THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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S.C. Supreme Court

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

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 ..... Respondents,

vs.

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

Of Whom
The City of Columbia is ..... Petitioner.

BRIEF OF RESPONDENTS

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September 3, 2013
Columbia, South Carolina

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STATEMENT OF THE CASE

This litigation stems from a dispute involving the formation of a development plan for a publicly-financed hotel for the City of Columbia. Respondents Gary Realty Company, Inc., and Garfield-Traub Development were part of a hotel development team that, in April 2003, signed a Memorandum of Understanding ("the MOU") with Petitioner City of Columbia ("the City"). (R. pp. 1443-1465) However, over a year later and without explanation, the City simply refused to go forward with the project, reopened the bidding process, and ultimately selected a different group to develop the hotel. (R. pp. 1466-1475)

On March 4, 2005, Respondents sued the City, and, after some revision to the pleadings, the causes of action included claims for Breach of Contract and Quantum Meruit. (R. pp. 814-820) Several other team members also brought lawsuits related to the hotel development process and breach of the MOU. These cases were consolidated "for discovery purposes" and eventually consolidated for trial as well. (R. pp. 742-750; R. pp. 751-753)

The City filed motions for summary judgment against the various plaintiffs. These motions were heard on July 9, 2009, and August 17, 2009. (R. pp. 864-1047; R. pp. 1048-1315) Many of the factual issues and legal arguments surrounding the motions were very similar, particularly whether it could be decided, as a matter of law, if the MOU did not form a valid contract. Consequently, and for purposes of judicial economy, the various plaintiffs defended many of these motions for summary judgment through joint briefs and joint oral argument. (R. pp. 864-1047; R. pp. 1048-1315; R. pp. 821-829; R. pp. 830-863)

The Circuit Court granted summary judgment to the City, holding: (1) the MOU did not form a valid contract; and (2) Gary Realty and Garfield-Traub did not have a valid claim

for recovery under the equitable theory of quantum meruit. (R. pp. 754-774; R. pp. 775-792; R. pp. 793-813)

Gary Realty and Garfield-Traub appealed the Circuit Court's order. (R. pp. 1789-1834; R. pp. 1876-1888) Reviewing the matter *de novo*, the Court of Appeals found that the contents of the MOU were ambiguous, that evidence existed to support the Plaintiffs' argument that the MOU formed a contract to create a development plan for a publically-owned hotel and that, therefore, a question of fact existed as to whether a contract was formed. (R. pp. 1889-1898) The Court also held that there was evidence that plaintiffs' work on the development project had provided some benefit to the City. Accordingly, the Court of Appeals reversed the award of summary judgment to the City on both the claim for breach of contract and for quantum meruit and remanded the case back to the Circuit Court. The City sought certiorari to the South Carolina Supreme Court that was granted on May 2, 2013.

STANDARD OF REVIEW

An appellate court should review a grant of summary judgment using the same standard applied by the trial court under Rule 56(c), SCRCP. Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). "[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).

Rule 56(c), SCRCP, provides that a grant of summary judgment is appropriate only "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 judgment as a matter of law."

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 should not be granted 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).

The party seeking summary judgment bears 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 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). "[T]he 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).

Summary judgment should not be granted where there is a question as to the construction of a written document and the contract is ambiguous because the intent of the parties cannot be gathered from the writing. Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517, 518-19 (Ct. App. 1988). If the intention of the parties as to the legal effect of the document is not certain from the four corners of the instrument itself, summary judgment is improper and a trial is necessary. First-Citizens Bank Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984). "Whether there was a meeting of the minds [presents] a question of fact for the jury to decide." Hobgood v. Pennington, 300 S.C. 309, 315, 387 S.E.2d 690, 693 (Ct. App. 1989).

"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 v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005) (*citing* Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003).

"Construction of an ambiguous contract is a question of fact." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (2009). "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, 23, 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)). 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 be denied. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

STATEMENT OF FACTS

In January 2001, the City of Columbia issued a Request for Qualifications for a team to develop a full-service, 300-room hotel to support its new convention center. (R. pp. 1439-1442) After a lengthy and involved bidding process, in December 2002, the City selected the Respondents (as part of a development team that also included a hotel chain, architect, construction company and finance specialists) to put together a plan to develop the hotel and, assuming the plan was feasible, to then develop that hotel. (R. pp. 1626-1627)

After awarding the project, the City and the Respondents' team set out to draft a written agreement for the creation of this hotel development plan. The City hired Strategic Advisory Group, which served to advise the City and drafted the development document that was ultimately entitled a Memorandum of Understanding ("the MOU"). (R. p. 1383, lines 15-22) A considerable amount of time, effort and negotiation went into formulating this written agreement, and it was not until April 2003 that the City and the development team executed the MOU. (R. pp. 1443-1465) Respondent Gary Realty, Respondent Garfield-Traub, and Appellant City of Columbia were all signatories to this MOU document. (R. pp. 1451, 1453, 1456)

Under the MOU agreement, the team members agreed to formulate a plan for the design, finance, construction, and operation of the requested convention center hotel pursuant to the terms therein. The team also agreed to move forward with this development plan, provided the City did not determine, in good faith, that the hotel development project it formulated was not feasible. For its part, the City agreed that it would take certain actions

(rezone the land, develop a nearby parking facility, etc.) related to the anticipated development project and that the City would move forward with the hotel project (provided that it did not make determination, in good faith, that proceeding with the project was not feasible), compensating the team members for their work.

