COMMITTEE AGENDA TOPICS

I. Subject: Disparity Study
Action: On April 9, 2012, Franklin Lee presented a summary of his findings and recommendations on the Disparity Study. Mr. Lee has completed his final report, and will discuss it in more detail and answer any questions from the Committee.
No action is required.

II. Subject: DNC Economic Development Update
Action: Discuss strategy regarding business prospects attending DNC.

III. Subject: CRVA Barometer May Report
Action: Information only

COMMITTEE INFORMATION

Present:	James Mitchell, Patrick Cannon, David Howard and LaWana Mayfield
Absent:	Warren Cooksey
Time:	12:00p.m. –1:45p.m.

ATTACHMENTS

1. Follow Up Report on City of Charlotte Disparity Study Presentation
2. Memorandum to the City of Charlotte from Tydings & Rosenburg, LLP

DISCUSSION HIGHLIGHTS

Mitchell: We have three items on our agenda today but one will consume part of our 60 minutes. I did ask Franklin to give us the short version. Then Brad will lead us through the DNC Economic Development discussion and then we have the CRVA Barometer May report. Does everyone have a copy of the agenda that needs one? Mr. Kimble, I will turn it over to you and let you introduce the distinguished gentlemen from Baltimore, Maryland.

Kimble: Thank you Chairman Mitchell. None of these items today require formal action by the Committee. Brad Richardson is going to lead off on the discussion of the Disparity Study topic and then Brad will do a brief report on the Democratic National Convention Economic Development. This will be an update of some of the things that are going on between and among the organizations in our community when the DNC happens, how we are going to attach ourselves to businesses and corporations that come to town. Then you have the CRVA (Charlotte Regional Visitors Authority) Barometer Report which comes to you on a monthly basis.

I. Subject: Disparity Study

Richardson: Mr. Chairman this is a follow-up to the April 9, 2012 Council Dinner Briefing where Franklin Lee gave a summary report of the topic. We are going to dive a little bit deeper into that today. The goal today is to have Mr. Lee answer questions from the Committee.

Lee: Thank you all for coming this afternoon. By way of background, I first got involved with the City of Charlotte efforts on behalf of small and minority businesses before the first Disparity Study was conducted in 2003. At that time, the City had a minority business program. There was a legal challenge to that program and it was suspended by the City, then a disparity study was undertaken. I worked with the City in developing some race and gender neutral policies and approaches while the study was being conducted. Once the study was finished, we determined that the most prudent force of action at that time was for the City to adopt the Small Business Program and indeed the City has been operating under that Small Business Program now for the last eight years. There has been a subsequent disparity study also undertaken by MGT that was just concluded. It ran up through 2011 and the findings of that study were a good deal stronger than we had in the first study simply because the data was better on this go round than it was for the first study. There were some questions raised by the Disparity Study Advisory Committee regarding the conclusion and a policy recommendation that MGT had made based upon that study update. As a result of that, I was retained again by the City of Charlotte, this time to review the MGT study in full and in detail. To reach my own independent conclusions regarding the findings of that study and the policy recommendations that came out of it. The core issue being whether or not there is sufficiently strong based in evidence for the City of Charlotte to consider at least the adoption of some race and gender conscience or remedial policy options. So our presentation today is basically looking at what is going on under this new Disparity Study update. I am going to go through some of those findings with you this afternoon then we will talk a little bit about the core issue, whether or not there is a strong base to consider race and gender conscience remedies. Then what, if any, remedies would be appropriate in a narrowly tailored to finding and the evidence presented in this study. MGT concluded in its study that while there was some evidence that could support the restoration of race and gender conscience remedy including sub-contracting goals for certain minority groups, the evidence in their opinion did not support a legally defensible race and gender conscience contracting program. Then on February 13, 2012 along with the study by Economic Development Committee and Disparity Study Advisory Committee, the Council then voted to bring me here. That is why I am here, basically the core issue being considering totality of the evidence presented does the City of Charlotte have a strong basis in evidence for considering the use of narrowly tailored race and gender conscience remedial policy to more fully remedy the on-going effect of market place discrimination upon its contractors. That is a lot of legal mumbo jumbo but basically where we are going is adopting the standards that the Supreme Court first set forth in the Crosin case back in 1989, which says before a local government can consider, let alone adopt the use of race and gender conscience remedies, there has got to be something call a strong basis of evidence to support that. That is why the Disparity Study was conducted. Bottom line answer is in giving my review of all the evidence in that Disparity Study update that MGT

just completed. I believe that there is a strong basis in evidence sufficient to at least warrant the consideration of some race and gender conscience remedy on a narrowly tailored basis. This is so particularly in light of the fact that the City has in good faith aggressively implemented a small business program over the last eight years. But despite the implementation of that program for eight years, there are still significant disparities in the utilization of ready, willing, and able minority and women owned businesses in this marketplace. What you will see is that MGT reached somewhat different conclusions than I did even though we looked at the same evidence. Legal minds might disagree as to what constitutes as sufficiently strong basis in evidence to warrant consideration of race conscience remedies. MGT's view was that there was no strong basis in evidence for the following reasons. First being existing statistically significant disparities in part due to larger M/MWBE availability in recent years. Second an increased utilization of M/MWBE subcontractors in absolute dollars and percentage participation since the SBO Program was adopted in 2003. They also relied upon evidence that showed the percentage of the total contract dollars that were going to M/MWBE construction subcontractors had tripled since 2003. They also looked at the increased utilization of M/MWBE subcontractors in absolute dollars and percentage participation since the SBO Program was adopted in 2003. They stated that the SBO Program has been a more effective remedy than Charlotte's former MWBE Program and that Charlotte's SBO Program is apparently as effective as other M/MWBE programs in the Charlotte area today. In the last reason that they felt that the anecdotal evidence was somewhat weak in combination with fiscal evidence that showed there are in fact some significant disparities still on going. I took a different view of the same evidence for the following reasons. MGT itself admits that all of its measures of availability reflect larger M/MWBE availability for this study period; that is true regardless of what availability is used. There are a number of methodologies that disparity studies adopt in order to try and determine what the relative availability is of minority and women owned firms. The whole core of the statistical analysis is to then compare that availability to utilization. When there is significant underutilization as compared to availability that is when there is an instance of discrimination in the marketplace. What MGT did was there has been a lot of increase in the dollars that have gone to MWBE's, which is true, but that increase in dollars in terms of utilization has not kept pace with the increase in the availability of minority women owned firms in the marketplace at the same time. The methodology that MGT used in this latest study update is called a custom census approach, whereby they will actually survey from the entire marketplace and not just those that are bidding or doing business with the City of Charlotte. A custom census approach used in the study update has been upheld repeatedly in the most recent court cases. For example, the HB Rhodes case in the 4th Circuit Court of Appeals here in North Carolina; they relied on that same methodology there successfully. It was also relied upon by Concrete Works in Denver, northern contracting case in Illinois involving the Department of Transportation and a number of challenges around the country. The custom census methodology more accurately reflects full universe of available firms and MGT is right to rely upon it in the latest study. My point is that this methodology is appropriate; it more accurately reflects the full universe of available firms that are in the marketplace and that MGT was correct in relying on that methodology and as such they ought to give adequate weight to the disparity. It identifies as a result of using that method of availability. This is a key point, one of the arguments

that Dr. Eagan from MGT made in stating why he did not think it was strong enough basis of evidence to consider what the race conscience remedies were. The absolute dollars that were awarded to minority and women owned subcontractors in this study update were much greater than what you saw back in 2003 and some instances it tripled. That is just a part of the equation; you can't just look at only the numerator in the Disparity index, you have to look at the Disparity index as a whole and compare it from 2003 timeframe to what it is now in 2011. The reason for that becomes rather clear; a basic mathematical example would be let's say that you had a disparity in 2003 of one over two, meaning that for every two minority women owned firms you had one dollar of utilization. If you fast forward that to 2010 and you compared the ration where the utilization went from one dollar to five dollars that five dollars is for ten firms as opposed to two firms. If you only focus on the numerator of that ration, it looks like in 2010 we are doing a whole lot better than we did in 2003 because we are getting five times as many dollars going to minority women owned firms. But when you look at the entire ratio, the disparity ratio, keep in mind that it's not just utilization but utilization and compared to availability. What you see is that one over two is actually equal to five over ten and it's been a known truth in it all in that hypothetical example. To be sure the actual result in the Disparity Study update are more nuance and varied than this basic mathematical example that I have given you. When we get to the slides a little later on, we will show you where in fact there is still significant disparity for a number of minority women business segments across different industries. It's pretty graphic so it's really misleading to conclude that the SBO Program has been successful simply because the utilization enumerators is five times as big as it was in 2010, in this particular example. It's also undisputed according to MGT's evidence that the SBO Program did not fully eliminate disparities. The size of disparities in 2003 has been reduced somewhat but substantial and statistically significant disparities remain. After eight years of race-neutral SBO Program policy, it is time to consider the use of a more aggressive, race-conscious remedial policies, on a narrowly tailored basis. Here is a key slide (#13) this shows us where we still have problem areas any place that you see red is a problem. Meaning that using the Supreme Court standard of what a substantial disparity is that is where the utilization of a minority firm is at least 80% or less that should be given the availability in the market place. You have an instance of discrimination where you see the double asterisk next to the "yes" that means that not only the disparity substantial, but it is statistically significant. That means that MGT conducted a statistical analysis to show that there is a 95% confidence level that the chance did not result in this disparity, that race and gender had something to do with it. So certainly in the area of construction subcontracts and A&E subcontracts, you can see where there is disparity. Some of these ethnic groups if statically significant and it is substantial.

Howard: What you are saying is that MGT did not give a lot of weight to anecdotal. What does that show on just the ratio basis and would that still be significant to you?

Lee: My conclusions are based on the totality of all the evidence and I will get to the antidotal evidence as well. We are just focusing on the statistical evidence right now. The statistical ratios are showing that there is an instance of discrimination at the very least. Any place that you see red on that chart that is after eight years of a Small Business Program. It's a problem that minority and women owned business were facing in this market place solely in the fact that they are small. You would not expect to see this much

red; this is roughly 2/3 of every segment of the industry that have some problems with substantial disparity. The presumed superiority of the SBO Program as compared to past City M/MWBE Program and current nearby M/WBE programs is not necessarily valid. As all M/WBE programs are not created equal. MGT has not demonstrated that those M/WBE programs are in keeping with today's best practices, such as effective and narrowly-tailored outreach, strong monitoring, contract-specific goal-setting and enforcement through sanctions as well as adequate staff and resources, automated bidder registration and automation in tracking of availability and actual payment data. Today's minority programs that are being adopted across the country are more effective and more narrowly tailored in terms of their outreach. They have the ability to break down your contracting patterns into commodity codes and to set goals based upon the availability of each one of those commodity codes. You are still going to have substantial disparity even with an aggressive Small Business Program. This Small Business Program is doing better than the old MBE program; I believe is not necessarily a valid point because not all MWBE programs are created equal. First of all, the old program that you had would not be like the program that we would have today. There have been a number of legal challenges to these programs over the years, and as a result, they have gotten much more supplicated, much more narrowly tailored and much more effective today than they were in the past. If you think of this Disparity Study in terms of where the illness is, the program is a remedy and you want to make sure that the medicine gets to that segment of your business population that is hurting the most. And that is what the new generation of the MWBE programs will do so it's really not fair to simply compare the SBO Program results to the old 2003 MWBE program because that is not what we are recommending. We are recommending that the City would consider at this stage.

Cannon: Could you tell me about the paid aspect of this as well?

Lee: In the past, the City of Charlotte and other jurisdictions around the country would make determinations about their MWBE programs based upon contract award data. There is a big difference between what a prime contractor promises it will do in terms of MWBE subcontract utilization and what it actually ends up paying them. I know in my hometown in Maryland, we had a legislative audit that was conducted on our minority business program that showed as much as a 40% variance between what was promised by prime contractors when they got the award and what actually ended up being paid to those minority sub-contractors.

Cannon: Have you seen that to be the case here in the City of Charlotte?

Lee: I don't know whether that is the case here in Charlotte or not but I am simply stating that any program or policy that we would recommend would base utilization on actual payments. There is better payment data today than there was back in 2003, which was one of the reasons why we didn't feel we had a strong basis of evidence to recommend a MWBE program back in 2003. Even looking at payment data here, you still have substantial disparity.

Cannon: From where we sit, I have never gotten a complaint for anything like that and I am sure if someone has been shortened on their pay, I would have gotten a call about it.

Lee: What we did get complaints about, and this has come up on anecdotal evidence that we are talking about, we did get complaints here of false reporting. Meaning there are instances where a subcontractor in submitting a bid that minority firm is never notified that they have listed and they never get a call and never get the work. So if they don't

know that they are supposed to be working, they never complain to you. Because market place discrimination often occurs outside of the presence of those affected, there is low probability for victims to have direct knowledge and yet anecdotal evidence is quite robust with over 100 particularized accounts/affirmations of discrimination with four different methodologies. Anecdotal evidence bolsters conclusion that discrimination occurs in many forms. Discrimination likely occurs in much more than a few isolated instances. Combined with widespread statistical disparities, anecdotal evidence supports class-based remedies.

Cannon: The biggest issue that I have gotten is maybe that some subs haven't gotten paid at all or there has been a lapse in time.

Lee: Low payment is still an issue that needs to be addressed and we have some policy recommendations that will help deal with that.

Howard: Do we have any of this in place now to make our system more responsive?

White: Some of that is in place now. We do have a payment affidavit policy to address the point that was just raised where the primes were supposed to tell how much they have paid the subs and they are supposed to be checking to make sure that the subs that the dollars were committed to actually get the dollars. That is in place; we are continually working on our recording and record keeping practices. As you are aware, in the past that has been a problem and some of that will be addressed with the ERP system, the tracking piece and we are continuing to try to find ways with or without the ERP to address these issues.

Howard: Are any specifically listed? Are we doing any of this now?

White: We are doing contact-specific goal setting; we have enforcements through sanctions. We have liquidated damages and we have set several letters threatening liquidated damages and usually that is enough to get someone attention.

Rosado: We do track the payments that are made so anytime when you are seeing the recommendation of Council Agenda, you are seeing what the prime has committed to and that is being tracked throughout the process.

Howard: Are you saying that the MGT report didn't address these?

Lee: MGT was trying to compare your present SBO Program to other MBE programs in the area and to you old MBE program by saying that it's superior in terms of results that it is getting. My point is that you are comparing apples and oranges. The kind of MBE program that we are talking about adopting today is far superior to what you had back in 2003.

Howard: The recommendations from MGT didn't address any of these?

Lee: They failed to analyze those MWBE programs to see if they had adopted these best practices. This is what is considered to be best practice in the industry today in terms of MWBE programs.

Rosado: They touched upon some of it and some of it we are already doing. The contract specific goal study they may not have touched upon it as much as a recommendation because it currently is this, so we are currently doing it. Their recommendation was to improve on that and reinforce what we are currently doing and tied to that is the Good Faith Efforts. So they do address some of these but not all of these. We can bring those back to you if you would like to go over those recommendations.

Howard: A lot of these make sense and I would like to know if these were suggested before or not.

Mitchell: Staff, can you bring MGT's recommendations back to us?

Rosado: Yes.

Lee: I can tell you that these are the kinds of recommendations that MGT frequently makes for MBE programs. There is nothing that they would be shocked by I think. In fact, they

usually say that you should model your MBE program after the Federal Disadvantage Business Enterprise Program, which has all of these features built into it.

Howard: I want to make sure that our Program reflects best practices.

Kimble: When we show you some of the recommendations that MGT made, they may be phrased differently, but they will touch in some way on many of these.

Mitchell: Ms. Mayfield has a question about enforcement through sanctions.

Lee: A lot of time under the old MBE program that the City had if someone asked for a waiver, they would get it. MGT made the point that they thought that the SBO Program was stronger because there were only two waivers that were granted under the SBO Program, but there have been 12 waivers granted under the MWBE program. When you have a prime that is not complying with the Good Faith Efforts requirement in terms of subcontracting, if they are not negotiating in good faith with minority subcontractors, they are violating the policy and there should be sanctions for that. Cindy mentioned the liquidated damages provision that you have with the Small Business Program. You should have similar provisions with any MBE component to your program. If a firm violates a non-discrimination policy, there should be provisions taken to prevent them from doing business with the City for period of time or remedy that discrimination and prevent its re-occurrence in the future. You also must have adequate resources and not one person running the whole show.

