complete its work on the Hotel Project because "inconsistent claims cannot be maintained in this appeal because of the possibility of a double recovery in these separate un consolidated appeals [Respondent s Brief at 35] This invocation of the doctrine of

election of remedies however is misplaced First it is unclear as to how double recovery is threatened while this case is pending on appeal Second if this case is remanded for trial, the trial judge may take sufficient steps to address the question of election of remedies at the appropriate time

Respectfully submitted,



Richard A Harpoonian
Graham L Newman
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

December 6, 2010
Columbia South Carolina

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr. Circuit Court Judge

Case No. 2005-CP 40-3361

Stevens & Wilkinson of South Carolina, Inc.

Appellant

v

City of Columbia, South Carolina

Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 211(B), SCACR

I certify that the Appellant's reply brief complies with Rule 211(b), SCACR.

By


Graham L. Newman

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 05-CP-40-3361

Stevens & Wilkinson of South Carolina, Inc Gary
Realty Company, Inc , Garfield Traub Development, LLC,
and Turner Construction Company

Plaintiffs

Of Whom

Stevens & Wilkinson of South Carolina, Inc , is

Appellant,

vs

Paul C “Bo” Aughtry III, Windsor/Aughtry Co , Inc ,
Vista Hotel Partners, LLC, Hilton Hotels Corporation and
the City of Columbia, South Carolina

Defendants,

Of Whom

City of Columbia, South Carolina is

Respondent

CERTIFICATE OF SERVICE

I, Beth Craft, Legal Assistant to the attorney for the Appellant, Richard A Harpootlian, P A ,
with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify _
that on December 6, 2010 served by Hand Delivery, the following documents to the below
mentioned person(s)

Documents

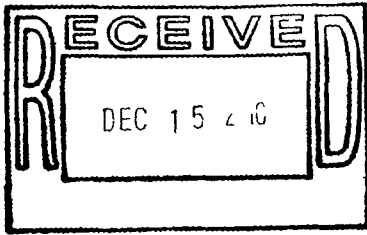
Final Reply Brief of Appellant

Served

Michael Tighe, Esquire
D Reece Williams, Esquire
Kathleen M McDaniel, Esquire
Richard C Detwiler, Esquire
Callison Tighe & Robinson, LLC
Palmetto Armory Office Building

1812 Lincoln Street Suite 200
Columbia South Carolina 29201


Beth Craft



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No 2005-CP-40-1014
(Consolidated Under Case No 2007-CP-40-1252)

Stevens and Wilkinson of South Carolina, Inc., Gary
Realty Company, Inc., Garfield Traub Development, LLC,
and Turner Construction Company, Plaintiffs

Of Whom
Gary Realty Company, Inc., and Garfield Traub
Development, LLC are Appellants,

vs

Paul C. "Bo" Aughttry III, Windsor/Aughttry Co., Inc.,
Vista Hotel Partners LLC, Hilton Hotels Corporation and
the City of Columbia, Defendants,

Of Whom
The City of Columbia is Respondent

RECORD ON APPEAL

Kenneth M. Suggs
Francis M. Hinson, IV
JANET, JENER & SUGGS, LLC
Post Office Box 927
Columbia, South Carolina 29202
Tel (803) 726-0050
Attorneys for Appellants

D. Reece Williams, III
Richard C. Detwiler
Kathleen McDaniel
CALLISON TIGHE
& ROBINSON, LLC
1812 Lincoln Street Suite 200
Columbia, South Carolina 29202
Tel (803) 404-6900
Attorneys for Respondent

INDEX

ORDERS

Order Consolidating Cases for Discovery filed May 24, 2007	5-13
Order Consolidating Cases for Trial, signed July 9, 2009	14-16

JUDGMENTS

Circuit Court's Grant of Summary Judgment to the City of Columbia, filed Nov 19, 2009	17-37
Circuit Court's Grant of Summary Judgment to Hilton Hotels Corporation, filed Nov 23, 2009	38-55
Circuit Court's Grant of Summary Judgment to Aughtry Parties, filed Dec 1 2009	56-76

PLEADINGS

Gary Realty Company, Inc and Garfield Traub Development LLC's Amended Complaint filed July 29, 2005	77-83
Gary Realty and Garfield Traub Development, LLC's Memorandum in Opposition to Defendant Hilton's Motion for Summary Judgment, filed July 2 2009	84-92
Joint Memorandum of Stevens & Wilkinson, Gary Realty, and Garfield Traub Development, LLC in Opposition to the City of Columbia and Aughtry's Motions for Summary Judgment, filed August 4, 2009	93-126

TRANSCRIPTS

Transcript of July 9, 2009 Hearing on Defendants' Motions for Summary Judgment	127-310
Transcript of Aug 17, 2009 Hearing on Defendants' Motions for Summary Judgment	311-577
Deposition Transcript of William Corrado, dated Dec 22, 2008, pp 1-3, 41-42 99	578-583
Deposition of Shawn Epps, dated April 28 2006 pp 1-2, 9-10	584-587

Deposition Transcript of John Lumpkin dated Aug 19, 2008 pp 1-4, 40, 52-53, 60-61, 67-68, 74, 83-84, 86, 158 287-88	588-605
Deposition Transcript of Robert Lyles, dated Aug 21, 2008, pp 1-5, 16, 82	606-612
Deposition Transcript of Greg Garfield, dated Aug 22, 2008, pp 1-5, 285-86, 290	613-620
Deposition Transcript of Raymond Garfield dated Oct 2 ~~1~~ , 2008, pp 1-5, 28 29	621-627
Deposition Transcript of Charles Gary, dated Sept 3, 2008 pp 1-5 23, 25 26, 30-31	628-637
Deposition Transcript of Jeff Sachs, dated Feb 5, 2009 pp 1 4, 96-98, 145	638-645
Deposition Transcript of Tony Traub dated Dec 4 2008, pp 1-5 79	646-651
Deposition Transcript of City s 30(b)(6) witness Steven Gantt, dated Dec 9, 2008, pp 1-4, 50-51	652-657

EXHIBITS AND OTHER MATERIAL PRESENTED TO THE CIRCUIT COURT

Affidavit of Joel Gottlieb dated Aug 11, 2009	658-662
Affidavit of Greg Garfield, dated June 24 2009	663-666
Affidavit of Raymond Garfield, dated June 24, 2009	667-690
Affidavit of Erika Salley, dated Aug 6, 2009	691-694
Affidavit of Eric Anthony Traub, dated June 26, 2009	695-698
Plaintiffs' Responses to Defendant Hilton Hotels Corp 's Second Request for Admissions, dated Oct 29, 2007	699-700
City's Request for Qualifications dated Jan 15, 2001	701-704
Memorandum of Understanding dated April 17, 2003	705-728 727
City s Request for Proposals dated April 2, 2004	728-737
PKF Study, dated Oct 2003	738-887

City Council Work Session Minutes, dated Dec 11 2002	888-889
Notes of Development Team/City Meeting held on July 10, 2003	890-893
City of Columbia Convention Center Hotel Corporation Board of Directors Meeting Minutes dated Feb 11, 2004	894-895
Columbia Convention Center Hotel Corporation Meeting Minutes, dated Feb 11, 2004	896-898
Handwritten Columbia Convention Center Hotel Corporation Meeting Minutes, dated Feb 11, 2004	899-903
Columbia City Council Meeting Minutes dated Mar 17, 2004	904-906
Columbia City Council Meeting Minutes, dated Mar 24 2004	907-910
Ambac Assurance Corporation Commitment for Financial Guaranty Insurance dated Feb 17 2004	911 913
Ambac Commitment Letter dated Feb 17 2004	914-915
Citigroup Financial Model, dated Sept 24 2003	916-926
Citigroup Financial Model, dated Mar 15, 2004	927-941
Citigroup Presentation, dated Feb 11, 2004	942-946
Pictures of Aughttry Hotel	947-949
Rendering of Project Team's Proposed Hotel	950
Articles of Incorporation and Bylaws for Columbia Convention Center Hotel Corporation	951-966
Excerpt of Draft Development Management Agreement	967-970
Excerpt of Agreement between Design/Builder and Architect/Engineer for Design/Build Project	971-980
Letter of Intent between Aughttry and City	981-984
Letter from Jack Plaxco to Shawn Epps dated July 8, 2003	985
Email from Bo Aughttry to Gantt, dated April 5 2004	986-987

Letter from Elliott Franks to Steve Gantt dated Feb 25 2004	988
Letter from John Lumpkin to Bill Corrado, dated Feb 26, 2004	989
Email Chain between Joel Gottlieb and Kathleen Wu, dated Nov 12 2003	990-994
Email Chain among Kathleen Wu and Others, dated Jan 6, 2004	995-996

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company Inc and
Garfield Traub Development, LLC,

Plaintiffs

vs

City of Columbia South Carolina,

Defendant

Stevens & Wilkinson of South
Carolina Inc ,

Plaintiff

vs

City of Columbia South Carolina

Defendant

Docket No 2005-CP-40-1014

CONSENT ORDER TO RESTORE
THE DOCKET PURSUANT TO
RULE 40(j) AND TO CONSOLIDATE
FOR DISCOVERY

Gary Realty Company, Inc and
Garfield Traub Development, LLC,

Plaintiff,

vs

Paul C "Bo" Aughtry III Windsor/Aughtry
Co Inc Vista Hotel Partners LLC and
Hilton Hotels Corporation

Defendants

Docket No 2006-CP-40-6488

Stevens & Wilkinson of South
Carolina Inc ,

Plaintiff

vs

Paul C "Bo" Aughtry III Windsor/Aughtry
Co , Inc and Vista Hotel Partners, LLC,

Defendants

Docket No 2006-CP-40-5092

Consent Order to Restore and Consolidate

Page 1 of 9

Turner Construction Company	)	Docket No 2007-CP-40-1252
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
City of Columbia South Carolina	)	
	)	
Defendant.	)	

1 *Gary Realty Company Inc and Garfield Traub Development v City of Columbia, South Carolina and Stevens & Wilkinson of South Carolina Inc v City of Columbia South Carolina*, consolidated by Order of Judge J Ernest Kinard Jr dated October 25, 2005 under Docket No 2005-CP-40 1014 were struck pursuant to Rule 40(j) SCRCP by Consent Order dated September 14 2006

2 On September 1 2006, Stevenson & Wilkinson Inc filed the case captioned *Stevens & Wilkinson of South Carolina, Inc v Paul C 'Bo" Aughtry, III Windsor/Aughtry Company Inc , and Vista Hotel Partners LLC* under Docket No 2006 CP-40-5092

3 On November 1 2006 Gary Realty Company Inc and Garfield Traub Development, LLC filed the case captioned *Gary Realty Company Inc and Garfield Traub Development LLC v Paul C "Bo" Aughtry III Windsor/Aughtry Company Inc , Vista Hotel Partners LLC and Hilton Hotels Corporation* under Docket No 2006 CP-40-6488

4 On or about February 26 2007 Turner Construction Company filed a case captioned *Turner Construction Company v City of Columbia, South Carolina*, under Docket No 2007-CP-40-1252

5 All parties to the above captioned cases hereby consent to restore *Gary Realty Company, Inc and Garfield Traub Development v City of Columbia South Carolina and Stevens & Wilkinson of South Carolina, Inc v City of Columbia, South Carolina* consolidated under Docket No 2005-CP-40-1014 to the Docket pursuant to Rule 40(j) SCRCP and to consolidate all of the

Consent Order to Restore and Consolidate

Page 2 of 9

above-captioned cases for discovery only pursuant to Rule 42 SCRPC under Docket No 2007-CP-40 1252

Based on the foregoing

IT IS HEREBY ORDERED that *Gary Realty Company, Inc and Garfield Traub Development v City of Columbia South Carolina* and *Stevens & Wilkinson of South Carolina Inc v City of Columbia South Carolina* Docket No 2005-CP-40-1014 are hereby restored to the Docket pursuant to Rule 40(j) SCRPC

IT IS FURTHER ORDERED THAT *Gary Realty Company Inc and Garfield Traub Development v City of Columbia South Carolina* and *Stevens & Wilkinson of South Carolina, Inc v City of Columbia South Carolina* Docket No 2005 CP-40-1014 *Stevens & Wilkinson of South Carolina Inc v Paul C "Bo" Aughtry, III Windsor/Aughtry Company Inc , and Vista Hotel Partners,LLC* Docket No 2006-CP-40 5092 *Gary Realty Company, Inc and Garfield Traub Development, LLC v Paul C "Bo" Aughtry III, Windsor/Aughtry Company Inc Vista Hotel Partners LLC and Hilton Hotels Corporation* Docket No 2006-CP 40 6488, and *Turner Construction Company v City of Columbia South Carolina* Docket No 2007-CP-40 1252 be and they hereby are consolidated for discovery only, in accordance with Rule 42 SCRPC under Docket No 2007-CP-40 1252

AND IT IS ORDERED at Columbia, South Carolina this 22 day of May 2007


ALISON R LEE
CHIEF ADMINISTRATIVE JUDGE
FIFTH JUDICIAL CIRCUIT

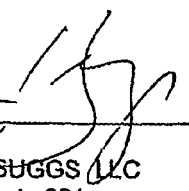
WE CONSENT

A handwritten signature in black ink, appearing to read "D. Reece Williams, III", written over a horizontal line.

D. Reece Williams, III
Richard C. Detwiler
CALLISON TIGHE & ROBINSON LLC
1812 Lincoln Street Suite 200
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone (803) 256 2371

ATTORNEYS FOR DEFENDANT
CITY OF COLUMBIA

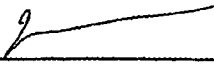
WE CONSENT



Kenneth M. Suggs
JANET JENNER & SUGGS LLC
500 Taylor Street Suite 301
Post Office Box 927
Columbia, South Carolina 20202
Telephone (803) 726-0050

ATTORNEYS FOR PLAINTIFFS
GARY REALTY CO INC and
GARFIELD TRAUB DEVELOPMENT

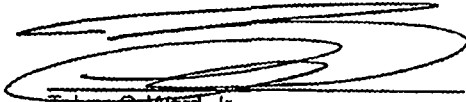
WE CONSENT



Richard A Harpootlian
RICHARD A HARPOOTLIAN, P A
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Telephone (803) 252-4848

**ATTORNEY FOR PLAINTIFF
STEVENS & WILKINSON OF
SOUTH CAROLINA, INC**

WE CONSENT



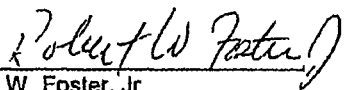
Tobias G. Ward Jr
TODD & WARD, PC
1709 Devonshire Drive
Post Office Box 1549
Columbia South Carolina 29202
Telephone (803) 779-4383

ATTORNEYS FOR DEFENDANTS
PAUL C. BOUGHTRY III
WINDSOR/AUGHTRY CO. INC. and
VISTA HOTEL PARTNERS LLC

James L. Paul
Thomas C. Grant
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
191 Peachtree St. N.E. 34th Floor
Atlanta, Georgia 30303
(404) 659-1410

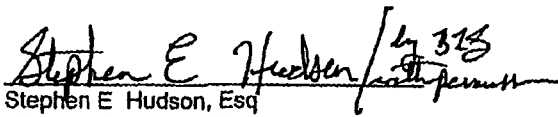
OF COUNSEL FOR WINDSOR/AUGHTRY CO. INC.

WE CONSENT


Robert W. Foster, Jr.
NELSON MULLINS RILEY
& SCARBOROUGH LLP
1320 Main Street 17th Floor
Post Office Box 11070
Columbia, South Carolina 29211
Telephone (803) 799 2000

ATTORNEYS FOR HILTON
HOTELS CORPORATION

WE CONSENT


Stephen E. Hudson, Esq.
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone (404) 815-6500

ATTORNEYS FOR TURNER
CONSTRUCTION COMPANY

14831/1510
00611

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Traub Development LLC,)

Plaintiffs,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP-40 1014))

CONSOLIDATED
CIVIL ACTION NO 2007-CP-40 1252

ORDER

Stevens & Wilkinson of South)
Carolina, Inc)

Plaintiff,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP-40 3361))

Stevens & Wilkinson of South)
Carolina, Inc)

Plaintiff)

vs)

Paul C "Bo" Aughtry III,)
Windsor/Aughtry Co , Inc , and)
Vista Hotel Partners LLC,)

Defendants)

(2006-CP-40 5092))

1

B/#1

Gary Realty Company, Inc and)
 Garfield Traub Development LLC)
)
 Plaintiff,)
 vs)
)
 Paul C "Bo" Aughtry III,)
 Windsor/Aughtry Co Inc)
 Vista Hotel Partners, LLC, and)
 Hilton Hotels Corporation)
)
 Defendants)
)
(2006-CP-40 6488))

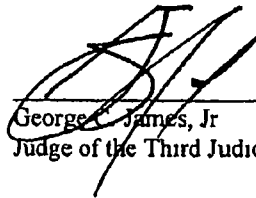
Turner Construction Company,)
)
 Plaintiff,)
)
 vs)
)
 City of Columbia,)
)
 Defendant.)
)
(2007 CP-40-1252))

This matter is before the Court on the motion of the Defendant City of Columbia, South Carolina, for an Order consolidating all of the above-captioned actions for trial pursuant to Rule 42, SCRCP, all of which are actions arising out of the same transaction, as more fully described in the pleadings filed in each matter. All of these actions were consolidated for discovery by Order of the Honorable Alison R. Lee on May 7, 2007.

After considering the facts of these actions as well as the law and rules of court of this state, I find that the interests of judicial economy will best be served by consolidation of the actions for trial because all of the actions involve common questions of law and fact.

IT IS HEREBY ORDERED, that the Defendant City of Columbia s motion is hereby **GRANTED** and the above captioned actions be and hereby are consolidated not only for discovery but also for trial under Civil Action Number 2007 CP-40 1252, in accordance with Rule 42, SCRCP

AND IT IS SO ORDERED


George C. James, Jr.
Judge of the Third Judicial Circuit

Columbia, South Carolina
7/9 2009



IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CONSOLIDATED
CIVIL ACTION NO 2007-CP-40-1252

Plaintiffs

vs

City-of Columbia, South Carolina,)

Defendant

(2005-CP-40-1014)

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,

VS

City of Columbia, South Carolina,)

Defendant.

(2005-CP-40-3361)

Turner Construction Company,)

Plaintiff

VS

City of Columbia,)

Defendant

(2007-CP 40-1252)

ORDER

2009 NOV 19 PM 12:59
JEANETTE J. GALLAGHER
COP 26

B/H

This matter came before the Court on the Motions for Summary Judgment filed by the City of Columbia in each of the above captioned cases. These three cases along with two companion cases¹ were consolidated for the purposes of discovery and thereafter, for trial. The parties to all five cases have filed voluminous materials regarding the defendants' motions for summary judgment in all five cases. Two full day hearings were held on these motions on July 9, 2009 and August 17, 2009. Because the factual and legal issues in the three cases where the City is the Defendant are identical, this Court will address the City's Motions for Summary Judgment against all three Plaintiffs together. Having fully considered the written motions and supporting materials submitted to the Court by the parties as well as the oral argument and exhibits presented to the Court, the Court hereby orders that each of the City of Columbia's Motions for Summary Judgment are granted.

FACTUAL BACKGROUND

In January 2001, the Lexington-Richland Columbia Convention Center Commission issued a Request for Qualifications (RFQ) seeking candidates to develop a hotel adjacent to the Midlands Regional Convention Center. Plaintiffs were part of a team led by Edens & Avant Real Estate Services, LLC², which responded to the RFQ. Almost two years later, in December 2002, the City of Columbia (the City) elected to enter negotiations with the Project Team that included Plaintiffs. The Project Team proposed to develop a publicly funded, full service Hilton Hotel. The proposed financing structure for this hotel provided that the City would issue tax exempt bonds to finance the

¹The other two cases are (1) Stevens & Wilkinson of South Carolina, Inc. v. Paul C. Bo-Aughtry III, Windsor/Aughtry Co., Inc. and Vista Hotel Partners, LLC, Civil action number 2006 CP 40 5092 and (2) Gary Realty Company, Inc. and Garfield Traub Development, LLC v. Paul C. Bo-Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners, LLC and Hilton Hotels Corporation, Civil action number 2006-CP 40 6488.

²Edens & Avant is not a party to any of these cases.

development, and the City would set up a non-profit corporation that would own the hotel. Under this proposal, Hilton would operate the hotel.

The negotiation process that began in December 2002 involved attempts to prepare several complex written agreements among the various parties. However, not one of these contract documents was ever executed. A Memorandum of Understanding dated April 17, 2003 (the MOU) was the only document ever signed by the parties. The MOU set forth a framework for the development of a publicly-funded convention center headquarters hotel. Page 1 of the MOU stated:

This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained. Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU.

The MOU identified the basic principles that were to be negotiated among numerous parties to create subsequent definitive written agreements.

In June 2003, the non-profit corporation (NPC) that was proposed to own the hotel was incorporated. The by-laws of the NPC stated that it was to fund the development, construction and commencement of operations of the hotel with the net proceeds of bonds issued by South Carolina Jobs-Economic Development Authority (JEDA). Funding the hotel project with the proceeds of bonds issued by JEDA would have necessitated approval not only by Columbia City Council but also by the State Budget and Control Board. Neither JEDA nor any other entity ever agreed to issue the bonds, and the bonds to finance this project were never issued.

The MOU stated that approximately \$60 million in tax-exempt municipal bonds would be issued to fund the hotel development. As Plaintiffs negotiated the proposed contracts, this cost estimate increased at a rate of almost \$1 million per month. By February 11, 2004, ten months

A handwritten signature in black ink, appearing to be 'H/3' or similar, written over the page number 19.

after the MOU was signed the proposed bond amount had grown to over \$69 million and none of the definitive written agreements had been finalized or executed On March 15 2004, the proposed bond amount had increased to over \$72 million, this financing model also included a portion of taxable bonds, something that was never contemplated in the MOU

On March 17, 2004, the City Council voted to open a new bidding process and issue a new Request for Proposals (RFP) for development of a privately-funded convention center The new RFP was issued on April 2, 2004 City Council appointed a Hotel Selection Committee, composed of ten private citizens, to review the responses to the RFP and make a recommendation to City Council about which proposal to select

Plaintiffs' Project Team, with the exception of Edens & Avant, participated in the new RFP process, submitting two proposals for consideration One of Plaintiffs' proposals was a resubmission of their original proposal for the same seventy plus million dollar publicly-financed Hilton Hotel, and the other was a new proposal for a \$53.75 million Hilton Hotel that would be funded partially by the City and partially with private capital Windsor/Aughtry Co Inc³ (Windsor/Aughtry) also submitted a proposal in response to the RFP

The Hotel Selection Committee recommended selection of Windsor/Aughtry, and the City ultimately accepted that recommendation Following their failure to be selected, Plaintiffs brought multiple lawsuits against the City, Hilton Hotels and Windsor/Aughtry

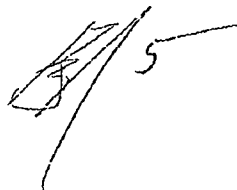
SUMMARY JUDGMENT STANDARD

³Windsor/Aughtry Co Inc along with Paul C Bo Aughtry III and the related Vista Hotel Properties LLC are Defendants in the other two companion lawsuits



Summary judgment is appropriate 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. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004), Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 567 (Ct. App. 2005). However, once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial. B. & B. Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). The opponent cannot rest on mere allegations or denials contained in the pleadings, but must come forward with specific facts showing there is a genuine issue for trial. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005) (citation omitted). If the evidence taken as a whole is susceptible of only one reasonable inference, there is no jury issue and the motion for summary judgment should be granted. Hopson v. Clary, 321 S.C. 312, 468 S.E.2d 305 (1995).

Where the preponderance of the evidence burden of proof applies, the non-moving party is required to submit only a "scintilla" of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., Inc. 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, to meet the scintilla standard, evidence must be probative, mere speculation is not probative and is not sufficient. McDowell v. Stalley Plywood Co., 210 S.C. 173, 41 S.E.2d



872 875 (1947) (recently quoted in Bass v. Gopal, Inc., 2009 WL 1917283 4 (S C Ct App 2009) (unpublished))

LEGAL ANALYSIS

Each of Plaintiffs assert similar causes of action against the City Gary Realty/Garfield Traub, in their Amended Complaint, assert two causes of action

- Quantum Meruit, and
- Breach of Duty of Good Faith and Fair Dealing ⁴

By its Second Amended Complaint Stevens & Wilkinson alleges three causes of action against the City

- Breach of Contract, including Breach of the Obligation of Good Faith and Fair Dealing,
- Quantum Meruit and
- Estoppel

In its Complaint, Turner Construction asserts four causes of action against the City

- Breach of Contract,
- Quantum Meruit
- Contract Implied in Law, and
- Breach of Duty of Good Faith and Fair Dealing and Violation of State Procurement Law

Turner Construction did not submit any evidence into the record in opposition to the City's Motion for Summary Judgment At the hearing, Turner Construction joined in the arguments presented by the other two Plaintiffs

⁴Gary Realty/Garfield Traub moved to amend their Complaint for a second time and the City consented to that amendment However Gary Realty/Garfield Traub never filed or served the Second Amended Complaint The proposed Second Amended Complaint added two causes of action for breach of contract and estoppel, premised on the same legal and factual arguments as the other two Plaintiffs Therefore had Gary Realty/Garfield Traub filed and served their Second Amended Complaint their causes of action for breach of contract and estoppel would also be dismissed on the City's Motion for Summary Judgment for the same reasons stated herein that Stevens & Wilkinson and Turner Construction's causes of action for breach of contract and estoppel are dismissed

This Court addresses each cause of action in turn and viewing the evidence in the record as to each cause of action in the light most favorable to Plaintiffs, finds that Plaintiffs fail to produce even a scintilla of probative evidence to create a genuine issue of material fact. Therefore, the City is entitled to summary judgment on each cause of action as a matter of law.

1 BREACH OF CONTRACT

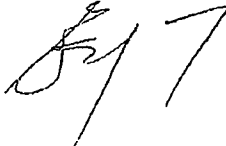
A The MOU was not a binding and enforceable contract

The issue of whether the MOU is a binding, enforceable contract is a matter of law for determination by this Court. Where, as here, the material facts concerning the formation of alleged contract are not in dispute, the issue of contract *vel non* is a question of law. WE Gilbert & Assocs. v. S.C. Nat'l Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985), see also Capital City Garage & Tire Co. v. Electric Storage Battery Co., 113 S.C. 352, 363, 101 S.E. 838, 841 (1920) (where the question was whether particular documents constituted a written contract, it was a question of law for the court, which found the documents did not constitute a contract). *Corpus Juris Secundum* states:

Pursuant to the generally applicable rule concerning decisions in respect of undisputed facts, whether undisputed facts establish a contract is a question of law, for decision by the court. By application of this principle whether a document, or multiple documents exchanged by the parties, constitute a contract is generally held to be a question of law for determination by the court, since the question involves the interpretation of an instrument or instruments, the determination of their validity as a matter of law or both.

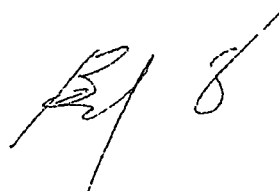
17B C.J.S. Contracts § 771 (2008)

A contract is an obligation which arises from actual agreement of the parties. Rushing v. McKinney, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006). There can be no contract where the parties never completed their negotiations as to essential terms. WE Gilbert &

7 

Assocs., 285 S C at 424 25, 330 S E 2d at 309 Electro-Lab of Aiken, Inc v Sharp Constr Co of Sumter, 357 S C 363, 593 S E 2d 170 (Ct App 2004) Specifically a letter of intent or agreement to agree is not a binding and enforceable contract Trident Constr Co, Inc v Austin Co., 272 F Supp 2d 566 575 (D S C 2003) ("agreements to agree do not amount to a contract in South Carolina"), Blanton Enterprises, Inc v Burger King Corp., 680 F Supp 753 770 n 20 (D S C 1988) (same) This principle was established early in South Carolina case law See Savannah Guano Co v Fogle, 112 S C 234, 100 S E 59 (1919) (concluding no contract existed where there was only a promise to enter into a contract in the future) Holliday v Pegram, 89 S C 73, 71 S E 367 (1911) (finding there was no contract where the defendant promised to make a contract or arrange an agreement at a future date) If the document or contract that the parties agree to make is to contain any material term that is not already agreed on no contract has yet been made and the so called contract to make a contract is not a contract at all Arthur L Corbin, Corbin on Contracts § 29, at 45, (One Vol Ed 1952)

An examination of the four corners of the MOU reveals that it was not a binding and enforceable contract but, rather, was an unenforceable, non-binding agreement to agree in the future The first page of the MOU states that the parties intended to negotiate further to reach definitive written agreements that would address the business terms and conditions contained in the MOU These business terms and conditions contained in the MOU were not there to bind the parties, but instead were to provide a framework for negotiating and executing subsequent definitive written agreements The MOU which reflected an intention to negotiate multiple agreements that would constitute this complex, multi million dollar deal, did not contractually bind the parties As the MOU stated, it was the definitive written agreements that were to bind the parties, not the MOU itself

A handwritten signature in black ink, appearing to be 'B. J. 8' or similar, written over a horizontal line.

There were at least six separate definitive agreements specifically mentioned in the MOU which were conditions precedent to the parties being contractually bound. These six agreements were (1) the Bond Underwriting/Bond Financing Agreement(s), (2) the Qualified Management Agreement, (3) the Joint Use Agreement Regarding Parking Rights, (4) the Hotel Room Block Agreement, (5) the Development/Management Agreement, and (6) the Design/Build Agreement. None of these agreements were ever fully negotiated or executed. Even if the MOU could be considered a contract, a contract that is otherwise valid becomes unenforceable if a condition precedent fails to occur. M & M Group, Inc. v. Holmes, 379 S.C. 468, 477, 666 S.E.2d 262, 266 (Ct. App. 2008) (A condition precedent to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.)

The record further demonstrates that there was never any agreement on the material business terms and conditions among the parties. On April 17, 2003, the date of the MOU, the projected cost for development and construction of the hotel was approximately \$60 million. By March 15, 2004, Plaintiffs' models indicated that price had increased to more than \$72 million. Similarly, in September 2003, the Plaintiffs' proposal for the "City Standby Support Payment obligation (i.e., the City's guarantee of the Hotel's operations) was \$53 million. By March 2004, this direct risk to the City had nearly doubled to \$91 million. There is no evidence in the record to demonstrate that the City, by action of City Council, agreed to these ever-changing terms and conditions.

Similarly, it is not disputed that other significant open issues were never resolved. For example, the Plaintiffs never determined whether the hotel would be required to pay property taxes, a material financial consideration that none of the financial projections for the hotel ever took into account. Plaintiffs also never determined how executive compensation to the members

Bi/ 9

of Hilton Hotels upper level management would be handled in a manner that satisfied Hilton but that did not violate the requirements of the Internal Revenue Service the executive compensation structure would determine whether the bonds were tax exempt or taxable, obviously a critical issue

The plain language of the MOU demonstrates that it was not a binding, enforceable contract. Furthermore, there is no genuine issue of material fact that the essential terms of the alleged contract were never agreed upon by the parties. Indeed, nowhere in the record do the Plaintiffs demonstrate what the terms of the purported contract were. The City, therefore, is entitled to summary judgment as a matter of law on the Plaintiffs' claim for breach of contract.

B Payment of Interim Architectural Fees

Stevens & Wilkinson also premises a breach of contract action upon the City Council's vote in July of 2003 to pay \$650,000 in interim architectural fees. This issue was the subject of a prior Motion for Partial Summary Judgment brought by Stevens & Wilkinson. In a separate order, Judge L. Casey Manning granted Stevens & Wilkinson's Motion for Partial Summary Judgment, finding that a contract was formed by the City Council's vote in response to a proposal made by Stevens & Wilkinson.

The uncontroverted evidence in this case indicates that Stevens & Wilkinson, as the head of the architectural/design team of the Hotel Project, completed all design work necessary to formulate a guaranteed maximum price for the Hotel Project by July of 2003. At that point in time, Bobby Lyles, the President of Stevens & Wilkinson, penned a letter to City Council notifying them of the design team's intent to put their pencils down until bond financing was finalized. As an alternative to this delay, however, Stevens & Wilkinson offered to continue work on the Hotel Project in exchange for \$650,000 through October 15, 2003 and \$75,000 a week thereafter. The City accepted this offer on July 30, 2003 via a vote of City Council approving the allocation of \$650,000 to the design team.



Order of Hon L Casey Manning, dated March 23, 2009

However, Judge Manning's order does not address whether any breach of that contract occurred

This Court's order does not have any effect on Judge Manning's finding that a contract was formed between Stevens and Wilkinson and the City through the July 2003 negotiations. One of the grounds the City cites in its motion for summary judgment is that the defendant breached no contract. See City's Motion for Summary Judgment. However, in its Memorandum in Support of Summary Judgment, the City states that its position on the issue of the July 30, 2003 contract is fully articulated in its motion to alter or amend Judge Manning's order. The City's memorandum clearly states that it will address its arguments on the issue in its reply memorandum if its motion to alter or amend had not been ruled on prior to the summary judgment hearing. See, City's Memorandum in Support of Motion for Summary Judgment.

Judge Manning issued his order on the City's Rule 59(e) Motion to Alter or Amend Judgment on July 23, 2009. The order denied the City's Motion to Alter or Amend and clearly confined its ruling to the existence of a contract, refusing to address whether or not a breach had occurred. Order of Hon L Casey Manning, dated July 23, 2009. The City subsequently submitted its Reply Memorandum in Support of its Motion for Summary Judgment. The City only addressed the issue of the July 2003 contract for interim architectural fees in its argument to dismiss Stevens and Wilkinson's cause of action for estoppel. The City's breach of contract argument was confined to the MOU and did not address the interim architectural fees.

While this issue was brought to the attention of the Court at the motion hearing, it was not fully briefed or argued. The Court made the parties aware that it had not received pre-trial briefs from either side on the issue of the interim architectural fees. The City handed up its Second Supplemental Exhibits in Support of City's Motion for Summary Judgment at the August



17 hearing. The City's original motion and the subsequent briefs did not adequately present the parties' positions on the issues nor did they inform the Court such that it could make a fully informed decision on the issue.

In my view, the question of whether the City breached any agreement arising out of the July 2003 vote is not properly before this Court. Neither side is prejudiced by this finding, and the issue may be determined in the normal progression of this case.

2 QUANTUM MERUIT

All three Plaintiffs assert causes of action for quantum meruit against the City. Quantum meruit is an equitable action for the recovery of unjust enrichment. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 259 S.E.2d 129, 129 (1994). The elements are: (1) a benefit conferred upon the defendant by the plaintiff, (2) the defendant realizes the benefit, and (3) the defendant retains the benefit under circumstances that would make it unjust for him to retain the benefit without paying its value. Id. Thus, the measure of damage is the benefit conferred upon the Defendant. Id. As a matter of law, none of Plaintiffs have demonstrated the required elements for a claim of unjust enrichment. Thus, summary judgment in favor of the City on each of Plaintiffs' claims for quantum meruit is appropriate.

Plaintiffs assert that they conferred valuable material and services to the City in the form of a "rendering" of the proposed hotel plans, designs, drawings, financial models, construction estimates, and expertise. As to each of these allegations, there is not a scintilla of probative evidence to support Plaintiffs' position. First, the rendering was a sketch of the proposed hotel which was commissioned by the City specifically for use in public presentations to community groups. The rendering was made by Barbara Ratner, a third party artist, and the City paid her



\$4,000 for her work directly. The City even paid Stevens & Wilkinson's co architect, TVS, \$400 to coordinate obtaining the rendering. Thus, the City paid for whatever benefit it received from the rendering. Furthermore, the rendering was not a confidential or proprietary document because the City commissioned the rendering and fully compensated the artist and TVS for their work. Thus, assuming as a fact that the City provided Windsor/Aughtry with a copy of the rendering, such fact does not provide a sufficient basis upon which Plaintiffs can premise an action for quantum meruit.

Second, Plaintiffs allege that the hotel constructed by Windsor/Aughtry looks like the hotel proposed by Plaintiffs and that this resemblance gives rise to an inference that the City gave Windsor/Aughtry the plans and drawings for use in constructing the privately-funded hotel. This, without more, cannot form the basis for a claim for quantum meruit. Plaintiffs presented no evidence of any striking similarities between their proposed hotel and that which was actually constructed. Even if it did look similar, Plaintiffs presented no evidence that Windsor/Aughtry ever received such plans from anyone, much less the City, or that Windsor/Aughtry made actual use of the plans. More to the point, however, there is nothing in the record to suggest that the City ever benefitted from the plans and drawings. Therefore, this allegation cannot form a basis for Plaintiffs' quantum meruit claim.

Third, the plans, designs, drawings, financial models, and construction estimates for a hotel never constructed have no intrinsic value and might only have been valuable if they had been utilized to construct the proposed hotel, which they were not. But again, no value could have been conferred upon the City.



Finally, the Project Team conferred no special knowledge or expertise upon the City that resulted in a benefit or value to the City, any benefit of learning how to structure such a deal was realized by members of the Project Team and not the City

In response to the City's Motion for Summary Judgment none of Plaintiffs put forth any probative evidence of a benefit conferred upon and used by the City. As a result, Plaintiffs failed to demonstrate any genuine issue of material fact that any of them conferred anything of value upon the City, or that the City realized a benefit from anything conferred. The City, therefore, is entitled to summary judgment in its favor on each of Plaintiffs' claims for quantum meruit.

3 CONTRACT IMPLIED IN LAW

Turner Construction asserts a claim against the City for breach of contract implied in law. There is no cause of action in South Carolina for breach of contract implied in law separate from a cause of action for quantum meruit. Myrtle Beach Hospital v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000). As a matter of law, Turner Construction's claim for contract implied in law must be amalgamated into its claim for quantum meruit. As noted, Turner is unable to meet the elements necessary to prevail on its claim for quantum meruit and the City is entitled to judgment in its favor on Turner's claim for quantum meruit.

4 BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING AND VIOLATION OF STATE PROCUREMENT LAW

Gary Realty/Garfield Traub and Turner Construction assert that the City has breached a duty of good faith and fair dealing. Turner Construction also asserts that the City violated state procurement law and a duty of good faith inherent in the state procurement procedures.

The South Carolina Consolidated Procurement Code, and any duty of good faith found thereunder, is inapplicable to the City. The Procurement Code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body. S.C.

Code Ann § 11-35 40 The statutory definition of governmental body specifically excludes municipalities S C Code Ann § 11-35 310(18) The only requirement of the State Procurement Code applicable to municipalities is that each municipality must adopt its own procurement code The City of Columbia has complied with this requirement Because the State Procurement Code is inapplicable to municipalities, it cannot provide a basis for liability for the City⁵

Gary Realty/Garfield Traub and Turner allege a breach of a covenant of good faith and fair dealing There is no separate cause of action for the breach of the implied covenant of good faith and fair dealing Williams v Riedman, 339 S C 251 274, 529 S E 2d 28, 40 (Ct App 2000) Further, where there is no contract, no covenant of good faith and fair dealing arises Keiger v Citgo, Coastal Petroleum, Inc 326 S C 369, 374, 482 S E 2d 792, 794 (1997) (dismissing for failure to state a claim a cause of action for breach of the covenant of good faith and fair dealing where plaintiff failed to allege the existence of a contract) Because there is no separate cause of action for the breach of covenant of good faith and fair dealing, the City is entitled to summary judgment as a matter of law in its favor on Gary Realty/Garfield Traub and Turner's claims for breach of the duty of obligation of good faith and fair dealing

5 ESTOPPEL

Stevens & Wilkinson⁶ asserts a cause of action in estoppel against the City In the context of a contract claim against a governmental entity, the relying party must meet the general requirements of estoppel in order to prevail Davis v Greenwood School District, 365 S C 629,

⁵This finding is consistent with a prior order of this Court (per Judge Kinard) dismissing the portion of Stevens & Wilkinson's Amended Complaint alleging a violation of the South Carolina Consolidated Procurement Code See, Order of The Honorable Ernest Kinard, filed April 27 2006

⁶See Footnote 4 supra

620 S E 2d 65 (2005) These elements are (1) the presence of an unambiguous promise, (2) the promisee's reasonable reliance upon the promise, (3) that the reliance was expected or foreseeable by the promisor, and (4) the promisee was injured as a result of reliance on the promise Id. at 634 620 S E 2d at 67

A party asserting an estoppel claim against a governmental entity must additionally prove that the alleged conduct of a government employee or officer was within the authority of that individual. If the employee or officer did not have authority to make the decision or statement, then no estoppel will lie against the governmental entity. Service Mgt., Inc. v. State Health and Human Servs. Fin. Comm'n., 298 S C 234 238 379 S E 2d 442 (Ct App 1989)

Stevens & Wilkinson first asserts that the MOU contains an unambiguous promise to pay for all work performed on the project. As a matter of law, the MOU contains no such promise, indeed the MOU specifically states that the Project Team is responsible for the costs incurred prior to closing the financing. Such closing, i.e., the issuance of the bonds, never occurred. The MOU makes clear that the Project Team, including Plaintiffs, was to bear the cost of its own performance unless and until the bonds closed.

The only basis provided in the MOU for Stevens & Wilkinson to recover costs would be if the bonds failed to close because the City breached an obligation in the Development Agreement. Execution of the Development Agreement was a condition precedent to Stevens & Wilkinson's recovery of its costs, and the Development Agreement was one of the numerous definitive written agreements that was never finalized nor executed.

Stevens & Wilkinson also fails to present evidence of any reliance on the MOU for payment for its work or that such reliance was reasonable and foreseeable by the City. Any work performed by these Plaintiffs was with full knowledge that it was performed at risk without

the protection of a Development Agreement. Further, the City had sole discretion to determine whether the project was feasible, making it patently unforeseeable to the City that Stevens & Wilkinson would expect payment for all of its work if the project failed to move forward.

Stevens & Wilkinson asserts that it relied upon statements made by individual officers or employees of the City. The power of officers and employees to bind the City in contract is limited by state statute and municipal ordinance, and neither provides any officer or employee with authority to bind the City in contract of the nature contemplated in the Hotel Project. The City can only be bound in a transaction of this nature and magnitude by a vote of the properly convened City Council. The City Council cannot delegate the authority to enter into such contractual arrangements. It was not within the scope of authority for any individuals to bind the City, therefore the actions or statements of any individual officer or employee of the City cannot form the basis for a claim of estoppel. Because officers or employees of the City lacked authority to bind the City, no statements of such individuals can form the basis of a claim of estoppel.

To the extent that Stevens & Wilkinson asserts that actions taken by the NPC form the basis for a claim of estoppel against the City, such assertion also fails as a matter of law. Such action could only be taken by City Council convened as City Council. The Columbia Convention Center Hotel Corporation had no authority to bind the City to enter into a contract to issue the necessary bonds, or to appropriate funds for the City Standby Support Payments. Because the City Council would ultimately have been required to enact an ordinance to issue the bonds or appropriate funds for the City Standby Support Payment, the Hotel Corporation acting alone would not have had authority to bind the City. Any reliance upon the actions of the Hotel Corporation would not have been reasonable or foreseeable. Thus, as a matter of law, an

estoppel claim against the City based upon actions of the Columbia Convention Center Hotel Corporation will not lie

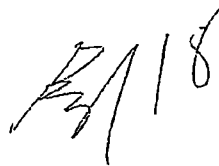
Finally, Stevens & Wilkinson attempts to base a claim for estoppel on the City Council vote on July 30, 2003 to pay \$650,000 in interim architectural fees. This presents a position wholly inconsistent with Stevens & Wilkinson's other theories of recovery. On July 30, 2003 the Columbia City Council voted to approve \$650,000 in interim architectural fees to be paid to Stevens & Wilkinson. Stevens & Wilkinson filed a Motion for Partial Summary Judgment on February 20, 2009, seeking a determination that Stevens & Wilkinson and the City of Columbia created a contractual agreement – separate and apart from the Memorandum of Understanding – in July of 2003 for the performance of and payment for architectural and design services. On March 23, 2009, Judge Manning issued an order granting Stevens & Wilkinson's motion for partial summary judgment. Thus, if a contract – separate and apart from the MOU – was formed by the July 30, 2003 vote, that vote cannot also create potential liability for the City under the MOU on the basis of estoppel.

For the foregoing reasons, Stevens & Wilkinson is unable to state a claim for estoppel against the City. The City, therefore, is entitled to summary judgment in its favor on the estoppel claims brought by Stevens & Wilkinson.

CONCLUSION

Based upon the foregoing, the Motions for Summary Judgment brought by the City of Columbia are granted as to all causes of action brought by all Plaintiffs.

Accordingly, it is ordered that



- 1 The City of Columbia's Motion for Summary Judgment on Stevens & Wilkinson and Turner's claims for breach of contract is **GRANTED**, provided however, this Court makes no finding as to the claim for payment of Interim Architecture Fees
- 2 The City of Columbia's Motion for Summary Judgment against the three Plaintiffs' claims for quantum meruit is **GRANTED**
- 3 The City of Columbia's Motion for Summary Judgment on Stevens & Wilkinson's claim for estoppel is **GRANTED**
- 4 The City of Columbia's Motion for Summary Judgment on Gary Realty/Garfield Traub's claims for breach of duty of good faith and fair dealing is **GRANTED**
- 5 The City of Columbia's Motion for Summary Judgment on Turner's claims for contract implied in law, breach of duty of good faith and fair dealing and violations of State Procurement Law is **GRANTED**
- 6 The original of this Order shall be filed in the Clerk of Court's file number 2007 CP 40 1252. Certified copies shall be filed in 2005 CP 40-1014 and 2005 CP 40 3361

AND IT IS SO ORDERED

James C. James, Jr., South Carolina
11/11, 2009

George C. James, Jr.
George C. James, Jr. Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Realty Company, Inc , and)
Garfield Tiaub Development LLC,)

CONSOLIDATED
CIVIL ACTION NO 2007-CP 40 1252

Plaintiffs,)

vs)

City of Columbia, South Carolina,)

Defendant)

(2005 CP-40 1014))

Stevens & Wilkinson of South)
Carolina, Inc ,)

Plaintiff,)

vs)

City of Columbia, South Carolina)

Defendant)

(2005 CP 40-3361))

Turner Construction Company)

Plaintiff,)

vs)

City of Columbia,)

Defendant)

(2007-CP-40 1252))

CERTIFICATE OF SERVICE

JEANETTE W. MERIDIE
C P & G S

2009 NOV 19 PM 12 59

CHIEF CLERK
FIVE

I Denise M Hardwick an employee of Callison Tighe & Robinson, LLC, Attorneys for
Defendant, City of Columbia, South Carolina, hereby certify that I served the Order of the Honorable

George C James, Jr., dated November 11, 2009 upon all counsel of record by causing a copy of the same to be placed in the U S Mail first-class postage affixed addressed as set forth below, on November 19 2009

Kenneth M Suggs Esq
Francis Hinson, IV, Esq
JANET JENNER & SUGGS, LLC
500 Taylor Street, Suite 301
Post Office Box 927
Columbia, South Carolina 29202
*(Attorneys for Gary Realty and
Garfield Traub Development)*

Richard A Harpootian, Esq
Graham L Newman, Esq
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(Attorneys for Stevens & Wilkinson)

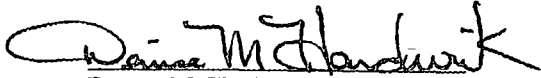
Melinda Pillow, Esq
KILPATRICK STOCKTON, LLP
1100 Peachtree Street Suite 2800
Atlanta, Georgia 30309

Tobias G Ward, Jr., Esq
TODD & WARD, P C
1709 Devonshire Drive
Post Office Box 1549
Columbia, South Carolina 29202-1549

John T Lay, Jr., Esq
ELLIS LAWHORNE & SIMS P A
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202
(Attorneys for Turner Construction Company)

Jimmy L Paul, Esq
Chamberlain Hidlucka, White, Williams &
Martin
191 Peachtree Street, NE 34th Floor
Atlanta Georgia 30303 1747
*(Attorneys for Bo Aughtry Windsor/ Aughtry
and Vista Hotel Partners)*

Robert W Foster, Jr., Esq
Jay T Thompson, Esq
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
1320 Main Street, 17th Floor
Post Office Box 11070
Columbia, South Carolina 29211
(Attorneys for Hilton Hotels Corporation)


Denise M Hardwick

Columbia, South Carolina

November 19, 2009

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Gary Realty Company Inc and Garfield) Civil Action No 2006 CP-40 06488
Traub Development, LLC,) (Consolidated under
) Civil Action No 2007 CP-40 01252)

Plaintiffs,)

vs)

Paul C "Bo" Aughtry III)
Windsor/Aughtry Co , Inc , Vista Hotel)
Partners LLC and Hilton Hotels)
Corporation,)

Defendants)

ORDER

This matter is before the Court on the motions for summary judgment by Defendant Hilton Hotels Corporation ("Hilton") This case has been consolidated with four other cases involving the same set of facts¹ The parties to all five cases have filed voluminous materials regarding the defendants' motions for summary judgment in all five cases Two full day hearings were held on these motions on July 9 2009 and August 17 2009 Having fully considered the written motions and supporting materials submitted to the Court by all parties as well as oral arguments and exhibits presented before the Court, the Court hereby ORDERS that summary judgment is GRANTED as to all causes of action against Defendant Hilton

FACTUAL BACKGROUND

In January 2001, the Lexington Richland-Columbia Convention Center Commission issued a Request for Qualifications seeking candidate teams to develop a hotel adjacent to the

¹ The civil action numbers of the consolidated cases are 2005 CP-40-01014, 2005-CP-40-03361 2006-CP-40-05092, 2006-CP 40-06488, and 2007-CP 40-01252



Midlands Regional Convention Center Plaintiffs were the development arm of one team led by Edens & Avant and consisting of numerous local and interstate entities Almost two years later, in December 2002, the City of Columbia (the City) elected to enter negotiations with the Plaintiffs and Edens & Avant team This team proposed to develop a bond financed, full service Hilton Hotel that the City would own and Hilton would operate The proposed financial model for this hotel provided that the City would issue municipal bonds to finance the development and the City would set up a non-profit corporation that would own the hotel

The negotiation process that began at this point in December 2002 involved attempts to prepare several complex written agreements among the various parties However, not one of these contract documents was ever executed The only document ever signed by the parties was a document denominated Memorandum of Understanding and dated April 17 2003 (the 'MOU) The MOU set forth a framework for the development of a publicly-funded convention center headquarters hotel The purpose of the MOU was to identify the basic principles that would have been negotiated among numerous parties to create the "definitive written agreements " Page 1 of the document stated

This MOU reflects the intent to proceed in good faith to execute
definitive written agreements with respect to the business terms
and conditions herein contained

In June 2003, the non-profit corporation ("NPC") that was to own the hotel was incorporated The by-laws of the NPC stated that it was to fund the development, construction, and commencement of operations of the hotel with "net proceeds of bonds issued by South Carolina Jobs-Economic Development Authority ('JEDA') Funding the hotel project with the proceeds of bonds issued by JEDA would have necessitated approval not only by Columbia City Council but also by the State Budget and Control Board Neither JEDA nor any other entity ever agreed to issue the bonds, and the bonds to finance this project were never issued

The MOU stated that “approximately \$60 million ’ in tax-exempt municipal bonds would be issued to fund the hotel development. As the Plaintiffs and Edens & Avant team negotiated the proposed contracts, this cost estimate increased at a rate of almost \$1 million per month. By February 11, 2004—ten months after the MOU was signed—the financing structure had grown to over \$69 million, and none of the “definitive written agreements” had been finalized or executed. On March 15, 2004, the bond amount had increased again by more than \$2 million to over \$72 million. This financing model also included a portion of taxable bonds, something that was never contemplated in the MOU.

Two days later, on March 17, 2004, the City voted to open a new bidding process and issue a new Request for Proposals (‘ RFP ’) for development of a convention center hotel on the same site that the City had been negotiating with the Plaintiffs and Edens & Avant team. The new RFP was issued on April 2, 2004. The new RFP called for a privately-owned hotel project. The Columbia City Council appointed a Hotel Selection Committee, composed of ten private citizens, to review the responses to the RFP and make a recommendation to the City Council about which proposal to select.

A total of seven proposals were submitted in response to the new RFP. Four of the seven proposals offered hotels from the Hilton family of hotels. Plaintiffs participated in the new RFP process and actually submitted two of the seven formal proposals. One of Plaintiffs’ proposals was a resubmission of their original proposal for the same seventy-plus million dollar, publicly funded, bond financed Hilton Hotel, and the other was a new proposal for a \$53.75 million Hilton Hotel that would be funded partially by the City and partially with private capital. In addition, two other bidders submitted proposals that included hotels from the Hilton family of hotels. One of these was Defendant Windsor/Aughtry, whose written proposal allowed the City

to choose its preferred hotel brand Windsor/Aughtry's proposal gave the City its choice of a "full service **Hilton Garden Inn or Marriott Courtyard,**' either of which would be privately funded with a proposed development cost of \$26 million (emphasis in original)

During Windsor/Aughtry's oral presentation of its proposal, the hotel selection committee appointed by the City asked if Windsor/Aughtry could develop a full service Hilton Hotel instead of the Marriott Courtyard or Hilton Garden Inn in its written proposal Windsor/Aughtry explained that this could be done at a cost of \$3 million to the City The City's Assistant Manager, who was responsible for the RFP process on behalf of the City, explained in his deposition that the brand was important to the City and the idea to have Windsor/Aughtry develop a full service Hilton Hotel came solely from the City Council

The Hotel Selection Committee recommended the Windsor/Aughtry team and the City ultimately selected Windsor/Aughtry to develop the convention center hotel and required that it be a full service Hilton Hotel Following their failure to be selected pursuant to the process of the new RFP Plaintiffs brought multiple lawsuits against various defendants The Court consolidated these actions both for discovery and for trial

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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 ' Rule 56(c) SCRCP "Once the moving party carries its initial burden the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing



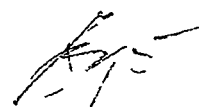
there is a genuine issue for trial ' *B & B Liquors Inc v O Neil* 361 S C 267 270 603 S E 2d 629, 631 (Ct App 2004) If the evidence taken as a whole is susceptible to only one reasonable inference, there is no jury issue and the motion for summary judgment should be granted *Hopson v Clarey* 321 S C 312 468 S E 2d 305 (1995)

This standard does not apply in instances where the plaintiff has a heightened burden of proof *Hancock v Mid-South Mgmt Co* , 381 S C 326, 330, 673 S E 2d 801 803 (2009) As *Hancock* explains

This Court has consistently held that where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment Accordingly in cases requiring a heightened burden of proof we hold that the non moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment

Hancock, 381 S C at 330-331 673 S E 2d at 803 In a claim for breach of contract based on an alleged oral contract, as Plaintiffs herein make against Hilton the existence and terms of an oral contract must be proven by evidence which is clear, specific, definite, and convincing in nature *Parr v Parr*, 268 S C 58, 65, 231 S E 2d 695, 698 (1977) Also, in a claim for breach of contract accompanied by a fraudulent act, as Plaintiffs make against Hilton, 'the standard of proof of clear and convincing evidence is applicable" to the alleged fraudulent act not just a preponderance of the evidence *Osborn v Univ Med Assocs of the Med Univ of SC* , 278 F Supp 2d 720, 740 (D S C 2003)

Further, in a claim for breach of contract accompanied by a fraudulent act "more is required than mere speculation ' *RoTec Servs Inc v Encompass Servs Inc* 359 S C 467, 471, 597 S E 2d 881, 883 (Ct App 2004) A plaintiff may not survive summary judgment by simply claiming that the alleged fraudulent act is inferable from the circumstances of the case
Id



Plaintiffs plead two causes of action against Defendant Hilton (1) breach of contract and (2) breach of contract accompanied by a fraudulent act

I Question of law for the Court

Critical in this Court's analysis was whether the MOU was a binding and enforceable contract. When a particular document is alleged to be a binding and enforceable contract, and there is no factual dispute such as the document's authenticity, the question of whether the document is a binding and enforceable contract is a question of law for the Court. See e.g. *WE Gilbert & Assocs v SC Nat'l Bank* 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (where the material facts concerning the formation of a document are not in dispute, the issue of whether the document is a binding contract is a question of law), see also *Capital City Garage & Tire Co v Electric Storage Battery Co*, 113 S.C. 352, 363, 101 S.E. 838, 841 (1920) (where the question was whether particular documents constituted a written contract, it was a question of law for the court, which found the documents did not constitute a contract).

Corpus Juris Secundum states

Pursuant to the generally applicable rule concerning decisions in respect of undisputed facts, whether undisputed facts establish a contract is a question of law, for decision by the court. By application of this principle, whether a document, or multiple documents exchanged by the parties constitute a contract is generally held to be a question of law for determination by the court, since the question involves the interpretation of an instrument or instruments, the determination of their validity as a matter of law, or both.

17B C.J.S. Contracts § 771 (2008)

In this case, the issue before the Court is whether the MOU constituted a binding contract or a non-binding 'agreement to agree.' Plaintiffs have presented no evidence requiring the Court to look beyond the four corners of the MOU. Because the Court has to look no further

5/7/6

than the four corners of the MOU to decide whether it is a binding and enforceable contract this is a question of law for the Court to determine

2 The MOU was not a binding and enforceable contract

The Court finds that the MOU was not a binding and enforceable contract but rather nothing more than an agreement to agree on future contract documents Therefore, summary judgment must be granted as to all causes of action for breach of contract and breach of contract accompanied by a fraudulent act because these causes of action require the existence of a binding contract

A The "four corners" of the MOU

'A contract is an obligation which arises from actual agreement of the parties' *Rushing v McKinney*, 370 S C 280 290 633 S E 2d 917, 922 (Ct App 2006) There can be no contract where the parties never completed their negotiations as to essential terms *WE Gilbert & Assocs*, 285 S C at 424 25, 330 S E 2d at 309 Specifically, a letter of intent or "agreement to agree" is not a binding and enforceable contract *Trident Const Co, Inc v Austin Co* 272 F Supp 2d 566, 575 (D S C 2003) ("agreements to agree do not amount to a contract in South Carolina"), *Blanton Enterprises Inc v Burger King Corp*, 680 F Supp 753, 770 n 20 (D S C 1988) (same) This principle was established early in South Carolina case law See *Savannah Guano Co v Fogle* 112 S C 234, 100 S E 59 (1919) (concluding no contract existed where there was only a promise to enter into a contract in the future), *Holliday v Pegram*, 89 S C 73 71 S E 367 (1911) (finding there was no contract where the defendant promised to make a contract or arrange an agreement at a future date)

'If the document or contract that the parties agree to make is to contain any material term that is not already agreed on no contract has yet been made, and the so-called 'contract to make

a contract' is not a contract at all Arthur L. Corbin, Corbin on Contracts § 29, at 45 (One Vol Ed 1952)

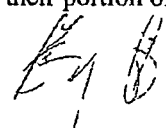
In this case, the Court has to look no further than the four corners of the MOU. The MOU was an unenforceable, non-binding agreement to agree in the future. It was not a binding and enforceable contract. The purpose of the MOU was stated on the first page:

This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained.

