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MEMORANDUM

TO: Jim Westmoreland, City Manager, City of Greensboro

RE: International Civil Rights Center and Museum

FROM: R. Thompson Wright

DATE: March 20, 2014

This memorandum addresses questions which have arisen regarding the purported agreement between the City of Greensboro and the International Civil Rights Center and Museum ("ICRCM" or "Museum")[1]. The discussion below is based upon the following:

FACTS

After a series of negotiations with the City Manager's Office, ICRCM and the City Manager presented to the Greensboro City Council a proposal regarding a loan of up to $1.5 million from the City to ICRCM, The loan proposal was set forth in a power point presentation presented by the City Manager to the Council at the meeting on September 3, 2013. The Council adopted a resolution to adopt the proposal as presented by the City Manager by a vote of 6-3.

Minutes of the September 3, 2014 meeting were thereafter prepared, and these minutes incorporated by reference a copy of the power point slides presented at the meeting and approved by Council. The presentation provided that the City would make a

[1] There are several entities involved in the ICRCM. For purposes of this memorandum, we refer to the ICRCM or Museum collectively.

total loan of up to $1.5 million, secured by a second lien on property, which was to be a second position lien until the tax credits on the property expire. The advance for FY 2013 would be in the amount of $400,000, 30 days following approval of the resolution by City Council. An additional $300,000 would be advanced within 30 days of the receipt of audits of ICRCM for fiscal years 2010 and 2011. The ICRCM must then provide and audit of its books for its FY 2012 by January 1, 2014 in order to prevent the City from being able to seek the [immediate] return of the $750,000 installment. The City was to make an additional installment of the loan available to ICRCM after July 1, 2014, within 30 days of its receipt of the FY 2013 audit, and a final loan advance of $250,000 after July 1, 2015, but within 30 days of the receipt of the FY 2014 audit report.

Under the proposal as presented, the loan advances bear interest at 2% per annum, and are repayable two and one-half years from January 1, 2014, in the case of the first $750,000, or from the date of the subsequent advances. The obligation of ICRCM is to be offset dollar for dollar by any funds raised by ICRCM through its fundraising programs. The Museum also agrees to allow two seats on its board of directors for the Mayor and City Manager until the loan is paid, to establish an audit committee, to begin a search for a permanent director of development, and to provide a sustainability plan for Museum operation. The presentation does not recite that the loan agreement should be memorialized in a formal definitive agreement.

In October, 2013, before any definitive agreement was signed by the constituent members of ICRCM, the City advanced the first $750,000 of the loan. The City has since received the required audit reports on a timely basis, due to an extension of the deadline by the City Manager. The Council has directed the City Manager to request other

information from the Museum, as a condition to the City presenting and signing the definitive agreement for the loan. There has been some suggestion that the Museum has not tendered adequate security for the loan as outlined by Council. This memorandum does not address whether the Museum may be in breach of any agreement adopted by the Council.

QUESTIONS PRESENTED

1. Is the City obligated to proceed with the loan agreement, in the absence of a definitive agreement signed by both the City and the Museum?

2. If the agreement approved by Council is not enforceable, can the City recover its first loan advance of $750,000?

EXECUTIVE SUMMARY

The loan agreement approved by City Council on September 3, 2013 is likely enforceable as a contract and could be enforced according to its terms. The agreement could be considered to be in writing, or was ratified and approved by the Council. The essential terms of the agreement are set forth in the minutes, and there do not appear to be any essential terms which are subject to further negotiation of the parties. If the agreement is found to be unenforceable, the City would be entitled to a return of the amount advanced under an implied contract for the return of the funds under the doctrine unjust enrichment.

ANALYSIS

A. ENFORCEABILITY OF AGREEMENT APPROVED BY COUNCIL.

North Carolina law expressly confers upon municipalities the right to support museums, so long as they are open to the public. N.C. Gen. Stat. § 160A-488(a) provides, "Any city or county is authorized to establish and support museums, art

galleries or arts centers, so long as the facility is open to the public." N.C. Gen. Stat. § 160A-488(d) contains a non-exclusive list of the type of assistance which a city is allowed to give to museums. "Support" includes "all operating and maintenance expenses of the program or facility." Where the funds are turned over to an organization other than the City, no "expenditure shall be made until the city or county has approved it, and all such expenditures shall be accounted for by the agency or organization by the end of the fiscal year for which they were appropriated." N.C. Gen. Stat. § 160A-488(e).

