SALT LAKE CITY CORPORATION
LAW DEPARTMENT

EDWIN P. RUTAN, II
CITY ATTORNEY

RALPH BECKER
MAYOR

MEMORANDUM

To: Mayor Becker
David Everitt
Lyn Creswell
Jill Remington Love
Carlton Christensen
Van Turner
Eric Jergensen
Luke Garrott
JT Martin
Søren Simonsen[1]

From: Ed Rutan
Boyd Ferguson
Brian Roberts

Date: September 25, 2008

Re: The Leonardo – Is the City Obligated to Issue Bonds?

Both the City Council and the Administration have requested legal advice from the City Attorney's Office on whether the City is obligated to issue bonds for the Leonardo museum project.

In addition, at an August 25, 2008 meeting with Lyn Creswell and Rick Graham, the Foundation suggested that if the bonds were not issued the City would be obligated to reimburse the Foundation for certain architect and other fees. We address that question as well.

Summary of Legal Advice

The primary question of whether the City is obligated to issue the bonds ultimately breaks down into the following two more specific questions: (1) Is the City obligated by the Matching Funds Agreement between Salt Lake City Corporation (the "City") and the Library Square Foundation for Art, Culture, and Science (the "Foundation") dated September 8, 2004 (the "Matching Funds Agreement") to issue bonds in an amount not to exceed $10.2 million if the Foundation raises the matching funds? and (2) Has the Foundation raised the matching funds in compliance with the Matching Funds Agreement?

[1] Although Council Member Simonsen has recused himself in this matter, we do not believe that that precludes him from receiving this memo on an informational basis provided that he does not discuss it with anyone.

I. Is the City Obligated By the Matching Funds Agreement to Issue the Bonds When the Foundation Has Met the Matching Requirement?

In our opinion, the answer to the first specific question is "No." We reach that conclusion by pursuing two independent legal approaches. These independent approaches turn on the technical questions of whether the Matching Funds Agreement is an "integrated" agreement or not and whether "parol" or "extrinsic" evidence of the parties' discussion may be considered. These issues are discussed below.

In either legal context, the underlying fact is that when the City certified that the Foundation had met the matching requirement in 2006 and continued with the process toward issuing the bonds by passing the parameters resolution, the conduct of the City and the Foundation then and since demonstrates that both the City and the Foundation understood that the bonds would not actually be issued until the parties had agreed on the scope of work for the building improvements with adequate funding in place and the City Council had approved the project.

First, the Matching Funds Agreement cannot be viewed in isolation. Both before and after the Matching Funds Agreement was executed, the City and the Foundation were negotiating a separate Construction and Renovation Agreement and a separate Lease Agreement. Negotiation of the scope of the renovation work occurred in the context initially of the Lease Agreement and subsequently of the Construction and Renovation Agreement, all of which was extrinsic to the Matching Funds Agreement. The Parties also subsequently executed an Interim Agreement addressing reimbursement for seismic study and preliminary architectural work.

Thus, there was not and has not been a "meeting of the minds" between the City and the Foundation to issue the bonds because they have not agreed on the scope of work to be funded by the bond proceeds. Without agreement on the work to be performed there can be no obligation to issue the bonds. There is nothing within the body of the Matching Funds Agreement that defines the renovation work to be done. Furthermore, evidence outside of the document demonstrates that no agreement as to its scope was ever reached.

In that context of a series of related agreements addressing specific aspects of the overall relationship between the City and the Foundation, the impact of the Matching Funds Agreement would be limited to the narrow context of its stated purpose – "to define which funds raised by the Foundation for The Leonardo project qualify as Bond matching funds." The sentence "When the total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds for the remodeling of the old library building" would be construed in the context of that specific purpose. Thus, the sentence would be construed to impose at most an obligation on the City to proceed expeditiously with issuance of the bonds <u>if</u> agreement on the scope of the renovation and funding had been reached. Because the scope of the renovation work to be done was a material term necessary to defining the consideration the City was to provide under the Matching Funds Agreement that was never agreed upon, there can be no binding obligation on the City to provide funds for a project that is insufficiently undefined.

Moreover, the conduct of both the Administration and the Foundation indicates that they understood that final approval by the City Council was required.

Second, if the Matching Funds Agreement is viewed in isolation, the operative provision in the Matching Funds Agreement setting forth the City's obligation to "expeditiously provide the bond funds for the remodeling of the old library building" is ambiguous. The provision can be read in at least two alternative ways. In one interpretation, the obligation could mandate that the City issue the bonds and provide the bond funds based solely upon the fact that the matching funds had been raised. A different interpretation would be that the City is obligated to "provide" the bond funds only if the City has issued the bonds. The issuance of the bonds in turn would be subject to the normal discretion available to the City Council based upon the scope, status, and desirability of the project and the time the matter was to be decided. Only if the City Council was satisfied that the issuance of the bonds served the purpose for which they were authorized would the obligation then arise to "provide the funds." Because the document itself does not provide any assistance in determining which of these two reasonably plausible interpretations is correct, outside of the contract evidence is required to determine the intent of the parties. All of the available outside evidence on the issue demonstrates that the parties did not intend for the matching requirement to be the sole basis for triggering the issuance of the bonds and provision of the bond funds to the project.

Finally, assuming arguendo that the City's obligation to provide the bond funds under the Matching Agreement is unambiguous and enforceable, the City probably would be excused from issuing the bonds for one or more of several reasons: failure of consideration, frustration of purpose, amendment by conduct, and/or equitable estoppel. All of these are contract doctrines that operate independently with some being more evident than others in this case, but supporting the conclusion that, were the City required to issue the bonds and provide the bond funds prematurely, the City would not be receiving what the parties intended at the time of the Matching Funds Agreement. The parties have both recognized this fact and conducted themselves accordingly.

II. Has the Foundation Met the Matching Funds Requirement?

While it appears that the Foundation may well have met the matching funds requirement as of April 30, 2008, further factual inquiry is necessary to confirm that.

The City's chief financial officer certified on two occasions in 2006 that the Foundation had met its matching funds obligation. However, the Foundation has since acknowledged that it in fact did not meet the matching fund requirement at that time because of the incorrect reporting of two guarantees.[2] Instead, the Foundation contends that it has now met the matching requirement through subsequent fundraising efforts.

[2] In view of our answer to the first question, we have not considered the possible impact of the Foundation's providing this incorrect information on the City's alleged obligation to issue bonds. For the same reason, we have not addressed the general concern expressed by the Council about the accuracy of information provided by the Foundation.

A threshold question is whether the matching requirement is $10.0 million or $10.2 million. Council Resolution No. 39 of 2003 set a matching requirement of $10.2 million, but the Matching Funds Agreement, which was approved by the Council, set the match at $10.0 million.

It appears from the Hansen, Barnett & Maxwell report that the Foundation has met the $10.0 million match as of April 30, 2008, if the Foundation is given credit for the FEMA, County, State and Blue Skys grants, but the Foundation has not submitted the periodic reports required by the Matching Funds Agreement since April 2006, nor has the City had the opportunity to confirm the enforceability of any outstanding pledges or to review any restrictive terms of any donations that the Foundation has received – an important point in light of the incorrect reporting of the guarantees by the Foundation. During the August 19, 2008 Council Work Session, the Foundation offered to provide whatever additional financial information the City might need. The City should request the Foundation to address both of these points.

In addition, because a considerable portion of the funds raised by the Foundation has already been spent, the City should be entitled to confirm that the matching funds have been spent for proper "Leonardo" purposes contemplated by the Matching Funds Agreement.

III. Is the City Obligated to Reimburse the Foundation Under the Interim Agreement Even if the Bonds Are Not Issued?

Yes. In September 2005, the City and the Foundation entered into an "Interim Agreement" that provided for reimbursement to the Foundation by the City from the bond proceeds for approximately $210,000 in expenses incurred by the Foundation for a seismic study and architectural programming services. (A 2007 amendment increased the amount to $262,079.) The Interim Agreement does not address what happens if the bonds are never issued (or not issued for a prolonged period of time). Because the occurrence of the condition to reimbursement – issuance of the bonds – is within the discretion of the City, we believe that a court would apply equitable principles and likely would conclude that the City is obligated to reimburse the Foundation for these expenses even though the bonds have not been issued unless there is evidence that we are not aware of that the Foundation understood that it was taking that risk.

Background[3]

The Original Concept

As the new City Library project progressed, the City considered the possible reuse of the old City Library (the "Building") after it was expected to be vacated in early 2003. In the fall of 1999, the City Council approved "re-use" parameters for the Building. The first parameter was that: "The new use should provide for continued public use of the building. This means that the majority of the building will be open to the public for uses such as displays, classes, exhibitions, performances, and related activities."

The re-use parameters also provided that the City would lease the Building to non-profit groups for a nominal rent, but "the re-use entities will be responsible for the design, construction and cost of altering the building to suit their needs and for on-going maintenance."[4]

In January 2000, the RDA solicited letters of interest for re-use of the old Library Building from over 750 non-profit and cultural groups throughout Salt Lake City. A "marketing package," including the re-use parameters adopted by the City Council, was made available. Proposals were due June 15, 2000.

Among those submitting proposals in response to the solicitation were the Utah Science Center ("USC") and the Center for Community and Culture – a loose affiliation of many groups headed by the Center for Documentary Arts and including the City's Global Artways program (the "CCC"). In November 2000, Mayor Anderson committed space to the Utah Science Center, with Gov. Leavitt endorsing the project.

In early 2001, the City also chose the CCC to reuse a portion of the Building. However, the USC and the CCC had each submitted proposals to use a majority of the space. The City encouraged the USC and the CCC to work together, and they developed the Leonardo da Vinci theme of combining art, music, culture, and science that would enable them to do so. The groups subsequently formed the Foundation, a Utah not-for-profit corporation, in January 2002 and agreed to call their combined effort "The Leonardo at Library Square" ("The Leonardo") in May 2002.

[3] This discussion of the background facts is based on documents in the City's files and discussions with current City employees. We have not had access to the Foundation's files nor have we had discussions with Foundation employees or former City employees. Information in the "control" of the Foundation could change some of our conclusions.

[4] The "re-use parameters" were modified by the Council in April 2000 to prefer multiple users and uses that would attract people to the public areas of the block and to make available the basement and sub-basement areas. However, the parameters for continued public use and re-user responsibility for any building improvements did not change.

In the meantime, the City had entered into an Interlocal Agreement in October 2001 with the Utah Science Center Authority. The Interlocal Agreement allowed the Science Center to use specified sections of the Building for $1 a month for a term of 10 years.

As further consideration for the right to use the Building, the USC agreed to make "major improvements and renovations to the Premises, but only upon prior approval by the City …" The improvements were estimated to cost $3.5 million.[5]

By the end of 2002, the Foundation had a $25 million capital campaign underway.

Drafting of a "Lease Agreement" between the City and the Foundation also began. The January 7, 2003 draft contained the following key elements.

- The City would lease specified portions of the Building "in its present condition" to the Foundation [Section 1]
- As consideration, the Foundation would pay a base rent of $1 per month and agree to renovate the Building as follows [Section 3.1 and 3.2]
  - The Agreement would be conditioned upon the Foundation obtaining funds sufficient to renovate the Building pursuant to plans approved by the City [Section 7 and 8]
  - Funding and construction would take place in two phases [Id.]
  - The estimated cost of the renovation and improvement to the Building was $9 million [Section 8]

Thus, the original plan was that the City would make the Building available to the Foundation at a nominal rent, but the Foundation would be responsible for raising non-city funds for both the rehabilitation of the Building and development of the exhibits and programs for "The Leonardo."

The Origin of the Bond Proposition

The Foundation's efforts to raise the estimated $25 million total cost ("bricks and mortar" plus programming /exhibits) were unsuccessful. One factor reported by the Foundation was the unwillingness of private donors to contribute funds to renovating or improving a City-owned building.

In the spring of 2003, Mayor Anderson proposed that the City Council allow the citizens to decide whether the City should commit public funds for the renovation of the Building. The Foundation would still be responsible to raise funds for the tenant improvements, exhibits, and initial programming.

[5] The City also granted a Revocable Permit to the USC in June 2005 to use the first basement floor and adjacent loading dock.

