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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

July 1, 2003

The Honorable Daniel L. Tripp
Member, House of Representatives
P. O. Box 217
Mauldin, South Carolina 29662

Dear Representative Tripp:

You reference the fact that in April, 2002, the Clemson University Foundation, or its subsidiary, entered into an agreement with the developer of a proposed research and development park in Greenville County. By way of background, you note the following:

> [t]hat agreement provides the means by which those parties will establish within the park certain facilities which are to house a Clemson graduate program in automotive engineering and a wind tunnel to be used in research by both Clemson and private businesses. In January 2003 the City of Greenville and the South Carolina Transportation Infrastructure Bank executed an agreement whereby the Infrastructure Bank is to fund and the City is to design and build a public road system within the same park. At the request of the Governor's Office, the developer and the Foundation are revisiting the earlier agreement to determine whether they should or can revise the terms. In the meantime, the City of Greenville has proceeded with performing under its agreement with the Infrastructure Bank.

Your question is quoted as follows:

> [w]hether the South Carolina Transportation Infrastructure Bank can deny payment to the City of Greenville under a grant to the City for the design and construction of a road system within a research and development park, when
>
> A. The basis of the denial would be the lack of a wind tunnel or a Clemson University graduate program at the research and development park, but
>
> B. The grant agreement between the Bank and the City makes no mention of the wind tunnel or the graduate program.

Presuming we have been provided all the relevant documents, it is our opinion that a court would conclude that the implementation or effectuation of the Intergovernmental Agreement is not dependent upon the existence of a wind tunnel or a Clemson University graduate program at the research and development park. In other words, presuming that the Agreement between the Bank and the City of Greenville is the controlling document, we conclude that, irrespective of any collateral agreements or negotiations regarding these other matters, the Bank must meet its obligations to provide the above-referenced funds pursuant to the Agreement.

Facts as Related By Your Letter

You have provided an extensive factual background regarding the question you have presented. Paraphrasing your letter, these facts, as related by you, are as follows:

1. In April 2002, the Clemson University Foundation, or its subsidiary, entered into an agreement with the developer of a research and development park. The research and development park was to be located on a large tract of land in Greenville County, bounded by Interstate 85 to the north, Laurens Road (U.S. 276) to the east, and Old Sulphur Springs Road (Salters Road) to the west and south. Although the April 2002 agreement has not been published, I understand that it addresses the means by which a branch of the Clemson campus would be established within the park with facilities for a graduate research program in automotive engineering and with a wind tunnel. The wind tunnel would be used in part by faculty and graduate students of Clemson and in part by private businesses with a need or desire for wind tunnel research. Neither the City nor the Bank was a party to that agreement, and neither participated in its negotiation.

2. In the summer of 2002, the Bank received an application for Twelve Million Dollars ($12,000,000) for the construction of a road system within the research and development park. The application came from the Greenville Area Development Corporation, which is a non profit corporation that promotes economic development in the Greater Greenville area. The City did not participate in the application for the grant. Nor did it participate in appearances related to the grant award. At that time the research and development park land was contiguous to the City limit, but located in the unincorporated area of Greenville County

3. The Infrastructure Bank authorized a grant in an amount of up to Twelve Million Dollars ($12,000,000). The Bank did so on condition that there be a research and development park and that the roads be public. In addition, the Infrastructure Bank's practice is to make such awards to governmental bodies, not to private businesses or non profit organizations and I understand that the Greenville County Public Works Department was not in a position to accept the grant and proceed with design and construction.

4. In early autumn, the developer of the research and development park asked the City to act as recipient of the grant and to design and build the road system. The City of Greenville agreed to do so, provided the tract of land constituting the research and development park were annexed into the City and the road bed was dedicated as a public road to the City.

5. The City then began simultaneous negotiations with the developer on the terms and conditions by which the property would be annexed, zoned, and taxed and with the Infrastructure Bank on the terms and conditions by which the road system would be dedicated, designed, and constructed. The City apprised the developer of its discussions with the Bank and apprised the Bank of its discussions with the developer. Copies of draft agreements with the developer were made available to the Bank during the course of negotiations.