Pursuant to the duties/obligations contained within the MOU document, the Respondents' hotel team: (1) completed the architectural plans, (2) designed and negotiated a guaranteed maximum construction price commitment for the hotel, (3) obtained hotel design approvals from the Design Development Review Committee of Columbia, (4) obtained commitments associated with the issuance of bonds to fund construction and operation of the hotel, (5) obtained an independent analysis of the hotel operations, and (6) negotiated and drafted numerous agreements associated with and necessary for the development of the hotel. (R. pp. 1443-1465; R. p. 1350, lines 2-12, R. p. , 1412, ¶ 12; R. pp. 1434-1435, ¶ 4; R. pp. 1402-1403, ¶ 4)

The Respondents' team put together a feasible hotel development project. Evidencing this point, a study conducted by an independent consulting group specifically found that the hotel development plan the team put together would be "an economically feasible Project" and that in "addition to providing the City of Columbia a self-funding and economically viable hotel, the Project will benefit the community through increased employment, additional tax base through the multiplier effect that will result from the increase in employment, and increased stature in the national hospitality community." (R. p. 1625) On February 11, 2004, the non-profit entity formed by the City for purposes of the hotel's development voted to approve the financing structure and development budget for the hotel project presented by the Respondents' team. (R. pp. 1632-1633) On February 17,

2004, Ambac Assurance Corporation signed a Commitment for Financial Guaranty Insurance for the financing of the hotel. (R. pp. 1649-1651; R. pp. 1652-1653) In short, the hotel development plan the team created was feasible and ready to be put into action.

However, in March 2004, the City, without explanation and without having ever determined or decided that the City-owned hotel was not feasible to develop, refused to further perform in accordance with the terms of the MOU and issued a new Request for Proposals, this time asking for a privately-developed convention center hotel. (R. pp. 1466-1475) To this day, the City has never formally given notice to the Respondents, or any other team members, that it believes the Respondents' hotel development project was "not feasible."

Ultimately, another team, headed by Winsor/Aughtry Co., Inc., was selected to develop a hotel to support the new convention center. (R. pp. 1719-1722) In order to develop the privately-funded hotel, Winsor/Aughtry required a multi-million dollar cash subsidy from the City, which the City paid. (R. p. 1720 ¶ 3(b))

Brief Background of the MOU and Freedom to Contract

The MOU provides the necessary framework under which City agreed to hire the Respondents' team to create a development plan for "a three hundred (300) guestroom, full service Hilton Hotel with approximately twelve thousand (12,000) square feet of meeting space in downtown Columbia adjacent to the new Midlands Regional Convention Center." (R. p. 1444) The MOU document lays out scores of obligations that the team members agreed to undertake (the Respondents' consideration) and clearly sets forth the manner in which the City agreed to compensate/pay the various entities for their work (the City's consideration).

The Respondents do not assert the MOU was a contract for the construction of a hotel, but that the agreement involved their obligation to put together a plan to encompass entire process for developing this publicly-owned building. That is to say, the contract was for the Respondents' team to take on the tasks of: (1) designing; (2) financing; (3) constructing; and (4) ultimately operating a hotel to support the City's convention center. Put another way, the MOU was a contract for the creation of a hotel development plan and to then move forward to actually develop that hotel, provided that the plan the team formulated was a feasible one.

This understanding – that the contract was for the formulation of a hotel development plan – is important to the issue of why additional written agreements would necessarily be executed during the development process. Within each of the four principal stages of development, it was anticipated that other written agreements would be drafted and signed. In fact, the MOU lists each of those agreements and goes to great length to provide guidelines for their content. As a hotel developer, Respondent Garfield-Traub's principal duty under the MOU was to negotiate and coordinate the final version of each of these written agreements, a task the company began doing as soon as the MOU was executed. (R pp. 1446-1447)

The MOU was drafted by the City's agent, Strategic Advisory Group, who was hired by the City to provide advice relating to the hotel project. (R. p. 1383, lines 15-22) Accordingly, all ambiguities, including whether or not the document was intended to form a contract, should be construed in Respondents' favor. Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (stating that any ambiguity in a writing document, or doubt or uncertainty as to its meaning, should be resolved against the

party who prepared the document or is responsible for the ambiguous language); Southern Atlantic Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter").

South Carolina's courts are very reluctant to rule contracts invalid and greatly favor parties' freedom to contract upon whatever terms they may agree. Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("people should be free to contract as they choose"); West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000) (stating that it is not for the courts to determine whether the parties' agreement was reasonable or wise). "**Contracts should be liberally construed so as to give them effect** and carry out the intention of the parties." Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 45, 47 (1958) (emphasis added).

ARGUMENT

I. The Court of Appeals did not err in determining the existence of evidence creating a question of fact as to whether a contract was formed.

The Court of Appeals ruled that there was there was evidence within the MOU both to support the existence of a contract and to support the lack of a contract, thus creating ambiguity within the four corners of the document and a question of fact as to whether a contract was formed. Although Respondents believe that the MOU establishes a contract as a matter of law, for the purposes of this appeal, they need only to address the elements of the document that create ambiguity and establish a question of fact as to whether a contract was formed. In other words, while Respondents believe the MOU should be held to be a

contract as a matter of law, this section of Respondents' Brief will focus solely on the reasons why there is, at minimum, ambiguity as to the effect of the MOU.

"Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975); *see also* Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) (the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof).

If the intention of the parties as to the legal effect of the contract is not certain from the four corners of the instrument itself, summary judgment is improper and a trial is necessary. First-Citizens Bank Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984). "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 v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005) (*citing* Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003).

An ambiguous contract is one that can be understood in more than one way or is unclear because it expresses its purpose in an indefinite manner. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (internal citation and quotation omitted).