Cannon: When we were dealing with a study back in the day with DJ Miller and Associates.

White: I was not here, but I am familiar with it.

Cannon: When we had our MWBE Program, we pretty much had these best practices in place.

White: Yes, some of them.

Cannon: I am looking at these six and there may be one or two that we didn't have.

Lee: Did you have a contract specific goal setting program back then?

Cannon: We did, but what we could not do, the issue became whether or not we wanted to have set aside versus goals; we ended up going toward goals.

White: Some of the differences were the good faith efforts under that old program were a lot more vaguely worded so it was less clear what the primes had to do to satisfy them. So fewer bids were rejected under the old program and it wasn't as adequately staffed. It was not quite as well monitored from the payment standpoint.

Cannon: We had more then than we have now staffing it.

White: Certainly with software, it has made it easier to track and enforce some of this.

Mitchell: Teresa McDow really has her hands full on the County side. What is adequate staff when you look at all these programs; it is six, seven, eight, nine, three? What is staff support for 672,000 citizens?

Lee: It depends on the size of your business population that you are serving and how big your women in business population are. I know that you need some staff that is dedicated to this certification side of things making sure that the firms that benefit from the program meet the standards. You also need staff that is dedicated to doing the outreach to help creating relationship with primes and subs, but also in-reach introducing your MWBE population to the City contracting process, meeting the key people involved in issuing those contracts, learning how to prepare themselves in seeking City contracts and capacity building. In a perfect world, you would not be able to look at the color of the skin of a business person and determine what industry they were in. You would have the same distribution regardless of race and gender across all industries. So the more successful

programs are the ones that have been able to pay some attention to those kinds of issues because they are not bogged down writing reports all the time and trying to collect data. That is where we would like to see the City of Charlotte get to and have a more effective program.

Mitchell: You have to give us a number.

Lee: I can't give that to you today; you don't have a program yet. All I am trying to do today is to let you know that there is a strong basis of evidence to consider certain types of race and conscience remedy; I going to give you some policy options that you can take into consideration. Once you define what that program is going to look like, then we have a better idea of the kind of resources that you need.

Mitchell: Here is the struggle we have on June 11th, we are going on our budget and so we have a timing issue. Right now, Nancy you have how many?

Rosado: Five.

Mitchell: She has five in her department so if you would share with us incorporating that practices that will make Charlotte successful, staffing wise, we need eight. It's better if we get that type of information before June 11th.

Lee: Well, I can tell you that I haven't talked to an MWBE director or small business director that says they have enough staff. So anything that you can come with, I am sure will be greatly appreciated.

Kimble: I hear what you are saying, but I think it's more important to make sure that we get the right program for Charlotte and then we build the staff and the resources that support it. I hear your time pressure, but I don't know if I would let that time pressure influence the study that we need to do quickly but efficiently on the right program.

Cannon: I just want to make sure that the person that we put at the helm has the appropriate resources that are not stretched so thin that we do have in place what could be a program, maybe a joint SBO/MWBE type program. One that can be administered again without any pressures on the staff and maybe making sure that there are appropriate job descriptions for each one.

Mitchell: One issue that you touch on and one that all of us can agree on that we would like to see is capacity building. I called Nancy and she said James we are building capacity. In one particular area CMUD. CMUD is probably going to be a great opportunity for us from the standpoint of working and getting the SBE involved. When you look at our database and utilization, the frustration that we have is that we see the goal as 3% and we see a $12,000,000 project. We look at Nancy and say, why not 20%? Why not 30%? But the utilization is so low because it was a struggle to get to 8% on the project. We have City Council that wants to help SBE and we have a staff that would love to do it, but capacity building becomes a challenge for her and we all get some level of frustration. Even when we bring in experts like Carol Lilly who says, "James, you just don't have it out there". I just want to make sure that we are fair with staff about allowing them to build capacity, especially in the next three years. CMUD and the Airport are going to be an opportunity, but when you look at the database, we don't have small business.

Lee: They have the same problem down in Columbia, S.C. They had a massive water sewer project in place and they realized that they did not have enough pipe contractors period in town to handle the work load, so it was a great opportunity to build capacity. At the same time to get minority and women owned contractors diversified into that area what will be around for ten years when there is an increase in demand. They created a mentor

protégé program where they tried to team up some of the small minority contractors with some of the more successful pipe contractors in the area and build capacity. Let's look at the anecdotal side of this MGT made the point that the anecdotal evidence wasn't all that strong. Anecdotal evidence is quite robust over 100 particularized accounts/affirmations for discrimination with four different methodologies. Anecdotal evidence bolsters conclusion that discrimination occurs in many forms. Discrimination likely occurs in much more than a few isolated instances. Combined with widespread statistical disparities, anecdotal evidence supports class-based remedies. Something that maintains the best elements of your small business program but combines it with additional tools, put additional tools in your tool kit to address those more persistent areas of disparity that is a minority women business program that has features that include contract specific determinations for the application of the SBO or the MWBE features based on a clear criteria. SBE or M/WBE subcontracting goals with good faith efforts with a vendor rotation on informal contracts and increase formal bid threshold to $500,000 on construction contracts. Policy recommendations would include an automated mandatory centralized bidder registration. The benefits enhance targeted automated outreach and greatly reduces administrative burden of such issues as satisfying good faith efforts requirements and contract-specific goal setting. Tracking and reporting of M/WBE utilization through payments and providing transparency in payments for better enforcement of prompt payment provisions. Other policy recommendations include an automated mandatory centralized bidder system model such as Washington Suburban Sanitary Commission, which was developed in house. The metropolitan district in Hartford, CT was an off–the-shelf software product as was DFW Airport. The City of Columbia, South Carolina developed theirs in-house.

Mitchell: On the vendor rotation in informal contracts, staff is anything under $200,000?

Rosado: $200,000 for construction.

Mitchell: So those incidents, there is not any goal established? The department can select who they want to perform the work.

Rosado: On those contracts, there aren't any sub-contractors established but the department has informal goals. So City-wide, we have informal goals; the department has a 5% SBE utilization goal.

Lee: Raise the threshold for informal contracts from $200,000 to $500,000 that could have significant impact. It's very important to bring some integrity to your reporting process what is actually happening with payments and what is happing in terms of availability of minority and women owned firms in the market place. But also in terms of the outreach efforts that you want to undertake. Vendor rotation options are based on bid solicitations on informal contracts require at least one or two out of three firms to be contacted of quotes are SBEs. Job order contracting or multiple prequalified firms selected on formal contracts with rotation of assignments of repetitive tasks. Increase the informal dollar threshold on construction contracts to $500,000 and reserve bidding for SBE primes. Hybrid SBO/MWBE programs such as the City of San Antonio model and the Washington Suburban Sanitary Commission model are examples. Contract-by-contract determinations of when to apply SBE goals versus M/WBE goals are based upon clearly stated criteria and size of goals. Goal setting committees functions as check and balance in applying race-conscious remedies. The best practices in race-conscious remedies have the benefits of hybrid SBO/MWBE programs most narrowly tailored forma of race-conscious programing.

This reduces legal risks from constitutional challenges and typically reduces the need for waivers that can delay procurement process and encourage bid protests and lawsuits. Maximum flexibility for varying the aggressiveness of remedies to get the best results.

Cannon: Nancy how does this recommendation stack up to what is currently in place?

Rosado: For the centralized bidder registration system, we have something not quite as advanced as this. We do have what we call Compass, which is our vendor registration system. Vendors are required to register in this system if they are interested in doing business with the City. To some extent, we do provide notices of opportunities, but there is not a central location for all of those opportunities to be housed so some of these assets are being touched upon on some level and others not at all.

Cannon: I would imagine that there would be a cost to this to some extent, so at some point Mr. Chair, I would like to get an idea and breakdown of what these recommendations would cost.

Rosado: The ERP system that we are looking at will touch upon some of those; it's not going to touch upon all of these. We have been in conversations on what are costs and the requirements and what are the things that we would like to have in that system. So staff is having those conversations.

Mitchell: Go back to that screen on payments (slide 17). Most of our sub-contractors would do a joint check. Does the system allow the flexibility to monitor joint checking as well? Especially point number three, the payment.

Lee: That is an interesting question. If you have a joint payment, the prime would still be responsible for indicating which part of that the sub gets to retain.

Mitchell: Exactly.

Lee: And that helps the SBO office do their monitoring on the back end to make sure that, in fact, the utilization that has been reported is verified. There are some software products out there that can help track that as well. But there has to be clear delineations as to what portion of the check goes to the sub and what portion goes to the prime; both of them would have to sign.

Mayfield: So we are thinking about what we just looked over and as far as creating those penalties if you are not compliant? Do we already have something in place tracking the payments? We have heard previously where some sub-contractors were delayed in their payments which often causes their credit scores to be dropped, therefore making it more difficult going forward. Do we now have something in place where there is potential fines associated if that contractor does not keep up with the agreement of paying the sub? Or is that something that we can look at adding or how well are we actually monitoring and giving the program the teeth that it needs in order to be successful?

Rosado: We currently do not have penalties associated with that. Typically, we take the stance that it is between the prime and the sub; that is their business relationship. We will advocate and there are times when we will hear from a sub-contractor calling to say that they have not gotten paid. We try to facilitate that conversation and dialogue, but at the end of the day, it is between the prime and that sub.

Mayfield: What I am hearing from going back and reviewing the study and from attending a number of meetings last year where we had discussions with MWBE's that disconnect right there that is happening. You win the contract through the City, is there a way for us to make sure that the policies and procedures that we put in place are there to help the sub-contractor to graduate if they choose too? We still have a role to ensure that once that

they leave out and create their contract, that they are still being protected. So once that the relationship is created and we verify that it is an actual relationship, we step away from it, outside of them calling you to say I haven't gotten paid. But that is 30 to 45 days or 60 days later before they talk to you, and in the meantime, they are being put in a financial position that will hurt their small business. When they come back later, we very well tell them that they don't qualify because their scores have dropped.

Rosado: We can look into things and see what we could in that aspect of the relationship.

White: It is actually a breach of the policy to not pay on time and the City can withhold money to the contractor. We can declare the contractor in default. I think what Nancy is referring to is a lot of the hesitance a lot of time, not every time, because there are times when people aren't paid and they should be. But sometimes it is because of the dispute between the contractor and the sub and we have been very reluctant to try to get into the middle and figure out who is right.

Mayfield: O.K.

Lee: Those kinds of nuts and bolts questions come up frequently in MBE programs and again where staffing really is key. Ideally, the City should have a staff person on construction projects or at least a staff person present on the job site just to track who actually shows up on the job. There are a lot of reasons for that beyond the MBE program, but you have liability issues. You don't want someone that is not licensed to be installing electrics on City projects so that inspector should be verifying which subs are on the site, who does the work and that nips a lot of these disputes between prime and sub.

Howard: Going back to what Councilmember Mayfield was talking about, what is the penalty if that part of the enforcement such as a mechanical lien or something against the prime for not paying? Are they automatically out of future contracts?

White: They are not automatically out of the running; it's the financial ability is certainly something that can be considered in determining whether somebody is a responsible bidder. They wouldn't automatically be disqualified, you would look at their financial situation at the time they submitted their new bid.

Howard: Would that include checking for a lien?

White: Sure.

Lee: There are some cities that have a debarring procedure. I think when I was here last; I was not sure the City of Charlotte had one.

White: No, we went through Raleigh to try and get that. We tried to get the right to debar contractors from doing business with the City; actually we tried to get it for commercial non-discrimination and we couldn't get it across the board. So we did something a little more modified; we said basically we can say that we are not going to do business with you if you have been found to violate the commercial non-discrimination ordinance until such time as you show us that you have taken steps to fix that problem.

Howard: But if you have a company that shows a trend of doing that over and over again, there is nothing that you can do about it? If they take care of it, even if it takes months, they can keep applying?

White: Are you taking about discrimination or the non-payment? We have some flexibility.

Howard: Non-payment I guess because that is what we were talking about, but since you brought up discrimination, there too.

White: I think if you can find that they are not financially responsible, then we can reject their bid as being non-responsible. It just depends on the facts of the individual case.

Mitchell: What if I, James, have $3,000,000 but I refuse to pay Patrick even when I owe him $189,000? What do you do with James? Do you allow him to continue to bid on the next project for Charlotte or do you say James, you have the financial means to pay?

White: I think we have to look at the circumstances that are in the dispute or was it flat out failure to pay. If it was just one time or multiple times.

Lee: Typically, I have seen cities hold up payments to primes; say you won't get another payment until he gets paid.

Mayfield: I understand that we do have some larger contractors that do have a history. If I am that small business owner and I know or there is the impression that this contractor is very well known and connected, if I am the one that is making waves and there is not a clear path for me to receive justification that I should have or for this to be settle, then the chances of me pursuing it may be less likely. If I do pursue it, there may very well be some type of retaliation later on through other contracts. So let's be realistic, Charlotte is a very small town and if I am in a certain level, the people that I am in those circles with that is a matter of conversation. It could be a general or specific conversation that could hurt that small business moving forward. We can say confidentiality all day but the reality is we are a small town. So what does the City have when we are trying to grow a city, both the prime and sub when they sign that contract? We clearly have policies and procedures that have enough teeth to be acted up to make sure that we are reducing the chances of anything happening that is going to be detrimental to that small business.

White: I think that is certainly something you have made clear that we need to talk about going forward as we look at revising the Program. We will look at what we have now. I haven't had an experience in enforcing that but I don't typically work with Engineering or Utilities on their contracts, so I can't really answer if they have had that come up or not. I personally have not, but that is not to say that the City has not. That is definitely something that we can take a look at to ensure that it is not a problem going forward.

Lee: in construction contracts, there is software that tracks the scope of work and the schedule to be performed over a period of time. They have cash flow projections and also software programs that help you track the MBE contract participation along with that, so if the gap between what was promised in terms of MBE participation and what is actually achieved becomes large enough, the program will flag it and notify the SBO office.

Mitchell: What is the name of the software and do you also know the cost of that software?

Lee: Yes, there are a few products out there; Prism is one and there is one called B2G Now and E-Bid marketplace. The prices range from $30,000 up to $100,000.

Kimble: Those conversations are already taking place between our staff members and the price that fits is GRT Networking.

Lee: O.k., my hour is up now.

Mitchell: Thank you, this is hard work. We always put you in a tough position bringing you down to Charlotte and tell you to look around, so thank you for taking this responsibility. This will be the only time we get to see you so I want to personally thank you for spending your time and coming here visiting with us. With that said, I will look at my Committee Members to see if there are any other questions we have for Franklin; this is our only opportunity to have him here in front of us.

Howard: I would like to know what the next steps are.

Richardson: Let me take a stab at the next steps; your next meeting is June the 7th. You have Franklin's report in front of you and there are some copies at the end of this table. The

date is May 9th and that is important because you are getting the information right off of Franklin's word processor computer. We need some time to go over this; a lot of questions have been raised. What we would like to do is come back on June 7th and lay out those next steps process. If you are like me, you are looking down the road asking for what happens and when. We want to digest that question very carefully. There are a lot of folks involved; you see some City departments in the room that have a stake in this and some Disparity Study Advisory Committee members in the room and a lot of business owners. We want to make sure we know who to contact when the appropriate time to contract comes. Cindy and Nancy will talk to you about the proposed next steps in the process.

Cannon: I would hope since it has been on our docket for a very long time that we could report out. I don't want to rush it.

Kimble: This is a process that we are thinking about laying out for you on June 7th. Take the comments of the Committee and the recommendations in August for you to start looking at and I don't know how long that is going to take for you to digest and review. Ultimately, it is going to be the Committee's recommendations that go to Council.

We want to do it right so it's probably another three or four months, that is just thinking out loud and we can discuss more of that in the meeting on June 7th where you can have more input into our schedule and what we decide to do to move forward.

Mitchell: To reach a compromise Mayor Pro Tem, if staff can give us a timeline, we have until June 11th to report out to Council with that. I like to report out on those things, here are some facts and here is the next step on the schedule.