The language contained within the MOU itself establishes that it was not an enforceable contract document. There is no genuine issue of material fact that this seven-page document laying out the items not yet agreed upon did not bind the parties in this complex multi-million dollar deal. As the MOU stated, it was the definitive written agreements that were to bind the parties, not the MOU itself. The material terms of the deal, including the price, were never agreed upon. On April 17, 2003, the date of the MOU, Plaintiffs offered a price of approximately \$60 million. By March 15, 2004, Plaintiffs were offering a price of more than \$72 million, and the parties still had not reached any definitive written agreements. The MOU was merely an agreement to negotiate and agree on complex terms that had not been negotiated and were never agreed upon. Under South Carolina law, such an agreement to agree is not a contract.

The MOU did not have the requisite elements of a binding contract: there was no expression of intent to be bound. The business terms and conditions of the document were not there to bind the parties. Rather, as stated on the first page, the "business terms and conditions herein contained" were in the MOU for the purpose of executing definitive written agreements.

Further, the language of the MOU provided that no party to the MOU was entitled to any fees until "closing the bond sale." The Plaintiffs would receive their portion of the development



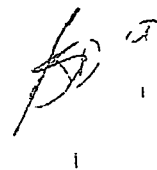
fee of 4.75% ' to be paid as follows 33 1/3% upon closing the bond sale 57 2/3% on a pro-rata basis over the construction period and the balance of 10% at the issuance of a Certificate of Occupancy for the Hotel (MOU VI, 2.) There was never a bond closing, or a construction period, or a Certificate of Occupancy

Plaintiffs have set forth the case *Arcadian Phosphates Inc v Arcadian Corp* 884 F.2d 69 (2nd Cir. 1989), in support of their position. However, while *Arcadian Phosphates* is not binding on this Court, it is favorable to Hilton in this case, and the Court finds it persuasive. It involved a memorandum of understanding similar to the MOU in this case. The *Arcadian Phosphates* court found the MOU to be an unenforceable agreement to agree. Like the MOU in *Arcadian Phosphates*, the MOU in this case was not a binding and enforceable contract.

B. Conditions Precedent

In addition, the MOU was not a binding and enforceable contract because it included conditions precedent that never occurred. A contract which is otherwise valid becomes unenforceable if a condition precedent fails to occur. *M & M Group Inc v Holmes*, 379 S.C. 468, 477, 666 S.E.2d 262, 266 (Ct. App. 2008) ("A condition precedent to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.")

In this case, each of the six separate definitive agreements briefly reiterated below constituted conditions precedent to the MOU because negotiation and execution of each of these agreements was required before parties could be required to go forward with the transaction envisioned by the MOU. To the extent the MOU could ever be considered a valid contract, the MOU was rendered unenforceable as a matter of law because failure of the conditions precedent set out here.



(i) *Bond Underwriting Agreement and Bond Financing Agreements* The transaction contemplated by the MOU was entirely dependent on tax exempt bond financing. However, the contracts supporting the bond were never executed, the City never passed the necessary resolutions to commit the City to issue either direct obligation bonds or credit enhancement commitments, and the necessary bonds were never issued or sold.

(ii) *Qualified Management Agreement* The Qualified Management Agreement consistent with the Internal Revenue Code was required in order for the bonds to be issued with tax exempt status necessary for sale. However, the Qualified Management Agreement was never negotiated or executed.

(iii) *Joint Use Agreement Regarding Parking Rights* The parking access necessary to the operation of the hotel was required to be governed by a Joint Use Agreement between the hotel operator and the City respecting a parking garage which did not yet exist. However, this Agreement was never negotiated or executed.

(iv) *Hotel Room Block Agreement* The operation of the hotel in relation to the needs and demands of users of the Columbia Convention Center were required to be governed by a Hotel Room Block Agreement setting forth financial and other terms by which the hotel operator would furnish rooms to users of the Columbia Convention Center. However, this Agreement was never negotiated or executed.

(v) *Design/Build Agreement* The construction of the hotel in terms of design, delivery and price was required to be governed by a Design/Build Agreement, whereby the Builder was to give a guaranteed price, a guaranteed delivery date, and posted a payment and performance bond as security. However, this Agreement was never fully negotiated or executed.

(vi) *Development/Management Agreement* The development of the proposed hotel in terms of coordination of design, construction delivery and other aspects of development and payment for those services, was required to be governed by a Development/Management Agreement. However, this agreement was never fully negotiated or executed.

C Illusory promise

In addition, the MOU was not an enforceable contract because any alleged obligation was based on an illusory promise. If one party's obligation under a bilateral contract is an illusory promise, then there is a failure of consideration and the alleged contract is not a contract. See *Armstrong v. Collins*, 366 S.C. 204, 222-23, 621 S.E.2d 368, 377 (Ct. App. 2005) (holding that mutual consideration is a necessary element of a bilateral contract).

The concept of illusory promise is a common law principle that is captured in the Restatement (Second) of Contracts. The Restatement defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1979). There can be no binding and enforceable contract if one party has the option not to perform without consequence. The Restatement provides: "Illusory promises. Words of promise which by their terms make performance entirely optional with the promisor do not constitute a promise." Restatement (Second) of Contracts § 77 cmt. a, § 2 cmt. e (1979).

In this case, the MOU established nothing more than an illusory promise on the part of the City of Columbia and was therefore not a binding contract for any party. On the first page of the document, in the General Conditions that underlay the entire document, the MOU stated: "Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project, it shall have no liability under this MOU." This plain language



granted the City complete discretion to determine whether it would have any obligation to do anything set forth in the MOU

If the City determined that the project was not feasible, then it determined for itself that it had no liability under the MOU. This is an illusory promise. It was the City's sole decision whether or not to proceed, and the City elected to issue a new RFP. Therefore, as a matter of law, the MOU was nothing more than an illusory promise, and it cannot be a binding and enforceable contract for any party.

D. The parties abandoned the MOU

In addition, the parties abandoned the MOU. A contract is abandoned when one party acts inconsistently with the existence of the contract and the other parties acquiesce. *Ro-Lo Enterprises v. Hicks Enterprises, Inc.*, 294 S.C. 111, 113, 362 S.E.2d 888, 889 (Ct. App. 1987). When a contract is abandoned, the parties give up their rights under the contract. *Id.*

In this case, Plaintiffs allege that Defendant Hilton breached the MOU by cooperating with the Defendants Paul C. Bo-Aughtry III, Windsor/Aughtry Co., Inc. and Vista Hotel Partners, LLC (collectively, the "Aughtry Defendants") in their response to the new April 2004 RFP. However, the MOU was abandoned when the City initiated a new bidding process by voting on March 17, 2004 to issue the new RFP. Plaintiffs acquiesced and participated in the new RFP process by submitting not one, but two, proposals. Plaintiffs' own actions confirmed that their negotiations with the City under the MOU were no longer ongoing, the City ended the negotiations under the MOU and implemented a new bidding process in its place. Plaintiffs took the affirmative measure of becoming active participants in the new bidding process that replaced the first project. Plaintiffs prepared two proposals and led a team to participate in the new bidding process. The evidence is susceptible to only one reasonable inference on this point: the

City abandoned the MOU and Plaintiffs acquiesced in this abandonment to participate instead in the new bidding process. Therefore, as a matter of law, there could have been no contractual obligation under the MOU after the issuance of the April 2004 RFP, which is the time period Plaintiffs contend Hilton breached the MOU.

3 No oral contract with Hilton

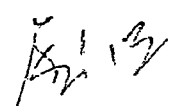
Other than the MOU, Plaintiffs' only contention that they had a contract with Hilton is an alleged oral contract. However, Plaintiffs have failed to present evidence from which a reasonable jury could find the existence of an oral contract. Further, any alleged oral contract would be barred by the South Carolina Statute of Frauds.

A. No evidence of an oral contract

To establish the existence of an oral contract, a plaintiff must show that there was a meeting of the minds as to all the essential and material terms of the alleged agreement. *LandBank Fund VII LLC v Dickerson*, 369 S.C. 621, 628, 632 S.E.2d 882, 886-87 (Ct. App. 2006). The existence and terms of an oral contract must be proved by evidence which is clear, specific, definite, and convincing in nature. *Parr v Parr*, 268 S.C. 58, 65, 231 S.E.2d 695, 698 (1977).

In addition, because there is a heightened burden of proof for an alleged oral contract, Plaintiffs must provide objective evidence that the parties intended to be bound. *Blanton Enterprises, Inc. v Burger King Corp.*, 680 F.Supp. 753, 771-73 (D.S.C. 1988) (granting summary judgment to the defendants because the "relevant documents, deposition testimony, and correspondence" did not demonstrate an objective intent to be bound by the alleged oral contract).

In this case, the terms of the alleged oral agreement have not been identified. Plaintiffs have failed to identify the terms of the alleged oral agreement they claim to have formed with



Hilton other than the conclusory argument by Plaintiffs' counsel that it was an oral contract of exclusivity ' Plaintiffs have presented no evidence of a meeting of the minds as to any of the essential and material terms of the alleged oral agreement

B. Statute of Frauds

The South Carolina Statute of Frauds provides that an alleged oral agreement that cannot be performed in one year from its making is not enforceable S C Code Ann § 32-3-10(5) In addition a contract required to be in writing by the Statute of Frauds cannot be orally modified *Player v Chandler*, 299 S C 101, 105, 382 S E 2d 891 894 (1989)

The question is whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year ' *Warner v Tex & P Ry Co* , 164 U S 418, 434 (1896)

In this case, the alleged contract between Plaintiffs and Hilton could not have been performed within one year It was objectively impossible that the alleged oral agreement, even if it existed could have been performed in one year The duration of the alleged oral contract has been made clear the principals of Plaintiff Garfield Traub themselves testified in their depositions that the oral agreement allegedly began before their team was selected in December 2002 and allegedly continued until the hotel was complete Necessarily the alleged oral agreement would have lasted for at least the entire duration of the design, development, and construction process It is undisputed that it was impossible for the design, development and construction process to be completed in less than one year

There is no writing that satisfies the statute of frauds South Carolina law provides that a writing is sufficient to satisfy the statute of frauds only if it provides evidence of the alleged contract and is signed by the party to be charged *Blocker v Hundertmark*, 204 S C 269 274

13/14

28 S E 2d 855 856 (1944) Plaintiffs contend they have identified documents that evidence an alleged oral exclusivity agreement between Plaintiffs and Hilton. However, the documents identified by Plaintiffs contradict the existence of an oral agreement. Plaintiffs have set forth no writing that evidences any exclusivity agreement between Plaintiffs and Hilton. In fact, an internal email among the principals and employees of Garfield Traub dated December 13, 2002 specifically expressed that Garfield Traub did not desire a contract of exclusivity as they stated

I don't think we need a teaming agreement with Hilton or SSMB at this stage now that we have been designated the developer. Furthermore, we'll want the flexibility to replace Hilton (only if absolutely necessary) and Turner (again only if absolutely necessary), so we don't want to have to make any commitments to them at this juncture.

Therefore, since there is no writing to support the existence of this alleged oral agreement, it is barred by the statute of frauds.

4 Breach of contract accompanied by a fraudulent act

Plaintiffs' second cause of action against Hilton is breach of contract accompanied by a fraudulent act. In addition to failure to establish the existence of a contract, Plaintiffs have failed to present evidence of a fraudulent act by Hilton sufficient to survive summary judgment.

To maintain a cause of action for breach of contract accompanied by a fraudulent act, a plaintiff must prove (1) a breach of contract, (2) fraudulent intent relating to the breach, and (3) a fraudulent act accompanying the breach. *Harper v Ethridge*, 290 S C 112, 119, 348 S E 2d 374, 378 (1986), *Armstrong v Collins*, 366 S C 204, 223, 632 S E 2d 368, 377 (Ct App 2005). The alleged fraudulent act must be separate and distinct from the alleged act or omission in breach of the alleged contract. *Smith v Canal Ins Co*, 275 S C 256, 260, 269 S E 2d 348, 350 (1980).

A fraudulent act for purposes of this cause of action is one that is characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of someone else's property by design " *Harper* 290 S C at 119 348 S E 2d at 378 *Ball v Canadian American Exp Co Inc* , 314 S C 272 276 442 S E 2d 620 623 (Ct App 1994) The fraudulent act cannot be "nonfeasance or a mere statement without more" *Foxfire Village Inc v Black & Veatch Inc* , 304 S C 366, 376, 404 S E 2d 912 918 (Ct App 1991) That is, "the breach must be accompanied by a fraudulent act" *Id* (emphasis in original)

To survive summary judgment, a plaintiff must set forth facts to demonstrate that the alleged fraudulent act occurred ' [M]ore is required than mere speculation' *RoTec Servs Inc v Encompass Servs Inc* , 359 S C 467, 471, 597 S E 2d 881 883 (Ct App 2004) In *RoTec*, the defendant Encompass counterclaimed for breach of contract accompanied by a fraudulent act, alleging that "prior to the execution of the contract, RoTec promised it would not represent Encompass s competitor" *Id* at 470, 597 S E 2d at 883 RoTec admitted it had continued to represent Encompass and the competitor simultaneously and Encompass alleged that RoTec had intentionally concealed this dual representation from Encompass *Id* at 470-71 597 S E 2d at 883 However Encompass offered nothing more than circumstantial evidence that RoTec had concealed anything, arguing that "it was 'inferable from RoTec s alleged promise that it intentionally concealed its continued representation of [the competitor]' " *Id* at 471 597 S E 2d at 883 The Court of Appeals found that this speculation was not sufficient to maintain this cause of action, stating that Encompass "failed to raise any genuine issue of material fact to show that RoTec ever did anything to deny or hide its continuing work for [the competitor]" *Id* Therefore the trial court was correct to grant summary judgment on the claim for breach of contract accompanied by a fraudulent act *Id*

In this case, summary judgment must be granted on this claim because there is no genuine issue of material fact for a jury of any alleged fraudulent act by Hilton. Plaintiffs' allegation of a fraudulent act is that Hilton and Defendant Windsor/Aughtry participated in a "bait and switch" scheme, wherein Plaintiffs allege that Windsor/Aughtry initially offered the City a Hilton Garden Inn with the intention of later switching to a full service Hilton Hotel. However, Plaintiffs have not shown any genuine issue of material fact from which a reasonable jury could conclude that the alleged bait and switch scheme by Windsor/Aughtry existed or that Hilton participated in such a scheme. Plaintiffs have offered no evidence that Hilton had any contact with Windsor/Aughtry regarding development of the convention center hotel prior to the April 2004 RFP. The principals of Garfield Traub testified in their depositions that they have no evidence of any contact between Hilton and Windsor/Aughtry regarding the convention center hotel prior to the April 2004 RFP, and no such evidence has been presented to the Court. Plaintiffs also have offered no evidence that Hilton had any involvement in Windsor/Aughtry's proposal in response to this RFP. The evidence shows that it was the City of Columbia's request, not any scheme by Hilton or Windsor/Aughtry, for Windsor/Aughtry to develop a full service Hilton Hotel. Plaintiffs have presented no evidence to contradict this.

To survive summary judgment under the heightened burden of proof for this claim, Plaintiffs must come forward with evidence on which a reasonable jury could find by clear and convincing evidence that Hilton's actions were characterized by dishonesty in fact or unfair dealing. Plaintiffs have failed to present this evidence. Therefore, summary judgment must be granted as to the claim for breach of contract accompanied by a fraudulent act.

ORDER

For the reasons stated above Hilton's motion for summary judgment is hereby GRANTED. As a matter of law the MOU was not a binding and enforceable contract. Plaintiffs have not presented evidence of an oral agreement between Plaintiffs and Hilton, and the Statute of Frauds mandates that any alleged oral or other non-written contract between Plaintiffs and Hilton is unenforceable because it could not have been performed in one year. In addition, Plaintiffs have failed to present evidence of a fraudulent act by Hilton sufficient to survive summary judgment.

Therefore, summary judgment must be GRANTED as to all causes of action against Defendant Hilton.

IT IS SO ORDERED



The Honorable George C. James Jr.
Circuit Judge

Sumter, South Carolina

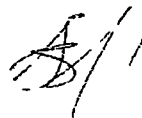

_____, 2009



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON
	)	PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Gary Realty Company, Inc	)	Civil Action No 2006-CP-40-6488
and Garfield Traub	)	(Consolidated under
Development, LLC	)	Civil Action No 2007-CP-40-01252)
	)	
Plaintiff(s)	)	
	)	ORDER GRANTING SUMMARY
vs	)	JUDGMENT
	)	
Paul C "Bo" Aughtry III,	)	
Windsor/Aughtry Co , Inc ,	)	
and Vista Hotel Partners, LLC	)	
	)	
Defendant(s)	)	

This matter is before the Court on the motion for summary judgment by Defendants Paul C "Bo" Aughtry III, Windsor/Aughtry Co , Inc , Vista Hotel Partners, LLC (collectively, the "Aughtry Defendants") This case has been consolidated with four other cases involving common facts¹ The parties to all five cases have filed voluminous materials regarding the defendants' motions for summary judgment in all five cases Two full-day hearings were held on these motions on July 9, 2009 and August 17, 2009 Having fully considered the written motions and supporting materials submitted to the Court by all parties, as well as

¹ The civil action numbers of the consolidated cases are 2005-CP-40-01014, 2005-CP-40-03361, 2006-CP-40-05092, 2006-CP-40-06488, and 2007-CP-40-01252



oral arguments and exhibits presented before the Court, the Court hereby ORDERS that summary judgment is granted in favor of the Aughtry Defendants

FACTUAL BACKGROUND

In January 2001, the Lexington-Richland-Columbia Convention Center Commission issued a Request for Qualifications seeking candidate teams to develop a hotel adjacent to the Midlands Regional Convention Center. Plaintiffs were the development arm of one team led by Edens & Avant and consisting of numerous local and interstate entities. Almost two years later, in December 2002, the City of Columbia (the "City") elected to enter negotiations with the Plaintiffs and Edens & Avant team. This team proposed to develop a bond-financed, full service Hilton Hotel that the City would own and Hilton would operate. The proposed financial model for this hotel provided that the City would issue municipal bonds to finance the development, and the City would set up a non-profit corporation that would own the hotel.

The negotiation process that began at this point in December 2002 involved attempts to prepare several complex written agreements among the various parties. However, not one of these contract documents was ever executed. The only document ever signed by the parties was a document denominated Memorandum of Understanding dated April 17, 2003 (the "MOU"). The MOU set forth a framework for negotiation of agreements to develop and operate a publicly-funded

convention center headquarters hotel The purpose of the MOU was to identify the basic principles that would have been negotiated among numerous parties to create the "definitive written agreements " Page 1 of the document stated

This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained

In June 2003, the non-profit corporation ("NPC") that was to own the hotel was incorporated The by-laws of the NPC stated that it was to fund the development, construction, and commencement of operations of the hotel with "net proceeds of bonds issued by South Carolina Jobs-Economic Development Authority ("JEDA") " Funding the hotel project with the proceeds of bonds issued by JEDA would have necessitated approval not only by Columbia City Council but also by the State Budget and Control Board Neither JEDA nor any other entity ever agreed to issue the bonds, and the bonds to finance this project were never issued

The MOU stated that "approximately \$60 million" in tax-exempt municipal bonds would be issued to fund the hotel development As the Plaintiffs and Edens & Avant team negotiated the proposed contracts, this cost estimate increased at a rate of almost \$1 million per month By February 11, 2004—ten months after the MOU was signed—the financing structure had grown to over \$69 million, and none of the "definitive written agreements" had been finalized or executed On

March 15, 2004, the bond amount had increased again by more than \$2 million to over \$72 million. This financing model also included a portion of taxable bonds, something that was never contemplated in the MOU.

Two days later, on March 17, 2004, the City voted to open a new bidding process and issue a new Request for Proposals ("RFP") for development of a convention center hotel on the same site that the City had been negotiating with the Plaintiffs and Edens & Avant team. The new RFP was issued on April 2, 2004. The new RFP called for a privately-owned hotel project. The Columbia City Council appointed a Hotel Selection Committee, composed of ten private citizens, to review the responses to the RFP and make a recommendation to the City Council about which proposal to select. The Plaintiffs contend the Columbia City Council's decision to issue the new RFP constitutes a breach of the MOU, and they contend this breach was caused by tortious interference of the Aughtry Defendants.

A total of seven proposals were submitted in response to the new RFP. Four of the seven proposals offered hotels from the Hilton family of hotels. Plaintiffs participated in the new RFP process and actually submitted two of the seven formal proposals. One of Plaintiffs' proposals was a resubmission of its original proposal for the same seventy-plus million dollar, publicly funded, bond-financed Hilton Hotel, and the other was a new proposal for a \$53.75 million Hilton Hotel that would be funded partially by the City and partially with private capital. In

addition, two other bidders submitted proposals that included hotels from the Hilton family of hotels. One of these was Defendant Windsor/Aughtry.

The Hotel Selection Committee recommended the Windsor/Aughtry team, and the City ultimately selected Windsor/Aughtry to develop the convention center hotel and required that it be a full service Hilton Hotel. Following their failure to be selected pursuant to the process of the new RFP, Plaintiffs and other signatories to the MOU brought multiple lawsuits against various defendants. The Court consolidated these actions both for discovery and for trial.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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." Rule 56(c), SCRCP. "Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial." *B & B Liquors Inc v O'Neil*, 361 S C 267, 270, 603 S E 2d 629, 631 (Ct App 2004). If the evidence taken as a whole is susceptible to only one reasonable inference, there is no jury issue and the motion for summary judgment should be granted. *Hopson v Clarey* 321 S C 312, 468 S E 2d 305 (1995).

To survive the Defendants' Motion for Summary Judgment, the Plaintiffs "must offer some evidence that a genuine issue of material fact exists as to each element" of their claim *Eadie v Krause*, 381 S C 55, 65 n 5, 671 S E 2d 389, 394 n 5 (Ct App 2008) Otherwise, the Plaintiffs "cannot meet [their] burden of proof and the claim may be determined as a matter of law by the trial judge" *Id*

LEGAL ANALYSIS

The Plaintiffs now plead two causes of action against Defendants Aughtry, Windsor/Aughtry, and Vista Hotel Partners (1) tortious interference with contract, and (2) intentional interference with prospective contractual relations²

1 Question of law for the Court

The Aughtry Defendants correctly argue that an essential element of Plaintiffs' tortious interference claim is proof of an enforceable contract which can be the subject of tortious interference *See e g Love v Gamble* 316 S C 203, 213-214, 448 S E 2d 876, 882 (Ct App 1994) Thus, critical in this Court's analysis is whether the MOU was a binding and enforceable contract When a particular document is alleged to be a binding and enforceable contract, and there is no factual dispute such as the document's authenticity, the question of whether the document is a binding and enforceable contract is a question of law for the Court *See e g W E Gilbert & Assocs v S C Nat'l Bank*, 285 S C 421, 423, 330

² At the August 17, 2009 hearing, Plaintiffs withdrew their Third Cause of Action which asserted damages based on claims of conspiracy

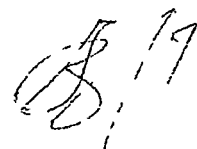
S E 2d 307, 309 (Ct App 1985) (where the material facts concerning the formation of a document are not in dispute, the issue of whether the document is a binding contract is a question of law), *see also Capital City Garage & Tire Co v Electric Storage Battery Co*, 113 S C 352, 363, 101 S E 838, 841 (1920) (where the question was whether particular documents constituted a written contract, it was a question of law for the court, which found the documents did not constitute a contract)

Corpus Juris Secundum states

Pursuant to the generally applicable rule concerning decisions in respect of undisputed facts, whether undisputed facts establish a contract is a question of law, for decision by the court. By application of this principle whether a document, or multiple documents exchanged by the parties, constitute a contract is generally held to be a question of law for determination by the court, since the question involves the interpretation of an instrument or instruments, the determination of their validity as a matter of law, or both

17B C J S Contracts § 771 (2008)

In this case, the issue before the Court is whether the MOU constituted a binding contract or a non-binding "agreement to agree." Because the Court has to look no further than the four corners of the MOU to decide whether it is a binding and enforceable contract, this is a question of law for the Court to determine



2 The MOU was not a binding and enforceable contract

The Court finds that the MOU was not a binding and enforceable contract but rather nothing more than an agreement to agree on future contract documents. Therefore, summary judgment must be granted as to Plaintiffs' First Cause of Action for tortious interference with contract because it requires the existence of a binding contract.

A The "four corners" of the MOU

"A contract is an obligation which arises from actual agreement of the parties." *Rushing v McKinney*, 370 S C 280, 290, 633 S E 2d 917, 922 (Ct App 2006). There can be no contract where the parties never completed their negotiations as to essential terms. *W E Gilbert & Assocs*, 285 S C at 424-25, 330 S E 2d at 309. Specifically, a letter of intent or "agreement to agree" is not a binding and enforceable contract. *Trident Const Co Inc v Austin Co*, 272 F Supp 2d 566, 575 (D S C 2003) ("agreements to agree do not amount to a contract in South Carolina"), *Blanton Enterprises, Inc v Burger King Corp*, 680 F Supp 753, 770 n 20 (D S C 1988) (same). This principle was established early in South Carolina case law. See *Savannah Guano Co v Fogle*, 112 S C 234, 100 S E 59 (1919) (concluding no contract existed where there was only a promise to enter into a contract in the future), *Holliday v Pegram*, 89 S C 73, 71 S E 367 (1911) (finding there was no contract where the defendant promised to make a

Handwritten signature/initials

contract or arrange an agreement at a future date) "If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made, and the so-called 'contract to make a contract' is not a contract at all " Arthur L Corbin, Corbin on Contracts § 29, at 45, (One Vol Ed 1952)

In this case, the Court has to look no further than the four corners of the MOU The MOU was an unenforceable, non-binding agreement to agree in the future It was not a binding and enforceable contract The purpose of the MOU was stated on the first page

This MOU reflects the intent to proceed in good faith to execute definitive written agreements with respect to the business terms and conditions herein contained

The language contained within the MOU itself establishes that it was not an enforceable contract document There is no genuine issue of material fact that this seven-page document laying out the items not yet agreed upon, did not bind the parties in this complex, multi-million dollar deal involving development and operation of a major hotel facility over a number of years As the MOU stated, it was the definitive written agreements that were to bind the parties, not the MOU itself These future agreements identified on the face of the MOU are as follows

(1) *Bond Underwriting Agreement and Bond Financing Agreements*

Sections V(3), (4) and (5) of the MOU outline in a general way, a multitude of



bond underwriting and financing agreements which were required to be negotiated, documented and effected in order to accomplish the tax exempt bond financing which is the underlying predicate of the project envisioned by the MOU. These sections of the MOU make clear that underwriting agreements were required to be drafted, credit enhancement agreements were required, and the terms of various bonds were required to be negotiated, documented and approved by public entities. The very words of the MOU demonstrate that all of these agreements were to be negotiated in the future, and were not in existence. Further, the undisputed facts show that in fact, the bond underwriting agreements and other bond related financing agreements had not been negotiated or documented when the MOU was signed. These agreements were never fully documented and were never executed.

(11) *Qualified Management Agreement* Section X of the MOU makes clear that the hotel which is the subject of the MOU would be managed by a 15 year Qualified Management Agreement which complied with IRS Revenue Procedure 97-13 and provisions of the Internal Revenue Code. This complex agreement (which was to set up the management of the hotel for a 15 year period in a manner which complied with Internal Revenue regulations necessary to enable tax exempt bond financing) did not exist at the time the MOU was executed. It was never fully negotiated or executed.

(iii) *Joint Use Agreement Regarding Parking Rights* Section IV(5) of the MOU provided that the hotel would have access to parking spaces in a public parking garage adjacent to the hotel which was the subject of the MOU. Section V(2) makes clear the parking facility did not exist when the MOU was signed, and that the use of the non-existent parking garage by the hotel facility would be subject to a Joint Use Agreement which also did not exist at the time the MOU was executed. The undisputed facts show this Joint Use Agreement was never fully negotiated or executed.

(iv) *Hotel Room Block Agreement* Section X(12) of the MOU provides that the hotel operator would enter into a Hotel Room Block Agreement with the adjacent convention center facility. As shown in Section X(12) of the MOU, this agreement would govern commitments by the hotel to furnish blocks of rooms for convention center users and commitments respecting rates for those rooms. Section X(12) shows this important agreement related to hotel use and revenue did not exist when the MOU was signed. The undisputed facts show the agreement was never fully negotiated or executed.

(v) *Design/Build Agreement* Sections VII(1) and (2) of the MOU provide that the hotel would be built pursuant to a Design/Build Agreement which would include the cost and terms of payment for construction of the hotel and which would provide a guaranteed maximum cost and a guaranteed delivery date.



respecting construction of the hotel This agreement which governed the costs, payment terms and delivery date for the hotel project did not exist when the MOU was signed The undisputed facts show the Design/Build Agreement was never fully negotiated, documented or executed

(vi) *Development/Management Agreement* Section VI(1) of the MOU provides the development of the hotel would proceed pursuant to a Development Management Agreement which governs the construction, design and delivery of the hotel Section VI of the MOU shows this Development Management Agreement had not been executed on the date the MOU was signed The undisputed facts show the development management agreement was never fully negotiated, documented, or executed

Because none of the above referenced agreements had been fully negotiated, much less executed at the time the MOU was signed, the MOU was clearly only an unenforceable agreement to agree

B. Conditions Precedent

Summary judgment must also be granted in favor of the Aughttry Defendants on Plaintiffs' First Cause of Action on the separate and independent ground that the MOU included conditions precedent that never occurred A contract which is otherwise valid becomes unenforceable if a condition precedent fails to occur *M & M Group, Inc v Holmes*, 379 S C 468, 477, 666 S E 2d 262, 266 (Ct App

B3/12

2008) ("A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises "'')

In this case, each of the six separate definitive agreements briefly reiterated below constituted conditions precedent to the MOU because negotiation and execution of each of these agreements was required before parties could be required to go forward with the transaction envisioned by the MOU. To the extent the MOU could ever be considered a valid contract, the MOU was rendered unenforceable as a matter of law because failure of the conditions precedent set out here

(i) *Bond Underwriting Agreement and Bond Financing Agreements* The transaction contemplated by the MOU was entirely dependent on tax exempt bond financing. However, the contracts supporting the bond were never executed, the City never passed the necessary resolutions to commit the City to issue either direct obligation bonds or credit enhancement commitments, and the necessary bonds were never issued or sold.

(ii) *Qualified Management Agreement* The Qualified Management Agreement consistent with the Internal Revenue Code was required in order for the bonds to be issued with tax exempt status necessary for sale. However, the Qualified Management Agreement was never negotiated or executed.

B/13

(iii) *Joint Use Agreement Regarding Parking Rights* The parking access necessary to the operation of the hotel was required to be governed by a Joint Use Agreement between the hotel operator and the City respecting a parking garage which did not yet exist. However, this Agreement was never negotiated or executed.

(iv) *Hotel Room Block Agreement* The operation of the hotel in relation to the needs and demands of users of the Columbia Convention Center were required to be governed by a Hotel Room Block Agreement setting forth financial and other terms by which the hotel operator would furnish rooms to users of the Columbia Convention Center. However, this Agreement was never negotiated or executed.

(v) *Design/Build Agreement* The construction of the hotel in terms of design, delivery, and price was required to be governed by a Design/Build Agreement, whereby the Builder was to give a guaranteed price, a guaranteed delivery date, and post a payment and performance bond as security. However, this Agreement was never fully negotiated or executed.

(vi) *Development/Management Agreement* The development of the proposed hotel in terms of coordination of design, construction, delivery and other aspects of development and payment for those services, was required to be governed by a Development/Management Agreement. However, this agreement was never fully negotiated or executed.

3 Interference with Prospective Contractual Relations

In their Second Cause of Action, Plaintiffs allege the Aughtry Defendants intentionally interfered with prospective contractual relations between Plaintiffs and the City. The essential elements of this tort are "(1) the intentional interference with the Plaintiffs' potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the Plaintiffs." *United Educ Distribs LLC v Educ Testing Serv*, 350 S C 7, 14, 564 S E 2d 324, 328 (Ct App 2002). See also *Crandall Corp v Navistar Int'l Transp Corp*, 302 S C 265, 266, 395 S E 2d 179, 180 (1990), *Eldeco Inc v Charleston Cty Sch Dist*, 372 S C 470, 480, 642 S E 2d 726, 731 (2007).

Plaintiffs contend that the Aughtry Defendants intentionally interfered with the Plaintiffs' prospective contractual relations which could result from the MOU. The Aughtry Defendants argue that there is no evidence that the Plaintiffs had a prospective contract because the MOU was too indefinite and uncertain and that there was no evidence that there was a "reasonable certainty" of prospective contractual relations. The Court believes that there are genuine issues of material fact on this issue and declines to grant summary judgment on this ground. To be clear, the Court is not finding that the Plaintiffs had a prospective contract or even prospective contractual relations, but merely that there are genuine issues of fact on this issue.

However, to recover on this cause of action, the Plaintiffs must also prove that the Aughtry Defendants intentionally interfered "for an improper purpose or by improper methods " This Court finds that the Plaintiffs have failed to provide sufficient evidence to create a genuine issue of material fact on this issue

"Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of [his or her] own contractual rights with a third party " *Eldeco Inc* , 372 S C at 482, 642 S E 2d at 732 (quoting *S Contracting Inc v H C Brown Constr Co* , 317 S C 95, 102, 450 S E 2d 602, 606 (Ct App 1994)) "If a defendant acts for more than one purpose, his improper purpose must predominate in order to create liability " *Crandall*, 302 S C at 266, 395 S E 2d at 180

In *Crandall*, the court points to the Virginia case of *Duggin v Adams*, 234 Va 221, 360 S E 2d 832 (1987), for a discussion of improper methods There it is said

Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship

Methods also may be improper because they violate an established standard of a trade or profession, or involve unethical conduct. Sharp dealing, overreaching, or unfair competition may also constitute improper methods.

Id. at 227-228, 360 S.E.2d at 836-837 (citations omitted)

In this case, Plaintiffs have failed to offer any evidence sufficient to create a genuine issue of material fact that Aughtry's contacts with the City were improper or that he used improper methods in seeking to have his own bid accepted by the City. The nature and extent of Aughtry's contacts with the City are not really in dispute. They are set forth in detail in his affidavit and in his deposition testimony which is part of the record before this Court.

The mere fact that the Aughtry Defendants wanted to build the hotel to support the Columbia Convention Center and that as a consequence the Plaintiffs would lose anticipated profits for building the hotel does not establish that the Aughtry Defendants acted for an improper purpose to "ruin or damage" the Plaintiffs.

The point is made clear by Judge Wilkinson in *Waldrep Bros. Beauty Supply Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59 (4th Cir. 1993). Judge Wilkinson opened the opinion as follows:

Business competition produces success and failure, over time, only firms that satisfy their customers will survive. In this diversity case, Plaintiff seeks to erect the tort law of South Carolina as a barrier to the forces of market competition.

- 17 -

Id at 60

Later in the same opinion, Judge Wilkinson addressed the Plaintiff's argument that its alleged loss of profits was evidence the defendant intended to cause the Plaintiff harm. Judge Wilkinson wrote the following

Waldrep was required to prove that the "object [of the conspiracy was] to ruin or damage the business of another." *LaMotte v Punch Line of Columbia Inc*, 296 S C 66, 370 S E 2d 711, 713 (1988) (quoting *Charles v Texas Co*, 199 S C 156, 18 S E 2d 719, 724 (1942), emphasis added). The evidence in this case, however, demonstrated that Wynn's object was simply to make money by distributing beauty products in South Carolina, there was no evidence that Wynn acted with malice towards Waldrep. The only harm that Wynn intended to cause Waldrep was the incidental harm to competitors that is necessarily part of all legitimate business competition. To be sure, Waldrep was harmed by the loss of business, but those losses must be considered against the gain to Redken and Sebastian from having a more energetic and efficient distributor. That increased profits for one enterprise may come at the expense of a competitor is a fact of life in a market economy. We cannot, however, simultaneously encourage competitors to compete and hold them liable in tort whenever they do so successfully.

Id at 63

In this case, the Aughtry Defendants freely admit they wanted to build the hotel to support the Columbia Convention Center, the Aughtry Defendants freely admit that they wanted to make money, and they freely admit that as an incidental consequence of the City choosing the Aughtry Defendants' project instead of the

Plaintiffs' project, Plaintiffs could conceivably lose profits they might have accrued had their project been chosen. However, this is business competition and not an improper purpose.

Nor did the Plaintiffs offer any evidence sufficient to create a genuine issue of material fact that the Aughtry Defendants used improper methods. Mr. Aughtry wrote letters and met with public officials about his bid to build a hotel.³ The Plaintiffs had these same rights. "Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994).

The Plaintiffs have failed to present sufficient evidence to create a genuine issue of material fact that the Aughtry Defendants acted for an improper purpose or used an improper means to interfere with the Plaintiffs' prospective contractual relations with the City; therefore, the Aughtry Defendants are entitled to summary judgment as a matter of law.

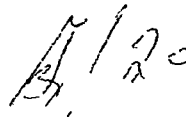
³ The Aughtry Defendants also raised the Noerr-Pennington Doctrine as a ground for summary judgment, but since this Court finds that there is not sufficient evidence to create a genuine issue of material fact that the Aughtry Defendants improperly interfered with the Plaintiffs' prospective contractual relations, there is no need to address the applicability of that doctrine.

11/19

ORDER

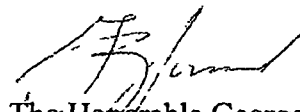
For the reasons stated above, the Aughtry Defendants' motion for summary judgment is hereby GRANTED respecting Plaintiffs' First Cause of Action for tortious interference with contract. As a matter of law, the MOU was not a binding and enforceable contract, and, even if it were, the failure of numerous conditions precedent excused any performance by the City. Because the MOU was not an enforceable contract, Plaintiffs cannot demonstrate one of the essential elements of their claim for tortious interference with contract.

Likewise, the Aughtry Defendants Motion for Summary Judgment is hereby GRANTED respecting Plaintiffs' Second Cause of Action for intentional interference with prospective contract relations. An essential element of this claim is proof that the Aughtry Defendants acted for an improper purpose or used improper methods in their dealings with the City. As a matter of law, the Record Evidence fails to create a genuine issue of material fact that the Aughtry Defendants acted for an improper purpose or used improper methods in their dealings with the City.



Summary Judgment is therefore granted as to all causes of action against the
Aughtry Defendants

IT IS SO ORDERED



The Honorable George C. James, Jr
Circuit Judge

Sumter, South Carolina

11/15, 2009

316729 1
007390-000000 10/16/2009



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Gary Realty Company, Inc and Garfield
Traub Development, LLC,

Plaintiffs,

vs

City of Columbia, South Carolina,

Defendant

) IN THE COURT OF COMMON PLEAS

) Civil Action No 05-CP 4014

) AMENDED COMPLAINT

FILED
2005 JUL 29 PM 2 17
CLERK OF COURT
C C C & ASSOCIATES

The Plaintiff would respectfully show that

1 The Plaintiff, Gary Realty, Inc Is a corporation organized and existing under the laws of the State of South Carolina and doing business in Columbia, South Carolina

2 The Plaintiff, Garfield Traub Development, LLC is a limited liability corporation organized under the laws of Delaware and doing business under the laws of the State of Texas

3 The Defendant City of Columbia, South Carolina, is a political subdivision of the State of South Carolina, and is amenable to suit for the causes of action alleged herein

FACTS COMMON TO ALL CAUSES OF ACTION

4 On or about January 15, 2001, the City issued a Request for Qualifications for a team to assist in developing a 300-room, first class, full service convention center Hotel (hereinafter "the Hotel")

5 In December 2002 the Plaintiffs, as part of a development team (hereinafter "the Team"), were selected to undertake development and operation of the Hotel

6 From December 2002 through February 2004, the Team established regular weekly development team meetings in which staff personnel of the City of Columbia regularly participated

7 During the course of these regular project meetings, the City encouraged the Team to continue to spend considerable time and money in the refinement of the project documents and agreements, financing, design and pricing

8 In April 2003 the Team executed a Memorandum of Understanding (MOU) with the City under which the Team agreed to design construct and finance the convention center Hotel pursuant to the terms therein A copy of the MOU is attached hereto and incorporated herein by reference

9 At all times, the Team acted in good faith under the MOU, and believed the city was acting in good faith as well

10 Pursuant to the MOU, the Team, among other things, designed and negotiated a guaranteed maximum price construction commitment for the Hotel obtained design approvals from the Design Development Review Committee of Columbia for the Hotel, obtained commitments associated with the issuance of bonds (including a commitment from AMBAC to insure the bonds and a letter from Standard & Poors indicating an investment grade rating would be assigned to the bonds) to fund construction and operation of the Hotel, obtained an independent analysis of the Hotel operations, and negotiated and drafted numerous agreements associated with and necessary to the transaction

11 In December 2003, in recognition that it would be inequitable to expect the Team to continue to work solely at its own risk, the city agreed to advance Seven Hundred Five Thousand Dollars (\$705 000 00) to certain members of the Team including Stevens & Wilkinson, as advance payment for services and expenses that occurred during the time period July 10, 2003 to December 15, 2003 None of that money was received by the Plaintiffs

12 Columbia Convention Center Hotel Corporation (CCCHC) is a non profit corporation which was formed by the City to hold title to the Hotel for the benefit of the City

13 After its formation, CCHC at all times acted as an agent of the City

14 On February 11, 2004, CCCHC voted to approve the financing structure and development budget for the convention center hotel as presented by the Team

15 On February 25, 2004, the City authorized the Team to proceed with finalizing documentation, closing, funding and ground breaking for the Hotel

16 In March 2004 in violation of its obligation of good faith and fair dealing under the MOU, the City issued a new Request for Proposal (hereinafter 'RFP') for privately funded delivery of the Hotel

17 S C Ann § 11 35 20 (2004), specifically subset (f) and subset (g) respectively outline the overarching policy of the code including ensuring "the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement" and "provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for

ethical behavior on the part of all persons engages in the public procurement process” The Defendant’s behavior as outlined in paragraph 19 below, deviates from these policy considerations, as public confidence in procurement procedures will not be increased when one bidder is favored and favoring one bidder is not ethical behavior

18 S C Ann § 11-35-30 (2004) imposes a good faith obligation for every contract or duty in its negotiation, performance, or enforcement The provision further defines good faith as ‘honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing ’

19 In the RFP process instituted as of March 2004, the City acted in bad faith and in violation of state procurement laws in favoring one bidder, Windsor/Aughtry Company, Inc (WAC) in at least the following ways

- a In allowing a representative of WAC to sit in on the Team’s presentation and have the benefit of its work product,
- b In allowing and encouraging WAC to modify its original proposal under the RFP, which had been for a limited service hotel, to a full service hotel, and
- c Deliberately withholding Team correspondence from the selection committee while providing post due date correspondence and materials from WAC

20 During the course of dealings between the Team and the City, the City obtained a substantial amount of material which was proprietary to the Team, which was work product of the Team and which was intended to be used only in connection with the Team's activities under the MOU. The material includes, but is not limited to, concepts, plans, designs, drawings and terms of the hotel agreement.

21 Notwithstanding the proprietary nature of the Team's work product, it was shared by the City with other parties interested in and competitive to the Team's project.

22 During the course of its good faith activities pursuant to the MOU, the Team expended large amounts of time and money, in the belief that the City was operating in good faith and would engage in fair dealing.

23 The reasonable value of the services and money provided by the Plaintiffs herein is Two Million One Hundred Fifteen Thousand dollars (\$2,115,000.00).

**FOR A FIRST CAUSE OF ACTION
(Quantum Meruit)**

24 By virtue of the work and effort described in the preceding paragraphs, the Plaintiffs have conferred a benefit upon the Defendant, including but not limited to the items set forth in paragraph 20 above, and in addition, the accumulation of expertise and understanding of the materials, methodology and means of the development of a project such as this. The Defendant has realized that benefit, and it would be unjust for the Defendant to retain the benefit without paying its fair value.

25 The Plaintiffs are informed and believe that they are entitled to recover the fair value of the benefit conferred upon the City under a theory of Quantum Meruit

**FOR A SECOND CAUSE OF ACTION
(Breach of the Covenant of Good Faith and Fair Dealing)**

26 By virtue of the operation of law, a covenant of good faith and fair dealing was a part of the MOU between the Plaintiffs and the City

27 The City breached that covenant in at least the following particulars

- a In favoring some of the members of the Team by paying for their services, while refusing to compensate the Plaintiffs,
- b In allowing a competing bidder to sit in on the Team's confidential presentation,
- c In sharing the Team's proprietary work product with third parties
- d In allowing a competing bidder to modify its proposal after the deadline for proposals had passed,
- e In unreasonably favoring a competing bidder,
- f In unreasonably changing the character of the project, and
- g In such other and further particulars as the evidence in discovery and at trial may show

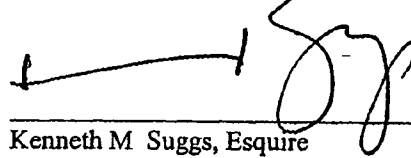
28 The Plaintiffs were damaged by the breach in the following ways

- a Expenditure of time and money at the specific request of the City; and

b Loss of expected profits on the completed project

Wherefore Plaintiffs pray for judgment against the City in a sum sufficient to compensate them for their actual damages, for the costs of this action for interest to the date of judgment, and for such other and further relief as the Court may deem just and proper

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Suggs', is written over a horizontal line.

Kenneth M. Suggs, Esquire
South Carolina Bar No. 5424
Janet, Jenner & Suggs, LLC
500 Taylor Street
Post Office Box 927
Columbia, South Carolina 29201
(803) 726-0050 TEL
(803) 726-1059 FAX
Attorney for Plaintiffs

Columbia, South Carolina
Dated July 29, 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No 2006-CP-40-6488
Gary Realty Company, Inc and	)	
Garfield Traub Development LLC	)	(For Discovery Purposes Only, Now a Part of
	)	Consolidated Action No 2007-CP-40-1252)
Plaintiffs,	)	
vs	)	
	)	PLAINTIFFS' MEMORANDUM
Paul C "Bo" Aughtry III, Windsor/Aughtry	)	IN DEFENSE OF DEFENDANT
Co , Inc Vista Hotel Partners LLC, and	)	HILTON'S MOTION FOR PARTIAL
Hilton Hotels Corporation	)	SUMMARY JUDGMENT
	)	
Defendants	)	

SUMMARY JUDGMENT STANDARD

South Carolina courts consider summary judgment to be a 'drastic remedy' that should be cautiously invoked " Englert, Inc v LeafGuard USA, Inc., 377 S C 129, 134, 659 S E 2d 496, 498 (2008) Summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law City of Columbia v American Civil Liberties Union, et al, 323 S C 384, 475 S E 2d 747 (1996) Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law Standard Fire Ins Co v Marine Contracting & Towing Co 301 S C 418, 392 S E 2d 460 (1990) For summary judgment to be granted, it must be "perfectly clear" that no issue of fact is involved Piedmont Engineers, Architects and Planners, Inc v First Hartford Realty Corp, 278 S C 195, 293 S E 2d 706 (1982) Even when there is no dispute as to evidentiary facts but only as to the conclusions or inference to be drawn from them, summary judgment should not be granted Baugus v Wessinger, 303 S C 412 415 401 S E 2d 169 171 (1991)

In determining whether any triable issues of fact exist the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party Hamiter v Retirement Div of S C, 326 S C 93, 484 S E 2d 586 (1997) The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact Baughman v American Tel and Tel Co, 306 S C 101, 410 S E 2d 537 (1991) ‘In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in favor of the nonmoving party who must be given the benefit of all favorable inferences that might reasonably be drawn from the record’ Bates v City of Columbia, 301 S C 320 321 391 S E 2d 733, 733 (Ct App 1990) (*citation omitted*) The court must construe all ambiguities, conclusions and inferences arising from the evidence most strongly against the moving party See Finger v Finger, 270 S C 244 241 S E 2d 746 (1978) ‘[I]n cases applying the preponderance of the evidence burden of proof the non moving party is only required to submit **a mere scintilla of evidence** in order to withstand a motion for summary judgment” Hancock v Mid-South Mgt Co, 381 S C 326, 330, 673 S E 2d 801, 803 (2009), (*emphasis added*)

HILTON’S MISREPRESENTATION OF SOUTH CAROLINA LAW

Briefly the Plaintiffs would bring to the Court’s attention Hilton’s inaccurate and incorrect presentation that “[t]he fraudulent act cannot be “nonfeasance or a mere statement without more ’ ” (*Hilton Brief p 6*) However, even if was the law of South Carolina were as such, summary judgment would nonetheless be inappropriate, for, at bare minimum there is a dispute as to evidentiary facts (and a dispute as to the conclusions or inference to be drawn from the facts) with regard to Plaintiffs claim that Hilton committed a fraudulent act in its breach of contract

Hilton misleads the Court when it advances that Foxfire Village, Inc v Black & Veatch, Inc., 304 S C 366, 404 S E 2d 912 (Ct App 1991) held “[t]he fraudulent act cannot be ‘nonfeasance or a mere statement without more ’” (*Hilton Brief* p 6) Hilton takes the quote out of context and improperly asserts that such was the holding of the Foxfire court. Reviewing an action in law for which the appellate court was required to view the facts in the light most favorable to the party prevailing at trial, in Foxfire the Court of Appeals upheld a master in equity’s finding that the evidence did not show fraudulent or dishonest intent in connection with these acts and omissions, specifically noting that “the master’s finding [was] not so arbitrary or lacking in evidentiary support as to constitute an error of law” Id at 376. In what was clearly dicta, the Foxfire Court then added ‘Additionally we observe that no decision of this Court or the Supreme Court has held that either nonfeasance or a mere statement without more satisfies the requirement that the breach must be accompanied by a fraudulent act ’ Id (*emphasis added*). Clearly our courts have not yet determined whether nonfeasance or a mere statement without more can serve as a fraudulent act. Although Hilton might desire otherwise, it is not the law of South Carolina that nonfeasance or a mere statement without more cannot be considered a fraudulent act.

ARGUMENT

Although filled with numerous red herrings regarding the costs of the hotel and other factual matters,¹ Defendant Hilton’s brief in support of its motion for partial summary judgment essentially boils down to an argument that there is no evidence to support the Plaintiffs’ allegation that Hilton committed a fraudulent act. Amazingly, Defendant Hilton even goes so far

¹ The Plaintiffs disagree with much of Hilton’s portrayal of the facts in this case. However, most of these matters are unrelated to Defendant Hilton’s motion for partial summary judgment. Accordingly only the relevant facts and the inferences that can be drawn from the facts will be addressed in this memorandum. However the voluminous amount of facts in dispute provides further reasoning as to why summary trial is appropriate and summary judgment should not be granted.

as to state that all the evidence in the record directly refutes such a claim ” (*Hilton Brief* p 2) Hilton’s assertions are simply untrue for, as discussed below both the testimony and written documentation in this case provide evidence of a fraudulent act (or acts) on the part of Hilton Giving the Plaintiffs the benefit of all favorable inferences that might reasonably be drawn from the record and construing all ambiguities conclusions and inferences most strongly in the Plaintiffs’ favor, there is no question that there is at absolute minimum, a scintilla of evidence showing that Hilton cooperated with Defendant Aughtry as the Plaintiffs’ have alleged

Hilton’s brief would seemingly argue that some sort of overt, concrete evidence of fraud is the only way by which a claim for breach of contract accompanied by a fraudulent act should go forward However, it is of no consequence and should come as no surprise that the document production in this case did not include a letter or an email from Hilton reading “lets defraud the members of the Garfield Traub team or that there has been no deposition testimony from a Hilton employee stating ‘ I lied to Garfield Traub Development ” Seldom do such smoking guns come forth in discovery, yet a mere inference of fraud is all that the Plaintiffs need show In fact, our appellate courts have specifically noted that ‘ fraudulent intent is normally proved by circumstances surrounding the breach Floyd v Country Squire Mobile Homes, Inc., 287 S C 51, 53-54, 336 S E 2d 502 503-04 (Ct App 1985) Furthermore, a “fraudulent act” is defined as **“any act characterized by dishonesty in fact or unfair dealing ”** Conner v City of Forest Acres, 348 S C 454, 466, 560 S E 2d 606, 612 (2002) (*emphasis added*) “Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its

presence or absence Id (citing Sullivan v Calhoun, 117 S C 137 139, 108 S E 189, 189 (1921) (internal quotations omitted)

Defendant Hilton argues that ‘[t]here is no evidence that Hilton [c]ooperat[ed] with Defendants *Aughtry Windsor/Aughtry and Vista Hotel* in their formal proposal of a non full-service *Garden Inn* with the knowledge and understanding that a full service Hilton Hotel would later be supplemented into the proposal ’” However, when the late May 2004 correspondence between Defendants Hilton and Aughtry are given their only reasonable interpretation (let alone construing all ambiguities, conclusions and inferences most strongly in the Plaintiffs favor) there is unquestionably evidence of fraud on the part of Hilton

Hilton claims that it had no knowledge of what brands of hotels Aughtry was offering to the City and that [t]here is no evidence that Hilton had any contact with the Aughtry Defendants regarding development of the convention center hotel prior to the April 2004 RFP ’ However, the written evidence in this case clearly indicates otherwise Making sure to include the City as a receipt of the letter, on May 25, 2004, Mr Aughtry wrote to Hilton stating

With the above said, you and Steve Crabill [of Hilton] **are fully aware of our intention to offer a full service Hilton as an alternative to the city** In fact you were kind enough to send me the Naples Hilton Prototype and we had specific discussions about making Columbia a ‘boutique Hilton’ as an example of this brand’s ability to function at a smaller scale, consistent with the Columbia Convention Center needs

Your statement that ‘Hilton looks forward to working with you should your proposal be chosen ’ is **consistent with our discussions** and I interpret as an **expression of your willingness to license us, regardless of which brand is chosen**

Brian you understand that it is untenable for me to be perceived as having represented a proposal to the city of Columbia without Hilton’s blessing **You Steve and I know that our Hilton alternative was well discussed among the three of us** and that fact needs to be affirmatively conveyed to the city of Columbia so that credibility does not come into question

(Ex DD to R. Garfield Aff)² A day later, on May 26th, Hilton wrote the City explicitly stating that Mr. Aughtry's May 25th letter was correct (Ex FF to R. Garfield Aff). Thus, by Hilton's own admission, the company had discussions with Mr. Aughtry informing him that Hilton would allow him to offer the City a full-service Hilton brand Hotel. The letter may not directly state that the Hilton-Aughtry discussions took place before the City issued the new RFP in April 2004, but neither does the letter state that the conversations took place only after the RFP was issued. Properly construing this ambiguity of time most favorably in the Plaintiffs' favor, the Court should consider the conversations mentioned in Aughtry's May 25th letter as having occurred before the RFP was issued.

However, even if these conversations took place after the April 2004 RFP was issued, this is not to say that Hilton could not be found to have acted fraudulently. It is the Plaintiffs' allegation that their contract of exclusivity with Hilton did not come to an end simply by the City having issued the April 2004 RFP, and the principals of GTD's have provided sworn testimony that Hilton confirmed this understanding—that after the RFP went out, Hilton provided them oral assurances that the hotel company remained committed exclusively to the GTD team. (R. Garfield Aff ¶ 23, G. Garfield Aff ¶ 4, 4(b)).

Hilton's letter of May 21 also provides evidence of fraud on the part of Hilton. In this letter, Hilton regional director for franchise development writes "Hilton supports [Mr. Aughtry's] proposed development of a **Hilton Garden Inn Hotel**" and "continues to support the Garfield / Traub team for development of a Hilton managed Hotel." (R. Garfield Aff ¶ 23) (*emphasis in the original*)

² Citations to R. Garfield Aff. refer to Raymond Garfield's June 24, 2009 affidavit, which was included as Attachment 1 to the Plaintiff's memorandum in opposition to Defendant Aughtry's motion for summary judgment based on the *Noerr Pennington* doctrine. Due to the affidavit's size, unless requested, an additional copy will only be furnished to the Court, not to each Defendant separately.