A. The MOU was a contract to formulate a hotel development plan.

Initially, the City desired a large, publically-owned full-service hotel to support its new convention center. However, considerable work was required before a decision could be made by the City regarding the feasibility of developing such a hotel. To create a development plan for type of a hotel, immense research was needed to determine such things as the hotel's ideal site layout, the features and amenities that the local hotel market demanded, and the exact number of guest rooms that would be most profitable. All of this research was needed before thousands of man hours could be spent finalizing architectural plans. Architectural documents were needed before construction plans/costs could be determined. Construction costs were needed before municipal bonds could be created. Countless other puzzles pieces were needed before a hotel operating agreement could be drafted. Thus, the City required a great deal of groundwork in order to determine whether financing, building and operating the hotel was even feasible.

In exchange for mutual promises between the City and the Respondents' team members, the team members agreed to take on these tasks – they agreed to begin the work necessary to create a development plan for a publically-owned hotel. In exchange, the City agreed that it would move forward with the hotel development plan and that, so long as it did not make a good faith determination that the hotel project was not feasible, that it would compensate the team members for their work.

B. The City's right to determine the feasibility of the hotel development plan (and other important determination) does not prevent the MOU from forming a contract, as the City had

a duty to use good faith and fair dealings in making its determinations.

The City argues that the MOU could not form a contract because "the plain language of the MOU leaves all of the critical determinations of the project to the sole discretion of the City." (City Brief, p. 21) However, simply because the City had the right to reject the development plan if it determined the hotel plan to be unfeasible (and other important decisions) does not render the MOU invalid.

South Carolina courts have made it clear that an implied covenant of good faith and fair dealing exists in every contract. Parker v. Byrd, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853 (1992). A promise conditioned upon an event within the promisor's discretion is not illusory if the promisor also "impliedly promises to [...] use good faith and honest judgment in determining whether or not it has in fact occurred." Corbin on Contracts § 149 Promises Conditional upon Events within the Promisor's Own Power (1963) (*see also* Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998) (holding that a jury question existed as to whether an employer used good faith in invoking a term within a employment contract that allowed for immediate termination if it found that an employee engaged in certain behavior); 17B C.J.S. Contracts § 563 Satisfaction of Party ("Parties may lawfully contract that the performance to be rendered by one of them will be to the satisfaction of the other.").

The Court of Appeals correctly recognized that the City "promise[d] to actually make the determination of feasibility, and to do so in good faith." (R. p. 1893) Accordingly, the MOU should not be found, as a matter of law, not to form a contract simply because the City had the right to make some important determinations under the terms of the MOU.

C. *The Court of Appeals does identify evidence of ambiguity within the four corners of the MOU.*

The City writes that "the Court of Appeals held that there was a 'scintilla of evidence,' [that a contract was formed by the MOU] without identifying what that evidence was, to preclude summary judgment." (City Brief, p. 3) This assertion is simply false. Contrary to the City's argument, the Court of Appeals identifies numerous pieces of evidence that support the Respondent's position that the MOU was a contract. The Court of Appeals' Order states:

> The MOU provides evidence supporting [Garfield Traub and Gary Realty's] theory. For example, the City needed detailed architectural plans from Stevens & Wilkinson and a guaranteed maximum price from Turner Construction before it could submit the hotel plan to a bond underwriter. The MOU contains Stevens & Wilkinson's promise to prepare the architectural plans. Stevens & Wilkinson contends it made that promise in exchange for, or in consideration of, the City's various promises, including its promise to acquire and prepare the land for the hotel site. The MOU also contains promises made by Garfield Traub and Gary Realty, supporting the plaintiffs' theory that all the promises were given as consideration for each other. *See* Sauner v. Pub. Servo Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract ... exists when both parties exchange mutual promises.").
>
> The MOU contains other promises the plaintiffs argue were made in consideration of each other, including the following:
>
> - The City promised to reimburse the development team's expenses out of "Hotel Revenue Bond proceeds" in exchange for the team's promise to expend substantial effort to design a feasible hotel.
> - The developers promised to "coordinate design ... of the Hotel" prior to the execution of any other contracts in exchange for the right to do the development work on the hotel and the promise of a fee of 4.75% of the project budget.
> - Stevens & Wilkinson promised to prepare hotel plans in exchange for the right to complete the architectural work on the hotel and the promise of a fee of 7.25% of the "hard construction costs" and Turner Construction's "general expenses and fees."

- Hilton promised to "contribute $1.5 million in the form of [a] loan" in exchange for the right to operate the hotel for fifteen years under a Qualified Management Agreement.

Based on the existence of these promises in the MOU; it is reasonable to infer that the plaintiffs would not have agreed to do their work unless the City made these promises, and that the City made the promises in order to induce the plaintiffs to perform the work.

There is other evidence to support the plaintiffs' claim that the MOU is a contract. First, the parties chose to use the classic contract language "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." The MOU also contains provisions excluding liability for certain actions. For example, the MOU states, "[I]f the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU." The exclusion of liability under one circumstance is some evidence the parties intended there to be liability under the MOU in other circumstances.

(R. pp. 1893-1895)

As discussed in more detail below, all the evidence cited by the Court of Appeals validates its finding and supports the Respondents' argument that evidence exists as to the existence of a contract, making summary judgment inappropriate.

D. Multiple pieces of evidence exist, both inside and outside the MOU, regarding the existence of a contract

1. Exchange of Sufficient Valuable Consideration

The face of the MOU demonstrates the parties' intention to create a binding contract. Chiefly, and in a quintessential example of contractual language and contractual intent, the first page of the document reads: "**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. 1444) (emphasis added)

As sophisticated business entities, the City and the Respondents' development team were familiar with the significance and legal implication of this language – that the exchange of valuable consideration is one of basic tenets of contract law. *See* Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration."); Wright v. Trask, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (1997) ("the essential elements of any contract [..] are: a contractual intent, an actual meeting of the minds of the parties, and valid mutual consideration.") Thus, by specifically stating that valuable consideration was being exchanged, the parties to the MOU were effectively declaring: "We believe this document to form a contract, want it to be viewed as a contract, and it is our intention to be bound by it." Explicit mention that valuable consideration was being exchanged provides evidence that the signatories to the document desired to form a binding contract.