An August 1, 2003 City Council Transmittal memo proposed a $10 million City bond issue. It was estimated that $4.5 million of that bond money would be used for remodeling and interior improvements, $4.5 million for seismic, electrical, plumbing, and heating and air conditioning, and $0.5 million for creating joint use spaces such as shops, ticketing, and security.

The Process for Issuing Bonds

After City officials determine that the City should issue bonds for a particular project, they work with bond counsel to prepare a resolution that sets the election date and contains the wording that will appear on the election ballot. That wording describes the project and asks voters whether or not the City should issue the bonds for that project.

After that election resolution is adopted, the City waits for the election day. During that waiting period it may provide neutral educational information to the public about the election and the ballot proposition.

The election is then held. Soon thereafter the City Council canvasses the votes and declares the result of the election. If the voters approve the issuance of the bonds, the City is authorized (though not obligated) to issue the bonds within 10 years. In most cases the City proceeds quickly (within a few months) to finalize the financing steps required to issue the bonds.

One of those steps is the adoption by the City Council of a "parameters" resolution. That resolution expresses a preliminary intention to issue the bonds and authorizes the publication of a "notice of bonds to be issued" that contains information such as the maximum amount of the bonds, the maximum number of years to maturity, and the maximum interest rate the bonds will bear. The publication of the notice of bonds to be issued begins the running of a 30-day contest during which persons may challenge the issuance of the bonds. After that period the bonds are incontestable.

The parameters resolution does not authorize the issuance of the bonds. Rather, a final bond resolution adopted by the Council and the Mayor accomplishes that.[6]

After the adoption of a final bond resolution the City works with bond counsel in preparing and signing various closing documents. The parties then attend a closing at which the bonds are officially issued by being sold and delivered to a purchaser pursuant to a bond purchase agreement.

[6] Pursuant to a new requirement effective May 2008, the City must publish notice of a public hearing and hold a public hearing to receive input with respect to (1) the issuance of the bonds and (2) the potential economic impact that the improvement, facility, or property for which the bonds pay all or part of the cost will have on the private sector.

The Leonardo Bond Proposition

In Resolution No. 39 of 2003, adopted on September 9, 2003, the City Council authorized a special bond election for six different propositions, including $10.2 million ($200,000 for bond costs) for The Leonardo bond. Section 17 of Resolution No. 39 provided as follows:

> "The City covenants that any bonds authorized pursuant to City Proposition Number 2 (The Leonardo at Library Square) shall only be issued if money or pledges satisfactory to the City have been received for the facilities described in City Proposition Number 2 in an aggregate amount at least equal to the principal amount of such bonds to be issued [i.e. $10.2 million]."

The approved ballot language for The Leonardo was as follows:

CITY PROPOSITION NUMBER 2

(The Leonardo at Library Square)

> Shall Salt Lake City, Utah, be authorized to issue and sell general obligation bonds of the City in an amount not to exceed Ten Million Two Hundred Thousand Dollars ($10,200,000) and to be due and payable in not to exceed twenty (20) years from the date or dates of the bonds for the purpose of paying the costs of renovating, improving and preserving the old main library building located at approximately 5th South Street and 2nd East Street to establish a science, culture and art education center currently know as The Leonardo at Library Square?

The Voter Information Pamphlet for the bond election described the "Purpose of Proposition #2 as follows:

- To renovate, improve, and preserve the old, city-owned Main Library building to house a science, culture, art, and education center, known as "The Leonardo at Library Square"

- To make way for Utah's first interactive science and technology center, arts education programming for youth, a documentary arts center that honors Utah's heritage and diverse cultures, a charter school, and dedicated space for the Center for Community and Culture

The Pamphlet provided the following as "Details":

- Project is sponsored by the Leonardo Foundation, a non-profit, 501(c)(3) partnership among The Center for Documentary Arts, Utah Science Center, and Salt Lake City's Global Artways program.

- The Leonardo Facility will consist of approximately 30,000 square feet of exhibit space, a gift shop, performance theaters, multimedia studios, science labs, a darkroom, a reception area, and conference rooms.

- The Leonardo is committed to raising matching funds of $10 million for the project.

Salt Lake City voters approved the ballot proposition for The Leonardo at the November election by a nearly 60% majority.

Discussions After Passage of the Bond Proposition

The December 17, 2003 draft of the Lease Agreement contained a number of changes reflecting the passage of the $10.2 million bond proposition. A new "whereas" clause stated that "the public has approved a $10,000,000 bond for the renovation of the Building, and the Salt Lake City Council has determined that the use of those bond proceeds shall be contingent upon the Foundation's first raising an equal sum of money to be used for exhibits, programs and activities to be conducted within the Building."

As consideration for the lease, Section 3.1 of the December 17, 2003 draft provided that:

> "the Foundation agrees to refurbish and renovate the Building pursuant to the terms and conditions of Section 7 of this Agreement and to establish exhibits and operate programs and activities within the Building to accomplish the Foundation's goals of exploring and connecting art, culture and science in imaginative ways to enrich peoples' lives, expand consciousness and enhance the community in concert with the City's intended [sic] to use the City Space for housing the City's Global Artways program and for a charter school known as Utah Academy for the Arts."[7]

Base rent in an unspecified amount was provided as additional consideration. [Section 3.2]

Section 6 on "Funding" provides that:

> "The public has approved a $10,000,000 bond for the renovation of the Building, and the Salt Lake City Council has determined that the use of those bond proceeds (The 'Bond Proceeds') shall be contingent upon the Foundation's first raising an equal sum of money to be used for exhibits, programs, and activities to be conducted within the Building (the 'Matching Funds'). Upon demonstrating, in writing, to the City that the Foundation has received $5,000,000.00 of the Matching Funds (the 'Initial Matching Funds') no later than May 31, 2004 the City shall make available to the Foundation a sum not to exceed $5,000,000.00 from the Bond proceeds to fund architect selection, final plans, contractor

[7] This and other drafts are quoted to show the issues being discussed at particular points in time. It is not assumed that either party had given final, binding approval to any portion of these drafts.

> selection, and the commencement of Refurbishment Improvements including seismic repairs, utilities installation, [blank] of the Building (the 'Refurbishment Funds')." (emphasis added)

"Refurbishment Improvements" were defined in Section 6 "as including at a minimum, the architect selection, final plans, contractor selection, seismic repairs, utilities installation, [blank] set forth in the Schedule of Refurbishment Improvements, attached hereto and incorporated herein as Exhibit B …" The December 17, 2003 draft did not contain an actual Exhibit B.

Section 6 further provides a parallel structure for a maximum $5 million payment from bond proceeds for "Renovation Improvements" defined "as including, at a minimum, those renovations set forth in the Schedule of Renovation Improvements, attached hereto and incorporated herein as Exhibit 'C' …" The December 17 draft also does not contain an actual Exhibit C.

Section 7.1 estimated the project cost at $10 million rather than $9 million and repeats the provision in Section 3.1 that the Foundation is to make "major improvements and renovations" to the Building as consideration for the lease.

On March 15, 2004, Linda Cordova (SLC Property Management); Boyd Ferguson (SLC City Attorney's Office); Ron Love (SLC Public Services); Joe Andrade (Chairman and Director of the Foundation) and Gaylord Smith (SLC Engineering) met to review the Lease Agreement. It was agreed on Cordova's suggestion that the "building modification list" be separated from the Lease Agreement "as the lease is a living agreement where as the building modification will be complete upon the end of the renovation."

The question was raised if there could be any expenditure of funds before the bond money was available which could not occur prior to the Foundation raising the $10 million match. It was noted that no funding "means no consultants to undertake programming, commissioning and design, etc." It was further noted that "City's $10 million is for brick and mortar. Leonardo's $10 million is for programming and fit-up of their systems."

The first item in the list of "Need" was the following:

> "Find or develop a prioritized list of City goals and expectations for the $10 million bond money. What does the City want: seismic upgrade, life-safety upgrades, new thermal envelope, new mechanical and plumbing systems, electrical systems, roof, elevator or escalator renovation, loading dock modifications, percent for art, exterior lighting, ADA upgrades – How [sic] come up with the list of items to make the VCBO budget?"

Separate drafts of a "Construction and Renovation Agreement" and a "Lease Agreement" were subsequently prepared.

The April 6, 2004 draft of the Construction and Renovation Agreement changed the structure of the relationship to shift responsibility for the construction work to the City as follows in Sections 2 and 3.1:

> "At a bond election the public has approved the issuance by the City of up to $10,000,000.00 of general obligation bonds to finance the renovation of the Building contingent upon the Foundation first raising an equal sum of money to be used for exhibits, programs and activities to be conducted within the Building (the 'Matching Funds'). Upon demonstrating, in writing, to the City that the Foundation has received all of the Matching Funds the City shall issue the bonds and use a sum not to exceed $10,000,000.00 from the proceeds of the sale of the Bonds (the 'Bond Proceeds') to fund the refurbishment and renovation of the Building." (emphasis added)

Section 3.1 provided that:

> The City shall make major improvements and renovations to the Building, using the Bond Proceeds and the Matching Funds … The Project is estimated to cost approximately Ten Million Dollars ($10,000,000.00)." (emphasis added)

Section 3.2 of the draft required the City to have "conceptual designs"[8] developed for the building improvements. The Foundation would have the opportunity to comment on the "Conceptual designs," but its approval was not required. The parties would only "in good faith work to resolve" the Foundation's comments.

The April 6, 2004 draft of the Lease Agreement provided that as consideration the Foundation "shall establish exhibits and operate programs and activities within the Building to accomplish the Foundations goals of exploring and connecting art, culture and science in imaginative ways …" and pay a base rent of $1 a month. Prior provisions related to "building" were deleted and moved to the new Construction and Renovation Agreement as discussed above.

The Lease Agreement and the Construction and Renovation Agreement drafts were revised by the parties over the ensuing two years.

The most recent drafts of the Lease Agreement and the Construction and Renovation Agreement are dated March 31, 2006[9] and April 26, 2006 respectively.

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[8] "Conceptual design" or "programming" is a pre-design written statement by the owner of a building of what the project is intended to accomplish. The architectural firm Ewing, Cole from Philadelphia and the local firm ACJ have been retained to consult on programming.

[9] A March 21, 2006 e-mail from Rick Graham, Director of Public Services, to Russell Weeks on the Council Staff provided a list of the "major deal points that are currently being discussed in the building lease negotiations with The Leonardo." Among the points was the following:

> "5. Capital Contribution. It [sic] The Leonardo makes a cash contribution (currently $5 million is being considered) for capital improvements and the City terminates the lease prematurely, The Leonardo wants some way to amortize the value of its capital investment and get some of its money back."

The Lease Agreement March 31 draft included the following new "whereas" clauses:

> "Whereas, The Leonardo has met its obligation to raise the $10,000,000.00;[10]
>
> "Whereas, The City is now in a position to issue $10,000,000.00 of general obligation bonds and to use the sale proceeds thereof to allow the Building renovation to begin;

In the second "whereas" clause the phrase that the City was "in a position to issue" replaced "obligated to release the."

The Construction and Renovation Agreement April 26 draft included the following new "whereas" clauses:

> "Whereas, B, the Building and its design are more than 40 years old and do not meet current building code, seismic, and American's with Disabilities Act requirements. All City laws and standards will be followed in renovating the Building. At a minimum, the Building will be designed and constructed to a 'Certified' level of sustainable practice per LEED standards; [11]
>
> Whereas, C, at a bond election in 2003, the public approved the issuance by the City of $10,000,000.00 of general obligation bonds to finance renovation of the Building. The Leonardo was obligated to raise $10,000,000.00 before the bonds could be issued by the City ('Matching Funds'). The Leonardo has raised the Matching Funds, and met its obligation to the City. Therefore, the time has come for the City to issue the funds and begin renovating the Building."

Section 2 of the Construction and Renovation Agreement draft included a provision that if the City defaulted, "the City shall be obligated to refund the Matching Funds to the Leonardo expended for the Improvements (defined below)." The "Improvements" were defined as "those set forth in the Schedule of Improvements, attached hereto and incorporated herein as Exhibit A." Exhibit A in the draft was a titled, but otherwise blank page.

Neither the "Lease Agreement" nor the "Construction and Renovation Agreement" have been executed by the City and the Foundation.[12] Nor were the various "improvements" schedules ever prepared, even in draft form.

<u>The Matching Funds Agreement (September 2004)</u>

A matching funds agreement apparently was suggested by Mayor Anderson in early 2004 to facilitate the process of determining whether the matching requirement had been met.