6. In January 2003, the City executed both agreements simultaneously. Both agreements refer to the establishment of a research and development park. Neither agreement mentions Clemson, the Clemson Foundation, any subsidiary, or the wind tunnel. In particular, the establishment of a Clemson campus or the establishment of a wind tunnel was not included as a condition of performance by any party in either of the signed agreements.

7. The Bank funding agreement with the City states that the condition of establishing a research and development park will be met when the developer closes on the first 120 acres of land purchase within the 400 acres constituting the full potential park. That condition was met by the third week of January when the closing occurred and the deed transferring the property was filed at the Greenville County Record of Deeds Office. The current owners of the park property have dedicated the road system to the City, and the dedication and a related plat have been filed in the Records of Deeds Office. The Bank has requested that the City and the property owners file amended language for the dedication. The City's and the owners' position is that amended language is not necessary but that they are willing to accept other language which is compatible with both underlying agreements.

8 Shortly after the city executed agreements with the developer and the Bank, the Governor expressed concern about the April 2002 agreement between the Clemson Foundation entity and the developer and announced that the parties should review the agreement for possible revisions. No statement was made that the grant agreement between the City and the Bank needed to be revisited or that the agreement between the City and the developer should be revisited.

9. The agreement between the City and developer provides that the City will perform in a timely manner its duty to design and construct the road system. The City has proceeded with procuring engineering and construction services. It has entered into

a design contract and a clearing and grubbing contract. The City expects to enter into a construction contract by late June or July 2003. Meanwhile, I am informed that discussions are continuing between the developer and the Clemson Foundation or its subsidiary. It is conceivable that those discussions may not result in an agreement for a wind tunnel or a graduate automotive engineering program, or both, to be located at the research and development park.

10. The City of Greenville is incurring design and construction expenses as envisioned under its agreement with the Bank and as required under its memorandum of understanding with the developer. Under these circumstances the Bank's possible delay or denial of payment becomes significant. In addition, without the road system being constructed in the very near future, the research and development park stands to be delayed

Authority of South Carolina Transportation Infrastructure Bank

The South Carolina Transportation Infrastructure Bank was created by Act No. 148 of 1997 and is codified at S.C. Code Ann. § 11-43-110 et seq., Section 11-43-110 provides extensive legislative findings regarding the General Assembly's purpose in the creation of the Bank. Among these objectives, the Legislature recognized the following:

... (4) [l]oans and other financial assistance to government units and private entities can play an important part in meeting transportation needs. This assistance is in the public interest for the public benefit and good as a matter of legislative intent.

(5) The chapter provides an instrumentality to assist government units and private entities in constructing and improving highway and transportation facilities by providing loans and other financial assistance.

Section 11-43-120 establishes the Bank as a "body corporate and politic and an instrumentality of the State." Governed by a board of directors, the Bank's purpose, pursuant to subsection (c) of § 11-43-120, is as follows:

... [t]he corporate purpose of the bank is to select and assist in financing major qualified projects by providing loans and other financial assistance to government units and private entities for constructing and improving highway and transportation facilities necessary for public purposes including economic development. The exercise by the bank of a power conferred in this chapter is an essential public function.

Section 11-43-140 characterizes the Bank's board of directors as "the governing board of the bank." The Board is comprised of the following voting directors:

> the Chairman of the Department of Transportation Commission, ex officio; one director appointed by the Governor who shall serve as chairman; one director appointed by the Governor; one director appointed by the Speaker of the House of Representatives; one member of the House of Representatives appointed by the Speaker, ex officio; one director appointed by the President Pro Tempore of the Senate; and one member of the Senate appointed by the President Pro Tempore of the Senate, ex officio.

The Bank's powers are specified in § 11-43-150. Among these is the authority to "make loans to finance the eligible costs of qualified projects" and to provide "qualified borrowers with other financial assistance necessary to defray eligible costs of a qualified project ... ." §§ 11-43-150 (5) and (6). Subsection (9)(a) of § 11-43-150 empowers the Bank to "establish ... policies and procedures for the making and administering of loans and other financial assistance ... ."