Cannon: Yes, that would suffice greatly if we can reach that, it would be really helpful. Mr. Chairman, I think one of the things that you have been doing and we can work together on this, but we have a timeline and we want to see something happen. We are well past that timeline and that is o.k. because we have been challenged and we want to give due diligence to what MGT has suggested and be able to give them a report back in terms of Mr. Lee. That in terms of what we have received in the past put a snag in where we wanted to be and where we wanted to go, so I think to your point, to go ahead make that doable.

Mitchell: O.k., June 11th report out to Council.

Kimble: When you get the process on June 7th, you will report that to Council so that the Council will know what to expect at that end.

Mitchell: I think Mayor Pro Tem was being very kind but I think the one thing that we all have talked about is making sure that the community knows that this is a top priority and focus. We are committed to make it deliverable so I think we can report out and just inform everyone, that would be a good thing for us.

Cannon: Thank you Mr. Chair.

Mitchell: Committee and staff, if we talk about making this transition to a whole new program, I want to think about even changing the words. I think SBO Program has some emotional energy attached to it and I don't think sometimes that it is good energy. I would like for us to look at when we come back, are we now talking about new economic inclusion and performance program, a new economic capacity building program. I think we all need to take a deep breath and say the past is in the past. We are trying to put a program in place that will really make a difference in our community. Committee, think about a new name. I am going to challenge staff to come up with a creative name, but I think we are

ready to do that. I will be the first to admit to you that I still remember 1:00am on February in 2002 when we got rid of the old MWBE. I need to let go because I am not as effective if I don't embrace something new and I can share and build capacity in our community. It's time to move on with a new program for our community. Thank you staff. Our next topic is the DNC update.

II. Subject: DNC Economic Development Update

Richardson: Thank you Mr. Chairman. I will be necessarily brief because it's not a longer report today and we are happy to keep you updated. The topic that I have been asked to talk about is activities on-going for economic development around the DNC. I will lay out some ground work. We know that there will be several thousand media in town that in itself is a large economic driver. We are not really talking about that in the context of this conversation. What we are talking about is the request by you, what are we doing to leverage business recruitment opportunities. When we talk about business recruitment opportunities and a convention that drives business recruitment, there are partners around the table. You would know who they are, they are certainly it would be the City, the Chamber of Commerce, Charlotte Regional Partnership, Charlotte Center City Partners and the Charlotte Regional Visitors Authority when it comes to the tourism aspect. That is the framework that generally works with Economic Development on recruitment and retention. In this case given that it is an international audience, there are some other players around the room; those that work with international export assistance center in town. I will summarize my report by saying that a lot has been done by some players. The City has done most in planning, security and in business we call it continuity. We have a lot of need happening with hotels and restaurants, large property owners, parking lot operators led primarily by the Police Department and the Transportation folks. We have met recently with the Chamber to partnership on our first real planning meeting which happens next week where we begin to map out the strategy. Think of international, think of domestic, think of Fortune 500 and international companies. I will tell you a couple of things that the Chamber has shared; they have been proactive in the sense of the last six months to a year doing some direct mailing to Fortune 1000 companies. There have been efforts to target Fortune 500 companies through direct contact. Those are tactile things that happen anytime a convention like this is announced in Charlotte. We will be exploring ways to enhance and amplify and bring in the collective resources of those partners to do a very broad base approach. The end game of this is to get the notoriety from the media in town but we also want to make sure that we capture our direct contact and face to face meetings potentially between foreign investors and local corporations. Leveraging all of the resources so when they walk out of our City understanding that this is a great place to come locate and set up shop; we are hospitable to the international world. That is a brief report. I wish that I had more to share but we will continue to provide information to you.

Howard: The reason that I asked at the last meeting was I that hear a lot of we do this on anormal basis. I think this is somewhat of a not a normal situation. Then intentional about what we heard at the Retreat is what I am trying to get at. I am not sure who was doing it but one thing that was made clear was that somebody needed to take it up. From what I understood from a lot of people was that the Host Committee was busy, the Chamber is going to do its own thing, but who is going to make sure that we don't just leave this with

this being a convention that came spent money and left. The connections between companies and people that come, the connections between diplomats and the Chamber; the things that we just normally don't do is what I am looking for. We hope that some of this lands but we wanted to make sure that we got four more companies in energy. We have identified these three we know that they have expanded and we want to make sure that while they are in town, we put the right diplomats in the room with them.

Richardson: So don't misunderstand that the old things are still happening but what I want you to hear today is that we collectively met with Mr. Fowler just to learn from him. It was a larger room with the partners bringing several staff; the outcome was let's spend some time with a task force of key folks of each of those five or six agencies mapping out the strategy. We know some things that will happen and we need to plan some others.

Howard: Who is taking the lead, following economic development? I think that I felt that was still up in the air, maybe it was Chamber or maybe Ronnie. Your hands are full too like you said we have the security and all this other stuff.

Kimble: It's more the Chamber in the lead, but all the other partners have to be at the table because each has a role to play in the overall theme plan strategy. The Mayor was at that meeting and the Mayor is also very engaged. It's also data. Where do we get the data on who is coming and how you sift through that data and make the contact? What is the right contact to make and what is the right medium to make that contact? So we are going through that as well.

Howard: If the Chamber is going to take the lead, can we make sure as strong as it can possibly be heard to do all that stuff that we just talked about? It can't be just a bunch of numbers, it can't be you have to take this all and run with it.

Kimble: I said the Chamber takes the lead, but I think the lead is with the Chamber and the City because we are joined there with the Mayor.

Cannon: When we were at the Retreat, the question was posed and I asked the President of the Chamber, he had no response. He did not know what they were going to do. I asked him, "what is your plan for dealing with international business opportunities"? He had no response, which said I think we have the ball rolling. The one thing I would like to get away from is the tug of war in the private sector between like interest entities that are responsible for bringing companies and corporations to the region and/or the City. We can all be at the table together working for the common interest.

Kimble: In the meeting, there was 25 to 30 people gathered around the table doing an exercise on how we get the data, how do we contact, how do we pursue, how do we connect and then that group is going to have a small task force group that goes off and brings the things back.

Mitchell: Brad and Ron, I will ask that when you get comfortable, come back to us with a schedule of things. I know July 19th we are scheduled for a report back of where we are and hope by then the pieces will be in place. Brad, thank you. We talked about getting a copy of this when we had the entrepreneurs here; you went to the meeting so thank you for giving this report.

Cannon: Who again is leading the charge for the DNC?

Kimble: City and Chamber.

Cannon: Should we have some that is neutral?

Mitchell: Mayor Pro Tem has a good point. Who was the guy that came to our Retreat?

Kimble: Don Fowler.

Mitchell: Is he retired?

Kimble: He is and he lives in Columbia, South Carolina.

Mitchell: Mayor Pro Tem point is that if you find someone that doesn't have just one set of lenses on, I wouldn't mind if we had a conversation with Don, just a conversation. His experience was very helpful to us at the Retreat. We have the CRVA Barometer Report in closing. The next meeting is June 7th. Thank you all, the meeting is adjourned.

Adjourned: 5:00p.m.

Economic Development Council Committee
May 17, 2012 at 3:00pm
Room 280

Committee Members: James Mitchell, Chair
Patrick Cannon, Vice Chair
Warren Cooksey
David Howard
LaWana Mayfield

Staff Resource: Ron Kimble, Deputy City Manager

AGENDA

I. DISPARITY STUDY – 60 minutes
Staff: Nancy Rosado, Neighborhood & Business Services & Cindy White, City Attorney's Office
Guest: Franklin Lee, Tydings & Rosenburg, LLC
Action: On April 9 2012, Franklin Lee presented a summary of his findings and recommendations on the Disparity Study. Mr. Lee has completed his final report, and will discuss it in more detail and answer any questions from the Committee. No action required. **Attachment**

II. DNC ECONOMIC DEVELOPMENT UPDATE – 10 minutes
Staff: Brad Richardson, Neighborhood & Business Services
Action: Discussion of strategy regarding business prospects attending DNC.

III. CRVA Barometer May Report – (Information only – Attachment)

IV. NEXT MEETING DATE: June 7 at Noon, Room 280

Future Topics & Tentative Schedule:

- Disparity Study (June 7)
- Business Investment Program Update (June 7)
- Youth Employment (June 21 or July 19)

Distribution: Mayor/City Council Curt Walton, City Manager Leadership Team Executive Team

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Franklin M. Lee
Partner, Law Firm of
Tydings & Rosenberg LLP
Baltimore, MD

Follow Up Report on City of Charlotte Disparity Study

City of Charlotte, NC
Economic Development Committee
City Council
May 17, 2012
3:00 P.M.

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Background

- In October 2010 the City retained MGT of America, Inc. (MGT), to conduct a Disparity Study comparing use and availability of minority and women owned business enterprises (MWBEs) on City contracts.
- The 2010 Disparity Study covered City spending from July 1, 2005 through June 30, 2010, updating the City's 2003 Disparity Study (also conducted by MGT).

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- MGT presented findings and recommendations to City Council in September, 2011.
- MGT concluded that while some evidence may support the restoration of race and gender conscious subcontracting goals for certain minority groups, the study's cumulative evidence did not support a legally defensible race and gender conscious contracting program.
- On February 13, 2012, following review of the Disparity Study by the Economic Development Committee and the Disparity Study Advisory Committee, City Council voted to retain Tydings & Rosenberg LLP to review MGT's findings and recommendations.

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CORE ISSUE

- Considering the totality of the evidence presented, does the City of Charlotte have a strong basis in evidence for considering the use of narrowly tailored race / gender-conscious remedial policies to more fully remedy the ongoing effects of marketplace discrimination upon its contracting?

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CORE ISSUE

ANSWER: YES

- Particularly in the context of the inability of an aggressive small business enterprise program over an 8-year period to fully eliminate significant disparities in the utilization of ready, willing, and able M/WBE firms.

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MGT Conclusion Differs

– No "strong basis in evidence" for following reasons:

1. Existing statistically significant disparities in part due to larger M/WBE availability in recent years.
2. Increased utilization of M/WBE subcontractors in absolute dollars and percentage participation since SBO Program was adopted in 2003.

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MGT Conclusion Differs

– No "strong basis in evidence" for following reasons:

3. Percentage of total contract dollars going to M/WBE construction subcontractors tripled since 2003.
4. Increased utilization of M/WBE subcontractors in absolute dollars and percentage participation since SBO Program was adopted in 2003.

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MGT Conclusion Differs

– No "strong basis in evidence" for following reasons:

5. The SBO Program has been a more effective remedy than Charlotte's former M/WBE Program
6. The Charlotte SBO Program is apparently as effective as other M/WBE programs in Charlotte area

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MGT Conclusion Differs

– No "strong basis in evidence" for following reasons:

7. Anecdotal evidence is weak.

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Alternative View of Same Evidence

1. MGT admits that ALL of its measures of availability reflect larger M/WBE availability for this study period.
   - "Custom Census" approach used in Study Update has been upheld repeatedly in most recent court cases
   - "Custom Census" methodology more accurately reflects full universe of available firms
   - MGT is right to rely upon it in latest study

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Alternative View of Same Evidence

2. Utilization numerators in disparity ratios from two different time frames are not interchangeable:
   - For Example: Assume a 1/2 disparity ratio in 2003 as compared to 5/10 disparity ratio in 2010
   - Misleading to conclude that SBO Program is successful simply because utilization numerator is five times as big in 2010… disparity ratios remain the same.

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Alternative View of Same Evidence

3. Undisputed evidence reflects that SBO Program did not fully eliminate disparities:
   - Size of disparities in 2003 have been reduced somewhat
   - **But** substantial and statistically significant disparities remain
4. After 8 years of race-neutral SBO Program policy, it is time to consider the use of more aggressive race- conscious remedial policies on a narrowly tailored basis.

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Persistent Substantial Underutilization in Charlotte Contracting (FY 2006 thru FY 2010)

Industry Segments	African American	Hispanic	Asian	Native Am.	Non-Minority Women
Construction Prime	Yes	Yes	No	Yes	Yes
Construction Subcontracts	Yes**	Yes**	No	Yes**	No
A&E Prime Contracts	Yes	Yes	No	Yes	Yes
A&E Subcontracts	Yes**	No	No	No	No
Prof. Services	No	No	Yes	No	Yes
Other Serv.	No	Yes	Yes	No	Yes
Goods	Yes	No	Yes	No	Yes

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Alternative View of Same Evidence

5. Presumed superiority of SBO Program as compared to past City M/WBE Program and current nearby M/WBE programs is not necessarily valid, as all M/WBE Programs are not created equal. MGT has not demonstrated that those M/WBE Programs are in keeping with today's "best practices" such as:
   - Effective and narrowly-tailored outreach
   - Strong monitoring
   - Contract-specific goal-setting
   - Enforcement through sanctions
   - Adequate staff and resources
   - Automated bidder registration, and automation in tracking of availability and actual payment data

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Alternative View of Same Evidence

6. Because marketplace discrimination often occurs outside the presence of those affected, there is low probability for victims to have direct knowledge:
   - Yet, anecdotal evidence is quite robust (over 100 particularized accounts / affirmations of discrimination, w/ four different methodologies)
   - Anecdotal evidence bolsters conclusion that discrimination occurs in many forms
   - Discrimination likely occurs in much more than a few isolated instances.
7. Combined with widespread statistical disparities, anecdotal evidence supports class-based remedies.

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POLICY RECOMMENDATIONS

- Hybrid SBO / M/WBE Program with following features:
  - Contract-specific determinations for the application of SBO or M/WBE program features based on clear criteria
  - SBE or M/WBE subcontracting goals with good faith efforts
- Vendor rotation on informal contracts
- Increase formal bid threshold to $500,000 on construction contracts

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POLICY RECOMMENDATIONS

- Automated Mandatory Centralized Bidder Registration: The Benefits
  - Enhances targeted automated outreach
  - Greatly reduces administrative burden for:
    - satisfying good faith efforts requirements
    - contract-specific goal setting
    - tracking and reporting of M/WBE utilization thru payments
    - providing transparency in payments for better enforcement of prompt payment provisions

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POLICY RECOMMENDATIONS

- Automated Mandatory Centralized Bidder System Models:
  - Washington Suburban Sanitary Commission (developed in-house)
  - The Metropolitan District (Hartford, CT) off-the-shelf software product
  - DFW Airport (off-the-shelf software product)
  - City of Columbia, SC (developed in-house)

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Best Practices in Race-Neutral Remedies

- Vendor Rotation Options
  - Bid Solicitations on informal contracts require at least one or two out of three firms to be contacted for quotes are SBEs
  - Job Order Contracting (multiple prequalified firms selected on formal contracts) with rotation of assignments of repetitive tasks
- Increase informal dollar threshold on construction contracts to $500,000 and reserve bidding for SBE primes.

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Best Practices in Race-Conscious Remedies

- Hybrid SBO / M/WBE Programs
  - City of San Antonio Model
  - Washington Suburban Sanitary Commission Model
- Contract-by-contract determinations of when to apply SBE goals vs. M/WBE goals based upon clearly stated criteria, and size of goals
- Goal setting committee(s) functions as check and balance in applying race-conscious remedies

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Best Practices in Race-Conscious Remedies

- Benefits of Hybrid SBO / M/WBE Programs:
  - Most "narrowly tailored" form of race-conscious program
  - Reduces legal risks from constitutional challenges
  - Typically reduces the need for waivers that can delay procurement process and encourage bid protests / lawsuits
  - Maximum flexibility for varying the aggressiveness of remedies to get best results

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QUESTIONS???

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Privileged and Confidential – Attorney-Client Communications

MEMORANDUM

May 9, 2012

To: The City of Charlotte, NC

Attn: Robert E. Hagemann
City Attorney

Cynthia L. White
Senior Assistant City Attorney
City of Charlotte, North Carolina

From: Franklin M. Lee, Esquire
Tydings & Rosenberg LLP

Re: The Adequacy of the Evidentiary Basis for Charlotte's Consideration of Race-Conscious Remedial Policies for Application to City Contracting and Procurement

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I. Introduction

Our law firm has been retained by the City Attorney's Office to review the methodology, findings, and policy recommendations of MGT of America, Inc. ("MGT") as reflected in its September 26, 2011, Disparity Study Update for the City of Charlotte ("Study Update"), and based upon that review, to offer an independent opinion regarding the adequacy of the evidentiary basis for the City's consideration of race-conscious remedial policies that might be appropriately applied to the City's contracting and procurement procedures. In addressing this core issue, we have been requested to also address questions raised by the City-appointed Disparity Study Advisory Committee regarding the conclusions and policy recommendations of MGT.