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[10] See page 16-17, below.
[11] LEED certification was not anticipated in the original budgeting.
[12] A separate lease was entered into for the Body World exhibition.

The Matching Funds Agreement, dated September 8, 2004, begins with "Recitals" referring to the bond election authorizing "the issuance of up to $10.2 million of general obligation bonds" "to retrofit and renovate the City-owned former main library building" that "would house The Leonardo at Library Square." The "Recitals" referred to the Foundation as the non profit entity responsible for operating The Leonardo that also was charged with matching dollar for dollar the par amount of the bonds up to $10 million (excluding costs of issuing the bonds)."

The description of the matching funds obligation as "up to $10 million (excluding costs of issuing the bonds)" in the Matching Funds Agreement was different from the wording in Section 17 of Resolution No. 39 – "at least equal to the principal amount of such bonds to be issued [up to $10.2 Million]." The change apparently was made because the estimated cost of the building improvements was $10.0 million and that was what was expected to be matched, not the additional cost of issuing the bonds.

Section 1 of the Matching Funds Agreement states the "Purpose" of the agreement as follows, with the first and last sentences being the most relevant to the present question:

> "This Agreement is intended to define which funds raised by the Foundation for The Leonardo project qualify as Bond matching funds. This Agreement will guide both parties as they monitor progress toward the match via monthly and quarterly reports. Each month, the Foundation will present the City with an accounting of total funds and pledges raised during the preceding month that meet the agreed upon criteria for matching funds. At the conclusion of each quarter, no later than the 15th of January, April, July, and October, the Foundation shall present to the City a written report detailing all individual pledges and donations secured during the quarter, as well as a cumulative total of matching funds and pledges. The quarterly reports shall detail the date, amount, and name of donor for each entry, but the monthly reports need only provide total amounts for the month. No later than the last day of January, April, July and October, the City shall verify in writing that the criteria have been met for the donations reported in the most recent quarterly report, and that the Foundation's reported total of matching funds raised to date is consistent with City records. When that total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds for the remodeling of the old library building." (emphasis added)

Fleshing out the intent to define funds qualifying as matching, Sections 2 and 3 are titled "Criteria for Qualifying Matching Funds" and "Funds That Are Not Qualifying Matching Funds" respectively.

Qualifying matching funds were defined in Section 2 as being:

"for, 1) building remodeling and renovation to prepare the building for The Leonardo's occupancy and programs; 2) programming related to the occupancy and operation of the building; 3) capital improvements and expenses relating to exhibits and on-going functions of The Leonardo and its tenants. This includes donations toward any and all capital improvements, planning, and program needs of any of The Leonardo partner organizations – Global Artways, The Center for Documentary Arts, and The Utah Science Center – so long as those donations are designated for the partner organizations' use at Library Square. Qualifying donations shall include, but are not limited to the following:

1. Funds donated to develop exhibits and related materials and programs for The Leonardo and its partners (GA, CDA, USC)

2. Funds donated to support the development of The Leonardo's organizational infrastructure and facility features.

3. State, County, or Federal funds raised for The Leonardo's capital improvement, exhibit or program development.

4. In-kind donations approved by Salt Lake City that provide goods or services included in The Leonardo or partner organization budgets for building renovation, exhibit and program development.

Non-qualifying matching funds were described as follows:

A. Independent operating expenses for the current programming and administration of partner organizations (GA, CDA, USC) to the extent those expenses are not incurred in furtherance of The Leonardo project.

B. Any public funds raised by partners for current operations, to the extent those expenses are not incurred in furtherance of The Leonardo project.

C. Examples of Funds That Are Not Qualifying Funds

1. Micron Technology Foundation grants for USC Discovery on Wheels program in the Lehi area;

2. Kennedy Center Imagination Celebration donation for ongoing Global Artways programs;

3. Center for Documentary Arts ZAP funding for programs prior to occupancy of the building.

Section 4 ("Deadline for Raising Funds") provides that the Foundation "shall have no more than five (5) years from the date of this agreement to raise the full $10 million in matching funds." If the Foundation fails to do so, it "shall relinquish any and all claims to the bond funds approved by the voters." Section 4 further provides that "[u]ntil such time as matching funds are

secured under the terms of this agreement, Salt Lake City shall have the right to use the former main library building as it sees fit."

Section 6 states that:

> "This Agreement, and the attached and incorporated exhibits, constitutes the entire agreement between City and the Foundation."

In fact, there are no exhibits attached or incorporated.

The Agreement was signed on behalf of the City by Ross C. Anderson as Mayor and Jill Remington Love as Chair of the City Council. (The Council had authorized execution of the Matching Funds Agreement on August 24, 2004 after previously adding the requirement that the matching funds be raised within 5 years.)

The contract was primarily drafted by the City. The sentence "when that total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds …" was added at the request of the Foundation. The contract was approved as to form by the City Attorney's Office.

In an October 8, 2004 e-mail, Mary Tull asked DJ Baxter whether the following guarantee would qualify under the Matching Funds Agreement:

> "One donor has worded their pledge in the form of a guarantee. We have agreed to fundraise to reduce his guarantee over the next several months but the only time the guarantee is null and void is IF we completely failed and at the end of the five years the bond opportunity ended …" (emphasis in original)

He replied the same day as follows:

> "Although this guarantee would become void if the Leonardo fails to qualify for the bond funds, I think the same could be said of all (or many) of your other pledges as well. So long as you are entitled to collect on the full amount of the guarantee, I think it qualifies, so long as it is written and enforceable, as required by the agreement."

<u>The Interim Agreement (September 2005)</u>

In September 2005, the City and The Foundation entered into an "Interim Agreement" to cover reimbursement for the cost of the seismic study and the services of an architectural consultant. The agreement was executed by the City Engineer and the Foundation's Executive Director. Recital B made the following statement:

> "The public approved the issuance by the City of up to $10,000,000 of general obligation bonds to finance the renovation and retrofitting of the Building (the "Project"), contingent upon The Leonardo first raising an equal sum of money

(the "$10 Million Matching Funds") to be used for exhibits, programs and activities to be conducted within the Building."

The Interim Agreement provided that the City would prepare solicitation documents; that the City and the Foundation would select a consultant to provide "architectural programming, construction documents and construction administration services for the Project"; that after the Foundation raised the matching funds and the City issued the Bonds, the City would reimburse the Foundation from the bond proceeds a maximum of $10,000 for the seismic study and a maximum of $200,000 for architectural programming phase services.

A May 8, 2007 amendment increased the amount for architectural services to $230,944 and added $21,135 for schematic phase work by the consultants for a new maximum total of $262,079.

The Interim Agreement did not address what, if any, reimbursement obligation the City would have if the bonds were not issued and the project did not go forward.

The architect subsequently retained presented various project options over the course of 2005 and 2006 that varied in cost.

The Parameters Resolution (April 2006)

On February 1, 2006, the City's Chief Financial Officer, certified that the Foundation had achieved its $10.0 million matching funds goal. However, because the matching fund amount required by Section 17 of Resolution No. 39 was actually $10.2 million, an updated certification was issued on May 19, 2006 for $10.2 million. Based on reports by the Foundation, he provided the following summary in May:

Quarter/Year	Qualifying Funds Reported	Cumulative Total	Amount Remaining
3Qtr/2004	$ 5,578,644	$ 5,578,644	$ 4,421,356
4Qtr/2004	$ 341,300	$ 5,919,944	$ 4,080,056
1Qtr/2005	$ 480,470	$ 6,400,414	$ 3,599,586
2Qtr/2005	$ 72,917	$ 6,473,331	$ 3,526,669
3Qrt/2005	$ 269,819	$ 6,743,150	$ 3,256,850
4Qrt/2005	$ 3,304,406	$10,047,556	$152,444
April/2006	$ 162,571	$10,210,127	$-0-

A Summary of the cumulative total is as follows:

Cash Received	$ 2,688,947
Pledges	5,437,692
Stocks	1,496,597
In – Kind Donations	843,230
Total	$10,466,339
Less Leonardo on Wheels	(256,339)
Net Total	$ 10,210,127

In response to a question from the City Treasurer, bond counsel from Chapman and Cutler advised on February 9, 2006 that:

> "It isn't essential from a bonding perspective [that the lease between the City and Foundation needs to be in place before the bonds are issued]. However, it would seem to me that the City would want to have the relationship worked out and documented before it incurs debt, etc. rather than after the fact. What if the City issues the bonds and then there is not agreement with the Leonardo? Wouldn't that leave both parties in an uncertain situation which could lead to misunderstandings and problems? Also, the lease could have some consequences from a tax perspective relative to the tax-exempt status of the bonds. It would seem to me that the City, as well as the Leonardo, would want to have the business and operational arrangements in place before the bonds are issued and work is started. (emphasis in original)

In a February 13, 2006 e-mail, the City Treasurer stated that "since matching funds/pledges have been satisfied (per a review by [the City's CFO]) as required in an Agreement between the City and the [Foundation], we are ready to begin the bonding process." A briefing was scheduled for the City Council on February 21, 2006, but was pulled at the request of the Foundation because it felt that the timing was not right.

In March 2006, the Administration transmitted to the Council a briefing paper from the Foundation updating the Council on progress in developing a renovation program for the Building; requesting that the Council acknowledge that the Foundation had met the matching funds obligation; and requesting that the Council approve issuance of the bonds in the June time frame. A March 15, 2006 Council staff memo reported that "The Leonardo is now requesting per the terms of the Matching Funds Agreement and the Special Bond Election Resolution, that the City issue the $10 million general obligation bonds.

The Foundation submitted revised cost estimates for building renovation to the City Council. The earlier estimate of $10 million for seismic retrofit and remodeling was increased to

a "minimal building budget" (Option A) of $14.8 million due to inflation and increased seismic requirements. An Option B was estimated at $17.8 million. The Foundation authorized using up to $5 million of its funds for building renovation to deal with the increased costs.

On April 18, 2006, the City Council passed Resolution No. 24 of 2006 (the "Parameters Resolution") which authorized the issuance and sale of up to $15.6 million of general obligation bonds representing a combination of $10.2 million for The Leonardo project and $5.4 million for open space. The Leonardo and open space projects were combined because the City believed that dealing with the two projects simultaneously would be efficient.

With respect to the matching funds requirement for The Leonardo, Section 8 of the Parameters Resolution quoted Section 17 of Resolution No. 39 of 2003 and found that the requirement had been satisfied "in an aggregate amount at least equal to the principal amount of the Bonds."[13]

The City did not proceed to prepare a Preliminary Official Statement for distribution to prospective purchasers and a final bond resolution has not been adopted.

The City apparently did not proceed further at that time because both the Administration and the Foundation wanted to pursue a more robust building option, but the necessary funding to do so was not available. Council members apparently also had doubts about the lack of sufficient funding.

Subsequent Discussions

In a November 10, 2006 e-mail to Philippe Wyffels (Foundation business manager), Gaylord Smith (SLC Engineering) responded to a series of questions from Wyffels as follows:

> "4. What is the process of review and approval/signing for the lease? It is the city's opinion that the Lease Agreement is dependent on finalization of the scope of work. The Lease has been drafted to the extent that it can until the scope of work is defined. This is not to say that additional work cannot be done on the lease; however, the scope and the effect of Historic Tax credits have significant effect on a lease, neither of which is resolved to date.
>
> 5. When do we absolutely need the lease in place? The Lease needs to be in place prior to commencing the EC [Ewing Cole, the architect] contract with the City to insure that the lease and EC's scopes are one and the same.
>
> 6. What is the process of finalizing the contract City/Ewing Cole? A Ewing Cole contract can be signed upon completion of the Leonardo's Programming Phase and an agreement is in place that defines Leonardo's funding of +/- $3 million for

[13] The February 1, 2006 letter from the City's Chief Financial officer supported a certification of only $10.0 million. The May 19, 2006 letter certifying $10.2 million as of April 30, 2006 suggests that $10.2 million may well have been correct as of April 18, 2006. (However, those certifications included the invalid guarantees.)

renovation, Historic Tax Credit is "in" or "out" of the program. Funds are in place for design …

8. How does the City see SHPO/Historic Tax Credit at this point (I will check again with Walt about the preliminary review which should start right now)? The City is waiting for The Leonardo to gain sufficient reassurances from SHPO and the NPS to pursue the arduous and expensive process of bring tax credits into the project. As you know any tax credit involvement by the City greatly complicates the process.