Section 11-43-180(A) further authorizes the Bank to "provide loans and other financial assistance to a government unit or private entity to pay for all or part of the eligible cost of a qualified project." Prior to providing such loans or other financial assistance, however, the Board "must obtain the review and approval of the Joint Bond Review Committee." Id.

Pursuant to Subsection (B) of § 11-43-180, the Board is designated as the entity which possesses the discretion to "determine which projects are eligible projects and then [to] select from among the eligible projects those qualified to receive from the bank a loan or other financial assistance." Preference is given to "eligible projects which have local financial assistance." The Board is also to consider "the projected feasibility of the project and the amount and degree of risk to be assumed by the bank. Numerous other criteria must also be considered by the Board in determining whether "an eligible project is a qualified project." See, § 11-43-180(B)(1) through (6). It is clear that the General Assembly has placed the authority and discretion to determine which projects are qualified and which projects should be provided "financial assistance" solely in the hands of the Infrastructure Bank Board. Pursuant to this authority, the Bank approved the grant application for $12 million and thereafter the Bank contracted with the City of Greenville in January through the Intergovernmental Agreement to effectuate its decision to grant these funds.

Intergovernmental Agreement Between Bank and City of Greenville

You note in your letter that the Infrastructure Bank executed an Intergovernmental Agreement with the City of Greenville on January 15, 2003. This Agreement is the subject of your opinion request. Thus, it is necessary for us to describe the Agreement in some detail.

Based upon the information provided, it is evident that the Agreement has undergone considerable review, having been carefully scrutinized through a number of reviw processes. This Agreement provides the terms and conditions of the Bank's decision to grant 12 million dollars to the City for "the funding and construction of certain public roads in a research and development park at the intersection of Interstate Highway 85 and U.S. Highway 276 in Greenville, South Carolina as

part of the Upstate GRID program. ..." Reference is made to the Bank Board determination on August 15, 2002 that the road construction project met the requirements for financial assistance pursuant to § 11-43-180(B). As noted above, the referenced subsection enumerates specific criteria for Bank funding, including requirements for local support, establishment of economic benefit, enhancement of mobility, enhancement of public safety, acceleration of project completion, and enhancement of transportation services. According to recitals in the Agreement, the Capital Improvements Joint Bond Review Committee of the General Assembly approved the Bank's grant of $12 million for the road construction project on September 12, 2002. Greenville City Council generally approved the Agreement's terms on November 25, 2002 and December 9, 2002. The City thus agreed to administer this project. In addition, the Agreement recites the fact that the Developer "proposed to provide to the Bank and agreed to provide to the City a Letter of Credit to make those parties whole in the event they incurred obligations or made expenditures without the research and development park being established...."

Article II of the Agreement specifies the particular conditions by which the contract is made effective. This provision states as follows:

> 2. Terms of Agreement
>
> This Agreement shall be effective as of the date of the last of the following two occurrences: (I) the Greenville City Council approves final reading of an annexation ordinance for approximately 407 acres containing the proposed research and development park in which the Project is to be located, and (ii) the record owner of these 407 acres dedicates all of the real property necessary for the construction of the Project to the City. The dedication shall be in fee simple, or in the form of an easement if the easement is required to be converted to a conveyance in fee simple upon completion of construction funded by the grant provided for herein. This Agreement shall terminate when the City has submitted a substantiated draw request for final payment for the grant award and the Bank has provided that payment to the City.

The Agreement further provides for the funding commitments of the parties (Article III); the obligations of the city (Article IV); and the administration of the project (Article V). Article VI enumerates the conditions precedent to disbursements by the Bank; Article VII provides for indemnification; Article VIII for the Bank's rights and remedies and Article IX, those rights and remedies for the City. General conditions of the Agreement are specified in Article X, including standard items such as a clause relating to the benefit and rights of third parties, assignment, captions, notices, amendments and a savings clause.