In undertaking this task, we have framed the issues to be addressed in Section II of this memorandum. In providing answers to these questions, Section III of this memorandum references supporting evidence, while also presenting a thorough discussion of key areas of agreement and disagreement with MGT's stated conclusions and policy recommendations, as well as special considerations for drafting remedial policies in a manner that maximizes effectiveness and minimizes legal risks. Finally, Section IV of this memorandum broadly

outlines our final conclusions and recommendations regarding a legally defensible array of appropriately narrowly-tailored policy options for the City's consideration.

II. Issues Presented

In order to justify its consideration and adoption of a race-conscious measure to remedy discrimination that affects public contracting, a local government must "identify that discrimination, public or private, with some specificity," and must satisfy a "strict scrutiny" standard under the Equal Protection Clause of the 14th Amendment by having a "strong basis in evidence for its conclusion that remedial action is necessary." Moreover, any race-conscious remedies adopted by the government must be "narrowly tailored" to address the identified discrimination. *City of Richmond v. J. A. Croson*, 488 U.S. 469, 504 (1989); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277 (1980); and see also *H.B. Rowe, Inc. v. Tippett*, 615 F.3d 233 (4th Cir. 2010). Although gender-conscious measures to remedy the effects of gender discrimination are subjected to a somewhat lesser standard of "intermediate scrutiny" wherein the local government must demonstrate an "exceedingly persuasive justification" for such remedial policies,[1] as a practical matter, given the lack of guidance in the case law regarding the degree to which a lesser quantity and quality of evidence may be required to satisfy the intermediate scrutiny standard, an assumption that gender-conscious policies will be subjected to a similarly rigorous standard of review as is required under strict scrutiny has served as the basis for the Study Update's methodology and findings regarding evidence of gender discrimination.

Accordingly, for purposes of this review, the key issues that are presented en route to making a determination regarding the adequacy of the evidentiary basis for the City's consideration of race- and/or gender-conscious remedial policies are as follows:

A. Does the Study Update present a strong basis in evidence of ongoing effects of race- and gender-based discrimination in the Charlotte marketplace sufficient to support consideration of race- and/or gender-conscious remedies by the City?

B. Which, if any, race- and gender-neutral policy options recommended by MGT are appropriately narrowly tailored to address identified ongoing effects of discrimination?

C. What, if any, additional race- and gender-neutral policy options are appropriately narrowly tailored to remedy ongoing effects of discrimination?

D. What, if any, race- and/or gender-conscious policy options are appropriately narrowly tailored to more fully remedy ongoing effects of discrimination?

III. Discussion

A. Defensibility of MGT's Study Update Methodology

For purposes of this memorandum, we assume the Study Update provides the evidentiary basis and factual predicate upon which the City's remedial policies will be evaluated. The strength of that evidence is directly tied to the legal sufficiency of MGT's study methodology and data sources as measured against controlling legal authority. Chapter 2.0 of the Study Update

[1] *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

thoroughly and appropriately summarizes the legal framework against which the strength of the evidence is to be evaluated. MGT's stated methodologies for the Study Update[2] are all appropriate and mostly in keeping with controlling legal precedents and industry standards for disparity studies. At times, preferred methodologies cannot be employed due to the inadequacy or unavailability of data sources. In such situations, the best available methodology and data is substituted, leaving open the question as to whether the resulting evidence and findings are sufficiently strong to warrant reliance upon them in drafting public policy. The answers to the questions presented in Section II largely rest upon the totality of the evidence gathered pursuant to the appropriate methodologies used by MGT in the Study Update. A full discussion of this evidence follows.

B. The Study Update Presents a Strong Basis in Evidence of Ongoing Effects of Race- and Gender-Based Discrimination Sufficient to Support the City's Consideration of Race- and Gender-Conscious Remedial Policies

The Study Update presents a compelling combination of statistical and anecdotal evidence of ongoing affects of marketplace discrimination that is sufficient to satisfy the "strong basis in evidence" standard under "strict scrutiny."

Disparity Evidence

The foundation of the statistical analysis is disparity ratios that compare the availability of M/WBE firms, by industry, within the relevant geographic market, to the utilization of such firms ("utilization" is defined as payments by the City to M/WBE prime contractors, and as payments by prime contractors to M/WBE subcontractors). MGT has defined the relevant geographic market for its statistical analysis as the Charlotte-Gastonia-Salisbury Combined Statistical Area ("CSA").[3]

MGT relied upon a "custom census" methodology in estimating the availability of M/WBE construction prime contractors, M/WBE construction subcontractors, and M/WBE A&E sub-consultants.[4] The custom census methodology was based on an independent survey of firms from the Charlotte CSA that were contained in a Dun & Bradstreet database. For all other industry segments (i.e., A&E prime consultants, professional services firms, other services firms, and goods and supplies firms), MGT calculated availability estimates based upon U.S. Bureau of

[2] MGT's stated methodologies for: (a) defining the relevant geographic for the Study Update, (b) measuring availability of ready, willing, and able minority- and women-owned businesses ("M/WBEs") in that relevant market that supply the goods and services the City is purchasing, (c) measuring the relative utilization of M/WBEs, (d) calculating disparity indices reflecting substantial and statistically significant underutilization of M/WBE firms, (e) collecting evidence of private sector discrimination and its nexus with public sector contracting, and (f) collecting anecdotal and qualitative evidence that identifies the existence and nature of discriminatory barriers adversely affecting M/WBE participation, are all founded upon guidance gleaned from the case law summarized in considerable detail in Chapter 2.0 wherein disparity studies were subjected to strict scrutiny by reviewing courts.
[3] See Study Update at p. 3-19.
[4] The custom census methodology approach was successfully relied upon by MGT in the *H.B. Rowe v. Tippett* case involving the North Carolina Department of Transportation's M/WBE program. This methodology has also been successfully relied upon in cases such as *Concrete Works v. City and County of Denver* and *Northern Contracting v. Illinois DOT.*

the Census 2007, Survey of Business Owner data.[5]

To determine MBE utilization during the study period, MGT gathered payment data from City hard copy and electronic files, and also from SBE reports maintained by Charlotte's Small Business Office. The percentage of total payment dollars that were paid to MBE firms is referred to as the MBE utilization figure.

To calculate disparity indexes for each industry segment, and for each ethnic and gender classification of firms, MGT compared the relevant availability estimate (i.e., the MBE percentage of all firms that were ready, willing, and able to provide to the City goods or services within that industry category), to the percentage of total dollars that were paid to a particular ethnic category of MBE firms over the course of the five-year study period (MBE utilization). In keeping with legal precedent and industry standards, to the extent the disparity ratio reflected that utilization of the MBE firms in an industry category was only 80% or less than their share of availability, MGT characterized such disparities as "substantial", and where feasible, then calculated t-test statistics to determine whether such substantial disparities were statistically significant. Where there is substantial disparity that is statistically significant, there is a 95% confidence level that the disparity was not the result of chance, and therefore there is a legal inference that discrimination has occurred.[6]

The Study Update's disparity analysis established that, over the past five years, there was substantial and statistically significant disparity in the underutilization of certain classifications of MBE firms in the following industry segments within the relevant marketplace[7]:

- Construction Subcontracting (African American, Hispanic American, and Native American firms)
- Architectural & Engineering Sub-consulting (African American firms)

The Study Update's disparity analysis also established that there was substantial disparity of unknown statistical significance in the underutilization of certain classifications of MBE firms in the following industry segments within the relevant marketplace:

- Construction Prime Contracts (African American, Hispanic American, Native American, and Non-minority Women-owned firms)

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[5] While not the preferred method of estimating availability in the most recent cases, the use of U.S. Census data was approved by the Third Circuit Court of Appeals in the case of *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 739 F. Supp 227, 6 F.3d 990 (3rd Cir. 1993). However, as MGT notes in the Study Update, U.S. Census measures of availability tend to be somewhat lower than those resulting from the custom census methodology. Accordingly, any disparities identified using the U.S. Census measure of availability may likely be somewhat understated as compared to those that would be identified using the preferred custom census approach. *See* discussion by Dr. Vince Eagan, October 11, 2011, Disparity Study Advisory Committee meeting minutes at pp. 1-2.

[6] See *Connecticut v. Teal,* 457 U.S. 440 (1982); *Contractors Association of Eastern Pennsylvania, Inc.*, 91 F.3d at 603. See also Study Update at p. 4-2. Where there is substantial disparity of unknown statistical significance, a number of courts have nonetheless established an inference of discrimination. However, such inferences are stronger where statistical significance at the 95% level can be demonstrated.

[7] Study Update at pp. 4-2 to 4-20, and pp. 7-2 to 7-3.

- Architectural & Engineering Prime Contracts (African American, Hispanic American, Native American, and Non-minority Women-owned firms)

- Professional Services Prime Contracts (Asian American and Non-minority Women-owned firms)

- Other Services Prime Contracts (Hispanic American, Asian American, and Non-minority Women-owned firms)

- Goods and Supplies Prime Contracts (African American, Asian American, and Non-minority Women-owned firms)

Anecdotal Evidence

This disparity evidence is just the beginning of the strong basis in evidence that supports the City's consideration of narrowly tailored race-conscious remedies. Multiple forms of anecdotal evidence complement the disparity evidence by helping to identify the form and nature of barriers that have resulted in the statistical disparities, and by suggesting explanations for the manner in which discrimination may have affected market outcomes.[8] The four distinct methodologies used by MGT for collecting anecdotal evidence in the Study Update included focus groups with 29 participants[9], personal interviews of 54 randomly selected business owners and City vendors selected from MGT's Master Vendor Database,[10]survey results from 155 respondents to a survey of 502 randomly selected vendors and contractors,[11]and a public hearing with 19 witnesses providing testimony.

The robust body of anecdotal evidence obtained through these multiple methodologies established several common themes in identifying recognized forms of marketplace discrimination that is adversely affecting the ability of M/WBE firms attempting to do business on City of Charlotte contracts. In some instances, alleged discrimination has been directly attributed to the City. In other instances, many forms of private sector discrimination and prime contractor discrimination have been identified that could undermine the ability of M/WBEs to be competitive in bidding on City contracts. Key findings[12] from this anecdotal evidence include the following:

- 70 M/WBE survey respondents (nearly 15% of M/WBEs surveyed) stated that the City had unnecessarily restrictive contract specifications in its bids and requests for proposals.[13]

- A non-minority female owner of a services firm stated in a focus group that her firm had received a Letter of Intent on a project and did not get the contract. She also stated that

[8] *Croson*, 489 U.S. at 509; *H. B. Rowe* at p. 15 and 17.
[9] Study Update at pp. 6-4 and 6-11.
[10] Id. at p. 6-11.
[11] Id. at p. 6-16
[12] Study Update at p. 7-14 to 7-16; see also pp. 6-12, 6-15, 6-16, and 6-19 to 6-21.
[13] Study Update at p. 6-12.

because of her reputation, other agencies outside of the City called her to bid on projects, but that she is unable to get anyone in the City to call her for bids.[14]

- An African American specialty trade contractor stated in a focus group that when the City's M/WBE program ended and the SBO Program started he stopped getting calls or any notifications of bid opportunities.[15]

- A non-minority female construction company owner stated that one of the City inspectors did not like her firm. The inspector modified the plans and instructed her firm to follow the changed plans. When the project was complete, the City said that the work was not correct as it was not in accordance with the original plans and that they did not instruct her to make those changes.[16]

- A non-minority female owner of a professional services firm stated that while construction bids only have a number (i.e., "price") attached to them, professional services contract awards with the City are based on the prequalification information and your pre-qualification is based on the amount of previous business you have done with the City. Since she cannot get prequalified, she does not spend the money responding to RFPs. She also stated, "In the end, it is going to be the same ones selected."[17]

- Several survey questions addressed discrimination and disparate treatment of vendors. The most notable responses involved firms being used for projects governed by the SBO program, but not elsewhere, being included on a bid for good faith efforts requirements and then being dropped after contract award, and being excluded from contract opportunities by an informal network of firms. Key survey findings include the following:

    - 134 M/WBE survey respondents (over 33%) affirmed that while they were used when SBE goals were applied, they seldom, or never were solicited for other contracts;

    - 103 M/WBE survey respondents (over 25% of M/WBE respondents) affirmed the existence of an informal network that excluded firms from participating in contracts;

- 76 M/WBE survey respondents (nearly 19% of M/WBE survey respondents) stated their firms were included with bids by prime contractors and were then subsequently dropped after contract award;

- 45 M/WBE survey respondents (over 11% of M/WBE respondents) stated that their firms had experienced discrimination in the private sector; 37 M/WBE survey respondents (over 9% of M/WBE respondents) expressed that their firms had experienced bid shopping (i.e., a practice wherein a prime solicits a price from a prospective sub solely for purposes of sharing it with a favored subcontractor and allowing that favored sub to

[14] Id. at p. 6-16
[15] Study Update at p. 6-19.
[16] Id. at p. 6-15.
[17] Id. at p. 6-15.

get the work if it is willing to meet the prospective sub's price); 29 M/WBE survey respondents (over 7% of M/WBE respondents) expressed that they had experienced unequal treatment in the course of bidding on and performing contracts; 25 M/WBE survey respondents (over 6% of M/WBE respondents) stated that their firms had experienced unfair denial of contract awards; 22 M/WBE survey respondents (over 5 % of M/WBE respondents) stated that they had experienced being subjected to double standards in their performance of contracts; and 22 M/WBE survey respondents (over 5% of M/WBE respondents) stated that their firms had experienced discrimination as a prime contractor bidding or proposing on Charlotte projects.[18]

- An African-American specialty trade contractor stated that the prime will squeeze your price, and that they are just asking minority firms to fill out paperwork, and then give the work to someone else.[19]

- An Hispanic American "other services" firm stated that primes used his firm's name at bid time as a subcontractor, but did not award the work to his firm. He went on to state that the prime never called to let us know they were listed for $300,000. The firm went on to say, "I never gave them a bid and I never did the work."[20]

- An African American specialty trade contractor stated that he had a Letter of Intent signed, the contract negotiated, and then the prime went with someone else.[21]

- An African American "other services" firm owner stated that we (minority business owners) are in the same spot ten years ago when it came to small black businesses.[22]

- An African American specialty trade contractor stated that the prime awards the job and starts putting obstacles in the way. The prime gave him a schedule then starts adding more work. With the additional work, the prime begins to complain that the job is getting behind. He went on to state that once the schedule gets behind they kicked him off the job. The prime then hired two white contractors to replace him. He hired an attorney but the prime told him, "You don't have enough money to fight us."

In addition, there were several overall trends that emerged from 102 anecdotal accounts that were provided subject to the survey methodology, focus groups, personal interviews, and public hearing testimony:[23]

1. There was a consensus from persons who gave testimony that although the City has a small business program, M/WBE firms are not experiencing improvement in the amount of business conducted with the City.

2. Participants overwhelmingly agree that the M/WBE program will not be successful without stringent monitoring, consistency in application, and greater accountability.

[18] Id. at p. 6-20.
[19] Id. at p, 6-22.
[20] Id. at p. 6-22.
[21] Id.
[22] Id.
[23] Id. at p. 6-24

3. The biggest procurement issues were competing with large firms and the City's bid or proposal selection process (i.e., the City's emphasis in prequalification criteria on prior experience with City contracts favors nonminority incumbent firms over M/WBEs).

4. The biggest disparate treatment discrimination issues involved firms being used for projects governed by the SBO program, but not elsewhere; being included on a bid and then being dropped after contract award; and being excluded from work by an informal network of firms.