9. Finally when will the bond be issued? How is cash flow going to be managed before that happens? Bonds will not be issued immediately; the City will front moneys for AE fees. The city will issue bonds when it is assured that the Leonardo's funding is in place for both Exhibits and the additional $3+ million for Leonardo's additional renovation scope. Cash flow for design will be funded from City resources." (emphasis added)

The City Treasurer agreed with Smith's responses on points 8 and 9 and added: "We can't begin the bonding process until the tax credit issues are resolved."

In an April 16, 2007 e-mail, Rick Graham described the status of the project as follows:

"The project is at a critical junction. The Leonardo Board has decided on the direction it wishes to follow relative to the design of the facility, a preliminary construction budget has been prepared and the Leonardo has reached its matching fund raising obligation (which has been validated by the City's Finance Division).

There remains one huge issue that must be resolved in order for the current plans to move forward. A funding gap exists between what Leonardo has committed to the project and what the engineers and designers believe the project will cost to construct. The estimated budget for the project is approximately $18,000,000. Leonardo has firm funding of approximately $11,000,000. It has a grant submitted to FEMA of approximately $2,500,000 (for building seismic improvements, but not approved yet), and it is considering an effort to secure New Market Tax Credits (amount available unknown at this point). The $11,000,000 is made up of $10,200,000 in bond financing and a $750,000 grant from the RDA to the project that has a current expiration date of July 2007.

The current construction budget may be reduced by scaling down the scope of the project, but that is not the desire of Leonardo. It really wishes to build the $18,000,000 project. The sum of the committed funds and outstanding grant money is approximately $13,500,000 which leaves Leonardo with a gap of approximately $4,500,000. The longer Leonardo takes to make a decision on its funding capacity the higher the cost of construction rises. The inflationary cost of construction in SLC's market is out of control." (emphasis added)

At an April 30, 2007 meeting of Mary Tull and Philippe Wyffels from the Foundation with Rick Graham and Gaylord Smith from the City it was apparently decided to "constrain the program scope of work to match the $10 million in hand and proceed with design on that basis." Particular items were identified as "Essential" (e.g. asbestos elimination); "Necessary" (e.g. HVAC); "Recommended" (e.g. renovation to facilitate The Leonardo's operation); and "Other."

A July 27, 2007 chart prepared by Philippe Wyffels (the Foundation's business manager) to justify $13 million in additional funding states: "If no extra funding is achieved, the building cannot be retrofitted satisfactorily." The chart explained the cost increase from the original $10 million to $24.8 million as follows:

#1 Economic Changes:

Inflation	$7.6 M approx. 76% inflation since 2001
Higher Contingencies	$2.0 M Contingencies increased from 10% to 15+15%
Total	$9.6 M

#2 Design intent changes:

Seismic retrofit ($1.02 M FEMA grant)	$1.5 M Original solution only with securing concrete
3d floor Community & Culture Center	$1.4 M Revenue generating facility
LEED Silver certification	$1.2 M Not required in 2001
Asbestos removal	$0.4 M Not included in 2001 estimate
Total	$4.5 M
Total cost differences	$14.1M

In August 2007, Mayor Anderson submitted a proposal to the City Council for an additional $13.23 million in City funding on top of the $10 million in general obligation bonds – $5.23 million from the City's surplus property account and $8 million from a new sales tax bond. The proposal was based on an estimated cost of $25 million for the building improvements. The memorandum noted that construction cost increases derailed the ability to begin construction without additional resources and that the initial cost estimates were too low.

This proposal was not adopted, but on September 28, 2007, the City Council approved $2,518,274 ($1,025,328 from a FEMA grant, the rest from "fund balance") for asbestos removal and the seismic retrofit.[14]

In February 2008, a new set of options was presented to the Council – the "Basis of Design (the original scale of renovation at current cost estimates): $21.9 million; the "Hybrid option": $19.1 million; and the "Economy option": $16.7 million. "Committed" funds available

[14] On June 13, 2006, the RDA approved a $750,000 grant for the north side seismic addition. The grant required matching contributions of $2.25 million (exclusive of the $10 million bond). The RDA has agreed to extend the matching deadline several times, most recently in August 2008. The grant was also subject to the conditions that the "actual total project costs must be equal to or less than the funding commitments" and that the grant funds be the last funds expended for the renovation.

were stated at $13.615 million, which left funding gaps for the various options of $8.29 million, $5.49 million, and $3.09 million respectively.

In an informal "straw vote," the Council chose the "hybrid option" of $19.1 million and directed the Foundation to close the $5.5 million funding gap by June 1, 2008. At the Foundation's request, the Council extended that deadline to August 2008.

The Hanson, Barnett & Maxwell Report (August 1, 2008)

On May 2, 2008, the City's Chief Administrative Officer sent the Foundation a letter advising the Foundation that the City had requested Hansen Barrett & Maxwell ("HB&M") to review specified financial information concerning the Foundation's operation.

On August 1, 2008, Hanson, Barnett & Maxwell, P.C. ("HB&M"), acting as independent accountants, submitted a report to the Mayor and City Council reviewing certain information provided to the City by the Foundation concerning the matching funds. Among the matters reviewed were two guarantees, with HB&M reporting as follows:

> "HB&M reviewed the terms of the $3.10 million and $300,000 guaranties as provided in the response packet. The original agreement states that the $3.10 million guarantee is to be contributed on September 30, 2009, reduced by the amount of funds contributed by other donors until that date. The $300,000 guarantee contains the same condition of contribution amount reduced by contributions received before the agreed contribution date. HB&M also reviewed the detail of the contributions received in the response packet since the inception of these agreements and matched all contributions over $1,000 to the records of The Leonardo. The schedule of matching funds, included in the response packet, includes these guarantees in its matching calculation. This results in insufficient matching of the original $10 million match if removed from the schedule."[15]

With respect to the Foundation's fundraising efforts after the certification by the City, the report stated the following:

> 1. How much funding has The Leonardo raised since April 2006, the date the City reviewed and confirmed the $10 million match?
> HB&M reviewed the total of the amount of $5.47 million raised from May 1, 2006 through April 30, 2008 as stated in the packet received. …

[15] In an August 13, 2008 response to the City, the Foundation stated the following:

> "The $3.1 million and $300,000 guarantees have been backfilled with other funds raised and therefore are now invalid. We also understand based on the auditors' report that the schedule of matching funds originally included these guarantees in its matching calculations and the result was that the original match was insufficient but we have since completed the requirements for the match per the matching funds agreement."

		From May 1, 2006 through April 30, 2008
Contributions as Booked		
Cash Contributions	$	278,755
Earned Revenues		116,257
In-Kind Contributions		53,660
Accounts Receivable		1,000,000
Total Contributions as Booked		1,448,672
Cash Appropriated from Other Entities		
County Appropriation (pending bond release)		400,000
State Appropriations		250,000
Total Cash Appropriated from Other Entities		650,000
Building Partnership with the City:		
RDA		750,000
FEMA PDM Grant		1,025,000
Seismic & Asbestos Abatement Appropriation		1,475,000
Blue Sky Grant		125,000
Total Building Partnership with the City		3,375,000
Total Additional Contributions	$	5,473,672

With respect to the Foundation's expenses, the report provided the following:

		Total cash used from Inception through April 30, 2008
Program Services		
Education	$	909,165
Supporting Services		
Management and general		571,551
Fundraising		1,216,254
Personnel Expenses		899,067
Non-Personnel Expenses		114,037
Payments to Affiliates		117,161
Other		348
Purchase of Property and Equipment		145,822
Construction in Progress		683,963
Total Expenses and Cashflow Payments		4,657,368
Other Balance Sheet Considerations		
Prepaid Expenses		5,618
Accumulated Depreciation		(75,536)
Accounts Payable		(29,330)
Accrued Expenses		(7,086)
Total Estimated Funds Used	$	4,551,034

The August 19, 2008 City Council Work Session

At the August 19, 2008 Council meeting, the Foundation presented a new three phase approach to the building renovations. The strategy was that the Phase I renovation would be "sufficiently extensive for full and useful occupancy of the building, yet reduced in scope sufficiently to limit the cost to an amount fundable by the $10 million bond funding and the other funds raised by the [Foundation] and the City."[16]

The Foundation observed that:

> "From the start, the [Foundation] anticipated taking one of two approaches to the renovation, one full-scale in nature and the other a less expensive, reduced scope option. The approach taken depended on available funding sources. As it turns out, even the lesser option has proven to be too scope-excessive and expensive given present economic and budgetary constraints." Id.

The Foundation stated its position that the City contractually committed to release the bond funds after the match was met and that the Foundation has now done so as certified by the City. The Foundation accordingly requested the City it issue the bonds.

The Memorandum of Understanding (August 27, 2008)

On August 27, 2008 the City and the Foundation entered into a memorandum of understanding that included the statement that they "intend to reach a resolution of all issues in an expeditious manner, and will work in good faith, without publicly criticizing or maligning on another." The MOU is essentially a road map for further discussions, acknowledging existing disputes such as the eligibility of the Foundation for the bond funds and the financial viability of The Leonardo project, and does not affect the merits of those disputes.

LEGAL DISCUSSION

I. Is the City obligated by the Matching Funds Agreement to Issue the Bonds when the Foundation Meets the Matching Funds Requirement regardless of other considerations?

We conclude that the City is not so obligated.

A. Limitations on the City's Authority to Contract

[16] The Foundation referred to a "building" cost of $11 million, but it appears that that is just the Phase I building cost. Apparently, the "building" cost for Phases II and III will be $5 million each, with the total "building" or "bricks and mortar" cost for the project as a whole being $21 million.

As a threshold matter it is important to discuss limitations on the ability of Salt Lake City to enter into contracts that would affect how the Matching Funds Agreement is interpreted. Because of the nature of representative government and the public interest, there are limitations on a government entity's contractual obligations not applicable to private parties.

As a starting point, it is a general rule that:

> "All existing applicable or relevant and valid statues, ordinance, regulations, and settled law of the land at the time a contract is made become part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention.

17A Am. Jur. 2d Contract § 371 (2008).[17] More specifically, one who contracts with a governmental entity is deemed to know the statutory and constitutional limits on the government's contracting authority. Weese v. Davis County Commission, 834 P.2d 1 (Utah 1992); Thatcher Chemical Co. v. Salt Lake City Corp., 445 P.2d 769, 771 (Utah 1968) ("One who deals with a municipal corporation does so at his peril. He is presumed to know the municipal ordinance controlling the administration of public business and the limitations on the powers and authority of the City officers he is dealing with.").

The following are laws and legal principles in existence in 2004 that would have to be read into the Matching Funds Agreement:

1. The Local Government Bonding Act

The City's ability to issue bonds is governed by the Local Government Bonding Act, UCA Section 11-14-101 et seq. Section 11-14-301(1) provides that if the voters have approved the bond proposition, the City Council "may proceed to issue the bonds voted at the election." (emphasis added) The Legislature's use of the word "may" indicates that the City Council has the discretion not to issue the bonds if it believes that it is no longer in the public interest to do so. "That wording clearly denotes a discretionary power and correlates with the idea of recognizing that a governing body should have some flexibility in planning for contingencies and adapting to changes in circumstances." Gardner v. Davis County, 523 P.2d 865, 867 (Utah1974) (abandonment of bond issue when anticipated federal funding for project not available).[18]

At the time that the Council submitted the proposition to the voters, it was anticipated that $10 million would be sufficient capital for building renovations and improvements at the Building. However, subsequent to voter approval, it became apparent that considerably more capital funds would be required, due to increased costs and/or changing views as to the desired

[17] See also Washington National Insurance Co. v. Sherwood Associates, 795 P.2d 665 (Utah App. 1990); Beehive Medical Electronics, Inc. v. Industrial Commission, 583 P.2d 53 (Utah 1978). Such incorporated "laws" have been held to include the case law also. Fisherman Surgical Instruments, LLC v. Ti-anim Health Services, Inc., 502 F.Sup.23d 1170 (D. Kan., 2007).

[18] At the August 12, 2003 work session the City's Chief Administrative Officer advised the Council that if the voters approved the bond issue, they would be authorizing the Council to issue the bonds, but that the Council would not be obligated to exercise that authority.

improvements. This "change in circumstances" would have justified the decision of the City Council not to issue the bonds insofar as UCA Section 11-14-301(1) is concerned.