Though loans are not specifically mentioned in the statute, it is reasonable to conclude that loans would be allowed. The agreement approved by Council provides that the loan to the Museum can be offset dollar for dollar by fundraising conducted by the ICRCM. This would effectively convert the loan into a grant. The statute does not require any particular form of support, and refers only to "funds turned over to" the agency or organization. N.C. Gen. Stat. § 160A-488(e). Thus, it is highly likely that support in the form of loans to the ICRCM will be upheld as within the authority of the City.

The general rule is that contracts with a city must be in writing. N.C. Gen. Stat. § 160A-16 provides, "All contracts made by or on behalf of a city shall be in writing. A contract made in violation of this section shall be void and unenforceable unless it is expressly ratified by the council." The statute is silent as to what it means for a contract to be in writing. The wording does not expressly require that the contract be signed by the parties. In the context of the North Carolina statute of frauds, certain contracts must

be "...in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." N.C. Gen. Stat. § 22-1.[2]

The power point presentation submitted and approved by Council on September 3, 2013, is certainly a "writing," since the terms are reduced to a tangible form. A court considering the issue could nevertheless conclude that N.C. Gen. Stat. § 160A-16 requires that the writing be signed in some form by the City, since otherwise, the purpose of the provision could be easily evaded. However, the purpose requiring a writing signed by the parties is to make sure that particular contract terms are indeed adopted by and assented to by the parties. Where the Council adopts specific contract provisions by resolution, as duly reflected by the minutes, there is no doubt that the written terms have been adopted and assented to by the City. Thus, the requirement of a signature by the City is at best superfluous in this context. The absence of an express requirement of a signature, and the certainty of the City's approval of the proposed terms could persuade a court to hold that, unlike the contracts listed in the statute of frauds, N.C. Gen. Stat. § 160A-16 does not expressly require a signature, and the "writing" requirement is satisfied where the terms of the agreement are contained in the official minutes of the meeting of the Council.

A second question arising from N.C. Gen Stat. § 160A-16 is the meaning of "expressly ratified by the council." In this case, the Council for the City adopted a resolution which approved the loan terms as presented by the City Manager and as set forth in the power point presentation. This presentation was later incorporated into the

[2] Commercial loan commitments for loans in excess of $50,000 by a bank, savings and loan association, or credit union, are not binding in N.C. unless the commitment is "in writing and signed by the party to be bound." N.C. Gen. Stat. § 22-5. This section is inapplicable to the City, because it is not a bank, savings and loan or credit union.

written minutes of the September 3, 2013 meeting of the Council. There is no doubt that the Council approved the loan upon the stated terms. The question is whether the Council has expressly "ratified" the agreement for purposes of § 160A-16. If the court concludes that the minutes of the meeting constitute a writing in accordance with the first sentence of N.C. Gen. Stat. § 160A-14, then the court would not reach this issue. Typically, the notion of ratification involves a later act which adopts an earlier course of action or set of circumstances. *Dorsey v. Town of Henderson*, 148 N.C. 423, 427, 62 S.E.2d 547, 548 (1908). It could be argued that there was no ratification here, where the Council's act approving the loan proposal was an original act which did not relate back to any antecedent act. It could also be argued that, when the minutes of the meeting were reduced to writing, and were not changed or modified by Council, that this constitutes an express ratification of the earlier adoption of the proposal at the Council meeting.

N.C. Gen Stat. § 160A-16 most clearly applies when there has been an unauthorized contract, and the city council later approves the contract. The purpose of the statute is to ensure that a contract is properly approved by the city. Where it is the Council itself which adopts the contract, there is no doubt that the City has approved the agreement through its highest authority. It make little sense to require a second action by the City's highest authority to re-approve what has already been adopted by it. N.C. Gen. Stat. § 160A-4 provides that it is the "policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed...." With this rule of construction, a court would more likely conclude that N.C. Gen. Stat. § 160A-16 does not require the Council

to re-approve agreement it has already adopted. This would be nothing but a waste of time, without any corresponding benefit. However, there is no judicial authority or interpretation of this provision, and this result is not entirely free from doubt.