2. The MOU was identified as the parties' final understanding for the creation of a plan to develop a hotel

The General Conditions section of the MOU closes by proclaiming: "**Unless superseded** by an amendment to this MOU or the final Development Management Agreement, **this MOU identifies the understanding of the parties**." (R. p. 1444) (emphasis added) Thus, the MOU was contemplated to be capable of serving as the final contractual agreement for the formation of a development plan for the City's convention center hotel.

While the document recognizes that it may be "superseded by an amendment," the possibility of amendment exists for any contract, for parties are free to amend or otherwise modify any contractual agreement. *See eg.* First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994) (contracts can be modified provided that there

is a meeting of the minds); Sanchez v. Tilley, 285 S.C. 449, 452, 330 S.E.2d 319, 320 (Ct. App. 1985) ("A written contract may be orally modified by the parties even if the writing itself prohibited oral modification.").

That a Development Management Agreement may have been anticipated to later amend or "supersede" the MOU is not to say that the MOU was not intended as a binding agreement. In fact, by stating "unless superseded... this MOU identifies the understanding of the parties," the signatories declared that the document was to serve as the final contractual agreement lest it was amended otherwise.

3. *Mandatory language and obligations are contained within the MOU*

No wording within the MOU states or even suggests that it was only intended to be an "agreement to agree," but, in fact, the document speaks in mandatory terms. The South Carolina Supreme Court has observed that mandatory language such as "shall" and "will" typically 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).

Regarding the rights and responsibilities of the parties under the agreement, the MOU employs exactly this type of language:

- The Operator **will contribute** $1.5 million in the form of an interest free, self-amortizing loan... If the [Qualified Management Agreement] is terminated before such loan is fully amortized, Operator **shall be repaid** the unamortized portion of such loan. (R. p. 1449, ¶ X.1) (emphasis added)
- The Operator **is to outline** its plan for directing the pre-opening marketing activities of the Hotel.... (R. p. 1449, ¶ X.7) (emphasis added)
- The City **is to develop** a nearby Parking Facility of approximately 800 spaces. (R. p. 1446, ¶ V.2) (emphasis added)
- 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. 1446, ¶ V.3) (emphasis added)

- 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. (R. p. 1446, ¶ VI.1) (emphasis added)
- 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. (R. p. 1448, ¶ VI.2) (emphasis added)
- 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. 1448, ¶ VIII.1) (emphasis added)

Indicative of a contract, the MOU lays out scores of obligations for both the team members and the City. A recitation of all the duties required by the MOU would nearly turn into a regurgitation of the document itself, and the following excerpts represent a small sample of the many obligations contained in the agreement:

- **ROLE OF THE CITY**
  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 [City's Non-Profit Corporation] at cost, funded by Hotel Revenue Bond proceeds. (R. p. 1446, ¶ V.1)
- **ROLE OF THE ARCHITECT**
  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. 1448, ¶ VIII.2)
- **ROLE OF THE UNDERWRITER**
  Services Provided – Underwriter as the [City's Non-Profit Corporation's] senior managing underwriter is to be responsible for analyzing and structuring the project, development of the financing plan, development of the supporting financial documents, and marketing the bonds. (R. p. 1448, ¶ IX.1)

Furthermore, the entirety of the "Preliminary Development Management Scope of Services" is simply a list of duties to be performed by the Respondents' project team. (R. pp.

1463-1465) For example, the first eight steps of phase three, "Construction Phase," are stated as:

> 1. Provide on-site representation throughout the entire construction process as the City's representative.
> 2. Monitor the development and maintenance of the construction schedule by the general contractor(s).
> 3. Conduct regular on-site meetings with the general contractor(s), architect, operator and other appropriate development team members to coordinate and maintain the construction process.
> 4. Review and coordinate all requests for information from the general contractor(s) for timely response by the architect. Review and monitor all supplemental instructions and directives for potential impact on the Project budget and schedule.
> 5. Review all invoices and applications for payment from the general contractor(s) and design team and include all approved requests in the monthly draw package to be submitted to the City for payment.
> 6. Provide a monthly report to the City that summarizes the status of the Project cost and schedule.
> 7. Review change proposals submitted by the general contractor(s) for appropriateness and accuracy and recommend acceptance and/or payment of such changes to the City.
> 8. Monitor the submission of shop drawings and product samples by the general contractor(s) and response and review by the architect for timeliness and appropriateness.

(R. p. 1464)

The contents within the four corners of the MOU do not lay out an "agreement to agree" but use mandatory language to establish duties and obligations that the team members and the City were contractually required to perform.

4. The City makes a declaration of its liability under the MOU

The MOU states:

> 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. 1444)

This statement stands as a manifest declaration that the City intended to be bound by the MOU. More easily understood by removing the double negatives, the sentence affirms that, "if it is feasible to proceed with the Hotel project, the City shall be liable under this MOU." Addressing this wording in the MOU and to this same point, the Court of Appeals writes: "The exclusion of liability under one circumstance is some evidence the parties intended there to be liability under the MOU in other circumstances." (R. pp. 1894-1895)

5. The MOU contains remedies for breaches of the document.

Several sections of the MOU define remedies in the event a party were to breach the agreement. If the MOU was not considered to be a contract, what purpose would the remedies serve? *See* Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002) ("A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent."); Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) ("The purpose of all rules of contract construction is to ascertain the intention of the parties[,] and that intention must be gathered from the entire agreement and not from any one particular phrase....").