The question becomes whether the City can limit the City Council's exercise of discretion by contract, and if so, has the City done so with respect to The Leonardo and the Foundation.

2. The City Council cannot, by contract, bind the exercise of legislative or governmental discretion – as opposed to proprietary or business discretion – by future city councils.[19]

The Utah Supreme Court has stated that:

> "[T]he courts hold that municipal governing bodies have two classes of powers-governmental or legislative and proprietary or business. In the absence of express statutory provision, such governing bodies, in the exercise of governmental or legislative power cannot make a contract which is binding on the municipality after the end of such governing body's term of office. But in the exercise of its business or proprietary power such body may bind the municipality for as long a period of time as is reasonably necessary to accomplish a legal purpose. Contracts involving water, electricity and gas supply and sewer systems and sewer disposal treatment and the like are generally held to be an exercise of the business or proprietary power and are binding on future governing bodies, the same as if made by individuals, for a reasonable period of time."

Bair v. Layton City, 307 P.2d 895, 902 (Utah 1957).

The Utah Supreme Court has also discussed this issue in Uintah Basin Medical Center v. Hardy, 54 P.3d 1165, 1167 (Utah 2002) and stated that:

> Government contracts raise public policy concerns beyond those involved with private contracts. . . . One such concern involves contracts that extend beyond the term of the governing body that originally entered into the contract. Such contracts, if enforced, potentially allow a former governing body to perpetuate its policies beyond its term and thereby limit a successor governing body's ability to respond to the public's changing needs. . . .
>
> While such concerns militate against enforcing a predecessor governing body's contracts against its successors, the common law also recognizes a countervailing concern: that permitting successor governing bodies to indiscriminately terminate government contracts may make private parties hesitant to contract with government entities, thereby reducing the viability of contracts as a means of solving public problems. . . .

[19] A corollary principle is that, unless authorized by statute, a municipal corporation cannot surrender, by contract, any of its legislative and governmental functions and powers. 2A McQuillin Mun. Corp. § 10.41 (2008).

> A desire to accommodate these competing concerns animates the various common law tests for determining whether a contract should be enforced against a successor governing body. The test on which Utah courts rely is known as the governmental/proprietary test. *See Bair v. Layton City Corp., 6 Utah 2d 138, 147-48, 307 P.2d 895, 902 (1957*). . . . Under the governmental/proprietary test, a contract is (1) unenforceable against successor governing bodies if it involves a governmental power or function, but (2) enforceable against successor governing bodies if it involves a proprietary power or function and is of a reasonable duration.[20]

In this case, to fully determine whether the City had the power to restrict the City Council's future discretion by the terms of the Matching Funds Agreement we would have to determine whether the Matching Funds Agreement and the obligation contained therein was dealing with a governmental or a proprietary matter. However, we do not find it necessary to further analyze that question because we have concluded under standard contract principles as we discuss below that the City is not obligated to issue the bonds.

3. The City must spend public funds for public purposes and in the public's interest.

An additional criteria concerning government contracting, is that the City may not simply spend public funds for any purpose. It is a fundamental principle of municipal law that public funds cannot be expended for private purposes. See, e.g., McQuillen, The Law of Municipal Corporations, § 39:25; Utah Technology Finance Corporation v. Wilkinson, 723 P.2d 406, 412 (Utah 1986); SLCC § 3.25.010A. This principle cannot be overridden by contract. E.g. Municipal Building Authority of Iron County v. Lowder, 711 P. 2d 273 (1985) (proposed sale of municipal property for nominal consideration)

There is no doubt in our minds that the general concept of The Leonardo project could potentially satisfy any "public benefit" test under the "Doug Short" line of cases or UCA Section 10-8-2. However, the Council would have the responsibility to determine whether the particular embodiment of the Leonardo concept agreed to by the parties meets the public benefit test. See UCA § 10-8-2. Elected officials may not simply turn over public monies or assets to a private party[21] without assuring themselves that the monies or assets will be spent or used in a manner that in fact provides equivalent value in serving the public interest. [22]

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[20] Similarly, the Utah Supreme Court stated in an earlier opinion:

> A common council 'cannot bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.' So, power given to contract respecting a particular thing does not confer power, by implication, to contract even with reference to such thing so as to embarrass and interfere with its future control of the matter, as the public interests may require."

Warm Springs Co. v. Salt Lake City, 165 P. 788 (Utah 1917) (quoting McQuillin on Municipal Corporations). See also 10 McQuillin Mun. Corp. § 29.07 (2008)

[21] Transactions with charitable or not-for-profit organizations must meet a public benefit test. E.g., Salt Lake County Commission v. Short, 985 P. 2d 899 (Utah 1999).

[22] The precise flow of City monies here would determine the nature of the "public benefit" process. At a minimum, a lease of the Building to the Foundation for nominal rent would require a "public benefit" finding.

A public hearing/public benefit process pursuant to UCA § 10-8-2 has not been held by the Council. [23]

B. Did the City and the Foundation agree that the City would issue the bonds when the Foundation met the matching requirement without regard to any other consideration?

The Foundation contends that the City agreed, in the Matching Funds Agreement, to automatically issue the bonds once the Foundation met the matching requirement. That contention presupposes that the Matching Funds Agreement contains the entire agreement between the parties regarding that matter. We disagree with that contention, but our analysis first requires an understanding of the "parol evidence rule" and the rule is accordingly discussed as a preliminary matter.

1. The Parol Evidence Rule and Written Integration of a Contract

Evidence outside the express terms of a contract concerning the negotiation of the agreement, the intention of the parties, and the surrounding circumstances is known as "parol evidence" or "extrinsic evidence." "The "Parol Evidence Rule" generally is that such evidence may not be considered to vary or contradict the terms of an agreement that is "integrated." On the other hand, if an agreement is not integrated, parol evidence is freely admissible to prove the meaning of the agreement.

The Utah Supreme Court recently clarified the rules on when an agreement is "integrated" in Tangren Family Trust v. Tangren, 2008 UT 20;182 P.3d 326. Accord Daines v. Vincent, 609 Utah Adv. Rep. 37 (Sup. Ct. July 29, 2008).

> "To determine whether a writing is an integration, a court must determine whether the parties adopted the writing 'as the final and complete expression of their bargain.' Importantly, we have explained that when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud,[24] that the writing contains the whole of the agreement between the parties." 182 P.3d at 330 (emphasis in original/footnotes omitted)

The Supreme Court was quite explicit that "in the face of a clear integration clause, extrinsic evidence of a separate oral agreement is not admissible on the question of integration." 182 P.2d at 332. See also Daines v. Vincent, 609 Utah Adv. Rep.¶ 23 (Tangren articulated a "clear integration clause" standard). However, if the agreement does not have a "clear" integration clause, extrinsic (or parol) evidence is admissible to prove the parties' intent.

[23] Another example of a provision of law that would have to be read into any contract between the City and the Foundation is Salt Lake City Code Chapter 3.25- - City Contracts. Chapter 3.25 specifies requirements for a contract to be valid and binding against the City, but we do not see it as raising dispositive issues here.
[24] We are not aware of any evidence of fraud here.

Even if an agreement is integrated, parol evidence is still admissible to clarify ambiguous terms of the agreement. Tangren, supra., 182 P.3d at 330. The following are examples of situations in which such parol evidence has been admitted:

- To construe ambiguity in a contract to determine the true intentions of the parties. Daines v. Vincent, supra.;
- To determine the intention of the parties concerning the meaning of a single word. Id;
- To resolve ambiguity as to the contract taken as a whole. WebBank v.Am. Gen. Annuity Serv. Corp, 2002 UT 88, ¶ 27-29, 54 P.3d 1139;
- To resolve ambiguity created where there are missing terms in a contract. Nielson v. Gold's Gym, 2003 UT 37, ¶ 14, 78 P.3d 600; and
- To resolve ambiguity within the context of the parties' course of conduct. Peterson v. Sunrider Corporation, 2002 UT 43, ¶¶ 22-23, 48 P.3d 918.

In addition, parol evidence is admissible to determine whether a contract lacks consideration, even if the contract is unambiguous. Tangren, supra., 182 P.3d at 331; DeMentas v. Estate of Tallas, By and Through First Sec. Bank 764 P.2d 628 (Utah App 1988) (*quoting* Restatement (Second) of Contracts § 218(2) (1981)).

2. Section 6 of the Matching Funds Agreement Is Not a "Clear" Integration Clause and Therefore Extrinsic Evidence of the Parties' Intent May Be Considered

The "integration" clause in the Matching Funds Agreement reads as follows:

> "Section 6. Entire Agreement.
> This Agreement, and the attached and incorporated exhibits, constitutes the entire agreement between the City and the Foundation."

By comparison, the "Entire Agreement" clause in Tangren provided that:

> "[t]his Lease contains the entire understanding between the parties with respect to its subject-matter, the Property and all aspects of the relationship between Lessee and Lessor." 182 P.3d at 330 (emphasis added)

The Daines case involved a release which stated that: "This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members."

In contrast to the clauses in Tangren and Daines, we do not believe that Section 6 of the Matching Funds Agreement meets the standard of a "clear integration clause."

First, Section 6 states that the "attached and incorporated exhibits" are part of the "entire agreement," but there are no exhibits attached or incorporated. What was intended to be integrated by such absent exhibits is thus unknown.

Second, the Matching Funds Agreement on its face refers to other contractual relationships between the parties with no hint that such agreements were intended to be subsumed by the Matching Funds Agreement. Specifically, the Recitals refer to: (1) bond proceeds to be spent on retrofitting and renovating the Building; (2) the Building as housing The Leonardo; and (3) the Foundation as operating The Leonardo; and (4) the Foundation raising matching funds. Thus the Recitals at least implicitly refer to a lease to cover (2) and other agreements to cover (1) and (3) because the Matching Funds Agreement addresses only (4). Therefore, the Recitals place in question the proposition that the Matching Funds Agreement is the "entire agreement" between the parties. In contrast to the clause in Tangren, Section 6 does not state that the Matching Funds Agreement covers "all aspects of the relationship" between the City and the Foundation, nor could it.

Third, the "Purpose" Clause states that the Matching Funds Agreement "is intended to define which funds raised by the Foundation for The Leonardo project qualify as Bond matching funds." This narrow purpose raises questions about an expansive interpretation of just what Section 6 integrates.

On that basis, we believe that a court would conclude that Section 6 of the Matching Funds Agreement is not a "clear" integration clause. As a result, the parol evidence rule would not prohibit consideration of extrinsic evidence as to the intent of the City and the Foundation.

The extrinsic evidence detailed above supports two factual findings. First, the parties did not intend that the Matching Funds Agreement would govern "all aspects of their relationship." It was intended to govern which funds qualified for the matching requirement. Second, both parties understood that the bonds would not actually be issued until the parties had agreed on a scope of work with adequate funding in place and the project was approved by the City Council.

In order to determine the parties intent, it is necessary to identify the various aspects of the business arrangement that the City and the Foundation contemplated. As discussed above, the parties contemplated a lease of the Building by the City to the Foundation, improvements to the Building by the City funded by the bond proceeds, the raising of matching funds by the Foundation, and the use of those matching funds by the Foundation for programming and exhibits to realize The Leonardo concept. (See generally pages 6-12, supra.)

The history of the parties' discussions detailed above indicates that each of these elements was critical to the parties' overall business relationship and that each was "material" under contract law.

Each of these elements was intended to be addressed by the parties in different contractual contexts. Thus, when the City and the Foundation executed the Matching Funds Agreement they had already been negotiating and continued to negotiate a separate Lease Agreement and a separate Construction and Renovation Agreement. In that context of interrelated agreements, we believe that the Matching Funds Agreement would be construed in light of its specific stated intent – "to define which funds raised by the Foundation for The Leonardo project qualify as bond matching funds." The argument by the Foundation that the final sentence of the "Purpose" section – "when that total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds for the remodeling of the old library building "—created an absolute obligation for the City to issue the bonds fails for two reasons. First, such an obligation is much broader than the stated intent of the Matching Funds Agreement. Second, and more importantly, the City and the Foundation have never agreed on what the specific scope of the building improvement to be funded with the bond proceeds would be. The fact that the parties were continuing to negotiate the Construction and Renovation Agreement demonstrates that the phrase "renovating, improving and preserving" in the Bond proposition as recited in the Matching Funds Agreement was too general for them to implement without further elaboration in a separate contract.