Well-recognized forms of marketplace discrimination were identified within this vast body of anecdotal evidence:

- False reporting / fraud in good faith efforts
- Unequal access to bid opportunities
- Slow payment
- Bid shopping
- Unequal access to capital & bonding
- Unfair termination
- Exclusion from 'good old boy" informal business networks

In addition to the traditional disparity index analysis and the anecdotal evidence typical of most disparity studies, MGT's Study Update also incorporated several other methodologies that further bolstered the strong basis in evidence for determining whether race- and/or gender-based discrimination is adversely affecting market outcomes for M/WBE firms within the realm of City contracting. In particular, the Study Update included analyses of private sector market conditions and contracting patterns to determine whether the City might be a "passive participant" in private discrimination absent some remedial relief that is provided to M/WBE firms within the context of City contracting.[24]

Private Sector Commercial Construction Permitting Data ("Passive Participant" Subcontractor Disparity Analysis)

Under this methodology, MGT undertook an examination of commercial construction permitting data in the Charlotte market area to compare M/WBE subcontracting utilization rates on City contracts to the M/WBE subcontracting utilization rates in private commercial construction projects by that segment of Charlotte's construction prime contractors that also performed

[24] In *City of Richmond v. J.A. Croson (Croson)*, the Supreme Court established that a "municipality has a compelling government interest in redressing not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality has participated in the discrimination to be remedied by the program." *Croson*, 488 U.S. at 492 (1989). This argument was reinforced by the Court of Appeals decision in *Adarand Constructors v. Rodney* Slater, 228 F.3d 1147 (10th Cir. 2000). This basis for race-conscious remedial relief has become known as the "passive participant" justification that establishes a "compelling governmental interest" under the strict scrutiny standard.

private commercial construction prime contracts. The findings from MGT's examination were as follows[25]:

- Fifty prime contractors that had been awarded and performed on City contracts were also identified as having participated in private sector commercial projects, and 49 of those identified prime contractors also utilized subcontractors on their private commercial projects.

- For 42 of those 50 prime contractors, M/WBE subcontractors constituted less than 5% of the number of subcontractors they used and about 3% of the total subcontract dollars they awarded on their private commercial contracts.

- Based upon gross disparity ratios: The City is a "passive participant" in private sector discrimination wherein its tax dollars are being paid to 42 prime contractors that have substantially excluded /underutilized ready, willing, and able M/WBE subcontractors on their private commercial construction projects (i.e., 3% M/WBE subcontract utilization on private sector contracts vs. 28% M/WBE subcontract utilization on City contracts). These vast disparities in private sector commercial construction subcontracting utilization of available M/WBEs were found for all M/WBE categories: African American, Hispanic American, Asian American, Native American, and nonminority Women-owned subcontracting firms.

Given extensive anecdotal evidence reflecting that M/WBE business owners frequently complained when they were not given work on City projects after prime contractors had listed them on bid documents as being available, it is very unlikely that such M/WBE subcontractors were so busy on City contracts that they were unavailable to perform on any commercial subcontracting opportunities with these same prime contractors. Moreover, such an explanation for this vastly lower utilization of known M/WBE subcontractors on private commercial projects is even more dubious considering that private commercial contracts are not subject to open competitive bidding laws, and that negotiated pricing with private owners may frequently result in higher profit margins for the contractors on private commercial projects than what is typically obtained in the highly competitive public sector contracting realm. The "bid by invitation only" nature of private sector construction projects is also significant when considering the implications of M/WBE bidders receiving only 8.5% of prime contract dollars on private commercial construction projects as compared to 17.5% of prime contract dollars awarded on highly competitive and openly bid City of Charlotte projects.[26]

Regression Analysis of Business Formation Rates and Earnings ("PUMS" Analysis)

Further bolstering the already strong basis in evidence supporting the compelling governmental interest for considering the use of race- and gender-conscious remedies, MGT's Study Update also used two multivariate regression techniques (logistic regression and linear regression) to examine the effects of race and gender, along with other demographic and individual business owner characteristics, on business formation rates and business firm earnings. In undertaking this analysis, MGT adopted the same methodology, relevant variables, and Public Use Microdata Samples (PUMS) data source that were successfully relied upon by the City of Denver in defending its M/WBE program from constitutional challenge.[27] After controlling for numerous

[25] Study Update at pp. 5-3 to 5-18.
[26] Study Update at pp. 5-17 to 5-18.
[27] *Concrete Works v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

variables such as race and sex, availability of capital (i.e., home ownership, home value, unearned income, and residual income), marital status, primary language, disability, age, education level, household children, etc., in the Charlotte CSA, MGT found the following[28]:

- Nonminority males are over two times as likely to be self-employed as minorities and women; and
- Minorities and women who were self-employed reported significantly lower earnings than non-minority males in all business categories.

Overall combined findings from MGT's private sector analysis also lead to the following conclusions[29]:

- Differences in capacity alone are an insufficient explanation for the very low M/WBE subcontractor utilization in private commercial construction.
- Disparities associated with race and gender in business formation rates and earnings persist after controlling for financial capacity, education level, and business experience.
- Race and gender variables explain a large percentage of the differences in market outcomes across all industry categories as indicated by business earnings.

To the extent that M/WBE subcontractor utilization is all but absent in the private sector, credence may be given to the proposition established in *Croson* that the City of Charlotte would become a passive participant in private sector discrimination if it did not require contractors who apply for public sector construction projects to solicit and negotiate with M/WBE subcontractors in good faith.[30]

Overall 'Strong Basis' in Evidence

Charlotte can demonstrate that its governmental interest is compelling only if it satisfies two conditions. First, it must identify the past or present discrimination "with some specificity." Second, it must also demonstrate that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *see also Concrete Works v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003). Considering the totality of the quantitative and qualitative evidence presented in MGT's Study Update, the City of Charlotte has identified past and present discrimination with specificity, and has also established that it has a "strong basis in evidence" that supports consideration of the use of narrowly tailored race / gender-conscious remedial policies to more fully remedy the ongoing effects of marketplace discrimination upon its contracting.

[28] Study Update at pp. 5-28 to 5-40.
[29] Study Update at p. 5-40 to 5-41.
[30] Id. at p. 5-41.

C. Race- and Gender-Neutral Policies Recommended by MGT Are Appropriately Narrowly Tailored to Address Identified Discrimination

Assuming the "compelling governmental interest" prong of the strict scrutiny standard has been met by the City of Charlotte, the second prong of strict scrutiny analysis then requires the City to demonstrate that its proposed remedy is narrowly tailored to address the ongoing effects of that identified discrimination. One aspect of 'narrow tailoring' is that the City must have considered in good faith the efficacy of race- and gender-neutral remedies and determined that race- and gender-neutral remedies, in and of themselves, are not likely to fully remedy the ongoing effects of such discrimination. In this context, the Study Update has confirmed that for the past 8 years, the City of Charlotte has aggressively implemented a mandatory Small Business Opportunity (SBO) Program. The SBO Program is race- and gender-neutral, and indeed, the entire 5-year study period upon which the Study Update was conducted occurred within the tenure of the City's SBO Program. In evaluating the degree to which the City's SBO Program and other race- and gender-neutral policies and practices have been fully successful in remedying the effects of identified discrimination, MGT has made the following findings and proposed adoption of the following additional race- and gender-neutral policies:

1. Following eight years of the aggressive implementation of the SBO Program in City contracts, despite significant increases since 2003 in the absolute dollar level of utilization of M/WBE firms in prime contracts and subcontracts, relative to the increased levels of availability of such firms in the relevant marketplace, there remain substantial and statistically significant disparities in the utilization of M/WBE firms in City prime contracts and subcontracts. Such disparities have continued to occur among certain segments of the M/WBE population for each and every industry category.[31]

2. In addition to the continuation of the SBO Program, MGT has recommended several additional race- and gender-neutral policy options for the purpose of improving M/WBE utilization at the prime contract level. These policy recommendations include:

    a. Raising the dollar threshold for informal construction contracts from $200,000 to $500,000 to enable more flexibility in applying the SBO Program to prime contract opportunities;[32]

[31] Study Update at pp. 7-2 to 7-4, and p. 4-20. (MGT found statistically significant underutilization of African American, Hispanic American, and Native American firms in the category of construction subcontracts; statistically significant underutilization of African American firms in the category of Architectural & Engineering subcontracts; substantial underutilization of African American, Hispanic American, Native American, and Nonminority Women firms in the category of construction prime contracts; substantial underutilization of African American, Hispanic American, Native American and Nonminority Women firms in the category of Architectural & Engineering prime contracts; substantial underutilization of Asian American and Nonminority Women firms in the category of Professional Services prime contracts; substantial underutilization of Hispanic American, Asian American, and Nonminority Women firms in the category of Other Services prime contracts; and substantial underutilization of African American, Asian American, and Nonminority Women firms in the category of Goods & Supplies prime contracts.)

[32] Id. at p. 7-18.

b. Vendor rotation for certain kinds of repetitively purchased goods and services;[33] and
c. Expansion of Charlotte's SBE directory to include firms that are more likely to be vendors for P-card transactions and highlighting these additional firms to Charlotte staff that are authorized P-card users.[34]

MGT has also recommended that the City adopt a Mandatory Joint Venture policy with SBEs, citing the success of an Atlanta version of this policy in which joint ventures between prime contractors that are of different ethnic/gender backgrounds is required on projects in excess of $10 million.[35] However, in our view, such policies are race- and gender-conscious and invoke strict scrutiny because they rely upon racial and gender-classifications in determining which joint ventures are eligible to compete. Such a policy recommendation by MGT is therefore inconsistent with MGT's own conclusion that it lacks a sufficiently strong basis in evidence to warrant consideration of race- and gender-conscious policies.[36]

D. Additional Race- and Gender-Neutral Policies That Are Appropriately Narrowly Tailored to Address Identified Discrimination

Mandatory Centralized Bidder Registration

The above race- and gender-neutral policy recommendations of MGT are all appropriately narrowly tailored remedies in keeping with controlling legal precedent, and pose minimal legal risks. In addition to the above neutral recommendations, we also strongly recommend that the City of Charlotte also adopt and implement an automated Mandatory Centralized Bidder Registration System ("CBR"). The CBR should require all prospective prime contractors, subcontractors, consultants, sub-consultants, and vendors that are interested in performing City contracts or subcontracts to register basic contact and business profile information (i.e., identify appropriate commodity codes that represent the types of goods and services that the prospective bidder seeks to sell) through the City website. Such registration should be a prerequisite for all firms, regardless of ethnicity or gender of ownership, to receive bid solicitation, contract award, and payment as either a prime contractor or a subcontractor on City contracts. The CBR would automatically issue a unique CBR I.D. number to each registrant, and that number would be required for bid solicitation, contract award, and invoice / payment procedures.[37] Benefits of the CBR system would include the following:

[33] Id. at p. 7-19. By requiring SBE firms to be included within the rotation of vendors that are routinely selected for repetitive tasks or purchases, the City will indirectly enhance the opportunity for M/WBE vendors to perform on smaller prime contracts and purchases.
[34] Id. at p. 7-19.
[35] Id. at p. 7-19. Under Atlanta's Mandatory Joint Venture policy, joint venture partners of the same ethnic or gender background are not eligible to compete.
[36] Moreover, MGT's insertion of this proposed policy recommendation might also be viewed as tacit acknowledgement by MGT that race- and gender-neutral remedies have not been fully successful in remedying the substantial disparities in the utilization of M/WBE firms in prime contracts that its Study Update has revealed.
[37] There are a number of jurisdictions that have already designed and installed such bidder registration systems that could serve as useful models to the City, including the State of North Carolina, the Washington Suburban Sanitary Commission, the U.S. Small Business Administration (ccr.gov), the City of Columbia, SC, and the Metropolitan District in Hartford, CT.

- Enables enhanced targeted outreach to prospective bidders through free email alerts based upon registered commodity / industry code profiles;

- Greatly reduces the administrative burden for the following:

  - Ensuring compliance with good faith efforts requirements;

  - Contract-specific goal setting;

  - Accurate and timely reporting of M/WBE, non-M/WBE, and SBE prime and subcontract utilization based upon actual payments; and

  - Providing transparency of payments issued by the City to primes through email notifications to all subcontractors performing on a contract to permit better enforcement of prompt payment provisions.

E. Additional Race- and Gender-Conscious Policies That Are Appropriately Narrowly Tailored to More Fully Remedy Identified Discrimination

Particularly in the context of the inability of an aggressive small business enterprise program (implemented over the span of eight years) to fully eliminate significant and substantial disparities in the utilization of ready, willing, and able M/WBE firms, we conclude that based upon the totality of the evidence presented in MGT's Study Update, the City of Charlotte has a strong basis for considering the use of narrowly tailored race- and gender-conscious remedial policies to more fully remedy the ongoing effects identified discrimination upon its contracting.

MGT has reached a different conclusion on this core issue based upon its review of the same body of evidence. As reasonable minds may well disagree about this legal conclusion, a fuller discussion about the merits of MGT's stated reasons for reaching a conclusion that there is not a sufficiently strong basis in evidence to warrant consideration of race-conscious remedies is appropriate. These reasons are identified and addressed below.

MGT Rationale

MGT concluded that there is no 'strong basis in evidence' to support the City of Charlotte's consideration of race- and gender-conscious remedies for the following reasons[38]:

1. Existing statistically significant disparities are in part due to larger M/WBE availability in recent years; if current M/WBE utilization as reflected in the Study Update is compared to 2003 measures of M/WBE availability, there is no disparity.

2. Increased utilization of M/WBE subcontractors in absolute dollars and percentage participation since the inception of the SBO Program in 2003 indicates that race-neutral remedies work, and that race-conscious remedies are not necessary.

3. The percentage of total contract dollars going to M/WBE construction subcontractors has tripled since 2003.

[38] Study Update at pp. 7-1, 7-7 to 7-8, 7-12 to 7-13, and 7-20 to 7-21.

4. The SBO Program has been a more effective remedy than Charlotte's former M/WBE Program.

5. The Charlotte SBO Program is apparently as effective as other M/WBE Programs in the Charlotte area.

6. The anecdotal evidence in the Study Update is weak.

Alternative Arguments and Views of the Same Evidence

Upon closer examination, MGT's stated rationales for its conclusion are not supportable for the following reasons:

1. While it is true that a comparison of current M/WBE utilization to 2003 Disparity Study measures of availability would not yield any disparities, MGT readily admits that all three of its measures of M/WBE availability used in the 2011 Study Update resulted in higher percentages of M/WBE availability estimates than in the 2003 Study.[39] The "Custom Census" approach that MGT has used most recently in estimating availability of M/WBE firms has been upheld repeatedly in the most recent court cases, and it more accurately reflects the full universe of available firms.[40] MGT was correct in relying upon these larger M/WBE availability measures in the Study Update, and therefore, the resulting disparities using this methodology are legally defensible.

