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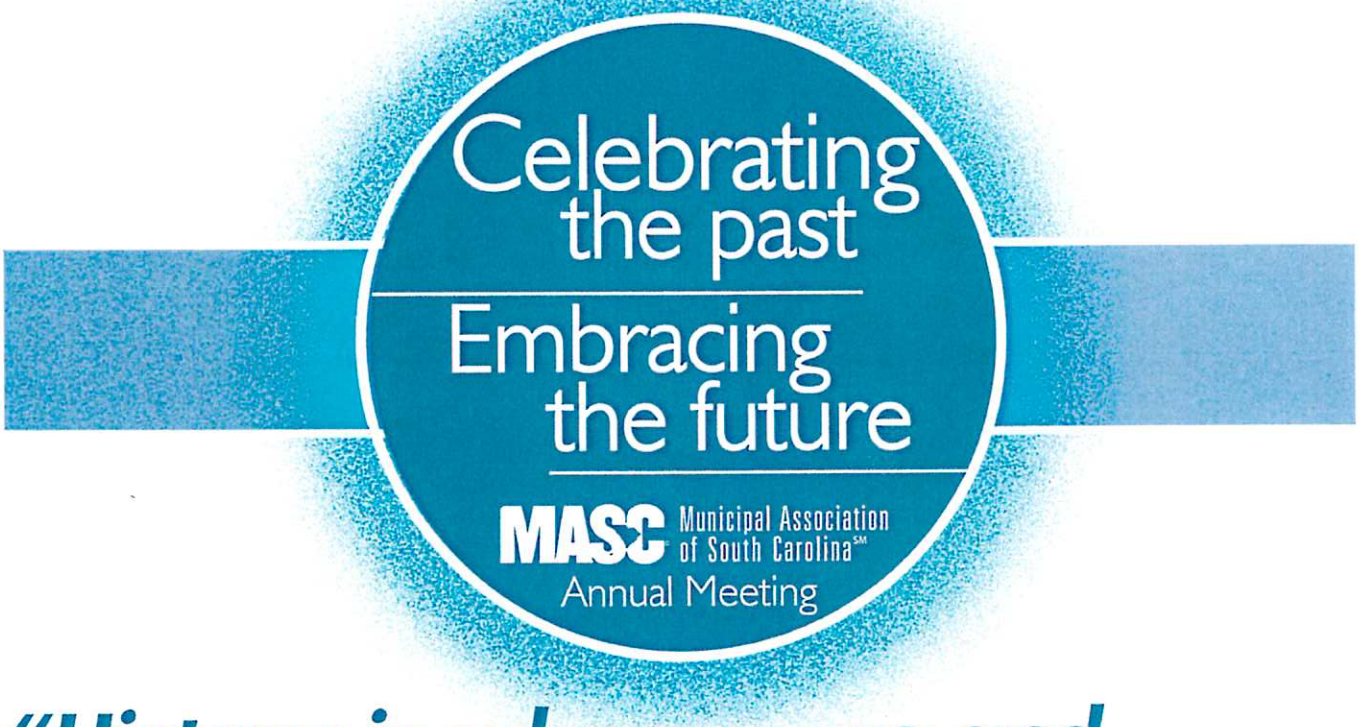

"History is who we are and why we are the way we are."

~David McCullough

Our history helps us celebrate milestones of success and look to the future to build on that success. That's just what the Municipal Association's Annual Meeting in Hilton Head this year will offer a celebration of what South Carolina cities and towns have accomplished through the decades by coming together through the Association. The meeting will also offer attendees a look at the possibilities for the future.

A look back at the Municipal Association's rich history of supporting the state's cities and towns will include the release of a book meticulously researched over several years by Howard Duvall, former executive director.

The book reflects on the Association's history, impact and legacy. It provides snapshots, milestones, stories and photographs

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In This Issue

Don't misunderstand the memorandum of understanding

By Lanneau Wm. Lambert, Jr.

Can a city change its mind about development partners after signing a memorandum of understanding?

That question bounced around in South Carolina courts for a decade, and the state Supreme Court issued the final answer last summer. A city—or any party—may back out of an "understanding" that doesn't include a definitive agreement.

That's good news for cities and governmental agencies that often use MOUs but subsequently determine that unanticipated costs or political considerations alter plans for development or construction projects.

The issue came up between the City of Columbia and the firms that were initially under consideration for design, development and construction of a publicly-funded hotel adjacent to the Columbia Metropolitan Convention Center. The city and the firms signed a MOU in 2003, and the city paid the design firm $650,000 for interim architectural design. But, after estimated costs for the overall project rose, the city issued a new request for proposals in 2004. City officials selected other firms that went on to successfully develop the hotel.

The initial group of firms was unhappy not to be included in the project after being a part of it in early planning and discussions. They sued the city, claiming that the MOU constituted an implied contract for the entire project. One central element to the design firm's claim was that it was paid for its early work on the project, which, it said, was evidence of an implied contract. The plaintiffs also said the city had received benefits from their initial involvement.

Agreeing to agree is not a contract

The court sided with the city in an emphatic ruling that said the MOU was not a binding contract, but was, instead, "a nonbinding agreement to agree in the future." In case there was any doubt about what "agreeing to agree" meant, the court added that this MOU "is unambiguously not an enforceable contract."

The decision turned mostly on the absence of any clearly expressed, long-term commitments in the MOU, as well as a clause that pointed out that some fees would be based on undetermined costs. The court cited case law that said, in order for a contract to be binding, it cannot leave open some terms for future negotiation.

The court also was not impressed with the idea that the city received "benefits" from the early working relationship, noting that "any dealing with other professionals is educational," especially in the context of business negotiations.

Takeaways

- Don't rely on what a document is named. You can call it an MOU, letter of understanding, term sheet or anything else, but the court cares about what it says. If there is an express agreement in the document, you can be held to it. And if you want it to be a definitive agreement, then call it that and make sure it reads that way.
- MOUs remain useful documents. They can be used to preserve confidentiality, to carve out a period of exclusivity that bars reaching out to other parties, and to memorialize a general understanding on key points of discussion.
- Consider including a disclaimer in MOUs. In the Columbia case, the court's discussion indicated that a provision that said the city would have no liability under the MOU if it decided not to proceed with the project would have been helpful to provide the clear intent of the parties.

The South Carolina Supreme Court has given us more clear direction by assuring us that MOUs don't have implied or assumed commitments. An MOU in South Carolina means exactly what it says —nothing more and nothing less.

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