"[A] condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced." Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988) (quoting Valcarce v. Bitters, 362 P.2d 427, 428 (1961). Furthermore,

> "[a] binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms. Furthermore, a contract can be enforced ... only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." … "[W]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." …

Sachs v. Lesser, 2007 UT App 169; 163 P.3d 662 (citations omitted).

There was no "meeting of the minds" here that the bonds should be issued by the City because there was no agreement on how the bond proceeds would be used and the improvements funded. There is therefore no enforceable contractual requirement to issue the bonds.

Moreover, the conduct of the parties demonstrates an understanding by both the City and the Foundation that there would be no obligation for the City to issue the bonds without final approval by the Council.

3. Assuming That the Matching Funds Agreement Is "Integrated," Extrinsic Evidence of the Parties' Intent May Still Be Considered Because the Matching Funds Agreement Is Facially Ambiguous.

Even though we believe that the Matching Funds Agreement is not clearly integrated, we will nonetheless analyze it on the alternative assumption that it was integrated.

Section 1 of the Matching Funds Agreement ends with the sentence "When that total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds for the remodeling of the old library building." The Foundation contends that this sentence creates an absolute obligation for the City to issue the bonds when the matching requirement is met, but that is not the only possible interpretation.

One reasonable interpretation, as argued by the Foundation, is that the obligation could require the City to issue the bonds and provide the bond funds to the Foundation based solely upon the fact that the matching funds had been raised without regard to any other factors or considerations. Another reasonable interpretation is that the City would be obligated to "provide" the bond funds only if the City has issued the bonds and agreed to the proposed scope of the project. The issuance of the bonds would be subject to the normal discretion available to the City Council based upon the scope, status, and desirability of the project at the time the matter was to be decided. Only if the City Council was satisfied that the issuance of the bonds served the public purpose for which they were authorized would the obligation then arise, if the Foundation had met its matching requirement, for the City to "provide the funds." The contractual provision is ambiguous even regarding to whom the bond funds were to be provided. Such language could mean that the funds were provided to the Foundation or provided to the City department charged with renovating the Building.

It is clear that the stated intent of the Agreement, i.e. to define which funds qualify for the match, does not provide any guidance regarding the bond issuance, nor do the Recitals. In the end, the meaning of the sentence at issue, and the intent of the parties represented by such wording, is ambiguous insofar as the "four corners" of the document are concerned. However, once again parol evidence can be used to construe ambiguity in a contract to determine the true intentions of the parties (see Section B1, above)

With respect to interpreting this particular provision, one important principle to keep in mind is that "[a]mbiguities are construed against the drafter" of a provision. Utah Farm Bureau Ins. Co. v. Crook, 1999 UT 47, ¶ 6, 980 P.2d 685. In the case of this particular provision, the drafter was the Foundation so any ambiguity is construed in the City's favor.

Similar to the analysis of the ambiguity revealed by the entire course of conduct between the parties, a review of the parol evidence concerning this provision indicates that the parties did not intend that the City would be obligated to issue the bonds simply upon certification that the Foundation had raised the matching funds. As stated, the Matching Funds Agreement was part of a much broader set of agreements including the Lease Agreement and the Construction and Renovation Agreement. In addition, the entire scope of the project had yet to be determined at the time of the Matching Fund Agreement and in fact remains vague. The entirety of the

evidence available to determine the meaning of the phrase "provide the bond funds for renovation of the old library building" demonstrates that the intention of the parties was not that matching of the funds was to be the sole trigger that obligated the City to both issue the bonds and provide the bond funds. Rather, it demonstrates that the intent of the parties was that the scope of the project would already have been determined and that the only matter left was for the match to take place.

The City would not be obligated to provide the bonds prior to agreement as to the scope of the project. Because those conditions precedent have not been resolved, the mere matching of funds cannot provide a basis for requiring the City to issue the bonds and provide the funds for the Leonardo project.

4. Assuming that the Matching Funds Agreement Is "Integrated," Extrinsic Evidence of the Parties' Intent May Still Be Considered Because the Consideration Was Not Certain Enough to Support an Enforceable Contract.

An additional means of analyzing the Matching Funds Agreement as a standalone document is to determine whether there was sufficiently definite consideration provided for in the agreement so as to create a valid and enforceable contractual obligation in 2004 that the City provide the bond funds upon the Foundation providing its fund match.

For a binding and enforceable contractual obligation to exist, there must be adequate consideration exchanged between the parties. The first issue to analyze with respect to the obligation is therefore whether there was adequate consideration for the promise. "Where consideration is lacking, there can be no contract. …" General Insurance Co. v. Carnicero Dynasty Corp., Utah, 545 P.2d 502, 504 (1976). "A generally accepted definition of consideration is that a legal detriment has been bargained for and exchanged for a promise." DeMentas v. Estate of Tallas, By and Through First Sec. Bank 764 P.2d 628 Utah App.,1988. (quoting Miller v. Miller, 664 P.2d 39, 40-41 (Wyo.1983)). "Consideration is present when there is an act or promise given in exchange for the other party's promise. … Thus, 'there is consideration whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.'" Healthcare Services Group, Inc. v. Utah Dept. of Health, 40 P.3d 591, Utah, 2002 (quoting Gasser v. Horne, 557 P.2d 154, 155 (Utah 1976)).

The question is therefore whether there was a sufficiently identified detriment to be suffered or benefit received if the terms of the Agreement were met, thereby making it an enforceable contract. Upon first blush, the exchange seems straightforward: the Foundation raises $10 million and the City provides the bond funds. However, the "provision of the bond funds" is not unfettered. The City's obligation under the agreement is "to expeditiously provide the bond funds for the remodeling of the old library building." This promise is restricted to a particular use. This is reiterated in other places in the Agreement: 1) the Recital discusses the use of the funds "to retrofit and renovate the City-owned former main library building;" and 2) Section 1 states that the City will provide the bond funds "for the remodeling of the old library building." Thus, the Agreement clearly contemplates that the funds raised and bond funds

provided would not simply be exchanged, but rather used for a specific purpose: renovation of the old City Library building.

To find otherwise would require a reading of the contract that is nonsensical because it would simply require the City to turn over $10 million in bond funds without any notion of how such funds would be utilized or any control over their use. Under such an interpretation, the funds could be used to build something completely arbitrary and not compliant with the purpose for which the bond election authorized the funds. The more plausible reading is that the use to which the bond funds were to be put is an essential and indispensible part of the Agreement in determining the consideration, if any, exchanged therein. The City would be obligated to provide the bond funds only for the agreed upon purpose of renovating the old Library Building for use as The Leonardo.

However, the terms "renovation," "retrofit" and "remodeling" are not defined in the Agreement. Neither is there any detail as to what exactly the parameters of The Leonardo project would be. There is nothing in the document that details what the parties agreed to with respect to the identified use of the funds. Was the $10 million to provide remodeling of the Old Library on all three floors, plus a basement, including a cafeteria, shops, etc.? Or was it to remodel in phases with smaller portions of the Building upgraded with more to come later? The document is entirely silent regarding the issue. The City is therefore left with a document in which its sole obligation is completely uncertain.

Similarly, there is no express obligation in the Matching Funds Agreement that the Foundation actually spend the matching funds on The Leonardo. More to the point, there is nothing in the Matching Funds Agreement that directs how or when the Foundation will spend the funds to create a functioning museum.

Such uncertainly can be fatal to a contractual obligation. "Even when the parties intend to enter into a contract, uncertainty may be so great as to frustrate their intention." Restatement of Contracts (Second) § 33, Comment f. "An agreement cannot be enforced if its terms are indefinite…." Richard Barton Enters. v. Tsern, 928 P.2d 368, 373 (Utah 1996). "[A] contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." Bunnell v. Bills, 368 P.2d 597, 600 (Utah 1962). "'[A] condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.'" Cottonwood Mall Co. v. Sine, 767 P.2d 49 (Utah 1988) (quoting Valcarce v. Bitters, 362 P.2d 427, 428 (1961)).

> "[W]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." Stangl v. Todd, 554 P.2d 1316, 1319 (Utah 1976); see also Utah Golf Ass'n v. City of N. Salt Lake, 2003 UT 38, ¶ 13, 79 P.3d 919 ("An unenforceable agreement to agree occurs when parties to a contract fail to agree *on material terms* of the contract 'with sufficient definiteness to be enforced.' " (emphasis added) (quoting Cottonwood Mall Co. v. Sine, 767 P.2d 499, 502 (Utah 1988)).

Sachs v. Lesser, 163 P.3d 662 (Utah App. 2007). The question is therefore whether the Agreement provides sufficient definiteness as to the consideration to be provided by the City, i.e. the promise to "provide" the funds, that it is an enforceable obligation, because "an indefinite promise is insufficient consideration." 17A Am. Jur. 2d *Contracts* § 132; *see also* Gull Laboratories, Inc. v. Diagnostic Technology, Inc., 695 F.Supp. 1151 (D.Utah 1988) (stating that an indefinite and uncertain promise fails for lack of consideration under Utah law).

As discussed above, there is no detail whatsoever in the Agreement concerning the nature of the "remodeling" of the old Library Building that was to be accomplished using the bond funds. The term "remodeling" could have numerous meanings, none of which are spelled out within the body of the Matching Funds Agreement. The provision of the "bond funds for the remodeling of the old library building" could be viewed as so uncertain that no one could reasonable ascertain the duty the City had under the express terms of the Agreement. This lack of specificity demonstrates that there was no meeting of the minds between the Foundation and City concerning the key consideration to be provided by the City. As a result, the contractual obligation to provide the bond funds fails for lack of sufficiently definite consideration.

As discussed above, parol evidence can be used in this analysis as well to determine whether there was sufficiently definite consideration to render the promise an enforceable contractual obligation. As shown in the factual recitation above, all of the extrinsic evidence demonstrates that the raising of funds and provision of bond funds was not an exercise unto itself, but was rather for the sole purpose of creating a project known as The Leonardo at the old Library Building. That was the underlying purpose of the Agreement. Somewhat paradoxically, however, all of the evidence extrinsic to the document also shows that the two parties never had a clear conception of precisely what the scope of the project was going to be at the end of the process of raising the matching funds and therefore there was no agreement as to the City's responsibility concerning the remodeling of the library.

Once again, in making such an analysis, the Agreement cannot be viewed in isolation and must be examined in the full context the circumstances in which it was created. Both before and after the Agreement was executed, the City and the Foundation were negotiating a separate Construction and Renovation Agreement and a separate Lease Agreement. The Parties also subsequently executed an Interim Agreement addressing reimbursement for seismic study and preliminary architectural work. In that context, the impact of the Agreement is limited to the narrow context of its purpose – "to define which funds raised by the Foundation for The Leonardo project qualify as Bond matching funds." The sentence "When the total matches or exceeds $10 million, the City will proceed to expeditiously provide the bond funds for the remodeling of the old library building" would be construed in that context. Thus, the sentence would be construed to impose at most an obligation on the City to proceed expeditiously with issuance of the bonds if agreement on the scope of the renovation had been reached. Negotiation of the scope of the renovation occurred in the context initially of the Lease Agreement and subsequently of the Construction and Renovation Agreement. Because the scope of the renovation work was a material term, indeed the very essence of the consideration the City was obligated to provide under the Agreement, and no agreement was ever reached on that material

term, there can be no binding obligation on the City to issue the bonds and provide the bond funds. The parties' inability to agree upon the fundamental consideration the City was to provide is fatal to the assertion of an enforceable contract.

In this instance, the fundamental and material terms concerning how the bond funds and matching funds were to be used were not, and have not been, agreed upon by the parties. The parties have been trying to agree upon such terms since before the Agreement was executed, but have still not been able to do so. Thus, even using all of the available extrinsic evidence in an effort to ascertain the intentions of the parties, it is impossible to determine the intention of the parties. The contractual obligation fails for lack of definite consideration because the only possible consideration, i.e. the provision of the bond funds for the renovation of the building, is so undefined as to be a failure of the parties to have a meeting of the minds. Even analyzing just the Matching Funds Agreement as a standalone document, that provision of the Agreement is unenforceable, and the City is not required to issue the bonds for the purpose of funding a project that still remains unsettled.