On its very face, this letter appears to provide evidence of a fraudulent act by Hilton, and supports Plaintiffs' allegation that Hilton cooperated with Defendant Aughtry in a scheme to formally propose a non full-service Garden Inn with the intention that a full-service Hilton Hotel would later be supplemented. The letter seemingly scolds Mr. Aughtry for having informed the City that he could build a Hilton-brand hotel and is worded ever so carefully so that the causal reader would take the correspondence to stand for the position that Aughtry had Hilton's support only for the construction of a Garden Inn and the right to build a Hilton lay solely with GTD. However, as part of a plan to later allow Aughtry to build a Hilton-brand hotel, Defendant Hilton included the term "Hilton managed Hotel" as a qualifier of their support for the GTD team. These specific words were included because Hilton's plan with Aughtry was for Aughtry to actually build a franchised Hilton Hotel. Thus, Hilton's intention was to write a letter that would be construed in such a way that gave GTD a feeling of assurance that Hilton was still honoring their commitment of exclusivity, while also giving the hotel company wiggle room to later defend and explain the letter after provided support for Aughtry to construct a Hilton hotel beside the City's convention center. In other words, the letter was crafted in such a way where it would not be a lie in the most rigid, technical sense of the word, since the support/permission Hilton gave to Aughtry was for the construction of a Hilton *franchised* hotel and not a Hilton *managed* hotel. However, the letter was obviously intentionally worded in a deceptive manner, for if Hilton had wanted the correspondence to convey the idea they now claim it expresses, surely the company could and would have presented this idea in a much different, more transparent and evident manner. As mentioned above, South Carolina has defined fraud broadly as "any act characterized by dishonesty in fact or unfair dealing." Taken in the light most favorable to the Plaintiffs', surely Hilton's May 25, 2004 letter provides, at minimum, a scintilla

of evidence that Hilton committed at least one act characterized by dishonesty in fact or unfair dealing

Further, the May 25th email from Hilton s Bill Fortier (Ex EE to R Garfield Aff) also creates an inference of dishonestly and unfair dealings on the part of Hilton In this email, Mr Fortier states

[Hilton] will let the city know that Bo was not trying to mislead the city when he talked about the full-service hotel Bo [Aughtry] was misled [sic] by us That we stand behind Traub for the Hilton and Bo for the [Garden Inn] However, **we will do this through a phone call not a letter**

(emphasis added) Setting aside the obvious issue that this statement provides evidence that at least some executives at Hilton understood the company to be committed to the GTD team, construed in the light most favorable to the Plaintiffs , this communication and the fact that this Hilton executive did not want to leave a written record of Hilton's communications which in an of itself serves to create of evidence of dishonest behavior on the part of the Defendant

CONCLUSION

Clearly the Plaintiffs case is not one that rests solely on inferences—although as stated above under the law of South Carolina, inferences alone are enough to defeat a motion for summary judgment—for there is clear, documentary and testimonial evidence that Defendant Hilton committed a fraudulent act Accordingly, the Defendant's motion for partial summary judgment should be denied

Respectfully submitted



Kenneth M Suggs, Esquire
Francis M Hinson IV, Esquire
Janet, Jenner & Suggs LLC
500 Taylor Street
Post Office Box 927

Columbia, South Carolina 29201
(803) 726-0050 TEL
(803) 726 1059 FAX
Attorneys for Plaintiffs

July 2nd, 2009
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 2, 2009, copies of the above and foregoing **PLAINTIFFS' MEMORANDUM IN DEFENSE OF DEFENDANT HILTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**, was served upon all parties, with all attachments and exhibits, via hand-delivery, electronic mail or U S Mail, first-class postage prepaid, the affidavits of Raymond Garfield, Anthony Traub and Greg Garfield having previously been provided in Plaintiffs prior response to one of the Aughty Parties' motions for summary judgment


Francis M Hinson, IV

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Stevens & Wilkinson, Inc ,
Gary Realty Company, Inc and
Garfield Traub Development, LLC,

Plaintiffs,

vs

Paul C "Bo" Aughtry III, Windsor/Aughtry
Co , Inc , Vista Hotel Partners LLC, Hilton
Hotels Corporation, and the City of
Columbia,

Defendants

(Consolidated Civ Act No 2007-CP-40-1252)

**JOINT MEMORANDUM OF STEVEN
REALTY, AND GARFIELD-TRAUB IN
AND AUGHTRY'S MOTIONS FOR**

PROCEDURAL SUMMARY

This is a joint memorandum filed by plaintiffs Stevens & Wilkinson, Gary Realty and Garfield-Traub in opposition to the motions for summary judgment filed by the City of Columbia and Windsor-Aughtry. The claims of the plaintiffs are not identical, but are sufficiently similar to warrant a joint response out of concerns for judicial economy. Differences in analysis will be noted throughout the brief.

Preliminarily, it should be noted that Stevens & Wilkinson has alleged three causes of action against the City: 1) breach of contract, 2) quantum meruit; and 3) estoppel.¹ Gary Realty and Garfield-Traub have alleged two causes of action against the City: 1) breach of contract, and 2) quantum meruit. Thus the City's motion as to estoppel only applies to Stevens & Wilkinson.

¹ Stevens & Wilkinson also previously pleaded a claim for breach of covenant of good faith and fair dealing. With the consent of the City of Columbia, however, Stevens & Wilkinson has amended its complaint so as to combine this cause of action with its breach of contract claim.

RICHLAND COUNTY
FILED
2009 AUG -4 PM 3 57
JED:sm

The plaintiffs have also alleged a claim of tortious interference with contractual relations against Defendant Windsor-Aughtry Whereas Aughtry's motion for summary judgment as to these claims closely parallels the City's motion for summary judgment as to breach of contract, Aughtry's motion is addressed within this memorandum

As a final matter, Stevens & Wilkinson possesses a claim for breach of contract against the City stemming from a July 2003 agreement that is independent of any other plaintiffs' claims Stevens & Wilkinson has been awarded summary judgment as to the existence of that contract by an order of the Honorable Casey Manning, dated July 23, 2009 Neither the motions of the City nor the motion of Windsor Aughtry pertain to this July 2003 contract between Stevens & Wilkinson and the City

STANDARD OF REVIEW

A grant of summary judgment is only appropriate "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" Rule 56(c), SCRCF, *Wilson v Style Crest Products Inc* , 367 S C 656, 627 S E 2d 733 (2006)

"[I]n cases applying the preponderance of the evidence burden of proof, the non moving party is only required to submit a *mere scintilla of evidence* in order to withstand a motion for summary judgment" *Hancock v Mid South Management Co, Inc* , 381 S C 326, 330, 673 S E 2d 801, 803 (2009)(emphasis supplied)

"In evaluating whether such a grant of summary judgment is proper, the court must view all evidence adduced and ratiocinations drawn from the evidence in the light most favorable to the non-moving party" *Byrd v City of Hartsville*, 365 S C 650, 620 S E 2d 76 (2005) "Since a

grant of summary judgment has the effect of revoking a litigant's opportunity to dispute factual issues at trial it should be fastidiously invoked " *Cunningham ex rel Grice v Helping Hands*, 352 S C 485, 575 S E 2d 549 (2003)

ANALYSIS

The City and Aughtry have moved for summary judgment as to the Plaintiffs' breach of contract and tortious interference allegations on largely duplicative grounds and thus shall be addressed together. Additionally, the City has moved for summary judgment as to quantum meruit and estoppel. All motions should be denied.

I Breach of Contract

Both the City of Columbia and Aughtry argue that the memorandum of understanding did not constitute a contract. As a preliminary matter, it must be emphasized that "[i]f the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury" *Armstrong v Collins*, 366 S C 204, 223, 621 S E 2d 368, 377 (Ct App 2005)(emphasis supplied), citing *Hendricks v Clemson Univ* 353 S C 449, 459, 578 S E 2d 711, 716 (2003) ²

The arguments offered by the Defendants may be grouped into three categories first, the parties did not intend to create a contract, second, even if the MOU is a contract, it is void for indefiniteness, and third, even if the MOU is a contract, it is void due to the failure of conditions precedent. Each argument is fundamentally flawed both legally and factually and thus the Defendants' motion for summary judgment as to Breach of Contract must be denied.

² The City claims that its argument on this point may be resolved "as a matter of law" (City's Memo, p. 9). This is incorrect. The authorities cited by the City go to the interpretation of a contract rather than the determination of whether a contract exists. As *Armstrong v Collins* points out, the question of the existence of a contract is one of fact.

a Through the MOU, the parties intended to create a binding contract

"An agreement between two or more persons upon sufficient consideration to either do or not do a particular act is a contract." *McPeters v Yeargin Const. Co. Inc.*, 290 S C 327, 331, 350 S E 2d 208, 210 (Ct App 1986) In this case, the "particular act" contemplated by the MOU was "the development of a 300-room convention center hotel" (See Exhibit A, p 1) "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses, and subsequent acts are relevant to show whether a contract was intended." *Wright v Trask*, 329 S C 170, 178, 495 S E 2d 222, 226 (Ct App 1997), quoting *Caulder v Knox*, 251 S C 337, 344-345, 162 S E 2d 262, 266 (1968)³

Surrounding circumstances, witness testimony, and the parties' subsequent acts all provide ample evidence of intent to form a contract

1 Surrounding circumstances support the existence of a contract

The "surrounding circumstances" of the MOU transaction demonstrate strong evidence of contractual intent First of all, the language of the MOU establishes mutual obligations on behalf of the City and the plaintiffs As it pertains to the plaintiffs and the City, the MOU speaks in mandatory terms as to what the rights and responsibilities of each are under the agreement.

- "The Architect *shall develop* and implement a design review process that is to provide the City, neighborhood and professional staff input into the design of the Hotel" (Exhibit A, p 5, ¶ VIII.2)
- "The Architect *is to be paid* a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder's general expenses and fees" (Exhibit A, p 5, ¶ VIII.1)

³ *Wright v Trask* addressed the issue of a contract to make a will *Caulder v Knox*—the case which the *Wright* court relied upon—made it clear that "[a] contract to make a will must have the essential elements of any contract, which are, a contractual intent, followed by an actual meeting of the minds of the parties and accompanied by a valid consideration." *Id.* at 344, 162 S E 2d at 266

- **"The City agrees to acquire** the Hotel Site, satisfy any environmental issues, demolish any existing structures, rezone the land for the Hotel (if required) and convey it to the NPC at cost, funded by Hotel Revenue Bond proceeds " (Exhibit A, p 3, ¶ V 1)
- **"The City is to develop** a nearby Parking Facility of approximately 800 spaces " (Exhibit A, p 3, ¶ V 2)
- **"The City is to establish** a [non-profit corporation] to issue bonds to finance the Hotel, own the Hotel developed by the Project Team and retain the Operator for the operation of the Hotel consistent with the terms and conditions of this MOU " (Exhibit A, p 3, ¶ V 3)
- **The Developer will coordinate** design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or NPC and the Developer (Exhibit A, p 3, ¶ VI 1)
- **The Developer is to be paid** a development fee of 4.75% of the project budget to ensure the coordination and delivery of the Hotel on time and on budget. (Exhibit A, ¶ VI.2)

The South Carolina Supreme Court has observed that mandatory language such as "shall" and "will" has been held to create contractual rights within a document. See *Conner v City of Forest Acres*, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002). In the context of employment contracts, the Supreme Court has recognized that "[i]t is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of general policy whenever it works to his disadvantage.'" *Small v Springs Industries, Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). Here, a similar injustice would work upon the Plaintiffs where the City has held out the performance of the parties as mandatory—not conditioned upon any contingency.

Furthermore, if the parties intended the MOU to be "nothing more than a framework for the parties to negotiate an agreement" (City's Memo, p. 10), it would render the following phrase meaningless: "if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU." (See Exhibit A, ¶ I 1) "The rule of construction is that

every word of a contract should be given meaning and effect if possible " *J A Fay & Egan Co v Mims*, 151 S C 484, __, 149 S E 246, 248 (1929) The clear intent of the language of ¶ 11 is to provide a condition in which—if such condition occurs—the City will suffer no liability under the MOU In the eyes of contract law, this "feasibility" clause exists as a "condition subsequent." "A condition subsequent has been defined as a future event upon the happening of which the agreement or obligations of the parties would be no longer binding" 13 *Williston on Contracts* § 38 9 (4th ed) Here, the mere existence of a condition subsequent evidences the parties' intent to be bound by the MOU until which time the condition might occur If the MOU is interpreted as a non-binding document, however, then the entirety of ¶ 11 would be rendered mere surplusage in violation of South Carolina's rules of construction ⁴

Adhering to the defendants' insistence that the MOU was meant to be a non-binding "agreement to agree" would also render meaningless the clear contractual language found within the opening paragraphs of the document.

NOW THEREFORE, in consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows

(See Exhibit A, p 1)

⁴ In its recitation of the facts of this case, the City hints that the condition subsequent did, indeed, occur However, neither the City nor Aughtry rely upon this allegation within the body of their motions and it is quite clear that the question of whether the City determined the Hotel project to be "not feasible" is—at a bare minimum—a genuine issue of fact See, e g , Exhibit C, Deposition of John Lumpkin p 276, ll 3 – 9

Q Has anyone with the City ever told you that the hotel project as envisioned by the original MOU—that the completion of that project was not feasible?

A No, sir

Q Even to this day you've not hear that?

A No, sir

The recitation of consideration in the form of mutual promises is a fundamental characteristic of a contractual agreement "If practical, documents will be interpreted to give effect to all of their provisions " *M & M Group, Inc v Holmes*, 379 S C 468, 476, 666 S E 2d 262, 266 (Ct. App 2008)

Finally, it must be emphasized that the nature of this transaction—the construction of a major hotel valued at approximately \$60 million—calls into question the reasonableness of the defendants' allegation that the parties would have begun such a monumental undertaking without some assurance of compensation

11 Witness testimony supports the existence of a contract

The witness testimony provided in this case also demonstrates the parties' intent to be bound to the terms of the MOU Ray Garfield, Greg Garfield, and Tony Traub have all submitted sworn affidavits testifying to the following

Each party agreed that they would complete certain duties and tasks necessary for the creation of the Hotel, and the City offered to pay the various members for their work I considered then, and still believe, that this agreement formed a binding contract between and among all parties to the document. Vast amounts of work and attention were put into drafting the MOD, there were many detailed discussions of its provisions, and it was evident that all parties considered the document to be very important. I do not believe that this much attention and interest would have been given to the document if the parties had not considered it to form a binding agreement. GTD, for its part, never would have agreed to put in the effort necessary to develop the Hotel if we did not consider the MOD to form a contract and believe that all signatories felt similarly on the matter

(See Exhibit B, Affidavits of R Garfield Aff ¶ 8, T Traub Aff ¶ 4, G Garfield Aff ¶ 4)

Paul Little, the regional Senior Vice President of Turner Construction, testified that he saw the City as possessing mandatory obligations under the MOU

Q As to the MOU, what is your understanding of what the City's responsibilities within that document were?

A Attend meetings, make decisions related to the program, and keep the team moving forward

Q When you say "keep the team moving forward," did that involve any type of good faith effort to secure financing for the project?

A Yes That's the way I would interpret that

Q Did you expect the City to use good faith efforts to secure bond financing?

A Of course, yes

(See Exhibit D, Deposition of Paul Little, p 53, ll 12 - 25)

Even John Lumpkin, upon whose testimony the City and Aughtry so strongly rely, testified that the MOU was not a "boundless" document and that "each party had responsibilities under the document in terms of each party's role and responsibility to move forward consistent with the framework of the Memorandum of Understanding " (See Exhibit C, Deposition of John Lumpkin, p 281, ll 21 - 25, p 311, l 19) Lumpkin discussed, at length, the issue of the "feasibility" clause within the MOU and described its efficacy consistent with a condition subsequent

Q Now, am I reading that correctly by determining—when I interpret it—interpret this as saying the City will have no liability under the MOU if it determines that it's not feasible to proceed with the hotel project?

A Okay

Q Is that a fair reading?

A. That's—that's what it says

(See Exhibit C, Deposition of John Lumpkin, p 307, l 24 - p 308, l 6)

Thus the sworn testimony of five witnesses provides evidence that 1) several parties looked upon the MOU as a binding contract, 2) parties recognized mutual obligations within the MOU, and 3) parties recognized the “feasibility” provision as a condition subsequent to the execution of the MOU. Undoubtedly the defendants will point to contradictory testimony, but in the context of a motion for summary judgment “[t]he court must construe all ambiguities, conclusions and inferences arising from the evidence most strongly against the moving party.” *See Finger v. Finger*, 270 S.C. 244, 241 S.E.2d 746 (1978).

iii The subsequent acts of the parties demonstrate the existence of a contract

In recent years, both the South Carolina Supreme Court and Court of Appeals have noted that “evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract’s existence, the meaning of its terms, and whether the contract was breached.” *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008), quoting *Conner v. City of Forest Acres*, 363 S.C. 460, 473, 611 S.E.2d 905, 912 (2005). In this case, the parties—including the defendants—operated for nearly an entire year under the terms of the MOU before the City chose to breach its agreement. These substantial, subsequent acts provide strong evidence of the existence of a contract.

Several witnesses have testified that the members of the development team had completed their work required under the MOU for the breaking of ground on the Hotel project when the City suddenly chose to issue a new RFP. Bobby Lyles, CEO of Stevens & Wilkinson, stated the following:

A. When the non profit accepted the whole deal in—whenver that was, February 4th, to go to bond closing, is when everything—

I mean, the project, my drawings were finished, *everything was done*

Q Okay

A And as far as we were concerned, we had delivered everything that we were supposed to do and it had been approved And so they owed us for our contract for the work performed, all the work performed

(See Exhibit E, Deposition of Bobby Lyles, p 82, ll 2 – 12)(emphasis supplied)

Paul Little, the regional Senior Vice President of Turner Construction, concurred with Lyles' assessment of the progress of the Hotel project.

Q My question is in regard to the February of 2004 time frame Was there anything, any disagreement or other potential roadblocks that you saw at that time that could have potentially derailed this project, speaking of, again, February 2004

A No I think that's about when the GMP was approved. *I think we were rocking and rolling and ready to go*

(See Exhibit D, Deposition of Paul Little, p 78, ll 15 – 23)(emphasis supplied)

Shawn Epps, the City's Special Projects Coordinator overseeing the Hotel project, testified that the City worked to comply with its responsibilities under the MOU

Q Okay And on page 3 of the agreement, you may need to look at it I don't expect you to have memorized it. Paragraph V, sets out the role of the City in this transaction, is that right?

A. Yes.

Q Okay The Paragraph V or Roman Numeral 5, number 1, says Hotel site assembly, the City agrees to acquire the hotel site and then it goes on to say some other things Did the City acquire the hotel site?

A. Yes, sir

Q Did it satisfy the environmental issues?

A Yes

Q Okay Was the land rezoned for the hotel?

A I think it was zoned appropriately at the time for the hotel, is what I recall. I don't think it was rezoned

Q Okay Didn't need to be rezoned, is what you're saying?

A Yes, sir, that's what I recall

Q And was a nonprofit corporation organized?

A By the City?

Q Yes

A Yes

(See Exhibit F, Deposition of Shawn Epps, p 9, l 13 – p 10, l 17)

The City—both its council members and its non-profit hotel corporation—were well aware of the continued work under the memorandum, as was memorialized in the hand-written minutes of the October 15, 2003 non-profit corporation meeting

Shawn Epps reminded the not for profit that arch (sic) lawyers, and other consultants were working and that *a great deal of money was being spent each day* the not for profit board discussed stopping everyone until the rating agencies came to town and responded The not for profit decided not to stop any work at this time

See Exhibit G, October 15, 2003 minutes, p 2 (emphasis supplied)

It should be noted that the members of the non-profit corporation present to hear Epps' warning included all five voting members of City Council (Mayor Coble, Councilpersons Cromartie Davis, Sinclair, and Isaac), City Manager Charles Austin, Assistant City Manager Steve Gantt, and City Attorney Jim Meggs⁵

⁵ Councilmen Osborne and Papadea abstained from all votes on the Hotel project due to conflicts of interest.

Both the City and Aughtry rely heavily upon the deposition testimony of John Lumpkin in arguing that the parties did not intend the MOU to be a binding contract. What the defendants fail to mention, however, is that Lumpkin specifically noted that the parties' subsequent performance under the terms of the MOU may have changed what he previously perceived to be the nature of that document. In deposition testimony, Lumpkin discusses the parties' subsequent acts at length, perhaps best exemplified in the following exchange with the City's counsel:

Q Now, you said that that MOU—and I'm going to paraphrase here—

A That's all right

Q —may have been affected by subsequent actions of the City?

A It may have. I mean, again, the facts are the facts and whether—whether the—whether that—they—you know, they demonstrated the actions of the City as it moved forward in certain respects give rise to other rights, I'm not—I can't speak to that. I have no opinion about that, *but it could have*

Q And exactly what are those actions, if you can identify the ones that you know of that the City took or didn't take that you believe you understand may have affected the MOU?

A Well, I guess it would probably be a combination as we started out—we began to have weekly meetings ordinarily at Mr. Lyles' office, and the City was there, I mean, with its staff participating, and we worked through all the iterations of the—particularly of the—of the hotel itself and the construction of the hotel and all the pieces and parts. And I think there's a fairly—you know, I say detailed—a thorough paper trail about having that.

We went to the City periodically and explained to the City where we were with all of the things we were working on, and—you know, and, again, I think as mentioned earlier, there were other things that the City had—was interested in improving coverages and things, and we worked on that.

But I guess in the—sort of the grand scheme of things or the overall scheme of things that we were working toward a closing, and there was no one at the City—and whether it was the—certainly not the staff, but no one that I had talked with—and I didn't—we were not having ongoing conversations with counsel

or the staff or the attorneys that were saying, "Well, gee whiz, Houston, we've got a problem. There's something here that's not working."

So you work on that till—you know, from whenever the MOU was signed, if not before, until after February of 2004 which is close to a year. There could be certain rights that could have arisen by virtue of the City's involvement and participation in moving the project forward, maybe I don't—again, I don't—that's not for me to, you know, conclude that.

(See Exhibit C, Deposition of John Lumpkin, p. 235, l. 9 – p. 237, l. 9)

As shown by this lengthy testimony, the parties worked for an extended period of time under the contractual framework established by the MOU. In the months following the execution of the MOU, in fact, Stevens & Wilkinson subcontracted with numerous companies to help provide the design services necessary for the hotel project. (See Exhibit H, Sample of Subcontractor Invoices). As a result, Stevens & Wilkinson incurred substantial debt under the reasonable presumption that the City would live up to its promises set forth within the MOU.

b Memorandum of Understanding is not void for indefiniteness

The City and Aughtry devote considerable effort towards claiming that the MOU is not enforceable because the document envisioned the execution of additional agreements. According to both parties, reference to additional agreements rendered the MOU insufficiently definite to constitute a binding contract. "[N]either law nor equity requires every term or condition to be set forth in a contract." *Maccaro v. Andrick Development Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct. App. 1984). "The requirement of certainty in contracts ensures that the parties intend to conclude a binding agreement and provides the court a reasonably certain basis for granting a remedy." *Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998) (emphasis supplied), citing *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984). In conducting this analysis of "sufficient certainty of

terms", the South Carolina Court of Appeals has been careful to note that the existence of intent to conclude a binding agreement must be "viewed in the light most favorable to the [non moving party] *Prestwick Golf Club, Inc* at 390, 503 S E 2d at 187

Both the MOU and the circumstances surrounding it show strong evidence sufficient to indicate intent to form a binding agreement Furthermore the MOU provides a reliable basis for the Court to grant the plaintiffs' requested remedy—compensation for fees not paid Therefore the defendants' arguments as to indefiniteness fail

i Intent of the parties to construct a binding contract is clear

As shown in the discussion above, the language of the MOU provides evidence of contractual intent through its use of mandatory terms such as "will" and "shall" that set forth mutual promises, the utilization of conditions subsequent that would excuse the City from performance, and the recitation of contractual consideration Witness testimony and the parties' subsequent acts with regard to the MOU further support the intent to contract Thus, with regard to this consideration of the definiteness of the MOU, the plaintiffs incorporate the discussion set forth above

ii Contractual terms are sufficient to provide court with reasonably certain basis for granting a remedy

In arguing that the MOU is unenforceable for indefiniteness, the City and Aughtry allege that the price with regard to the Hotel project was not sufficiently detailed "Where a contract does not fix a definite price, there must be a definite method for ascertaining it" *McPeters v Yeargin Const Co, Inc*, 290 S C 327, 331, 350 S E 2d 208, 211 (Ct App 1986), citing *Edens v Laurel Hill, Inc*, 271 S C 360, 364, 247 S E 2d 434, 436 (1978), see also 17 C J S *Contracts*, § 36(2)(c) The defendants latch onto the fact that the contractual price was fixated at "approximately \$60 million" The defendants fail to note, however, that the MOU specifically

developed a definite method through which the price of the plaintiffs' services would be calculated

Stevens & Wilkinson, Gary Realty, and Garfield-Traub are seeking compensation from monies they rightfully earned under the MOU. The City directly questioned Bobby Lyles as to how Stevens & Wilkinson would have calculated its fee.

Q What was going to be your fee in—under the arrangement you had?

A Whatever is stated in the MOU.

(See Exhibit E, Deposition of Bobby Lyles, p. 34, ll. 11-13)

And, indeed, the MOU provides ample direction as to how the plaintiffs' fees were to be derived.

Fee—The Architect is to be paid a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder's general expenses and fees. This fee is comprised of a 6% basic services fee and 1.25% for special consultants to be retained by the Architect for the project. The fee is to be paid consistent with the normal AIA contractual provisions in terms of timing and amount of payments.

(See Exhibit A, ¶ VIII 1)

Development Fee—the Developer is to be paid a development fee of 4.75% of the project budget, exclusive of land and any financing related fees, to ensure the coordination and delivery of the Hotel on time and on budget.

(See Exhibit A, ¶ VI 2)

The MOU establishes a clear guidepost for the price of the hotel at \$60 million. (See Exhibit A, ¶ V 4) The remedies sought from the plaintiffs in this case turn upon the fees that would have been earned under the MOU. As shown above, the parties foresaw the great potential of flexibility of cost when executing the MOU, and thus accounted for all contingencies by spelling out construction/management/design fees in terms of percentages of cost rather than flat

rates (See Exhibit A, ¶¶ VI 2, VIII 1) Clearly, this constituted a “definite method for ascertaining” the various fees and cured the MOU of any potential indefiniteness of costs

The South Carolina Court of Appeals has dismissed claims that variables within methods of payment give rise to an indefinite agreement ‘[The parties’] agreement need not have specified all details concerning method of payment, especially where it is reasonable to infer the obvious ’ *Lites v Taylor*, 284 S C 316, 319, 326 S E 2d 173, 175 (Ct. App 1985) In *Lites*, “the obvious” was that a balance owed would be paid upon completion of a job In this case, “the obvious ’ is that unforeseen changes in the cost of the development and design of the hotel would be accounted for by the establishment of a percentage basis of payment

Furthermore, any uncertainty surrounding the cost of the hotel at the date of the MOU’s execution is common to the trade in which the plaintiffs operate

When we entered into this MOU at the time, we didn't have floor plans or quantities or anything to take a reasonable estimate from It was just our guess -- I shouldn't say our guess - our estimate at that time of hopefully what it was *Until you start designing a building on the site and understand the site constraints and understand more of the nature of what you have to do, the best you can do is take an estimate and hope they can get there*

(See Exhibit I, Deposition of Tony Traub, p 255 ll 10 – 19)(emphasis supplied)

[O]ne way that architects get paid is a percentage of construction cost. If you bid a job, that number that you get on a bid day includes general conditions, overhead and profit, everything Some contractors try to exclude that when you're negotiating with the contractor They say, “Well, that's not construction cost, that's my cost,” you know But I guess generally accepted number that you multiply a percentage on is—includes those items, also And it doesn't make any real difference If you don't include it, your percentage goes up

(See Exhibit E, Deposition of Bobby Lyles, p 46, ll 8 – 18)(emphasis supplied)

South Carolina law holds that “it is necessary for enforceability that the essentials of the contract be agreed upon *but all need not be expressed*. They may be implied from custom and usual forms

[trade usage] and former course of dealing" *Keith v River Consulting, Inc* , 365 S C 500, 505 506, 618 S E 2d 302, 305 (Ct App 2005)(emphasis in original), *quoting Carolina Aviation, Inc v Glens Falls Ins Co* , 214 S C 222, 230, 51 S E 2d 757, 761 (1949) As Traub points out, the defendants' protestations over the lack of a definite price within the MOU belies the nature of hotel design and development Bobby Lyles further establishes that the designation of percentage fees a traditional method of compensation within the industry For these reasons, the approximate cost of the Hotel project as "\$60 million"—taken in conjunction with the definite method for calculating plaintiffs' fees within the MOU—does not render the MOU unenforceable for indefiniteness

iii Additional Agreements do not render the MOU void for indefiniteness

The defendants argue that the envisioning of additional agreements arising out of the MOU renders the MOU hopelessly unenforceable Very simply, this is not the law

Minor terms left unresolved do not vitiate an agreement if the essential terms have been incorporated into the agreement. Further, a contract will not fail for indefiniteness if any missing terms can be supplied by law, presumption or custom

[P]arties may agree on some terms sufficient to create a contract, leaving other provisions for later negotiations A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement. The actions of the parties may conclusively establish their intention to enter into a binding agreement even if some terms are left for future agreement

C J S Contracts § 78

Aughtry's claim of the materiality of the envisioned agreements rests upon his unsupported allegation that the agreements

were necessary to determine fundamental issues, including the source and terms of the approximately \$60 million needed to fund the project, the construction and development of the hotel and a related parking facility, the management and use of the hotel, the

operating relationship and terms on which the proposed hotel
would commit rooms for users of the Columbia Convention
Center

(Aughtry's Memo, p 21)

Notably absent from this hyperbolic description, however, is any reference to how these documents or their execution would affect the Court's ability to determine contractual intent or a basis for granting a remedy. Similarly, the City offers no such explanation beyond mere presumption. In fact, none of the agreements fingered by the City and Aughtry are necessary to determine contractual intent or reach a remedy—and, as such, the agreements do not invalidate the MOU.

It is also important to note that neither Stevens & Wilkinson, nor Gary Realty, nor Garfield & Traub were to be signatories to any of the agreements raised by the defendants. Both the "qualified management agreement" and "hotel room block agreement" were to be entered between the City and the Hilton (See Exhibit A, ¶¶ X.2, X.12). The "design/build agreement" was to be executed between Turner Construction and the City (See Exhibit A, ¶¶ VII.1). The "development management agreement" seems to have been initially envisioned between the developers and the City (See Exhibit A, ¶ VI.1), but was actually drafted for the signature of Hilton (See Exhibit J, Drafted Development Management Agreement). The "joint use agreement" was to be executed between the City of Columbia and its non-profit corporation. (See Exhibit A, ¶ V.2). And finally, as stated above, neither a "bond underwriting agreement" nor a "technical services fee agreement" are actually referenced within the MOU.

The plaintiffs do not dispute that there were further contracts that would be signed prior to the actual opening and operation of the 300 room Hilton Hotel. However, South Carolina law provides that "[a] contract is not unenforceable simply because its performance is, as to

particular details, left open to subsequent agreement of the parties [and] this is especially true where the contract provides guidelines for subsequent agreement." *Aperm of South Carolina v Roof*, 290 S C 442, 447, 351 S E 2d 171, 173 (Ct. App 1986) (citing *Touche Ross & Co v DASD Corp*, 162 Ga.App 438, 292 S E 2d 84 (1982), 17 AmJur 2d *Contracts* § 76 (1964), 17 AmJur 2d *Contracts* § 77 (1964))

In *Aperm* the contract at issue provided that if the marketing program one party was to present contained the agreed minimum royalty provisions the other party would agree to arbitrate the other terms of the program. The Court of Appeals found that this contract did not fail for indefiniteness, noting it was evident that the *sine qua non* of the agreement was to insure that the second party received minimum royalties. *Id.* Similarly, here the *sine qua non* of the MOU was the design and development of the Hotel project—the essential terms of which were spelled out within the MOU. Thus the defendants may not invalidate the MOU by pointing to tangential agreements.

Furthermore, even if the envisioned agreements constituted absent material terms, the actions and subsequent negotiations of the parties established those terms. "A writing is incomplete as an agreement or a contract if blanks as to material matters are left in it, unless the omissions may be supplied from other parts of such writing or the blanks are subsequently and lawfully filled." *Potomac Leasing Co v Otis Market, Inc*, 292 S C 603, 606-607, 358 S E 2d 154, 156 (Ct. App 1987), citing 17 C J S *Contracts* Section 65 (1963). John Lumpkin—upon whom both the City and Aughtry so strongly rely—specifically notes that "all the major points to finalize and close this deal had been resolved" (See Exhibit C, Deposition of John Lumpkin, p 97, ll 16-23).

There were—there were some details to work out in certain of the agreements that had been pointed out, but in my—my recollection.

there were—there were no—there were no significant issues as it related to those documents. It was simply a matter of getting the documents finally finalized so we could go to a closing.

(Deposition of John Lumpkin, p. 266, ll. 6-12)

With particular regard to the development management agreement, Lumpkin felt that all material issues had been agreed upon.

I believe that—this is John Lumpkin's thought process at the time—that we had reached a meeting of the minds with that development management and, again, internal review, but it was never—it was never executed. It was not—a development management was not executed, but it had been negotiated in my mind.

(See Exhibit C, Deposition of John Lumpkin, p. 74, ll. 14-20)

Finally, even if the Plaintiffs were to concede that the MOU was a mere informal agreement in anticipation of more final documents (which they do not), such a concession would not render the MOU unenforceable. "The cases uniformly hold that whether the contracting parties intended to be bound by an informal agreement prior to the execution of a contemplated formal agreement is to be determined by the surrounding facts and circumstances of each particular case." *Bugg v. Bugg*, 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978). In this case, the facts and circumstances show that the material terms of Hotel project—those which demonstrate the contractual intent of the parties and the remedies of each party through contract—are clearly set forth within the MOU. Thus the MOU does not fail for a lack of definiteness and the defendants' motions must be denied.

c. The contract is not void for a failure of conditions precedent

Going beyond the arguments offered by the City, Defendant Aughtry insists that the MOU—if a contract—must be found unenforceable due to failures of conditions precedent. "In contract law, ['condition precedent'] connotes any fact other than the lapse of time, which,

unless excused, must exist or occur before a duty of immediate performance arises " *Worley v Yarborough Ford, Inc* , 317 S C 206, 210, 452 S E 2d 622, 624 (Ct. App 1994), citing *Ballenger Corp v City of Columbia*, 286 S C 1, 331 S E 2d 365 (Ct App 1985)

The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered Parties are governed by their outward expressions and the court is not free to consider their secret intentions

M & M Group, Inc. v Holmes, 379 S C. 468, 476-477, 666 S E 2d 262, 266 (Ct App 2008)(internal citations omitted)

Allegations of a condition precedent within a contract give rise to questions of fact subject to South Carolina's traditional summary judgment scrutiny See *Ballenger Corp v City of Columbia*, 286 S C 1, 4, 331 S E 2d 365, 367 (Ct App 1985)

Aughtry claims that various "agreements contemplated by the MOU" constituted conditions precedent and relies upon "the explicit language of the MOU" A close examination of the MOU terms Aughtry cites, however, disproves his theory The South Carolina Court of Appeals has noted that "[w]ords and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional " *Ballenger Corp v City of Columbia*, 286 S C 1, 5, 331 S E 2d 365, 368 (Ct. App 1985) Aughtry claims that seven separate agreements constituted conditions precedent a bond underwriting agreement (See Exhibit A, ¶ IX 1), a qualified management agreement (See Exhibit A, ¶ X.2), a joint use agreement relative to parking (See Exhibit A, ¶ V 2), a hotel room block agreement (See Exhibit A, ¶ X 12), a design/build agreement (See Exhibit A, ¶ VII 1-2), a development management agreement (See Exhibit A, ¶ VI 1), and a technical services fee agreement (See Exhibit A, ¶ X 6) None of the agreements cited by Aughtry contain the

“conditional ’ language recognized by South Carolina courts In fact, two of the agreements to which Aughtry refers—the ‘ bond underwriting agreement” and the “technical services fee agreement”—aren’t found in the MOU at all.

Aughtry also offers as evidence of “conditions precedent” several deposition excerpts evincing that the “agreements contemplated” were never physically executed Of course, as shown above in the depositions of Lumpkin and Little, sufficient contrary testimony exists which states that a meeting of the minds had been achieved as to all material terms with regard to these agreements But more importantly, none of the deposition excerpts offered by Aughtry address the intent of parties to the MOU as to whether the “agreements contemplated” “must exist or occur before a duty of immediate performance arises ” *Worley supra*

South Carolina courts look skeptically upon claims of inferred “conditions precedent” relating to unexecuted documents In *Ballenger, supra* the City of Columbia attempted to evade performance under a contract by alleging that a condition precedent—in the form of a written “Notice to Proceed”—was never executed

The Contractor hereby agrees to commence work under the contract on or before a date to be specified in [a] written Notice to Proceed of the Owner and to fully complete the project within 450 consecutive calendar days thereafter The Contractor further agrees to pay as liquidated damages the sum of \$150 00 for each consecutive calendar day thereafter

Id. at 5, 331 S E 2d at 368

The Court of Appeals quickly rejected this position with regard to the Notice, holding that “its purpose is to fix the date for the completion of the project and nothing more ” *Id.*

Just as with the “Notice to Proceed” in *Ballenger*, here the various “agreements contemplated” carry with them no evidence of express intent to create a contingency to performance However, the courts have made clear that “a condition precedent may not be

implied when it might have been provided for by the express agreement " *Worley supra* at 210, 452 S E 2d at 625 (Ct. App 1994), quoting 17A C J S *Contracts* § 338 (1963), 17A Am.Jur 2d *Contracts* § 471 (1991) The parties, undoubtedly, were well aware of how to create contingencies with the MOU as they agreed to the "feasibility" condition subsequent within ¶ 11 However, the parties made no effort to make the performance of the MOU expressly contingent upon the completion of the "agreements contemplated" Thus, based upon the evidence before the Court, it must be assumed that no such contingency was contemplated

Because there is no such express representation of conditions precedent within the MOU, Aughtry's motion for summary judgment must be denied. As shown by this analysis, to the extent that any evidence exists supporting Aughtry's argument, sufficient evidence exists to the contrary so as to preclude summary judgment

II Quantum Meruit

The City moves for summary judgment as to the plaintiffs' Quantum Meruit cause of action on the basis that no benefit was conferred by the plaintiffs upon the City "Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are (1) a benefit conferred upon the defendant by the plaintiff, (2) realization of that benefit by the defendant, and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value" *Columbia Wholesale Co Inc v Scudder May N V*, 312 S C 259, 261, 440 S E 2d 129, 130 (1994) In this case, there is ample evidence that the City of Columbia received, realized and retained the benefit of the efforts of the Plaintiffs without providing adequate compensation Thus the City's motion for summary judgment must fail

On April 5, 2004—the first business day after the second RFP was issued—Bo Aughtry contacted the City of Columbia and requested copies of documents prepared by the plaintiffs

Steve,
As you know I received the RFP on Friday—thank you
I have several immediate questions and am sure there will be more
Secondly, you were going to send me a rendering of the City
Hilton Hotel If you would please also send a copy to Danny
Bounds, Bounds & Gillespie Architects, 7975 Stage Hills Blvd,
Ste 4, Memphis, TN, 38113, I would be most appreciative

(See Exhibit K, Gantt-Aughtry correspondence)

Pertinent to Aughtry's request, Gantt bluntly replied "[t]he rendering has been mailed to your Architect " (See Exhibit K, Gantt-Aughtry correspondence) In fact, under the terms of the MOU, upon the potential dissolution of the MOU "[a]ll studies, tests, plans and the like prepared or obtained by the Project Team will be assigned to and become the property of the City " (See Exhibit A, ¶ VI 3) Thus there is no doubt that, at the time construction finally began on the Hotel project, the City and Aughtry were in possession of the full set of documentation prepared by the plaintiffs

The City scoffs at the notion that the months and months of work dedicated to the hotel project conferred any benefit upon it. But even the deposition excerpts cited by the City give rise to an inference that the City utilized the work completed by the plaintiffs

Q What part of what Gary Realty did did (sic) the City of Columbia ever ultimately use?

A Ultimately used?

Q Yes, sir

A I don't know whether they ultimately used it, but when I take a look at the final product down there, it has a pretty good resemblance of what we put together

(See Exhibit L, Deposition of Charles Gary, p 30, l 22 – p 31)

Yet the City—through its 30(b)(6) deposition—has readily admitted the notable similarity of the plans prepared by the plaintiffs and the hotel eventually constructed by Aughtry

Q You had a rendering of the proposed hotel from the Edens & Avant group, correct?

A Yes, sir

Q That rendering would be in the category of information, materials, or other documents, would it not? It would be — it was a document, was it not?

A It was public information that had been provided to us, had been in the paper. We had had that long before this request was made

Q Well, my question is: Was it a document?

A Yeah. Yes, sir

Q And the Garfield Traub team was a proposer under this RFQ, correct?

A. Yes, sir

Q All right. And that document had previously been submitted by the team for which Garfield Traub was working, correct?

A The rendering?

Q Yes

A I'm—I don't think Garfield Traub had submitted it. I think that was something that one of—somebody from the previous development team had prepared that. Yes

Q It was done most likely by Stevens and Wilkinson?

A I would assume. Or TVS

Q All right. And you—the City gave that rendering to Mr. Aughtry, is that not correct?

A. That's correct

Q What use did Mr. Aughtry make of that rendering?

A I don't know.

Q Do you remember what that rendering looked like?

A It looks much like the building, the hotel we presently have.

(See Exhibit M, Deposition of Steve Gantt, p. 50, l. 4 – p. 51, l. 16)

Presumably the City feels it is mere coincidence that the Aughtry produced hotel “looks much like the building” designed by Stevens & Wilkinson and the rest of the publicly financed hotel team. But, undoubtedly, Aughtry’s request and receipt of the Stevens & Wilkinson renderings prior to even developing his own hotel proposal gives rise to competent evidence that the City retained and utilized the work of the plaintiffs without compensating the plaintiffs for their work.

Furthermore, Garfield-Traub expended a significant amount of time and effort facilitating the Hotel Block Room Agreement between the City and the Hilton.

Q And Room Block and Meeting Facilities Agreement, was one ever executed?

A No. Again, it would be executed upon the bond closing, but it was negotiated, heatedly I might add, and we spent a lot of time in arriving to a conclusion which I believe both Hilton and the City were comfortable with.

(See Exhibit I, Deposition of Tony Traub, p. 79 ll. 15-21)

Whereas the parties to the Room Block Agreement remained the same during the private hotel development, undoubtedly both the City and Hilton had the benefit of the efforts expended by Garfield-Traub with regard to the document’s negotiations.

The City insists that “the plans and drawings had no value to the City after the City determined that the project was infeasible”, but it offers no evidence of such beyond this conclusory allegation. To the contrary, competent evidence exists demonstrating the plaintiffs’

conferral of realized benefits upon the City and the City's likely retention and utilization of those benefits without just compensation. As a result, the plaintiffs' claims for quantum meruit meet the "mere scintilla" standard and the City's motion for summary judgment must fail.

III Breach of Covenant of Good Faith & Fair Dealing

As to Plaintiff Stevens & Wilkinson, the City moves for summary judgment on the grounds that Stevens & Wilkinson's claim for breach of the covenant of good faith and fair dealing is properly contained within the claim for breach of contract. Stevens & Wilkinson concurs with this analysis and has combined the two claims in its latest amended complaint.

The City also moves for summary judgment on the grounds that the MOU is not a contract. Stevens & Wilkinson adopts the arguments set forth in section one of this memorandum in defense of that allegation.

IV Estoppel

Promissory estoppel requires a claimant to prove (1) the presence of an unambiguous promise, (2) the promisee reasonably relied upon the promise, (3) the reliance was expected and foreseeable by promisor, and (4) the promisee was injured as a result of reliance upon the promise.

Davis v Greenwood School Dist 50, 365 S C 629, 634, 620 S E 2d 65, 67 (2005), citing *Satcher v Satcher*, 351 S C 477 484, 570 S E 2d 535, 538 (Ct App 2002)

The City claims that no genuine issue of material fact exists as to the first three elements of promissory estoppel. As shown below, sufficient facts exist to warrant a jury trial.

a. The MOU and subsequent acts of the City formed an unambiguous promise of payment to Stevens & Wilkinson

"Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise's subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property." *Satcher v Satcher*, 351 S C

477, 484, 570 S E 2d 535, 538 (Ct. App 2002) South Carolina courts have observed that evidence tending to show an “unambiguous promise” includes whether a party can “clearly articulate the terms of the alleged [] contract, how much money would ultimately be [exchanged], or how [the parties] would ‘settle up ’” *Rushing v McKinney*, 370 S C 280, 295, 633 S E 2d 917, 925 (Ct. App 2006)

In this case, the City promised Stevens & Wilkinson that it would compensate them for their efforts spent designing and developing the convention center hotel. Both the memorandum of understanding and the parties’ interaction following the execution of the MOU gave rise to this unambiguous representation.

The MOU set forth several unambiguous promises that give rise to this claim.⁶

- “The Architect *is to be paid* a fee of 7.25% by the Design/Builder based on hard construction costs together with the Design/Builder’s general expenses and fees.” (Exhibit A, p. 5, ¶ VIII.1)
- “The City *shall use its best efforts* to approve the issuance of a series of tax-exempt Hotel Revenue bonds.” (Exhibit A, p. 3, ¶ V.4)
- “The NPC is to retain the Underwriter and legal counsel to structure and issue *approximately \$60 million* in tax-exempt hotel revenue bonds.” (Exhibit A, p. 3, ¶ V.4)

These promises made by the City to Stevens & Wilkinson within the MOU are set forth in unequivocal language. The amount of financing involved in the transaction is “approximately \$60 million” which, according to the testimony of Tony Traub, is the best estimate of price in such a transaction. (See Exhibit I, Deposition of Tony Traub, p. 255 ll. 10 – 19) The method of “settling up” with the plaintiffs is also specifically stated as a percentage of the project budget and/or construction costs. Thus the promises extended by the City to the plaintiffs are clear cut.

⁶ The City alleges that Stevens & Wilkinson relies upon ¶ VI.3 of the MOU in pleading estoppel. Stevens & Wilkinson cited to this provision in a previous version of its complaint but has since removed the specific reference in its most recent filing.

The City insists that contingencies within the contract relevant to either the failure of the City to use its best efforts to issue the necessary bonds or the refusal of the Underwriter to approve the bonds renders the above-listed promises ambiguous. However, these conditions are in no way detrimental to the clarity of the obligations set forth within in the MOU—rather the conditions more specifically set forth the relationship of the City to the plaintiffs as it pertains to the promises made by the City.

As shown above, the terms of the City's promises to the plaintiffs are clearly articulated, the amount of money involved is set forth, and the method of the parties' "settling up" is spelled out. Thus evidence exists the assurances given by the City of Columbia to the plaintiffs were unambiguous promises.

b. The Plaintiffs reasonably relied upon the City's promises

The conduct of the City towards the MOU transaction provided the plaintiffs with sound reason to rely upon the City's representations within the MOU. John Lumpkin testified that the members of the project team worked closely with both members of City Council and City staff persons to achieve the goals set forth within the MOU.

[W]e did go on a – on two or three or four occasions—and I don't remember, but established a report, "Here is where we are. Here is where it is." You know, the bond—the underwriters came into town. *The mayor was there. Several members of council were there, you know, again, working to get the bond—getting a—I mean, they're working hard to make this work—this transaction happen which is where—you know where they—we did get favorable letters from underwriters, you know, and I think the City's mayor and others involved there—just I think as they do any time they come to look at a—Moody's and S&P I think were the two that were in, maybe Fitch, but Moody's was one, and then Ambac, the bond insurer, came in and we went through the same drill with them, with the City's participation*

(See Exhibit C, Deposition of John Lumpkin p. 238, l. 18 – p. 239, l. 10) (emphasis supplied)

Tony Traub testified that the parties reacted to the City's on-going participation and encouragement in the further development of the MOU framework

In fact, when we gave the GNP, the City consistently told us through Steve Gantt, and possibly Shawn Epps, but certainly Steve Gantt, that we need to get the project development cost under 50 million, which we did *And then the City not only said, keep going, that's what we want, but that's when they authorized payment to the architects for additional plans so that we could refine the cost better and get it to a point where they wanted more finite plans done*, although we were willing to sell bonds at an earlier stage. It was the City who wanted more drawings done

(See Exhibit I, Deposition of Tony Traub, p. 255, l. 19 – p. 256, l. 5) (emphasis supplied)

And Bobby Lyles spoke at length about his day to day dealings with the City and his reliance thereupon

A. It's my testimony that we would do enough work to get a guaranteed maximum price that's acceptable to the city, which is what we did.

Q. And so –

A. *And I would have never done any more work unless the city asked me to do more work.*

Q. Okay

A. *Which they did*

(See Exhibit E, Deposition of Bobby Lyles, p. 80 l. 7 – l. 14) (emphasis supplied)

Stevens & Wilkinson pleads in its complaint that the work performed beyond the four corners of the MOU both evinced good faith reliance upon the City's continuing representations and gave rise to a claim of estoppel, in its own right. Steve Gantt, testifying as a 30(b)(6) witness for the City, largely agrees

Q. Who told them to stop working, that they were at risk again? Because obviously, what the Council—you would agree with me,

what the Council did in July was not consistent with the MOU, is that correct?

A That's correct

Q Their agreement under the MOU was to -- that is Stevens and Wilkinson with the City -- was you are at risk, you will not be paid for generating construction drawings to the point drawings that would be sufficient for Turner to generate -- to give an estimate of the guaranteed maximum price That's what they agreed to do at risk.

A Yes

Q They did that by July and said, we're putting our pencils down because we've done what we said we would do at risk Isn't that correct?

A That's what they said

(See Exhibit M, Deposition of Steven Gantt, pp 33 34)(emphasis supplied)

Q Isn't it reasonable for them to believe that they should have been paid for what they did after City Council told them to pick their pencils back up?

A I don't know

Q So you have a question about that? They could have reasonably expected to be paid

A I guess they could have, yes

(See Exhibit M, Deposition of Steve Gantt, p 32) (emphasis supplied)

As shown above, not only did the MOU provide substantial justification for Stevens & Wilkinson's reliance upon the City's representations, but the City's ongoing interaction with the project team under the MOU and subsequent approval of additional funding for work beyond the MOU both buttressed the reasonableness of Stevens & Wilkinson's reliance and created an independent right of estoppel For these reasons, the City's motion must be denied

c. The Plaintiffs' reliance was foreseeable by the City

The City's involvement with Stevens & Wilkinson and the other members of the project team throughout the progress of work envisioned within the MOU and beyond rendered the plaintiff's reliance highly foreseeable. As noted above, in October of 2003 Shawn Epps specifically brought to the attention of City Council the fact that contractors such as Stevens & Wilkinson were continuing to work on the project envisioned within the MOU. Yet the City, despite considering whether it should request the contractors stop work, expressly chose not to do so. (See Exhibit G, October 15, 2003 minutes) During his deposition, Epps described the situation as follows:

A. The reason I brought it up is because there was a lot of questions about a financing package and the coverages and how it all fit. Whether the deal was feasible as it related to the financing and the coverages and *I wanted to remind them, I didn't want them to have any misunderstanding that, you know, people were still working. That work was still going on, that those consultants were still expending time and effort as it related to the project.*

Q And it would be—if you knew you weren't going to do this project, it would be fair to stop them from doing any more work, right?

A. Yes

(See Exhibit F, Deposition of Shawn Epps, p. 44, l. 21 – p. 45, l. 9)

Councilwoman Tameika Isaac-Devine also testified as to her personal knowledge of Stevens & Wilkinson continuing to work above and beyond the terms of the MOU.

Q The Stevens & Wilkinson (sic) as you saw continued to work after that period of time described under the MOU and council voted to pay them additional moneys through bond closing?

A We voted to pay them \$650,000 which was the estimate we received through October. Yes.

Q Right. And they ultimately were paid more than that, about \$710,000 according to these documents because they continued to work even beyond that, beyond the October 10th, isn't that correct?

A. I can't recall. But I wouldn't disagree with that, no.

(See Exhibit N, Deposition of Tameika Isaac-Devine, pp. 82-83)(emphasis added)

Perhaps most directly on point, however, is an exchange that occurred between Bobby Lyles and Mayor Bob Coble regarding not only the City's knowledge, but the City's desire for Stevens & Wilkinson to continue working on the hotel project envisioned within the MOU above and beyond the work required for a guaranteed maximum price.

Well, that July [of 2003] council meeting, the presentation was made by the various team members of the design, the construction cost, the financial package, the whole ball of wax. And that was approved by council in executive session.

At that time, if I'm not—I'm going from memory now, Mayor Coble asked when the bonds could be sold.

And it was—I think the date was, like, October 13th or sometime in October was the anticipated date for the bonds to be sold.

At that point, I reminded city council that our job as contemplated under the MOU was complete and we were—and I used the expression we were putting our pencils down until the bonds were sold. And they asked the general contractor how did that effect the opening date of the hotel. And we said, well, its July, that's October. So I was asked by council, I think specifically Bob Coble to come up—what it would cost for us to continue working. I told him I'd go back to the office and figure it out and get back in touch.

I went back and prepared a document that I sent to Shawn Epps that estimated, I think, \$650,000 to get through October the 13th, if I'm not mistaken. And \$75,000 a week for each week after that until we contemplated the project. I was told after the next council meeting that we were to—that that was approved and that we would proceed.

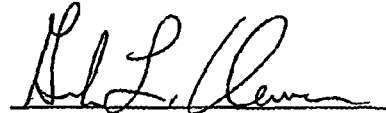
(See Exhibit E, Deposition of Bobby Lyles, p. 67, l. 10 – p. 68, l. 24)

Based upon the testimony of Epps, Isaac-Devine, and Lyles, it is undisputed that not only should the City have foreseen that Stevens & Wilkinson was relying upon its promises within the MOU and subsequent promises in July of 2003, but the City had actual knowledge of such reliance. Due to this evidence, the City's motion as to the claim of estoppel must be denied.

CONCLUSION

For the reasons set forth herein, the motions of Defendants City of Columbia and Windsor/Aughtry should be denied.

Respectfully submitted,



Richard A. Harpothian
Graham L. Newman
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR STEVENS &
WILKINSON

Kenneth M. Suggs
Francis M. Hinson, IV
JANET, JENNER & SUGGS, LLC
500 Taylor Street
Columbia, South Carolina 29201
(803) 726-0050
(803) 727-1059 (facsimile)

ATTORNEYS FOR GARY REALTY
AND GARFIELD-TRAUB

August 3, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

2006-CP-40-6488

2006-CP-40-5092

GARFIELD TRAUB DEVELOPMENT
LLC, AND GARY REALTY COMPANY,
INCORPORATED

-VS-

TRANSCRIPT OF RECORD

PAUL C "BO" AUGHTRY III,
VISTA HOTEL PARTNERS, LLC, AND
WINDSOR AUGHTRY COMPANY
INCORPORATED

STEVENS & WILKINSON OF SOUTH
CAROLINA INCORPORATED

-VS-

PAUL C "BO" AUGHTRY, III
VISTA HOTEL PARTNERS, LLC AND
WINDSOR AUGHTRY COMPANY,
INCORPORATED

JULY 9, 2009
COLUMBIA SOUTH CAROLINA

B E F O R E

THE HONORABLE GEORGE C JAMES, JR JUDGE

A P P E A R A N C E S

KENNETH M SUGGS, ESQUIRE
JOHN VAIL, ESQUIRE
GRAHAM L NEWMAN, ESQUIRE
FRANCIS "BRINK" HINSON IV ESQUIRE
ATTORNEYS FOR THE PLAINTIFFS

TOBIAS G WARD, JR , ESQUIRE
REECE D WILLIAMS, III ESQUIRE
ROBERT W FOSTER, JR ESQUIRE
JAY T THOMPSON, ESQUIRE
JAMES L PAUL, ESQUIRE
RICHARD C DETWILER ESQUIRE
KATHLEEN M MCDANIEL ESQUIRE
ATTORNEYS FOR THE DEFENDANTS

DAPHNE D HELMS
CIRCUIT COURT REPORTER

1 THE COURT ALL RIGHT THANK YOU HAVE A SEAT ALL
2 RIGHT WOULD Y'ALL DO A COUPLE OF THINGS FOR ME? FOR THE
3 COURT REPORTER -- FOR THE COURT REPORTER'S ASSISTANCE, IF
4 EVERYBODY COULD IDENTIFY THEMSELVES AND WHO THEY REPRESENT
5 AND THEN WE'LL GO THROUGH A COUPLE OF THINGS AND THEN WE'LL
6 GET MOVING ON AND WHAT I'LL DO IS AFTER WE -- PROBABLY
7 ABOUT AN HOUR AND A HALF AFTER WE GET INTO THIS, WE'LL TAKE A
8 BREAK AND THEN WE'LL MOVE FORWARD FROM THERE AND IF Y'ALL
9 COULD INTRODUCE YOURSELVES FROM LEFT TO RIGHT MR SUGGS?