The parties never envisioned that the City could simply back out of this deal on a whim, for the document states as follows:

> 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.

(R. p. 1447, ¶ VI.3) (emphasis added) Similar language, explicitly stating that the City will face liability if it does not meet certain obligations, appears at several other places in the document, and, by way of example, the section related to the role of the architect reads: "If the Underwriter does not close the financing, the City will not be responsible for reimbursing for any costs incurred **except as provided in Section VI, 3 herein above**." (R. p. 1448, ¶ VIII.1) (emphasis added)

If the parties believed that the MOU was not binding and that City could simply decide not to proceed on its own accord, then such terms describing its liability if the City did not perform its "obligations" would never have been included in the document and would serve no purpose.

6. The parties' behavior demonstrates the intention to form a contract

"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." Conner v. City of Forest Acres, 363 S.C. 460, 473, 611 S.E.2d 905, 912 (2005). "The intention of the parties [to make a contract] 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).

The amount of time the parties took drafting the MOU indicates that the document was much more than simply an agreement to agree. Choosing between several other

respondents/bidders, in executive session on the morning of December 11, 2002, the City voted to select the Respondents' team to undertake the creation of a development plan for a publically-owned hotel to support Columbia's Metropolitan Convention Center. (R. pp. 1626-1627) However, it took until April 2003, nearly four months later, for the MOU to be finalized and fully executed. The parties put vast amounts of time and attention into drafting the document and, as principals for Garfield-Traub testified, the parties considered the MOU to be very important. (R. pp. 1408-1409, ¶ 8; R. pp. 1434-1435, ¶ 4; R. pp. 1402-1403, ¶ 4) The Respondents' have affirmed that, after the MOU was signed, the team members spent hundreds of hours working on the hotel project, acting in a manner consistent with an understanding that a contract had been formed. (R. p. 1412, ¶ 12; R. pp. 1434-1435, ¶ 4; R. pp. 1402-1403, ¶ 4) The time put into drafting the document and the efforts the team put forth after it was executed provide evidence that the parties considered the MOU to be binding.

Witnesses testified that members of the development team had begun or completed all of their work required under the MOU. The CEO of the architectural firm on the development team stated as follows:

> 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. 1350, lines 2-12) (emphasis added).

The City's Special Projects Coordinator overseeing the hotel planning 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. 1324, line 13–p. 1325, line 17)

In a City Council meeting, a City Council member stated that the City "must move forward to fulfill **commitments** that have been made." (R. p. 1633) (emphasis added) Further, those same minutes state: "Staff was authorized to proceed with the [Hotel] Agreement **and other contracts** as outlined." (R. p. 1633) (emphasis added)

The Respondents offered testimony, from signatories to the MOU, that the parties believed the MOU to have formed a binding contract. In reference to the MOU, the principals of Respondent Garfield-Traub testified in their affidavits:

> 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 [at the time the MOU was signed], 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 MOU, 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. [Garfield-Traub], for its part, never would have agreed to put in the effort necessary to develop the Hotel if we did not consider the MOU to form a contract and believe that all signatories felt similarly on the matter.

(R. pp. 1408-1409, ¶ 8; R. pp. 1434-1435, ¶ 4; R. pp. 1402-1403, ¶ 4)

The signatories' behavior – both in the efforts put forth in drafting the MOU, statements made, and actions taken after the document was signed – is evidence that the MOU was intended to be a binding contract and not some sort of unenforceable agreement to merely move forward to sign other documents. While this behavior may be outside the four corners of the MOU, given the ambiguity in the document, this behavior is evident that the Court of Appeals could properly consider.

II. The Court of Appeals did not err in having mentioned the affidavits of Garfield Traub's principals, but based its decision in the ambiguity within the four corners of the MOU.

The City argues that the Court of Appeals somehow erred by having mentioned that the Respondents' principals submitted affidavits stating that they intended for the MOU to form a contract – that by simply having mentioned this fact, the Appellate Court must have

used this information as an improper basis for its opinion. The Court of Appeals committed no such error and makes clear that its basis for finding a dispute as to whether the MOU formed a contract comes primarily from and is based in ambiguous and conflicting language within the document itself.

For example, providing the reasoning for its holding, the Court of Appeals cites to the "classic contract language" within the MOU – "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" – as evidence that permits the reasonable inference that these sophisticated parties (who surely understood the significance of exchanging consideration) intended to form a binding contract. (R. p. 1894)

Again looking within the four corners of the document, the Court of Appeals references the MOU's language which states: "[I]f the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU." The Appellate Court specifically notes this is evidence that the document was intended to be a contract, stating that the "exclusion of liability under one circumstance is some evidence the parties intended there to be liability under the MOU in other circumstances." (R. pp. 1894-1895)

The Court of Appeals also cites four distinct promises made within the agreement and then writes: "Based on the existence of these promises in the MOU, it is reasonable to infer that the plaintiffs would not have agreed to do their work unless the City made these promises, and that the City made the promises in order to induce the plaintiffs to perform the work." (R. p. 1894)

The City asserts that the Court of Appeals incorrectly based its ruling on evidence outside of the MOU. As discussed above, clearly this is incorrect and, in actuality, the

Court bases its decision on the language contained within the document itself and not on the affidavits.

