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)
S.C. Supreme Court Tracking No.: 2012-208490

Stevens and 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" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners LLC, Hilton Hotels Corporation ..... Defendants,

Of Whom
City of Columbia, South Carolina is ..... Petitioner.

BRIEF OF THE RESPONDENT STEVENS & WILKINSON OF SOUTH CAROLINA, INC.

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)

ATTORNEYS FOR RESPONDENT

September 13, 2013
Columbia, South Carolina

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COUNTERSTATEMENT OF THE CASE

This action commenced on July 12, 2005 in the Richland County Court of Common Pleas. Within the original complaint, Respondent Stevens & Wilkinson alleged claims of breach of contract, quantum meruit, and breach of duty of good faith and fair dealing. (R. pp. 39 - 45) Stevens & Wilkinson amended its complaint on November 14, 2005 to add a claim of estoppel. (R. pp. 51 - 59) 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. 60 - 65)

Petitioner City of Columbia moved for summary judgment as to all causes of action on December 15, 2008. (R. p. 78) The parties presented fully briefed arguments to Judge George C. James, Jr. on August 17, 2009. (R. pp. 78-296; pp. 297-343)

The trial court filed an order granting the Petitioner's motion for summary judgment on November 20, 2009. (R. pp. 12 - 34) Respondent, pursuant to Rule 59(e), SCRCP, filed a motion to alter or amend this order on November 30, 2009. (R. pp. 334-340) The trial court denied this motion on Feburary 1, 2010 and the Respondent received written notice of this order on February 4, 2010. (R. p. 35-38) The Respondent appealed the trial court's November 20, 2009 and February 1, 2010 orders on March 5, 2010. (R. p. 6)

The Court of Appeals entertained oral argument on September 13, 2011. On November 30, 2011, the lower court issued its opinion, reversing the trial court's grant of summary judgment as to Stevens & Wilkinson's breach of contract claim but affirming summary judgment as to the Respondent's claim for estoppel. (R. p. 1889-1898) The City

of Columbia petitioned for rehearing on December 15, 2011 (R. p. 1899) and the Court of Appeals denied this motion on January 27, 2012. (R. pp. 1915-1916)

The City petitioned for a Writ of Certiorari as to the Court of Appeals' reversal of the trial court's summary judgment on Stevens & Wilkinson's breach of contract claim. Stevens & Wilkinson has not appealed the Court of Appeals' affirmation of the trial court's ruling on its estoppel claim.

STATEMENT OF THE FACTS

Respondent Stevens & Wilkinson of South Carolina, Inc. ("Stevens & Wilkinson") is an architectural firm based primarily in Columbia, South Carolina. On April 17th, 2003, Stevens & Wilkinson formed a contract with the City of Columbia and various other parties in which all parties would jointly develop a hotel in downtown Columbia (the "Hotel Project"). (R. pp. 467 - 489) 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 withdrew from the development team, reneged on its obligations under the contract, and left Stevens & Wilkinson and the other development team members with millions of dollars in unpaid expenses and lost profits.

The April 17, 2003 contract defining the obligations of each member of the development team was titled a "Memorandum of Understanding." (R. p. 467) The contractual obligations pertaining to Stevens & Wilkinson and the City of Columbia, described by the parties as "mutual promises" (R. p. 468), were as follows:

- "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. 472, ¶ 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. 472, ¶ 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. 470, ¶ V.1)

- "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. 470, ¶ V.3)

- "The City shall use its best efforts to approve the issuance of a series of tax-exempt Hotel revenue bonds." (R. p. 470, ¶ V.4)

This 12-page document, also referred to as the "MOU," was signed by representatives of Stevens & Wilkinson, the City of Columbia, and ten other members of the development team. (R. pp. 467 – 489)

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. 370 (pages 79-80); R. p. 381 (pages 22-23); R. p. 359 (pages 174-175); R. p. 461). 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. 384 (page 43); R. pp. 343-344 (pages 9-10))