Article XI joins the developer in the Agreement for certain limited purposes. This Article provides in pertinent part as follows:

> [b]y its within Joinder, the Developer hereby confirms to the Bank that the Developer, by its own actions or by that of an affiliated business entity has heretofore entered into an agreement for the establishment of a research park in the property upon which the Project will be constructed (the "Development"). The Developer further acknowledges that the grant of the funding for the Project by the Bank is subject to the condition that a research park be established within the lands which comprise the Development (the "Condition") and that the grant will revert to the Bank if the research park is not established.
>
> The Developer hereby joins in this Intergovernmental Agreement for the sole purpose of setting forth its agreement that at or prior to such Disbursement from the Bank to the City on account of the Project and until the Condition shall be fulfilled, the Developer shall provide to the Bank bond(s) or letter(s) of credit payable to the Bank in amounts sufficient to repay the aggregate Disbursements made by the Bank to the City should the Condition not be fulfilled ....

(emphasis added).

Caveat That Opinion of the Attorney General May Not Resolve Any Factual Disputes Surrounding the Intergovernmental Agreement

In a previous opinion of this Office, we expressed the following reservation concerning the difficulties in attempting to resolve contractual issues through the issuance of an opinion of the Attorney General:

> [a] legal opinion cannot resolve such obviously critical questions as precisely what expectations the parties may have had or what reliance was placed upon any representations made ....
>
> Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body ... we do no possess the necessary fact-finding authority and resources to adequately determine the difficult factual questions present here.

Op. S.C. Atty. Gen., Op. No. 85-132 (November 15, 1985). These limitations have been recognized consistently by this Office and we reiterate them here. Accordingly, only a court possesses the authority to resolve the issues of fact which may be highly relevant to any final resolution of the question raised by your letter. Therefore, as stated above, we must presume that we have been provided all relevant documents, including the Agreement itself. With this caveat in mind, we turn now to an examination of the controlling law.

Applicable Law

Our courts have consistently recognized fundamental rules in the interpretation of contracts. As the Court of Appeals reiterated in State Farm Auto Ins. Co. v. Nationwide Mut. Ins. Co., 327 S.C. 646, 649-650, 491 S.E.2d 272, 274 (1997),

> [i]t is not the function of the courts to rewrite or torture the meaning of a contract. See Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275, 277 (Ct. App. 1993). Courts are limited to the interpretation of the contract made by the parties, regardless of its "wisdom or folly, apparent unreasonableness, or failure of the parties to guard their rights carefully." Id. In interpreting contracts, the foremost rule is to give effect to the intent of the parties, and in doing so, the court looks to the language of the contract. If the language is unambiguous, the language alone determines the contract's force and effect and courts must construe it according to its plain, ordinary, and popular meaning. Id.; G.A.N. Enterprises, Inc. v. South Carolina Health and Human Serv. Fin. Comm'n. 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

Furthermore, it is well recognized that "'the rules of law pertaining to the contracts of a governmental body or agency are not different from those pertaining to any other contract.'" Op. S.C. Atty. Gen., Feb. 22, 1982 (citing 72 C.J.S. Public Contracts § 2). In that same opinion, we noted that a "basic tenant of contract law is that one who is not a party to a contract simply is not bound by the terms thereof." There, we stated that "'the obligation of contracts is limited to the parties making them ... .'" Therefore, parties to a contract cannot "'impose any liability on one who under its terms, is a stranger to the contract.'" Id., citing 17 Am. Jur.2d, Contracts, § 294.

With respect to a particular contract, "[a] condition precedent is any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise." Ballenger Corp. v. City of Cola., S.C., 286 S.C. 1, 331 S.E.2d 365, 368 (Ct. App. 1985). The Court of Appeals in Ballenger stated that "[w]hether a stipulation in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. A "condition precedent may not be implied when it might have been provided for by the express agreement." Worley v. Yarborough Ford, Inc., 317 S.C. 206, 452 S.E.2d 622, 624 (Ct. App. 1994), quoting 17A C.J.S. Contracts § 338 (1963). See also, 17A Am.Jur.2d Contracts § 471 (1991).