Regardless, the Court of Appeals was not incorrect, even if it based its decision, in part, on the affidavits. One of the paramount elements of a contract is contractual intent. *See* Caulder v. Knox, 251 S.C. 337, 344, 162 S.E.2d 262, 266 (1968) (noting that the essential elements of any contract are a contractual intent, a meeting of the minds of the parties, and mutual consideration). The parties' intention to make a contract should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses, and even subsequent acts are relevant to show whether a contract was what the parties were intending to form. Wright v. Trask, *supra*. To this point, the Court of Appeals correctly notes that the Respondents' intention to form a contract is some evidence, besides the language within MOU itself, that the MOU formed a binding agreement to create a development plan. While the contractual intent of these individuals does not make up the sole basis for the Court of Appeals' holding (its basis is the ambiguity within the document), their intent to form a binding agreement was worthy of mention, and the Court did not err by having brought it up.

III. The Court of Appeals was correct in holding that, as a matter of law, it could not be found that material terms were absent from the MOU's contract to form a development plan for a City-owned hotel.

The principle fallacy in the City's argument regarding missing material terms is that it ignores the very purpose of the MOU and instead argues, off topic, why the MOU would be insufficient to serve as a contract to construct or to finance a hotel. The City's argument regarding missing material terms fails because it does not address the fact that the

Respondents are not alleging that the MOU was a contract to construct a building, to operate a hotel or to sell bonds, but that assert that it was a contract for Respondents' team to prepare a development plan for a City-owned hotel and that if the plan the team put together was feasible, that the City had an obligation to move forward with that development plan.

As stated previously, the Court of Appeals correctly recognizes Respondents' argument and belief regarding the nature of the contract which the MOU memorialized: "The plaintiffs argue the MOU contains a mutual exchange of promises between the City and the team members to perform the various tasks necessary for the City to eventually make this determination of feasibility. [Respondents' team] agreed to perform the work allocated to each of them in the MOU in exchange for the promises made by the other parties, particularly the City. The plaintiffs argue these promises include the City's promise to actually make the determination of feasibility, and to do so in good faith." (R. p. 1893)

The City argues that the MOU could not have formed a contract because such things as the Development Management Agreement, Hotel Operating Agreement, Room Block Agreement and the terms and amount of the bond were not contained within the MOU document. Undoubtedly, these things were not finalized at the MOU's signing – in fact, it was the creation and negotiation of these various documents that comprised much of the work the Respondents' development team promised to do under this contract to formulate a development plan for a City-owned hotel.

The amount and terms of the bonds that could be used for the construction of the hotel are the allegedly "material terms" on which the City focuses most heavily. What the City overlooks is that a large part of Respondents' consideration under the MOU was to complete the tasks necessary to determine the amount and terms of the bond – this is

important information needed to determine the feasibility of a City-owned hotel. What the City claims are missing material contractual terms were actually the end-result of the work the Respondents' development team was to put forth under the MOU. Determining and negotiating the bond terms was part of the work required of the Respondents' team, and this work (along with considerable other work) would allow the City to determine if a publically-owned hotel was feasible to develop.

The bond amount and bond terms were undoubtedly important things that the City wanted the Respondents' development team to determine and needed to make a decision on feasibility. In order to know the amount of bond money needed, the Respondents' development team had to first discern the construction price for the hotel. In order to know the construction price, the Respondents needed to have a design plan. In order to have a design plan, the Respondents had to know precisely where the hotel would best be located, how many rooms it would have, what amenities it would offer, etc. Once all of this was in place, the team could then determine the amount of bond financing that would be needed for the hotel's construction.

Similarly, in order to provide the City with the bond terms available, the development team had to gather information from the bond market that, of course, was most interested in the estimated risk involved in the investment. First, the team had to know the estimated hotel occupancy rates, revenues, operating costs, and the City's credit worthiness, for only then could the development team determine the bond terms the market would offer and communicate this information to the City.

Putting together all of this information – the creation of a development plan – was part of the consideration the Respondents' were required to do under the MOU. If all of this

had been done at the time of the MOU's signing – if there were already completed architectural plans for the hotel, if a finished Development Management Agreement was executed, if a finalized Hotel Operating Agreement was already in place, if a Room Block Agreement was signed, if bonds were ready to be issued – then surely the City would have had no need for the work the Respondents' was to do under the MOU. If all the documents the City claims to be missing material terms were in place, then there would be no need to have ever sought out bids for the creation of a hotel development plan. The Respondents' work under the MOU was to put all of these agreements in the place and to then, assuming the City did not find the hotel plan not to be feasible, to move forward to develop the publically-owned hotel that the City desired.

Again, the MOU was not a contract for building, financing, or operating a hotel, for other documents would serve those purposes. The MOU was a contract for the service of creating a development plan for a publicly-owned hotel. For a contract such as this, the two essential terms are the scope of the work to be performed and the compensation formula to be used. *See* W.E. Gilbert & Associates v. South Carolina Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) ("In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.") As the Court of Appeals recognized, under the Respondents' argument regarding the contractual purpose of the MOU, evidence exists that all the material terms for the creation of a development plan are present. Both of these terms – what the team was to do for the City and how the team members were to be compensated for their services – are set forth within the four corners of the MOU.

Further, within the General Conditions section, the MOU reads:

> 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.

(R. p. 1444) These words follow immediately after the section that discusses the exchange of valuable consideration and actually support the idea that the parties intended to form a binding contract. What the sentence clearly does not say is that the only thing MOU reflects is the intent to proceed to execute additional written agreements. That additional agreements were anticipated does not equate to the proposition that the document could not create a contract to develop the hotel. Furthermore, by directly stating that good faith was required in effectuating these additional written agreements, the parties were affirming their intention to be bound by the MOU.