Stevens & Wilkinson completed all architectural work necessary to formulate a GMP by June of 2003. (R. p. 363 (pages 279 – 280); R. p. 461) 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. 354 (pages 67-68); R. p. 626)

Stevens & Wilkinson submitted two different estimates for this work. The first totaled $450,000 and $60,000 per week for work performed after October 13th (the projected date of bond closing) and was limited to Stevens & Wilkinson's individual expenses. (R. p. 466). 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. 630) 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. 586)

Following this agreement, Stevens & Wilkinson continued to work closely with the City and its agents towards finalizing bond closing and all other preliminary preparations for the hotel's construction. In particular, Respondent worked with PKF Consulting, the City's retained market analyst, to produce a 149-page "Market Study, Financial Projections and Economic Return Analysis for the Proposed Hilton Hotel." (R. pp. 1476 – 1625) In producing the study, PKF relied, in part, on the architectural designs produced by Stevens & Wilkinson to analyze the economic feasibility of the Hotel Project. (R. pp. 1580 – 1588) The Report was produced on October 15, 2003 and concluded that the Hotel Project "appears to be an economically feasible project" and would provide the City "a self-funding and economically viable hotel" that would "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)

Though bond closing did not proceed as projected on October 13th, Stevens & Wilkinson continued working with the City on finalizing all preparations for construction, meeting weekly with City officials to review progress. On December 18, 2003, Stevens & Wilkinson submitted an invoice to the City for $697,084.79 for services rendered through December 15th. (R. p. 631) The City released a check to Stevens & Wilkinson on December 29, 2003 in the amount of $697,084.79. (R. p. 632)

Subsequent to this initial payment, Stevens & Wilkinson produced to the City a final set of architectural renderings. (R. p. 371 (page 82 lines 2 – 12)) With these completed documents in hand, the Convention Center Hotel Corporation (the directors of which were the Mayor and the majority of City Council) approved the financing of the Hotel Project on February 11, 2004. (R. p. 183) At the same meeting, the Director of Citigroup Global Markets, Inc. (the prospective underwriter of the bond financing and a party to the MOU) "said that the financial structure that's being presented does qualify the bonds that are being issued for bond insurance." (R. p. 569) On February 17, 2004, Ambac Assurance Corporation committed to insuring the bonding of the hotel. (R. p. 547)

At this point, Stevens & Wilkinson had completed all of its obligations spelled out within the MOU. The City, likewise, had acquired the hotel site, established its non-profit corporation to issue the bonds, analyzed and determined the economic feasibility of the Hotel Project, received approval of bond financing from the bond underwriter, and received commitment of insurance of the indebtedness. The development team stood on

the cusp of breaking ground. All that remained was for the City to finalize the issuance of the hotel revenue bonds, as it promised to do under the MOU. The City, however, hesitated.

Despite the City's written promise that it "shall use its best efforts to approve the issuance of a series of tax-exempt Hotel revenue bonds" (R. p. 470, ¶ V.4), the City abandoned its duties to secure financing in March of 2004. On April 2, 2004, the City issued a Request for Proposals for a privately-financed hotel, essentially cancelling the hotel project envisioned within the April 2003 MOU and leaving the rest of the development team—particularly Stevens & Wilkinson—with millions of dollars in unpaid expenses and lost profits. (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

I. Because genuine questions of material fact exist as to whether the parties intended to form a binding contract, the Court of Appeals correctly reversed the trial court's grant of summary judgment

Rather than claim it satisfied its duty to use its "best efforts" to secure the financing of the Hotel Project, the Petitioner's strategy in its motion for summary judgment underlying this appeal was to claim that the "mutual promises" contained within the MOU were, in fact, not binding. (R. pp. 78 – 110) The Court of Appeals, viewing the facts in the light most favorable to the non-moving parties, held that "evidence exists to support the plaintiffs' theory" that the MOU was a binding contract (R. p. 1896) and remanding the case "for a jury to make that determination." (R. p. 1898) The Petitioner argues the Court of Appeals' opinion should be reversed for two reasons:

first, the lower court erred in considering matters outside of the four corners of the MOU in determining whether the parties intended the MOU to be a binding contract; and second, the lower court erred in finding evidence of contractual intent where "material terms" were omitted from the MOU.