5. Assuming that the Alleged Obligation Was Both Enforceable and Unambiguous, is the City Nonetheless Excused From Providing the Bond Funds?

Finally, and for the sake of providing a thorough analysis, even assuming, arguendo, that the City's obligation to issue the bonds and provide the bond funds at the time that the Foundation's matching obligation was certified was an enforceable, unambiguous obligation, it is possible that the City might be excused from performance by the occurrence of subsequent events or subsequent conduct of the parties. As discussed below, we conclude that the City is likely excused from performance by one or more of the following: a failure of consideration, a frustration of purpose, the amendment of the Agreement by the conduct of the parties, and/or equitable estoppel.

i. Is the City discharged from performance of its duties by a failure of consideration?

Assuming that the obligation is enforceable and unambiguous, the next question is whether there has been such a material change in circumstances that the City, if it issued the bonds and provided the proceeds to the Foundation, would not receive what it bargained for under the terms of the Matching Funds Agreement. This is difficult to determine because, as discussed above, the scope of the project has been so nebulous and there was no true meeting of the minds. However, assuming for the sake of discussion that there was such an agreement, the only possible scope of that consideration would be The Leonardo project as envisioned in 2004 as reflected in the discussions between the parties and materials the Foundation provided at the time of the execution of the Matching Funds Agreement. The analysis must then turn to whether that consideration is currently being provided in exchange for the bond funds or whether such consideration has "failed."

"Where consideration fails, there was a contract when the agreement was made, but because of some supervening cause, the promised performance fails. General Insurance Co. v. Carnicero Dynasty Corp., Utah, 545 P.2d 502, 504 (1976). "Failure of consideration [as opposed to lack of consideration] exists wherever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance." Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 91 (Utah 1988) (quoting Bentley v. Potter, 694 P.2d 617, 619 (Utah 1984)). If a failure of consideration occurs, the contract ceases to exist. Id.

It is therefore necessary to determine what consideration the City expected from the Foundation at the time the City entered into the Matching Funds Agreement. One aspect of that consideration would certainly be the $10 million of matching funds. However, the City did not have interest in that money in a vacuum.[25] Rather, the matching funds were valuable only if they were to be put into The Leonardo project that the parties contemplated at the time of the Agreement. Consequently, if, due to later circumstances, the matching funds plus the bond proceeds would no longer be sufficient to complete the project the parties contemplated, that could be a failure of consideration, excusing the City's obligation.

The Foundation's own materials make clear that there have been numerous and significant changes of circumstance, beyond the control of the City, that have resulted in the City not receiving the project it bargained for at the time of the execution of the Matching Funds Agreement. To the extent the consideration for the Matching Funds Agreement is actually identifiable, there may have been a failure of such consideration because of the severe reduction in the nature and scope of the project that the Foundation is offering to provide in exchange for the bond funds. The City would therefore not be obligated to issue and provide the bond funds for the proposed reduced project. *See* FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327 (Utah 1980) (finding that despite party signing acceptance of delivery and making payment that a failure of consideration occurred because party did not get what it bargained for); *see also* Nielsen v. MFT Leasing, 656 P.2d 454 (Utah 1982).

ii. Is the City discharged from its duties under the Agreement by frustration of purpose?

A similar issue is whether the City is discharged from any obligation it may have to provide the bond funds on the basis that the purpose of the contract has been frustrated. Using their equitable powers, courts will sometimes discharge contractual obligations when supervening events significantly change the circumstances after a contract is made. In such cases courts may apply one of the related doctrines of impossibility, impracticability, or frustration of purpose.

[25] As with lack of consideration, parol evidence is admissible to determine failure of consideration, Nielsen v. MFT Leasing, 656 P.2d 454, 456 (Utah 1982).

In Utah, the doctrine of impossibility has been defined as follows: "Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which events makes performance of the obligation impossible or highly impracticable. The rationale for this rule is founded on principles of assent and basic equity. Parties are ordinarily thought to have made certain assumptions in visualizing their agreement, and those assumptions comprise part of the basis and extent of their assent. The impossibility defense serves to prevent enforcement where those assumptions, and hence, the parties assent, prove to be faulty." Western Properties v. Southern Uintah Aviation, Inc., 776 P.2d 656, 658 (Utah App. 1989).

Furthermore, "It is now recognized that '[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' . . . Commercial Union Associates v. Clayton, 863 P.2d 29, 39 (Utah App. 1993) (quoting Holmgren v Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978)).

Frustration of purpose "differs from the defense of impossibility only in that performance of the promise, rather than being impossible or impracticable, is instead pointless." Western Properties v. Southern Utah Aviation, Inc., 776 P.2d 656, 659 (Utah App. 1989). [26]

In Castagno v. Church, 552 P.2d 1282, 1283-84 (Utah 1976), the Utah Supreme Court added the following:

> The applicability of this doctrine depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was made. Although performance remains possible, the expected value of performance to the party seeking to be excused has been destroyed, by a fortuitous event; which supervenes to cause an actual, but not literal failure of consideration. Where the defense of frustration is proper, the issue is whether the equities, considered in the light of sound public policy, require placing the risk of destruction or disruption of the contract equilibrium on defendant or plaintiff.….
>
> The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counter performance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counter performance remains valuable.

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[26] In Bitzes v. Sunset Oaks, Inc., 649 P.2d 66, 69 (Utah 1982), the court quoted the Restatement (Second) of Contracts on this point: "This statement is consistent with the doctrine of frustration of purpose as set out in Restatement (Second) of Contracts s 265 (1979). The following explanation is found in comment a. of s 265:

> The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. ... Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss … Third, the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made.

The supervening events in the current case are the change in the scope and size of the project, plus significant increases in construction costs, which have frustrated a principal purpose of the Matching Funds Agreement, namely the ability to build The Leonardo to the standards contemplated at the time of the Matching Funds Agreement. The change in scope and size is clearly substantial in light of the severely reduced nature of the currently proposed "phase" of The Leonardo. The parties made a basic assumption that the amount indicated in the Matching Funds Agreement, $10 million in bond funds and $10 million in matching funds, would be sufficient to create The Leonardo as contemplated. It is unclear whether the doctrine of frustration would apply to this event because both parties are at "fault" in the sense that they discussed and contemplated an expansion of the scope of the project.

However, the cause of the other frustrating event has been the rapid escalation of costs beyond any of the parties' expectations or control. Thus, the City's purpose in entering into the Matching Funds Agreement may to have been frustrated through no fault of its own. If so, its performance could therefore be excused under the doctrine of frustration of purpose.

The question is whether the degree of frustration is sufficient to excuse the City from issuing the bonds. Because the Foundation's proposed counter-performance of the scaled down project still has some value, it may be that the purpose has not been totally frustrated and therefore performance is still required, but it is clear that a substantial frustration has occurred that would at least call into serious question the City's obligation to perform.

iii. Did the parties amend the Agreement by their conduct to remove the contractual obligation of the City to provide the bond funds based solely upon the Foundation's matching of funds?

The Foundation's assertion that the City is obligated to provide the bond funds for the project solely on the basis of the raising of the matching funds under the Matching Funds Agreement is by definition predicated on the belief that there are no other requirements, such as agreement and approval regarding the scope of the project, that must be met. Taking that as true for the sake of analysis, it is necessary to determine whether the conduct of the parties in 2006, after this obligation "ripened" upon the certification of the matching funds, effectively amended the Matching Funds Agreement so that the City is no longer obligated to provide the bond funds. A contract can be modified by the conduct of the parties. Robison v. Hansen, 594 P.2d 867 (Utah 1979)(a "substituted contract, whether of rescission or modification, may be expressed otherwise than in words. Such an implied, or inferred, agreement, found by the interpretation of conduct instead of words, has the same legal operation as if it had been expressed in words.")

When the City certified the Foundation's matching funds in May 2006, it was evident to both parties that the original project cost estimate had been too low, and that inflation had increased construction costs such that the bond funds would not be sufficient to pay for the construction cost of the project the parties had in mind. At that point the parties began discussions and efforts to obtain other sources of money for renovation costs. The parties appear

to have agreed, at least implicitly or by their conduct, that the City would not issue the bonds if the bond funds would be insufficient to pay for the project contemplated by the parties and that further action by the City Council was necessary. Thus, the parties undertook a course of conduct that indicates that they implicitly agreed that the bond funding requirement in the Matching Funds Agreement would not be enforced, but would be postponed until (and if) other funding sources were obtained or the City and the Foundation made some other affirmative agreement to move forward. The Foundation's conduct also indicates that it believed that the City Council approval was required. This was, in effect, an amendment, or even possibly a rescission, of the Matching Funds Agreement's asserted requirement to "expeditiously" provide the bond funds.

Salt Lake City Code § 3.25 requires that City contracts be in writing and made with certain formalities to be enforceable against the City, but Utah law has made clear that even in the face of contract provisions requiring amendments be in writing it is nevertheless possible for the conduct of the parties to result in a binding amendment. *See* Prince v. R.C. Tolman Const. Co., Inc., 610 P.2d 1267, 1269 (Utah 1980) ("Parties to a written agreement may not only enter into separate, subsequent agreements, but they may also modify a written agreement through verbal negotiations subsequent to entering into the initial written agreement, even if the agreement being modified unambiguously indicates that any modifications must be in writing.") Similar logic would apply in this instance, although Utah courts do not appear to have ruled specifically on the amendment of written agreements through conduct in light of a municipal code requirement for contracts to be in writing.

iv. Is the Foundation equitably estopped from insisting that the City issue the bonds and provide the bond funds?

Finally, is the Foundation equitably estopped, in light of its past assertions and conduct, from now insisting that the City provide the bond funds for a "phased" project. There are three elements for equitable estoppel: 1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; 2) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and, 3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. Youngblood v. Auto-Owners Ins. Co. 158 P.3d 1088 (Utah 2007). "Equitable estoppel reflects circumstances where it is not fair for a party to represent facts to be one way to get the other to agree, and then change positions later to the other's detriment" Id. The first two elements are met here, but the third is questionable.

Here, the Foundation seems to have taken a position from the time of the certification of funds, through 2007, and into 2008, that the current funding level was insufficient to create the project that both parties intended when they entered into the Agreement. The Foundation recognized that the originally contemplated project could not be built with the $10 million dollars in bond funds, plus matching funds, so that other avenues of funding needed to be

explored whether they be additional city funding, ultimately denied, or large contributions for naming rights, which the Foundation was ultimately unable to obtain. During this time, the Foundation did not take the position that the City was obligated to provide the $10 million dollars and "get what it could" out of such funds. It was maintained that the project would go forward as planned and that more money would be acquired. The City relied on that assertion and position and did not issue the bonds at the time the matching funds were certified. Allowing the Foundation to now reverse its prior position and require the City to issue the bond funds arguably would injure the City as it would not receive even that level of project that could have been accomplished in 2006 had the Foundation not continued to pursue the original scope of the project. Equitable estoppel could prevent the Foundation from making such a reversal in light of its prior conduct.

6. Contractual Remedies Potentially Available to the Foundation

The Foundation is urging the City to issue the bonds. If the dispute were in litigation, that would mean that the Foundation is seeking what is referred to in contract law as "specific performance" of the contract. "Specific performance" is a so-called "equitable" remedy and there are a number of defenses that might be available to the City. Because our conclusion is that the City is not obligated to issue the bonds, we have not analyzed those potential defenses here.

Similarly, it is not clear what the Foundation's monetary damages would be for a breach of contract by the City and we have not analyzed that issue here for the same reason.

II. Has the Foundation Met the Matching Funds Requirement?

Even if the City is not obligated to issue the bonds when the Foundation meets the matching requirement, whether the Foundation has done so is relevant to any possible future decision by the City to issue the bonds. As noted above, it appears that the Foundation may well have met the matching funds requirement if it is given credit for the FEMA, County and Blue Sky grants, but further inquiry is necessary to confirm that.