Besides simply recognizing that additional written agreements would be utilized, this sentence also states that the signatories will "proceed in good faith" toward the execution of those forthcoming documents. Thus, this sentence actually imposes an obligation on the parties—the duty to work, in good faith, in drafting and implementing these anticipated documents. Without this sentence, a party could, arguably, walk away from the table by simply refusing to negotiate the Room Block Agreement, Joint Use Agreement Regarding Parking Rights, etc. However, by including this sentence, the MOU establishes that the parties understood that they would not be able to back out of the hotel development deal by unreasonably and unjustifiably refusing to subscribe to one of the later written provisions. Thus, the signatories were required, in good faith, to work out the minor details involved in the hotel's development.

That additional agreements would be employed in developing the hotel is not determinative of whether or not the MOU formed a binding contract. "**[A] contract is not**

unenforceable simply because its performance is, as to particular details, left open to subsequent agreement of the parties," particularly "where the contract provides the guidelines for the subsequent agreement." Aperm of South Carolina v. Roof, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986) (emphasis added) (finding the existence of a contract in a document which provided that the owner of intellectual property rights to a roof-coating product agreed to arbitrate the remaining terms of its agreement with a manufacturer/seller of its product, so long as the program presented by the manufacturer/seller contained particular royalty provisions) (*citing* 17 Am.Jur.2d Contracts § 76 (1964); 17 Am.Jur.2d Contracts § 77 (1964)).

The MOU here does provide "guidelines for the subsequent agreement(s)." For example, giving instructions as to the content of the Room Block Agreement that was to help support and promote the convention center, the MOU states:

> HQ Hotel Room Block Commitment - The Operator is to enter into an agreement with the Convention Center Authority that is to make available 250 of the Hotel's standard rooms and an applicable percentage of the Hotel's suites for a to-be-determined number of event nights each month for city-wide events booking the MRCC for a mutually agreeable number of months in advance. The number of rooms required to be made available can be reduced to 200 at a mutually agreeable point in time. The City is to retain the right to impose a room block rate cap on each type of room tied to the average daily group rate for such type of room, if the City determines it is required to book the event. The Operator can reasonably request release of dates beyond a to-be-agreed-upon date for certain high-impact in-house group events.

(R. p. 1450, ¶ X.12) With regard to the Qualified Management Agreement, the MOU directs:

> The Hotel is to be managed by the Operator under a 15-year Qualified Management Agreement ("QMA") that complies with Operating Guidelines for Management Contracts as set forth in the IRS Revenue Procedure 97-13 and in the Internal Revenue Code of 1986, as

> amended, as a interpreted by the City's or NPC's Bond Counsel, as appropriate....

(R. p. 1449, ¶ X.2)

Such guidelines are precisely what the Aperm court was envisioning when it held that a contract can be enforceable despite particular details being left open to subsequent agreements and "especially where the contract provides guidelines for the subsequent agreement(s)." Id. at 447, 351 S.E.2d at 173.

The City's brief mentions the negative impact this decision could potentially have on commerce. However, a negative impact would occur only if the MOU is found, as a matter of law, to not create a contract. If the City's argument were to carry the day and contracts to create a development plan were held as a matter of law to be invalid because the final documents to be used in construction, financing, etc. were unfinished, then development in South Carolina would be in serious jeopardy. Large development contracts of this nature cannot practically be formed in a single document, for surely such projects as stadiums, auditoriums, hospitals, etc. must begin with a contract to move forward, in good faith, to execute the numerous documents (design, financing, construction, operation) involved in the development process.

Every part of a development project simply cannot be complete on day-one, and if the development plan could not serve to bind the parties to move forward together in good faith, then few companies would choose to engage in such an endeavor. If parties cannot enter a development plan with the confidence that the executed plan binds them together (provided that the project remains feasible), then few builders, architects, financiers, etc. are going to risk becoming involved in such projects.

IV. The Court of Appeals correctly identified evidence of value conveyed to the City by the Respondents and, therefore, the Court correctly overturned the award of summary judgment regarding Respondents' quantum meruit cause of action.

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).

The evidence supports the position that the City recognized value in the work Respondents performed. Contrary to the City's argument, the Court of Appeals does identify evidence that supports the Respondents' claim that their work had value and that value was conferred to the City. The Court of Appeals writes:

> Focusing on the [element of a benefit conferred upon the defendant by the plaintiff], the circuit court found the team's plans, drawings, financial models, construction estimates, and expertise had no intrinsic value and did not benefit the City. Based solely on that element, the circuit court granted summary judgment for the City. We do not believe it is possible to rule as a matter of law that the alleged benefit to the City had no value.

(R. pp. 1896-1897) (emphasis added).

The City finds fault with this language, seemingly arguing that the Respondents and the Court of Appeals were required to show an exact numerical figure of the monetary value conferred on the City by the Respondents' work. This was not the Respondents' burden to overcome at summary judgment – Respondents merely needed to show a scintilla of evidence that demonstrated that the City realized a benefit from their work under the MOU. Accordingly, the Court of Appeals correctly recognized that, when taken in the light most

favorable to the Respondents, there was evidence that the plans, drawings, financial models and construction estimates, conferred value to the City.

The evidence considered by the Court of Appeals shows that the Respondents' team worked for nearly a year to develop a feasible plan for the development of a convention center hotel for the City. Although the City breached the MOU just days before shovels were to dig dirt or bricks were to be stacked, there is evidence that the City retained and utilized the research and knowledge that the Respondents' team had provided while putting together a development plan. If the City had retained researchers and consultants to conduct this research and provide the City with this knowledge, great expense would necessarily have been involved.

Providing the Respondents' with all reasonable inferences to which they are entitled, evidence exists that, at the point in time when the City breached the MOU and offered the hotel project for a private-development bid, the City received the benefit of receiving a lower bid price on the project (paying a smaller subsidy to the private developer) because the City was able to provide the winning bidder all the intellectual capital gained from the efforts of the Respondents' team. This intellectual capital was not knowledge that the City had obtained by hiring and paying consultants and researchers, but that it gained by utilizing the efforts made by the Respondents' team working under the MOU.