2. MGT's juxtaposition of the M/WBE utilization numerators in disparity ratios from two different time frames (i.e., 2003 vs. 2011) absent the appropriate context of M/WBE availability denominators is not a valid comparison, and is misleading. The appropriate comparison is between the disparity *ratios* from 2003 and 2011, and *not* between the utilization levels alone from those time periods. The erroneous mathematical basis of MGT's argument is apparent. For example, if in hypothetical time frame A there were a disparity ratio of ½ (i.e., one dollar of utilization for 2 available M/WBEs), and then in time frame B both M/WBE availability and utilization increased dramatically such that there was now $5 dollars of utilization for 10 available M/WBEs (i.e., a disparity ratio of 5/10), by focusing solely upon the numerators in comparing market outcomes from these two time periods, one might erroneously conclude that M/WBEs were doing much better in time frame B because their cumulative dollar utilization had increased five-fold from $1 to $5 over this span of time. Yet, when one considers the entire disparity ratio and compares the ½ disparity ratio from time frame A to the 5/10 disparity ratio in time frame B, it is quite apparent the disparity ratios are identical and there has been no relative improvement in M/WBE utilization over time in this hypothetical example. The comparison of actual disparity ratio results from the 2003 and 2011 studies are admittedly considerably more varied and nuanced (by ethnic group and by industry) than this

[39] Id. at p. 7-8. Moreover, it is undisputed that the entire Charlotte CSA has grown dramatically over the past decade, and Charlotte is now the 18th largest city in the United States. So it is hardly surprising that the business population would expand significantly as well.
[40] These cases include the recent 4th Circuit decision in *H.B. Rowe v. Tippett*, *Northern Contracting v. Illinois DOT*, and *Concrete Works v. City and County of Denver.*

hypothetical example. However, it is undisputed from the Study Update that while the SBO Program did have a generally positive effect in reducing the size of the disparities found in 2003, statistically significant and substantial disparities remain in 2011 across all industries for certain segments of the M/WBE population. By ignoring the differences in availability measures that were used in these two time frames, MGT obliterates the proper context for evaluating the significance of the increase in absolute M/WBE utilization dollars and greatly exaggerates the degree to which the SBO Program successfully remedied the ongoing effects of identified discrimination.[41]

In addressing the Disparity Study Advisory Committee, MGT's lead researcher, Dr. Vince Eagan, acknowledged this point when he stated the following: "If someone came up to me and said you have done this study, you have shown these disparities, have you shown the SBO Program didn't work? I could say "Yes", it didn't work because there are still some disparities... In terms of the application in this case if they said the SBO Program failed to address the disparities you could kind of say that."[42]

Moreover, while the SBO Program has been of some benefit to M/WBE firms, it is also undisputed by MGT that non-minority male contracting firms are disproportionately benefiting from this program as they represent only 25% of all SBE firms but are receiving approximately 52% of all contracting dollars received by SBE firms.[43]

3. MGT's presumption of the superiority of the SBO Program over an M/WBE program for reducing disparities based upon the lower relative utilization of M/WBEs under the City's prior M/WBE program and present-day M/WBE programs in neighboring jurisdictions is not necessarily valid, as all M/WBE programs are not created equal. Due to vastly different program features, staff resources, and administration, some M/WBE programs are far more effective than others. MGT has not examined whether those past and present M/WBE Programs that it is comparing to the SBO Program are in keeping with today's M/WBE program "best practices" such as:

    - Effective and narrowly-tailored outreach;
    - Strong monitoring of compliance with policy;
    - Contract-specific goal setting;
    - Narrow tailoring of program eligibility for M/WBEs by ethnic/gender group and by industry based upon industry-specific disparity ratios;
    - Enforcement of sanctions for violations of policy;

[41] The fact that the disparity ratios from 2003 and 2011 are based upon entirely different methodologies for measuring availability makes such juxtapositions and comparisons all the more inappropriate.
[42] October 11, 2011, Disparity Study Advisory Committee Minutes, at p. 1.
[43] October 11, 2011, Disparity Study Advisory Committee Minutes at p. 4. Dr. Vince Eagan stated, "Yes, I would say they [nonminority male contractors] are getting more benefits from the program. Nonminority women and nonminority males... they are getting the bulk of the benefits of the [SBO] Program." This phenomenon, in and of itself, may be further evidence that differences in size and capacity do not fully explain the disparities and underutilization of M/WBE firms as racial and gender-based disparities persist even within the context of the SBO program.

- Clear standards for good faith efforts documentation requirements and waiver requests;
- Adequate staffing and resources; and
- Automated bidder registration and automation in the tracking of availability and actual prime contract and subcontracting payment data.

With the inclusion of the improved features of modern-day M/WBE programs, there is every reason to believe that the next generation of Charlotte's M/WBE program would be far more effective than its previous one.

Similarly, MGT has made no qualitative assessment regarding other M/WBE programs in the area and their adherence to such "best practices" in program design and administration.[44]

4. When considering that marketplace discrimination often occurs outside the presence of those affected, there is a low probability for victims to have direct knowledge of specific instances of discrimination. Accordingly, it would not be at all surprising if the majority of M/WBE business owners did not perceive such discrimination on a routine basis. For example, fraudulent reporting of M/WBE subcontracting, bid shopping, price discrimination by suppliers, double standards in performance, and exclusion from opportunities to bid, are all forms of discrimination where unless a third party informs the M/WBE firm of the disparate treatment on the basis of race or gender, the victim will not be in a position to even know that the discrimination has occurred. Moreover, even when an M/WBE owner suspects that they are not being treated fairly, it is far easier for them to view the occurrence as being unique and isolated rather than part of a systemic pattern of racial or gender discrimination. To conclude otherwise could lead them to an uncomfortable and depressing assessment that their decision to be self-employed in business was an irrational one given the highly competitive nature of the marketplace.[45] Yet, despite these factors, the anecdotal evidence compiled in the Study Update is quite robust with over 100 particularized accounts and affirmations of various forms of discrimination gathered through four different methodologies (e.g., surveys, personal interviews, focus groups, and public hearing testimony).[46] The quantity and quality of this anecdotal evidence compares favorably with other disparity studies,[47] and when

[44] MGT readily admits that "the relative effectiveness of the Charlotte SBO Program is, in all likelihood, due to the more rigorous good faith efforts requirements of the SBO Program (as compared to the State of North Carolina's M/WBE statute), and the fact that Charlotte can, and has been, more aggressive in enforcing project goals under the SBO Program due to the reduced risk of litigation on constitutional grounds. Charlotte rejected the bids of twelve low bidders during the current study period for noncompliance with the SBO Program as compared to rejecting two low bidders for noncompliance with the previous M/WBE program during the study period of the 2003 Disparity Study." Study Update at p. 7-21.

[45] Successful entrepreneurs are typically optimistic, in nature even in the face of substantial obstacles to success.

[46] See Section III. B. of this memorandum for an extensive summary of this anecdotal evidence.

[47] In *Concrete Works IV,* the 10th Circuit Court of Appeals found a strong basis in evidence with disparity study interviews of just 38 M/WBE firms in construction and professional design services(*Concrete Works I*, 823 F.Supp 821 at 834), and where only 8 M/WBE firms testified at trial that general contractors only used them on City construction projects and not private projects, and where only 18 prime contractors (versus 42 prime contractors in Charlotte) were identified as having performed City contracts while also excluding M/WBE subcontractors on their private sector projects. *Concrete Works* at 976

combined with strong statistical disparities in government contracting and private sector data reflecting near total exclusion of M/WBE firms from subcontracting opportunities in private commercial projects, and regression analyses showing stark disparities in business formation rates and business earnings based on race and gender, establishes a strong basis for concluding that marketplace discrimination occurs in much more than a few isolated instances. Therefore, consideration of narrowly tailored class-based race- and gender-conscious remedies is warranted.

F. Other Considerations and Constraints in Drafting Remedial Policies for the City

Although it is not the primary purpose of this memorandum to provide detailed policy guidance on the specific features of a Charlotte M/WBE program, in the event the City of Charlotte follows the recommendation of this memorandum to consider the adoption of narrowly tailored race- and gender-conscious remedies, there are additional constraints on the City's adoption of such policies that need to be taken into consideration:

1. It is important that the M/WBE policy be harmonized with the State of North Carolina's statute that authorizes local governments to establish good faith efforts minority business participation goals programs. As Charlotte is not a "home rule" municipality, Charlotte can only establish M/WBE programs to the extent authorized by State law.[48] However, Charlotte must also be careful to comply with the legal precedents of *H.B. Rowe* and other relevant legal precedents in narrowly tailoring the program definitions of M/WBE firms that are eligible to participate in the remedial relief based upon the findings of the Study Update.

2. Mandatory good faith efforts documentation requirements should be strengthened to the maximum extent permitted under N.C.G.S. § 143-128.2. This has been a key to the success of the SBO Program. For example, submission of documentation of good faith efforts negotiations with subcontractors should be mandatory.

3. The features of the SBO Program should be saved and merged into a single "hybrid" SBO / M/WBE Program that includes contract-specific determinations for the application of either race- / gender-neutral SBO program features or race- and gender-conscious M/WBE program features based upon established criteria that clearly define under what conditions it is appropriate to consider application of the race- / gender-conscious remedial program features.[49]

[48] Specific issues that will need to be addressed will include the extent to which the City may establish definitions of M/WBE firms that are subsets of the categories of firms certified by the State. Some firms that are certified by the State are located out of state and may not be within the relevant geographic market as established by the City's factual predicate. Moreover, depending upon the industry, the City may need to define "M/WBE" more narrowly in terms of program-eligible race and gender classifications than the State has defined them for purposes of satisfying the "narrow tailoring" prong of strict scrutiny under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.

[49] While such hybrid programs are more challenging to implement from an administrative standpoint, because they provide for a contract-by-contract determination of whether to apply race-neutral program features or race-conscious program features, they are far more narrowly tailored than more traditional M/WBE programs. As such, they are less susceptible to facial legal challenges under the 14th Amendment Equal Protection Clause.

4. Whenever M/WBE subcontracting goals are applied, they should be set on a contract-specific basis based upon relative availability for that specific project. The City's former M/WBE program approach of applying uniform industry-based goals to each and every contract is no longer considered as a best practice.[50]

IV. Conclusions and Recommendations

Through the combination of multiple methodologies, including disparity analysis, anecdotal evidence, private sector commercial construction permitting data ("passive participant" analysis), and regression analysis of PUMS data, MGT has provided the City with a "strong basis" in evidence for considering the use of race- and gender-conscious remedies in its public contracting. Consistent with this finding, we recommend the consideration of the following policies:

1. A hybrid SBO / M/WBE Program with features including contract-specific goal setting and clear standards and criteria for contract-specific determinations as to when it is appropriate to apply race- and gender-neutral program features and when it is appropriate to apply race- and gender-conscious program features;
2. Vendor rotation policy for certain kinds of repetitively purchased goods and services;
3. Increase the formal bid threshold for construction contracts from $200,000 to $500,000;
4. Expand Charlotte's SBE directory to include firms that are more likely to be vendors for P-card transactions and highlighting these additional firms to Charlotte staff that are authorized P-card users; and
5. Establish an automated mandatory centralized bidder registration system that enhances targeted outreach capabilities and greatly reduces the administrative burdens for satisfying good faith efforts requirements, undertaking contract-specific goal-setting, tracking and reporting of SBE and M/WBE utilization as reflected in prime contract and subcontract payments, and providing transparency in payments for better enforcement of prompt payment provisions.

[50] Narrow tailoring of the goal setting process through a contract-specific goal setting mechanism has the additional benefit of reducing the scope of exposure from legal challenges to the individual contracts for which the application of the M/WBE program is being challenged. Assuming the facial legal challenges to the M/WBE Program are initially rebuffed, the potential liability from all subsequent challenges will be limited to damages from the particular contracts at issue and attorneys fees. In such "as applied" challenges, the worst possible outcome should likely be that the program is held to be unconstitutional, but only as it has been applied to a specific contract, and the remainder of the program should remain intact.

The Charlotte BAROMETER Report

An Official Publication of the Charlotte Regional Visitors Authority

MAY 2012

National & International Business & Convention

2012 MEETINGS FORECAST

This year, global demand for meetings and events is expected to rise, according to the **American Express Meetings & Events** 2012 Meetings Forecast. Eighty percent of North American planners are expecting to increase or maintain the number of meetings this year. While spending for individual meetings will likely decrease or remain flat, American Express also believes that companies will increase their overall meeting budgets next year. Meetings are also expected to (1) be shorter and smaller, (2) be more local, (3) have fuller agendas, (4) be greener and (5) be more austere. When it comes to locations, North American planners are booking 2012 meetings primarily in large cities (71%), although 13% are shifting bookings from tier-one to tier-two destinations.

Local Perspective

CHARLOTTE AREA LODGING – MARCH SMITH TRAVEL RESEARCH

Charlotte area **occupancy** was 70.8% for the month of March, up 10% over March of 2011. Year to date, occupancy is 61.1% in the market, up 5.5% from the same period last year. By comparison, year to date occupancy is up 3.8% in the US (56.8%), 4.7% in NC (52.3%) and 3.8% in the Top 25 (65.2%)

Charlotte area **room demand** totaled 703,329 rooms sold for March, up 9.2% over March of 2011. Year to date, nearly 1.8 million rooms have been sold in the market, up 5% from the same period last year. By comparison, year to date demand is up 4.1% in the US, up 5.4% in NC and up 4.3% in the Top 25.

Charlotte area **average daily rate (ADR**) was $91.99 for the month of March, up 7.1% over March of 2011. Year to date, ADR is $86.21 in the market, up 4.9% from the same period last year. By comparison, year to date ADR is up 4% in the US ($103.54), up 3.7% in NC ($79.79) and up 4.1% in the Top 25 ($123.52).

Charlotte area **revenue per available room (RevPAR)** was $65.10 for the month of March, up 17.7% over March 2011. Year to date, RevPAR is $52.65 in the market, up 10.6% from the same period last year. By comparison, year to date RevPAR is up 7.9% in the US ($58.78), up 8.6% in NC ($41.74) and up 8.1% in the Top 25 ($80.47).

Charlotte Market Trends & Highlights

- The first time occupancy has surpassed 70% in any month since April of 2008 (70.2%)
- 27 consecutive months of occupancy improvements in the market
- The first time ***ever*** that monthly room demand in the market eclipsed 700,000 room sold
- 29 consecutive months of demand improvements in the market
- The first time ADR has surpassed $90 in any month since October of 2008 ($92.57)
- 21 consecutive months of ADR improvements in the market
- The highest RevPAR since October 2007 ($67.33)
- 26 consecutive months of RevPAR improvements in the market

MECKLENBURG COUNTY HOSPITALITY TAX COLLECTIONS-- FY12 THROUGH MARCH

Mecklenburg County **6% regular occupancy tax collections** total $19.6 million fiscal year to date, up 12% from the same period last fiscal year.

Mecklenburg County **2% NASCAR Hall of Fame tax collections** total $6.5 million fiscal year to date, up 12% from the same period last fiscal year.

Mecklenburg County **1% prepared food & beverage tax collections** total $17.3 million fiscal year to date, up 13% from the same period last fiscal year.

National Leisure & Tourism

TRAVELER INTERESTS & PASSIONS MOTIVATE DESTINATION CHOICE

"We are hearing from travelers that it is not always about the destination, but also about what their passion points are, what motivates them, what they love to do in their life," according to Ellen Bettridge, vice president of the **American Express Retail Travel Network**. Travelers are increasingly building their trips around festivals (such as wine and/or food). Although the culinary experience is a big draw, there is also increasing interest in hiking tours and outdoor, active vacations and expedition-type holidays. American Express data shows that U.S. consumers are planning to spend 11% more on vacations in 2012 than last year.

Economy

NATIONAL RESTAURANT ASSOCIATION'S RPI

Driven by solid same-store sales and traffic results and an increasingly bullish outlook among restaurant operators, the **National Restaurant Association**'s Restaurant Performance Index (RPI) stood at 102.2 in March, up 0.3% from February and equaling its post-recession high that was previously reached in December 2011. In addition, the RPI stood above 100 for the fifth consecutive month in March, which signifies expansion in the index of key industry indicators. Restaurant operators are solidly optimistic about sales growth and the economy in the months ahead, which propelled the Expectations component of the RPI to its highest level in 15 months.

Media

APRIL 2012 VOCUS

During April, **Vocus** identified 3,491 media mentions related to key search words. 'Democratic National Convention' led the way with 60.8% and 'NASCAR Hall of Fame' with 29.3%.