A. The Amount of the Matching Funds Requirement -- $10.0 million or $10.2 million?

The City's Chief Financial Officer certified on February 1, 2006 that the Foundation had achieved its $10 million matching funds obligation and on May 19, 2006 that it had met a $10.2 million obligation. The initial question is whether the matching requirement is $10.0 million or $10.2 million. Section 17 of Resolution 39 of 2003 set the requirement at $10.2 million. Because the matching requirement was not referenced in the ballot proposition, we believe that the City had the authority to change it. The Matching Funds Agreement, which was approved by both the Mayor and City Council, changed the requirement to $10.0 million to more accurately reflect the City's intent. The subsequent parameters resolution in effect referred to the requirement as $10.2 million, but that was a unilateral act by the City which would not be

binding on the Foundation without the Foundation's agreement. Therefore, we believe that the matching requirement is $10.0 million for purposes of the Matching Fund Agreement.[27]

B. "Backfilling" for the Guarantees

Although the Foundation now acknowledges that it had not in fact met the matching fund requirement at that time due to incorrect reporting of two guarantees, the Foundation contends that it has now nonetheless met the matching fund obligation through subsequent fundraising.

The Foundation has not submitted the regular fundraising reports to the City contemplated by the Matching Funds Agreement since April 2006 (presumably because of the May 2006 certification). Nor has the Foundation specified in writing the specific basis on which it argues that it has now met the matching funds requirement.

Working from the Chief Financial Officer's May 19, 2008 letter, the numbers appear to us to be the following:

Certified funds (as of 4/30/08)	$10,210,127
Less guarantees no longer valid	3,400,000
Balance	6,810,129
Matching Funds Requirement	10,000,000
Shortfall	$ 3,189,873

From May 1, 2006 through April 30, 2008, the Foundation states that it has raised $5.47 million broken down by HB&M into three categories: (1) Contributions as booked ($1,448,672); (2) Cash appropriated from other entities ($650,000); and (3) Building partnership with the City ($3,375,000).

The first category on its face[28] would appear to qualify because they are "non-city" funds. The Matching Funds Agreement does not explicitly state that qualifying funds must be from sources other than the City, but that was clearly the parties' intent. See Section 2A(1).

That brings the shortfall to $1,741,201.

The second category consists of County and State grants, and the third category includes a FEMA grant of $1,025,000. (Again, the terms of those grants would have to be met.) The fact that those funds presumably could not be used for exhibits or programming does not disqualify them.[29]

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[27] It is quite possible that the Foundation has raised sufficient additional funds since April 2008 to make the $10.0 million v. $10.2 million question moot. If not, out of an abundance of caution if the City does decide to issue bonds, we recommend that a new "notice of bonds to be issued" be published concerning this issue so that a 30 day "contest" period could run.

[28] We are not aware of the terms, including use restrictions, on which these funds were granted and therefore cannot say whether they are "enforceable" – whether in cash or not – as required by the Matching Funds Agreement.

[29] When the proposal of a City bond issue and a matching fund requirement were introduced in 2003, the general expectation seems to have been that the bond funds would be used for renovation and retrofitting of the Building,

Section 2(A)(3) of the Matching Funds Agreement expressly refers to "State, County, or Federal Funds raised for The Leonardo's capital improvement, exhibit or program development" as qualifying funds. The FEMA, County and State grants would fit within that definition. The question is whether these grants can be said to have been "raised by the Foundation" as contemplated by Section 1 of The Matching Funds Agreement.[30] The Foundation presumably will claim that their participation in securing these grants (and the Blue Sky Grant) was sufficient to meet the "raised by the Foundation" standard. Without knowing more about the precise role played by the Foundation a definitive answer cannot be given.

C. The RDA Grant

Although it does not appear at this point that the $750,000 RDA grant is necessary for the Foundation to meet the $10 million matching requirement, it is worth addressing two points for future planning.

First, the Matching Funds Agreement at least suggests that funds raised from the City would not count toward the match. See Section 2(A)(3). The usual intent of a matching funds requirement is that the funds come from other donors.

The RDA is a separate legal entity from Salt Lake City Corporation, but it is clearly closely tied to the City. For purposes of the matching funds requirement a good argument could be made that the RDA stands in the same shoes as the City.

Second, for future planning purposes, the RDA grant would be available only if all the conditions imposed by the RDA had been met. The RDA itself imposed a $2.25 matching funds requirement. Neither the RDA grant letter nor the Matching Funds Agreement addresses the question of whether the Foundation could use the dollars it raised to satisfy both the City and the RDA matching requirements.

The RDA grant was also subject to the requirement that the actual total project cost not exceed the funding commitments. Because the scope of the project has not been finalized, this condition has not yet been met. The "phased" approach proposed by the Foundation would not satisfy this requirement. See footnote 16 above.

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while the matching funds would be used for exhibits, programs and activities inside the building. (See, e.g. Lease Agreement, December 17, 2003 draft, Section 6; Interim Agreement, Recital B.)
However, Section 17 of Resolution No. 39 provides that the matching funds must be "for the facilities described in City Proposition Number 2." Proposition Number 2 referred to "renovating, improving and preserving" the Building. The Matching Fund Agreement itself specifically states that donations for "building remodeling and renovation to prepare the building for The Leonardo's occupancy and programs" are qualifying for the matching requirement. Section 2(A)(1). Thus, funds which could not be used for exhibits or programming may still be qualifying under both Section 17 of Resolution No. 39 and Section 2(A)(1) of the Matching Funds Agreement.

[30] The focus of Section 17 of Resolution No. 39 of 2003 was on raising another $10 million of non-city money. Whether the City raised an additional $10 million from other governmental or private sources or a third party did so would not have mattered.

D. Disqualifying Expenditures

Raising the funds is not the end of the question. While the Matching Funds Agreement does not explicitly say so, it is implicit that the Foundation must not only raise the funds, but actually make them available for the project. Otherwise, raising the funds in order for the bonds to be issued would be illusory. If the project had proceeded quickly, the Foundation would have had the full amount of the matching funds available to spend on the project when certification was made. That would not be true if certification were made today because the Foundation necessarily has had to spend funds on its activities since 2006.

The point is not that the Foundation is in "breach" of its obligations because it does not have $10 million in the bank today. The question is whether the funds that it has expended have been expended in a manner consistent with the purpose of the match. For example, the Matching Funds Agreement provided that funds raised for "independent operating expenses for the current programming and administration of partner organizations (GA, CDA, USC) to the extent those expenses are not incurred in furtherance of The Leonardo project" do not qualify for the match. [Section 3(A)] By the same logic, funds raised that were spent on such purposes would have to be deducted. For example, the HB&M report identifies expenses of $117,161 as "payments to affiliates." We are not aware of any facts that would disqualify those expenses or any others. We simply raise this as an issue to be confirmed.

E. Personnel Expenses and Fundraising Expenses

The HB&M report indicates that the Foundation has spent $1,246,254 on fundraising and $899,067 on personnel expenses. These expenses could theoretically be viewed as having the effect of reducing the matching funds available for "programming" to less than $10 million. That raises the question of whether the $10 million in matching funds must be "net" of fundraising expenses and/or personnel expenses.

The Matching Funds Agreement is reasonably clear that personnel expenses for The Leonardo would not have to be netted out. Section 2(A)(2) provides that qualifying donations include "funds donated to support the development of The Leonardo's organizational infrastructure …" That should include personnel expenses.

The question is less clear with respect to the expenses of raising the $10 million. The Matching Funds Agreement does not expressly refer to "fundraising expenses" and it is not clear that initial "fundraising expenses" would fall within the "organizational infrastructure" category. The Recitals to the Matching Fund Agreement do not provide a clear answer, nor does Section 17 of Resolution No. 39 of 2003.

In terms of "parol evidence," the Administration decided not to deduct fundraising expenses in making the certification determination.

Against that background, it seems unlikely that a court would require netting out personnel expenses and/or fundraising expenses for purposes of the matching funds requirement.

III. Does the City have a duty under the Interim Agreement to pay for the seismic and architectural expenses if the bonds aren't issued?

The September 2005 Interim Agreement provided that the City would reimburse the Foundation from the bond proceeds a maximum of $10,000 for the seismic study and a maximum of $200,000 for architectural programming phase services. A May 8, 2007 amendment increase the amount for architectural services to $230,944 and added $21,135 for schematic phase work by the consultants for a new maximum total of $262,079.

The Interim Agreement itself did not address what, if any, reimbursement obligation the City would have if the bonds were not issued and the project did not go forward. We are not aware of any "parol evidence" that the Foundation understood that it was taking that risk.

This matter involves the following sub-issues:

a. Is the issuance of the bonds a condition precedent to the City's obligation to reimburse?

In Commercial Union Associates v. Clayton, 863 P.2d 29, 37-38 (Utah App. 1993), the court defined a "condition precedent" as follows:

> A condition precedent is one which must be performed by the one party to an existing contract before the other party is obligated." . . . ("Conditions precedent call for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend."). Courts must respect express conditions precedent.
>
> Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced "in accordance with the intentions as ... manifested by the language used by the parties to the contract. . . .

Furthermore, "[c]onditions precedent are operative facts 'on which the existence of some particular legal relation depends.' . . . Courts have long held that conditions that are indefinite but not illusory can be enforced. . . . Where an indefinite condition depends upon the satisfaction of one or more parties, the duty to deal in good faith is sufficient to render the condition enforceable. Utah Golf Association, Inc. v. City of North Salt Lake, 2003 UT 38, 79 P.3d 919, 921 (Utah 2003).

It is our opinion that the issuance of the bonds by the City is a condition precedent to the City's obligation to reimburse the Foundation under the Interim Agreement. The parties expressly stated that bond proceeds would be the City's source of reimbursement funds.

b. If the issuance of the bonds was a condition precedent, was that condition illusory because the City could control whether the bonds would be issued?

The law recognizes that if a party controls whether or not a condition to its performance occurs at all, that party can decline to make the condition happen, to the detriment of the other party.

> One who prevents or makes impossible the performance or occurrence of a condition precedent, upon which that person's liability depends under the contract, cannot insist or rely on the condition. . . . A promisor who prevents or hinders the occurrence or fulfillment of a condition in a contract excuses the condition, and the liability of the promisor is fixed regardless of the failure to perform the condition. A party may not hinder, delay, or prevent the occurrence of a condition for the purpose of avoiding performing the contract, or rely on that failure to excuse his or her own failure to perform. . . .

17A Am Jur 2d Contracts § 687 (2008); Young v. Wardley Corp., 182 P.3d 412 (Utah App. 2008) ("The implied covenant of good faith and fair dealing (the covenant) inheres in every contract." . . ." 'Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.' " . . .); Bastian v. Cedar Hills Investment and Land Company, 632 P.2d 818 (Utah 1981).

In the instant case, there is no evidence that the City has acted in bad faith by not yet issuing the bonds. On the contrary, the City has been willing to issue the bonds if the project scope could be specifically defined and funded. Therefore, the condition precedent is not illusory.

c. If the City never issues the bonds, is the Foundation entitled to reimbursement under the "equitable" doctrines of quantum meruit/unjust enrichment?

> In order to prevail on a claim for unjust enrichment, three elements must be met. . . . First, there must be a benefit conferred on one person by another. . . . Second, the conferee must appreciate or have knowledge of the benefit. . . . Finally, there must be "the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." . . . The plaintiff must prove all three elements to sustain a claim of unjust enrichment.

Desert Miriah, Inc. v. B and L Auto, Inc., 12 P.3d 580, 582 (Utah 2000).

Furthermore, "an unjust enrichment/quantum meruit claim may be upheld against a governmental entity. Governmental immunity may not be used as a defense to such an equitable claim." Shoreline Development, Inc. v. Utah County, 835 P.2d 207 (Utah App. 1992).

In this case, we believe that the three part test is met. First, the parties agreed that the Foundation would front the expenses for a seismic study and certain architect expenses that would have been the City's responsibility. Second, the City was aware of that financial benefit conferred on it. Third, the City let the Foundation proceed on that basis, to the Foundation's detriment, in a situation where both parties were endeavoring to structure a successful project. We believe that a court would hold that it would be unjust enrichment for the City to retain that benefit and not reimburse the Foundation, simply because the City didn't issue the bonds.

That leaves the issue of timing. If the parties had mutually agreed that the project was dead, the answer would be easy. However, that is not the case. Both parties are still trying to find a successful structure for the project and the bonds may still be issued. A court would apply equitable principles in determining when payment was due. For example, a court would look at the timing originally anticipated by the parties, the reasons the bonds have not yet been issued, and the relative hardships on the City and the Foundation. On that basis, it seems unlikely that a court would hold that payment by the City is immediately due. At the same time, a court likely would require payment in the near term if further progress is not made.