The Petitioner is incorrect. First, the Court of Appeals examined the plain language of the MOU and determined that the document itself contained sufficient evidence of contractual intent to survive the City's motion for summary judgment. Second, the Court of Appeals correctly considered matters beyond the four corners of the MOU—including the subsequent acts of the parties—in determining whether evidence existed that the parties intended the document to be binding. And third, terms material to the parties' negotiated bargain were not omitted from the MOU.

a. Evidence of Contractual Intent within the Document Itself

In ruling that a genuine issue of fact existed as to whether the parties intended the MOU to constitute a binding contractual agreement, the Court of Appeals first analyzed the language of the MOU itself and found "[t]he MOU provides evidence supporting [the Plaintiff's] theory [of the case]." (R. p. 1893)

> 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.

(R. pp. 1893-1894). In short, the MOU reflected a *quid pro quo* agreement. Also, the MOU's preamble utilized language typically associated with contractual intent:

> NOW THEREFORE, in consideration for 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. 468) The Court of Appeals described this recitation of consideration and mutual promises as "the classic contract language." (R. p. 1894) Following this language was the specific detailing of duties and promises of each party, including specifications for Stevens & Wilkinson's hotel design and its ultimate payment. "Based on the existence of these promises in the MOU," the Court of Appeals held, "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)

Perhaps even more convincing evidence of contractual intent is the fact that "[t]he MOU also contains provisions excluding liability for certain actions." Id. Specifically, the following provision:

> 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. 468) Known as a "condition subsequent," this "feasibility" clause is "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.). According to the Court of Appeals, "[t]he 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) In fact, if the MOU were held to be non-binding, it would render this "condition subsequent" a nullity, an action that would violate the long standing tenet of contractual

construction 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).

Thus, solely on the basis of the contents of the MOU itself, the Court of Appeals found sufficient evidence to give rise to a genuine issue of material fact as to whether the parties intended for the document to constitute a contract. 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 Court of Appeals' opinion should be affirmed.

b. Evidence of Contractual Intent Beyond the Four Corners of the MOU

The City posits that "the Court of Appeals was precluded from going beyond the four corners of the MOU to determine the parties' intent to be bound." (Petitioner's Brief at 18) This assertion runs contrary to existing precedent. For example,

> when the existence of a contract is disputed or its terms are ambiguous, 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). Like this case, Conner involved a written instrument (an employee handbook) and competing assertions as to whether that written instrument constituted a contractual agreement. Despite this fact, Conner established that evidence external to the handbook was admissible to determine whether the parties intended to be contractually bound by its

contents. Id. at 476, 611 S.E.2d at 913 ("We conclude the trial court erred in excluding evidence of the grievance proceedings which occurred after Employees initial termination date and in instructing the jury to ignore such evidence.") Thus, in this case, the Court of Appeals correctly considered external matters in determining sufficient evidence of contractual intent existed to survive summary judgment.

Petitioner argues that its position is analogous to the parol evidence rule, which was succinctly stated by Judge Bell in one of his earliest opinions: "[t]he terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984), citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922); M'Dowall v. Beckly, 9 S.C.L. (2 Mill) 265 (1818). Petitioner's analogy fails, however, in that it attempts to disprove the existence of "a completely integrated agreement" with the parol evidence rule rather than preserve the integrity of the terms of such an agreement. As another leading commentator has noted,

> In order to exclude oral evidence of a contract, it must first be established that there is a subsisting written contract between the parties. Where the initial contention is that there is no written contract, oral testimony should not be excluded on that issue.