Sources for this Publication

- **American Express**
- **Conference Board**
- **London Tourism Publications**
- **Mecklenburg County Tax Office**
- **National Restaurant Association**
- **Rubicon**
- **Smith Travel Research**
- **The TAP Report**
- **US Department of Labor**
- **US Travel Association**
- **Visit Charlotte/CRVA**
- **Vocus**

Michael Applegate, CDME
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Inside This Report

- **Barometer Summary (p. 1&2)**
- **Hospitality Industry Statistical Report (p. 3)**
- **Definite Bookings (p. 4)**
- **Pace Report (p. 5)**
- **Charlotte Market Committed Room Nights (p. 6)**
- **Hospitality Industry Sales Activities (p. 7)**
- **Lost Business Report (p. 8)**
- **Occupancy Tax Collections (p. 9)**
- **Prepared F&B Tax Collections and The Economy (p. 10)**

HOSPITALITY INDUSTRY STATISTICAL REPORT
April 2012

Charlotte Market Lodging Production					
	Charlotte Market	**North Carolina**	**Competitive Set**	**United States**	**Top 25**
April 2012 Occupancy %	70.8	59.8	65.0	63.6	72.5
% Change	10.0	7.4	4.1	4.0	3.7
April 2012 ADR $	91.99	82.65	94.99	105.91	128.06
% Change	7.1	4.1	3.3	3.9	4.8
April 2012 RevPAR $	65.10	49.42	62.34	67.38	92.84
% Change	17.7	11.8	7.6	8.0	8.7
2012 YTD Occupancy %	61.1	52.3	57.0	56.8	65.2
% Change	5.5	4.7	3.9	3.8	3.8
2012 YTD ADR $	86.21	79.79	92.87	103.54	123.52
% Change	4.9	3.7	5.0	4.0	4.1
2012 YTD RevPAR $	52.65	41.74	53.37	58.78	80.47
% Change	10.6	8.6	9.2	7.9	8.1

Source: Smith Travel Research-Stats lag by one month

Comp Set includes: Tampa, Atlanta, Indianapolis, Baltimore, Minneapolis, St. Louis, Greensboro, Raleigh, Cincinnati, Columbus, Philadelphia, Pittsburgh and Nashville

Charlotte Douglas International Airport Aviation Production				
	Month of March	**% Chg from Mar '11**	**2012 YTD**	**YTD % Chg from '11**
Passenger Enplanements	1,769,708	4%	4,865,753	7%
Passenger Deplanements	1,771,050	4%	4,881,753	6%

Source: Charlotte Douglas International Airport-Stats lag by one month

Visit Charlotte Definite Room Night Production				
	Month of April	**Change from April 2011**	**FY 2012 YTD**	**YTD Chg (%) from FY11**
Total Room Night Production	8,636	573	266,577	-156,019 (-37%)
Visitor Economic Development ($)	2,644,983	-5,772,869	156,159,929	-160,226,641 (-51%)
Number of Definite Bookings	20	-3	310	-12 (-4%)
Average Size of Definite Bookings	432	81	860	-452 (-34%)
Total Attendance	8,822	-1,907	447,892	-183,475 (-29%)
Convention Center GSF Booked	120,000	120,000	20,490,000	5,470,000 (36%)

Visit Charlotte Lead Room Night Production				
	Month of April	**Change from April 2011**	**FY 2012 YTD**	**YTD Chg (%) from FY11**
Total Room Night Production	57,325	-1,817	767,759	-69,170 (-8%)
Number of Lead Bookings	68	13	656	-16 (-2%)
Average Size of Lead Bookings	843	-233	1,170	-75 (-6%)

Visit Charlotte Housing Bureau Production			
	Month of April	**FY 2012 YTD**	**YTD% Chg from FY11**
Total Reservations Produced	1,347	8,920	6%
Total Room Nights Produced	5,279	24,836	-27%

Visit Charlotte Leisure Tourism Promotion & Production			
	Month of April	**FY 2012 YTD**	**YTD % Chg from FY11**
Advertising Impressions	13,682,155	118,704,533	122%
www.charlottesgotalot.com Visitors (Google)	137,825	1,337,280	52%
Motor Coach Group Bookings (Passengers)	1,007	5,463	20%

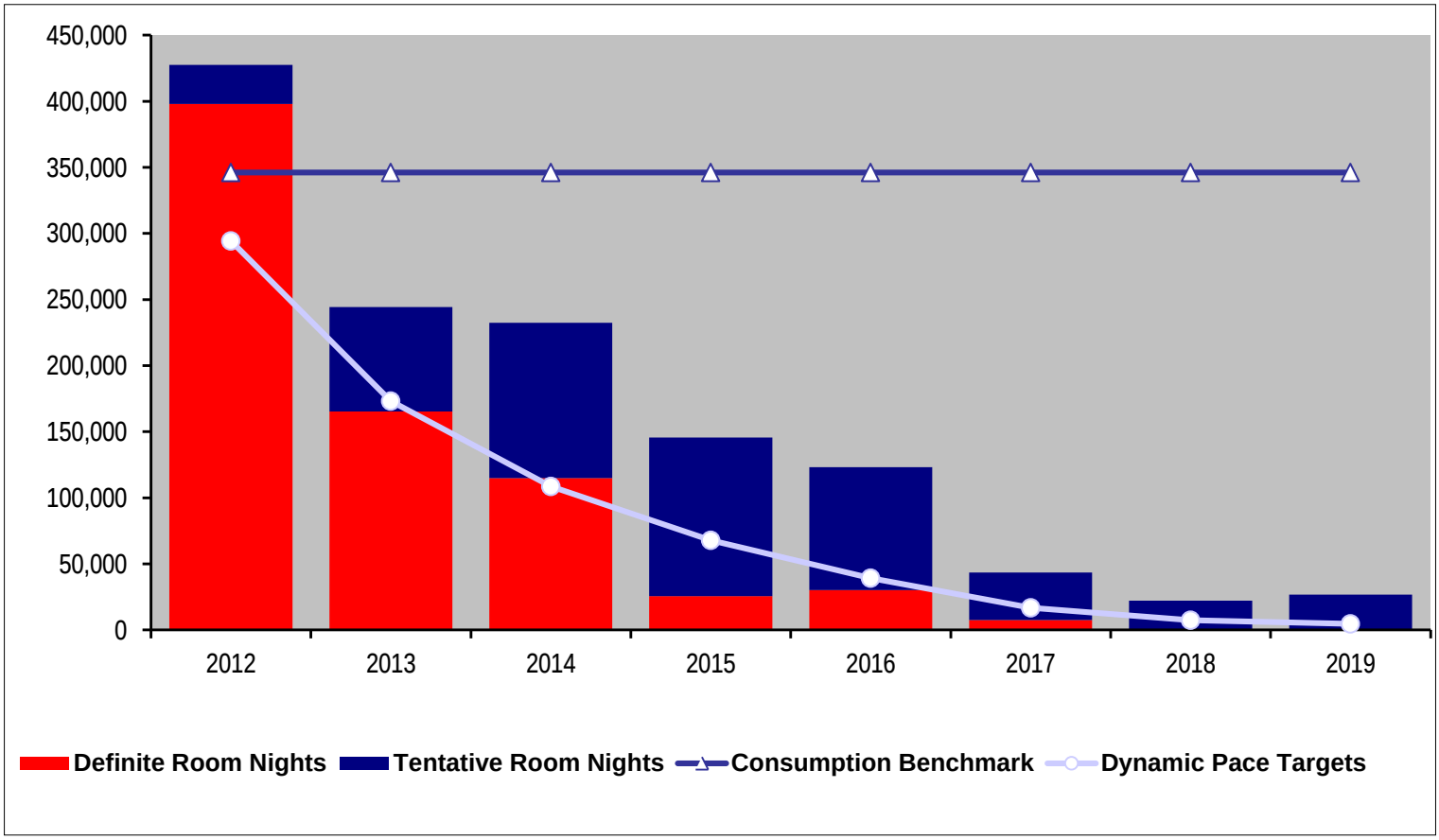
DEFINITE BOOKINGS
April 2012

Charlotte Convention Center							
Group Name	**Meeting Type**	**Event Date**	**Days**	**Exhibit Gross Sq Ft**	**Total Room Nights**	**Attend**	**Dir. Visitor Econ. Dev. ($)**
Carolinas Roofing & Sheet Metal Contractors Association ®	Convention	Jan '15	2	120,000	290	200	91,146
Total				**120,000**	**290**	**200**	**91,946**

Conference Sales					
Group Name	**Event Date**	**Days**	**Total Room Nights**	**Attendance**	**Dir. Visitor Econ. Dev. ($)**
Active Communications International	Apr '12	3	30	200	18,245
Football Club Carolina Alliance	Apr '12	2	1,400	1,000	268,000
Schneider National	Apr '12	3	54	40	16,346
Helms Briscoe ®	Apr '12	2	70	25	18,704
American Health Information Management Assoc.	May '12	3	75	62	22,219
StickWithUs Lacrosse ®	Jun '12	2	782	1,800	482,400
American Society of Mechanical Engineers ®	Jun '12	3	105	100	29,033
TJ/H2b Analytical Services	Jun '12	3	34	20	9,025
StickWithUs Lacrosse ®	Jun '12	2	510	900	241,200
RTP Company	Jun '12	2	20	75	9,046
Heinemann Professional Development	Jul '12	5	400	300	121,278
International Trademark Association	Oct '12	3	630	320	154,753
Regenerative Medicine Foundation	Oct '12	2	510	400	142,521
Hope Unlimited	Oct '12	2	32	60	11,063
StickWithUs Lacrosse ®	Oct '12	2	1,258	1,800	482,400
VMG9	Oct '12	1	66	20	18,186
Football Club Carolina Alliance	Nov '12	2	1,400	1,000	268,000
TJ/H2b Analytical Services	Feb '13	4	445	150	107,466
Property Loss Research Bureau	Oct '13	2	525	350	133,152
Total			**8,346**	**8,622**	**2,553,037**
GRAND TOTAL			**8,636**	**8,822**	**2,644,983**

Sports & Leisure Spending -DKS&A 2007 Charlotte Update (attendance x $134 x # days)
Convention & Conference Spending -2011 Tourism Economics, DMAI, Charlotte Event Impact Model
® Repeat Business

Eight Year Dynamic Room Night Pace Report
(As of 4/1/12) Trends Analysis Projections, LLC

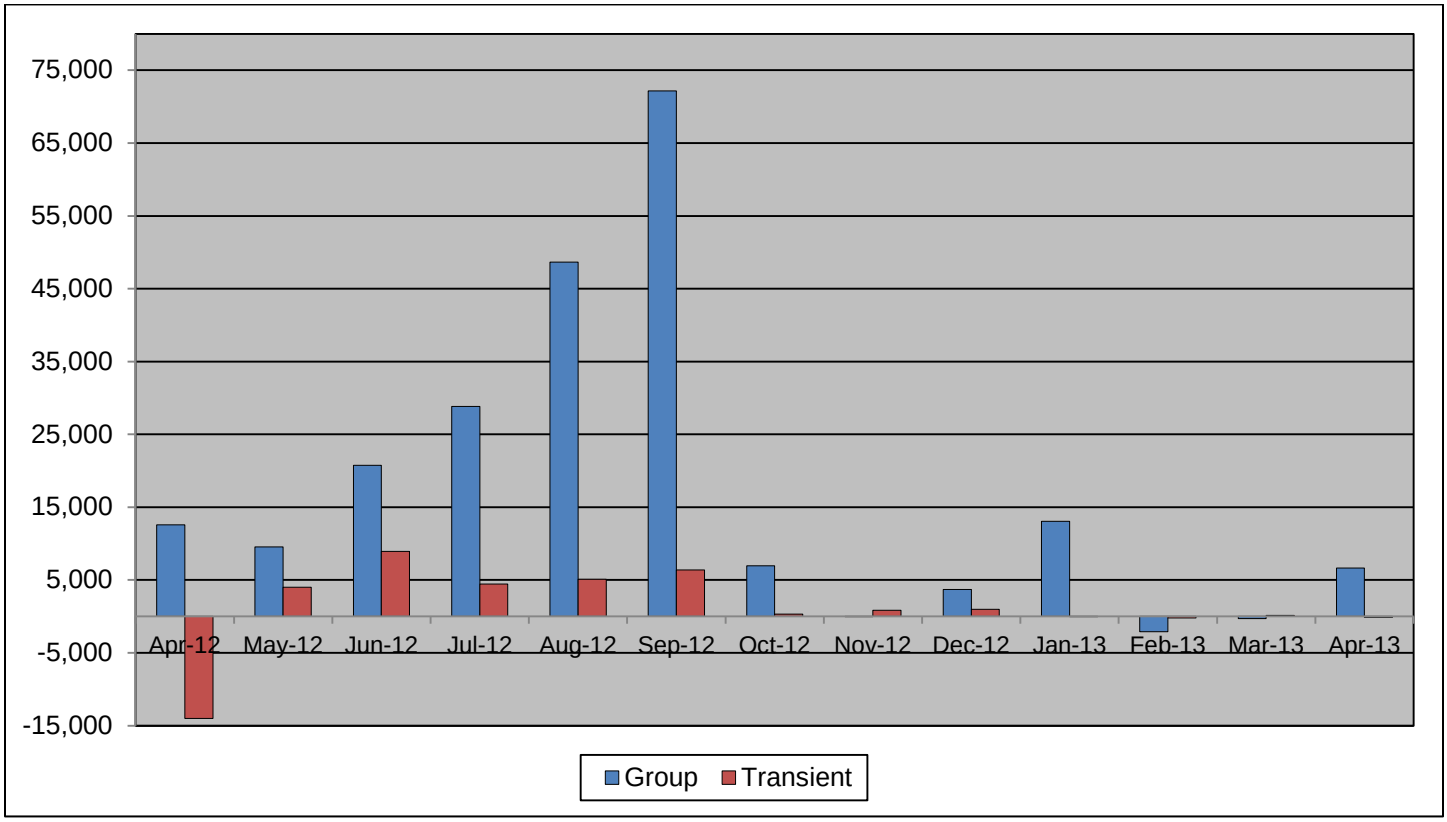


Eight Year Dynamic Room Night Pace Report
(As of 4/1/12) Trends Analysis Projections, LLC

	2012	2013	2014	2015	2016	2017	2018	2019	Total
Charlotte Definite Room Nights	397,988	165,410	114,985	25,537	30,299	7,617	0	0	741,836
Pace Target	294,462	173,213	108,658	67,913	39,179	16,797	7,528	4,642	712,392
Pace Percentage	135%	95%	106%	38%	77%	45%	0%	0%	104%
Tentative Room Nights	29,505	78,811	117,536	120,139	92,806	35,947	22,204	26,876	523,824
Consumption Benchmark	346,233	346,233	346,233	346,233	346,233	346,233	346,233	346,233	2,769,864
Peer Set Pace Percentage	106%	87%	82%	93%	77%	70%	61%	113%	91%

Peer Set Data includes Charlotte, Baltimore, Louisville, Pittsburgh and Tampa

Charlotte Market
Change in Committed Room Nights
From Previous Year (As of 4/22/12)



Source: Rubicon

Charlotte Market
Change in Committed Room Nights
From Previous Year (As of 4/22/12)

	4/12	5/12	6/12	7/12	8/12	9/12	10/12	11/12	12/12	1/13	2/13	3/13	4/13	Total
Change Group RN	12,592	9,555	20,761	28,818	48,661	72,184	6,941	-38	3,713	13,063	-2,110	-284	6,633	220,489
% Change Previous Year	18.2	11.6	26.2	43.3	113.9	128.0	14.4	-0.1	29.8	220.5	-11.0	-1.4	101.6	40.5
Change Transient RN	-14,022	4,107	8,923	4,457	5,102	6,401	324	847	957	-21	-192	126	-121	16,798
% Change Previous Year	-6.1	4.2	33.2	31.7	54.3	82.4	-4.2	17.4	36.2	-4.7	-7.2	3.5	-55.8	4.2
Change Combined RN	-1,430	13,752	29,684	33,275	53,763	78,585	7,265	809	4,670	13,042	-2,303	-158	6,512	237,287
% Change Previous Year	-0.5	7.6	28.0	41.3	103.1	122.5	13.0	2.0	30.9	204.6	-10.5	-0.7	96.5	25.0