10 MR SUGGS GOOD MORNING I'M KEN SUGGS I REPRESENT
11 GARY REALTY AND THE GARFIELD TRAUB TEAM AND I PROBABLY WILL
12 NOT BE SPEAKING TODAY

13 THE COURT ALL RIGHT

14 MR HINSON BRINK HINSON YOUR HONOR, ALSO FOR GARY
15 REALTY AND GARFIELD TRAUB DEVELOPMENT

16 THE COURT ALL RIGHT

17 MR VAIL JOHN VAIL YOUR HONOR, ALSO FOR THE
18 PLAINTIFFS

19 THE COURT ALL RIGHT ARE YOU WITH THE SAME FIRM?

20 MR SUGGS LET ME INTRODUCE MR -- MR VAIL IS FROM THE
21 CENTER FOR CONSTITUTIONAL LITIGATION IN WASHINGTON, D C AND
22 WE'VE ASKED -- HE'S BEEN PRO HAC'D INTO THE CASE IN THE---

23 THE COURT OKAY

24 MR SUGGS ---IN DUE COURSE AND HE'LL BE HANDLING THE
25 NOERR-PENNINGTON PART OF THE ARGUMENT FOR US

1 THE COURT ALL RIGHT YES SIR?

2 MR FOSTER ROBERT FOSTER, YOUR HONOR, WITH NELSON
3 MULLINS AND ARGUING ON BEHALF OF THE HILTON HOTELS

4 THE COURT ALL RIGHT

5 MR THOMPSON JAY THOMPSON ALSO WITH NELSON MULLINS,
6 AND I PROBABLY WILL NOT BE SPEAKING TODAY

7 THE COURT OKAY ALL RIGHT MR WILLIAMS YOU
8 REPRESENT?

9 MR WILLIAMS MAY IT PLEASE THE COURT? MR DETWILER
10 AND MS MCDANIEL AND I REPRESENT THE CITY OF COLUMBIA IN
11 THREE OF THE FIVE CASES THAT HAVE BEEN CONSOLIDATED AND I
12 THINK THE MOTION THAT WE HAVE TO BE HEARD TODAY IS THE MOTION
13 TO CONSOLIDATE

14 THE COURT ALL RIGHT THAT---

15 MR WILLIAMS MINE MAY NOT HAVE TO BE HEARD BASED ON
16 THE---

17 COURT REPORTER JUDGE, I DIDN'T GET HIS NAME I'M
18 SORRY

19 THE COURT REECE WILLIAMS

20 COURT REPORTER REECE WILLIAMS?

21 THE COURT R-E-E-C-E MR DETWILER---

22 MR DETWILER I'M RICHARD DETWILER YES SIR

23 THE COURT AND Y'ALL ARE TOGETHER RIGHT?

24 MR DETWILER YES SIR

25 MR WILLIAMS YES SIR AND KATHLEEN MCDANIEL

1 THE COURT ALL RIGHT

2 MS MCDANIEL AND, YOUR HONOR, WE ALSO HAVE A MOTION TO
3 AMEND OUR ANSWER WHICH YOU MAY HEAR TODAY

4 THE COURT AND YOU REPRESENT WHO NOW?

5 MS MCDANIEL I'M WITH MR DETWILER AND MR WILLIAMS

6 THE COURT ALL RIGHT ANYBODY ELSE?

7 MR WARD MAY IT PLEASE THE COURT, YOUR HONOR? I'M
8 TOBY WARD, AND I REPRESENT WHAT WE CALL THE AUGHTRY
9 DEFENDANTS BO AUGHTRY, THE WINDSOR AUGHTRY COMPANY, AND
10 VISTA HOTEL WITH ME ALSO IS MR JIMMY PAUL FROM THE
11 CHAMBERLAIN HRDLICKA FIRM IN ATLANTA, AND HE'S BEEN PRO HAC'D
12 IN HE'LL BE HANDLING THE ARGUMENT TODAY WITH RESPECT TO THE
13 NOERR-PENNINGTON MATTER

14 THE COURT ALL RIGHT ANYBODY FOR MR NEWMAN?

15 MR NEWMAN YES, SIR, GRAHAM NEWMAN I'M HERE FOR THE
16 PLAINTIFF STEVENS & WILKINSON WHO IS A PARTY TO TWO OF THESE
17 CASES

18 THE COURT OKAY THAT TAKES CARE OF IT ALL RIGHT --
19 BEFORE WE GET STARTED I WANTED TO MAKE SURE ALL OF YOU
20 UNDERSTOOD THAT YOU'VE DONE NOTHING OTHER THAN WHAT I ASKED
21 YOU TO DO AND I APPRECIATE THAT IF IT'S -- IF IT'S MY
22 DOING NOT HAVING PROPER COMMUNICATION WITH JUDGE BARBER,
23 I'LL TAKE THE HIT FOR THAT BUT I DIDN'T WANT ANYBODY TO
24 THINK THAT I WAS CONSPIRING BEHIND YOUR BACK TO TALK TO JUDGE
25 BARBER ABOUT THIS I SIMPLY TOLD HIM THAT THE ROSTER

1 REFLECTED THESE WERE SET FOR A HALF A DAY AND THAT I ARRANGED
2 A SCHEDULE AS BEST I COULD TO ACCOMMODATE THESE MOTIONS AND
3 THE 12 THAT ARE SCHEDULED FOR THIS AFTERNOON AND OTHER CASES,
4 TWO OF WHICH ARE SUPPOSED TO TAKE TWO HOURS SO YOU KNOW
5 HUMAN BEINGS CAN ONLY DO WHAT THEY CAN DO AND I APPRECIATE
6 YOU WORKING WITH ME

7 WE'LL TALK AS WE GO ALONG ABOUT ANY FURTHER INVOLVEMENT
8 THAT I WILL HAVE WITH THIS CASE, AND I'VE TOLD JUDGE BARBER
9 THAT I WOULD BE HAPPY TO COME BACK AT ANOTHER TIME PERHAPS
10 DURING A CHAMBERS WEEK AND HE SAID HE WOULD DISCUSS THAT
11 WITH ME I DON'T KNOW WHETHER WE WOULD HOLD THAT MUCH HOPE
12 FOR THAT -- FOR ME COMING BACK I GUESS THE QUESTION WOULD
13 BE IS IF I'M ABLE TO WRAP MY ARMS AROUND ALL OF THIS WHICH ON
14 THE SURFACE TO ME DOESN'T APPEAR TO BE HORRIBLY COMPLICATED
15 THERE'S NO NEED FOR SOMEBODY ELSE TO STEP IN AND RELEARN IT,
16 SO TO SPEAK SO WE'LL DO WHAT WE CAN TODAY

17 I WANT TO MAKE SURE THAT ALL OF YOU UNDERSTAND A COUPLE
18 OF THINGS OF COURSE, ALL OF YOU ARE EXTREMELY EXPERIENCED
19 AND WELL-SPOKEN AND CAPABLE, BUT DON'T FALL INTO THE TRAP OF
20 WHAT WE FACED IN SOME OF THE PRO SE HEARINGS THIS WEEK WHERE
21 WE HAVE FOUR OR FIVE PEOPLE TALKING AT ONCE THERE WILL BE
22 PLENTY OF TIME FOR EVERYBODY TO SPEAK I WILL PROBABLY
23 RARELY ASK ANY QUESTIONS UNLESS IT'S TO CLARIFY A POINT THAT
24 I HAVE IN MY MIND EVEN THOUGH IT MIGHT BE IRRELEVANT TO WHAT
25 YOU'RE TALKING ABOUT I APOLOGIZE IN ADVANCE FOR THAT

1 ALL RIGHT THE FIRST SET OF MOTIONS, AS I UNDERSTAND
2 IT, DEAL WITH MR FOSTER'S MOTION FOR SUMMARY JUDGMENT AND
3 PARTIAL SUMMARY JUDGMENT AND THEN ARGUMENTS ON THE NOERR-
4 PENNINGTON ISSUE WHO IS ADVANCING AN ARGUMENT THAT THE
5 CASES SHOULD BE DISMISSED UNDER THE NOERR-PENNINGTON
6 DOCTRINE? I KNOW MR PAUL---

7 MR PAUL YES SIR

8 THE COURT MR WARD YOU'RE ADVANCING THAT PROPOSITION

9 MR PAUL YES SIR

10 THE COURT IS THERE ANYONE ELSE WHO IS ARGUING THAT?

11 MR FOSTER NO, SIR

12 THE COURT OKAY ALL RIGHT MR FOSTER, YOU HAVE A
13 MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT IN
14 YOUR MIND WHO WOULD BE THE BEST PERSON IN HERE TO GIVE ME I
15 GUESS WHAT RULE 16 CALLS A CONCISE NON-ARGUMENTATIVE
16 STATEMENT OF THE FACTS OF THIS CASE?

17 MR FOSTER I BELIEVE I WOULD

18 THE COURT OKAY ALL RIGHT KEEP IT---

19 MR FOSTER I'VE BEEN SO DESIGNATED TO DO SO

20 THE COURT IF YOU WOULD -- IF YOU WOULD -- I'VE READ --
21 BELIEVE IT OR NOT I'VE READ SUBSTANTIALLY WHAT YOU SUBMITTED
22 EXCEPT SOME OF THE THINGS THAT WERE SUBMITTED IN THE LAST
23 COUPLE OF DAYS I KNOW THERE'S A MOTION FROM MR SUGGS FOR
24 ME TO EXCLUDE AN AFFIDAVIT AND I WOULD ASSUME THAT---

25 MR SUGGS THAT WAS MR PAUL

1 THE COURT MR PAUL

2 MR PAUL YES, SIR

3 THE COURT AND I DO HAVE TWO COPIES OF MR GARFIELD'S
4 AFFIDAVIT I GOT ABOUT 10 PAGES INTO THE SECOND ONE WHEN I
5 REALIZED IT WAS THE SAME THING I'D READ BEFORE I DON'T KNOW
6 HOW I GOT TWO, BUT THAT'S PERFECTLY FINE ALL RIGHT MR
7 FOSTER YOU CAN BEGIN WITH YOUR SUMMARY OF WHAT THE CASES ARE
8 ABOUT

9 MR FOSTER OKAY, YOUR HONOR AND I'VE WORKED WITH THE
10 DEFENDANTS TO TRY TO COME UP WITH A LIST OF THE HIGH POINTS,
11 AND I PUT TOGETHER A CHRONOLOGY I'VE PASSED OUT COPIES TO
12 EVERYBODY YOU HAVE A COPY OF THIS CHRONOLOGY

13 THE COURT YES SIR

14 MR FOSTER WRITE ON YOUR CHRONOLOGY ANYTHING YOU WANT
15 IF THE PLAINTIFFS THINK THAT I HAVE LEFT SOME FACTS OUT THAT
16 ARE REALLY IMPORTANT, THEN THEY CAN OBVIOUSLY WRITE ON MY
17 LITTLE BOARD RIGHT HERE BUT THE PROCESS THAT I'M GOING TO
18 WALK THROUGH IS I'M GOING TO JUST GIVE A VERY SUMMARY EVENTS
19 OF WHAT I'VE COME UP WITH AS THE 12 KEY EVENTS THERE'S
20 GOING TO BE A LOT OF ACTIVITY IN BETWEEN I WILL THEN GIVE
21 KIND OF A FACTUAL BACKGROUND WITH THE POWERPOINT THAT WILL
22 ADD A LITTLE BIT OF MEAT TO THIS SKETCH, AND THEN I'LL ARGUE,
23 FIRST OF ALL, OUR PRIMARY SUMMARY JUDGMENT MOTION THAT THE
24 M O U IS NOT A BINDING CONTRACT AND THEN I'LL STOP AND LET
25 THE PLAINTIFF GARFIELD COUNTER-ARGUE ON THE M O U ISSUE, AND

1 THEN WE HAVE TWO KIND OF FOLLOW-UP ARGUMENTS, AND THERE IS NO
2 ORAL AGREEMENT BETWEEN GARFIELD AND HILTON AND THEIR SECOND
3 CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUD,
4 THEY HAVE NOT COME FORWARD WITH ANY EVIDENCE OF FRAUD

5 SO THOSE ARE ALL OF OUR MOTIONS SO LUCKILY I'M NOT
6 CAUGHT IN THE MIDDLE OF THIS DILEMMA WITH JUDGE BARBER, AND
7 THEN WE'LL JUST SEE WHAT HAPPENS THEREAFTER AS I -- SO I
8 BASICALLY HAVE THREE ARGUMENTS M O U IS NOT A BINDING
9 CONTRACT, NO ORAL CONTRACT, NO FRAUD

10 THE COURT ALL RIGHT

11 MR FOSTER SO YOUR HONOR YOU ARE CORRECT IT'S NOT
12 NEARLY AS COMPLICATED AS US LAWYERS TEND TO MAKE THINGS BE
13 BECAUSE WE ALL WANT TO ADVANCE OUR OWN ARGUMENTS WHAT I
14 WANT TO TRY TO DO IS LAY OUT FOR YOU, OKAY NO LAWYER
15 ARGUMENT JUST WHAT IS THIS CONVENTION CENTER HOTEL STORY ALL
16 ABOUT AND HAVE YOU BEEN TO THE CONVENTION CENTER, YOUR
17 HONOR?

18 THE COURT YES

19 MR FOSTER YEAH OKAY SO COLUMBIA BUILDS THE
20 CONVENTION CENTER THEY NOW WANT TO BUILD A HOTEL TO SERVICE
21 THE CONVENTION CENTER THAT'S JUST PART OF THE NORMAL CITY
22 PLANNING THE CONVENTION CENTER SO AS THEY -- AFTER THEY HAD
23 AGREED TO BUILD A CONVENTION CENTER THE FIRST STEP WAS THEY
24 SENT OUT A -- ON JANUARY 15, 2001 THEY SENT OUT A REQUEST
25 FOR QUALIFICATIONS TO BUILD A CONVENTION CENTER HOTEL

1 ALMOST TWO YEARS LATER THEY SELECTED THE -- WHAT AT THAT
2 TIME WAS CALLED THE EDENS AND AVANT TEAM NOW THE EDENS AND
3 AVANT TEAM -- EDENS AND AVANT IS A LOCAL DEVELOPER THE
4 OTHER TWO DEVELOPERS ARE THE GARFIELD TRAUB WHO ARE A
5 PLAINTIFF IN THIS CASE AND GARY REALTY, A LOCAL REALTOR
6 THOSE WERE THE THREE DEVELOPERS

7 EDENS AND AVANT AND GARFIELD TRAUB, THEY PUT TOGETHER
8 WHAT SOME PEOPLE HAVE CLASSIFIED AS THE DREAM TEAM TO BUILD
9 THIS HOTEL THAT INCLUDES STEVENS & WILKINSON FOR THE
10 ARCHITECT THAT INCLUDED HILTON WAS GOING TO BE THE MANAGER
11 OF THIS HOTEL, AND THAT INCLUDED THE VARIOUS OTHER PARTIES TO
12 THE M O U SO THEY WERE SELECTED TO START THE NEGOTIATIONS
13 TO BUILD THIS HOTEL

14 THE COURT JUST TO START TALKING ABOUT IT

15 MR FOSTER JUST TO START TALKING ABOUT IT I DON'T
16 REMEMBER HOW MANY PEOPLE SUBMITTED BIDS BUT THERE WERE A
17 HANDFUL OF PEOPLE AND THE SELECTION PROCESS SAID WE
18 SELECT YOU, THE EDENS AND AVANT TEAM, TO PUT TOGETHER THIS
19 HOTEL AND THEY HAD ALREADY SUBMITTED THEIR PROPOSAL THAT
20 INCLUDED THIS -- IT WAS GOING TO BE FINANCED THROUGH TAX-
21 EXEMPT BONDS SO THE CITY KNEW THAT THAT'S WHAT THEY WERE
22 GOING TO BE GETTING INTO SO THEY SELECTED THEM TO COMMENCE
23 THE NEGOTIATIONS TO SEE IF THEY COULD COME UP WITH ALL THE
24 APPROPRIATE CONTRACT DOCUMENTS AND ALL THE FINANCING
25 SO AFTER ABOUT FOUR MONTHS, A LOT OF NEGOTIATION HAD

1 ALREADY TAKEN PLACE THERE WAS A LOT OF DETAILS THAT WERE
2 ALREADY AGREED UPON WITH THE VARIOUS TEAM MEMBERS AND SO
3 WHAT WE BELIEVE IS THIS M O U WAS A BASIC MEMORANDUM OF
4 UNDERSTANDING OF NEGOTIATIONS THAT HAD TAKEN PLACE TO DATE
5 AND FURTHER TASKS AND DUTIES TO TAKE PLACE IN THE FUTURE IT
6 WAS A VERY PRELIMINARY AGREEMENT, IN OUR OPINION I'M
7 PROBABLY BEING ARGUMENTATIVE, AND I SHOULDN'T DO THAT AT THIS
8 POINT

9 THE COURT YOU SAID YOU HAD AN AGREEMENT TO AGREE
10 MR FOSTER THAT'S WHAT WE SAY AN AGREEMENT TO AGREE
11 AND WE'LL GET INTO THAT IN A LITTLE MORE DETAIL IN A MINUTE,
12 BUT IT WAS TO BE APPROXIMATELY 60 MILLION NOW, THE OTHER --
13 KIND OF YOU KNOW, TAX-EXEMPT BONDS WHICH HAD A LOT OF
14 COMPLICATION TO IT THE OTHER THING IS THE CITY -- WELL NOT
15 REALLY THE CITY THE CITY WAS GOING TO FORM A NONPROFIT
16 HOTEL CORPORATION WHICH THEY DID THEY DID THAT ON JUNE THE
17 10TH AS PART OF THIS WHOLE PROCESS

18 A NOT-FOR-PROFIT CORPORATION WAS GOING TO OWN THE HOTEL
19 THAT WAS SEPARATE FROM CITY COUNCIL, BUT CITY COUNCIL MEMBERS
20 WERE PART OF THE BOARD OF THIS NOT-FOR-PROFIT SO THAT WAS
21 ALL PART OF THE SCHEME THE CITY COUNCIL COULDN'T OWN THE
22 HOTEL, BUT THEY COULD SET UP A CORPORATION THAT COULD OWN THE
23 HOTEL, NOT FOR PROFIT WHICH ENDS UP ALSO CAUSING A LOT OF
24 COMPLICATIONS DOWN THE ROAD WITH I R S ISSUES

25 SO FROM -- REALLY FROM DECEMBER 11 ALL THE WAY THROUGH

1 FEBRUARY 11 A LOT OF NEGOTIATIONS---

2 THE COURT THAT WAS TWO YEARS?

3 MR FOSTER WELL, THAT WOULD BE---

4 THE COURT A YEAR AND TWO MONTHS---

5 MR FOSTER A YEAR AND TWO MONTHS

6 THE COURT ALL RIGHT

7 MR FOSTER A LOT OF WORK HAD GONE INTO THIS PROJECT
8 NOW, BY THE WAY, I REPRESENT HILTON I'M BEING SUED HERE
9 I'M PART OF THAT TEAM FOR THIS YEAR AND A HALF I MEAN WE
10 SPENT A LOT OF MONEY, AS DID EVERYONE ELSE TO TRY TO PUT
11 THIS DEAL TOGETHER AND THE REAL -- THE REAL DIFFICULT PART
12 OF THE DEAL WAS LET'S GET THE FINANCING WORKED OUT AND
13 LET'S GET ALL THESE CONTRACT DOCUMENTS WORKED OUT SO WHAT
14 HAPPENS A KEY EVENT ON FEBRUARY 11 AND THE PROJECT
15 FINANCING HAD GONE FROM 60 MILLION TO 71 MILLION AND DO
16 WE HAVE THE CITICORP NOTEBOOK OR THE

17 MR THOMPSON (NODDED HEAD UP AND DOWN)

18 MR FOSTER THROUGHOUT THIS ENTIRE PROCESS CITICORP
19 WAS THE BOND WRITING -- THE BOND UNDERWRITER AND THEY WERE
20 CONSTANTLY SENDING FINANCIAL PRO FORMAS AS TO WHAT THIS WAS
21 GOING TO COST, AND IT LITERALLY WAS GOING UP A MILLION
22 DOLLARS A MONTH AND SO FROM APRIL 17 TO FEBRUARY 11 WHICH
23 IS MAYBE EIGHT, NINE I GUESS NINE OR TEN MONTHS, IT HAD GONE
24 UP \$11 MILLION

25 THAT CAUSED ENOUGH OF A CONCERN THAT ON FEBRUARY 11 -

1 AND WE'LL GO INTO THIS DETAIL WHEN I SHOW YOU SOME OF THE
2 DOCUMENTS - THAT WE HAD TO HAVE A MEETING WITH THE CITY
3 COUNCIL ACTUALLY WITH THE NOT-FOR-PROFIT HOTEL CORPORATION
4 AND BILL CORRADO FROM CITIGROUP CAME DOWN AND EXPLAINED THE
5 NEW FINANCIAL PACKAGE SO CITY COUNCIL -- SORRY THE
6 NOT-FOR-PROFIT CORPORATION -- BECAUSE ALL THE MEMBERS OF THE
7 CITY COUNCIL ARE ON THIS CORPORATION BUT TECHNICALLY THE
8 NOT-FOR-PROFIT CORPORATION, NOT CITY COUNCIL, THEY VOTED TO
9 APPROVE THE NEW FINANCING, AND I'LL SHOW YOU SOME DETAILS OF
10 THAT MEETING WHEN WE GET INTO THAT IN JUST A MINUTE

11 SO THE IDEA WAS, OKAY WE ARE NOW ALL AWARE THIS PROJECT
12 HAS GONE UP TO 71 MILLION THEY VOTED KEEP GOING FORWARD
13 THAT'S GOING TO BE A VERY SIGNIFICANT MEETING FOR A LOT OF
14 DIFFERENT REASONS AS WE GET INTO IT

15 THE COURT WHO WAS AT THE MEETING? JUST MEMBERS OF THE
16 CORPORATION?

17 MR FOSTER NO, AND I'LL SHOW YOU IT WAS A GROUP OF
18 PEOPLE I DON'T KNOW IF GARFIELD WAS THERE OR NOT I KNOW
19 HILTON WAS NOT IT WAS CITY COUNCIL IT WAS ASSISTANT CITY
20 MANAGER BILL CORRADO FROM THE UNDERWRITER CAME DOWN FROM
21 NEW YORK I'VE GOT A LIST OF THE PEOPLE AND I'LL SHOW YOU
22 THAT ON ONE OF THE DOCUMENTS

23 MR SUGGS EDENS AND AVANT WAS THERE

24 MR FOSTER EDENS AND AVANT SO EDENS AND AVANT IT
25 WAS -- IT WAS A GROUP OF THE TEAM AND THE UNDERWRITER AND THE

1 NOT-FOR-PROFIT CORPORATION HERE IS WHERE THIS PROJECT
2 STANDS AND THEY HAD TO VOTE DO WE WANT TO PULL THE PLUG
3 OR DO WE WANT TO GO FORWARD? THEY VOTED GO FORWARD

4 THE COURT 71 MILLION

5 MR FOSTER 71 MILLION ONE MONTH LATER MARCH 15 --
6 DO WE HAVE THE PRO FORMAS? OH, OKAY YOUR HONOR I'M NOT
7 GOING TO GO THROUGH ALL THESE BUT I MEAN, THIS IS JUST AN
8 IDEA -- THESE ARE THE CITY -- THESE ARE THE CITIGROUP'S
9 DIFFERENT PRO FORMAS EVERY MONTH EVERY TWO WEEKS AND SO WE
10 GOT ANOTHER ONE OF THESE PRO FORMAS ON MARCH 15, AND THE
11 PROJECT HAD GONE UP ANOTHER TWO AND A HALF MILLION

12 NOW, AS WE'RE GOING TO SEE FROM SOME OF THE NOTES FROM
13 THIS MEETING RIGHT HERE ENOUGH WAS ENOUGH TWO DAYS LATER
14 CITY COUNCIL VOTED TO ISSUE A NEW R F P NOW, YOU CAN -- WE
15 CAN ARGUE WHAT WE WANT ABOUT THAT

16 THE COURT WHAT'S THE DIFFERENCE BETWEEN AN R F P AND
17 AN R F Q ?

18 MR FOSTER NOTHING OF SIGNIFICANCE I THINK THAT
19 THEY'RE -- NOTHING RELEVANT TO THIS CASE I CALL IT A NEW --
20 THE SECOND R F P TECHNICALLY, IT'S THE FIRST R F P BUT IT
21 WAS STARTING THE BIDDING PROCESS OVER

22 THE COURT OKAY

23 MR FOSTER I'M NOT AWARE OF ANY SIGNIFICANCE BETWEEN
24 THE WORDING SO THEY ISSUE A SECOND R F P THEY VOTE TO
25 ISSUE A SECOND R F P APRIL THE 2ND THE R F P IS SENT OUT

1 TO VARIOUS PEOPLE, TO THE PUBLIC APRIL THE 30TH WAS THE DUE
2 DATE FOR THE RESPONSES SIX DIFFERENT TEAMS RESPONDED TO
3 THIS SECOND ROUND OF BIDDING GARFIELD TRAUB SUBMITTED TWO
4 ONE WAS THE ORIGINAL 73 MILLION TAX-EXEMPT BOND AND THEN THEY
5 SUBMITTED A SECOND ONE THE AUGHTRY TEAM SUBMITTED ONE AND
6 AS WE WILL SHOW YOU ANOTHER ENTITY SUBMITTED ONE TO OFFER A
7 HILTON GARDEN INN WHICH IS PERFECTLY APPROPRIATE ANYONE WHO
8 WANTED TO OFFER TO THE CITY A HILTON OR A MARRIOTT OR
9 WHATEVER THEY HAD THE RIGHT TO DO IT UNDER THIS OPEN SEASON
10 OF NEW BIDS SO THE BIDS ARE SUBMITTED THEY THEN HAVE AN
11 ORAL PRESENTATION AND I THINK---

12 THE COURT THIS WAS ALL SIX TEAMS OR THE FINAL---

13 MR FOSTER I THINK THE FINAL THREE

14 THE COURT OKAY

15 MR FOSTER I'VE HEARD FROM THE DEPOSITIONS THAT THREE
16 PEOPLE WERE CALLED IN, AND SO I THINK THAT'S -- I KNOW THREE
17 CAME IN AND THEY SUBMITTED THEIR ORAL PRESENTATIONS AT
18 THE - TO THE HOTEL SELECTION COMMITTEE THE CITY COUNCIL --
19 DESIGNATED A HANDFUL OF PEOPLE TO BE KIND OF THE SCREENING
20 BOARD, AND THAT'S WHAT WE CALL THE HOTEL SELECTION COMMITTEE
21 THAT WAS GOING TO RECOMMEND TO CITY COUNCIL WHO THEY THOUGHT
22 THE WINNING BIDDER SHOULD BE

23 SO ALL THREE TEAMS AT LEAST MADE AN ORAL PRESENTATION
24 ON MAY 28 THE HOTEL SELECTION COMMITTEE RECOMMENDED THE
25 AUGHTRY TEAM AS THE WINNING BID, AND ON JUNE THE 2ND THE CITY

1 SELECTED -- THEY VOTED TO SELECT -- TO COMMENCE NEGOTIATIONS
2 WITH THE WINDSOR AUGHTRY TEAM SO IF I COULD JUST -- THAT
3 CHRONOLOGY MIGHT HELP US TO UNDERSTAND -- IT'S NOT AS
4 TERRIBLY DIFFICULT AS US LAWYERS ARE MAKING IT THAT'S
5 REALLY WHAT HAPPENED

6 **THE COURT** AND THE PLAINTIFFS ARE CONTENDING THAT
7 WITHIN ALL THOSE TIME FRAMES SOME HANKY PANKY WAS GOING ON

8 **MR FOSTER** WELL, YES YEAH I MEAN, THERE IS NO
9 GUESS -- I MEAN I GUESS

10 **THE COURT** IS THAT RIGHT, MR SUGGS? MR HINSON?

11 **MR HINSON** YES, SIR BUT I THINK WHAT MR FOSTER IS
12 GOING TO SAY -- FOR THE PURPOSES OF HIS ARGUMENT RIGHT NOW,
13 THE ISSUE IS WHETHER OR NOT THE MEMORANDUM OF UNDERSTANDING
14 FORMED A CONTRACT

15 **THE COURT** OKAY

16 **MR FOSTER** YEAH YOUR HONOR, TO ANSWER YOUR QUESTION,
17 WHEN WE GET TO OUR VERY LAST MOTION FOR PARTIAL SUMMARY
18 JUDGMENT ON WHETHER THERE WAS FRAUD, I'LL GO INTO THAT, THE
19 ALLEGED HANKY PANKY, THE ALLEGED FRAUD, AND WE SAY THERE'S
20 JUST NO EVIDENCE OF ANY OF THAT NOW, THERE IS NO QUESTION
21 -- WELL IT'S NOT REALLY MY ISSUE, BUT, YEAH THERE WERE
22 PEOPLE THAT WERE CONTACTING CITY COUNCIL AND TALKING TO THEM
23 AND NEWSPAPER ARTICLES ALL THE WAY UP TO THIS PERIOD AND ALL
24 THE WAY FROM HERE ALL THE WAY DOWN TO HERE THERE WERE A LOT
25 OF NEWSPAPERS ARTICLES EDITORIALS, THINGS OF THAT NATURE,

1 BUT THAT -- WHAT I WOULD LIKE TO DO IS FOCUS ON BUT WHAT IS
2 THIS M O U DOCUMENT? IS IT A CONTRACT OR IS IT JUST AN
3 AGREEMENT TO AGREE?

4 AND I THINK THAT THE REASON WE SAID LET'S TEE THIS ISSUE
5 UP FIRST, YOUR HONOR, IS EVERY ONE OF THE DEFENDANTS HAS A
6 CAUSE OF ACTION AGAINST THEM THAT IS BASED ON THE M O U IS A
7 CONTRACT NOW, THAT'S ALL THEY HAVE AGAINST HILTON HILTON
8 HAS ONLY TWO CAUSES OF ACTION BREACH OF CONTRACT, BREACH OF
9 CONTRACT ACCOMPANIED BY FRAUD IF THE M O U IS NOT A
10 BINDING CONTRACT, THEN BOTH OF THE CAUSES OF ACTION AGAINST
11 HILTON GET DISMISSED BUT IF THE M O U IS NOT A CONTRACT,
12 EACH ONE OF THE CO-DEFENDANTS IS GOING TO HAVE ONE OR MORE OF
13 THEIR CAUSES OF ACTION DISMISSED IF IT IS A CONTRACT, IF
14 THE COURT RULES THAT THE M O U IS A VALID BINDING CONTRACT
15 THEN THOSE CAUSES OF ACTION DO GO FORWARD AND---

16 THE COURT THEN WOULD WE JUST BE RULING THERE WOULD BE
17 A GENUINE ISSUE OF FACT AS TO THAT?

18 MR FOSTER YEAH THE RULING WOULD BE EITHER--- WELL,
19 WE BELIEVE WHEN YOU LOOK AT THE FOUR CORNERS OF THE DOCUMENT
20 ITSELF THIS IS A QUESTION FOR THE COURT TO DECIDE---

21 THE COURT OKAY

22 MR FOSTER ---AS A MATTER OF LAW NOW, THE PLAINTIFFS
23 ARE ARGUING THERE ARE PLENTY OF GENUINE ISSUES OF MATERIAL
24 FACT AND THE COURT CAN'T MAKE THAT RULING AS A MATTER OF LAW
25 WE THINK YOU CAN WE'RE ASKING YOU JUST TO LOOK AT THE

1 DOCUMENT ITSELF AND WE THINK WE CAN SHOW YOU THAT THIS WAS
2 NEVER INTENDED TO BE A BINDING CONTRACT AND THAT IT WAS JUST
3 A NEGOTIATION IN THE MIDDLE OF THE PROCESS

4 SO LET ME JUST WALK THROUGH -- I THINK NOW TO JUST ADD A
5 LITTLE BIT OF EXPLANATION TO THESE POINTS, LET'S GO TO THE --
6 SO WHAT WE HAVE HERE, YOUR HONOR IS JUST THIS IS THE
7 ACTUAL -- THIS IS THE DECEMBER 11 MEETING OF CITY COUNCIL AND
8 THEY SELECTED EDENS AND AVANT WITH THE CAVEAT THAT A FINAL
9 AGREEMENT IS NEGOTIATED AND AUTHORIZED STAFF AND THE
10 CONSULTANTS TO STRENGTHEN THE 1 3 TIMES DEBT SERVICE SO
11 THEY VOTED TO SELECT THEM BUT WE WANT FINAL AGREEMENTS AND
12 WE NEED SOME BETTER DEBT RATIO ON BONDS SO THEY'RE
13 SELECTED OKAY

14 NOW, ONE THING THAT I -- I'VE PUT THIS UP AT FIRST
15 BECAUSE I THINK THIS IS GOING TO BE A VERY RELEVANT DOCUMENT
16 DOWN THE ROAD THIS IS A -- TWO DAYS AFTER THEY WERE
17 SELECTED, THE GARFIELD ACCOUNT ISSUED AN E-MAIL, AND A LOT OF
18 TIMES IN THESE DEALS WHEN YOU HAVE MULTIPLE PARTIES -- WE'LL
19 SHOW YOU A TEAMING AGREEMENT AND YOU AGREE THAT YOU WILL BE
20 PART OF A TEAM AND YOU'LL BE EXCLUSIVELY PART OF OUR TEAM
21 SO NO ONE EVER ASKED HILTON TO SIGN A TEAMING AGREEMENT BUT
22 IN INTERNAL MEMOS THE GARFIELD CROWD IS SAYING DO WE WANT A
23 TEAMING AGREEMENT? AND ONE OF THE GARFIELDS SAID "I DON'T
24 THINK WE NEED A TEAMING AGREEMENT WITH HILTON OR S S M B "
25 WHO IS THAT?

1 MR THOMPSON SMITH BARNEY

2 MR FOSTER THE UNDERWRITING?

3 MR THOMPSON CITIGROUP

4 MR FOSTER YEAH CITIGROUP THE UNDERWRITERS AND
5 THEN THEY WENT ON TO SAY FURTHERMORE, WE'LL WANT THE
6 FLEXIBILITY TO REPLACE HILTON ONLY IF ABSOLUTELY NECESSARY
7 AND TO PLACE TURNER THE CONSTRUCTION COMPANY, AGAIN ON IT SO
8 WE DON'T HAVE TO MAKE ANY COMMITMENTS TO THEM AT THIS TIME
9 THAT'S GOING TO COME UP WHEN WE TALK ABOUT THIS ORAL CONTRACT
10 OF EXCLUSIVELY THAT GARFIELD SAYS THEY ENTERED INTO WITH
11 HILTON BUT JUST CHRONOLOGICALLY, TWO DAYS AFTER THEY'RE
12 SELECTED THEY DON'T WANT TO HAVE HILTON BECAUSE THEY MIGHT
13 WANT TO REPLACE HILTON AND THEY DON'T WANT TO MAKE ANY
14 COMMITMENTS TO HILTON IF HILTON IS DIFFICULT TO GET ALONG
15 WITH

16 OKAY SO THE NEXT IS THE MEMORANDUM OF UNDERSTANDING
17 NOW DO YOU HAVE A COPY OF THAT, YOUR HONOR?

18 THE COURT (NODDED HEAD UP AND DOWN)

19 MR FOSTER OKAY AND AS FAR AS WHETHER THIS IS A
20 BINDING CONTRACT OR NOT, YOU KNOW THAT IS A SEVEN-PAGE
21 DOCUMENT, AND AS MR HINSON POINTED OUT, IT HAS A THREE-PAGE
22 ATTACHMENT TO IT AND I THINK THE -- LET'S GO TO SOME OF THE
23 PROVISIONS OF IT YOU KNOW, THE OBVIOUS ONE THAT EVERYONE IS
24 CITING TO -- YOU KNOW, THIS M O U REFLECTS THE INTENT TO
25 PROCEED IN GOOD FAITH TO EXECUTE DEFINITIVE WRITTEN

1 AGREEMENTS THAT'S WHAT THE DOCUMENT'S INTENT WAS NOW
2 WHEN WE SAY---

3 THE COURT ARE YOU TALKING ABOUT THE FINAL COPY OF
4 APRIL 17?

5 MR FOSTER RIGHT THIS IS YEAH, THE FINAL THAT IS
6 THE ONLY -- YEAH I'M SURE THERE WERE DRAFTS SUBMITTED, BUT
7 THAT'S THE ONLY DOCUMENT -- THAT'S THE ONLY M O U THAT WAS
8 SIGNED

9 THE COURT OKAY

10 MR FOSTER NOW, YOUR HONOR -- AND JUST SO YOU'LL KNOW
11 WHAT THEY'RE TALKING ABOUT THESE DEFINITIVE WRITTEN
12 AGREEMENTS -- I MEAN, I HAVE 11 OF THEM RIGHT HERE NOT A
13 SINGLE ONE OF THESE WAS FINALIZED OR AT LEAST EXECUTED, NOT A
14 SINGLE ONE FOR EXAMPLE, THE HOTEL OPERATING AGREEMENT AND
15 THE M O U IS ONE AND A HALF PAGES OF NEGOTIATED TERMS
16 BETWEEN HILTON AND THE CITY OF COLUMBIA UP TO THAT -- AND THE
17 TEAM UP TO THAT POINT THIS IS WHAT ONE OF THE DOCUMENTS --
18 AND THERE ARE NUMEROUS PORTIONS OF THIS DOCUMENT THAT WERE
19 NOT FINALIZED I KNOW HILTON'S DOCUMENTS WERE NOT FINALIZED
20 I'M NOT SURE ABOUT SOME OF THE OTHERS BUT I KNOW NONE OF
21 THEM WERE SIGNED

22 SO THIS IS WHAT THIS PROJECT WAS GOING TO REQUIRE IN
23 TERMS OF DEFINITIVE AGREEMENTS BEFORE THEY COULD EVER SUBMIT
24 THIS DEAL FOR BOND CLOSING SO THE ULTIMATE GOAL WAS TO GET
25 THE BOND CLOSING BUT YOU COULDN'T DO THAT UNTIL YOU GOT ALL

1 THESE OTHER THINGS IN PLACE

2 OKAY LET'S GO TO THE NEXT ONE YOU KNOW, HERE'S THE
3 APPROXIMATELY 60 MILLION I'M GOING TO TALK ABOUT THE
4 IMPORTANCE OF THIS DOCUMENT WHEN WE SAY, OKAY, LET'S DECIDE
5 WHETHER THE PARTIES INTENDED THE M O U TO BE A BINDING
6 CONTRACT, LET'S LOOK AT THE MONEY AND THAT WILL REVEAL TO US
7 VERY CLEARLY THAT NO ONE INTENDED THIS DOCUMENT TO BIND
8 ANYBODY IF IT DID, THEN THE CITY WOULD HAVE SAID, OKAY,
9 WAIT A MINUTE, TEAM YOU SAID YOU COULD BUILD THIS THING FOR
10 APPROXIMATELY 60 MILLION HOW COME WE'RE AT 71 MILLION? WE
11 ALL KNEW THAT THIS WAS A NEGOTIATED CON -- A NEGOTIATED
12 DOCUMENT A LIVING DOCUMENT, THAT WAS GOING TO BE CONTINUED
13 IN THE FUTURE OKAY

14 LET'S GO TO OKAY SO THEN THE OTHER KEY FINANCIAL
15 PIECE -- LET'S LOOK AT WHAT PEOPLE THOUGHT ABOUT THE MONEY
16 HERE'S THE -- THIS WHOLE LAWSUIT IS ABOUT THIS PROVISION
17 RIGHT HERE THESE DEVELOPERS WANT THEIR DEVELOPMENT FEE
18 THEY WANT 4 75 PERCENT OF THE BUDGETED PROJECT THAT'S WHAT
19 THEY SUED US FOR BUT WHEN YOU LOOK AT THE MONEY AND HOW
20 IT'S GOING TO -- HOW WE FOLLOW THAT THROUGH THE DOCUMENT,
21 THIS IS HOW THEY GET THEIR FEE DEVELOPMENT WOULD BE PAID 33
22 PERCENT UPON CLOSING OF THE BOND 57 DURING THE CONSTRUCTION
23 PERIOD, 10 PERCENT AT THE CERTIFICATE OF OCCUPANCY NONE OF
24 THOSE HAPPENED
25 SO WE'VE BEEN SUED UNDER A BINDING CONTRACT FOR 4 7

1 PERCENT OF THE BUDGETED -- FOR THE PROJECT BUDGET THESE --
2 NONE OF THESE CONDITIONS EVER TOOK PLACE THE PARTIES KNEW
3 THAT BEFORE THEY GET 4 75 PERCENT, THEY HAD A LOT MORE WORK
4 TO DO THEY WEREN'T -- WE WEREN'T BINDING EACH OTHER TO PAY
5 THAT MONEY WE WERE SAYING WHEN YOU DO ALL THIS OTHER
6 WORK, THIS IS WHAT YOU GET PAID

7 OKAY LET'S GO TO THE NEXT ONE OKAY SO NOW WE'RE
8 AT -- LET'S JUMP FORWARD THE PARTIES WORKED DILIGENTLY TO
9 GET ALL THE DOCUMENTS THERE'S REALLY NO -- AT LEAST AMONG
10 HILTON AND THE CITY AND THE PLAINTIFFS, NO ONE IS ARGUING
11 THAT SOMEONE DID NOT WORK DILIGENTLY WE ALL TRIED TO MAKE
12 THIS WORK

13 SO WE GO TO THE FEBRUARY 11 MEETING NOW, THIS IS-- MR
14 CORRADO CAME DOWN FROM NEW YORK AND HE STATED THE PROJECT IS
15 NOW A TOTAL OF 71 MILLION IN FUNDING AND THE LAWYER FOR THE
16 CITY JOEL GOTTLIEB, HE TOLD THE COUNCIL AND REALLY THE NOT-
17 FOR-PROFIT CORPORATION THE MOST SIGNIFICANT AGREEMENT IS
18 THE QUALIFIED MANAGEMENT AGREEMENT ALSO KNOWN AS THE HOTEL
19 MANAGEMENT AGREEMENT BETWEEN THE CORPORATION AND THE HILTON
20 THAT MUST REFLECT THE BUSINESS DEAL WITH HILTON AND FALL
21 WITHIN THE VARIOUS TAX-SAFE HARBORS SO THE BOND FINANCING
22 WILL FLOW

23 THIS PROVED TO BE A VERY COMPLICATED FACT BECAUSE IT WAS
24 A TAX-EXEMPT BOND, BUT YET WE HAD A HOTEL OPERATING AGREEMENT
25 AND THEY NEVER GOT RESOLUTION ON HOW TO COMPENSATE THE

1 EXECUTIVES AT THIS NOT-FOR-PROFIT HOTEL AND SO THAT WAS A
2 -- THAT WAS A BIG DEAL HE SAID THAT THE ROOM BLOCK
3 AGREEMENT BETWEEN THE HOTEL -- BETWEEN THE CONVENTION CENTER
4 AND THE CONVENTION CENTER HOTEL WAS ALSO SIGNIFICANT HE
5 STATED SEVERAL AGREEMENTS IN VARIOUS BOND DOCUMENTS ARE STILL
6 UNDER NEGOTIATION NOTHING HAD BEEN FINALIZED YET, AND THE
7 BOND, WHICH WAS THE KEY ISSUE, COULD NOT BE FINALIZED UNTIL
8 WE KNEW HOW MUCH IT WAS GOING TO COST AND ALL THESE DOCUMENTS
9 GOT SIGNED SO MR GOTTLIEB IS JUST REPORTING WE'VE GOT A
10 LOT MORE WORK TO DO

11 NOW AT THIS POINT, IF THIS IS A BINDING CONTRACT, NO
12 ONE SAID AT THIS MEETING "HEY, BUT YOU KNOW WE'VE GOT THIS
13 M O U WE'VE GOT A BINDING CONTRACT WE NEED TO GO FORWARD
14 WITH THIS " THAT'S NOT AT ALL WHAT ANY OF THE PARTIES
15 UNDERSTOOD AT THAT TIME THE CITY COULD HAVE SAID "NO, WE
16 ARE NOT GOING FORWARD THIS IS 71 MILLION " SO THEY WENT
17 INTO EXECUTIVE SESSION AND VOTED, AND THEY VOTED FOUR TO ONE
18 TO APPROVE THE NEW FINANCING PLAN THIS IS A -- THIS M O U --
19 IS A LIVING DOCUMENT IT IS CHANGING EVERY MONTH IT'S
20 CHANGING AND SO THEY VOTED THERE'S NO CONTRACT OBLIGATION
21 TO GO FORWARD

22 NOW THE PLAINTIFFS TOUT THIS AS A BIG VICTORY, BUT WHAT
23 IT REALLY WAS WAS THEY COULD HAVE VOTED NO NOW THEY
24 PROBABLY WOULD HAVE SUED IF THEY VOTED NO BUT WE KNOW THE
25 CITY HAS THE RIGHT TO PULL THE PLUG ON THIS DEAL ON FINANCING

1 WHENEVER THEY WANT TO THAT'S THE ISSUE OF THE CITY HAS NO
2 RESPONSIBILITY IF THIS PROJECT IS NOT FEASIBLE THIS WAS AN
3 EXAMPLE WHERE THEY HAD THE UNILATERAL RIGHT TO DECIDE IS IT
4 FEASIBLE? THEY SAID, "OKAY LET'S GO FORWARD " BUT JUST AS
5 SIGNIFICANT---

6 THE COURT AT 71 MILLION

7 MR FOSTER EXCUSE ME?

8 THE COURT AT 71 MILLION

9 MR FOSTER AT 71 MILLION THEY'RE NOW SAYING WE
10 HEAR THE NEW NUMBERS AND WE'RE WILLING TO GO FORWARD IT WAS
11 MORE THAN JUST 71 MILLION THERE WERE A LOT OF OTHER BOND
12 ISSUES, AND THEY LOOKED AT IT ALL AND THEY SAID "OKAY IT'S
13 DIFFERENT BUT WE'RE GOING TO VOTE TO GO FORWARD "

14 NOW, THE OTHER THING THAT'S -- IN ADDITION TO PROVING
15 THE FACT THAT THE CITY HAD THE UNILATERAL RIGHT TO VOTE NO OR
16 VOTE YES THIS IS WHAT ELSE IS GOING ON, YOUR HONOR THAT'S
17 REALLY IMPORTANT WE HAVE ANNE SINCLAIR STATING THAT AS THIS
18 DEAL GROWS HER CONCERNS CONTINUE TO INCREASE NOW, IT WENT
19 FROM 60 TO 71 SHE SAID THAT SHE'S CONCERNED BECAUSE THE
20 PARKING IS NOT INCLUDED IN ADDITION TO THE OTHER ISSUES
21 WHEN YOU REALLY LOOK BEHIND SOME OF THESE NUMBERS, THERE'S
22 ARGUABLY ANOTHER THREE TO SIX MILLION THAT WAS GOING TO HAVE
23 TO BE ADDED TO THIS 71 MILLION AND THAT WAS EXPLAINED IN THIS
24 MEETING BUT FOR PURPOSES OF RIGHT NOW WE KNOW THE NUMBERS
25 ARE GOING UP

1 AND IT WAS -- JUST AS SIGNIFICANT IS THE NOTES -- THIS
2 IS THE EXECUTIVE -- THE CITY MANAGER, STEVEN GANTT HE'S AT
3 THIS MEETING HE'S TAKING NOTES AND ON -- AND THESE ARE THE
4 PEOPLE WHO WERE IN ATTENDANCE YOUR HONOR I DON'T KNOW WHO
5 ALL THESE PEOPLE ARE, BUT YOU SEE SHAUN -- IT'S SOME CITY
6 PEOPLE HERE'S A LAWYER MR MUNSER (PHONETIC) IS THE BOND
7 LAWYER THE CITY COUNCIL MEMBERS

8 **THE COURT** ANYBODY FROM HILTON THERE?

9 **MR FOSTER** NO NO ONE FROM HILTON IS THERE NOW YOUR
10 HONOR DURING THIS WHOLE TIME -- WELL HILTON IS DOING THE
11 BEST IT CAN WITH THE HOTEL OPERATING AGREEMENT IT DOESN'T
12 HAVE ANYTHING TO DO WITH THESE NUMBERS AND WE'RE JUST
13 SAYING, "OKAY JUST TELL US WHAT YOU'RE UP TO " WE'VE
14 ALREADY COMMITTED 1 5 MILLION AS PART OF THE PACKAGE, AND
15 THAT STAYED THE SAME AND WE NEVER DEVIATED FROM THAT SO NO
16 ONE FROM HILTON IS THERE, BUT HERE ARE THE NOTES, JUST TO LET
17 YOU SEE HOW CLOSE THIS PROJECT IS FROM GETTING THE PLUG
18 PULLED SAM DAVIS, HE STATED THAT TODAY--HE---

19 **THE COURT** WHO IS HE?

20 **MR FOSTER** HE'S A CITY COUNCIL MEMBER THERE WERE
21 FIVE CITY COUNCIL MEMBERS WHO WERE VOTING ON THIS AND THE
22 VOTE WAS FOUR TO ONE ANNE SINCLAIR WAS A NO AND THE OTHER
23 FOUR WERE TWO OF THESE PEOPLE RIGHT HERE SAM DAVIS STATED
24 THAT TODAY HE WAS FOR IT BUT THAT IF THE COST CONTINUED TO
25 RISE THAT HE WOULD VOTE AGAINST HE STATED HE WOULD VOTE FOR

1 IT TODAY TAMEKA DEVINE, CITY COUNCIL MEMBER SHE STATED --
2 SHE STATED THAT SHE WAS 52 PERCENT IN FOR IT SHE STATED SHE
3 WOULD VOTE FOR IT TODAY BUT THAT JUST BARELY SHE ALSO
4 STATED THAT -- AND I DON'T KNOW WHAT ELSE SHE STATED I
5 MEAN, IT'S NOT WITHIN THE -- THE NOTES STOP RIGHT THERE AND
6 WE'VE DEPOSED THE PERSON WHO TOOK THESE NOTES, AND THE
7 DEPOSITION SAYS, YEAH, TWO PEOPLE SAID THEY WERE GETTING VERY
8 HESITANT SO FEBRUARY 11 THE TEAM, INCLUDING HILTON, WAS
9 GIVEN THE BLESSING TO GO FORWARD WITH THIS DEAL BUT JUST
10 BARELY

11 THE COURT TO GO FORWARD AND DO WHAT?

12 MR FOSTER TO CONTINUE WITH THIS WHOLE M O U AND
13 SELECTION TEAM PROCESS I MEAN WE WERE -- THE VOTE WAS TO
14 APPROVE THE NEW FINANCING

15 THE COURT ALL RIGHT

16 MR FOSTER KEEP GOING GET THE DOCUMENTS WE HEAR
17 71 WE'RE GETTING A LITTLE NERVOUS, BUT KEEP GOING PUT
18 THIS DEAL TOGETHER UNDER THOSE FINANCIAL TERMS SO ANOTHER
19 ISSUE WAS SIX DAYS LATER WE -- WE FOUND OUT LATER THAT NO
20 ONE HAD UPDATED THE AMBAC ASSURANCE CORPORATION WITH THE --
21 WHO WAS GOING TO INSURE THESE BONDS YOU KNOW, WE WERE TOLD
22 71 MILLION NO ONE HAS ADVISED THEM, "HEY, THIS PROJECT HAS
23 GONE UP " SO THEY'RE STILL BACK AT THE 63 MILLION THAT WAS
24 SOMETHING THAT HAD TO BE TAKEN CARE OF THIS IS AN EXAMPLE
25 OF DOZENS OF LITTLE THINGS THAT THIS BOND FINANCING NEEDED TO

1 TAKE CARE OF THAT JUST WERE NOT COMPLETED THIS PROJECT WAS
2 NOT IMMINENT TO CLOSE AS THE PLAINTIFFS WOULD LIKE THE COURT
3 TO BELIEVE A LOT MORE WORK HAD TO BE DONE, AND IT WAS JUST
4 DETAILS BUT A LOT OF WORK

5 THEN ON -- CITIGROUP, MARCH 15, THEY HAVE NOW PROJECTED
6 THE TOTAL PROJECT PRICE IS \$73 5 MILLION SO IT WAS GOING UP
7 A MILLION DOLLARS A MONTH NOW, ONE MONTH AFTER THE VOTE
8 WE'RE GOING UP TWO AND A HALF MILLION DOLLARS AND
9 THEREFORE, ALL WE KNOW IS TWO DAYS LATER CITY COUNCIL MARCH
10 17, IN THE MINUTES UPON MOTION BY MS SINCLAIR, SECONDED BY
11 MR CROMARTIE THE STAFF WAS DIRECTED TO DRAFT A REQUEST FOR
12 A PROPOSAL FOR A FULL-SERVICE HILTON CONVENTION HOTEL SO
13 NOW THEY PULL THE PLUG AT A MINIMUM THEY REOPENED IT TO THE
14 PUBLIC OKAY

15 SO EVERYONE GOES THROUGH THE PROCESS NOW, HERE'S WHAT
16 THE NEW R F P REQUIREMENTS WERE ON APRIL THE 2ND THE CITY
17 OF COLUMBIA IS ISSUING THIS REQUEST FOR PROPOSALS FOR THE
18 DEVELOPMENT OF A FULL-SERVICE CONVENTION CENTER HOTEL -- THE
19 CITY SHALL ESTABLISH A SPECIAL COMMITTEE TO REVIEW THIS TO
20 MAKE RECOMMENDATIONS THIS IS ALL IN THE R F P PROPOSALS
21 MUST BE IN BY MAY 4 THIS WAS THE MINIMUM THAT WAS REQUIRED
22 200 ROOMS, 5,000 SQUARE FEET SO THEY GAVE A LOT OF
23 SPECIFICS THAT THEY WANTED IN THE PROPOSALS OKAY SO SIX
24 TEAMS SEVEN TOTAL PROPOSALS WERE SUBMITTED
25 THE COURT UNDER THE APRIL -- PURSUANT TO THE APRIL

1 '04---

2 MR FOSTER RIGHT

3 THE COURT ---REQUEST

4 MR FOSTER RIGHT SO AT THE APRIL -- APRIL 2 '04,
5 R F P WE NOW HAVE -- WE'RE UP TO -- WE'RE UP TO APRIL 30TH,
6 AND WE HAVE THE GARFIELD TEAM NOW, EDENS AND AVANT HAS
7 DROPPED OUT OF THIS BY NOW THEY SAID, "WE DON'T WANT TO
8 HAVE ANYTHING TO DO WITH THIS " SO NOW GARFIELD AND GARY
9 REALTY -- AND THAT'S WHY THEY'RE THE PLAINTIFFS IN THE CASE
10 EDENS IS OUT OF THE PICTURE

11 THE COURT ALL RIGHT

12 MR FOSTER THEY SUBMIT TWO -- THEY SUBMIT TWO
13 PROPOSALS WE SAY THEY UNDERSTOOD WHAT WAS GOING ON YOU
14 KNOW, NO -- WHAT THEY'LL SAY IS WELL MR FOSTER DIDN'T
15 TELL YOU THAT CITY COUNCIL NEVER VOTED THAT THE PROJECT WAS
16 NOT FEASIBLE AND MR FOSTER DIDN'T TELL YOU THAT CITY COUNCIL
17 NEVER SENT US A LETTER SO I'M TELLING YOU THAT THEY VOTED
18 TO ISSUE A NEW R F P AND WE THINK THAT SPEAKS VOLUMES OF
19 WHAT'S GOING ON HERE AND EVERYBODY KNEW THAT THEY
20 ACQUIESCED TO THIS NEW DEAL

21 THE COURT SO THEY SUBMITTED TWO NEW PROPOSALS?

22 MR FOSTER TWO NEW PROPOSALS ONE OF THE PROPOSALS
23 APPEARS TO BE FAIRLY SIMILAR, IF NOT IDENTICAL, TO THE BOND
24 FINANCING PROPOSAL AND THE OTHER ONE WAS KIND OF A MIX
25 SOME BOND FINANCING SOME PRIVATE CAPITAL THEY KNEW THIS

1 100 PERCENT BOND FINANCING WAS CAUSING A LOT OF CONCERN SO
2 THEY PARTICIPATED IN THIS PROCESS THEY KNOW THAT THE CITY
3 GETS TO VOTE ON THIS ANY TIME THEY WANT TO THEY WON THE
4 VOTE ON FEBRUARY 11 SO DID HILTON, BUT ON MARCH 17 WE ALL
5 LOST THE CITY HAD THE RIGHT TO DO THAT THEY MAINTAINED
6 CONTROL TO SAY WE WANT TO MAKE SURE THE FINANCES WORK
7 BEFORE WE'RE GOING TO BUY INTO THIS

8 IN ADDITION TO THOSE TWO THIS IS THE -- THIS IS THE
9 AUGHTRY PROPOSAL, AND WHAT'S REAL IMPORTANT HERE YOUR HONOR,
10 AS WE GET INTO THIS -- YOU KNOW 216 ROOMS VERSUS THE
11 GARFIELD 300 ROOMS AND WHAT'S IMPORTANT HERE -- I DON'T --
12 I'M NOT SURE WHY GARFIELD KEPT SAYING IN THEIR -- WHEN WE
13 LOOK AT THE FRAUD CLAIM THAT GARFIELD -- AUGHTRY AND HILTON
14 WERE CONSPIRING TO DO A BAIT AND SWITCH, THAT AUGHTRY
15 SUBMITTED A NON-FULL-SERVICE HILTON GARDEN INN THAT'S --
16 THOSE AREN'T THE FACTS OF THIS CASE THIS IS WHAT -- THIS IS
17 WHAT THE WRITTEN PROPOSAL WAS A FULL-SERVICE HILTON GARDEN
18 INN OR MARRIOTT COURTYARD

19 NOW AS OF APRIL 30TH MR AUGHTRY IS NOT PROPOSING A
20 HILTON HOTEL HE'S SAYING I CAN DO EITHER ONE OF THEM
21 I'M GOING TO LET YOU PICK WHICH ONE YOU WANT I'M GOING TO
22 MAKE IT FULL SERVICE NOW, THEY'LL ARGUE, "YEAH, WELL, THE
23 HILTON GARDEN INN IS NOT FULL SERVICE " WELL, THAT'S NOT
24 TRUE IT'S A SCALED-DOWN HILTON, BUT YOU CAN ADD ALL THE
25 SERVICES TO IT CONCIERGE BELLMEN, 24-HOUR ROOM SERVICE

1 YOU CAN TURN IT INTO A FULL SERVICE

2 THE COURT DID THE 84 ROOMS MAKE A DIFFERENCE? BOTH
3 WERE OVER THE 200---

4 MR FOSTER BOTH WERE OVER 200

5 THE COURT ALL RIGHT

6 MR FOSTER SO I MEAN, IT MET ALL THE SPECIFICATIONS
7 IT WAS 200 -- MORE THAN 200 IT WAS FULL SERVICE, WHATEVER
8 THE CITY WANTED TO CHOOSE NOW HILTON DOESN'T KNOW WHAT'S
9 GOING ON WITH THIS WE DIDN'T -- THE AFFIDAVIT FROM MR
10 AUGHTRY -- WE DIDN'T LOOK AT THIS PROPOSAL WE DIDN'T
11 APPROVE IT, WE DIDN'T RECOMMEND IT HE UNILATERALLY SAID
12 THIS IS WHAT I'M PROPOSING

13 AND THEN WE HAVE THIS J H M HILTON DIDN'T EVEN KNOW
14 ABOUT THIS PERSON THIS IS A FRANCHISE -- FRANCHISEE UP IN
15 GREENVILLE HE SUBMITTED A HILTON PROPOSAL A HILTON GARDEN
16 INN THEY DIDN'T SUE HIM BUT APPARENTLY HILTON WASN'T
17 ALLOWED TO LET ANYONE ELSE SUBMIT A PROPOSAL WE HAVE NO
18 CONTROL OVER THAT WE DIDN'T EVEN KNOW THEY WERE DOING THIS
19 UNTIL SOMEONE WINS THE SITE, THEY DON'T EVEN COME TO
20 HILTON NOW, MR AUGHTRY HAS SEVEN HILTON FRANCHISES, SO HE
21 DID TALK TO US ABOUT AN ALTERNATIVE FULL-SERVICE HILTON WHICH
22 IS THE LETTERS WE'LL GET INTO IN A MINUTE SO WE HAVE -- WE
23 HAVE FOUR BIDS THAT ARE SUBMITTING HILTON PROPOSALS NOTHING
24 IS WRONG WITH THAT THAT'S NOT FRAUD

25 SO AFTER THE PROPOSALS ARE SUBMITTED, STEVEN GANTT --

1 WHAT NOW HAPPENS IS WE'RE UP TO MAY 20TH, AND THIS IS REALLY
2 IMPORTANT WHEN WE GET TO THE FRAUD I'M GOING INTO MORE
3 FACTS THAN THE M O U NECESSARILY BUT JUST SO THAT THE COURT
4 CAN SEE IT CHRONOLOGICALLY ON MAY 20TH MR AUGHTRY GOES TO
5 THE PRESENTATION AND HE PRESENTS HIS FULL-SERVICE HILTON
6 GARDEN INN OR MARRIOTT YOU TELL ME WHICH ONE YOU WANT IT
7 COULD HAVE BEEN MARRIOTT AS FAR AS HILTON KNOWS HE
8 WASN'T -- HE WASN'T -- HILTON WAS NOT ON HIS TEAM AS LATE AS
9 MAY 20TH HE WAS SAYING I'LL DO EITHER/OR BECAUSE I'VE GOT
10 -- I'VE GOT INNS WITH BOTH OF THESE COMPANIES I'VE GOT
11 FRANCHISES WITH BOTH MARRIOTT AND HILTON