Rick J. Norman, "Introduction of Evidence Over Parol Evidence Rule Objection." 36 Am. Jur. Proof of Facts 3d 331 (1996).[1]

[1] Even if we were to mistakenly apply the parol evidence rule to questions of a contract's existence, such evidence would be admissible in this case for "where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." Penton v. J.F. Cleckley & Co., 326 S.C. 275, 486 S.E.2d 742 (1997). This court has noted that "[a]n ambiguous contract is one capable of being understood in more ways than just one...". Id. The Court of Appeals found, within the MOU itself, evidence both for and against contractual intent.

As to the evidence that Petitioner contends was wrongly considered, the City only references the affidavits of Garfield-Traub employees. Petitioner dismisses the affidavits as "self-serving" and inadmissible, yet Rule 56 itself provides for the defense of a motion for summary judgment via affidavit. See Rule 56(e), SCRCP. Regardless, however, substantial additional evidence suggests the parties intended the MOU to be a binding contract. 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. 372 (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. 364 (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 witnesses independent from this appeal 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." 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. As noted above, "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. 371 (page 82 lines 2 – 12))(emphasis supplied). Paul Little 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. 373 (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. 343 (page 9, line 8) – R. p. 344 (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. 429)(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 Meggs.[2]

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 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

[2] Councilmen Osborne and Papadea abstained from all votes on the Hotel project due to conflicts of interest.

> 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. 360 (page 235, line 9) – R. p. 361 (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. 430 – R. p. 464) 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.

As established by Conner, all of the foregoing is properly admissible evidence of intent to contract. Thus the Court of Appeals correctly found that "the evidence permits the reasonable inference that the parties entered the MOU with the intent to create a contract." (R. p. 1895)

c. The Material Terms of the Contractual Agreement Were Set Forth Within the MOU

The MOU set out the material terms of the transaction sufficient to make the contractual agreement between Petitioner and Stevens & Wilkinson enforceable. "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 v. S. Carolina Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985), citing Farr v. Barnes Freight Lines, 97 Ga.App. 36, 101 S.E.2d 906 (1958). The Memorandum of Understanding clearly established both the scope of work to be performed by the parties and the amount of compensation to be received by Stevens & Wilkinson. Thus the material terms necessary to render it a binding contract are present.

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. 469, ¶ 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. 469, ¶ 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. 472, ¶ 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. 487 – 489)

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 A.I.A. contractual provisions in terms of timing and amount of payments.

(R. p. 472, ¶ 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 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, 247 S.E.2d 434 (1978); see also 17 C.J.S. Contracts, § 36(2)(c). Furthermore, as Bobby Lyles testified, 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. 368 (page 46, lines 8-18))(emphasis supplied). As our courts have established, specific contractual terms "may be implied from custom and usual forms [trade usage]

and former course of dealing." Keith v. River Consulting, Inc., 365 S.C. 500, 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). 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.

The City's contractual duties under the Memorandum of Understanding were equally well-established. First, the City promised to "acquire the Hotel Site, satisfy any environmental issues, demolish any existing structures, [and] rezone the land for the Hotel (if required)...." (R. p. 470, ¶ V.1) This was done. Next the City was "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. 470, ¶ V.3) This was also done. Finally, the City promised that it "shall use its best efforts to approve the issuance of a series of tax-exempt Hotel revenue bonds." (R. p. 470, ¶ V.4) This was not done.

The City's failure to use its best efforts to secure the bond financing of the hotel—and its ultimate abandonment of the hotel project—constituted a breach of the contract established between it and the parties to the Memorandum of Understanding. The damages suffered by Stevens & Wilkinson are evident from the face of the MOU: 7.25% of the hard construction costs of the project. (R. p. 472, ¶ VIII.1) The Restatement asserts that "[t]he terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33(2). As shown herein, both the basis for the

breach and the appropriate remedy therefore are evident on the face of the MOU, and thus the contract is enforceable.