An additional attack on the enforceability of the loan agreement could be that the proposal adopted by Council is not definite enough to constitute an enforceable contract. The proposal before the Council did not expressly provide that the contract between the City and the Museum comply with N.C. Gen. Stat. § 160A-20.1(b), which provides that the City may not enter into a contract with a private contractor, unless the contractor complies with the E-verify provisions contained in Chapter 64, Article 2. In addition, the proposal does not require that the Museum account for the funds turned over to it at the end of the fiscal year for which they were appropriated, as required under N.C. Gen. Stat. § 160A-488(e).[3] Also, many provisions which are customarily included in a commercial loan transaction are not spelled out in the proposal. These provision included such requirements as keeping the collateral properly insured, restrictions on moving the personal property collateral, and other conditions normal in a commercial loan transaction.[4] In North Carolina, the omission of any essential and material terms in an agreement will cause the entire agreement to fail. *See, Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). In this case, if a court were to conclude that an essential term is missing, it would not enforce the loan agreement as a contract. The court will not write in new terms of a the parties' contract, although it will recognize terms will are necessarily implied into the agreement of the parties.

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[3] The proposed Loan Agreement includes both an E-verify compliance provision and an accounting provision which arguably complies with N.C. Gen Stat. § 160A-488(e). However, the original power point proposal did not contain these provisions.

[4] ICRCM has not raised any issue about these additional terms with the proposed Loan Agreement and deed of trust.

Such an argument is highly dependent upon the facts. With regard to the statutory provisions being omitted from the power point presentation, a court is likely to conclude that such requirements are automatically incorporated in the agreement, since these are requirement of North Carolina law. The Museum has not raised any objection to these provisions, and a court would likely not be impressed that the City would seek to void an agreement on the grounds of omitted terms which are provided by statute and which were not objectionable to either side, even if not expressly included in the power point proposal. With regard to the omission of terms regarding the maintenance of collateral and terms normally contained in the security instruments, the power point proposal did not provide that such terms would be included in a definitive agreement. A court could conclude that all the essential terms of the agreement were contained in the power point proposal, and the "normal provisions" were not essential to the agreement, especially where, as here, the Museum does not object to the "normal provisions." However, it is not inconceivable that a court would find that the agreement is not definite enough to be enforced, and thus, the matter is not free from doubt. However, it seems more likely than not that a court would find that the agreement is not void for indefiniteness.

In summary, though the matter is not free from doubt, the more likely outcome is that the ICRCM would be able to enforce the loan agreement as approved by Council on September 3, 2013. If the loan agreement is determined to be enforceable, and the City repudiates the agreement, the City could be liable for breach of contract damages. The extent of such potential damages is beyond the scope of this memorandum.

B. RECOVERY OF THE INITIAL ADVANCE OF 750,000 BY THE CITY.

If a court concludes that the loan agreement approved by Council is not enforceable, the issue arises as to whether the City can seek return of the initial advance of $750,000 made to the Museum, and, if so, under what terms. If the loan agreement is not enforceable, then the advance to the Museum was not a legal loan from the City. Even though the Museum signed nothing agreeing to repay the funds, the law will not permit it to keep the money, since it was clearly not a gift from the City. Under these circumstances, courts in North Carolina have applied the doctrine of unjust enrichment to require the return of benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid. *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *affirmed*, 312, N.C. 324, 321 S.E.2d 892 (1984). The court would imply a contract between the parties for the return of the funds. In *Orange Water & Sewer Authority v. Carrboro*, 58 N.C. App. 676, 294 S.E.2d 757 (1982), the court found an implied contract, to pay for hydrant maintenance, even in the absence of express contractual language regarding such payment. In this instance, even though the contract was required to be in writing, the court found an implied contract to pay for hydrant maintenance in order to prevent unjust enrichment.

A court should find all of the factors necessary to conclude that there is an implied contract requiring the Museum to repay the $750,000 to the City. Both parties were operating under the assumption that there was a valid contract. The City had already begun performance by advancing the first $750,000 of the loan. It would be unjust if the City could not recover the amount it advanced under the assumption that it

was a loan. The court would likely conclude that there is an implied contract for the return of the loan.

It should be noted that the obligation of the Museum to return the funds would be immediate upon the demand of the City for such return. Also, the rate of interest would be calculated at the legal rate of 8% per annum, and would accrue after the obligation became payable to the City. Even though the original agreement was that the loan would be repaid on July 1, 2016, and bear interest at the rate of 2% per annum, these terms were part of the contract which is assumed to be invalid in this discussion.

Please let me know if you have any questions regarding the discussion above, or whether you want our opinion on other issues in this matter.

This 20th day of March, 2014.

HILL EVANS JORDAN & BEATTY, PLLC

BY: _____
R. Thompson Wright