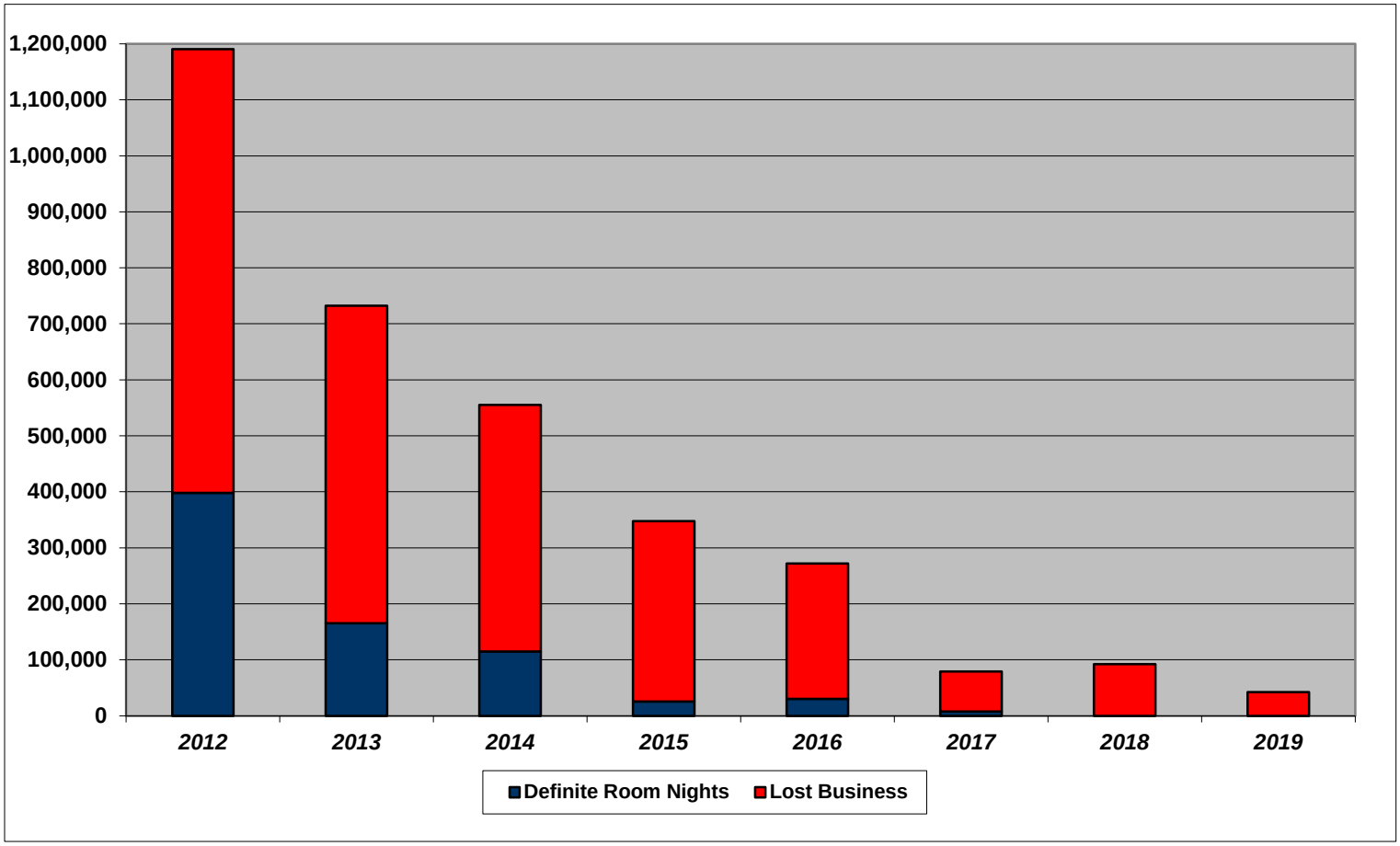
Source: Rubicon

HOSPITALITY INDUSTRY SALES ACTIVITIES
April 2012

Site Visits			
Group Name	**Venue**	**Total Room Nights**	**Total Attendance**
DEFINITES			
Association of American Medical Colleges (April, 2012)	Hotel	80	40
TENTATIVES			
Bayada Home Health Care (May, 2014)	CCC MS	3,536	1,550
North American Society for Trenchless Technology (April, 2015)	CCC	2,000	1,700

Trade Shows & Events (attended by staff)	
Event Name	**Location**
Destination Marketing Association of North Carolina	Smithfield, NC
EBMS CVB Steering Committee	Reno, NV
International Pow Wow	Los Angeles, CA
National Association of Sports Commissions	Hartford, CT
Sales Calls	New York, NY

Visit Charlotte Pace vs. Demand Comparison – Lost Business (As of 4/1/12)Trends Analysis Projections, LLC



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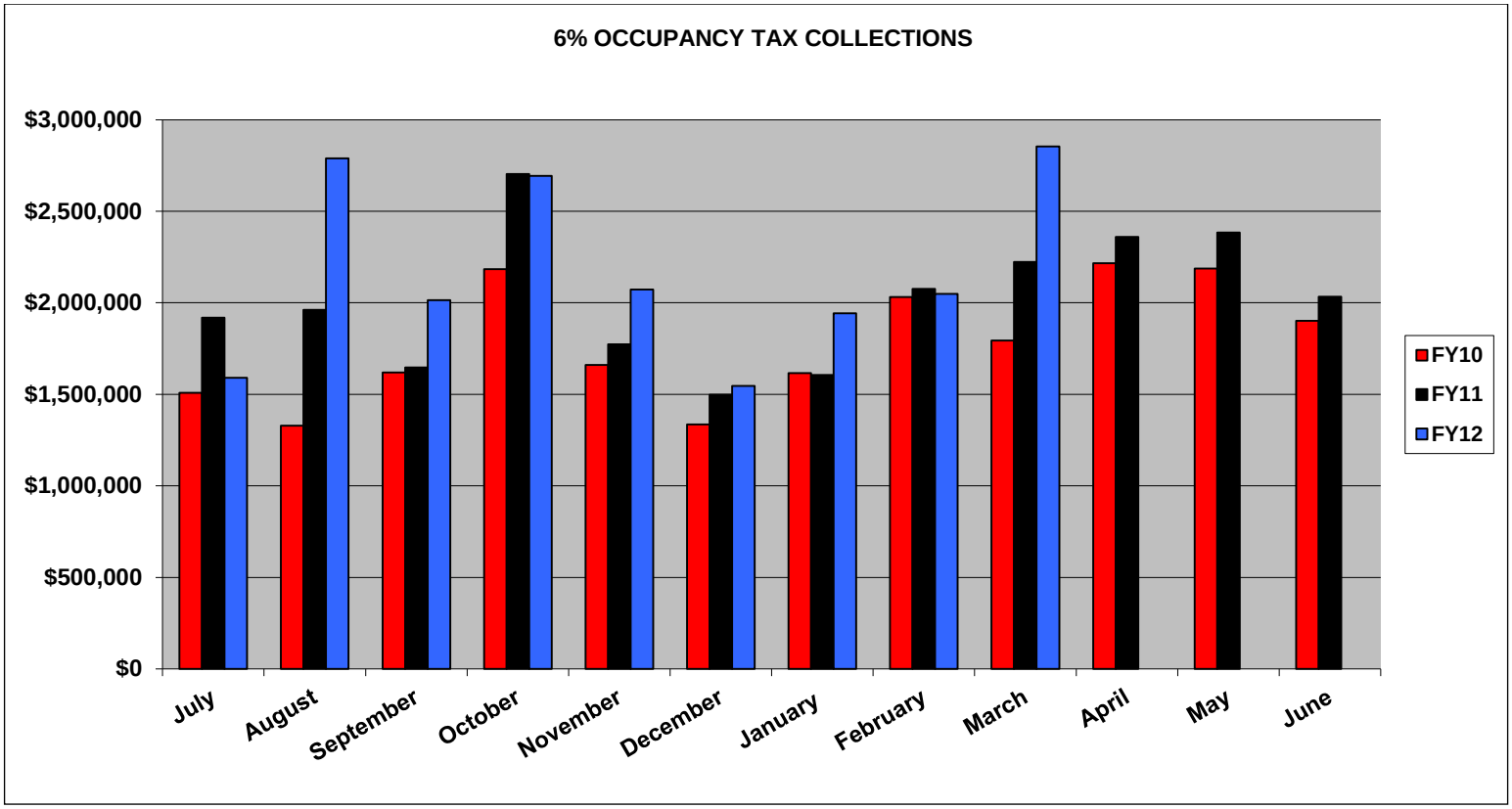
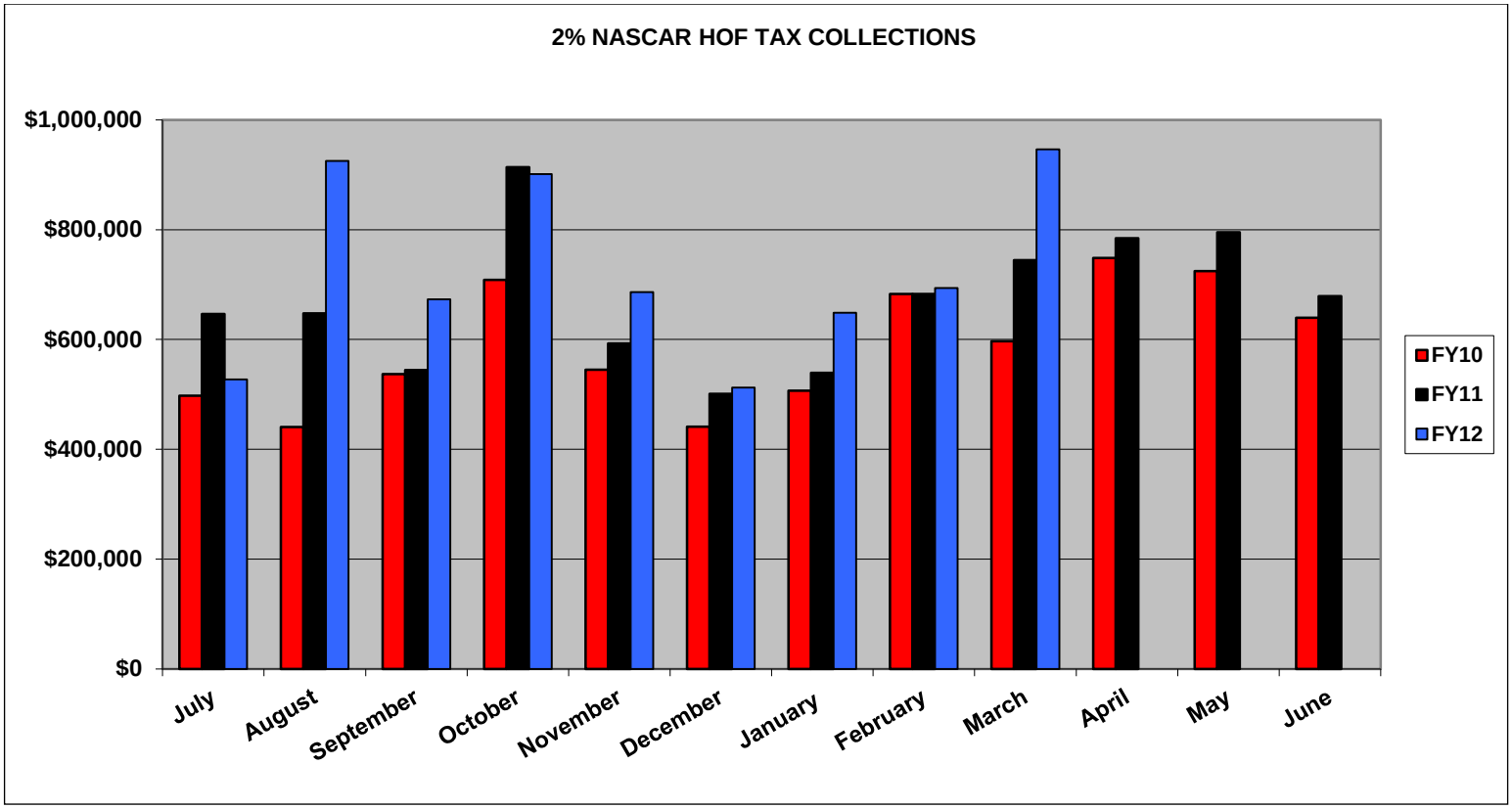
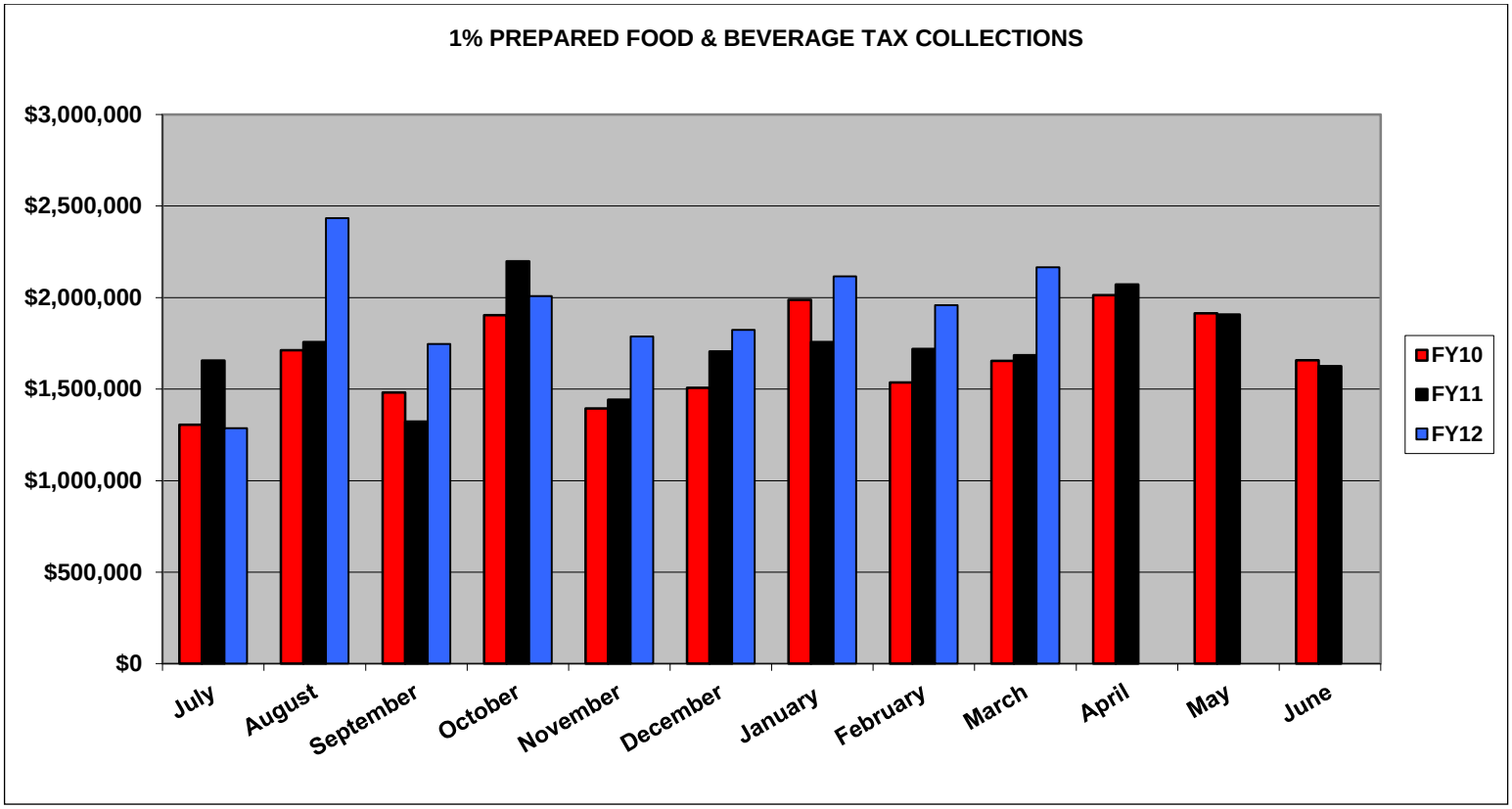
Pace Target	294,462	173,213	108,658	67,913	39,179	16,797	7,528	4,642	712,392
Pace Percentage	135%	95%	106%	38%	77%	45%	0%	0%	104%
Total Demand Room Nights	1,190,531	732,531	555,293	347,648	272,090	79,154	92,075	42,219	3,311,541
Lost Room Nights	792,543	567,121	440,308	322,111	241,791	71,537	92,075	42,219	2,569,705
Conversion Percentage	33%	23%	21%	7%	11%	10%	0%	0%	22%
Peer Set Conversion Percentage	26%	22%	20%	22%	22%	24%	17%	41%	23%

Peer Set Data includes Charlotte, Baltimore, Louisville, Pittsburgh and Tampa


6% OCCUPANCY TAX COLLECTIONS
$3,000,000
$2,500,000
$2,000,000
$1,500,000
$1,000,000
$500,000
$0
July
August
September
October
November
December
January
February
March
April
May
June
FY10
FY11
FY12


2% NASCAR HOF TAX COLLECTIONS
$1,000,000
$800,000
$600,000
$400,000
$200,000
$0
July
August
September
October
November
December
January
February
March
April
May
June
FY10
FY11
FY12



THE ECONOMY
March 2012

	2011	2012	% Change
Consumer Confidence Index	63.4	69.5	9.6%
Consumer Price Index (CPI)	223.467	229.392	2.7%
Unemployment Rate			
- National	8.9%	8.2%	-7.9%
- State	10.4%	9.7%	-6.7%
- Local	10.9%	9.6%	-11.9%