Petitioner contends that "the two terms that defined more than any others the development of the entire publicly-funded hotel project were the amount of the bonds to be issued and the City Standby Support." (Petitioner's Brief at 24) But neither of these items were the subject of any negotiation between the parties, nor are they necessary to establish the respective contractual rights of the parties or the potential damages suffered by those now seeking relief. In contrast, it was the City's contractual duty "to establish a [non-profit corporation] to issue bonds to finance the Hotel" (R. p. 470, ¶ V.3) and to "use its best efforts to approve the issuance of a series of tax-exempt Hotel revenue bonds."[3] (R. p. 470, ¶ V.4) Whether the City satisfied that duty is a central point in this case.

Finally, the City argues that the fact the MOU contemplated future agreements would be established between some of the parties (though, notably, not Stevens & Wilkinson) renders the document unenforceable. However, "[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

[3] The relevance, if any, of the bonds and standby support to the continuing viability of the parties' contractual relationship was limited to the condition subsequent—the "feasibility" provision—contained on the contract's first page. But the City never invoked the feasibility provision nor claimed its financing responsibilities were infeasible. And for good reason: as noted, the City's own market analyst, PFK Consulting, determined "the hotel, operated as a going-concern and owned by the City of Columbia, appears to be an economically viable project." (R. p. 1625) Petitioner's non-profit corporation minutes from February 11, 2004 reflect that the Director of Citigroup Global Markets, Inc. (the prospective underwriter) "said that the financial structure that's being presented does qualify the bonds that are being issued for bond insurance." (R. p. 569) That assertion was confirmed six days later when Ambac Assurance Corporation committed to insuring the bonding of the hotel. (R. p. 547)

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). For over a century, our courts have upheld the enforceability of such contracts.

> 'If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted.'

Carolina Aviation at 230-231, 51 S.E.2d at 761, quoting Eames v. Home Ins. Co., 94 U.S. 621, 629, 24 L.Ed. 298 (1876).

Here, the contractual rights between the City of Columbia and Stevens & Wilkinson were fully set forth within the Memorandum of Understanding. As a result, the contract lacks no material terms and is enforceable.

CONCLUSION

For the reasons set forth herein—or, pursuant to Rule 220(c), SCACR, upon any grounds appearing in the Record on Appeal—the Court of Appeals should be affirmed and the case should be remanded to the trial court for trial on the Respondent's claim for Breach of Contract.

Respectfully Submitted,

Richard A. Harpootlian
Graham L. Newman
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street

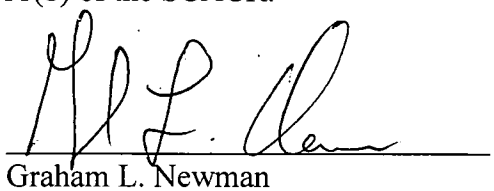
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR RESPONDENT

September 13, 2010
Columbia, South Carolina

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Brief of the Respondent, Stevens & Wilkinson of South Carolina, Inc., complies with rule 211(b) of the SCACR.



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

ATTORNEYS FOR RESPONDENT

September 13, 2013
Columbia, South Carolina

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)
S.C. Supreme Court Tracking No.: 2012-208490

Stevens and 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" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners LLC, Hilton Hotels Corporation ..... Defendants,

Of Whom
City of Columbia, South Carolina is ..... Petitioner.

CERTIFICATE OF SERVICE

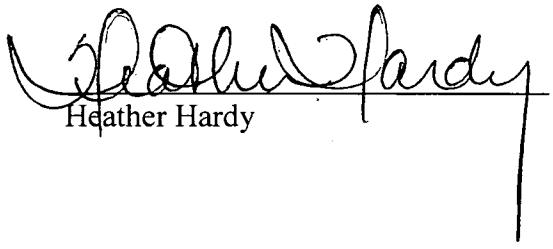
I, Heather Hardy, legal assistant with Richard A. Harpootlian, PA, who represent Stevens & Wilkinson of South Carolina, Inc., hereby certify that on September 13, 2013, I did serve, via HAND DELIVERY , the following documents to the below mentioned person(s):

Documents: **Brief of the Respondent.**

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



Heather Hardy