Furthermore, it is well understood that conditions precedent in contracts are disfavored. Therefore, contract provisions are construed as conditions precedent only if unambiguous language so requires or such conditions arise by necessary implication. Jetz Service Co., Inc. v. Botros et al., 91 S.W.3d 157 (Mo. Ct. App. 2002). Conditions precedent are particularly disfavored when the obligee has no control over the occurrence of the event in question. Mrozik Construction, Inc. v. Lovering Assoc. Inc., 461 N.W.2d 49, 52 (Minn. App. 1990). In Juengel Construction Co., Inc. v. Mt. Etna, Inc., 622 S.W.2d 510, 513 (Mo. Ct. App. 1981), the Court stated the generally recognized rule as follows:

> [t]he requirement in a contract of a third party's acquiescence or the performance of some act by him may or may not be a condition precedent to enforcement of the contract. On the one hand, if the fulfillment of the contract depends on the act or consent of a third party, the contract is unenforceable until the third party so acts or consents. However, if a party to a contract unconditionally undertakes to perform an act that is not impossible, but merely requires a third party to acquiesce or perform a preceding act, the party's performance is not deemed to be conditional on the third party's acquiescence or performance. 17A C.J.S. Contracts § 456(f) (1963).

Applying this rule, the Juengel Court concluded that "[i]f the parties intended the contract or further performance of it to be conditional on National's (third party) consent to subcontractors, they would have explicitly so provided." Id.

By contrast, a condition subsequent to an enforceable contract is a term of the contract "'within the intent of the parties that the happening or non-occurrence of an event after the contract becomes binding upon the parties, causes the contract to terminate without further duties and obligations on any party.'" Emanuel Tractor Sales, Inc. v. Dept. of Transportation, 257 Ga. App. 360, 571 S.E.2d 150, 154, quoting Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 318, 554 S.E.2d 296, 318 (2001). As stated above, determination of the intent of the parties is the cardinal rule of contract construction. This rule is applicable with respect to a condition subsequent provision in a contract as well. As our Supreme Court has recognized, "[w]hile courts lean against a construction which creates a condition subsequent, because that works forfeiture which often results in unconscionable hardship, they have no power by construction to make or modify contracts or statutes." State v. Cola. Ry., Gas and Elec. Co. 112 S.C. 528, 100 S.E. 355, 357 (1919).

Further, it is a well-settled legal principle that "[t]he fact that no duty of performance can arise until the happening of a condition does not make the existence of the contract depend upon its happening, unless the parties so intend." Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404, 408 (Ct. App. 1984), referencing Harris & Harris Const. Co. v. Craig & Denbo, Inc., 256 N.C. 110, 123 S.E.2d 590 (1962). Such a case in which the parties did intend the formation of the contract itself to depend upon the occurrence of the condition is Wahl v. Hutto, 249 S.C. 500, 155 S.E.2d 1 (1967). There, a broker brought suit to recover his real estate commission, based upon a theory of quantum meruit. In that case, the Court concluded that the parties intended that the contract was not entered unless the buyer secured financing. The Wahl Court reasoned as follows:

> [i]t is the position of the respondents that when the appellant executed the bond for title or contract to sale the lot in question to Bass such constituted a sale and rendered the appellant liable to the respondents for the sales commission. The appellant contends that, regardless of the execution of the bond for title or contract of sale to Bass that such was delivered conditionally and the effectiveness thereof depended upon the condition that Bass was able to secure adequate financing for the construction of a drive-in restaurant upon said property. Admittedly, bass was unable to secure the financing and fulfill the condition upon which the bond for title or

> contract of sale was executed and delivered. The evidence in this case is conclusive that the entire transaction was conditional and the delivery of the bond for title or contract was so understood by the parties thereto.

249 S.C. at 504. Therefore, the relevant contract must be carefully examined when applying the foregoing legal rules.

Analysis of Specific Questions Raised

We now turn to the specific questions raised by your letter. You note that in April, 2002, the Clemson University Foundation or its subsidiary entered into an agreement with the developer of a proposed research and development park in Greenville County. The proposed research park is to house a Clemson graduate program in automotive engineering and a wind tunnel to be used in research by both Clemson and private businesses. You have asked us to address whether the separate Intergovernmental Agreement, requiring the Infrastructure Bank to make a grant payment of $12 million to the City of Greenville for the design and construction of a public road system within that research park, may be effectuated immediately. The alternative is that implementation of the contract between the Bank and the City of Greenville would be delayed because, at present, a wind tunnel or a Clemson University graduate program at the research and development park are not in place. In other words, the essence of your question is whether implementation of the Intergovernmental Agreement is in any way dependent upon implementation of the April, 2002 agreement between the Clemson Foundation and the developer or any subsequent negotiations concerning of revisions thereto? The key issue in resolving this question is what the parties – the Infrastructure Bank and City of Greenville – intended by the Intergovernmental Agreement.