12 WHAT HAPPENED WAS ACCORDING TO STEVE GANTT WHO WAS AT
13 THE PRESENTATION -- HE'S THE ASSISTANT CITY MANAGER SO --
14 AND WE'RE ASKING HIM ABOUT HOW DID IT COME TO WHERE AUGHTRY'S
15 PROPOSAL CHANGED FROM A FULL-SERVICE HILTON GARDEN INN OR
16 MARRIOTT COURTYARD, AND HE SAID THE COUNCIL MEMBERS SAID WE
17 WANT HILTON, FULL HILTON AND FULL SERVICE SO EVEN THOUGH HE
18 PROPOSED TO HAVE ALL THE AMENITIES OF A FULL-SERVICE HILTON
19 IN A GARDEN INN, COUNCIL WAS INSISTENT THAT THEY WANTED A
20 FULL-SERVICE CONVENTION CENTER HILTON HOTEL WITH THE BIG RED
21 H ON TOP OF IT AND AT THAT MEETING MR AUGHTRY SAID, "IF
22 THAT'S WHAT YOU WANT, IT'S GOING TO COST YOU THREE MILLION
23 BUCKS," BECAUSE AUGHTRY HAD PRICED -- NOW, YOU KNOW
24 GARFIELD THEY'RE UP TO 71, 73 MILLION AUGHTRY HAD PRICED A
25 216-ROOM HOTEL HILTON GARDEN INN AT \$26 MILLION IF YOU

1 WANT MORE CONFERENCE SPACE YOU WANT A BIGGER LOBBY IF YOU
2 WANT THE FULL BIG RED H THAT WILL COST ME THREE MILLION
3 MORE DOLLARS TO BUILD, AND THIS PROJECT WON'T WORK AS A
4 FULL -- AS A FULL BIG H HILTON UNLESS YOU WANT TO SUBSIDIZE
5 THAT EXTRA THREE MILLION IN CONSTRUCTION COSTS THAT'S WHAT
6 HAPPENED THIS IS A PUBLIC MEETING CITY COUNCIL SAID "WE
7 WANT YOU TO GO THAT ROUTE " HILTON DOESN'T KNOW ANY OF THIS

8 AND IT WAS CITY COUNCIL WHO WANTED MR AUGHTRY TO
9 PROVIDE THAT UPSCALE FULL-SERVICE HILTON AND MADE THAT
10 REQUEST AND YES, SIR, IN A PUBLIC HEARING, A PUBLIC MEETING
11 AND CITY COUNCIL IS THE ONE WHO SAID THIS IS WHAT WE WANT
12 AND WE ARE WILLING TO PAY YOU \$3 MILLION SEE THE CITY AT
13 THIS POINT, THEY'RE ON THE HOOK FOR A -- IF THIS BOND DEAL
14 GOES BAD, THEY'RE ON THE HOOK FOR \$71 MILLION OF TAXPAYER
15 MONEY POTENTIALLY SO TO SAY WE WANT THIS BIG HOTEL AND
16 WE'RE WILLING TO PAY \$3 MILLION THAT WAS A RELIEF TO THEM
17 AND AUGHTRY COULD DO THAT FOR 29 OR \$30 MILLION

18 SO WE HAVE THE MEETING OF MAY 21 NOW, JUST TO QUICKLY
19 GO THROUGH THESE LETTERS AND THEN WE'LL GET BACK TO THIS ON
20 THE FRAUD ARGUMENT JUST SO YOU CAN SEE IT CHRONOLOGICALLY,
21 THE NEXT DAY THE PEOPLE FROM GARFIELD HEAR THAT MR AUGHTRY
22 HAS TOLD CITY COUNCIL HE CAN OFFER A FULL-SERVICE HILTON AND
23 THEY GOT MAD AND THEY CALLED HILTON AND SAID "SET THE
24 RECORD STRAIGHT ' AND SO WE GOT THE PHONE CALL AND THEN---

25 THE COURT AND IT'S YOUR POSITION YOU DIDN'T KNOW IT AT

1 THAT TIME THAT MR AUGHTRY HAD SAID THAT

2 MR FOSTER DID NOT KNOW IT WE HAD TALKED TO MR
3 AUGHTRY AFTER THE SECOND R F P CAME OUT AND HE SAID, "IF
4 THE CITY WANTS FULL SERVICE HAVE YOU ALL GOT SOME TYPE OF
5 SCALED-DOWN FULL SERVICE? I MEAN, WE CAN'T AFFORD A 500-ROOM
6 HILTON HOTEL " AND SO WE SAID, "YEAH, WE HAVE A SMALLER
7 PROTOTYPE OF A FULL-SERVICE HILTON," AND WE PROVIDED THAT
8 INFORMATION TO HIM WE DIDN'T KNOW WHAT HE WAS GOING TO DO
9 WITH IT WE CERTAINLY DIDN'T KNOW WHAT WAS GOING ON IN THE
10 PROPOSAL OR IN THE PRESENTATION WE DIDN'T KNOW ANY OF THAT

11 AND SO WE SIMPLY -- THESE THREE LETTERS THAT THEY'RE
12 CITING AS THE FRAUD, I'LL JUST TELL YOU THESE THREE LETTERS
13 ARE THE TRUTH THERE'S NOTHING IN THESE LETTERS THAT'S
14 ANYTHING BUT THE TRUTH THEY DON'T LIKE IT THEY DON'T LIKE
15 THAT HILTON TOLD THE CITY OF COLUMBIA THAT WE'RE WRITING --
16 THE HILTON FRANCHISE DEPARTMENT IS WRITING ACTUALLY MR
17 AUGHTRY BUT WE'RE ALSO COPYING IN MR GANTT YOU KNOW,
18 WE'RE COMMUNICATING TO AUGHTRY AND THE CITY AND WE'RE SAYING
19 TO THEM -- WE'RE SITTING IN L A OR MEMPHIS WE DON'T KNOW
20 WHAT'S GOING ON IN COLUMBIA BUT HERE'S WHAT WE DO KNOW THE
21 HILTON FRANCHISE COMMITTEE -- WE'RE -- BO -- MR AUGHTRY WAS
22 NOT ALLOWED NOR DID HE SAY I CAN -- I HAVE A FRANCHISE FOR
23 HILTON HE JUST SIMPLY SAID, "IF I GET SELECTED, I THINK I
24 CAN SUBMIT MY APPLICATIONS AND I THINK I CAN GET APPROVED "
25 SO HILTON JUST WANTED TO MAKE IT CLEAR YOU KNOW WE'RE

1 RESPONSIBLE FOR APPROVING ALL APPLICATIONS AND WE HAVE NOT
2 YET RECEIVED AN APPLICATION FOR ANY PROJECT AT THIS LOCATION
3 AS SITE CONTROLS REQUIRE IN OTHER WORDS, UNTIL YOU GET
4 SELECTED, YOU'RE NOT EVEN ALLOWED TO SUBMIT AN APPLICATION
5 SO HE DID NOT SUBMIT AN APPLICATION WE'RE SETTING THE
6 RECORD STRAIGHT I HOPE YOU DIDN'T REPRESENT THAT TO THE
7 CITY BECAUSE YOU DON'T HAVE SITE CONTROL YOU HAVEN'T EVEN
8 SUBMITTED AN APPLICATION SUBJECT TO RECEIPT AND PROCESSING
9 OF A FRANCHISE APPLICATION HILTON SUPPORTS YOUR PROPOSED
10 DEVELOPMENT FOR A HILTON GARDEN INN HOTEL HILTON CONTINUES
11 TO SUPPORT THE GARFIELD TRAUB TEAM FOR A HILTON-MANAGED
12 HILTON FULL SERVICE

13 THAT'S ALL WE KNEW AT THE TIME WE DID NOT KNOW THAT --
14 THAT MR AUGHTRY SAID, "IF YOU'RE NOT SATISFIED WITH THE
15 HILTON GARDEN INN, I CAN DO A FULL-SERVICE BIG HILTON, BUT
16 IT'S GOING TO COST \$3 MILLION " WE DIDN'T KNOW THAT THAT HE
17 HAD RECOMMENDED THAT SO HE THEN -- HE'S A LITTLE BIT
18 PERTURBED THERE'S A LOT OF CONFUSION GOING ON HERE BY THE
19 WAY YOUR HONOR CONFUSION DOESN'T EQUATE TO FRAUD

20 THE COURT AUGHTRY DIDN'T LIKE THAT LETTER BECAUSE IT
21 SAID THAT HE -- IT WAS FAVORING OR SUPPORTING SOMEBODY ELSE

22 MR FOSTER NOW, AUGHTRY HE DIDN'T -- HE KNEW WE
23 WERE -- HILTON FLEW SOMEONE TO COLUMBIA FROM L A TO ATTEND
24 THE MEETING WITH GARFIELD I MEAN, HE KNEW HILTON WAS -- WE
25 WANTED THE GARFIELD TEAM TO WIN AT THIS -- AT THE SECOND

1 PHASE WE WANTED THIS TO BE A HILTON-MANAGED HOTEL AUGHTRY
2 WAS OFFERING A HILTON FRANCHISE, THAT WAS NOT OUR PREFERENCE
3 WE WANTED TO BE THE HILTON-MANAGED HOTEL WHAT HE WAS MAD
4 ABOUT WAS WE SAID YOU'RE NOT ALLOWED TO -- YOU HAVEN'T EVEN
5 SUBMITTED AN APPLICATION YET, AND HE WRITES AND SAYS, "I KNOW
6 THAT I KNOW THE RULES I NEVER SAID THAT I HAVE GUARANTEED
7 THIS " BUT THE OTHER THING HE DIDN'T LIKE IS WE SIMPLY SAID,
8 "WE SUPPORT YOU FOR A HILTON GARDEN INN," AND WHAT HE HAD
9 TOLD THE CITY WAS---

10 THE COURT WHO IS -- JUST FOR THE RECORD, HE IS?

11 MR FOSTER AUGHTRY DID NOT LIKE THAT WE HAD PUT IN
12 WRITING "WE SUPPORT YOU FOR A HILTON GARDEN INN " SO HE IS
13 WRITING TO HILTON SAYING, "WAIT A MINUTE MY CREDIBILITY IS
14 AT STAKE HERE, AND YOU NEED TO TELL THE CITY THAT WE TALKED
15 ABOUT IN ADDITION TO A HILTON GARDEN INN, A FULL-SERVICE
16 FRANCHISE HILTON " I MEAN WE DIDN'T REALLY KNOW THAT WAS
17 GOING ON

18 SO HE WRITES US TO CLARIFY THE RECORD -- EVERYTHING IN --
19 THIS -- IN THIS LETTER IS TRUTHFUL, AND HE SIMPLY SAYS, YOU
20 KNOW, "I DID NOT REPRESENT THAT I'VE BEEN APPROVED FOR A
21 HILTON I HAVE SEVEN OTHER PROPERTIES I KNOW THE PROCESS,"
22 AND THEN HE GOES ON TO SAY, BRIAN FRYE - HE'S THE FRANCHISE
23 DIVISION MANAGER - "YOU UNDERSTAND IT'S UNTENABLE FOR ME TO
24 BE PERCEIVED AS HAVING REPRESENTED A PROPOSAL WITHOUT
25 HILTON'S BLESSING YOU, STEVE AND I KNOW THAT OUR HILTON

1 ALTERNATIVE" - AND THAT'S THE SCALED-DOWN FULL-SERVICE
2 HILTON, NOT HILTON GARDEN INN - "WAS WELL DISCUSSED AMONG THE
3 THREE OF US AND THAT FACT NEEDS TO BE AFFIRMATIVELY CONVEYED
4 TO THE CITY SO MY CREDIBILITY IS NOT QUESTIONED "

5 SO WE GET THAT LETTER AND WE TALK AMONGST OURSELVES AND
6 WE SAY HE'S RIGHT EVERYTHING HE SAYS IN THIS LETTER IS
7 CORRECT SO WE WRITE AND SAY OKAY WE'RE OUT HERE IN L A
8 WE DON'T KNOW WHAT'S GOING ON IN COLUMBIA BUT WE WANT TO SET
9 THE RECORD STRAIGHT EVERYTHING WE SAID ABOUT THE HILTON
10 GARDEN INN AND THE GARFIELD TEAM FOR THE FULL-SERVICE MANAGED
11 HILTON WAS CORRECT AND EVERYTHING THAT MR AUGHTRY SAID IS
12 CORRECT

13 SO WE BASICALLY -- THESE TWO LETTERS -- AND THEN THE
14 THIRD LETTER SAYING WE AGREE WITH THE FIRST TWO WE'VE GOT
15 THREE DIFFERENT PRODUCTS AT PLAY HERE WE HAVE A FRANCHISE
16 HILTON GARDEN INN WE HAVE A FULL-SERVICE HILTON-MANAGED
17 HOTEL, AND NOW AUGHTRY HAS INJECTED THIS KIND OF HYBRID FULL-
18 SERVICE HILTON FRANCHISE WHICH HE HAD A RIGHT TO DO AND WE
19 JUST SAID YES IF HE CHANGED HIS TUNE IN THE PRESENTATION
20 WE HAVE NO PROBLEM WITH THAT SO I THINK THAT'S IT

21 SO, YOUR HONOR WHAT WE'RE SAYING IS, GOING BACK TO
22 THE -- I WANTED TO GIVE YOU SOME OF THOSE FACTS BECAUSE
23 THEY'RE GOING TO BE -- THEY'LL PLAY A ROLE DOWN THE ROAD
24 BUT THE M O U , WHAT WE'RE ASKING THE COURT TO DO IS LOOK AT
25 THE FOUR CORNERS OF THAT DOCUMENT DOES IT REALLY PROVIDE

1 CONTRACTUAL OBLIGATIONS? NOW WE'RE NOT DENYING THAT IT HAS
2 A LOT OF NEGOTIATED TERMS IN IT BUT WHEN YOU LOOK AT THE --
3 WHAT I SAY IS THE CRITICAL TERMS THE MONEY, WHEN YOU LOOK AT
4 THE MONEY, THIS WAS SIMPLY MEMORIALIZING A BASELINE FOR US TO
5 CONTINUE TALKING

6 THE GARFIELD AND DEVELOPER'S FEE -- THEY KNEW THAT THIS
7 WAS AN AT-RISK BUSINESS PROPOSAL THAT'S WHY WE SAY IT'S
8 SIMILAR TO A LETTER OF INTENT THE CONTRACT DOCUMENT, NOT US
9 LAWYER ARGUMENT, BECAUSE -- I MEAN, WHEN I READ THE BRIEFS, I
10 GET VERY CONFUSED ALSO WE'RE ALL PULLING OUT PROVISIONS
11 SAYING THIS AND SAYING THAT BUT WHEN YOU LOOK AT THE MONEY
12 GARFIELD KNEW THIS WAS AN AT-RISK BUSINESS VENTURE IT
13 WAS THE -- THE CITY WAS NOT GOING TO PAY HIM HIS MANAGEMENT
14 FEE UNDER THIS M O U UNTIL BOND CLOSING, AND WE'VE CITED
15 SEVERAL THINGS IN OUR BRIEF WHERE THAT IS VERY CLEAR TO
16 EVERYBODY

17 IT'S A BUSINESS RISK, AND WHEN THESE THREE TRIGGER
18 ~~EVENTS OCCUR-- BOND CLOSING -CONSTRUCTION PHASE, CERTIFICATE~~
19 OF OCCUPANCY - YOU START TO GET PAID BUT THE M O U IS A
20 DOCUMENT LEADING EVERYONE TO A BOND CLOSING THAT'S THE KEY
21 ISSUE HERE

22 THE SECOND KEY ISSUE IS THE APPROXIMATE \$60 MILLION
23 WELL, IF THIS IS A CONTRACT WHY DIDN'T THEY DO IT FOR 60
24 MILLION? WE KNOW BETTER, AS HILTON AND THE CITY OF COLUMBIA
25 WE KNOW THAT EVERYBODY WAS WORKING TOGETHER TO GET THIS DEAL

1 PUT TOGETHER IN THE \$60 MILLION RANGE YOU DON'T HAVE MANY
2 CONTRACTS THAT ALLOW YOU TO HAVE A 20 PERCENT FLUCTUATION IN
3 PRICE THIS CONTRACT DID THIS DOCUMENT DID
4 THIS DOCUMENT WENT FROM 60 TO 71 MILLION, AND WE DIDN'T
5 COMPLAIN AT THE FEBRUARY 11 MEETING NOW WAIT A MINUTE
6 GUYS WHAT ABOUT THE CONTRACT DOCUMENT? WE ALL KNEW IT
7 WASN'T A CONTRACT WE HAD TO VOTE THE CITY OF COLUMBIA HAD
8 TO VOTE THAT IS WHY THIS BECOMES A UNILATERAL DECISION
9 THE CITY GETS TO DECIDE THESE DEVELOPERS KNEW THAT IF THE
10 CITY WASN'T SATISFIED, THIS DEAL IS DONE
11 NOW, THEY HAVE TURNED THIS DOCUMENT INTO A BINDING
12 CONTRACT BUT NO ONE HAS FINANCIAL TERMS THAT SUGGEST A
13 BINDING CONTRACT NO ONE OPERATED AS IF IT WAS A BINDING
14 CONTRACT EVERYONE OPERATED AS IF IT WAS JUST AN AT-RISK
15 BUSINESS VENTURE THE DOCUMENT ITSELF - AND WE HIGHLIGHTED
16 THIS IN THE REPLY BRIEF - IT HAD PROVISIONS IN THERE IF THE
17 FINANCING IS NEVER CONCLUDED, WE WILL REIMBURSE YOU SOME OF
18 YOUR DOCUMENTED EXPENSES EVERYONE KNEW THAT THIS MIGHT NOT
19 GO FORWARD
20 SO WHAT WE'RE SAYING IS WHEN YOU LOOK AT THE DOCUMENT
21 AS THE COURT IT DOESN'T HAVE SUFFICIENT INDICIA OF BINDING
22 THE PARTIES IT IS CLEARLY A DOCUMENT TO SAY, "LET'S ALL
23 PROCEED IN GOOD FAITH HERE'S WHAT WE'VE DONE SO FAR, AND
24 HERE'S WHAT MORE WE HAVE TO DO WE UNDERSTAND THINGS ARE
25 GOING TO CHANGE NO ONE IS GOING TO BE BOUND TO THIS

1 NUMBER " AND THAT'S EXACTLY WHAT HAPPENED AND THE CITY HAD
2 THE ABSOLUTE RIGHT ON FEBRUARY 11 TO VOTE IN THEIR FAVOR, MY
3 FAVOR, AND IT HAD THAT SAME RIGHT ON MARCH 15 TO VOTE AGAINST
4 ME AND GARFIELD

5 THE COURT YOU MEAN THE 17TH?

6 MR FOSTER THE 17TH SORRY YEAH, THE NUMBERS CAME
7 IN ON THE 15TH OF MARCH THEY HAD THE ABSOLUTE RIGHT TO
8 VOTE, AND HILTON WAS SHOCKED BY THIS AS WELL

9 THE COURT WHAT WOULD -- SO YOU'RE CLAIMING -- PART OF
10 WHAT YOU'RE CLAIMING IS THAT IF -- IF IT'S A BINDING
11 CONTRACT THEN THE PLAINTIFFS COULD HAVE BEEN HELD TO THE 60
12 MILLION

13 MR FOSTER YEAH YEAH, THAT'S EXACTLY WHAT WE'RE
14 CLAIMING AND -- BUT WE ALL KNOW BETTER THAN THAT WE ALL
15 KNOW NO ONE INTENDED THAT BUT, YEAH THIS IS A CONTRACT
16 M O U -- IF THIS WAS A BINDING CONTRACT DELIVER THIS FOR
17 US, AND THAT'S WHY I SAY ALL THE LAWYERS ARE TALKING ABOUT
18 DIFFERENT PROVISIONS --JUST LOOK AT THE MONEY-- THE MONEY --
19 WILL SHOW YOU -- PEOPLE GET REAL SERIOUS WHEN THEY TALK ABOUT
20 FEES AND PRICES THIS WAS A MOVING DOCUMENT THAT EVERYONE
21 UNDERSTOOD LET'S DO THE BEST WE CAN, GUYS, AND THE CITY HAS
22 THE RIGHT TO PULL THE PLUG THANK YOU FOR VOTING IN OUR
23 FAVOR ON FEBRUARY 11 WE'RE GOING TO SUE YOU BECAUSE OF MAY
24 17TH EXACT SAME EVENT THEY WON THEY LOST NOW WE SUE
25 BECAUSE WE LOST YOUR HONOR I THINK THAT'S ALL ON THE

1 M O U

2 THE COURT AND THEN I THINK WHAT YOU INDICATED AT THE
3 VERY BEGINNING IS THAT MR HINSON WAS GOING TO RESPOND TO
4 WHAT YOU HAVE TO SAY AND THEN YOU'RE GOING TO TALK ABOUT 11,
5 12, AND 13

6 MR FOSTER I'M GOING TO TALK ABOUT -- THAT'S THE --
7 11 12, AND 13 IS THE NOERR-PENNINGTON I'M GOING TO TALK
8 ABOUT THAT IN ADDITION TO -- BECAUSE THEY PROBABLY KNOW THE
9 M O U IS NOT A BINDING CONTRACT, THEY'VE ALSO SUED US FOR A
10 BREACH OF THE ORAL CONTRACT---

11 THE COURT ALL RIGHT

12 MR FOSTER ---OF EXCLUSIVITY AND THEY'VE ALSO SUED US
13 FOR BREACH OF CONTRACT WITH FRAUD SO I'M GOING TO ADDRESS
14 THE ORAL CONTRACT AND FRAUD VERY QUICKLY

15 THE COURT RIGHT NOW

16 MR FOSTER NO, I'M GOING TO LET THEM ARGUE THE M O U
17 SO WE CAN GET ALL THAT IN FRONT OF THE COURT, AND THEN I'LL
18 JUST QUICKLY GO THROUGH THE ORAL CONTRACT AND THE FRAUD

19 THE COURT ARE YOU OKAY?

20 COURT REPORTER YES SIR

21 THE COURT ANYBODY NEED TO TAKE A BREAK? ALL RIGHT
22 MR HINSON?

23 MR HINSON YOUR HONOR, MR FOSTER SAID THAT THIS
24 DOCUMENT, THIS M O U WE CONTEND WAS THE CONTRACT HE SAID
25 SOMETHING TO THE EFFECT OF IT WAS NOTHING MORE THAN FURTHER

1 TASKS AND DUTIES TO TAKE PLACE IN THE FUTURE AND I WOULD
2 PRESENT TO THE COURT WHAT MORE IS A CONTRACT THAN AN
3 AGREEMENT FOR FURTHER TASKS AND DUTIES TO TAKE PLACE IN THE
4 FUTURE?

5 THESE SOPHISTICATED BUSINESS ENTITIES SPENT FOUR MONTHS
6 DRAFTING THIS MEMORANDUM OF UNDERSTANDING THEY SPENT FROM
7 DECEMBER 11TH UNTIL APRIL 17TH WORKING ON THIS DOCUMENT IF
8 THEY DID NOT THINK THIS WAS A BINDING AGREEMENT, I SUBMIT TO
9 YOU THIS MUCH TIME WOULD NOT HAVE BEEN SPENT ON IT THIS
10 DOCUMENT STATES ON PAGE 1 "IN CONSIDERATION OF THE FOREGOING
11 AND MUTUAL PROMISES CONTAINED HEREIN AND OTHER VALUABLE
12 CONSIDERATION, THE SUFFICIENCY AND RECEIPT OF WHICH IS HEREBY
13 ACKNOWLEDGED THE PARTIES AGREE AS FOLLOWS "

14 YOUR HONOR THIS IS QUINTESSENTIAL CONTRACT LANGUAGE
15 THIS DOCUMENT DOES NOT SAY, "WE DO NOT INTEND TO BE BOUND BY
16 THIS AGREEMENT " BUT IT IMPLIES THE EXACT OPPOSITE, THAT THEY
17 ARE -- THEY ARE SPELLING OUT THAT THEY RECOGNIZE THE VALUABLE
18 CONSIDERATION THAT'S BEING EXCHANGED HERE

19 THE COURT HOW ABOUT THE NUMBER ONE UNDER THE GENERAL
20 CONDITIONS?

21 MR HINSON WELL, YOUR HONOR, I WOULD RESPOND TO THAT
22 THAT THE CITY -- THAT THE TEAM'S DUTY UNDER THIS -- UNDER
23 THIS M O U UNDER THIS CONTRACT, WAS TO PUT TOGETHER A
24 FEASIBLE HOTEL PROJECT, AND IF THEY COULD NOT DO THAT THEN
25 THIS DOCUMENT WOULD -- IT WOULD BE UNENFORCEABLE THEY WOULD

1 HAVE FAILED TO MEET THEIR END OF THE BARGAIN TO PUT TOGETHER
2 A FEASIBLE HOTEL AND FEASIBLE YOUR HONOR THAT IS
3 SOMETHING THAT -- WE HAVE A DISPUTE OVER WHAT FEASIBLE MEANT
4 THE PLAINTIFFS WILL PRESENT AN EXPERT FROM P K F , THE
5 CONSULTING FIRM, WHO WILL SAY THIS WAS A FEASIBLE PROJECT AND
6 THAT THE CITY, IF THEY WERE ACTING IN GOOD FAITH, HAD AN
7 OBLIGATION TO GO FORWARD WITH IT BECAUSE WHAT GARFIELD TRAUB
8 AND THE REST OF THE TEAMS PUT TOGETHER COULD HAVE BEEN BUILT
9 COULD HAVE BEEN FINANCED, COULD HAVE BEEN FUNDED

10 YOUR HONOR, MR FOSTER MAKES IT SOUND LIKE THERE'S
11 NOTHING MORE GOING ON HERE IN THIS DOCUMENT THAN JUST
12 NEGOTIATIONS AND TALKS THIS TEAM WORKED FOR NEARLY A YEAR
13 TO PUT TOGETHER A HOTEL THEY WEREN'T JUST SITTING AROUND
14 TALKING ABOUT WELL, CAN WE AGREE TO THIS? CAN WE AGREE TO
15 THAT? THEY PUT TOGETHER ALL OF THIS WORK THIS WAS
16 WHAT THEIR -- THIS IS WHAT'S NECESSARY TO BUILD A HOTEL

17 ULTIMATELY, WHAT THIS HOTEL WOULD BECOME WOULD BE A
18 QUALIFIED MANAGEMENT AGREEMENT IT WOULD BE A ROOM BLOCK
19 AGREEMENT IT WOULD BE ALL THESE THINGS THERE WAS NOT ONE
20 DOCUMENT AT ONE PERIOD OF TIME WHERE THEY WOULD SAY OKAY
21 NOW WE HAVE A CONTRACT THAT WAS NEVER GOING TO OCCUR THE
22 CONTRACT WAS RIGHT HERE AND IT'S WE'RE GOING TO MOVE
23 FORWARD TO BUILD A HOTEL, AND THESE ARE THE STEPS YOU, TEAM
24 MEMBERS HAVE TO DO TO BUILD THIS HOTEL FOR US AND IF YOU
25 FAIL TO DO IT, WE DON'T -- WE DON'T HAVE TO PAY YOU ANYTHING

1 WE, THE CITY OWE YOU NOTHING BUT THE CITY IF THEY MADE
2 THAT DETERMINATION THEY HAD TO DO SO IN GOOD FAITH THERE
3 WAS AN OBLIGATION FOR BOTH SIDES AND IF YOU READ THIS
4 DOCUMENT, THEY'RE SPELLED OUT VERY SPECIFICALLY

5 AND I WOULD POINT THE COURT - I LEFT MY NOTEBOOK EXCUSE
6 ME - TO THE APERM CASE WHICH WAS CITED IN MY BRIEF THAT
7 SPECIFICALLY STATES AND I QUOTE "A CONTRACT IS NOT
8 UNENFORCEABLE SIMPLY BECAUSE ITS PERFORMANCE IS AS TO
9 PARTICULAR DETAILS LEFT OPEN TO SUBSEQUENT AGREEMENT OF THE
10 PARTIES " THEN IT GOES ON TO SAY, "THIS IS ESPECIALLY TRUE
11 WHERE THE CONTRACT PROVIDES GUIDELINES FOR SUBSEQUENT
12 AGREEMENT " YOUR HONOR THAT'S WHAT THIS DOCUMENT IS THERE
13 ARE AGREEMENTS LEFT TO BE NEGOTIATED THE TEAM WORKED TO
14 NEGOTIATE THOSE AGREEMENTS AND SOUTH CAROLINA LAW WOULD HOLD
15 THAT THAT DOESN'T MEAN THAT THIS CONTRACT -- THAT THIS IS NOT
16 A BINDING CONTRACT

17 A LOT OF WHAT MR FOSTER TALKS ABOUT IS THE INTENT OF
18 THE PARTIES YOUR HONOR, I WOULD SUBMIT THAT'S A JURY --
19 QUESTION - TO DETERMINE THE INTENT OF THE PARTIES IN THIS
20 DOCUMENT - IF IT CAN'T BE DETERMINED FROM THE FOUR CORNERS OF
21 THIS DOCUMENT WELL, I WOULD POINT THE COURT AGAIN TO THE
22 LANGUAGE OF VALUABLE CONSIDERATION, THE SUFFICIENCY AND
23 RECEIPT WHICH IS HEREBY ACKNOWLEDGED MR FOSTER, YOU KNOW
24 TAKES ISSUE THAT THAT WASN'T THE PARTIES' INTENT, AND I
25 WOULD -- I WOULD ADVANCE THAT IF THE -- THAT THE INTENT IS IN

1 DISPUTE AND THAT SUMMARY JUDGMENT WOULD BE INAPPROPRIATE AT
2 THIS TIME

3 THE COURT ALL RIGHT ALL RIGHT MR FOSTER WHERE IS
4 THE 60 MILLION OTHER THAN IN THE -- UNDER THE ROLE OF THE
5 CITY UNDER ROMAN NUMERAL FIVE? THAT'S THE ESSENCE OF IT?

6 MR FOSTER THAT'S -- THAT'S IT THAT'S IT YOUR
7 HONOR

8 MR HINSON YOUR HONOR IF I COULD ADDRESS THAT 60
9 MILLION FOR JUST A SECOND

10 THE COURT YEAH, BECAUSE MR FOSTER KEPT COMING BACK
11 WELL, YOU'VE GOT TO LOOK AT THE MONEY WOULD YOU BE
12 OBLIGATED TO SECURE THE COMPLETION OF THIS PROJECT FOR \$60
13 MILLION?

14 MR HINSON WELL, YOUR HONOR, I BELIEVE THAT WOULD HAVE
15 BEEN -- THAT WOULD HAVE BEEN THE CASE IF WE COULD NOT PUT
16 TOGETHER A PROJECT THAT COULD HAVE BEEN BUILT FOR \$60
17 MILLION, THEN IT WOULDN'T HAVE BEEN A FEASIBLE PROJECT

18 THE COURT COULD YOU PUT TOGETHER THAT PROJECT?

19 MR HINSON WELL YOUR HONOR, LET ME JUST ADDRESS
20 WHAT'S GOING ON HERE WITH THE 71 AND \$73 MILLION THERE ARE
21 A LOT OF CHANGES THAT THE CITY IS MAKING TO WHAT THEY WANT
22 IF YOU LOOK ON PAGE THREE, THE SECOND PARAGRAPH TALKS ABOUT
23 THE PARKING FACILITY AND IT READS, "THE CITY HAS DEVELOPED A
24 NEARBY PARKING FACILITY OF APPROXIMATELY 800 SPACES " WELL
25 THAT CHANGED AND THAT WAS AN AMENDMENT TO THIS -- TO THIS

1 AGREEMENT AND WHAT IT WAS WAS THAT THE COST OF DOING THAT
2 PARKING FACILITY WOULD BE INCURRED AS PART OF THE \$60
3 MILLION

4 THE COURT AS PART OF IT OR ON TOP OF IT?

5 MR HINSON WELL, ON TOP OF I GUESS

6 THE COURT WAS THE 71 MILLION IN FEBRUARY OF '04
7 INCLUSIVE OF THINGS OTHER THAN WHAT THE 60 MILLION INCLUDED
8 AT THE TIME OF THE M O U ? IS THAT QUESTION CLEAR?

9 MR HINSON DID IT -- WAS THERE MORE IN THAT 71 MILLION
10 THAN THERE WAS IN THIS 60 MILLION?

11 THE COURT YES, SIR

12 MR HINSON YES, SIR, THERE WAS MORE IN THERE ANOTHER
13 THING THAT'S DRIVING UP THE COST THE CITY HIRED A
14 CONSULTANT, STRATEGIC ADVISORY GROUP, TO HELP THEM WITH THIS
15 THE FEES THAT STRATEGIC ADVISORY GROUP WOULD INCUR IN
16 ADVISING THE CITY WERE TO BE ROLLED UP IN THIS 60 MILLION
17 AND I DON'T HAVE THE NUMBERS RIGHT IN FRONT OF ME, BUT THAT
18 PRICE JUST SKYROCKETED BECAUSE THE CITY WANTED MORE FROM- --

19 STRATEGIC ADVISORY GROUP THE CITY SAID STRATEGIC ADVISORY
20 GROUP, STAY ON AND DO A LITTLE -- DO NOT A LITTLE BIT MORE
21 DO A LOT MORE FOR US AND IT WAS SEVERAL TIMES WHAT THE
22 ORIGINAL AGREEMENT WITH STRATEGIC ADVISORY GROUP WAS TO BE
23 PAID

24 SO WHEN THIS DOCUMENT WAS MADE, THEY WERE ANTICIPATING
25 X AMOUNT OF FEES FROM STRATEGIC ADVISORY GROUP THE CITY

1 SAID HEY WE WANT S A G TO DO MORE THE TEAM SAYS, OKAY,
2 WE'LL ROLL THAT INTO THE BONDS THE PRICE KEEPS RISING
3 THAT'S AN AMENDMENT TO THE AGREEMENT THE CITY WANTS MORE
4 THE TEAM SAYS, OKAY, WE'LL ROLL THAT INTO THE BONDS

5 SO I THINK TO GET HUNG UP ON THESE NUMBERS IS A LITTLE
6 BIT OF A RED HERRING THE NUMBERS ARE RISING BECAUSE
7 EVERYONE IS AGREEING WITH IT, PLUS AGAIN LET'S KEEP IN MIND
8 THAT ON FEBRUARY 11TH THE CITY VOTES TO APPROVE THIS I
9 MEAN THE CITY AGREES THAT THIS NUMBER AS TO WHAT'S CAUSED
10 THIS NUMBER TO RISE

11 THE COURT WELL, JUST FOR THE RECORD IT'S NOT THE
12 CITY IT'S THE NONPROFIT CORPORATION, TO THE EXTENT THAT
13 MAKES A DIFFERENCE

14 MR HINSON OKAY WELL, THE CITY HAS ADVOCATED THAT
15 THEY'RE THE -- OR ADVANCED THAT THEY'RE THE SAME THING AND
16 ACTUALLY KEPT US FROM DEPOSING THE MEMBERS OF THE NONPROFIT
17 CORPORATION

18 THE COURT I SEE

19 MR HINSON CLAIMING LEGISLATIVE PRIVILEGE

20 THE COURT OKAY ALL RIGHT IF THINGS -- OR WHAT IS
21 IT -- WHAT IS THE PLAINTIFFS' CONTENTION AS TO WHERE THINGS
22 STARTED TO CUT AGAINST YOU IN AN ACTIONABLE WAY? IN OTHER
23 WORDS, WHAT SEQUENCE OR WHEN DID THE SEQUENCE OF EVENTS START
24 AND WHAT HAPPENED THAT MADE THIS TURN INTO A SITUATION WHERE
25 YOU HAD A VIABLE CAUSE OF ACTION AGAINST THESE DEFENDANTS?

1 WHAT DID THEY DO AND WHEN DID THEY DO IT?

2 MR HINSON WELL YOUR HONOR, THE -- LET ME SEE IF I
3 CAN FIND

4 THE COURT IT WOULD PROBABLY BE IN THE VICINITY OF
5 APRIL 30TH OF '04?

6 MR HINSON NO, SIR WELL, AS FAR AS THE CITY---

7 THE COURT WELL, YEAH

8 MR HINSON MARCH 17TH---

9 THE COURT START WITH THE CITY

10 MR HINSON OKAY WELL, YOUR HONOR, HERE WE ARE AT
11 FEBRUARY 11TH EVERYTHING IS GOING GOOD I MEAN, THE CITY
12 HAS VOTED TO APPROVE THE BOND FINANCING AND INCLUDED AS AN
13 ATTACHMENT TO MR GARFIELD'S AFFIDAVIT, STANDARD & POOR'S,
14 JANUARY 20TH, 2004, HAD WRITTEN A LETTER INDICATING THAT THEY
15 PREDICTED AN INVESTMENT GRADE RATING WOULD BE GIVEN TO THE
16 HOTEL BONDS SO EVERYTHING'S -- EVERYTHING'S ON TRACK
17 EVERYTHING IS GOING FEBRUARY 17TH 2004, AMBAC WRITES A
18 COMMITMENT FOR FINANCIAL GUARANTEE -- THOSE ARE EXHIBITS O
19 AND P IN MR GARFIELD'S AFFIDAVIT

20 THE COURT ALL RIGHT

21 MR HINSON SO EVERYTHING'S -- EVERYTHING'S GOING WELL
22 IN FACT, DURING THIS FEBRUARY 11TH MEETING COUNCIL MEMBER
23 DEVINE STATED THAT THE CITY HAD TO GO FORWARD WITH THE
24 COMMITMENTS THAT HAD BEEN MADE YOUR HONOR I SUBMIT TO YOU
25 THAT SHOWS THE INTENT OF THE CITY THEY THOUGHT THEY HAD A

1 COMMITMENT TO THIS TEAM BECAUSE A VIABLE HOTEL PROJECT HAD
2 BEEN PRESENTED IT HAD BEEN PUT TOGETHER AND SO TO ANSWER
3 YOUR QUESTION THOUGH AS FAR AS -- THE CITY'S BREACH OCCURS
4 RIGHT HERE APRIL 2ND, 2004, WHEN THEY ISSUE THIS NEW R F P
5 NOW, MR FOSTER WOULD ADVANCE THAT MY -- THAT MY CLIENTS
6 HAVE SOMEHOW ACQUIESCED TO THIS BREACH BY SUBMITTING A BID
7 RESPONSIVE TO THIS R F P YOUR HONOR MY CLIENTS WERE JUST
8 TRYING TO MITIGATE THEIR DAMAGES

9 THE COURT AT THAT POINT WAS THERE ANY COMMUNICATION
10 BETWEEN YOUR CLIENT AND THE CITY OR ANY PARTY SAYING "WAIT A
11 MINUTE HOW ABOUT WHAT WE'VE BEEN DOING FOR THE LAST COUPLE
12 OF YEARS?"

13 MR HINSON I THINK THERE WAS A LOT OF COMMUNICATION TO
14 THAT RESULT

15 THE COURT WAS THERE ANYTHING IN WRITING? FOR EXAMPLE
16 WE'RE SUBMITTING THIS NEW PACKAGE OR THESE TWO NEW PACKAGES
17 BUT WE'RE NOT SATISFIED THAT WE'VE BEEN DEALT WITH FAIRLY OR
18 THAT THE CONTRACT THAT YOU CLAIM EXISTS HASN'T BEEN BREACHED
19 BECAUSE OF THIS NEW REQUEST FOR A PROPOSAL

20 MR HINSON NO, SIR, I DON'T KNOW OF ANYTHING THAT'S IN
21 WRITING, AND IT CAUGHT MY CLIENTS AND THE WHOLE TEAM
22 COMPLETELY OFF GUARD BECAUSE THERE WAS NEVER A DETERMINATION
23 MADE BY THE CITY THAT THIS WASN'T A FEASIBLE PROJECT

24 THE COURT WHERE DID EDENS AND AVANT GO WHEN THIS NEW
25 R F P REQUEST CAME OUT?

1 MR HINSON EDENS AND AVANT THOUGHT THERE WAS A LOT OF
2 HANKY PANKY ON THE WALL MY CLIENT IS IN DALLAS AND ISN'T
3 QUITE AS CONNECTED WITH THE COLUMBIA---

4 THE COURT IS THAT WHAT MR LUMPKIN SAID IN HIS
5 DEPOSITION? DID HE SAY THAT HE THOUGHT SOMETHING WAS GOING
6 ON?

7 MR HINSON I'M NOT SURE THOSE WERE HIS WORDS, NO, SIR

8 MR FOSTER NO, YOUR HONOR, HE DID NOT SAY THAT IN HIS
9 DEPOSITION

10 MR HINSON THAT WOULD BE TESTIMONY I GUESS FROM MY
11 CLIENTS THAT THAT'S -- THAT HE CHOSE TO BOW OUT AT THIS
12 POINT

13 THE COURT HIS DEPOSITION IS IN SOME RESPECTS BARELY
14 INNOCUOUS BASICALLY JUST SAYING WHAT HIS OBSERVATIONS WERE
15 DIDN'T APPEAR TO COLOR IT ONE WAY OR THE OTHER AT LEAST
16 THAT'S THE WAY I INTERPRETED IT

17 MR HINSON I WOULD THINK THAT'S FAIR, YOUR HONOR HE
18 ~~JUST BOWED OUT I THINK IS THE --- IS THE --~~ I'M SORRY IF I MAY
19 HAVE COLORED THAT WRONG

20 THE COURT YOU ANSWERED THE QUESTION

21 MR HINSON OKAY

22 THE COURT OKAY YOU CAN CONTINUE

23 MR HINSON SO THAT'S WHEN THE CITY HAS BREACHED THEIR
24 CONTRACT THEY HAVE NOT -- THEY HAVE NEVER MADE A
25 DETERMINATION OF INFEASIBILITY THEY JUST ISSUED A NEW

1 R F P MY CLIENTS TRYING TO MITIGATE THEIR DAMAGES
2 RESPONDED TO THIS R F P HAD THEY NOT WE WOULD BE IN HERE
3 TODAY AND HILTON AND THE CITY WOULD BE ARGUING THAT MY
4 CLIENTS DIDN'T MAKE EVERY EFFORT TO MITIGATE THEIR DAMAGES
5 SO THEY COULD -- HAD THEY WON THE SECOND BID, WE WOULDN'T --
6 WE WOULDN'T BE HERE TODAY

7 THE COURT THE CASE THAT YOU MENTIONED EARLIER THAT YOU
8 CITED IN YOUR BRIEF, WAS THAT AN M O U CASE?

9 MR HINSON YOUR HONOR, APERM -- YES, SIR IT WASN'T
10 -- IT WASN'T -- THE DOCUMENT WASN'T ENTITLED AN M O U

11 THE COURT WHAT WAS IT?

12 MR HINSON IT WAS A -- LET'S SEE IN APERM THE
13 CONTRACT PROVIDED THAT AS THE MARKETING PROGRAM ONE PARTY WAS
14 TO PRESENT -- CONTAINED THE MINIMUM AGREED ROYALTY
15 PROVISIONS, THE OTHER PARTY WOULD AGREE TO ARBITRATE THE
16 TERMS OF THE PROGRAM SO THERE WAS THIS WHOLE QUESTION IN
17 APERM LEFT UP TO WHAT THAT ARBITRATION WOULD RESULT IN

18 THE COURT IN ESSENCE WHAT YOU'RE SAYING IS THAT AN
19 AGREEMENT TO AGREE IS A CONTRACT

20 MR HINSON IT CAN BE YES, SIR

21 THE COURT IF THE ELEMENTS OF THE CONTRACT ARE
22 SATISFIED

23 MR HINSON YES SIR AND I THINK---

24 THE COURT AND YOU'RE SAYING AT THE LEAST THAT IT'S A
25 QUESTION OF FACT

1 MR HINSON YES, SIR YES, YOUR HONOR, AND I THINK A
2 LOT OF WHAT -- IF YOU CANNOT -- IF THE PARTIES' INTENT ISN'T
3 CLEAR FROM THIS DOCUMENT -- BUT I WOULD ADVANCE THAT IT IS,
4 THAT IT'S CLEAR THEY WERE INTENDING TO MAKE A CONTRACT, THAT
5 THESE - EXCUSE ME, YOUR HONOR - THAT THESE SOPHISTICATED
6 BUSINESS ENTITIES ARE PUTTING CONTRACT LANGUAGE IN HERE
7 THEY'RE NOT DOING THAT OUT OF IGNORANCE THEY KNOW WHAT
8 THEY'RE DOING

9 THE COURT THAT'S ONE OF THE QUESTIONS THAT I FORGOT TO
10 ASK MR FOSTER, PROBABLY BECAUSE HE DOESN'T REPRESENT THE
11 CITY I WAS JUST WONDERING WHY THERE WASN'T SOME ESCAPE
12 VALVE PUT INTO THE CONTRACT THAT BASICALLY SAYS LOOK HERE
13 EVERYBODY THIS IS NOT A CONTRACT THIS IS -- THIS IS AN
14 ONGOING EFFORT AT NEGOTIATIONS TO TRY TO GET TO THE END OF
15 WHERE A BINDING CONTRACT WOULD BE SIGNED THAT'S NOT IN THAT
16 EIGHT-PAGE OR SEVEN-PAGE DOCUMENT IS IT?

17 MR FOSTER NO IT'S NOT

18 THE COURT OKAY --AND --OF COURSE, MR FOSTER'S POSITION
19 IS IT DOESN'T MATTER TO HILTON BECAUSE MR HILTON DIDN'T DO
20 ANYTHING TO PUT THAT TOGETHER ANYWAY IS THAT RIGHT? Y'ALL
21 SIGNED IT, I THINK

22 MR FOSTER WE SIGNED IT, BUT YOU'RE CORRECT THAT IT
23 DOES NOT HAVE THAT LANGUAGE IF IT DID HAVE THAT LANGUAGE,
24 WE WOULDN'T EVEN BE HERE TODAY

25 THE COURT ALL RIGHT

1 MR HINSON IF IT HAD THAT LANGUAGE, IT WOULD BE A
2 DIFFERENT STORY BUT THAT WAS -- THERE'S AT A MINIMUM, YOUR
3 HONOR A DISPUTE AS TO WHAT THE INTENT IS BEHIND THIS
4 DOCUMENT, AND I THINK SUMMARY JUDGMENT WOULD BE
5 INAPPROPRIATE IF I COULD---

6 THE COURT AND YOU THINK A JURY COULD SORT ALL THIS
7 OUT

8 MR HINSON I BELIEVE THAT'S WHAT'S APPROPRIATE, SIR,
9 AND IF I COULD---

10 THE COURT NOT WHETHER THEY COULD BUT SHOULD

11 MR HINSON THEY SHOULD YES SIR MR SUGGS JUST
12 BROUGHT ME A LITTLE NOTE IN REGARD TO YOUR QUESTION EARLIER
13 IF MY CLIENTS COMPLAINED YOU ASKED IF THERE WAS ANY WRITTEN
14 DOCUMENTATION THERE IS -- AND I HAD FORGOTTEN THIS THERE
15 IS A LETTER IN EVIDENCE OF I S LEEVY JOHNSON TO THE CITY
16 COMPLAINING ABOUT A MEMBER OF MR AUGHTRY'S TEAM BEING IN ON
17 THESE PRESENTATIONS THAT MY -- MY CLIENTS WERE COMPLAINING
18 THAT THIS HAD NOT BEEN A FAIR PROCESS SO THERE IS WRITTEN
19 EVIDENCE OF---

20 THE COURT WHICH PRESENTATIONS ARE THOSE?

21 MR HINSON THESE ARE THE---

22 THE COURT FINALIST TEAM PRESENTATIONS?

23 MR HINSON YES YES, YOUR HONOR

24 THE COURT DIDN'T YOUR TEAM MAKE A PRESENTATION ALSO?

25 MR HINSON WE DID

1 **THE COURT** ARE YOU SAYING THAT THAT WAS INDICATIVE OF
2 YOUR OBJECTION TO ANYBODY ELSE'S INVOLVEMENT? IF YOU COULD
3 POINT ME TO THAT COMMUNICATION, MAYBE I COULD GET A BETTER
4 FLAVOR OF IT IF IT'S NOT IN WHAT I'VE GOT---

5 **MR SUGGS** LET ME SEE IF I CAN, YOUR HONOR I DON'T
6 THINK IT'S IN WHAT YOU'VE GOT, BUT I THINK WE CAN GET IT OVER
7 TO YOU IT'S AN EXHIBIT TO ONE OR MORE OF THE DEPOSITIONS,
8 AND MR JOHNSON WAS REPRESENTING THE TEAM AT THE TIME

9 **THE COURT** I SEE OKAY ALL RIGHT ALL RIGHT SO,
10 IN ESSENCE, YOU'RE SAYING THAT IT IS A FAIRLY SIMPLE PROCESS
11 OF WHETHER OR NOT I CAN RULE AS A MATTER OF LAW THAT NO
12 CONTRACT EXISTED

13 **MR HINSON** YES, YOUR HONOR

14 **THE COURT** AND IF YOU GET PAST THE NUMBER OF COMMAS OR
15 ZEROS, IF THIS WERE OVER \$60 INSTEAD OF 60 MILLION YOU'RE
16 SAYING THAT THE LEGAL ISSUE WOULD BE THE SAME

17 **MR HINSON** YES YOUR HONOR

18 **THE COURT** AND IT MAY JUST NOT HAVE BEEN PURSUED
19 BECAUSE IT MIGHT NOT HAVE BEEN AS IMPORTANT AND WHAT ARE
20 THE DAMAGES THAT YOUR CLIENTS ARE SEEKING?

21 **MR HINSON** WELL, YOUR HONOR WE'RE SEEKING THE
22 DEVELOPMENT FEE WE WOULD HAVE EARNED

23 **THE COURT** AND MR FOSTER SAID THAT THAT WAS IN PHASES,
24 AND I SUPPOSE YOUR RESPONSE TO THAT WOULD BE WE NEVER GOT A
25 CHANCE TO CARRY IT THROUGH TO THOSE PROGRESSIVE STAGES

1 MR HINSON YES YOUR HONOR

2 THE COURT SO THE 4 75 PERCENT OF -- HOW MUCH MONEY
3 WOULD YOU BE CLAIMING YOU'RE ENTITLED TO? 71 OR 73 AND A
4 HALF OR 60?

5 MR HINSON I THINK, YOUR HONOR, WE---

6 THE COURT 60 IS IN THE CONTRACT

7 MR HINSON YES YOUR HONOR I THINK 71 -- 71 IS WHAT
8 THE---

9 THE COURT CONTRACT -- YOU SAY IT'S A CONTRACT

10 MR HINSON YES YOUR HONOR 71 IS WHAT THE CITY HAD
11 APPROVED AND I WOULD ADVANCE THAT THAT WAS BY -- AGAIN BY
12 AGREEMENT OF THE PARTIES I MEAN, THEY HAD AMENDED THIS
13 CONTRACT

14 THE COURT ALL RIGHT

15 MR HINSON THE LEVEL HAD GONE UP

16 THE COURT ALL RIGHT HELP ME OUT HERE THOUGH IF THE
17 M O U IS A CONTRACT, IF THE NONPROFIT CORPORATION - OR YOU
18 CALL IT THE CITY - VOTES TO APPROVE 71, IS THAT IN ANYTHING
19 OTHER THAN MINUTES? WAS THAT EVER REDUCED TO AN ADDENDUM TO
20 THE M O U OR IN ANY OTHER WRITTEN INSTRUMENT SIGNED BY ALL
21 OF THESE PARTIES THAT SIGN -- ALL -- EVERYBODY SIGNED IT
22 SEPARATELY

23 MR HINSON NO YOUR HONOR THEY DID NOT MAKE A
24 WRITTEN AMENDMENT TO THIS DOCUMENT IT WAS -- I BELIEVE ALL
25 THE PARTIES WOULD TESTIFY, IT WOULD BE MY EXPECTATION THAT

1 -- WELL I MEAN, THIS, OF COURSE, IS DOCUMENTED IN THE CITY
2 COUNCIL MINUTES AND THAT THAT WAS AGREED THAT THIS -- THIS
3 PRICE OF 71 MILLION HAD BEEN AGREED TO

4 THE COURT DID YOU INCLUDE A CAUSE OF ACTION FOR BREACH
5 OF THE COVENANT OF GOOD FAITH AND FAIR DEALING OR IS THAT
6 JUST PART OF YOUR BREACH OF CONTRACT?

7 MR HINSON WELL, IT'S FUNNY YOU SHOULD ASK THAT
8 BECAUSE WE HAD ACTUALLY HAD THAT -- WE HAD THAT CAUSE OF
9 ACTION SO NAMED AND---

10 THE COURT THAT DOESN'T EXIST, DOES IT?

11 MR HINSON AND IT ENDED UP THAT WE HAD TO MERGE IT
12 INTO OUR BREACH OF CONTRACT CLAIM

13 THE COURT OKAY AND I DID INTERRUPT YOU A COUPLE OF
14 TIMES AND I APOLOGIZE FOR THAT ANYTHING ELSE THAT YOU HAVE
15 IN RESPONSE TO MR FOSTER'S STATEMENTS? AND YOU'LL HAVE
16 ANOTHER CHANCE TO SPEAK IN A MINUTE

17 MR HINSON THANK YOU, YOUR HONOR NOT AT THIS TIME,
18 YOUR HONOR

19 THE COURT ALL RIGHT NOW, MR FOSTER AND MR HINSON,
20 IS THERE -- WHAT'S THE NEXT PHASE OF THIS PROCEEDING TODAY?

21 MR FOSTER THE -- WHETHER THERE WAS AN ORAL CONTRACT
22 CAN I MAKE A COUPLE OF POINTS ABOUT---

23 THE COURT YES SIR

24 MR FOSTER JUST VERY QUICKLY YOUR HONOR NUMBER ONE,
25 THERE WAS NEVER AN AMENDMENT TO THE M O U BECAUSE THE M O U

1 WAS NOT A CONTRACT THE M O U WAS A---

2 THE COURT HE'S SAYING IT WAS DONE VERBALLY BY VIRTUE
3 OF THE NONPROFIT'S VOTE

4 MR FOSTER EXACTLY, AND I'M SAYING THE SAME THING
5 I'M SAYING THIS PROVES THAT EVERYBODY KNEW THAT WE COULD VOTE
6 IT DOWN AT 71 WE COULD VOTE IT UP THAT IS SOME OF THE
7 MOST PERSUASIVE EVIDENCE THAT EVERYBODY KNOWS THE M O U WAS
8 NOT BINDING

9 NOW I THINK -- I DO FIND IT INTERESTING THAT WHEN YOU
10 ASKED HIM ABOUT THE 60 MILLION AND THE 71 THAT IT'S A RED
11 HERRING WELL IT'S A RED HERRING IF YOU WANT TO STAY AWAY
12 FROM THE MOST IMPORTANT ISSUE WE THINK IN THIS ENTIRE M O U
13 CONTRACT ISSUE WHEN YOU LOOK AT THE MONEY, YOU COME OUT
14 WITH NOBODY INTENDED TO BE BOUND BY THE DOLLARS SO IT'S A
15 RED HERRING BECAUSE YOU DON'T -- THEY DON'T WANT TO TALK
16 ABOUT IT

17 THE COURT WELL, ONE OF THE QUESTIONS I'M GOING TO ASK
18 MR HINSON AND MR SUGGS IS HE SAID THAT THE "NOW
19 THEREFORE" PART IS QUINTESSENTIAL CONTRACT-LANGUAGE TO ME
20 IT WOULD ALSO BE QUINTESSENTIAL CONTRACT LANGUAGE TO HAVE A
21 MERGER CLAUSE, A PROVISION IN THE CONTRACT FOR WHEN THE
22 CONTRACT -- OR HOW IT'S TO BE AMENDED

23 MR FOSTER YEAH

24 THE COURT AND THINGS OF THAT NATURE SO MR HINSON
25 CAN PERHAPS ANSWER THAT QUESTION IN A FEW MINUTES BUT IT'S

1 -- AND IT'S USUALLY TOWARD THE END DOESN'T HAVE TO BE IT
2 CAN BE THE FIRST PROVISION THAT ANY AMENDMENTS HAVE TO BE
3 REDUCED TO WRITING AND SIGNED BY ALL PARTIES AND I DON'T
4 RECALL THAT BEING IN HERE

5 MR FOSTER THAT'S CORRECT, YOUR HONOR IT'S IN THIS
6 DOCUMENT, THE REAL CONTRACT, THAT WAS NEVER EXECUTED ALL OF
7 THAT -- THIS -- THE ONE PAGE---

8 THE COURT ARE THOSE PART OF THE EXHIBITS TO THE
9 AFFIDAVIT YOU REFERENCED OR DO I HAVE THOSE?

10 MR FOSTER NO YOU DON'T WE DID -- WE DID NOT ATTACH
11 THE 11 DOCUMENTS THAT WERE IN THE PROCESS OF BEING DRAFTED
12 I JUST WANTED TO BRING THEM TO THE COURT'S ATTENTION YOU
13 ARE CORRECT THAT THIS M O U DOES NOT HAVE ANY OF THE NORMAL
14 CONTRACT LANGUAGE THE FACT AT THE INTRODUCTION IT SAYS "FOR
15 MUTUAL CONSIDERATION" DOESN'T MEAN THERE WAS A RECITATION
16 OF CONSIDERATION DOESN'T MEAN THAT ESTABLISHES AS A MATTER OF
17 LAW THAT THERE WAS CONSIDERATION OR ANY OF THE OTHER TERMS
18 YOU ARE TO LOOK AT THE DOCUMENT-ITSELF-AND-IT DOESN'T HAVE
19 ANYWHERE NEAR THE TYPE OF LANGUAGE THAT SOPHISTICATED
20 DEVELOPERS WOULD ENTER INTO

21 I MEAN I HAPPEN TO HAVE LOOKED THROUGH THIS DOCUMENT,
22 AND IT GOES INTO DETAIL ABOUT WHAT WILL HAPPEN IF THE BOND
23 CLOSING -- I MEAN AFTER THE BOND IS CLOSED AND YOU KNOW,
24 WHAT HAPPENS THERE ARE SO MANY DETAILS UNADDRESSED THE
25 FACT THAT THERE WAS NEVER AN AMENDMENT THAT THE CITY COULD

1 VOTE IT UP OR DOWN - EVERYONE UNDERSTOOD IF THEY VOTE IT
2 DOWN THIS DEAL IS OVER THIS WAS NOT INTENDED TO BE
3 FINANCIALLY BINDING

4 AND THEN LASTLY YOUR HONOR, JUST TWO OTHER QUICK
5 POINTS YOU ASKED THE QUESTION DID ANYONE OBJECT? THE
6 OBJECTION THAT MR SUGGS TALKED ABOUT WAS WELL AFTER THE SO-
7 CALLED BREACH OF MARCH 17 THE OBJECTION THEY'RE TALKING
8 ABOUT IS -- THEY'RE TALKING ABOUT SOMETHING TOTALLY
9 IRRELEVANT TO THE M O U THEY'RE SAYING WE DON'T THINK IT
10 WAS FAIR THAT SOMEONE FROM THE AUGHTRY TEAM SAT IN ON OUR
11 PRESENTATION

12 THE COURT OH, ON THE ENEMY'S PRESENTATION

13 MR FOSTER YEAH YEAH WE DON'T THINK IT'S FAIR SO
14 THEY OBJECTED LONG AFTER THEY WALKED THROUGH THE NEW PROCESS
15 THEY DIDN'T HAVE ANY OBJECTION TO---

16 THE COURT IS THAT -- IS THAT ANYWHERE IN THEIR CAUSES
17 OF ACTION THAT THAT EVENT SHOULD NOT HAVE OCCURRED OR THAT
18 THAT WAS PROOF OF AN EXISTING CONSPIRACY, SO TO SPEAK?