The deposition testimony gives rise to an inference that the City utilized the work completed by the Respondents regarding the aesthetic and architectural design of the hotel. In a deposition of the City, taken under Rule 30(b)(6), SCRCP, the City admitted to the

striking similarity between the plans prepared by the Respondents' team and the hotel ultimately constructed by Mr. Aughtry's company[1]:

> 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.

(R. p. 1394, line 4–p. 1395, line 16)

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[1] Bo Aughtry is a principal in Windsor/Aughtry, the winning bidder of the new Request for Proposals put forth but the City.

Depositions of the members of the Respondents' project team offer similar evidence:

> 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.

(R. p. 1374, line 22–p. 1375, line 4)

On April 5, 2004 (the first business day after the new Request for Proposals was issued and the MOU was effectively breached) Mr. Aughtry wrote to the City asking for copies of documents prepared by the Respondents' team:

> 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.

(R. pp. 1724-1725) In response to Mr. Aughtry's request, the City replied: "The rendering has been mailed to your Architect." (Id.)

Mr. Aughtry's request and receipt of the plans prior to developing his own hotel proposal (which ultimately required the City to pay a multi-million dollar cash subsidy) creates an inference and gives rise to evidence that the City retained and utilized the Respondents' work. In other words, by providing Mr. Aughtry with the Respondents' hotel plans, thereby saving Mr. Aughtry from a great deal of work in research, conceptual development and design, the City paid a smaller subsidy to Windsor/Aughtry than it otherwise would have been required to pay.

If these plans truly had no value, then it would nonsensical for Mr. Aughtry to have even requested to see them. Thus, this request and transfer of the hotel rendering is evidence that it is more than mere coincidence that the privately developed hotel "looks much like the building" designed by Respondents' team and supports the Respondents' quantum meruit claim. While it there may only be circumstantial evidence that the builder hired by the City utilized the plans (and thus was able to demand a smaller subsidy from the City), such facts may be proven by circumstantial evidence *See eg.* St. Paul Fire & Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 159 S.E.2d 921 (1968) (circumstantial evidence is admissible evidence).

The City states that the rendering used by Windsor/Aughtry "was not a confidential or propriety document." (City Brief, p. 33). However, there is no requirement that one's work product has to be confidential or propriety in order to have and to confer value. This argument is little more than a red herring. Further, the City states that the rendering was commissioned and paid for by the City. This overlooks the fact that very basis of the rendering – what was given to the artist in order to create the rendering -- was the hotel design plans created by Respondents' development team (R. p. 1374, line 22–p. 1375, line 4). The City needed the design plans and research to give the artist, and thus retained a value bestowed upon it by the Respondents' team.

In mentioning the Respondents' "expertise" in the hotel development industry, the Court of Appeals correctly recognized that there was evidence that during the course of the nearly twelve months that the MOU was in effect, the Respondents' researched and made determinations on many issues that were beneficial to the City. Notably, these benefits included a determination of the critical issue regarding the most favorable location and

orientation for a convention center hotel. (R. pp. 1498-1503) As part of their work in creating a development plan, the Respondents' researched and reached a conclusion on this subject. The City adopted this same conclusion when it put the hotel project out for private bid, thus utilizing/retaining the benefit of the Respondents' work. Had the City hired consultants to determine the most favorable location and orientation of the hotel, this work would surely have come at cost to the City. Thus, the Respondents' efforts to determine the best placement for the hotel is part of the team's work that the Court of Appeals found could not be held, as a matter of law, to have given no value to the City.

Similarly, the Court of Appeals correctly recognized that evidence existed Respondents' "expertise" in coordinating and facilitating a Hotel Block Room Agreement[2] between the City and the Hilton conferred value to the City. One of Respondents' team members testified at deposition:

> 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.

(R. p. 1389, lines 15-21)

The City's argues that the Room Block Agreement prepared by the Respondents' team did not "contain any proprietary information created by Gary Realty/Garfield Traub." (City Brief p. 35). Again, this is a red hearing. The efforts negotiating and laying down the ground work for the Room Block agreement do not have to be propriety in nature in order to confer a value upon the City. Propriety work is not an element of a quantum meruit claim.

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[2] The Hotel Room Block Agreement sets forth the terms (number of rooms, group discount rates, notice required, etc.) by which the hotel will set aside rooms for events being held at the City's convention center.

The same hotel brand, Hilton, was the operator of the hotel that Windsor/Aughtry built for the City as had been in development plan created by Respondents' team. Thus, the parties to the Room Block Agreement remained the same with the private development of the convention center hotel as it had under the MOU. Thus, the City retained the benefit of the efforts expended by the Respondents with regard to this document's negotiation. The efforts the Respondents put forth in negotiating the details of the Room Block Agreement simply could not be erased once the City passed the hotel project on to Windsor/Aughtry, thus allowing the City to pay a smaller subsidy to have Windsor/Aughtry built the hotel it desired. Thus, viewing this evidence in the light most favorable to the Respondents, there was evidence the Respondents' team's work conferred a benefit to the City.

CONCLUSION

For the reasons set forth above, the Court of Appeals' order was not in error, and its decision should be affirmed.

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September 3, 2013
Columbia, South Carolina

CERTIFICATE OF COUNSEL

I hereby certify that this BRIEF OF RESPONDENTS complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that, in accordance with Rules 242 of the South Carolina Appellate Court Rules, that on the date indicated below, BRIEF OF RESPONDENTS was served by causing copies of same to be placed in the United States Mail, first-class postage affixed, to the following:

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