As discussed more fully below, it is our opinion that a court would find that the Intergovernmental Agreement – consummated by the parties in order to set forth the terms and conditions whereby the Bank would grant $12 million to the City for the design and construction of the public road system in the park – is not dependent upon the implementation of any the separate contract between the Clemson Foundation and the developer or other contracts or decisions relative to the wind tunnel project or the establishment of a graduate program by Clemson at the research park. In other words, we believe the Intergovernmental Agreement stands on its own – separate and apart from the referenced third party transaction between the developer and the Clemson Foundation.

It is apparent that the parties here – the Infrastructure Bank and the City of Greenville – intended certain specified conditions to occur before their obligations under the contract were required to begin. Article II of the Intergovernmental Agreement states that the Agreement shall be effective after the Greenville City Council approves final reading of an annexation ordinance for the approximately 407 acres of property where the research park is to be located and the record owner of these 407 acres "dedicates all of the real property necessary" for the road system to the City.

Your letter notes that, in your view, all conditions mandated by the Intergovernmental Agreement have now been met. You state that the developer has closed on the first 120 acres of land

purchased within the 400 acres constituting the full potential park and that the separate contract between the developer has not been questioned or is not under review. Furthermore, you indicate that the closing on this 120 acres occurred in the third week of January, 2003 and the deed transferring the property was filed with the Record of Deeds office in Greenville County. You also advise that the current owners of the park property have dedicated the road system to the City and the dedication deed and plat have been filed. With respect to the dedication requirement, you indicate that there has been some ongoing discussion between the Bank and the City as to precisely what manner of dedication is required by the Agreement. However, you state that the City is willing to accept "amended language for the dedication." Thus, according to the facts as you have presented them, the express conditional requirements of the Intergovernmental Agreement will not present a barrier to that contract's implementation.[1]

You further point out that, because of the delays imposed by the Governor's review as well as further discussion between Clemson and the developer, it "is conceivable that those discussions may not result in an agreement for a wind tunnel or a graduate automotive engineering program, or both, to be located at the research and development park." Notwithstanding these issues, however, we are aware of no facts which would prevent the Bank and the City of Greenville from proceeding with respect to their contract with one another.

The fact that the developer of the research park project and the Clemson Foundation have consummated a separate contract and are conducting ongoing discussions concerning that contract, may well have an indirect impact upon the Intergovernmental Agreement. However, neither the Bank nor the City of Greenville was a party to any negotiations or agreement between the Clemson Foundation and the developer. Conversely, neither Clemson, the Clemson Foundation nor the developer (except for Article XI) is a party to the Intergovernmental Agreement. We are aware of no statement that either the Intergovernmental Agreement or the contract between the city and the developer need to be revisited. The Intergovernmental Agreement does not incorporate the developer's contract with Clemson or any part thereof nor is there any conditions contained in the Intergovernmental Agreement concerning that contract. Moreover, the Intergovernmental Agreement does not suggest that the Bank's obligation to the City of Greenville requiring the Bank

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[1] It is our understanding that in late February, 2003, the attorney for the Bank informed the City Attorney of Greenville that the proposed Grant and Dedication of Easement "is not sufficient to meet the requirement of Section 2 of the IGA ... ." See, Letter dated February 28, 2003 from Jim Holly to Ron McKinney. Since that letter, there has occurred a continuing exchange of views between the Bank's attorney and the city of Greenville in an effort to resolve any problem which the Bank might have with the form of the public dedication. We understand that on May 20, 2003, the Greenville City Attorney provided the Bank's attorney with a draft Dedication of Pubic Right of Way, which was based upon the S. C. Department of Transportation form provided by the Bank's attorney. For purposes herein, we assume this particular issue has been resolved or will be shortly. In any event, this issue is not central to our conclusions herein.