19 MR FOSTER IT IS IN A DIRECT CLAIM AGAINST AUGHTRY
20 IT DOESN'T -- IT DOESN'T HAVE ANY IMPACT ON HILTON HILTON
21 DIDN'T PARTICIPATE IN THAT THEY RAISE THAT IN THE CLAIM
22 AGAINST AUGHTRY, BUT TO YOUR POINT THAT IS NOT RELEVANT TO
23 WHETHER THE M O U WAS A BINDING CONTRACT OR NOT THAT HAD
24 TO DO WITH WE DON'T LIKE THE PROCESS

25 AND THEN LASTLY, YOUR HONOR I THINK THE CASE LAW -- YOU

1 KNOW SOUTH CAROLINA AS WE CITED IN OUR BRIEF, DOES HAVE
2 CASE LAW THAT SAYS AN AGREEMENT TO SIMPLY AGREE IS NOT A
3 CONTRACT, BUT IT DOESN'T GIVE THE COURT A WHOLE LOT OF
4 EDIFICATION

5 THE COURT RIGHT

6 MR FOSTER I WOULD REFERENCE YOUR HONOR -- WE LOOKED
7 AT THE STATE OF NEW YORK THEY HAVE A LOT OF BUSINESS LAW ON
8 THIS POINT, AND WE CITED IT IN OUR REPLY BRIEF IT'S CALLED
9 THE DOCTRINE OF PRELIMINARY AGREEMENTS AND SO THE NEW YORK
10 COURTS FLESH OUT WHEN ARE THESE PRELIMINARY AGREEMENTS,
11 WHICH THE COURT SHOULD DECIDE AS A MATTER OF LAW A CONTRACT
12 OR NOT? AND IT GIVES YOU VARIOUS FACTORS -- YOU KNOW FOR
13 YOUR EDUCATION PURPOSES ARCADIAN PHOSPHATE CASE AND IT'S
14 DEALING WITH AN M O U

15 I MEAN, THESE CASES DEAL WITH AN M O U AND THEY SAY,
16 SORRY, THIS IS A MATTER OF LAW -- ARCADIAN PHOSPHATES
17 HAPPENED TO CONCLUDE AS A MATTER OF LAW THAT AN M O U IS NOT
18 A BINDING CONTRACT BUT IT GIVES THE COURT SOME GUIDANCE--
19 THE SOUTH CAROLINA COURTS DON'T REALLY TELL YOU ANYTHING
20 OTHER THAN YOU CAN LOOK AT THE FOUR CORNERS OF THE DOCUMENT
21 AND YOU CAN DECIDE AS A MATTER OF LAW DOES THIS REALLY HAVE
22 BINDING EFFECT?

23 THE COURT DID ANYBODY -- AND I APOLOGIZE IF I DIDN'T
24 READ THIS, BUT WE HAVEN T GOTTEN TO THE ORAL PART YET BUT
25 IS THERE A STATUTE OF FRAUDS ISSUE ON THAT?

1 MR FOSTER YES YES

2 THE COURT ALL RIGHT YOUR REPLY -- LET ME GET OVER
3 SOME TERMINOLOGY HERE WHAT'S A BETTER WORD FOR YOUR REPLY
4 MEMORANDUM IN SUPPORT OF THE MOTION? IS IT A REPLY TO THEIR
5 MEMORANDUM---

6 MR FOSTER YES

7 THE COURT ---IN OPPOSITION?

8 MR FOSTER YES

9 THE COURT ALL RIGHT

10 MR FOSTER I'M NOT SURE WHAT DID WE WORD IT?

11 THE COURT I DON'T KNOW IT'S HARD TO SAY

12 MR FOSTER OKAY

13 THE COURT IT'S HARD TO READ DEFENDANT HOTEL
14 CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR
15 SUMMARY JUDGMENT

16 MR FOSTER I'LL TALK TO MY ASSOCIATE ABOUT THAT, YOUR
17 HONOR

18 THE COURT ALL RIGHT THAT'S PROBABLY MY

19 MR FOSTER THAT'S THE REPLY AND BOTH GARFIELD AND
20 HILTON CITED THE ARCADIAN PHOSPHATE CASE BUT WE WENT INTO
21 MORE DETAIL IN THE REPLY

22 THE COURT HOW ABOUT THE APERM CASE?

23 MR FOSTER WELL THAT'S A ROYALTIES CASE I MEAN,
24 IT'S JUST -- I MEAN WE -- IT'S A CONTRACT IT'S A ROYALTIES
25 CONTRACT WE HAVE AN M O U WE HAVE A BODY OF LAW THAT

1 TALKS ABOUT THE DOCTRINE OF PRELIMINARY AGREEMENTS DID
2 THIS PRELIMINARY -- WE ALL AGREE IT'S A PRELIMINARY
3 AGREEMENT THAT'S WHAT THE COURT NEEDS TO LOOK TO, AND ALL
4 SOUTH CAROLINA TELLS YOU IS---

5 THE COURT BUT AREN'T THERE SOME INSTANCES WHERE
6 BEHIND-THE-SCENES ACTIVITY, IF YOU PHRASE IT KINDLY, THAT
7 SCUTTLES AN M O U COULD BE ACTIONABLE?

8 MR FOSTER SURE JUST NOT ON A BREACH OF CONTRACT
9 SURE WE'RE ON THE FOURTH AMENDED COMPLAINT AGAINST HILTON
10 I'VE SEEN EVERY CAUSE OF ACTION OUT THERE

11 THE COURT SO WHAT IS THE CAUSE OF ACTION AGAINST
12 HILTON?

13 MR FOSTER WELL---

14 THE COURT OR CAUSES OF ACTION

15 MR FOSTER OH, BREACH OF CONTRACT, NUMBER ONE BREACH
16 OF CONTRACT ACCOMPANIED BY FRAUDULENT -- A FRAUDULENT ACT

17 THE COURT WHICH NECESSITATES A CONTRACT

18 MR FOSTER RIGHT -- BOTH OF THEM-- WE'RE DOWN TO HILTON
19 ONLY HAS TWO CAUSES OF ACTION BOTH OF THEM ARE A BREACH OF
20 CONTRACT CAUSE OF ACTION THERE ARE OTHER CAUSES OF ACTION
21 AGAINST THE CITY AND AGAINST AUGHTRY YOU KNOW, THE SUGGS
22 LAW FIRM IS VERY GOOD AT PULLING OUT AS MANY POSSIBLE CAUSES
23 OF ACTION---

24 THE COURT YOUR CAUSES OF ACTION OR THE ONES AGAINST
25 YOU ARE SOLELY CONTRACT-BASED

1 MR FOSTER CORRECT CORRECT IF YOU DETERMINE THE
2 M O U IS NOT A BINDING CONTRACT BOTH CAUSES OF ACTION
3 AGAINST HILTON SHOULD BE DISMISSED AS A MATTER OF LAW

4 THE COURT AND THERE WOULD BE OTHER MATCHES TO PLAY
5 AGAINST THE OTHER DEFENDANTS

6 MR FOSTER CORRECT

7 THE COURT AND THAT'S WHERE THE NOERR-PENNINGTON WOULD
8 COME UP AND THINGS THAT YOU AREN'T---

9 MR FOSTER CIVIL CONSPIRACY QUANTUM MERUIT THERE'S
10 A LOT OF OTHER CAUSES OF ACTION WHICH IS WHY WE TRIED TO
11 NARROW THE FIRST WAVE OF THESE MOTIONS AT YOU WITH TWO OF THE
12 BIGGER ISSUES IN THE CASE

13 THE COURT YOU WOULD BE FACED WITH NOT BEING A PARTY
14 BUT SIMPLY BEING A WITNESS

15 MR FOSTER CORRECT CORRECT

16 THE COURT AND YOU'RE NOT ACCUSED OF ENGAGING IN THE
17 CONSPIRACY

18 MR FOSTER WELL, THAT'S A FRAUDULENT ACT WE'LL GET
19 INTO THAT THEY'RE SAYING THAT BREACH OF CONTRACT
20 ACCOMPANIED BY FRAUDULENT ACT, NUMBER ONE, SOMEHOW HILTON
21 BREACHED THE CONTRACT HILTON BREACHED THE ORAL CONTRACT
22 THEY'VE GOT TO GO THERE FIRST, AND AFTER YOU BREACHED THE
23 ORAL CONTRACT, YOU CONSPIRED WITH AUGHTRY TO DO A BAIT AND
24 SWITCH

25 THE COURT ALL RIGHT

1 MR FOSTER AND SO THAT'S THE FRAUD PART AND, YOUR
2 HONOR, JUST SO YOU'RE CLEAR THERE IS NO OTHER DOCUMENT THAT
3 ANYONE IS ALLEGING IS THE CONTRACT THIS IS THE SOLE
4 DOCUMENT THAT WAS SIGNED ALL THE OTHERS WERE NEVER
5 EXECUTED

6 THE COURT ALL RIGHT

7 MR FOSTER SO WE'RE DOWN TO JUST THE M O U

8 THE COURT ALL RIGHT MR HINSON, WHAT I WANT TO DO
9 NOW IS EITHER ASK YOU THIS QUESTION WHAT I INTEND TO DO
10 NOW IS TAKE A BREAK FOR A FEW MINUTES AND LET ALL OF YOU TALK
11 AND FIGURE OUT WHERE YOU ARE ON THE TIME, AND THEN WE CAN GET
12 BACK TOGETHER IN TEN MINUTES OR SO AND YOU CAN TELL ME WHAT
13 EVERYBODY THINKS BUT ONE OF THE QUESTIONS THAT I DID HAVE
14 IS IF THAT "NOW THEREFORE IN CONSIDERATION OF MUTUAL
15 COVENANTS AND CONDITIONS SET FORTH HEREIN" AND WHATEVER ELSE
16 IS IN THAT WHICH YOU THOUGHT WAS QUINTESSENTIAL CONTRACT
17 LANGUAGE, WHERE IS THE OTHER QUINTESSENTIAL CONTRACT LANGUAGE
18 THAT YOU WOULD USUALLY FIND IN JUST ABOUT ANY CONTRACT, AT
19 LEAST A MULTIMILLION-DOLLAR CONTRACT?

20 MR HINSON YOUR HONOR, I THINK THE REMAINDER OF THE
21 DOCUMENT IS SUCH LANGUAGE THAT IT SPELLS OUT THE OBLIGATIONS
22 OF THE VARIOUS PARTIES IT SPELLS OUT THE COMPENSATION THAT
23 IS TO BE PAID AND TO ME THAT'S A QUINTESSENTIAL CONTRACT
24 YOU WILL DO THIS YOU WILL BE COMPENSATED THAT AMOUNT
25 THAT'S WHAT THESE PAGES SPELL OUT AND---

1 THE COURT WELL, ON THE CONTRACT -- AND I'LL READ IT
2 MORE CLOSELY IN THE CONTEXT OF WHAT Y'ALL HAVE ARGUED BUT
3 WHAT DAMAGES WOULD YOU BE SEEKING FROM HILTON? THEY DIDN'T
4 HAVE AN OBLIGATION TO PAY THE DEVELOPMENT FEES BUT YOU'RE
5 SAYING THAT THEIR BREACH -- I GUESS IT WOULD BE YOUR SECOND
6 CAUSE OF ACTION AGAINST THEM THAT WOULD LEAD YOU TO THINK YOU
7 CAN RECOVER THE DEVELOPMENT FEES BECAUSE IF IT'S JUST BREACH
8 OF CONTRACT, THEY DIDN'T HAVE ANY OBLIGATION TO PAY YOU
9 ANYTHING SO WHAT IS YOUR REMEDY FOR BREACH OF CONTRACT
10 AGAINST HILTON?

11 MR HINSON YOUR HONOR -- AND I APOLOGIZE I PROBABLY
12 DID NOT -- I DID NOT EXPLAIN THIS EARLIER WHAT WE ALLEGE
13 HILTON DID IS THAT THEY WERE A PART OF OUR TEAM, THAT THEY
14 WERE SIGNATORY TO THIS DOCUMENT AND THEY WERE SIGNATORY TO
15 THIS CONTRACT THEY WERE ON THE GARFIELD TRAUB/EDENS AND
16 AVANT TEAM AND AS PART OF THAT TEAM AS A SIGNATORY TO THIS
17 DOCUMENT THEY OWED US A DUTY OF GOOD FAITH AND FAIR
18 DEALINGS

19 THE COURT TO DO WHAT?

20 MR HINSON TO DO THE BEST THEY COULD TO WORK IN GOOD
21 FAITH TO SEE THAT THIS HOTEL WAS BUILT

22 THE COURT ALL RIGHT AND WHAT EVIDENCE IS THERE IN
23 THE RECORD THAT THEY DIDN'T?

24 MR HINSON WELL, YOUR HONOR, THERE IS EVIDENCE IN THE
25 RECORD -- THIS IS ACTUALLY ONE OF THE DOCUMENTS MR FOSTER

1 BROUGHT UP WHERE HILTON IS WORKING WITH THIS DEVELOPER OUT OF
2 GREENVILLE BO AUGHTRY---

3 THE COURT BOTH SIDES OF THE FENCE

4 MR HINSON BOTH SIDES OF THE FENCE AND BO IS
5 LOBBYING THE CITY HE IS CALLING CITY COUNCIL HE IS
6 WRITING CITY COUNCIL WE HAVE NUMEROUS LETTERS BO AUGHTRY
7 WROTE TO CITY COUNCIL SAYING THE CITY DOES NOT NEED THIS
8 HOTEL THAT YOU'RE PLANNING TO BUILD THE CITY DOESN'T NEED
9 IT WHAT THE CITY NEEDS IS MY HOTEL AND HILTON GAVE
10 SUPPORT TO MR AUGHTRY, AND WE HAVE EVIDENCE THAT ONE OF THE
11 LETTERS THAT BO WRITES AND SAYS, "HILTON YOU KNOW GOOD AND
12 WELL THAT WE HAVE DISCUSSED MY ABILITY TO OFFER THE CITY OF
13 COLUMBIA"---

14 THE COURT AND THEY WRITE BACK AND SAY "YEAH, BOTH OF
15 YOU ARE "

16 MR HINSON YES, YOUR HONOR AND SO WE ALLEGE THAT
17 THIS CONTRACT WAS BREACHED IN PART BECAUSE HILTON DIDN'T ACT
18 IN GOOD FAITH AND FAIR DEALINGS, THAT THEY WERE CONSPIRING
19 WITH THIS DEVELOPER OUT OF GREENVILLE BECAUSE HILTON DIDN'T
20 CARE THEY JUST WANTED TO HAVE THE HILTON NAME ON THAT
21 HOTEL, AND IF IT LOOKED LIKE IT MIGHT GO THE WAY OF BO
22 AUGHTRY, THEY WERE WILLING TO HELP HIM OUT

23 IF I COULD, YOUR HONOR, JUST TO ADDRESS A COUPLE OF
24 THINGS MR FOSTER SAID HE'S TALKING ABOUT THE BEHAVIOR OF
25 THE PARTIES HOW THEY ACTED WELL HOW THEY ACTED, YOUR

1 HONOR IS THAT THERE WAS A CONTRACT MY CLIENT IS SPENDING
2 HUNDREDS AND HUNDREDS OF HOURS, TENS UPON TENS -- HUNDRED
3 THOUSAND DOLLARS I'M NOT SURE, BUT SPENDING TONS OF MONEY
4 WORKING ON THIS PROJECT THE ARCHITECTS THE SAME THING
5 THEY ARE DRAFTING PLANS FOR THIS -- TO BUILD THIS HOTEL

6 THE BEHAVIOR OF THE PARTIES, WHAT MR FOSTER KEEPS
7 REFERENCING, SHOWS THAT THE SIGNATORIES TO THIS DOCUMENT
8 TREATED IT LIKE A CONTRACT AGAIN, COUNCILWOMAN DEVINE SAYS,
9 "WE NEED TO MOVE FORWARD WITH THE COMMITMENTS THAT HAVE BEEN
10 MADE "

11 THE COURT WE NEED TO HONOR THE COMMITMENTS

12 MR HINSON WE NEED TO HONOR THE COMMITMENTS THAT HAVE
13 BEEN MADE THE FACT THAT MR FOSTER---

14 THE COURT COULDN'T THAT -- COULDN'T THAT -- COULDN'T
15 THAT HAVE BEEN A POLITICAL STATEMENT?

16 MR HINSON I THINK MAYBE THAT SHOULD BE UP TO THE JURY
17 TO DECIDE WHICH IS ACTUALLY MY NEXT POINT SO MUCH OF MR
18 FOSTER'S ARGUMENT -- THE VAST MAJORITY OF IT IS THINGS
19 OUTSIDE OF THIS DOCUMENT WELL WHEN YOU GET OUTSIDE OF THIS
20 DOCUMENT, THAT'S WHEN SUMMARY JUDGMENT BECOMES INAPPROPRIATE
21 A CONTRACT IS AMBIGUOUS WHEN THE INTENT OF THE PARTIES CANNOT
22 BE GATHERED FROM THE DOCUMENT MOST OF WHAT WE'VE TALKED
23 ABOUT TODAY IS OUTSIDE OF THE DOCUMENT ITSELF

24 THE COURT AND I AGREE WITH YOU THERE BUT THE LAW IS
25 NOT THAT IF TWO PARTIES DISAGREE ABOUT WHAT IT MEANS IT'S

1 AMBIGUOUS THAT'S -- IF Y'ALL DISAGREE ABOUT WHAT IT MEANS,
2 THAT DOESN'T MEAN THAT IT'S AMBIGUOUS

3 MR HINSON I CERTAINLY AGREE WITH THAT YOUR HONOR,
4 BUT -- AND I WOULD SAY IT'S NOT AMBIGUOUS THAT THE LANGUAGE
5 IN THIS DOCUMENT HAS QUINTESSENTIAL CONTRACT LANGUAGE THERE
6 IS NOTHING IN HERE -- THESE SOPHISTICATED BUSINESS ENTITIES
7 IF THEY DIDN'T WANT TO BE BOUND BY IT, THEY WOULD HAVE SAID,
8 "THIS IS NOT A CONTRACT " THAT'S NOT WHAT THIS INDICATES

9 IT SETS OUT THE DUTIES AND OBLIGATIONS AND THE PAYMENT
10 THAT WILL BE RECEIVED TO BUILD THIS HOTEL FOR THE CITY OF
11 COLUMBIA AND EARLIER YOU MENTIONED OR YOU ASKED ABOUT A
12 MERGER CLAUSE AND I WOULD -- I WOULD JUST POINT YOU TO THE
13 BOTTOM OF PAGE ONE THAT SAYS "UNLESS SUPERSEDED BY AN
14 AMENDMENT TO THIS M O U OR THE FINAL DEVELOPMENT AGREEMENT,
15 THIS M O U IDENTIFIES THE UNDERSTANDING OF THE PARTIES "

16 THE COURT ALL RIGHT YOU SAID THAT EQUATES TO A
17 MERGER CLAUSE I MEAN, THERE'S NO MAGIC LANGUAGE THAT A
18 MERGER CLAUSE HAS TO BE USED -IT'S JUST LANGUAGE THAT'S

19 UNIFORMLY USED ALL RIGHT OKAY WE CAN TAKE A BREAK FOR A
20 FEW -- DO YOU HAVE ANYTHING ELSE TO COVER AT THIS POINT, MR
21 SUGGS?

22 MR SUGGS LET ME WHISPER AT HIM ONE MORE TIME, YOUR
23 HONOR

24 THE COURT ALL RIGHT

25 MR HINSON YOUR HONOR IF I COULD I WOULD JUST LIKE

1 TO MAKE ONE -- MAKE ONE MORE POINT THE -- AND THIS MAY BE
2 SOMETHING I MENTIONED EARLIER BUT THE CONTRACT TALKS ABOUT
3 THE FEASIBILITY OF THE HOTEL PROJECT, AND FEASIBILITY IS NOT
4 DEFINED IN THESE PAGES AND I WOULD SUBMIT TO YOU THAT THAT
5 IS AN AMBIGUITY IN TERMS OF WHAT IS MEANT BY A FEASIBLE HOTEL
6 PROJECT

7 THE COURT THAT'S UNDER NUMBER 1-A -- I MEAN 1 1
8 ACTUALLY

9 MR HINSON 1 1 YES, YOUR HONOR, AND THAT THE
10 DETERMINATION OF WHAT IS A FEASIBLE HOTEL PROJECT IS
11 SOMETHING THAT---

12 THE COURT BUT DOESN'T THE VERY LANGUAGE -- IT SAYS
13 THAT IF THE CITY DETERMINES IT'S NOT FEASIBLE SO DOESN'T
14 THAT MEAN IT COULD -- THE CITY I ASSUME WOULD ARGUE THAT AS
15 A MATTER OF LAW THAT THAT MEANS THAT IT'S THE CITY'S
16 SUBJECTIVE DEFINITION OF FEASIBILITY IN THE CONTEXT OF
17 EVERYTHING THAT WAS GOING ON

18 MR HINSON WELL, YOUR HONOR, I WOULD ANSWER THAT WITH
19 THE CITY HAD THE DUTY TO MAKE THAT DETERMINATION IN GOOD
20 FAITH, AND THERE WILL BE---

21 THE COURT THAT'S THE TAIL THAT WE'RE CHASING HERE AND
22 I'VE GOT TO DECIDE WHETHER OR NOT THERE IS A JURY ISSUE OR
23 NOT SO I UNDERSTAND THAT

24 MR HINSON AND I WOULD LIKEN THAT TO A BEST EFFORTS
25 CLAUSE AND IT S UP TO A JURY AND SOUTH CAROLINA RECOGNIZES

1 BEST EFFORTS CLAUSES AND ONE PARTY CAN SAY WELL, THAT, YOU
2 KNOW, BEST EFFORTS CLAUSE DOESN'T MEAN ANYTHING BECAUSE IT'S
3 UP TO THAT PARTY TO DECIDE WHAT THEIR BEST EFFORTS IS
4 THAT'S NOT THE LAW IN SOUTH CAROLINA THE JURY CAN DECIDE IF
5 A PARTY USED THEIR BEST EFFORTS AS WAS CALLED FOR IN THE
6 CONTRACT, AND I THINK SIMILARLY THE JURY CAN DECIDE IF
7 FEASIBILITY WAS -- AND ALSO I WOULD JUST SUBMIT THAT'S AN
8 ISSUE -- THERE'S EXPERTS ON BOTH SIDES OF THIS CASE THAT ARE
9 GOING TO SAY THIS HOTEL WAS FEASIBLE, THIS HOTEL WASN'T
10 FEASIBLE I MEAN THAT'S---

11 THE COURT THE COUNTER-ARGUMENT TO IT IS IF THE CITY --
12 IF THE CITY TAKES THE POSITION IT'S NOT FEASIBLE TO PROCEED
13 WITH THE PROJECT, THEN THAT NEW PROJECT WITH AUGHTRY WOULD
14 NEVER HAVE TAKEN PLACE BECAUSE THAT INDICATES THAT IT WAS
15 FEASIBLE, JUST NOT FEASIBLE WITH WHO THEY WANTED IT TO BE
16 FEASIBLE WITH ALL RIGHT

17 MR HINSON YES, YOUR HONOR

18 THE COURT OKAY ALL RIGHT -- WELL, LET'S TAKE-ABOUT--
19 TEN MINUTES IF YOU FOLKS WILL TALK ABOUT THE TIME, HOW
20 WE'RE FALLING IN ON THAT

21 MR SUGGS WHAT TIME DOES THE TIME END, YOUR HONOR? IS
22 IT 12 30 OR 1 OR---

23 THE COURT WELL, THAT'S AN INTERESTING QUESTION I
24 DON'T -- I DON'T -- I DON'T CARE ABOUT LUNCH, BUT I THINK
25 THERE'S SEVERAL PEOPLE IN HERE WHO DO

1 **MR SUGGS** WELL I KNOW REECE ALWAYS DOES, YOUR HONOR
2 **THE COURT** THAT DON'T WORK FOR ME SO THAT'S WHAT I'M
3 CONSCIOUS OF I'M WILLING TO GO ALL THE WAY THROUGH 'TIL --
4 WITHOUT STOPPING BUT SOME PEOPLE JUST DON'T LIKE TO DO THAT

5 **MR SUGGS** IF YOU'LL JUST---

6 **THE COURT** I'M NOT GOING TO -- I'M NOT GOING TO EVEN
7 FORCE THE QUESTION SO I WOULD SAY LET'S GO TO 1, AND THEN
8 WE'LL SEE WHERE WE STAND WHY DON'T Y'ALL TALK ABOUT THE
9 TIME? AND I'LL COME BACK IN A FEW MINUTES BUT THANK YOU
10 (WHEREUPON, A SHORT BREAK WAS TAKEN)

11 **THE COURT** SORRY IT TOOK ME A LITTLE BIT LONGER I GOT
12 ON THE PHONE ANY INFORMATION YOU CAN GIVE ME ABOUT HOW
13 FAR -- HOW WELL WE'RE DOING?

14 **MR FOSTER** YOUR HONOR WHAT WE'RE GOING TO DO NEXT IS
15 I'M GOING TO SPEND 15 MINUTES ON THE LAST TWO HILTON ISSUES
16 EVERYONE HAS CHALLENGED ME THAT THAT'S NOT POSSIBLE BUT I'M
17 REALLY GOING TO TRY TO

18 **THE COURT** GOOD, BECAUSE IT'S QUARTER 'TIL SO---

19 **MR FOSTER** YES, SIR MR HINSON WILL RESPOND WITH 15
20 MINUTES OR SO

21 **THE COURT** SO 30 MORE MINUTES ON THAT?

22 **MR FOSTER** YES

23 **THE COURT** ALL RIGHT AND THEN, MR WARD, HOW ABOUT
24 YOUR NOERR-PENNINGTON?

25 **MR WARD** YES, SIR YOUR HONOR AT YOUR SUGGESTION I

1 CONFERRED WITH COUNSEL THAT ARE PRINCIPALLY INVOLVED IN THAT
2 ARGUMENT, AND DEPENDING ON HOW MUCH TIME IS ACTUALLY LEFT,
3 THEY WANT TO ARGUE NOERR-PENNINGTON TODAY BECAUSE AMONG
4 OTHER REASONS, THE GENTLEMAN FROM WASHINGTON TRAVELED HERE
5 TODAY FOR THAT PURPOSE

6 THE COURT ALL RIGHT WHAT WE'LL DO IS I'LL -- SHE CAN
7 GO DOWN THE HALL AND TELL JUDGE BARBER THAT HE'LL JUST HAVE
8 TO DO THE 2 00 DID YOU FLY?

9 MR VAIL UH-HUH

10 THE COURT WHEN DO YOU LEAVE?

11 MR VAIL I'M GOOD 'TIL

12 THE COURT AND, MR PAUL, DID YOU FLY?

13 MR PAUL I DROVE AND I DON'T CARE I'M HERE

14 THE COURT ALL RIGHT

15 MR WARD AND THEN LOOKING FURTHER DOWN THE ROAD WE
16 ALSO HAD A SUGGESTION THAT IF THIS COURT COULD NOT ADJOURN
17 THE HEARING TODAY BUT KEEP THE MATTERS PRESENTLY BEFORE YOU
18 IF THAT DIDN'T OFFEND ANY OF YOUR HONORS, THEN WE WOULD---
19 TRAVEL TO SUMTER DURING YOUR CHAMBERS WEEK AND ARGUE THE
20 REMAINING MOTIONS THAT -- SOME OF THEM MIGHT BE RESOLVED
21 BEFORE THEN, AND SO WE OFFER THAT AS -- WE DISCUSSED IT AND
22 AGREED AMONGST OURSELVES IF THAT WOULD---

23 THE COURT WELL, I THINK THAT'S PROBABLY WHERE WE'RE
24 HEADED---

25 MR WARD YES, SIR

1 **THE COURT** THAT'S KIND OF THE WAY IT'S BEEN EXPRESSED
2 TO ME AND FOR THE -- WE'RE NOT ASKING YOU TO DO THIS, BUT
3 WE'RE ASKING YOU TO DO THIS SO

4 **MR WARD** YES, SIR, AND I KNOW THE COUNSEL WHO ARE IN
5 THE COURTROOM TODAY ALL AGREE TO THAT AND I THINK I CAN
6 STATE THAT THEY ALL WOULD LIKE YOU TO DO THAT THEY WOULD
7 APPRECIATE IT IF YOU DID THAT, BUT WE UNDERSTAND THERE'S NO
8 DUTY INCUMBENT UPON THE COURT TO DO SO

9 **THE COURT** WELL IF WE GO THAT ROUTE WE CAN DISCUSS
10 THE SCHEDULING OF THAT AT THE END BUT JUDGE BARBER HAS
11 INDICATED HE'LL TAKE MY AFTERNOON HEARINGS SO -- AND THE
12 COURT REPORTER -- THE COURT REPORTER HAS GRACIOUSLY AGREED
13 THAT IF WE GO PAST TODAY FOR ANY REASON THAT SHE'LL
14 VOLUNTEER, IF COURT ADMINISTRATION ASSIGNS HER, TO STAY WITH
15 IT IT PROBABLY WOULD BE EASIER FOR ME TO COME BACK HERE
16 EVEN THOUGH THE COURTROOM IS A LOT BIGGER IN SUMTER IT'S
17 PROBABLY NOT REASONABLE FOR TWELVE PEOPLE TO GO TO ONE PLACE
18 WHEN ONE PERSON CAN GO TO THE OTHER BUT WE'LL DISCUSS ALL
19 THAT

20 **MR WARD** ALL RIGHT, SIR AND I KNOW BEING ALLOWED
21 MORE THAN THE PERHAPS 45 MINUTES THAT THEY WOULD HAVE WOULD
22 ALLOW YOU TO HEAR A MUCH BETTER ARGUMENT ON NOERR-PENNINGTON

23 **THE COURT** ALL RIGHT OKAY WELL, THEN AT LEAST I
24 WON'T HAVE TO DECIDE THAT UTILITY CASE THIS AFTERNOON JUDGE
25 BARBER CAN DO THAT WHERE DID MR CRUMPTON GO?

1 (PAUSE IN PROCEEDINGS)

2 THE COURT SO MR FOSTER AND MR HINSON WHAT ARE WE
3 GOING TO DO NOW? FIFTEEN PLUS FIFTEEN---

4 MR FOSTER FIFTEEN PLUS FIFTEEN THE SECOND HALF OF
5 OUR SUMMARY JUDGMENT MOTION IS THAT THERE WAS NO VALID ORAL
6 CONTRACT

7 THE COURT OKAY

8 MR FOSTER AND THEN QUICKLY TO JUMP INTO THE FRAUD,
9 BECAUSE THEY'RE REALLY INTERTWINED AS TO THOSE TWO ISSUES---

10 THE COURT I THOUGHT Y'ALL WERE SUED ON FRAUD

11 MR FOSTER A BREACH OF CONTRACT ACCOMPANIED BY A
12 FRAUDULENT ACT, TO MOVE TO DISMISS THAT CAUSE OF ACTION
13 BECAUSE THERE IS NO SEPARATE ACT OF FRAUD OVER AND ABOVE WHAT
14 THEY'RE CLAIMING WITH THE BREACH OF CONTRACT

15 THE COURT OKAY

16 MR FOSTER SO, YOUR HONOR, BRIEFLY THE ORAL CONTRACT
17 ISSUE IS THE SECOND HALF OF THEIR GARFIELD'S COMPLAINT
18 AGAINST HILTON THAT THERE WAS AN ORAL AGREEMENT OF

19 EXCLUSIVITY NOW, WE DON'T KNOW WHERE THEY'RE COMING UP WITH
20 THAT BUT THEY CLAIM THAT MR GARFIELD HAD A CONVERSATION
21 WITH SEVERAL EXECUTIVES AT HILTON, THAT WE AGREED THAT WE
22 WOULD DEAL EXCLUSIVELY WITH THE GARFIELD TEAM

23 NOW, THE REASON THAT'S SO INTERTWINED WITH THE FRAUD IS
24 BECAUSE IF THERE'S NOT A CONTRACT OF EXCLUSIVITY THERE IS --
25 THEY CAN'T EVEN ATTEMPT TO MAKE AN ARGUMENT ON FRAUD BECAUSE

1 ALL THEY'RE SAYING WE DID WITH FRAUD WAS THAT WE TALKED TO
2 MR AUGHTRY AND WE WERE NOT -- WE WERE NOT ALLOWED TO TALK TO
3 MR AUGHTRY IS THEIR FRAUD CASE SO, YOUR HONOR, WE
4 ABSOLUTELY DISPUTE THE OFFER OF ACCEPTANCE AND MUTUAL
5 CONSIDERATION OF THIS ORAL CONTRACT WE HAVE NO IDEA WHAT
6 THE TERMS ARE IT'S JUST SOME KIND OF VAGUE NOTION OF AN
7 ORAL CONTRACT OF EXCLUSIVITY BUT, MORE IMPORTANTLY, THIS
8 ALLEGED ORAL CONTRACT VIOLATES THE STATUTE OF FRAUDS AND I
9 THINK THAT WHEN WE GO DOWN THE STATUTE OF FRAUDS ROAD WE CAN
10 SEE THAT

11 NOW, AS FAR AS THE INTERTWINING OF THIS WITH THE FRAUD
12 YOUR HONOR, THE BREACH OF CONTRACT, THE ONLY -- WE DID A
13 12(B)(6) MOTION TO DISMISS THE BREACH OF CONTRACT ACCOMPANIED
14 BY FRAUD AND THE COURT DISMISSED ALL THE SUBCATEGORIES OF
15 THE ALLEGED FRAUD BECAUSE THE COURT -- JUDGE MILLING SAID TO
16 HAVE BREACH OF CONTRACT ACCOMPANIED BY FRAUD, THE FRAUD HAS
17 TO BE SEPARATE FROM THE BREACH OF CONTRACT SO THE ONLY
18 ALLEGATION LEFT AFTER ONE ROUND OF HEARINGS -- JUDGE MILLING
19 SAID THE PLAINTIFFS HAVE THE RIGHT TO TRY TO PROVE THIS
20 SO-CALLED BAIT AND SWITCH AND WHAT THEY'RE CLAIMING HERE---

21 THE COURT AND THAT WAS JUST PURELY 12(B)(6)

22 MR FOSTER 12(B)(6) WE JUST SAID THEY DO NOT HAVE
23 ANY EVIDENCE OF AN ADDITIONAL ACT OVER AND ABOVE THE BREACH
24 WE DIDN'T GET INTO -- I SHOULDN'T SAY THAT WE DIDN'T EVEN
25 GET INTO THE EVIDENCE WE JUST SAID EVERY ALLEGATION OF

1 FRAUD IS THE SAME AS THE BREACH SO THIS IS THE ONLY ONE
2 THAT SURVIVED, AND WHAT THEY SAID WAS THAT HILTON COOPERATED
3 WITH AUGHTRY IN THEIR FORMAL PROPOSAL OF A NON-FULL-SERVICE
4 GARDEN INN FIRST OF ALL, THERE WAS NEVER A NON-FULL-SERVICE
5 GARDEN INN SO THAT FACT ALONE REALLY CUTS AGAINST ANY KIND
6 OF FRAUD

7 THE COURT WELL, I THOUGHT IN SOME OF THE THINGS I READ
8 THERE WAS DISCUSSION AT SOME POINT OF JUST THE STANDARD
9 HILTON GARDEN INN THAT WASN'T FULL SERVICE

10 MR FOSTER WELL---

11 THE COURT DID I MISREAD THAT?

12 MR FOSTER WELL, LET ME JUST SAY THE FACTS OF THE
13 CASE THE WRITTEN PROPOSAL THAT WE SHOWED YOU EARLIER THIS
14 MORNING MR AUGHTRY IN WRITING OFFERED A FULL-SERVICE HILTON
15 GARDEN INN OR COURTYARD MARRIOTT SO I MEAN, THEY ARGUE
16 THAT WE CONSPIRED WITH AUGHTRY TO INITIALLY PROPOSE A NON-
17 FULL-SERVICE AUGHTRY NEVER PROPOSED A NON-FULL-SERVICE SO
18 FACT NUMBER ONE AS PART OF THEIR FRAUD IS NOT EVEN ACCURATE

19 THE COURT OH, YOU'RE SAYING AUGHTRY NEVER PROPOSED IT

20 MR FOSTER RIGHT AUGHTRY NEVER PROPOSED WHAT THEY'RE
21 CLAIMING IN THIS CAUSE OF ACTION THE SECOND HALF THAT GETS
22 EVEN WHAT I WOULD CALL MORE PREPOSTEROUS IS WITH THE
23 KNOWLEDGE AND UNDERSTANDING THAT AUGHTRY WAS GOING TO SWITCH
24 THE PROPOSAL TO A FULL-SERVICE HILTON HOTEL, AND WE'RE SAYING
25 ON THAT SECOND HALF THERE IS ZERO EVIDENCE IN THIS CASE WE

1 DID NOT HAVE ANYTHING TO DO WITH AUGHTRY CHANGING THE
2 PROPOSAL WHICH WAS A FULL-SERVICE HILTON GARDEN INN OR
3 COURTYARD MARRIOTT TO A FULL-SERVICE HILTON HOTEL, AND THE
4 ONLY EVIDENCE THEY CAN CITE ARE THOSE THREE LETTERS AND TWO
5 E-MAILS ALL OF THOSE---

6 THE COURT THAT YOU'VE ALREADY PUT UP ON THE BOARD?

7 MR FOSTER ALREADY PUT UP ON THE BOARD AND ALL OF
8 THOSE START WITH MAY 21, WELL AFTER THE SECOND R F P
9 PROCESS AND SO, YOUR HONOR, ON THE -- ON THE -- WE HAVE THE
10 AFFIDAVIT ON THIS ISSUE FROM MR AUGHTRY THAT'S IN OUR BRIEF
11 HILTON HAD NOTHING TO DO WITH WHAT I PROPOSED IN WRITING
12 HILTON HAD NOTHING TO DO WITH MY PRESENTATION HILTON NEVER
13 SAW IT BUT THAT'S THEIR CLAIM AND IT S TIME FOR THEM TO COME
14 UP WITH SOME EVIDENCE IF THEY THINK WE HAD ANYTHING TO DO
15 WITH MR AUGHTRY'S PROPOSALS

16 MR BRIAN FRYE WAS ASKED WHETHER HE HAD ANY
17 COMMUNICATION WITH AUGHTRY BEFORE THE SECOND R F P AND THE
18 ANSWER IS NO DURING THIS TIME FRAME, APRIL 1ST OF '03
19 THROUGH MARCH 23RD, '04, ANY CONVERSATIONS? NO SO HILTON
20 DIDN'T TALK TO AUGHTRY UNTIL AFTER THE SECOND R F P THE
21 SAME THING WITH MR GARFIELD HE DOESN'T HAVE ANY EVIDENCE
22 -- NOW, THIS -- OKAY SO THE TEAM -- SO WE'RE MOVING TO THE
23 TEAMING AGREEMENT

24 SO THE WAY THE ORAL CONTRACT COLLIDES WITH FRAUD IS
25 THEIR EVIDENCE OF -- THEIR ALLEGATION OF FRAUD IS EVEN

1 THOUGH MR. AUGHTRY OWNS SEVEN HILTON FRANCHISES, WE CAN'T
2 TALK TO HIM ON THE TELEPHONE BECAUSE YOU AGREED TO HAVE AN
3 ORAL CONTRACT OF EXCLUSIVITY. SO IF YOU DON'T HAVE AN ORAL
4 CONTRACT OF EXCLUSIVITY, THEY CAN'T EVEN START THIS
5 CONVERSATION ABOUT FRAUD.

6 THE COURT: WELL, YOU SAY -- YOU SAY THAT THE ORAL
7 CONTRACT OF EXCLUSIVITY IS A FICTION. WHAT DO THEY SAY IT
8 CONSISTS OF?

9 MR. FOSTER: THEY SAID THEY HAD A TELEPHONE CONVERSATION
10 WITH HILTON EXECUTIVES WELL BEFORE DECEMBER 11, 2002. WE
11 WANT YOU TO BE ON THE TEAM. HILTON SAID WE WANT TO BE ON THE
12 TEAM, AND WE WANT YOU TO BE EXCLUSIVELY ON THE TEAM. AND
13 HILTON SAID WE WILL BE EXCLUSIVELY ON THE TEAM. THAT'S THE
14 CONTRACT. NO OTHER TERMS. WE DON'T KNOW HOW LONG IT WAS
15 SUPPOSED TO LAST. WE DON'T KNOW WHAT WE WERE SUPPOSED TO DO
16 OR NOT DO, BUT THAT IS THE BASIC EXCLUSIVITY. NOW YOUR
17 HONOR, THAT'S A TEAMING AGREEMENT.

18 SO IF I CAN JUMP -- I'M JUMPING THROUGH A LOT OF THIS
19 QUICKLY BECAUSE I TOOK TOO MUCH TIME THIS MORNING. MY
20 COLLEAGUES GOT MAD AT ME. BUT THE TEAMING AGREEMENT IS
21 ABSOLUTELY A CONTRACT OF EXCLUSIVITY, AND HERE'S A TEAMING
22 AGREEMENT. THAT IS A TEAMING AGREEMENT THAT BOTH HILTON AND
23 GARFIELD -- TWO MONTHS BEFORE THIS DATE ON ANOTHER PROJECT WE
24 ENTERED INTO A TEAMING AGREEMENT THAT---

25 THE COURT: ANOTHER PROJECT?

1 **MR FOSTER** YEAH, ANOTHER PROJECT UNRELATED TO THIS
2 CASE THESE PARTIES KNOW HOW TO DO A WRITTEN EXCLUSIVITY
3 AGREEMENT AND IT'S THIS DOCUMENT THAT WE BOTH ENTERED INTO
4 OCTOBER 2, 2002 WE DID NOT ENTER INTO THAT IN THIS CASE
5 BECAUSE OF THIS E-MAIL DECEMBER 13, TWO DAYS AFTER THEY
6 WERE SELECTED, THEY SAID WE DON'T WANT A TEAMING AGREEMENT
7 WITH HILTON BECAUSE WE WANT TO REPLACE -- WE MIGHT NEED TO
8 REPLACE THEM

9 SO WHEN WE GET INTO THIS ORAL CONTRACT IT IS BARRED BY
10 THE STATUTE OF FRAUDS BECAUSE IT WAS FOR MORE THAN ONE YEAR
11 COULDN'T HAVE BEEN POSSIBLE THAT THIS EXCLUSIVITY COULD HAVE
12 BEEN ACCOMPLISHED WITHIN ONE YEAR, ACCORDING TO THE AFFIDAVIT
13 FROM THE CITY ADVISOR ACCORDING TO MR GARFIELD'S AFFIDAVIT
14 WHEN HE WAS CRITICIZING MR AUGHTRY FOR SAYING HE COULD BUILD
15 THIS HOTEL FROM START TO SCRATCH IN 18 MONTHS, AND HIS
16 AFFIDAVIT SAID IN HIS THREE DECADES HE DIDN'T SEE HOW THAT
17 WAS POSSIBLE

18 IN HIS DEPOSITION WHEN I ASKED MR GARFIELD COULD THIS
19 EXCLUSIVITY AGREEMENT THAT YOU'RE TALKING ABOUT SOMETIME --
20 WITH THE TELEPHONE CALL PRIOR TO THIS, COULD THAT HAVE BEEN
21 COMPLETED IN A YEAR? ABSOLUTELY NOT SO THE STATUTE OF
22 FRAUDS IS WHAT BARS THE EXCLUSIVITY ORAL AGREEMENT THE
23 OTHER THING---

24 **THE COURT** WHERE IS THE E-MAIL -- THERE'S AN E-MAIL
25 THAT YOU PUT UP ONE TIME ABOUT THE PLAINTIFF GARFIELD WANTING

1 TO HAVE THE RIGHT TO---

2 MR FOSTER YEAH RIGHT HERE, YOUR HONOR THIS E-MAIL
3 RIGHT HERE---

4 THE COURT I'M SORRY IT'S RIGHT IN FRONT OF ME
5 WHERE IS THAT IN MY PACKETS?

6 MR FOSTER IT IS -- IT IS IN OUR REPLY MEMO BECAUSE
7 THE PLAINTIFFS' ARGUMENT AROUND THE STATUTE OF FRAUDS IS WHEN
8 THERE'S A WRITTEN DOCUMENT THAT CONFIRMS THE EXISTENCE OF THE
9 ORAL CONTRACT THEN THAT'S AN EXCEPTION TO THE STATUTE OF
10 FRAUDS OUR POSITION IS EVERY WRITING DIRECTLY DISPUTES THAT
11 THERE WAS AN EXCLUSIVITY THIS IS WRITING NUMBER ONE WE
12 DON'T WANT TO MAKE A COMMITMENT TO THEM

13 WRITING NUMBER TWO THE M O U NOW THIS M O U THAT
14 THEY SAY IS A BINDING CONTRACT THERE'S NOTHING -- THERE'S NO
15 QUESTION THE M O U DOCUMENTED THE NEGOTIATIONS UP TO THAT
16 DATE UP TO FEBRUARY 17TH 2003 THE M O U DOCUMENTED THE
17 NEGOTIATIONS NOWHERE IN THAT DOCUMENT IS THERE ANY MENTION
18 OF THIS EXCLUSIVITY AGREEMENT THAT THEY'RE CLAIMING EXISTED

19 AND THEN LASTLY, AS IT RELATES TO BOTH THE FRAUD AND THE
20 ORAL AGREEMENT, THE LETTERS THAT WERE WRITTEN, FIRST OF ALL,
21 CLEARLY DEMONSTRATE THAT HILTON WAS NOT DEALING EXCLUSIVELY
22 WITH GARFIELD HILTON SUPPORTS THE PROPOSAL OF A HILTON
23 GARDEN INN SO ALL THE WRITINGS IN THIS CASE DISPUTE THIS
24 IMAGINARY ORAL CONTRACT AND THIS ALSO IS APPARENTLY THE
25 BASIS OF -- NOT APPARENTLY IT IS THESE THREE LETTERS ARE

1 THE BASIS OF FRAUD BECAUSE WE TOLD THE CITY THE TRUTH, WE
2 CONSPIRED WITH BO AUGHTRY ON A BAIT AND SWITCH

3 SO IF THERE'S NO ORAL CONTRACT, THEY CAN'T TELL US WE
4 CAN'T TALK ON THE TELEPHONE TO MR AUGHTRY EVEN IF THERE IS
5 AN ORAL CONTRACT OF EXCLUSIVITY, ALL WE DID WAS AFTER THE
6 SECOND R F P WAS ISSUED, WE DISCUSSED WITH MR AUGHTRY A
7 HILTON GARDEN INN OR A FULL-SERVICE ALTERNATIVE THEY HAVE
8 TO COME FORWARD WITH PROOF OF THIS BAIT AND SWITCH THAT'S
9 WHAT THEY'RE DOWN TO AND THAT WE PARTICIPATED IN THE ORIGINAL
10 WRITTEN PROPOSAL, THAT WE AT ALL TIMES INTENDED TO FLIP-FLOP
11 THAT, THAT WE SOMEHOW -- AUGHTRY WAS TRYING TO GET IN THE
12 DOOR WITH A NON-FULL-SERVICE HILTON KNEW THAT HILTON WAS
13 GOING TO CONSPIRE WITH CHANGING THE TERMS AND MAKE IT A FULL-
14 SERVICE HILTON, AND THAT'S WHAT THEY'RE DOWN TO AND THEY
15 DON'T HAVE ANY EVIDENCE OF THAT YOUR HONOR THANK YOU

16 THE COURT ALL RIGHT MR HINSON, HOW ABOUT THE
17 DECEMBER 13 E-MAIL? DOES THAT HAVE ANY IMPACT ON -- WELL,
18 LET ME ASK YOU THIS QUESTION FIRST WHEN DID THE ORAL
19 CONTRACT GERMINATE? WHEN DID IT -- WHEN DID IT COME INTO
20 EXISTENCE?

21 MR HINSON YOUR HONOR, OUR -- MR GAR -- MR RAY
22 GARFIELD -- WHAT MR FOSTER IS LEAVING OUT IS THAT THIS
23 E-MAIL OR WHAT HE'S NOT STRESSING IS THAT THIS E-MAIL WAS
24 FROM GREG GARFIELD WHO IS RAY GARFIELD'S SON AND AT THE
25 TIME THAT GREG WROTE THIS E-MAIL HE WAS AN EMPLOYEE OF THE

1 COMPANY HE WAS NOT A PRINCIPAL OF THE COMPANY HE WAS NOT
2 A MANAGER OF THE COMPANY

3 THE COURT HIS NAME WAS WHAT?

4 MR HINSON GREG GREG GARFIELD RAY GARFIELD'S
5 TESTIMONY IS THAT HE HAD CONVERSATIONS IN THIS TIME PERIOD
6 HERE BETWEEN THE TIME THE M O U WAS SIGNED AND FROM WHEN THE
7 REQUEST FOR QUALIFICATIONS WENT OUT, THAT THE GARFIELD TRAUB
8 COMPANY WAS INTERESTED IN RESPONDING TO THIS R F Q AND THEY
9 CALLED HILTON AND SAID "HILTON, WE ARE INTERESTED IN YOU
10 JOINING OUR TEAM WOULD YOU BE INTERESTED IN JOINING OUR
11 TEAM? WE WILL NOT OFFER ANY OTHER FLAGS OF ANY OTHER HOTEL
12 COMPANIES, AND YOU IN EXCHANGE, WON'T JOIN ANY OTHER TEAMS "
13 AND THAT THE HILTON EXECUTIVE SAID, "YES, WE WOULD BE
14 INTERESTED WE WOULD LIKE TO DO THAT " THAT'S WHAT
15 OCCURRED

16 HILTON JOINED THE GARFIELD TRAUB/EDENS AND AVANT TEAM
17 AND WHAT GREG GARFIELD SAID -- GREG WASN'T PRIVY TO THAT
18 CONVERSATION HE WASN'T IN ON THAT PHONE CALL -- HE WAS --
19 MISGUIDED

20 THE COURT WHAT AUTHORITY THEN DID HE HAVE TO DO ANY
21 KIND OF E-MAIL THAT WOULD HAVE ANYTHING TO DO WITH THIS
22 PROJECT?

23 MR HINSON WELL, THESE ARE JUST INTERNAL GARFIELD
24 TRAUB E-MAILS THAT GREG WAS SENDING WITHIN THE COMPANY

25 THE COURT ALL RIGHT

1 MR HINSON BUT THEY WEREN'T SENT TO HILTON THEY
2 WEREN'T SENT TO THE CITY THEY WERE JUST WITHIN THE COMPANY

3 THE COURT BUT DOES THAT MAKE A DIFFERENCE?

4 MR HINSON THE JURY MAY CONSIDER THAT IN DECIDING
5 WHETHER OR NOT MR GARFIELD -- MR RAY GARFIELD'S TESTIMONY
6 IS TRUTHFUL

7 THE COURT ALL RIGHT GO BACK TO THE POINT -- WHEN DID
8 THE CONTRACT THE VERBAL CONTRACT, BEGIN? WHEN WAS THERE A
9 MEETING OF THE MINDS?

10 MR HINSON THE MEETING OF THE MINDS OCCURRED DURING
11 THAT PHONE CALL WITH---

12 THE COURT WHEN? WHEN WAS IT?

13 MR HINSON MR GARFIELD DOESN'T HAVE AN EXACT DATE
14 I'LL FIND -- ONE SECOND

15 THE COURT ARE WE TALKING ABOUT BEFORE DECEMBER 11,
16 '02, OR DOES IT HAVE TO BE AFTER? I ASSUME GARFIELD HAD DONE
17 SOME DISCUSSION WITH HILTON---

18 MR HINSON IT WOULD HAVE BEEN---

19 THE COURT ---BEFORE DECEMBER 11 '02

20 MR HINSON IT WOULD HAVE BEEN BEFORE DECEMBER 11,
21 2002---

22 THE COURT ALL RIGHT

23 MR HINSON ---BECAUSE HILTON HAD JOINED THE TEAM AT
24 THAT POINT

25 THE COURT AND HOW ABOUT THE POINT THAT IT COULDN'T BE

1 PERFORMED WITHIN THE SPACE OF A YEAR?

2 MR HINSON WELL YOUR HONOR THERE'S TWO ISSUES WITH
3 THAT ONE, IT COULD BE PERFORMED WITHIN THE ISSUE OF A YEAR
4 -- WITHIN THE TIME SPAN OF A YEAR HAD THIS PROJECT PROVED
5 UNFEASIBLE HAD THE CITY -- HAD THE GARFIELD TRAUB/EDENS AND
6 AVANT TEAM NOT BEEN ABLE TO PUT TOGETHER A HOTEL PROJECT THAT
7 COULD BE BUILT, THEN IT WOULD HAVE COME TO AN END THE CITY
8 WOULD HAVE TAKEN A VOTE, SAID THIS IS NOT FEASIBLE THE
9 PROJECT COMES TO AN END THAT EASILY COULD HAVE OCCURRED
10 WITHIN A YEAR

11 THE COURT THAT COULD HAVE CERTAINLY

12 MR HINSON AND IF THAT HAD OCCURRED WITHIN A YEAR---

13 THE COURT BUT THE CONTRACT THAT WOULD ENTITLE YOU TO
14 SOME PAYMENT WHICH IS WHAT YOUR CAUSE OF ACTION IS BASED ON,
15 ISN'T THAT WHAT HAS TO BE ABLE TO BE PERFORMED WITHIN ONE
16 YEAR?