to begin payments for the road construction is dependent upon or effectuation or implementation of the developer's contract with Clemson. While Article XI of the Intergovernmental Agreement contains an acknowledgment by the developer "that the grant of funding for the Project is subject to the condition that a research park be established within the lands which comprise the development," the same sentence of Article XI adds that "the grant will revert to the Bank if the research park is not established." In our view, the use of such express language is persuasive with respect to the parties' intent that grant payments by the Bank pursuant to the terms of the Intergovernmental Agreement are not contingent upon the completion of the wind tunnel project or the establishment of the Clemson of the graduate program.

In short, a court would likely conclude that the establishment of the wind tunnel or the graduate program by Clemson University is not a condition precedent to the effectuation of the Intergovernmental Agreement or the Bank's obligations thereunder. As the case law, referenced above indicates, conditions precedent in contracts are disfavored by the courts and are generally not implied. Such conditions must be expressly incorporated into the contract. One would assume that if the parties to the Intergovernmental Agreement desired to make their contract contingent upon the acts of third parties, such as the developer or Clemson, they would have done so. These are parties separate and distinct from those possessing the obligation to provide the wind tunnel and the graduate research program. The contract between the developer and the Clemson Foundation or any subsequent negotiations relative thereto are separate and distinct from the Intergovernmental Agreement. Accordingly, a court would likely conclude that the Intergovernmental Agreement is not dependent upon the implementation of contracts of other parties.

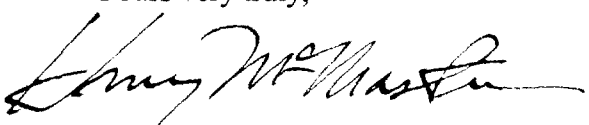
Our conclusion is reinforced by the powers and duties of the Infrastructure Bank. The Infrastructure Bank Board has approved the $12 million grant pursuant to its duly authorized powers. It is evident from an examination of the Bank's broad authority and the purpose for which that agency was created that the Bank must exercise its sound discretion by funding projects to improve the state's infrastructure in order to promote "public purposes including economic development." Often, such funding may stand separate and apart from a particular economic development project and is designed primarily to improve a locale's prospects for economic development. It is our understanding that, in this instance, this particular road construction project has been in the planning stage for many years – long before the present research park project or the wind tunnel and graduate program was envisioned or planned. Thus, the parties to this Intergovernmental Agreement, particularly the Infrastructure Bank, would likely choose to not make the Agreement to fund the road construction contingent upon the implementation of the wind tunnel and the Clemson graduate program. In our opinion, the parties did not do so.

Conclusion

We must presume herein that the Intergovernmental Agreement between the Infrastructure Bank and the City of Greenville – requiring the Bank to pay $12 million to the City for the planning and construction of the public road system in the research park – is the controlling document in this

instance. We must also assume that we have been provided all other relevant documents relating to the questions posed in your letter. It is our further understanding that the specific conditions contained in the Intergovernmental Agreement – those upon which the obligations contained in the Agreement depend – have already been accomplished or will be shortly. These conditions include the annexation of the property by the City of Greenville, the closing of the designated portion of the property by the developer, as well as the public dedication of the road property. Based upon these assumptions, it is our opinion that the execution and implementation of the Intergovernmental Agreement is not dependent upon other agreements between Clemson and the developer which relate to the construction of the wind tunnel and the establishment of the graduate research program in the research park. In other words, the Intergovernmental Agreement is, in our opinion, a valid, independent contract, separate from other agreements. We are aware of no facts which would prevent the Bank and the City of Greenville from proceeding with respect to their contract with one another. Accordingly, in our view, a court would likely conclude that the Bank is legally required to meet its obligations to provide the grant funds pursuant to the Agreement separate and apart from any agreements regarding the wind tunnel and the graduate program to be established by Clemson.

Yours very truly,



Henry McMaster

HM/an