17 MR HINSON NO, YOUR HONOR THE CONTRACT THAT WE'RE
18 SUING UNDER, THAT WE'RE TALKING ABOUT RIGHT NOW, IS THE
19 CONTRACT OF EXCLUSIVITY, THAT HILTON WOULD ONLY BE ON OUR
20 TEAM WE WOULD ONLY OFFER HILTON'S FLAG AND THAT CONTRACT
21 COULD HAVE BEEN FULFILLED IN UNDER A YEAR HAD THIS PROJECT
22 COME TO AN END THAT THE CONTRACT---

23 THE COURT WITH NO MONEY BEING PAID

24 MR HINSON WITH NO MONEY BEING PAID BECAUSE---

25 THE COURT IF YOU GO TO THE JURY ON THAT, THEN YOU

1 DON'T HAVE DAMAGES IF YOU GO TO THE JURY ON A CONTRACT THAT
2 COULD HAVE BEEN PERFORMED WITHIN THE SPACE OF A YEAR, THAT'S
3 WHERE YOU HAVE DAMAGES AND THAT'S WHERE YOU MIGHT RUN HEAD
4 INTO THE STATUTE OF FRAUDS

5 MR HINSON WELL YOUR HONOR, I WOULD---

6 THE COURT OR DO YOU THINK I'M BEING TOO -- OVER-
7 SIMPLIFYING?

8 MR HINSON I THINK YOU ARE, YOUR HONOR, YES, SIR,
9 BECAUSE WHAT HILTON'S ARGUMENT IS IS THAT THIS CONTRACT ISN'T
10 VALID -- THIS ORAL CONTRACT ISN'T VALID BECAUSE OF THE
11 STATUTE OF FRAUDS

12 THE COURT AND AS AN ASIDE THEY SAY IT DIDN'T EXIST
13 ANYWAY BUT FOR THE PURPOSES OF LEGAL ARGUMENT IT'S THE
14 STATUTE OF FRAUDS

15 MR HINSON YES SIR, YOUR HONOR AND WHAT I'M
16 ADVANCING IS THE STATUTE OF FRAUDS DOES NOT APPLY TO THIS
17 CONTRACT BECAUSE IT COULD HAVE BEEN ACCOMPLISHED WITHIN A
18 YEAR SECONDLY, THE STATUTE OF FRAUDS DOES NOT APPLY TO THIS
19 ARGUMENT BECAUSE THERE IS WRITTEN EVIDENCE OF A WRITING

20 NOW, ONE OF THE DOCUMENTS THAT MR FOSTER KEEPS PUTTING
21 UP SAYS -- THIS IS COMING FROM HILTON, AND IT SAYS "WE
22 REMAIN COMMITTED TO THE GARFIELD TRAUB TEAM " YOUR HONOR, I
23 WOULD SUBMIT TO YOU THAT THAT IS EVIDENCE THAT THEY HAD
24 COMMITTED THEMSELVES -- YOU CAN INFER -- YOU CAN TAKE A
25 REASONABLE INFERENCE FROM THAT THAT THEY ARE SPEAKING OF

1 THEIR COMMITMENT OF EXCLUSIVITY TO GARFIELD TRAUB AND AT
2 THIS POINT WE'RE ENTITLED TO THAT REASONABLE INFERENCE OR TO
3 ANY REASONABLE INFERENCE

4 THE COURT WHEN WAS -- WHEN WAS -- WHEN WAS THAT?

5 MR HINSON THAT WAS MAY 21ST, 2004

6 THE COURT ALL RIGHT

7 MR HINSON AND THAT'S EXHIBIT D D IN THIS BINDER,
8 YOUR HONOR

9 THE COURT THAT DATE ONE MORE TIME?

10 MR HINSON THAT'S MAY 24TH 2004 I'M SORRY THAT'S
11 -- I'M SORRY MAY 21ST, 2004

12 THE COURT AND THAT WAS THE CONFIRMATION YOU SAY FROM
13 HILTON TO YOUR CLIENT SAYING THEY'RE ON THE TEAM

14 MR HINSON WELL, HILTON CONFIRMS THEIR EARLIER
15 CONVERSATIONS HILTON SAYS---

16 THE COURT OR THAT THEY WERE ON THE TEAM EXCLUSIVELY

17 MR HINSON "WE CONTINUE TO SUPPORT THE GARFIELD TRAUB
18 TEAM FOR THE DEVELOPMENT OF A HILTON-MANAGED-FULL-SERVICE
19 HOTEL AT THE CONVENTION CENTER "

20 THE COURT THAT'S ONE OF THE THINGS THAT SOMEBODY PUT
21 ON THE SCREEN EARLIER?

22 MR HINSON YES, SIR AND I WOULD ADVANCE THIS ALL
23 WE NEED IS A WRITING TO SUBSTANTIATE OR TO EVIDENCE THE
24 EXISTENCE OF THIS ORAL CONTRACT THAT WOULD TAKE IT OUT OF THE
25 STATUTE OF FRAUDS AND THAT -- GIVEN THE REASONABLE INFERENCES

1 WE'RE ENTITLED TO THAT THAT STATEMENT BY HILTON MOVES THIS
2 CONTRACT OUT OF THE STATUTE OF FRAUDS BUT AGAIN, YOUR
3 HONOR, I DON'T THINK IT EVER FELL WITHIN THE STATUTE OF
4 FRAUDS TO BEGIN WITH BECAUSE BY ITS TERMS IT COULD HAVE BEEN
5 COMPLETED WITHIN A YEAR HAD THE FEASIBLE PROJECT NOT
6 BEEN---

7 THE COURT I CAN UNDERSTAND THAT ARGUMENT THE
8 RATIONALE OF IT BECAUSE YOU'RE SAYING THAT THE AGREEMENT
9 THAT COULD HAVE BEEN PERFORMED WITHIN ONE YEAR WAS WITH
10 EVERYBODY GOING HOME EMPTY-HANDED SO HOW IS THAT -- HOW IS
11 THAT JUST NOT AN ARTICULATE WAY OF SAYING NOTHING? IN
12 ESSENCE YOU'RE SAYING THAT, WELL WE -- THE STATUTE OF
13 FRAUDS ON THE ONE-YEAR PART DOESN'T APPLY BECAUSE IT COULD
14 HAVE BEEN PERFORMED IN A YEAR BUT ONLY IN A FASHION WHERE YOU
15 WOULD RECEIVE NO COMPENSATION OR REWARD

16 MR HINSON YOUR HONOR, IF I COULD, COULD I CITE AN
17 EXAMPLE OF SOME RESTATEMENT OF CONTRACTS?

18 THE COURT YES, SIR

19 MR HINSON A , THE MATERNAL GRANDMOTHER OF A NEWBORN
20 ILLEGITIMATE CHILD AGREES TO, B , THE FATHER, THAT A WILL
21 CARE FOR THE CHILD AND B WILL MAKE SUPPORT PAYMENTS UNTIL
22 CHILD BECOMES 21 YEARS OLD THE AGREEMENT IS NOT WITHIN THE
23 ONE-YEAR PROVISION OF THE STATUTE OF FRAUDS BECAUSE IF THE
24 CHILD DIES WITHIN A YEAR THE PRIMARY OBJECT OF FURNISHING
25 NECESSITIES TO THE CHILD WILL BE FULLY PERFORMED THIS IS

1 SYNONYMOUS WITH THE SITUATION THE PRIMARY OBJECT OF BEING
2 EXCLUSIVE WOULD HAVE BEEN FULLY PERFORMED HAD THIS PROJECT
3 NOT PROVED FEASIBLE -- NOT PROVEN FEASIBLE, AND IT TAKES THIS
4 OUT OF THE STATUTE OF FRAUDS

5 THE COURT OKAY

6 MR HINSON AND SOUTH CAROLINA LAW HAS -- HAS CLEARLY
7 STATED THAT THE QUESTION IS NOT WHETHER PERFORMANCE WAS
8 LIKELY, EVEN WHETHER IT WAS EXPECTED TO OCCUR BY THE PARTIES,
9 BUT WHETHER THE TERMS OF THE CONTRACT WOULD PERMIT
10 PERFORMANCE, AND THERE'S NOTHING ABOUT THE BUILDING OF THIS
11 HOTEL THAT WOULD NOT PERMIT IT TO BE ACCOMPLISHED WITHIN A
12 YEAR THERE'S NOTHING IN THIS CONTRACT THAT SAID THIS HOTEL
13 WILL BE BUILT TWO YEARS FROM TODAY THERE'S NOTHING IN THIS
14 CONTRACT THAT SAYS THIS HOTEL WILL NOT BE COMPLETED BEFORE 13
15 MONTHS FROM TODAY IN THEORY, THIS HOTEL COULD HAVE BEEN
16 BUILT UNDER A YEAR AND THAT'S THE LAW OF THE STATUTE OF
17 FRAUDS THERE'S NOTHING BY THE TERMS OF THE CONTRACT THAT
18 PREVENT PERFORMANCE WITHIN A YEAR

19 THE COURT BUT EVEN UNDER YOUR RESTATEMENT EXAMPLE
20 THERE WAS SOME COMPENSATION THAT WOULD BE OWED EVEN UNDER
21 THAT CONCEIVABLY LIMITED -- WITHIN THAT CONCEIVABLY LIMITED
22 TIME FRAME I DON'T WANT TO DWELL ON THAT I DON'T WANT---

23 MR HINSON WELL, I WOULD SAY, YOUR HONOR, IN THIS
24 SITUATION THERE WOULD BE COMPENSATION DURING THAT TIME
25 FRAME WE WOULD HAVE BEEN EXCLUSIVE AND THEY WOULD HAVE BEEN

1 EXCLUSIVE THAT WAS THE -- THAT WAS THE CONSIDERATION GIVEN
2 SO THE CONSIDERATION WOULD HAVE BEEN EXCHANGED DURING THAT
3 TIME PERIOD

4 THE COURT ALL RIGHT

5 MR HINSON IT'S---

6 THE COURT SO WHAT ARE YOUR -- WHAT ARE YOUR DAMAGES ON
7 THAT?

8 MR HINSON WELL, IN THAT SITUATION, YOUR HONOR, I
9 THINK WE ONLY NEED TO - THAT'S ONLY BEING ADVANCED TO PROVE
10 THAT THIS IS NOT A CONTRACT THAT FALLS WITHIN THE STATUTE OF
11 FRAUDS, THAT BECAUSE OF THAT SITUATION BECAUSE OF THE
12 POSSIBILITY OF PERFORMANCE WITHIN A YEAR, THEIR STATUTE OF
13 FRAUDS ARGUMENT FAILS THIS IS NOT A CONTRACT WITHIN THE
14 STATUTE OF FRAUDS WE CAN MOVE ON FROM THERE

15 THE COURT OKAY ALL RIGHT

16 MR HINSON AND---

17 THE COURT AND I -- THE GREG GARFIELD E-MAIL YOU'RE
18 SAYING IS OF ABSOLUTELY NO FACTUAL OR LEGAL CONSEQUENCE
19 EXCEPT MAYBE TO -- FOR IMPEACHMENT PURPOSES TO RAY GARFIELD

20 MR HINSON YES, YOUR HONOR THAT'S EXACTLY RIGHT
21 RAY'S TESTIMONY IS UNEQUIVOCALLY I HAD THESE CONVERSATIONS
22 HILTON EXECUTIVES MADE ME THESE PROMISES GREG DOESN'T SPEAK
23 FOR ME AND AT THE TIME GREG DIDN'T SPEAK FOR THE COMPANY
24 HE WAS AN EMPLOYEE, BUT HE WASN'T BINDING AND AGAIN, IT
25 WAS JUST INTERNAL GARFIELD TRAUB DEVELOPMENT E-MAILS

1 THE COURT OKAY

2 MR HINSON IF I COULD ADDRESS WHETHER OR NOT THERE WAS
3 A FRAUDULENT ACT

4 THE COURT THAT'S PARAGRAPH 64-A?

5 MR HINSON YES, YOUR HONOR CONNERS VERSUS CITY OF
6 FOREST ACRES SAYS, "A FRAUDULENT ACT IS DEFINED BY ANY ACT
7 CHARACTERIZED BY DISHONESTY IN FACT OR UNFAIR DEALINGS " AND
8 I WANT TO ACTUALLY GET AWAY FROM THESE LETTERS FOR JUST A
9 SECOND WE'VE GOT AFFIDAVITS FROM GREG GARFIELD RAY
10 GARFIELD, AND TONY TRAUB DISCUSSING CONVERSATIONS THEY HAD
11 WITH HILTON HOTELS, SOME OF THEM HAPPENING HERE IN THIS TIME
12 PERIOD WHERE THE SECOND R F P AND THE BIDS -- THE
13 PRESENTATION -- PRESENTATIONS ARE BEING MADE TO THE CITY

14 IT'S MR RAY GARFIELD'S TESTIMONY - AND MR GREG
15 GARFIELD WAS ON THE PHONE TOO - THAT THEY CALLED HILTON AND
16 THEY SAID, HILTON, WE UNDERSTAND THAT MR AUGHTRY HAS TOLD
17 THE CITY DURING HIS PRESENTATION OF HIS PROPOSAL THAT HE CAN
18 OFFER THE CITY A FULL-SERVICE HILTON AND THAT HILTON SAID,

19 NO, THAT'S NOT CORRECT HE'S ONLY ALLOWED TO BUILD A GARDEN
20 INN WE'LL GET THIS SET -- WE'LL SET THIS STRAIGHT

21 WELL, YOUR HONOR WE KNOW WHAT HAPPENED HILTON DIDN'T
22 SET IT STRAIGHT BO AUGHTRY WAS GIVEN PERMISSION TO BUILD A
23 FULL-SERVICE HILTON HOTEL

24 THE COURT BUT THEY SET IT STRAIGHT IN THEIR FOLLOW-UP
25 LETTER SAYING JUST TO CLARIFY, HERE'S THE EXACT SITUATION

1 ARE YOU SAYING THAT'S NOT SETTING IT STRAIGHT?

2 MR HINSON NOT AT ALL YOUR HONOR WHAT THEY SAID TO
3 RAY GARFIELD AND GREG -- OUR ALLEGATION IS THAT THEY SAID,
4 "DON'T WORRY HE WILL ONLY GET A GARDEN INN," AND THAT'S NOT
5 WHAT OCCURRED HE ENDED UP BEING ALLOWED TO SWITCH HIS BID,
6 TO SWITCH IT OVER TO A FULL-SERVICE HILTON OR TO A HILTON
7 THE LETTERS THEMSELVES, YOUR HONOR, ARE CHARACTERIZED BY
8 DISHONESTY AND UNFAIR DEALINGS

9 THE COURT AT SOME POINT -- I KNOW I'VE GOT THESE
10 LETTERS AND THEY'RE -- I THINK I'VE GOT THEM TWO OR THREE
11 TIMES, BUT IF SOMEBODY COULD GIVE THOSE TO MS FALCONE, SHE
12 CAN MAKE COPIES OF THOSE WE DON'T NEED TO DO IT NOW BUT SO
13 I CAN HAVE THEM TOTALLY SEPARATE FROM WHAT ALL I'VE GOT

14 MR HINSON OKAY SIR

15 THE COURT BECAUSE EVERYBODY SEEMS TO BE TALKING ABOUT
16 LETTERS AND THE GREG GARFIELD E-MAIL ALL RIGHT SO YOU'RE
17 SAYING THAT THE LETTERS THEMSELVES CLEARLY INDICATE THE
18 FRAUDULENT ACT OR NOT CLEARLY INDICATE BUT THERE'S EVIDENCE
19 OF A FRAUDULENT ACT

20 MR HINSON THEY ARE AND GIVEN THE -- GIVEN THE
21 INFERENCES WE'RE ENTITLED TO, I BELIEVE SUMMARY JUDGMENT
22 WOULD BE INAPPROPRIATE AT THIS POINT AGAIN, WHAT -- MY
23 CLIENTS HAVE THIS CONVERSATION WITH HILTON AND THEY SAY, YOU
24 KNOW "HILTON, MR AUGHTRY IS NOT ALLOWED TO GIVE A -- TO
25 OFFER THE CITY A FULL-SERVICE HILTON " HILTON SAYS, 'YES

1 THAT'S CORRECT WE'LL TAKE CARE OF IT, DON'T WORRY " SO
2 THEY WRITE THIS LETTER -- HILTON WRITES THIS LETTER THAT, YOU
3 KNOW, STATES, "WE REMAIN COMMITTED " LET ME GET MY --
4 "HILTON CONTINUES TO SUPPORT THE GARFIELD TRAUB TEAM FOR THE
5 DEVELOPMENT OF THE HILTON-MANAGED HILTON FULL-SERVICE HOTEL "

6 THE COURT AND WHAT ELSE DOES IT SAY?

7 MR HINSON WELL, IT SAYS HILTON SUPPORTS -- THEY'RE
8 WRITING TO AUGHTRY "HILTON SUPPORTS YOUR PROPOSED
9 DEVELOPMENT OF A HILTON GARDEN INN AT THE CONVENTION CENTER "
10 WELL YOUR HONOR, THEY ULTIMATELY ALLOWED AUGHTRY TO BUILD---

11 THE COURT AUGHTRY DIDN'T LIKE THAT LETTER

12 MR HINSON HE DIDN'T LIKE THAT A BIT

13 THE COURT THEN THEY WROTE ANOTHER ONE

14 MR HINSON AND THEN HE WROTE ANOTHER ONE BACK

15 THE COURT WHAT DOES THAT SAY?

16 MR HINSON IT SEEMINGLY -- WHAT IT SAYS -- IT'S
17 WRITTEN TO BRIAN FRYE OF HILTON "YOU AND STEVE CRABILL ARE
18 FULLY AWARE OF OUR INTENTION TO OFFER A FULL-SERVICE HILTON

19 AS AN ALTERNATIVE TO THE CITY " SO AUGHTRY IS SAYING
20 HILTON, YOU KNOW THAT I INTEND TO GO -- THAT I HAVE AN
21 INTENTION TO BUILD A FULL-SERVICE HOTEL, AND YOU HAVE
22 ACQUIESCED TO IT

23 THE COURT OKAY

24 MR HINSON WHEN JUST EARLIER HILTON WAS ON THE PHONE
25 WITH MY CLIENT SAYING DON'T WORRY ABOUT IT---

1 THE COURT AND THEN HILTON---

2 MR HINSON ---HE CAN'T DO THAT

3 THE COURT ---WRITES IT BACK TO THE CITY AND SAYS WHAT?

4 MR HINSON THEY WRITE THIS VERY CRYPTIC LETTER THAT

5 SAYS BOTH HILTON'S LETTER -- BOTH OUR EARLIER LETTER AND

6 AUGHTRY'S LETTER ARE CORRECT

7 THE COURT IS THAT ANY CONFIRMATION THAT THEY WERE EVER

8 ON AN EXCLUSIVE TEAM THOUGH? WHERE DOES THAT COME IN? WHERE

9 IS THE -- WHERE IS THE WRITING YOU'RE TALKING ABOUT THAT

10 PROVIDES SOME LINCHPIN THAT THEY WERE ON AN EXCLUSIVE TEAM?

11 MR HINSON WELL I THINK THE WRITING---

12 THE COURT IS THAT THE EARLIER ONE?

13 MR HINSON THAT'S THE EARLIER ONE WHERE THEY SAY, "WE

14 CONTINUE TO SUPPORT GARFIELD TRAUB FOR THE DEVELOPMENT OF A

15 HILTON," AND I THINK TAKING A REASONABLE INFERENCE FROM THAT,

16 THAT'S CONFIRMING THEIR COMMITMENT, THEIR SUPPORT TO GARFIELD

17 TRAUB DEVELOPMENT, AND THEY'RE WRITING AND THEY MAKE THE

18 LETTER SOUND AS IF AUGHTRY CAN'T OFFER A HILTON THEY

19 MAKE THE -- THE LETTER IS WRITTEN IN SUCH A WAY THAT IT

20 CREATES THE IDEA THAT ALL AUGHTRY CAN DO IS OFFER A GARDEN

21 INN AND NOT A HILTON

22 AND THEN AUGHTRY WRITES BACK YOU KNOW GOOD AND WELL

23 WE'VE TALKED ABOUT SOMETHING DIFFERENT AND THEN HILTON

24 RESPONDS AGAIN BOTH LETTERS ARE CORRECT, WHICH THEY DON'T

25 EXPLAIN HOW BOTH LETTERS CAN BE CORRECT AND THERE'S ALSO

1 THIS E-MAIL AND THIS IS WITHIN -- WITHIN THE DOCUMENTS
2 PROVIDED TO THE COURT, AN INTERNAL E-MAIL WITHIN HILTON WHERE
3 THEY TALK ABOUT WHAT ARE WE GOING TO DO? LET'S RESPOND IN
4 THE FORM OF A PHONE CALL BUT NOT -- LET'S NOT PUT IT IN
5 WRITING AND GIVEN THE REASONABLE INFERENCE, I THINK THAT
6 SHOWS THAT HILTON KNEW THEY WERE IN HOT WATER AT THIS POINT,
7 THAT THEY DIDN'T WANT TO PUT ANYTHING IN WRITING

8 THE COURT OKAY ALL RIGHT ANYTHING ELSE ON THAT
9 POINT OR IN RESPONSE TO MR FOSTER'S COMMENTS IN THE
10 PRECEDING 15 MINUTES?

11 MR HINSON NOTHING FURTHER, YOUR HONOR

12 THE COURT ALL RIGHT OKAY

13 MR SUGGS YOUR HONOR YOU HAD ASKED ABOUT WAS THERE
14 ANY PROTEST BY OUR CLIENTS TO THE CITY

15 THE COURT THAT WAS EARLIER THIS MORNING?

16 MR SUGGS EARLIER THIS MORNING I SAID MR I S LEEVY
17 JOHNSON HAD DONE IT ACTUALLY, IT WAS CAM LEWIS AND
18 EVERYBODY AGREES THIS LETTER IS PART OF THE PRODUCTION IN
19 THIS CASE MAY 28TH I'VE GOT YOU A COPY

20 THE COURT CAN I KEEP IT?

21 MR SUGGS YES, SIR

22 THE COURT OKAY

23 MR FOSTER YOUR HONOR COULD I RESPOND BRIEFLY?

24 THE COURT YES SIR

25 MR FOSTER OKAY THIS -- JUST SOME QUICK HITS THIS

1 E-MAIL THAT IS EXTREMELY IMPORTANT WAS---

2 THE COURT THE GREG GARFIELD E-MAIL

3 MR FOSTER YEAH GREG GARFIELD SENT THE E-MAIL TO THE
4 TWO PRINCIPALS OF GARFIELD TRAUB TONY TRAUB AND RAY
5 GARFIELD AND I ASKED HIM THAT IN HIS DEPOSITION

6 THE COURT ASKED WHO?

7 MR FOSTER I ASKED MR GARFIELD, "DID YOU GET THIS
8 E-MAIL?" "YES, I DID " "DID YOU OBJECT WHEN YOU GOT IT?"
9 "NO, I DIDN'T " SO ALL I KNOW IS THE GARFIELD TEAM SAID, "WE
10 DON'T WANT A TEAMING AGREEMENT WE WANT TO EXCLUDE -- WE
11 WANT THE CHANCE TO REPLACE HILTON " SO THE FACT THAT IT WAS
12 RAY VERSUS GREG, I DON'T KNOW IT'S A WRITING THAT TELLS US
13 WHAT THEY WERE THINKING

14 SECONDLY YOUR HONOR THESE LETTERS -- THE MAY 21 LETTER
15 THAT HILTON SENT TO MR AUGHTRY AND TO THE CITY WHILE THE
16 SENTENCE THAT MR HINSON READ SAYS "HILTON CONTINUES TO
17 SUPPORT THE GARFIELD TRAUB TEAM," IS SOMEHOW AN INDICATION OF
18 EXCLUSIVITY, THE SENTENCE BEFORE THAT SENTENCE "SUBJECT TO
19 RECEIPT AND PROCESSING OF A FRANCHISE APPLICATION HILTON
20 SUPPORTS YOUR," MR AUGHTRY, "PROPOSED DEVELOPMENT OF A
21 HILTON GARDEN INN HOTEL "

22 THIS LETTER EXPRESSLY SAYS THERE IS NO EXCLUSIVITY
23 BECAUSE HILTON IS GOING TO SUPPORT YOU AND HILTON ATTENDED
24 THE PRESENTATION WITH GARFIELD THERE'S NO QUESTION WE WERE
25 STILL HOPING THAT GARFIELD WOULD GET THIS PROPOSAL, BUT

1 THAT'S WHERE WE COME BACK TO THIS EXCLUSIVITY ORAL AGREEMENT
2 THEY CAN'T EVEN SUGGEST THAT THERE'S ANY PROBLEM WITH US
3 SUPPORTING THESE OTHER HILTON BIDDERS WITHOUT A WRITTEN OR
4 ORAL CONTRACT OF EXCLUSIVITY

5 WE KNOW THERE'S NOTHING IN WRITING, SO THEY'VE RESORTED
6 TO ORAL AND, YOUR HONOR, THE CASE LAW SAYS WITH BOTH AN ORAL
7 CONTRACT AND WITH FRAUD, YOU HAVE A HEIGHTENED BURDEN OF
8 PROOF WITH CLEAR AND CONVINCING EVIDENCE, AND YOU DON'T --
9 THE PLAINTIFF DOESN'T GET AWAY WITH THIS MERE SCINTILLA OF
10 EVIDENCE THESE TWO ISSUES, ORAL CONTRACT AND FRAUD, REQUIRE
11 MORE THEY DON'T EVEN HAVE A SCINTILLA OF EVIDENCE, IN OUR
12 OPINION THEY CERTAINLY DON'T HAVE AS MUCH AS THE CASE LAW
13 WOULD REQUIRE THEM THANK YOU

14 THE COURT ALL RIGHT LET ME ASK YOU THIS QUESTION
15 SINCE HE BROUGHT IT UP HOW ABOUT HIS RECITATION UNDER THE
16 RESTATEMENT SCENARIO OF THE CHILD OF 21 YEARS -- CHILD DIES
17 WITHIN A YEAR SO FORTH AND SO ON?

18 MR FOSTER WELL, YOUR HONOR, I DON'T -- I'M NOT SAYING
19 THIS TO FLATTER YOU, BUT I COMPLETELY AGREE WITH YOUR
20 ANALYSIS HERE THE CAUSE OF ACTION THAT THEY'RE SUING UNDER
21 ALLEGES WE HAD A FEASIBLE HOTEL AND YOU INTERFERED WITH IT
22 AND YOU WERE EXCLUSIVELY PRECLUDED SO, I MEAN THEY CAN
23 MAKE UP THIS IMAGINARY SCENARIO THAT HAS NOTHING TO DO WITH
24 THE LAWSUIT OR THE CAUSE OF ACTION AND YOU'RE RIGHT YOU
25 WOULDN'T BE ABLE TO SUE US IF THE DEAL JUST FELL APART THIS

1 LAWSUIT IS THEY CLAIM THIS DEAL WAS GOING TO GO THROUGH ALL
2 THE WAY TO CONSTRUCTION TO THE END THEY WANT THEIR LAST 10
3 PERCENT DEVELOPMENT FEE ON CERTIFICATE OF OCCUPANCY THEY'RE
4 ASKING FOR THAT IN THIS COMPLAINT AGAINST HILTON SO I JUST
5 -- I MEAN, FRANKLY YOUR HONOR, I DON'T HAVE -- I HAVE NO
6 IDEA HOW THAT ANALYSIS COULD POSSIBLY PLAY OUT IN THIS
7 LAWSUIT

8 THE COURT OKAY

9 MR FOSTER AND, YOUR HONOR HERE ARE THE THREE LETTERS
10 THAT WE'LL GIVE TO THE CLERK

11 THE COURT YEAH OH, SHE'S GOING TO COPY THEM NOW?

12 MR FOSTER SHE CAN DO IT LATER

13 THE CLERK OH

14 THE COURT NO, THAT'S FINE YOU CAN DO IT NOW ALL
15 RIGHT SO WHAT'S NEXT?

16 MR VAIL NOERR-PENNINGTON

17 THE COURT ALL RIGHT

18 MR HINSON YOUR HONOR IF I COULD VERY BRIEFLY JUST
19 RESPOND TO MR FOSTER'S ALLEGATION THAT THERE'S THIS
20 HEIGHTENED BURDEN OF PROOF EVEN IF HE'S CORRECT, WE MOVE
21 FROM A MERE SCINTILLA OF EVIDENCE TO SOMETHING MORE THAN A
22 MERE SCINTILLA OF EVIDENCE, BUT I WOULD JUST POINT THE COURT
23 OUT -- POINT THE COURT TO GILBERT VERSUS MIDSOUTH WHICH
24 STATES WHILE THE EVIDENCE OF AN ORAL CONTRACT -- I'M
25 PARAPHRASING THAT PART "WHILE THE EVIDENCE OF AN ORAL

1 CONTRACT MUST BE CLEAR AND CONVINCING, SUCH CLEAR AND
2 CONVINCING PROOF MAY BE MET BY A PREPONDERANCE OF THE
3 EVIDENCE " SO I'M NOT SO CERTAIN THAT WE HAVE THIS
4 HEIGHTENED BURDEN OF PROOF THAT MR FOSTER---

5 THE COURT YOU'RE SAYING THAT WOULD ONLY ARISE AT
6 TRIAL

7 MR HINSON YES YOUR HONOR

8 THE COURT ALL RIGHT MR SUGGS AND MR HINSON THE
9 OTHER MEMO THAT I DIDN'T QUITE UNDERSTAND THE TITLE OF
10 PLAINTIFFS' MEMORANDUM IN DEFENSE OF DEFENDANT HILTON'S
11 MOTION FOR PARTIAL SUMMARY JUDGMENT THAT'S YOUR -- I'M
12 TRYING TO GET THESE STRAIGHT HOW MANY MEMOS THERE ARE

13 MR HINSON THAT'S OUR RESPONSE

14 THE COURT THAT'S YOUR FIRST MEMO IN RESPONSE TO THEIR
15 MEMO IN SUPPORT OF THEIR MOTION, AND THEN THEY HAVE THAT
16 ODDLY-TITLED MEMO IN RESPONSE TO YOUR ODDLY-TITLED MEMO

17 MR HINSON YOUR HONOR, THEY GIVE IT ODD TITLES IT
18 JUST KIND OF TRICKLES DOWN I'M AFRAID

19 THE COURT SO IT'S OBVIOUSLY ALL MR FOSTER AND MR
20 THOMPSON'S FAULT

21 MR HINSON I AGREE

22 MR FOSTER YOUR HONOR, JUST TO MAKE IT SIMPLER, THE
23 WAY THE TWO ISSUES ARE BROKEN UP WHEN IT SAYS SUMMARY
24 JUDGMENT, IT HAS TO DO WITH THE M O U AND ORAL CONTRACT

25 THE COURT PARTIAL IS THE ORAL

1 MR FOSTER NO PARTIAL IS THE FRAUD

2 THE COURT PARTIAL IS THE FRAUD

3 MR FOSTER PARTIAL IS DISMISS THE SECOND CAUSE OF
4 ACTION OUT RIGHT THAT'S WHY WE TRIED TO BREAK IT UP THAT
5 WAY

6 THE COURT ALL RIGHT I JUST WANT -- SO I CAN PUT
7 HILTON'S DOCUMENTS ASIDE FOR THE TIME BEING IS THAT RIGHT?

8 MR FOSTER THAT'S CORRECT

9 THE COURT SO WE HAVE A -- WE'RE GETTING NOW INTO
10 NOERR-PENNINGTON WHO IS GOING TO ARGUE THAT?

11 MR VAIL I WILL FOR THE PLAINTIFFS

12 MR PAUL YOUR HONOR I'M JIMMY PAUL I'M GOING TO
13 ARGUE AUGHTRY ON NOERR-PENNINGTON

14 THE COURT OKAY MR VAIL?

15 MR VAIL FOR GARY REALTY

16 THE COURT MR PAUL, IT'S YOUR MOTION RIGHT?

17 MR PAUL YES SIR

18 THE COURT IF YOU'D GIVE ME 30 SECONDS TO GET MY
19 MATERIALS STRAIGHT HERE

20 MR PAUL WE ACTUALLY NEED A MINUTE TO GET ORGANIZED
21 ANYWAY, IF THAT'S ALL RIGHT WITH YOU I WAS A LITTLE BIT
22 UNCLEAR ABOUT WHAT THE COURT'S SCHEDULE WAS I DO NOT WANT
23 TO BORE ANOTHER JUDGE FROM OUT OF TOWN WHO---

24 THE COURT WE CAN DO -- WE CAN DO ONE OF TWO THINGS

25 MR PAUL I'LL DO WHATEVER THE COURT WANTS

1 **THE COURT** WE CAN BREAK -- WE CAN BREAK NOW FOR LUNCH
2 AND START BACK AT 1 30, QUARTER 'TIL 2, OR WE CAN DO WHAT WE
3 CAN UP TO 1 AND THEN COME BACK AT 2 15 I'LL LEAVE THAT UP
4 TO YOU AND MR VAIL

5 **MR PAUL** I WOULD RATHER -- I WOULD RATHER HAVE LUNCH
6 AND COME BACK

7 **MR VAIL** THAT'S FINE

8 **THE COURT** ALL RIGHT THAT SUITS ME

9 **MR PAUL** IS THAT ALL RIGHT?

10 **MR VAIL** COME BACK AT 1 30?

11 **THE COURT** AND IF YOU COULD ACCOMMODATE ONE THING SO
12 WE'LL STOP NOW AND WE'LL START BACK AT QUARTER 'TIL 2 THAT
13 WAY I CAN GET EVERYBODY OUT OF THE BUILDING AND BACK IN THE
14 BUILDING AND SO FORTH IF I COULD SEE THE LAWYERS FOR ABOUT
15 FIVE MINUTES DOWN THE HALL WHAT'S MY ROOM NUMBER? 222

16 **BAILIFF** JUDGE KINARD'S CHAMBERS

17 **THE COURT** IT'S A BOWLING-LANE DISTANCE DOWN THE HALL

18 **MR DETWILER** YOUR HONOR, I'M SORRY I DIDN'T MEAN TO

19 INTERRUPT I'M RICK DETWILER I REPRESENT THE CITY OF
20 COLUMBIA NOW THAT WE HAVE THIS TIME THIS AFTERNOON, DO YOU
21 INTEND TO ENTERTAIN ANY OF THE OTHER MOTIONS THAT WE REALLY
22 DIDN'T PLAN TO ARGUE TODAY?

23 **THE COURT** I'LL ENTERTAIN ANYTHING Y'ALL WANT ME TO
24 ENTERTAIN BECAUSE JUDGE BARBER HAS CHANGED THE SCHEDULE IN A
25 MANNER THAT WILL MAKE ME AVAILABLE UNTIL A REASONABLE TIME

1 MR DETWILER I GUESS WE NEED TO CONFER AMONG
2 OURSELVES

3 THE COURT AND THAT'S ONE OF THE THINGS THAT I WANT TO
4 TALK TO YOU ABOUT DOWN THE HALL

5 MR DETWILER OKAY

6 THE COURT I'LL SEE Y'ALL DOWN THERE IN ABOUT TWO OR
7 THREE MINUTES

8 (WHEREUPON A LUNCH BREAK WAS TAKEN)

9 THE COURT ALL RIGHT THANK YOU HAVE A SEAT LET'S
10 DO SOMETHING BEFORE WE IS MR FOSTER STILL HERE? IS HE
11 GONE?

12 MR THOMPSON YOUR HONOR MR FOSTER DID STEP BACK TO
13 THE OFFICE, BUT I'M STILL HERE FROM HIS FIRM

14 THE COURT ALL RIGHT MR HINSON, FOR THE BENEFIT OF
15 THE COURT REPORTER, IF YOU WOULD GIVE HER THE DOCKET NUMBERS
16 OF THE MOTIONS OF THE CASES THAT WE'RE ADDRESSING THE MOTIONS
17 TODAY SHE WANTS THAT CONFIRMED AND I KNOW THERE ARE
18 SEVERAL HOW MANY CASES IS HILTON A PARTY TO?

19 MR THOMPSON ONLY ONE YOUR HONOR

20 THE COURT IS THAT 06-6488?

21 MR THOMPSON THAT'S CORRECT YES SIR

22 THE COURT AND MR PAUL, MR VAIL, AND ALL THE OTHER
23 LAWYERS IN THE NOERR-PENNINGTON, WHAT ARE THE DOCKET NUMBERS
24 THAT WILL BE THE SUBJECT OF THIS AFTERNOON'S ARGUMENT?

25 MR PAUL YES SIR THE NOERR-PENNINGTON IS IN 06-488

1 (SIC) GARFIELD REALTY AGAINST AUGHTRY AND THEN---

2 THE COURT 06-6488?

3 MR PAUL YES, SIR

4 THE COURT OKAY

5 MR PAUL AND THEN THE SECOND CASE IS 06-40-5092

6 THE COURT 5092 DOES THAT HELP YOU OUT?

7 COURT REPORTER YES, SIR

8 THE COURT AND YOU CAN GET THE FULL CAPTIONS THERE?

9 COURT REPORTER YES, SIR

10 THE COURT OKAY AND THIS IS THE MOTION OF AUGHTRY AND

11 WINDSOR AUGHTRY IS THAT CORRECT?

12 MR PAUL YES, SIR THERE'S THREE BO AUGHTRY

13 WINDSOR AUGHTRY, AND VISTA HOTEL THERE'S THREE DEFENDANTS

14 THE COURT ALL RIGHT OKAY

15 MR PAUL ALL RIGHT THANK YOU YOUR HONOR, JIMMY

16 PAUL FOR THOSE THREE DEFENDANTS, AND THIS MOTION IS IN BOTH

17 CASES THAT WE JUST PUT ON THE RECORD IN THE GARFIELD TRAUB/

18 GARY REALTY CASE THERE ARE THREE COUNTS A COUNT FOR

19 INTENTIONAL INTERFERENCE OF CONTRACT RIGHTS TORTIOUS

20 INTERFERENCE WITH CONTRACT RIGHTS, INTENTIONAL INTERFERENCE

21 WITH PROSPECTIVE CONTRACT RELATIONS, AND CIVIL CONSPIRACY

22 THE MOTION GOES TO ALL THREE COUNTS IN THAT CASE

23 IN THE STEVENS & WILKINSON CASE THERE ARE TWO COUNTS

24 ONE FOR INTENTIONAL EXCUSE ME, TORTIOUS INTERFERENCE WITH

25 CONTRACT RIGHTS THE SECOND IS FOR INTENTIONAL INTERFERENCE

1 WITH PROSPECTIVE---

2 THE COURT WHO REPRESENTS STEVENS & WILKINSON?

3 MR NEWMAN I DO, YOUR HONOR

4 THE COURT IS MR VAIL SPEAKING FOR Y'ALL TODAY ON
5 THAT?

6 MR NEWMAN YES, SIR IN THE INTEREST OF ECONOMY, WE
7 AGREE TO ADOPT THE ARGUMENTS BEING OFFERED TO THE COURT BY
8 THE GARFIELD TRAUB---

9 THE COURT ALL RIGHT

10 MR PAUL AND THAT WAS MY NEXT POINT SO AS I
11 UNDERSTAND THE ORDER THAT WILL BE ENTERED, IT WILL BE ENTERED
12 IN EACH CASE

13 THE COURT AND THE STEVENS & WILKINSON CASE IS 06 WHAT?

14 MR PAUL 40-5092

15 THE COURT ALL RIGHT OKAY

16 MR PAUL ALL RIGHT THANK YOU YOUR HONOR, THE
17 MOTIONS THAT WE'RE HERE ABOUT TODAY ARISE OUT OF THE NOERR-
18 PENNINGTON DECISIONS BY THE U S SUPREME COURT THEY'RE TWO
19 DECISIONS THAT ARE SORT OF THE TWO LEGS ON WHICH THIS
20 DOCTRINE DEPENDS, AND THE GENERAL CONCEPT IS THAT CITIZENS
21 HAVE A RIGHT TO PETITION THE GOVERNMENT IN A REPRESENTATIVE
22 GOVERNMENT, THE CITIZENS HAVE A RIGHT TO ASK THE GOVERNMENT
23 TO DO THINGS DIRECTLY FOR THEM AS A PART OF A
24 REPRESENTATIVE GOVERNMENT THE CITIZENS HAVE A RIGHT TO MEET
25 WITH LEGISLATORS TRY TO INFLUENCE THE OUTCOME OF

1 LEGISLATION AND TO THE EXTENT THAT LEGISLATION HELPS ONE
2 GROUP, IT MAY HURT THE OTHER GROUP, BUT IF THERE IS
3 GOVERNMENT ACTION BY WAY OF LEGISLATION, THEN THE CITIZENS
4 WHO ARE ASKING A REPRESENTATIVE GOVERNMENT TO ACT FOR THEM
5 EVEN IF IT IS TO FAVOR THEM, ARE INSULATED FROM LIABILITY
6 BECAUSE THAT IS WHAT REPRESENTATIVE GOVERNMENT IS ABOUT AND
7 THERE ARE TWO CASES THAT BASICALLY SET THE STAGE FOR THAT
8 CONCEPT AND THAT'S IN -- ONE IS THE NOERR CASE THE OTHER IS
9 THE UNITED MINE WORKERS/PENNINGTON CASE

10 COURT REPORTER THE OTHER IS WHAT?

11 MR PAUL IS THE UNITED MINE WORKERS/PENNINGTON CASE
12 THE NOERR CASE---

13 THE COURT N-O-E-R-R

14 MR PAUL YES

15 THE COURT OKAY

16 MR PAUL THE NOERR CASE IS A FIGHT BETWEEN RAILROADS
17 AND LONG-HAUL TRUCKERS, AND IT IS A CASE WHERE THE LONG-HAUL
18 TRUCKERS SAID THE RAILROADS HIRED P R FIRMS AND GENERATED
19 PEOPLE WHO WERE PAID TO COME IN AND PRETEND TO BE INDEPENDENT
20 PEOPLE SPEAKING TO LEGISLATORS, SEEKING LEGISLATION TO
21 BENEFIT, THAT IS TO THE DETRIMENT, OF LONG-HAUL TRUCKING
22 THAT IS, TO UP THE FEES FOR TRUCKING, INCREASE THE LICENSE
23 FEES AND DO OTHER THINGS THAT WERE DETRIMENTAL TO THE
24 TRUCKING INDUSTRY AND SO THE LONG-HAUL TRUCKERS SUED ON A
25 CONSPIRACY THE SHERMAN ACT CASE, SUED THE RAILROAD AND THE

1 P R FIRMS

2 THE TRIAL COURT -- IT WAS A NON-JURY TRIAL THE TRIAL
3 COURT ACTUALLY FOUND THAT THE RAILROADS HAD INTENTIONALLY AND
4 MALICIOUSLY ATTEMPTED TO PUT LONG-HAUL TRUCKERS OUT OF
5 BUSINESS THE COURT OF APPEALS AFFIRMED IT WENT TO THE
6 SUPREME COURT, AND THE SUPREME COURT REVERSED AND SAID THAT,
7 ONE, THIS IS A REPRESENTATIVE GOVERNMENT CITIZENS DO HAVE A
8 RIGHT TO ASK LEGISLATURES TO ENACT LEGISLATION DIRECTLY FOR
9 THEIR BENEFIT CITIZENS DO HAVE A RIGHT TO PETITION THEIR
10 GOVERNMENT, AND WHEN THE GOVERNMENT ACTS THE CITIZENS ARE
11 IMMUNE FROM LIABILITY AND IMPORTANT TO THIS AND EVERY OTHER
12 CASE THAT ARISES IN THIS CONTEXT IS THAT THE SUPREME COURT
13 HELD THAT THE FACT THAT A CITIZEN IS ASKING THE GOVERNMENT TO
14 DO SOMETHING THAT IS IN THAT CITIZEN'S ECONOMIC INTEREST DOES
15 NOT MATTER THE MOTIVATION OF THE CITIZEN AND EVEN IF THE
16 CITIZEN'S PURPOSE IS THAT IT WILL DETRIMENTALLY AFFECT
17 SOMEONE ELSE, THAT DOES NOT ELIMINATE NOERR-PENNINGTON
18 IMMUNITY THAT IS, THE LEGISLATURE IS A FILTER, AND THE
19 LEGISLATURE IS SUBJECTED TO SPECIAL INTERESTS EVERY DAY ALL
20 DAY, AND THE LEGISLATURE WORKS THIS OUT

21 AND SO IF YOU'RE GOING TO HAVE A REPRESENTATIVE
22 GOVERNMENT AND YOU'RE GOING TO HAVE A RIGHT TO PETITION THEN
23 THE CITIZENS HAVE TO BE ABLE TO SEEK LEGISLATION THAT
24 DIRECTLY BENEFITS THEM, AND IF IT HURTS SOMEONE ELSE OR IF
25 THEY EVEN SEEK TO IMPAIR SOMEONE ELSE THAT IS -- THAT DOES

1 NOT MEAN YOU LOSE YOUR NOERR-PENNINGTON IMMUNITY BECAUSE THAT
2 IS WHAT REPRESENTATIVE GOVERNMENT IS ABOUT

3 NOW, THAT WAS THE NOERR CASE IN A NUTSHELL, AND THE
4 OTHER CASE THE UNITED MINE WORKERS/PENNINGTON CASE WAS A
5 FIGHT BETWEEN SMALL COAL COMPANIES AND BIG COAL AND ORGANIZED
6 LABOR, AND THE SMALL COAL COMPANIES SUED ON THE SHERMAN ACT
7 CLAIM SAYING THAT BIG COAL AND ORGANIZED LABOR HAD CONSPIRED
8 AND GONE TOGETHER TO THE SECRETARY OF LABOR AND PERSUADED THE
9 SECRETARY OF LABOR TO INCREASE THE MINIMUM WAGE FOR MINE
10 WORKERS SO THAT THE LARGE COMPANIES COULD PAY THE WAGES, BUT
11 IT WOULD DRIVE THE SMALL COMPANIES OUT OF BUSINESS

12 AND SO THE CASE WAS ACTUALLY TRIED TO A JURY THE JURY
13 RETURNED A VERDICT AGAINST ORGANIZED LABOR, AND THE QUESTION
14 ON APPEAL TO THE SUPREME COURT -- IT WAS AFFIRMED BY THE
15 COURT OF APPEALS AND IT WENT UP TO THE SUPREME COURT THE
16 QUESTION ON APPEAL WAS THE JURY INSTRUCTION, AND THE SUPREME
17 COURT REVERSED ON THE JURY INSTRUCTION THE TRIAL COURT HAD
18 INSTRUCTED THE JURY THAT IF YOU FIND THE APPROACH TO THE
19 SECRETARY OF LABOR -- WELL, IT SAID THAT THE APPROACH TO THE
20 SECRETARY OF LABOR IS LEGAL UNLESS YOU FIND THAT IT WAS PART
21 OF A CONSPIRACY TO DEPRIVE THE SMALL COMPANIES OF THEIR RIGHT
22 TO STAY IN BUSINESS

23 AND THE SUPREME COURT REVERSED ON THAT JURY INSTRUCTION
24 AND SAID IT DOESN'T MATTER WHAT IS THE REASON THAT THE
25 ORGANIZED LABOR AND THE LARGE COAL COMPANIES WERE DOING WHAT

1 THEY WERE DOING THE QUESTION IS WERE THEY DIRECTLY TRYING
2 TO AFFECT THE OUTCOME OF LEGISLATION? AND THE FACT THAT
3 TRYING TO AFFECT THE OUTCOME OF LEGISLATION WAS TO THEIR
4 BENEFIT AND TO THE DETRIMENT OF SMALL COAL AND EVEN IF THEY
5 WERE INTENTIONALLY DOING IT, THERE WAS ABSOLUTE IMMUNITY FOR
6 IT IT'S NOT A QUESTION OF WHEN YOU GO TO THE LEGISLATURE
7 ARE YOU DOING SOMETHING -- ARE YOU ASKING FOR SOMETHING
8 THAT'S GOING TO HURT SOMEBODY ELSE SO FROM THAT STANDPOINT,
9 THE IMMUNITY IN NOERR-PENNINGTON IS ABSOLUTE

10 AND SO IT'S OUT OF -- OUT OF THOSE TWO CASES THAT OUR
11 DEFENSE HERE ARISES AND THE -- THERE ARE TWO OR THREE
12 THINGS I WOULD LIKE TO TALK ABOUT BEFORE WE GET TO THE FACTS
13 BECAUSE IT SEEMS TO ME THAT THE PLAINTIFFS' STRATEGY HERE IS
14 TO, IF YOU WILL, PUSH THE ENVELOPE ON THE EXCEPTIONS TO
15 NOERR-PENNINGTON AND THEN TRY TO DEVELOP SOME FACT ISSUES
16 INSIDE OF THE EXCEPTIONS AND OUR POINT TO THE COURT TODAY
17 IS THAT IN TERMS OF LOOKING AT THE ALLEGED FACT ISSUES -- OF
18 COURSE, THE FACT ISSUES HAVE GOT TO BE MATERIAL, AND THEY'RE
19 ONLY MATERIAL IF THE EXCEPTIONS TO NOERR-PENNINGTON ARE
20 EXCEPTIONS THAT ARE RECOGNIZED AT LAW AND IF THE FACTS
21 SUPPORT COMING INSIDE OF THESE EXCEPTIONS

22 AND SO THE FIRST THING I -- I THINK THE PARTIES ARE IN
23 AGREEMENT AND I THINK THERE IS COMMON GROUND BETWEEN THE
24 PLAINTIFF AND THE DEFENDANTS THAT THE NOERR-PENNINGTON
25 DECISIONS WHICH AROSE OUT OF AN ANTITRUST CONTEXT APPLY

1 ACROSS THE BOARD NOW TO STATE LAW BUSINESS TORTS, AND I THINK
2 IT'S PAGE 15 OF THE PLAINTIFFS' BRIEF THAT I BELIEVE CONCEDES
3 THAT AND WE CITED---

4 MR VAIL WE CONCUR

5 MR PAUL OKAY SO I THINK WE CAN GO PAST THAT AND
6 SO THE -- ONCE YOU GET PAST THAT, THEN THE FACT ISSUES THAT I
7 UNDERSTAND THE PLAINTIFFS ARE WORKING ON THAT WE WANT TO TALK
8 ABOUT THE LAW ABOUT FOR A MINUTE -- THE FIRST ONE IS THE SHAM
9 EXCEPTION -- WHAT'S CALLED THE SHAM EXCEPTION TO NOERR-
10 PENNINGTON NOW IN THE NOERR CASE ITSELF THE COURT DID NOT
11 SPECIFICALLY IN DETAIL TALK ABOUT THE SHAM EXCEPTION IN
12 NOERR, BUT THE COURT DID SAY THAT IT IS POSSIBLE THAT A
13 PERSON OR A COMPANY'S ATTEMPT TO INFLUENCE THE GOVERNMENT
14 COULD JUST BE A COVER AND IF IT IS A COVER AND IF THE REAL
15 PURPOSE OF YOUR CONTACT WITH THE GOVERNMENT IS TO EXECUTE AN
16 ANTITRUST CONSPIRACY AND YOU HAVE NO GENUINE INTEREST IN
17 AFFECTING THE OUTCOME OF THE LEGISLATION OR THE GOVERNMENT
18 ACTION, THEN NOERR-PENNINGTON MAY NOT APPLY BECAUSE THAT
19 WOULD BE A SHAM IF YOU WERE USING YOUR CONTACTS WITH THE
20 GOVERNMENT IT'S JUST A COVER TO DO SOMETHING THAT WAS ANTI-
21 COMPETITIVE

22 THE COURT WHAT'S AN EXAMPLE OF THAT?

23 MR PAUL I DON'T KNOW OF A CASE IN THE LEGISLATIVE
24 CONTEXT WHERE THAT COMES UP, AND THAT IS ONE OF MY POINTS
25 IT COMES UP IN THE ADJUDICATORY CONTEXT MUCH MORE FREQUENTLY,

1 AND ACTUALLY MY POINT HERE IS THAT THE -- AFTER NOERR WAS --
2 I'M TRYING TO ANSWER YOUR QUESTION AFTER NOERR WAS DECIDED,
3 THE NEXT CASE THAT INVOLVES THIS IN THE LINE THAT I'M
4 DISCUSSING HERE WAS THE CALIFORNIA MOTOR TRANSPORT CASE WHICH
5 WAS ANOTHER TRUCKING CASE AND IT AROSE IN THE ADJUDICATORY
6 CONTEXT AND IN THAT CASE ONE TRUCKING LINE SUED ANOTHER
7 TRUCKING LINE SAYING THE DEFENDANT TRUCKING LINE WAS PURSUING
8 MASSIVE LITIGATION, YOU KNOW, IN ESSENCE ACROSS THE UNITED
9 STATES OPPOSING LICENSING PERMITS, LICENSING REQUESTS
10 LITIGATING JUST ACROSS THE BOARD IN BASELESS LITIGATION, THAT
11 IS, THEY HAD NO EXPECTATION OF WINNING

12 THEY WOULD LOSE AND THEY WOULD APPEAL THEY WOULD HAVE
13 NO EXPECTATION OF WINNING ON APPEAL IT WAS ALL AN ATTEMPT
14 TO DRIVE THE PLAINTIFF TRUCKING COMPANY OUT OF BUSINESS IN
15 THE CALIFORNIA MOTOR TRANSPORT CASE THE COURT DID SAY THE --
16 AND SO THE DEFENSE WAS NOERR PENNINGTON AND I THINK THE
17 LOWER COURT RULED IN FAVOR OF THE NOERR-PENNINGTON DEFENSE ON
18 APPEAL TO THE SUPREME COURT THE SUPREME COURT RULED THAT
19 THIS IS AN EXCEPTION TO NOERR THIS IS A SHAM EXCEPTION TO
20 NOERR-PENNINGTON BECAUSE THE EVIDENCE IN THAT CASE SHOWED
21 THERE WAS NO EXPECTATION OF THE DEFENDANT TRUCKING COMPANY
22 WINNING THE LITIGATION THEY REALLY WERE TRYING TO PUT THE
23 PLAINTIFF TRUCKING COMPANY OUT OF BUSINESS

24 NOW IN THAT CASE THE COURT MADE A DISTINCTION BETWEEN
25 MISREPRESENTATIONS AND BASELESS ACTS IN THE CONTEXT OF

1 ADJUDICATORY PROCESSES AND THE LEGISLATIVE PROCESS AND
2 THAT'S ONE OF THE IMPORTANT DISTINCTIONS IN THIS CASE I
3 THINK WHEN YOU LOOK AT THE PLAINTIFFS' CASES THE PLAINTIFF
4 HAS TAKEN WHAT IS THE RECOGNIZED LAW ON SHAM, THE SHAM
5 EXCEPTION WHICH IS THE WAY I HAD SAID IT A MINUTE AGO AND
6 WILL TALK ABOUT AGAIN, AND THEY HAVE TRIED TO MOVE THE
7 EXCEPTION TO TALK ABOUT A FRAUD SHAM EXCEPTION

8 AND MY POINT TO THE COURT IN TERMS OF LOOKING AT WHAT
9 FACT ISSUES ARE REALLY MATERIAL IS TO TRY TO DEVELOP A POINT
10 THAT THE SHAM EXCEPTION IN TERMS OF LEGISLATIVE ACTION IS
11 BROADER AND IT IS DIFFERENT THAN THE SHAM EXCEPTION IN
12 RELATION TO COURT PROCESSES EVERYBODY KNOWS YOU CAN'T GO TO
13 COURT AND MISREPRESENT FACTS AND COMMIT A FRAUD ON THE COURT,
14 AND IF YOU DO THAT, YOU CAN'T PLEAD NOERR-PENNINGTON
15 EVERYBODY KNOWS THAT

16 AND SO THE BOOKS ARE FULL OF CASES IN THE ADJUDICATORY
17 AND IN THE ADMINISTRATIVE PROCESS WHERE PEOPLE HAVE
18 INTENTIONALLY MISREPRESENTED AND FALSIFIED THINGS TO THE
19 COURT OR TO THE ADMINISTRATIVE PROCESS AND HAVE OBTAINED THE
20 RESULT AND THEN TAKEN THE POSITION THAT THEY CAN DEFEND IT ON
21 NOERR-PENNINGTON, AND THAT IS INSIDE OF A SHAM EXCEPTION AND
22 THOSE ARE ACTS OF FRAUD AND THE COURT HAS HELD THAT IS AN
23 EXCEPTION TO NOERR-PENNINGTON BUT MY POINT HERE IS THE
24 PLAINTIFFS, I DON'T THINK, HAVE CITED ANY CASES WHERE IT'S A
25 PURELY LEGISLATIVE FUNCTION AND WHERE YOU'RE TRYING TO

1 INFLUENCE A LEGISLATURE AND THE LEGISLATIVE ACT HAS BEEN SET
2 ASIDE OR WHERE A PARTY HAS BEEN FOUND LIABLE

3 THE COURTS ALL TALK ABOUT IF IT'S BRIBERY OF A
4 LEGISLATURE OR IF THERE'S DURESS OF A LEGISLATURE, THEN
5 ARGUABLY THE NOERR-PENNINGTON EXCEPTION, THE SHAM EXCEPTION,
6 WOULD NOT APPLY BUT I DON'T KNOW OF ANY CASES THE
7 PLAINTIFFS HAVE CITED THAT SHOW A COURT ACTUALLY HOLDING THAT
8 THIS IS INSIDE OF THE SHAM EXCEPTION TO NOERR-PENNINGTON
9 RELATED TO LEGISLATIVE CONDUCT WHICH IS WHAT WE HAVE HERE
10 WE DON'T HAVE AN ADJUDICATION HERE WE'VE GOT A LEGISLATIVE
11 -- WE'VE GOT A CITY COUNCIL OF COLUMBIA HERE

12 AND SO IN TERMS OF EVALUATING THE EVIDENCE TO DETERMINE
13 WHETHER THE FACT ISSUES THAT THE PLAINTIFFS ARE ARGUING
14 ABOUT, TO THE EXTENT THEY'RE TRYING TO SHOW FACT ISSUES ARE
15 REALLY OUTSIDE OF NOERR-PENNINGTON, THEN WE ASK THE COURT TO
16 LOOK AND SEE THE CASE LAW THAT THEY ARE CITING AND SEE IF
17 IT'S A CASE THAT INVOLVES COURT ADJUDICATION OR IF IT'S A
18 CASE THAT INVOLVES THE LEGISLATURE AND WE SUBMIT THAT THE
19 LAW IS THAT ON THE SHAM EXCEPTION RELATED TO LEGISLATIVE
20 CONDUCT AND LEGISLATIVE ACTION, YOU'VE GOT TO SHOW THAT THE
21 ACTION THAT IS BEING TAKEN IS A SHAM IN THE WAY THE FOURTH
22 CIRCUIT DESCRIBED IT IN A FISHERMAN'S BEST CASE AND THEY
23 SET OUT A TEST THE FOURTH CIRCUIT DID, THAT SAID IF YOU'RE
24 GOING TO SHOW A SHAM YOU'VE GOT TO SHOW AN INTENT TO INJURE
25 THE COMPETITOR AND YOU'VE GOT TO SHOW THAT THERE IS AN

1 ABSENCE OF ANY GENUINE EFFORT TO INFLUENCE THE GOVERNMENT
2 THAT IS YOU HAD NO REASONABLE EXPECTATION THAT THE
3 GOVERNMENT WOULD ULTIMATELY RESPOND FAVORABLY TO YOU YOU'RE
4 JUST TRYING TO RUN SOMEBODY OUT OF BUSINESS OR INJURE
5 SOMEBODY AND USING COVER BY SAYING YOU'RE DEALING WITH THE
6 GOVERNMENT THAT'S THE FOURTH CIRCUIT A FISHERMAN'S BEST
7 CASE THAT CAME OUT OF SOUTH CAROLINA IT CAME OUT OF THE
8 DISTRICT COURT IN SOUTH CAROLINA

9 THE SAME CASE AND SOME OTHER CASES SAY THAT IF YOU
10 SUCCEED WITH THE LEGISLATURE, THAT IS -- SOME OF THE CASES
11 SAY THAT'S IT THAT IS, YOU CERTAINLY CAN'T SAY THE EFFORT
12 WITH THE LEGISLATURE IS A SHAM IF YOU WERE SUCCESSFUL IN
13 INFLUENCING THE LEGISLATURE THEN THAT PRECLUDES ANY ARGUMENT
14 OF SHAM

15 THE COURT WHICH ONE IS THAT CASE AGAIN?

16 MR PAUL THAT'S A FISHERMAN'S BEST IT IS 310 F 3D
17 183 IT'S A 2002 FOURTH CIRCUIT DECISION AND THERE ARE
18 OTHERS, BUT THAT'S JUST THE ONE THAT I HAPPEN TO FOCUS ON
19 BECAUSE IT CAME OUT OF THIS SOUTH CAROLINA DECISION THAT WE
20 HAD EARLIER CITED

21 NOW, THE -- I THINK WHEN THE COURT LOOKS AT THE
22 PLAINTIFFS' CASES -- AND I'M NOT GOING TO GO THROUGH ALL THE
23 PLAINTIFFS' CASES I'M SURE MR VAIL WILL GO THROUGH THEM
24 BUT BASICALLY -- FOR INSTANCE WHELAN AGAINST ABELL IS ONE OF
25 THEIR CASES AND THAT'S A CASE WHERE -- THE CASE IS OF A JURY

1 VERDICT BASED ON CLAIMS OF INTENTIONAL MISREPRESENTATION TO
2 THE COURTS AND TO THE SECURITIES ADMINISTRATORS, AND
3 ULTIMATELY THERE WAS A HOLDING THAT NOERR DOES NOT INSULATE
4 MISREPRESENTATIONS AS A SAFETY COURT AND TO SECURITIES
5 ADMINISTRATORS IT JUST DOESN'T DO IT

6 WE DON'T SAY -- WE SAY THAT WHELAN IS NOT A CASE THAT
7 CAN BE USED TO EXPAND THE SHAM EXCEPTION IT'S NOT EVEN
8 INSIDE OF WHAT WE'RE TALKING ABOUT IT'S A COURT CASE AND
9 SO -- AND MOST OF THEIR CASES FALL INTO THAT CATEGORY SO
10 THAT'S OUR POINT ABOUT THE WAY WE WOULD ASK THE COURT TO
11 EXAMINE THE SHAM EXCEPTION TO NOERR-PENNINGTON

12 THE OTHER APPROACH THE PLAINTIFFS HAVE TAKEN TO TRY TO
13 DEVELOP AN EXCEPTION TO NOERR-PENNINGTON IS TO TALK ABOUT
14 WHAT THEY CALL THE COMMERCIAL ACTIVITY EXCEPTION, AND THEY
15 SAY THAT, AS I UNDERSTAND IT, THAT IF YOU -- IF THE
16 GOVERNMENT IS INVOLVED IN A COMMERCIAL ACTIVITY AND YOU ARE
17 PETITIONING THE GOVERNMENT FOR A COMMERCIAL ACTIVITY, THEN
18 THAT'S SOMEHOW OUTSIDE OF NOERR-PENNINGTON

19 NOW, MOST OF THE CASES THAT ARISE IN ANTITRUST CONTEXTS
20 ARE AS COMMERCIAL AND AS ECONOMIC AS YOU CAN POSSIBLY GET
21 IT'S ALL ABOUT MONEY I MEAN, RAILROADS FIGHTING TRUCKERS
22 UNIONS FIGHTING SMALL COAL COMPANIES IT'S LONG-LINE
23 FISHERMEN FIGHTING RECREATIONAL FISHERMEN I MEAN, IT'S ALL
24 ABOUT COMMERCE AND IT'S ALL ABOUT MONEY, AND THAT'S WHY THE
25 LITIGATION FIRST AROSE IN THE CONTEXT OF ANTITRUST LAW

1 THE IDEA THAT THERE IS A COMMERCIAL EXCEPTION WE DON'T
2 THINK IS SUPPORTED IN THE CASE LAW THEY HAVE CITED THE CASE
3 ALLIED TUBE AGAINST INDIAN HEAD THAT IS A CASE WHERE THE
4 STEEL COMPANIES HAD STEEL CONDUIT FOR ELECTRICAL CABLES AND
5 ALONG CAME PLASTIC AND PLASTIC WAS TRYING TO REPLACE STEEL AS
6 THE CONDUIT FOR ELECTRICAL CABLES AND AS THE COURT KNOWS,
7 THE NATIONAL FIRE PROTECTION ASSOCIATION SETS THE BUILDING
8 CODES ACROSS THE COUNTRY FOR EVERYTHING, AND SO THE STEEL
9 COMPANIES PACKED THE MEMBERSHIP OF THE N F P A WHEN COMING
10 UP FOR A VOTE WAS WHETHER OR NOT THAT PLASTIC CONDUIT CAN
11 COME INTO BUILDING CODES

12 THE STEEL COMPANIES BECAUSE THEY PACKED THE MEMBERSHIP
13 GOT PLASTIC VOTED DOWN SO THAT PLASTIC WAS NOT ADMITTED TO
14 THE ELECTRICAL CODE AND SO BUILDERS WOULDN'T USE IT BECAUSE
15 IT WASN'T IN THE CODE THE PLASTIC SUED STEEL SAYING
16 CONSPIRACY STEEL DEFENDED ON NOERR-PENNINGTON AND THE
17 SUPREME COURT ULTIMATELY HELD THAT THE N F P A EVEN THOUGH
18 THE CODES THAT IT DEVELOPED ARE FREQUENTLY ADOPTED BY
19 LEGISLATURES, IS NOT A GOVERNMENT AND IT IS NOT A QUASI
20 LEGISLATURE AND SO THERE'S NO INSULATION FOR A CONSPIRACY
21 TO GET A PRIVATE GROUP THAT AFFECTS COMMERCE TO DO SOMETHING
22 THAT IS ANTI-COMPETITIVE, AND SO THE NOERR-PENNINGTON
23 DOCTRINE DOES NOT APPLY

24 WELL, THAT'S NOT A CASE THAT SAYS THERE'S A COMMERCIAL
25 EXCEPTION TO NOERR-PENNINGTON THAT'S A CASE THAT DOESN'T

1 EVEN GET TO THE THRESHOLD OF NOERR-PENNINGTON BECAUSE THE
2 FIRST QUESTION IS IS THERE GOVERNMENT ACTION? IN THIS CASE
3 THERE WAS NO GOVERNMENT ACTION

4 THE OTHER CASE -- ANOTHER CASE THAT'S CITED IS UNION
5 CARBIDE AGAINST PALMETTO ORE, AND THAT'S A CASE WHERE UNION
6 CARBIDE HAD THE MONOPOLY ON VANADIUM ORE WHICH WAS USED TO
7 HARDEN STEEL IN WORLD WAR II AND CONTINENTAL APPARENTLY
8 ESTABLISHED THAT UNION CARBIDE HAD A MONOPOLY ON THE ORE
9 NOBODY COULD BUY THE ORE IN THE UNITED STATES THE WAR WAS
10 GOING ON UNION CARBIDE SUBSIDIARY WAS DESIGNATED AS THE
11 PURCHASING AGENT FOR CANADA TO PURCHASE AND ALLOCATE INSIDE
12 OF CANADA BASICALLY ALL METAL COMING INTO CANADA FOR WAR
13 EFFORTS, INCLUDING VANADIUM

14 AND SO THE UNION CARBIDE SUBSIDIARY REFUSED TO ALLOW
15 CONTINENTAL ORE TO SELL VANADIUM INTO CANADA AND THAT -- AND
16 SO UNION CARBIDE GOT SUED ON CONSPIRACY IT TRIED TO DEFEND
17 SAYING YOU ARE -- YOU CONTINENTAL, ARE PETITIONING -- THE
18 GOVERNMENT HAPPENED TO BE A CANADIAN GOVERNMENT BUT YOU ARE
19 PETITIONING A GOVERNMENT FOR ACTION AND SO YOU KNOW, THIS
20 IS A GOVERNMENT COMMERCIAL TRANSACTION AND WE'RE INSULATED
21 UNDER NOERR-PENNINGTON AND THE COURT SAID NO UNION
22 CARBIDE, YOU ARE A MONOPOLY - THERE'S NO QUESTION ABOUT THAT
23 - AND YOUR SUBSIDIARY IS A PURCHASING AGENT, AND THE
24 ALLEGATION IS YOUR SUBSIDIARY IS ACTING NOT AS A GOVERNMENT
25 IT'S ACTING AS YOUR SUBSIDIARY, EXCLUDING A COMPETITOR AND

1 SO AGAIN IT'S NOT AS IF THIS CASE IS SAYING THERE IS SOME
2 KIND OF COMMERCIAL OR ECONOMIC EXCEPTIONS TO NOERR-
3 PENNINGTON IN FACT, THAT'S WHAT NOERR-PENNINGTON IS ABOUT
4 IT'S SAYING NOERR-PENNINGTON DOESN'T APPLY BECAUSE THERE IS
5 NO GOVERNMENT ACTION THAT'S WHAT THE HOLDING IN THE CASE
6 IS AND SO---

7 THE COURT SO IT WASN'T AN EXCEPTION IT WAS JUST AN
8 INDICATION THAT YOU NEVER GOT TO

9 MR PAUL NEVER GOT TO THE THRESHOLD OF GOVERNMENT
10 ACTION AND SO -- AND SO THAT'S -- I WANTED TO GO THROUGH
11 THAT BECAUSE THE -- OF COURSE THE FACT ISSUES MUST BE
12 MATERIAL AND IT'S -- THE LAW HERE IS -- IT'S NOT COMPLEX BUT
13 IT IS AGGRAVATING, IF YOU WILL, IN TERMS OF BEING ABLE TO BE
14 SURE THAT A CASE IN ONE AREA IS ACTUALLY APPLICABLE IN
15 ANOTHER INSIDE OF NOERR-PENNINGTON AND SO I JUST WANT TO BE
16 SURE THAT ON THE SHAM EXCEPTION THAT THE COURT HAD OUR
17 POSITION ON THE SHAM EXCEPTION AND THE COURT HAD OUR POSITION
18 ON WHAT THEY'RE CALLING A COMMERCIAL EXCEPTION AND WHAT
19 THEY'RE CALLING SOME KIND OF FRAUD EXCEPTION AND WITH THAT
20 I'LL GO TO THE FACTS

21 THE COURT ALL RIGHT

22 MR PAUL THE FIRST THING I WANT TO TALK ABOUT IS THAT
23 -- THE FIRST THING I WANT TO TALK ABOUT IS THAT MR DETWILER
24 ASKED ME IF WE HAD POWERPOINT IN ATLANTA I TOLD HIM WE
25 DIDN'T HAVE ELECTRICITY DOWN THERE AND SO WE'RE STILL USING

1 FOAM BOARDS BUT THE POINT OF THE FOAM BOARD THAT I HAVE
2 HERE IS THAT THE PLAINTIFFS HAVE SAID THAT THIS IS A ONE-ON-
3 ONE COMMERCIAL DISPUTE BETWEEN BO AUGHTRY AND HIS COMPANIES
4 AND GARFIELD TRAUB AND GARY REALTY AND IT'S ALL ABOUT BO
5 AUGHTRY SOMEHOW INDIVIDUALLY, IN THE WORDS OF THE PLAINTIFFS'
6 BRIEF, STEALING -- STEALING THE PROJECT FROM GARFIELD TRAUB
7 AND GARY REALTY

8 THE POINT OF THIS BOARD IS TO SHOW THE COURT THE
9 EVIDENCE TO A NUMBER OF POINTS BUT FIRST OF ALL WHAT WE
10 ARE SHOWING HERE IN TERMS OF A REPLAY OF THE EVIDENCE IS THAT
11 THERE WERE TWO HOTELS, TWO PUBLIC HOTELS, IN COLUMBIA THAT
12 WERE BEING CONSIDERED FOR PUBLIC FINANCE, AND THEY WERE BEING
13 CONSIDERED OVER A PERIOD OF TIME STARTING IN 2002 GOING TO
14 2004 THE TIME LINE VARIES DEPENDING ON THE HOTEL

15 AND THE POINT IS THAT THE OPPOSITION TO PUBLICLY-
16 FINANCED HOTELS IN COLUMBIA IS BROAD IT WAS DEEP IT WAS
17 PERSISTENT, AND IT WAS LONG-RUNNING AND WHAT YOU WILL SEE
18 IS THAT THE FIRST HOTEL THAT WAS PROPOSED AS A PUBLICLY-
19 FINANCED HOTEL IS THE UNIVERSITY OF SOUTH CAROLINA HOTEL THAT
20 WAS GOING TO BE PART OF THE JUSTICE DEPARTMENT PROJECT, AND
21 THAT CAME UP FIRST AND SO YOU HAD A NUMBER OF GROUPS
22 OPPOSING THAT AS A PUBLICLY-FINANCED HOTEL THE GREATER
23 COLUMBIA HOTEL/MOTEL ASSOCIATION FORMED A COALITION THEY
24 WENT AFTER IT THEY OPPOSED IT THEY WROTE ARTICLES IN "THE
25 STATE " THEY FILED A COMPLAINT THE BOARD SAYS SUIT BUT

1 IT'S ACTUALLY A COMPLAINT WITH THE U S GENERAL ACCOUNTING
2 OFFICE THE ASSOCIATION OPPOSED THAT HOTEL AS A PUBLIC HOTEL
3 IN EVERY WAY POSSIBLE

4 "THE STATE" HERE IN COLUMBIA WENT AFTER IT AND PUBLISHED
5 A NUMBER OF ARTICLES OPPOSING THE HOTEL AS A PUBLICLY-
6 FINANCED HOTEL, AND I'VE GOT SOME OF THOSE -- THOSE ARTICLES
7 ARE IN THE RECORD AND I'VE GOT SOME OF THOSE ARTICLES LAID
8 OUT THERE WHERE THEY'RE TAKING GUEST ARTICLES AND WHERE
9 THEY'RE ALSO WRITING THEIR OWN ARTICLES OPPOSING A PUBLICLY-
10 FINANCED HOTEL AT THE UNIVERSITY OF SOUTH CAROLINA

11 BO AUGHTRY, WHO OWNED A HOTEL ALREADY HERE IN COLUMBIA,
12 JOINED THE HOTEL ASSOCIATION HE WAS OPPOSING IT, AND BO
13 AUGHTRY PERSONALLY OPPOSED OR HIS COMPANY OPPOSED A
14 UNIVERSITY OF SOUTH CAROLINA PUBLICLY-FINANCED HOTEL IT WAS
15 NOT THAT THEY WERE GOING TO TRY TO BUILD A HOTEL THERE THEY
16 JUST OPPOSED THE IDEA OF A PUBLICLY-FINANCED HOTEL AND THAT
17 OPPOSITION STARTED IN LATE 2002, AND IT WENT UNTIL THE MATTER
18 WAS SETTLED I THINK IN ABOUT OCTOBER OF 2003 AND THERE WAS
19 AN AGREEMENT THAT WAS REACHED THAT'S -- AND THAT AGREEMENT IS
20 NOT IN THE RECORD HERE IN THIS CASE BUT THE POINT IS
21 THERE WAS CONSIDERABLE SERIOUS OPPOSITION TO THE UNIVERSITY
22 OF SOUTH CAROLINA PUBLICLY-FINANCED HOTEL FROM THE DAY IT WAS
23 FIRST ANNOUNCED AND THEY -- THERE WERE PETITIONS TO EVERYBODY
24 THAT WOULD LISTEN, EVERY GOVERNMENT AGENCY THAT WOULD LISTEN
25 TO OPPOSE THAT BY THE PEOPLE THAT WERE OPPOSED TO IT

1 AND IF YOU MOVE TO THE HOTEL THAT WE'RE HERE ABOUT THE
2 CONVENTION CENTER HOTEL THE -- FIRST IN TERMS OF THE RECORD
3 I THINK THE FIRST INKLING IN THE RECORD THAT THERE WAS NOTICE
4 OF THE IDEA OF A PUBLICLY-FINANCED HOTEL AND CONVENTION
5 CENTER SHOWS UP IN LATE 2002 "THE STATE" PUBLISHED AN
6 ARTICLE TALKING ABOUT PUBLIC FINANCE OF THE CONVENTION CENTER
7 HOTEL PUTS THE CITY AT RISK, AND "THE STATE" STAYED ON THIS
8 PROJECT UNTIL THE PROJECT DID NOT GO FORWARD I MEAN I'VE
9 GOT A -- THESE ARTICLES ARE IN THE RECORD AND I'VE GOT THE
10 DATES OF THEM AND I'VE GOT EITHER THE TITLE OF THEM OR THE
11 SUBJECT MATTER OF THEM BUT YOU CAN SEE FROM THE BLURBS THAT
12 ARE ON THE CHART THE TONE OF THE OPPOSITION

13 JANUARY '03 URGES CITY COUNCIL TO REVISIT PUBLIC-
14 FINANCED HOTEL FEBRUARY '03 URGES PRIVATE DEVELOPMENT
15 AUGUST '03 URGES CITY TO BACK OUT OF AGREEMENT WITH EDENS
16 AND AVANT THE 2002 OCCUPANCY RATE IS DOWN SEPTEMBER '03
17 CITY SHOULD ALLOW PRIVATE DEVELOPER TO BUILD HOTEL DECEMBER
18 '03 COLUMBIA SHOULD STUDY MYRTLE BEACH'S STRUGGLING HOTEL
19 JANUARY '04 CITY MAY TAP HOSPITALITY TAX FOR HOTEL

20 FEBRUARY 14, '04 CRONYISM IN COLUMBIA OUT OF CONTROL
21 FEBRUARY 28, '04 COLUMBIA TAXPAYERS AT RISK TO BUILD CITY-
22 OWNED HOTEL 20 000 MAILERS CIRCULATED TO EXPRESS OPPOSITION
23 TO CITY MARCH 4 MAYOR'S HOTEL CANNOT MAKE MONEY MARCH
24 5 RESIDENTS ARE SWARMING CITY COUNCIL WITH OPPOSITION
25 THAT IS, THERE WAS MASSIVE OPPOSITION TO THE IDEA OF A

1 PUBLICLY-FINANCED HOTEL AT THE CONVENTION CENTER AND "THE
2 STATE" NEWSPAPER WAS DRIVING A LARGE PART OF THAT
3 THERE WAS THE SMALL -- THE SOUTH CAROLINA SMALL BUSINESS
4 CHAMBER OF COMMERCE OPPOSED IT THEY ADDRESSED THE CITY
5 COUNCIL ON TWO OCCASIONS, ONCE ON JULY 30 OF '03, AND SAID NO
6 PUBLIC ENTITY SHOULD BE IN THE HOTEL BUSINESS, AND THEN THEY
7 CAME BACK IN FEBRUARY 28 OF '04 AND THEY ADDRESSED IT AND
8 SAID THE CITY SHOULD NOT USE TAX-EXEMPT BONDS TO FINANCE THE
9 CONVENTION CENTER THIS IS THE CHAMBER OF COMMERCE TALKING
10 HERE AND THEN I'LL SKIP -- I'LL COME BACK TO AUGHTRY LAST
11 THERE'S AN AFFIDAVIT IN THE RECORD FROM A GENTLEMAN HERE
12 IN COLUMBIA CALLED RUSTY DEPASS MR DEPASS IS A -- IS A
13 CONSERVATIVE REPUBLICAN AND APPARENTLY MS WAITES CANDY
14 WAITES IS KNOWN TO BE -- SHE CALLS HERSELF A LIBERAL
15 DEMOCRAT AND MR DEPASS'S AFFIDAVIT SAYS THAT CANDY WAITES
16 ASKED RUSTY DEPASS TO JOIN WITH HER IN FORMING A
17 CONSERVATIVE/LIBERAL COALITION TO OPPOSE THIS CONVENTION
18 CENTER HOTEL AND THEY DID THAT AND HE TALKS IN HIS
19 AFFIDAVIT ABOUT THE THINGS HE DID TO OPPOSE IT, AND HE SAYS
20 HE OPPOSED IT IN EVERY WAY HE COULD POSSIBLY OPPOSE IT
21 INCLUDING GETTING MAILERS AND GETTING MONEY AND HAVING RADIO
22 ADS AND THINGS SUCH AS THAT
23 SO THERE WAS A CONSERVATIVE/LIBERAL COALITION THAT CUT
24 ACROSS PARTY LINES OPPOSING THE CONVENTION CENTER HOTEL ON
25 THE GROUNDS THAT THE GOVERNMENT SHOULD NOT BE IN THE HOTEL

1 BUSINESS AND THEN THE CITY COUNCIL -- THE MEMBERS OF THE
2 CITY COUNCIL WERE IN DISARRAY ABOUT IT STARTING AS EARLY AS
3 DECEMBER OF '02 COUNCILMAN OSBORNE AND COUNCILMAN --
4 COUNCILWOMAN SINCLAIR WERE OPPOSING IT COUNCILWOMAN
5 SINCLAIR NEVER LET UP SHE WAS ALWAYS OPPOSING IT

6 SHE PUBLISHED AN ARTICLE IN THE PAPER MAKING IT CLEAR --
7 IN ONE OF HER ARTICLES MAKING IT CLEAR THAT WHEN THERE WAS AN
8 ARTICLE SAYING THE COUNCIL APPROVED, SHE SAID "NOT ME " I
9 MEAN SHE OPPOSED IT FROM DAY ONE AND NEVER LET UP, AND THEN
10 FINALLY THE COUNCIL REVERSED ITSELF MR FOSTER WAS TALKING
11 EARLIER THIS MORNING ABOUT MARCH 15 MARCH 15 IS NOT ON MY
12 TIME BOARD, BUT HE WAS SHOWING THE COURT THIS MORNING THE
13 CHANGE IN THE BUDGET ON MARCH 15 AND THEN TALKING ABOUT THE
14 COUNCIL -- THE CHANGE IN THE COUNCIL VOTE ON MARCH 17

15 AND SO ON MARCH 16 COUNCILWOMAN DEVINE REVERSES HER
16 POSITION ON PUBLICLY-FUNDED AND OPERATED HOTELS, AND THAT WAS
17 MORE OR LESS THE END OF THE PUBLIC HOTEL ONCE THAT COUNCIL
18 PERSON CHANGED HER VOTE, AND IT FOLLOWED THE DAY THAT THE
19 BUDGET THAT MR FOSTER WAS TALKING ABOUT THIS MORNING WENT TO
20 THE COUNCIL AND THEN BO AUGHTRY CAME IN AND BO AUGHTRY --
21 ACTUALLY IN EARLY '01 HE OPPOSED THE IDEA OF A FULL-SERVICE
22 HOTEL THERE, BUT STARTING IN THE SPRING OF '03 BO AUGHTRY
23 BEGAN OPPOSING A PUBLICLY-FINANCED HOTEL

24 THE COURT WELL, THAT BLOCK YOU'VE GOT RIGHT THERE,
25 2/13/01---

1 **MR PAUL** YES, SIR

2 **THE COURT** HE URGED THE HOTEL DEVELOPMENT COMMITTEE NOT
3 TO BUILD A FULL-SERVICE CONVENTION CENTER HOTEL THAT HAS
4 NOTHING TO DO WITH WHETHER OR NOT IT WAS PUBLICLY FINANCED?

5 **MR PAUL** THAT HAS -- WE JUST PUT IT ON THE TIMELINE,
6 BUT IT HAS NOTHING TO DO WITH WHETHER IT'S PUBLICLY FINANCED
7 THE REST OF THESE DO STARTING WITH THE SPRING -- BECAUSE I
8 THINK AT THAT TIME IT WAS NOT CLEAR THIS IS '01, AND "THE
9 STATE'S" FIRST ARTICLE IS '02

10 **THE COURT** WHY DID HE OPPOSE IT, IF THAT MAKES A
11 DIFFERENCE?

12 **MR PAUL** HIS -- WHY DID HE OPPOSE? HIS LETTER SAYS
13 THAT HE THINKS THAT THERE'S -- AT THAT TIME, FEBRUARY OF '01
14 THERE WAS NOT A NEED FOR ANOTHER HOTEL, A FULL-SERVICE HOTEL
15 JUST HE WAS A HOTEL OWNER HERE AND HE DIDN'T THINK THERE WAS
16 ANOTHER NEED

17 **THE COURT** OKAY

18 **MR PAUL** BUT ONCE IT BECAME CLEARLY IT WAS GOING TO BE
19 A PUBLICLY-FINANCED HOTEL THEN BO AUGHTRY, IT IS TRUE,
20 CERTAINLY CAME OUT LONG AND HARD AGAINST A PUBLICLY-FINANCED
21 HOTEL HE'S ONE OF LITERALLY HUNDREDS, IF NOT THOUSANDS OF
22 PEOPLE OPPOSING IT AND SO I'VE GOT HERE ON THE TIMELINE --
23 WE'VE GOT BO AUGHTRY'S AFFIDAVIT WE'VE ATTACHED EVERY
24 LETTER THAT BO AUGHTRY WROTE AND HE WAS DEPOSED WITH HIS
25 DAYBOOK AND HIS DAYTIMER, AND THAT'S ALL IN THE RECORD ABOUT

1 THE MEETINGS HE HAD, TO THE EXTENT HE HAD MEETINGS
2 AND SO STARTING IN AUGUST OF '03 AND GOING THROUGH
3 NOVEMBER HE WROTE LETTERS AND HE HAD MEETINGS WITH THE MAYOR
4 AND WITH THE CITY COUNCIL, PERSONS THAT WOULD MEET WITH HIM
5 AND SAID IN HIS LETTERS THAT HE OPPOSED A PUBLICLY-FINANCED
6 HOTEL AND SAID IN MEETINGS FACE TO FACE TO THE EXTENT THAT HE
7 COULD GET THEM THAT HE OPPOSED A PUBLICLY-FINANCED HOTEL AND
8 THEN FOLLOWED IT UP WITH A LETTER SAYING THAT AND THEN HE
9 WROTE A GUEST ARTICLE IN "THE STATE" AND HE WROTE ADDITIONAL
10 LETTERS TO THE CITY COUNCIL

11 AND SO BO AUGHTRY YOU KNOW WENT DIRECTLY TO THE CITY
12 COUNCIL HE DIRECTLY TRIED TO INFLUENCE THE CITY COUNCIL,
13 LIKE MANY, MANY OTHER PEOPLE IN COLUMBIA WERE DOING NOT TO
14 COMMIT THE CITY TO A PUBLICLY-FINANCED HOTEL

15 THE COURT SO THAT 12/20/03 BLOCK YOU HAVE THERE
16 WRITES GUEST COLUMN CITING THE ADVANTAGES OF A PRIVATELY---

17 MR PAUL I'M SORRY THAT IS -- MY PARALEGAL IN
18 ATLANTA, I CALLED HER THIS MORNING AND SHE'S SLITTING HER
19 WRISTS THAT SHOULD SAY PUBLICLY INSTEAD OF PRIVATELY
20 THAT'S -- I FORGOT TO SAY THAT

21 THE COURT THE ADVANTAGE---

22 MR PAUL THE ADVANTAGE -- WRITES GUEST COLUMN THE
23 ADVANTAGES OF -- WELL I GUESS THAT IS RIGHT I CALLED THIS
24 MORNING NO, IT'S THE NEXT ONE IT'S 1/23/04 THAT'S GOT THE
25 TYPO IN IT WARNING PRIVATE HOTEL A SERIOUS ERROR ITS

1 ARTICLE---

2 THE COURT IT SHOULD BE PUBLIC?

3 MR PAUL SHOULD BE PUBLIC HOTEL THIS ONE -- THE
4 12/30 IS CORRECT ADVANTAGES OF PRIVATELY-FUNDED CONVENTION
5 CENTER 1/23/04 HAS GOT THE TYPO IN IT, AND IT SHOULD SAY
6 LETTERS TO CITY COUNCIL WANTING PUBLIC HOTEL A SERIOUS ERROR

7 THE COURT ALL RIGHT THAT JUST CAUGHT MY ATTENTION

8 MR PAUL YES SIR

9 THE COURT THE INCONSISTENCY---

10 MR PAUL YES SIR

11 THE COURT ---IN THOSE TWO

12 MR PAUL YEAH, AND I WAS SUPPOSED TO REMEMBER TO SAY
13 THAT AND I DIDN'T SO HE ADVOCATED A PRIVATE HOTEL --
14 PRIVATELY-FINANCED HOTEL HE ADVOCATED AGAINST A PUBLICLY-
15 FINANCED HOTEL CONSISTENTLY FROM THE -- FROM WHEN HE FIRST
16 HEARD THERE WAS GOING TO BE A PUBLICLY-FINANCED HOTEL

17 THE COURT AND THAT'S THREE YEARS BEFORE THE FACT THAT
18 HE HAD URGED THE COMMITTEE NOT TO BUILD A FULL-SERVICE
19 CONVENTION CENTER HOTEL IN HIS MIND, TO WHATEVER EXTENT IT
20 MAKES A DIFFERENCE THE DYNAMIC HAD CHANGED IN THE THREE-YEAR
21 SENSE?

22 MR PAUL THE DYNAMIC HAD CHANGED APPARENTLY HE
23 DIDN'T KNOW IT WAS GOING TO BE A PUBLICLY-FINANCED -- THERE'S
24 NO EVIDENCE THAT HE KNEW -- THAT ANYBODY KNEW IT WAS GOING TO
25 BE A PUBLICLY-FINANCED HOTEL

1 THE COURT HE JUST DIDN'T THINK THEY NEEDED ONE?

2 MR PAUL DIDN'T THINK THEY NEEDED A HOTEL

3 THE COURT BUT THREE YEARS LATER HE THOUGHT THEY DID OR
4 IF THEY DID IT SHOULD BE PRIVATELY---

5 MR PAUL THAT'S RIGHT THREE YEARS LATER -- IF
6 THEY'RE GOING TO HAVE ONE IT OUGHT TO BE A PRIVATELY-
7 FINANCED HOTEL

8 THE COURT I SEE

9 MR PAUL AND SO OUR POINT IS THAT THESE COMMUNICATIONS
10 ARE AS DIRECTLY INSIDE OF NOERR-PENNINGTON AS YOU CAN GET
11 THEY ARE -- THEY ARE -- THEY ARE TO THE CITY COUNCIL OF
12 COLUMBIA THEY ARE TO THE MAYOR OF COLUMBIA THEY ARE
13 PUBLIC THERE'S NOTHING WRONG WITH THEM THE FACT THAT HE
14 IS A HOTEL PERSON, THE FACT THAT HE HAD A HOTEL HERE, UNDER
15 NOERR AND UNDER PENNINGTON AND UNDER THE OTHER CASES THAT
16 WERE CITED IN THE BRIEF IT DOES NOT MATTER HE DOES NOT NEED
17 TO BE ASHAMED OF THE FACT THAT HE HAS A FINANCIAL INTEREST
18 HIMSELF IN THE OUTCOME OF THIS, THAT HE DOESN'T HAVE TO
19 APOLOGIZE FOR IT HE'S A CITIZEN HE HAS THE RIGHT TO
20 EXPRESS THOSE BELIEFS TO HIS GOVERNMENT, AND THOSE BELIEFS
21 ARE IMMUNE FROM CIVIL LIABILITY

22 THE COURT I GUESS THE SATELLITE FLOATING AROUND OUT
23 THERE IS THE FACT THAT HE ALSO BECAME ONE OF THE TEAM
24 CAPTAINS IN THE SECOND ROUND OF R F P 'S

25 MR PAUL WELL AND THAT -- AND SO I'M GOING TO TALK

1 ABOUT THAT NEXT, BUT MY POINT HERE AND BASICALLY FOLLOWING UP
2 ON A COLLOQUY THAT HAPPENED THIS MORNING BETWEEN THE COURT
3 AND MR HINSON IS THAT WE SAY THAT -- AND MR HINSON -- MR
4 HINSON'S DATE IS NOT FAR AWAY FROM THIS, BUT WE SAY THAT ON
5 MARCH THE 17TH, 2004 THE CITY COUNCIL VOTED TO ISSUE A -- TO
6 DIRECT STAFF TO ISSUE A NEW R F P THE SECOND R F P WAS
7 ACTUALLY ISSUED ON APRIL THE 2ND

8 NOW THE POINT THAT WE WANT TO GO TO NEXT IS RELATED TO
9 THIS AND THE TWO FOAM BOARDS THAT FOLLOW IS THAT THE
10 ALLEGATION IN THE COMPLAINT IS THAT THE CONTRACT THAT IS
11 ALLEGED TO EXIST IS THE M O U , THE APRIL 2003 M O U AND
12 THE BREACH THAT IS ALLEGED TO EXIST IS THE CITY COUNCIL'S
13 ISSUANCE OF THE SECOND R F P AND SO MR HINSON -- THE COURT
14 ASKED MR HINSON THIS MORNING WHEN IS IT THAT YOU CONSIDER
15 THERE WAS A BREACH?

16 NOW, THE COMPLAINT -- PARAGRAPH 30 OF THE COMPLAINT SAYS
17 THE BREACH HAPPENED RIGHT HERE WHEN THE CITY COUNCIL VOTED TO
18 DIRECT STAFF TO ISSUE THE NEW M O U MR HINSON THIS MORNING
19 SAID APRIL 2ND THERE'S NO -- THERE'S NO LEGAL OR
20 SUBSTANTIVE DIFFERENCE BETWEEN MARCH 17 WHEN THE COUNTY --
21 WHEN THE CITY SAID "STAFF GO DO IT," AND APRIL 2ND WHEN
22 THEY DID DO IT

23 THE POINT IS THAT THE CONTRACT THAT IS ALLEGED TO HAVE
24 BEEN INTERFERED WITH IS THE M O U , AND THE BREACH THAT IS
25 ALLEGED IS THE DECISION BY THE CITY TO ISSUE THE SECOND

1 R F P AND SO WHAT WE ARE SAYING IS THAT WHEN YOU LOOK AT
2 THE TIMELINE ON THE INTENTIONAL INTERFERENCE WITH A CONTRACT,
3 YOU IDENTIFY THE CONTRACT AND YOU IDENTIFY THE BREACH AND
4 WHAT THE PLAINTIFFS ARE DOING HERE -- AND IN THE NEXT TWO
5 CHARTS I'VE GOT I'LL TRY TO SHOW THIS BUT WHAT THE
6 PLAINTIFFS ARE DOING IS TRYING TO STRETCH THE TIMELINE PAST
7 THE BREACH TO GET INTO THE BIDS OVER HERE WHERE PEOPLE ARE
8 JUST COMPETING FOR BIDS AND THEY'RE TRYING TO -- THEY ARE
9 TRYING TO EXPAND THE SHAM EXCEPTION TO FRAUD WHEN IT'S REALLY
10 A LEGISLATURE THAT'S INVOLVED AND THEY'RE TRYING TO EXPAND
11 THE TIMELINE TO GET OVER HERE TO TALK ABOUT FACT ISSUES AND
12 THE---

13 THE COURT ARE YOU SAYING THE CLOCK STOPS IN MARCH
14 OF---

15 MR PAUL YES, SIR THAT'S WHAT -- YES, SIR AND I
16 DON'T JUST SAY THAT THE COMPLAINT SAYS THAT LET ME GET MY
17 HANDS ON IT THE COMPLAINT IN PARAGRAPH 30 SAYS IN MARCH
18 2004, AS A RESULT OF THE ACTION OF DEFENDANTS, THE CITY
19 ISSUED A NEW REQUEST FOR PROPOSAL FOR PRIVATELY-FUNDED
20 DELIVERY OF A HOTEL AND REFUSED TO FURTHER PERFORM IN
21 ACCORDANCE WITH THE TERMS OF THE M O U THAT'S PARAGRAPH 30
22 OF THE COMPLAINT AND THAT'S DIRECTLY CONSISTENT WITH MR
23 HINSON'S ANSWER TO THE COURT THIS MORNING THAT IS THE
24 CLOCK STOPS IN TERMS OF BREACH AND IN TERMS OF ANY ACTS THAT
25 WOULD INTERFERE WITH THE ALLEGED CONTRACT, EITHER MARCH 17 OR

1 APRIL 2ND WE'LL HAVE TO MOVE THIS OUT OF WAY AND SO

2 THE COURT SO YOU SAY THE BREACH OCCURRED AT THAT
3 EARLIER -- OR MARCH 17 OR APRIL 2, AND ANYTHING AUGHTRY DID
4 AFTER THAT DATE---

5 MR PAUL IS IRRELEVANT

6 THE COURT HE WOULD BE PARTICIPATING IN OR ENCOURAGING
7 A BREACH

8 MR PAUL YES, SIR AS I SAY, IT'S IRRELEVANT BECAUSE
9 IT'S -- IF HE DID SOMETHING ELSE AND THEY WANT TO SUE ABOUT
10 IT, THEY COULD TRY TO DO THAT, BUT IT HAS NOTHING TO DO WITH
11 INTERFERENCE OF A CONTRACT AND SO -- SO WE HAVE -- I DIDN'T
12 KNOW EXACTLY HOW MUCH MR HINSON WOULD ANSWER THE QUESTION
13 BUT MY FOAM BOARD TALKS ABOUT MARCH 17 BECAUSE THAT'S WHAT
14 THE COMPLAINT SAID OF THE M O U THAT WAS ISSUED

15 BUT THE POINT OF OUR NEXT FOAM BOARD IS THAT THE CLOCK
16 STOPS AT MARCH 17 IF THE COURT WANTS TO MOVE THE CLOCK TO
17 APRIL 2ND IT WON'T CHANGE WHAT I'M ABOUT TO SAY BUT WE SAY
18 THAT EVERYTHING THAT AUGHTRY COULD BE ALLEGED TO HAVE DONE OR
19 IS ALLEGED TO HAVE DONE BEFORE THE CLOCK DID STOP IS EITHER
20 DIRECTLY INSIDE OF NOERR-PENNINGTON OR THERE'S NO EVIDENCE TO
21 SUPPORT THE ALLEGATION

22 AND SO IF YOU JUST GO THROUGH THE ALLEGATIONS AND LOOK
23 AT THE EVIDENCE, PARAGRAPH 27 SAYS, "ALLEGATIONS OF AUGHTRY
24 COMMUNICATIONS TO CITY COUNCIL URGING CITY TO BREACH M O U "
25 WELL, ALL OF AUGHTRY'S LETTERS ARE ATTACHED TO AUGHTRY'S

1 AFFIDAVIT ALL OF THE LETTERS -- WE OBVIOUSLY MUST LIVE
2 WITHOUT ALL THE LETTERS I MEAN THE LETTERS ARE THERE AND
3 THE COURT WILL READ THOSE LETTERS, BUT OUR POSITION IS THOSE
4 LETTERS ARE DEAD INSIDE OF NOERR-PENNINGTON THERE'S NOTHING
5 ABOUT THOSE LETTERS THAT GETS BO AUGHTRY OUT OF NOERR-
6 PENNINGTON

7 AND SO IN TERMS OF THE COMMUNICATIONS THAT ARE IN
8 EVIDENCE -- AND BO AUGHTRY WAS DEPOSED AND THERE'S NOTHING IN
9 HIS DEPOSITION THAT ANYBODY HAS CITED TO THAT IS ANY KIND OF
10 ACTION OR CONDUCT THAT GETS BO AUGHTRY OUT OF NOERR-
11 PENNINGTON SO WE SAY WE'LL LIVE WITH THE COMMUNICATIONS -
12 THEY'RE ALL WRITTEN - AS FAR AS THE LETTERS, AND IF THERE
13 WERE MEETINGS, HE FOLLOWED THEM UP WITH LETTERS AND SO --
14 AND THERE'S NO EVIDENCE THAT THE PLAINTIFFS HAVE COME FORWARD
15 WITH

16 THEY'VE DEPOSED THE CITY ADMINISTRATOR THEY'VE DEPOSED
17 ANOTHER GUY FROM THE CITY THEY'VE DEPOSED AUGHTRY THEY'VE
18 DEPOSED A P R PERSON THAT AUGHTRY HAD THEY'VE DEPOSED
19 ANOTHER GUY AUGHTRY HAD WORKING FOR HIM, AND THERE'S NOT ONE
20 SCINTILLA OF EVIDENCE THEY'VE COME UP WITH THAT AUGHTRY HAS
21 DONE ANYTHING THAT WHEN THE COURT LOOKS AT IT GETS OUTSIDE OF
22 NOERR-PENNINGTON

23 NOW, IF YOU GO TO -- AND URGING THE CITY TO BREACH
24 WELL THAT'S THEIR ALLEGATION IN PARAGRAPH 27 THE
25 COMMUNICATIONS SPEAK FOR THEMSELVES IN TERMS OF THE WRITTEN

1 ONES AND THERE IS NO TESTIMONY THAT IS DIFFERENT THAN THE
2 WRITTEN COMMUNICATIONS BO AUGHTRY CONSISTENTLY SAID, "WE DO
3 NOT NEED TO HAVE A PUBLICLY-FINANCED HOTEL IN THIS TOWN I'M
4 AGAINST IT " WELL, HE'S NOT THE ONLY ONE THERE WAS
5 THOUSANDS OF PEOPLE THAT WERE AGAINST IT IF YOU GO TO
6 PARAGRAPH 27 -- I'M SORRY WELL YEAH AGAIN 27---

7 THE COURT WHY WAS HE INDIVIDUALLY OPPOSED TO IT? JUST
8 FORGET ABOUT HIM BEING A CITIZEN WHY DIDN'T HE LIKE IT?

9 MR PAUL I'M SORRY?

10 THE COURT WHY DIDN'T HE LIKE THE IDEA OF A PUBLICLY-
11 FINANCED---

12 MR PAUL WHY DID HE NOT LIKE IT?

13 THE COURT YES, SIR

14 MR PAUL BECAUSE HIS POLITICAL PHILOSOPHY IS THAT
15 GOVERNMENT SHOULD NOT COMPETE WITH PRIVATE BUSINESS, PERIOD
16 THAT'S HIS POLITICAL PHILOSOPHY, AND THAT'S WHAT HE'S
17 TESTIFIED TO

18 THE COURT OKAY

19 MR PAUL THAT'S EXACTLY HIS POLITICAL PHILOSOPHY AND
20 HE BELIEVES THAT AND THAT'S -- THAT'S HIS PHILOSOPHY, NOT
21 JUST WITH HOTELS THAT'S HIS PHILOSOPHY, PERIOD SO -- ALSO
22 IN PARAGRAPH 27 IT'S ALLEGED THAT AUGHTRY MADE UNSOLICITED
23 PROPOSALS TO THE CITY COUNCIL WELL, THE LETTERS ARE THERE
24 THE LETTERS SAY I WOULD LIKE TO MEET WITH THE CITY COUNCIL
25 TO PRESENT THE IDEA OF A PRIVATE HOTEL I WOULD LIKE TO MEET

1 WITH THE CITY COUNCIL

2 THERE'S NOTHING THAT SAYS A CITIZEN HAS TO BE INVITED TO
3 TALK TO THE LEGISLATURE I MEAN YOU CAN ASK THE LEGISLATURE
4 TO TALK TO YOU YOU DON'T HAVE TO BE INVITED SO THE FACT
5 THAT -- THE FACT THAT HE MADE AN UNSOLICITED ATTEMPT TO GET A
6 MEETING HAS NOTHING TO DO WITH GETTING OUTSIDE OF THE NOERR-
7 PENNINGTON IMMUNITY I MEAN, YOU HAVE A RIGHT TO GO TO YOUR
8 LEGISLATURE OR TO GO TO YOUR ENTIRE LEGISLATIVE BODY AND SAY
9 THIS IS AN IDEA I OUGHT TO PRESENT NOTHING WRONG WITH THAT

10 THE COURT WHERE DOES HE LIVE?

11 MR PAUL HE LIVES IN GREENVILLE

12 THE COURT AND SO AS A CITIZEN OF GREENVILLE WHY DID
13 HE FEEL COMPELLED TO OPPOSE PUBLICLY -- POLITICALLY OPPOSE OR
14 FOR POLITICAL REASONS OPPOSE A PUBLICLY-FUNDED HOTEL IN
15 COLUMBIA?

16 MR PAUL WELL, FOR ONE REASON, HE OWNS ANOTHER HOTEL
17 HERE

18 THE COURT SO IT WASN'T PURELY POLITICAL AS---

19 MR PAUL NO

20 THE COURT HE HAS SOME BUSINESSES HERE

21 MR PAUL HE'S GOT BUSINESS AND THAT WAS THE POINT OF
22 MY OPENING HERE WITH NOERR-PENNINGTON THERE'S NOTHING WRONG
23 WITH THAT THAT'S MY WHOLE -- THAT WAS MY WHOLE POINT ON
24 NOERR AND PENNINGTON THERE'S ABSOLUTELY NOTHING WRONG WITH
25 THE FACT THAT YOU HAVE AN ECONOMIC INTEREST IN IT AND THE

1 IDEA THAT YOU'RE PRESENTING IT TO YOUR GOVERNMENT THAT'S
2 WHAT PEOPLE DO

3 SO IF YOU GO STILL IN PARAGRAPH 27, THERE'S AN
4 ALLEGATION THAT AUGHTRY USED, QUOTE, OTHER MEANS CLOSED
5 QUOTE, TO BE UNCOVERED WELL, THERE'S BEEN YEARS OF
6 DISCOVERY LIKE I SAY, THERE'S BEEN DEPOSITIONS OF THE CITY
7 THERE'S BEEN DEPOSITIONS OF AUGHTRY THERE'S BEEN
8 DEPOSITIONS OF P R PEOPLE THERE'S BEEN DEPOSITIONS OF
9 ANYBODY THAT ANYBODY WANTS TO DEPOSE, BUT THERE'S NOT ONE
10 SCINTILLA OF EVIDENCE THAT ANYTHING IMPROPER EVER, EVER
11 HAPPENED NOT ONE SCINTILLA OF EVIDENCE, AND CERTAINLY
12 NOTHING THAT GETS OUTSIDE OF THE NOERR-PENNINGTON IMMUNITY
13 SO THAT'S AN ALLEGATION WITHOUT EVIDENCE FOR PURPOSES OF
14 SUMMARY JUDGMENT

15 IN PARAGRAPH 28 THERE'S AN ALLEGATION THAT AUGHTRY
16 DIRECTLY COMMUNICATED TO HILTON URGING HILTON TO BREACH THE
17 M O U WELL, THE COURT HAS BEEN THROUGH THE HILTON
18 COMMUNICATIONS I'M NOT GOING TO GO BACK THROUGH THOSE,
19 YOU'VE BEEN THROUGH THOSE A LOT TODAY BUT MY POINT HERE IS
20 THAT ON THE TIMELINE THAT WE'RE TALKING ABOUT, WHETHER IT'S
21 MARCH 17 OR APRIL 2002 -- BUT CERTAINLY I'M CONFIDENT IN
22 SAYING THAT UP THROUGH MARCH 17 WHEN THE CITY COUNCIL PASSED
23 THIS RESOLUTION SAYING, "STAFF, GO DO ANOTHER R F P , " THERE
24 IS ZERO EVIDENCE THAT AUGHTRY HAD ANY CONVERSATIONS OR
25 COMMUNICATIONS WITH HILTON ABOUT THE SUBJECT OF SPONSORING

1 HIM RELATED TO A HOTEL AT THE CONVENTION CENTER BECAUSE THERE
2 WAS NO BID FOR HIM TO THINK HE COULD GET A HOTEL AT THE
3 CONVENTION CENTER

4 SO THERE'S NO EVIDENCE FROM HILTON AND THERE'S NO
5 EVIDENCE FROM AUGHTRY AND THAT'S WHAT MR FOSTER WAS SAYING
6 THIS MORNING IN HIS ARGUMENT THERE'S NO -- THERE IS NO
7 EVIDENCE OF ANY CONTACT BETWEEN AUGHTRY AND HILTON UP THROUGH
8 THE TIME THAT THE CITY PASSED THE RESOLUTION---

9 THE COURT WHAT IF THERE HAD BEEN?

10 MR PAUL I'M SORRY?

11 THE COURT WHAT IF THERE HAD BEEN?

12 MR PAUL WELL I DON'T REALLY THINK THAT IT WOULD HAVE
13 MATTERED BUT THERE'S AN ALLEGATION -- UNDER THE PLAINTIFFS'
14 ANALYSIS OF THE CASE, THE PLAINTIFFS ARE CONTENDING THAT THEY
15 HAVE AN ORAL EXCLUSIVE RELATIONSHIP WITH HILTON WE DON'T
16 KNOW WHAT THEY HAD WITH HILTON WE'RE NOT INVOLVED IN IT
17 MR FOSTER SAYS THERE WAS NOTHING AND SO I CAN ONLY ANSWER
18 THAT WE DON'T KNOW WHAT THEY HAD WITH HILTON

19 THE COURT WELL, LET'S SAY, FOR EXAMPLE, THAT AUGHTRY
20 HAD A CONVERSATION WITH OR HAD WRITTEN A LETTER TO HILTON IN
21 FEBRUARY SAYING, "I DON'T KNOW WHETHER YOU'VE GOT AN
22 EXCLUSIVELY AGREEMENT WITH GARFIELD OR NOT BUT I WANT TO DO
23 WHAT I CAN TO QUASH THAT RELATIONSHIP THEY HAVE WITH THE CITY
24 AND GET MY OWN FOOT IN THE DOOR " WOULD THAT BE -- WOULD
25 THAT BE PROPER UNDER NOERR-PENNINGTON OR NOT PROPER BUT WOULD

1 IT BE PROTECTED UNDER NOERR-PENNINGTON?

2 MR PAUL I THINK IF -- I THINK IF AUGHTRY HAD WRITTEN
3 HILTON TRYING TO -- IF THERE WAS AN AGREEMENT BETWEEN HILTON
4 AND THE PLAINTIFFS THAT SAID THE RELATIONSHIP IS EXCLUDED,
5 WHICH HILTON DISPUTES AND IF AUGHTRY KNEW ABOUT IT, WHICH
6 NOBODY HAS EVER SEEN THIS AND NOBODY HAS EVER HEARD OF IT
7 AND THERE WAS AN AGREEMENT AND HE DID KNOW ABOUT IT AND HE
8 DID ASK HILTON TO BREACH THE EXCLUSIVE AGREEMENT, I DON'T
9 THINK THAT IS A PETITION TO THE GOVERNMENT I DON'T THINK
10 THAT'S A PETITION TO THE GOVERNMENT AND SO I WOULD HAVE TO
11 LOOK AT IT BUT THAT'S A PRIVATE -- THAT'S A PRIVATE ONE-ON-
12 ONE---

13 THE COURT ALL RIGHT

14 MR PAUL ---SITUATION SO I DON'T -- I DON'T THINK --
15 BUT THAT'S NOT A FACT -- I MEAN, THERE'S NONE OF THAT IN THIS
16 CASE IS MY POINT AND THERE'S NO EVIDENCE THERE IS ZERO
17 EVIDENCE OF THAT IN THIS CASE SO I'VE NEVER HAD TO CROSS
18 THAT BRIDGE, BUT I THINK THE HONEST ANSWER IS THAT IT MAY NOT
19 BE UNDER NOERR-PENNINGTON BECAUSE IT'S BETWEEN TWO PRIVATE
20 PARTIES HERE AND IT'S OUTSIDE OF NOERR-PENNINGTON

21 THE -- IN PARAGRAPH 39 THERE'S ALLEGATIONS OF A SECRET
22 CAMPAIGN THERE'S ZERO EVIDENCE ABOUT THAT I MEAN THE
23 CONTACTS ARE PRIMARILY WRITTEN AS I SAY, IF THERE WAS A
24 MEETING, IT WAS FOLLOWED UP WITH A LETTER AUGHTRY IS
25 DEPOSED, THEY'VE BEEN THROUGH IT WITH HIM THEY'VE BEEN

1 THROUGH IT WITH THE CITY ADMINISTRATORS

2 THERE'S NO SECRET MEETINGS THAT THEY'VE COME UP WITH
3 BUT I WILL SAY THIS THERE'S NOTHING WRONG CERTAINLY
4 THERE'S NOTHING WRONG WITH A ONE-ON-ONE CONVERSATION WITH A
5 LEGISLATURE I MEAN, THAT HAPPENS EVERY DAY IT HAPPENS
6 EVERY DAY SO IT'S NOT -- IT'S NOT A MATTER OF BEING SECRET
7 IT'S A MATTER OF SITTING DOWN WITH SOMEBODY AND TELLING THEM
8 WHAT YOUR INTERESTS ARE BUT THERE IS NO EVIDENCE OF ANY
9 SECRET MEETINGS HERE, AND EVERYTHING HE WAS DOING WAS AS
10 PUBLIC AS HE COULD MAKE IT

11 IN PARAGRAPH 46 IT SAYS THE ALLEGATIONS OF AUGHTRY
12 MAKING UNFOUNDED STATEMENTS TO THE CITY COUNCIL PREDICTING
13 SLOW-DOWN IN HOTEL ROOM DEMAND, THOSE -- TO THE EXTENT
14 AUGHTRY TALKED ABOUT HOTEL DEMAND, IT'S IN WRITING IT'S IN
15 EVIDENCE IT'S ATTACHED TO HIS AFFIDAVIT IT'S ALL HIS
16 OPINION HE IS A HOTEL OPERATOR AND IT'S HIS OPINION AND
17 SO THERE'S NOTHING WRONG WITH AUGHTRY SAYING WHAT HIS OPINION
18 IS, AND THAT'S WHAT THOSE LETTERS ARE DOING TO THE EXTENT
19 THAT THEY'RE TALKING ABOUT IT AT ALL, THEY'RE SAYING WHAT HIS
20 OPINION IS OF THE ROOM OCCUPANCY RATES AND THE PREDICTIONS OF
21 WHAT IS GOING ON IN THE COLUMBIA HOTEL MARKET WHICH HE IS A
22 PARTICIPANT IN, AND HE CERTAINLY HAS A RIGHT TO SAY WHAT HIS
23 OPINION IS SO THERE'S -- AND THERE'S BEEN NO SHOWING---

24 THE COURT DID HE MAKE ANY STATEMENT AT ALL THAT THERE
25 WAS GOING TO BE A SLOW-DOWN IN HOTEL ROOM DEMAND?

1 MR PAUL I THINK HE DID SAY THAT HE IS EXPERIENCING A
2 SLOW-DOWN IN HOTEL DEMAND I THINK HE DID, AND IT WAS TRUE
3 I MEAN, THERE'S NO SHOWING IT WAS NOT TRUE I MEAN, THERE
4 WAS -- IN FACT, THERE ARE OTHER ARTICLES THAT ARE TALKING
5 ABOUT SLOW-DOWN IN HOTEL DEMAND, AND THERE WAS A SLOW-DOWN IN
6 HOTEL DEMAND AND I THINK HE ATTACHED AT ONE POINT WHAT'S
7 CALLED A STAR REPORT THAT IS A REPORT OF -- IT'S A BLIND
8 REPORT WHERE PEOPLE REPORT TO THE REPORTING COMPANY THAT
9 SHOWS DEMANDS BUT THERE'S BEEN NO EVIDENCE AT ALL THAT
10 ANYTHING AUGHTRY SAID WAS UNTRUE, AND IT WAS ALL HIS OPINION
11 ANYWAY BUT THERE'S NOTHING THAT -- NOBODY HAS PROVED
12 ANYTHING THAT HE SAID WAS UNTRUE

13 SO WE SAY THAT DURING THE PERIOD BEFORE THE MARCH 17
14 BREACH DATE, IF YOU WILL, IF THERE IS A CONTRACT, THERE IS --
15 MOSTLY THERE IS NO EVIDENCE TO SUPPORT THE ALLEGATIONS AND
16 TO THE EXTENT THERE IS EVIDENCE TO SUPPORT THE ALLEGATIONS,
17 IF THE COURT LOOKS AT THE EVIDENCE AND LOOKS AT NOERR AND
18 PENNINGTON AND THE CASES THAT WE'VE CITED WE'RE DEAD INSIDE
19 OF THEM I MEAN, THERE'S NOTHING WRONG WITH IT AND SO THAT
20 WE SAY IS THE WAY THE EVIDENCE IS UP UNTIL MARCH 17, AND THEN
21 THE REST OF THE TIMELINE WE SAY REALLY IS IRRELEVANT AND
22 THAT IS GOING FROM MARCH 17 UNTIL AUGHTRY WAS AWARDED THE
23 BID AS THE COURT HEARD THIS MORNING---

24 MR VAIL EXCUSE ME YOUR HONOR AS WE MOVE TO THE
25 NEXT POINT I JUST WANT TO NOTE THAT WE'VE BEEN GOING FOR AN

1 HOUR NOW, AND AT SOME POINT WE HAVE TO CLOSE OUT

2 MR PAUL OKAY I'M---

3 THE COURT WE'VE GOT -- WE'VE GOT SOME TIME ALL
4 RIGHT

5 MR PAUL I'M AT THE VERY END

6 THE COURT YOU TAKE ALL THE TIME YOU NEED, MR VAIL
7 THANK YOU

8 MR PAUL THANK YOU

9 THE COURT IS YOUR PLANE LEAVING ANY

10 MR VAIL WE'LL MAKE IT, BUT IT WILL BE CLOSE

11 THE COURT ALL RIGHT GO AHEAD GO AHEAD

12 MR PAUL I'M SORRY ONCE YOU GET PAST MARCH 17 THE
13 SECOND R F P WENT OUT ON APRIL THE 2ND THE PLAINTIFF
14 SUBMITTED, AS MR FOSTER SAID TODAY, TWO RESPONSES THE
15 PLAINTIFF SUBMITTED TWO RESPONSES AUGHTRY SUBMITTED ONE
16 THERE WERE FOUR OTHER PEOPLE THAT SUBMITTED RESPONSES
17 AUGHTRY GOT IT AND THAT'S IT AND THEN WHAT THE PLAINTIFFS
18 WE SAY ARE DOING ARE TRYING TO TURN EVIDENCE -- IT'S -- ONCE
19 THE BREACH OCCURS THE CLOCK DOES STOP ON INTENTIONAL
20 INTERFERENCE WITH THE CONTRACT AND IT'S CLEAR UNDER THE
21 ALLEGATIONS, CLEAR UNDER THE ADMISSION THAT MR HINSON MADE,
22 THE CLOCK STOPPED AT LEAST BY APRIL THE 2ND AND WE SAY UNDER
23 THE ALLEGATIONS MARCH 17TH

24 THIS IS ALL JUST PEOPLE BIDDING AND COMPETING AGAINST
25 EACH OTHER, NOT RELATED TO A CONTRACT THAT ONE OF THEM HAD

1 THESE PEOPLE ARE ALL COMPETING TO GET A CONTRACT THEY DON'T
2 HAVE NOBODY CAN INTERFERE WITH SOMEBODY ELSE'S CONTRACT
3 HERE IN THIS BID CONTEST AND THAT'S NOT WHAT THIS SUIT IS
4 ABOUT THAT IS, THEY'RE NOT -- THEY ARE SUING AUGHTRY FOR
5 INTERFERING WITH THE M O U AND TO THE EXTENT THERE IS SOME
6 CLAIM THAT THEY WOULD THINK THEY HAD RELATED TO THIS, IT'S
7 NOT -- IT'S NOT IN THIS CASE AND IT CERTAINLY IS NOT
8 INTERFERENCE WITH THE M O U WHICH IS WHAT HE'S BEING SUED
9 FOR

10 AND SO THE ALLEGATIONS ARE IN THE BRIEF -- THIS IS
11 REALLY NOT SO MUCH IN THE COMPLAINT BUT THE ALLEGATIONS IN
12 THE BRIEF ARE THAT AUGHTRY USED SOME KIND OF BAIT AND SWITCH
13 THAT IS HE WENT IN WITH A -- WITH A -- THE BRIEF ACTUALLY
14 SAYS -- NOT FULL-SERVICE, IS WHAT I THINK THE BRIEF SAYS,
15 HOTEL WELL, AS MR FOSTER WAS SAYING THE SECOND LINE OF
16 AUGHTRY'S RESPONSE SAYS, "A FULL-SERVICE HILTON GARDEN INN OR
17 MARRIOTT COURTYARD " FULL SERVICE RIGHT THERE AND THEN IT
18 ~~LISTS ALL THE SERVICES WHICH SHOW IT IS, IN FACT FULL~~
19 SERVICE

20 SO IT'S SIMPLY NOT TRUE THAT HE SWITCHED FROM LIMITED TO
21 FULL SERVICE, BUT I DON'T WANT TO GET SUCKED INTO FIGHTING
22 ABOUT THINGS THAT ARE IRRELEVANT SO MY MAIN POINT IS THIS
23 IS ALL IRRELEVANT I DON'T WANT TO LEAVE IT UNRESPONDED TO
24 BUT IT IS IRRELEVANT TO THE ALLEGATIONS THAT THEY'RE MAKING
25 ABOUT INTERFERENCE WITH CONTRACT