STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Morningstar Fellowship Church,) Civil Action No. 2013-CP-46-00246

Plaintiff,)

v.) ORDER ON DEFENDANT YORK COUNTY'S MOTION TO EXCLUDE DAMAGES AND MOTION *IN LIMINE*

York County, South Carolina,)

Defendant.)

This matter comes before me on (1) Motion by York County (the "County") for an order excluding damages alleged to have been sustained by Plaintiff Morningstar Fellowship Church ("Morningstar") and (2) Motion *in limine* to exclude certain testimony and evidence at the trial of this case. After reviewing the motions and responses, as well as the deposition testimony and other submissions of counsel for the parties, I find and conclude as follows:

FACTS

This case arises from a development agreement entered into by Morningstar and the County pursuant to S.C. Code Ann. §6-31-10, et seq. (2004)(the "Agreement"), recorded May 5, 2008. The Agreement concerns, among other things, the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower, a 21-story condominium planned to have been part of the PTL Ministries development in the Regent Park area of Fort Mill, South Carolina (the "Tower"). Paragraph IV.C.2. of the Agreement provides:

> 2. Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer.

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EXHIBIT
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Morningstar contends that the County breached the Agreement by, among other things, failing to give it notice by certified or regular mail of the approval of the Morningstar site plan for the project, by declaring default when Morningstar failed to provide required financial information within 180 days after approval of its site plan and by allegedly failing to comply with the dispute resolution procedures set forth in the Agreement. The County denies the allegations of breach and contends that Morningstar's failure to provide the financial information required by Paragraph IV.C.2. constitutes a breach and default under the Agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MORNINGSTAR'S DAMAGES

In response to standard interrogatories served upon Morningstar by the County, Morningstar contends as follows:

> "3. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Morningstar.
>
> **RESPONSE: Plaintiff's damages are in three basic categories:**
> **(a) Loss of Value of the Tower which Defendants seek to have demolished. $11,889,719.00**
> **(b) Cost of the engineering, marketing, architectural legal and development spent to date $1,201,456.00**
> **(c) Lost income from reservation holders at the towers over the next 5 years $7,187,421.00."**

The County has moved to exclude these damages on the grounds that they lack foundation, are based on conjecture and speculation, and are not recoverable as a matter of law.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). As set forth hereinbelow, I find and conclude that the damages

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claimed by Morningstar are not recoverable in this action as a matter of law, and all evidence supporting such evidence should be excluded from the trial of this case.

1. Morningstar Cannot Prove "Loss of the Value of the Tower."

Morningstar contends that it should be allowed to present evidence of the "lost value of the Tower," which its CEO and 30(b)(6) designee, Rick Joyner, testified was the value of the partially constructed building in place that would not have to be paid for if the Tower were completed. Joyner at 498-504. Morningstar therefore claims, should it prevail at trial, the difference between the amount estimated in 2008 and whatever that value is today, representing the alleged increased costs of construction if it is allowed to complete the project. However, Morningstar has not determined what this number is, and Joyner admitted he cannot put a value on it with any degree of certainty. Joyner at 511 - 514.

The expert witnesses identified by Morningstar to testify as to the "General Economics of the Project/Damages," including Moore Stephens & Lovelace and Integra Realty Resources, and the documents related to such witnesses, all relate to matters prior to Morningstar's default under the Development Agreement. Morningstar has not provided any evidence whatsoever of any damages to the value of the Tower occurring after March 5, 2010, the date on which the County declared default. In fact, Morningstar's architect, Jefferson C. Woodall specifically stated in a letter to Plaintiff's counsel dated February 12, 2014, that "it is my opinion that the cost to renovate and restore has not significantly increased due to any change in the building condition over the period between the cost estimates in 2010 and the present."

Morningstar's evidence of any increased costs associated with the completion of the Tower is based upon conjecture and speculation and is contradicted by its own experts. Morningstar therefore cannot establish any amount of damages resulting from "Loss of the Value

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of Tower," asserted in Response 3(a), and that component of damages is excluded from the trial of this case.

2. Morningstar Cannot Recover Damages for Development Costs.

Morningstar also seeks an award of damages for the "engineering, marketing, architectural, legal and development spent to date $1,201,456.00." Prior to trial, Morningstar revised this number downward to $819,460.89, representing the amount it contends was spent on the Tower that must be incurred again if it is allowed to complete the project. Deposition testimony reveals that Morningstar has made no attempt to verify whether any of the expenses must in fact be incurred again, but instead simply calculated what had been spent on the Tower to date according to its internal accounting records. Joyner at 582-584; Deposition of David Yarnes at 368, 578-580, 591-592. Without evidence of which expenses assigned to the Tower are required to be incurred again if the Tower were allowed to be completed, the calculation of damages proximately caused by the alleged breach become a matter of conjecture and speculation.

While proof of Morningstar's damages with mathematical certainty is not required, "in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)(citing Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968)). The evidence as to the added development costs is in the Court's view speculative, not only as to the amount but speculative as to the portion thereof proximately and directly resulting from the alleged breach on the part of

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the County. Accordingly, such evidence has no real probative value in ascertaining the amount of any actual damage property resulting from such alleged breach.

3. **Morningstar has Produced No Evidence of Lost Profits Resulting from Actions of the County.**

Morningstar also seeks recovery for lost future income in the amount of $7,187,421.00 which it has characterized as the income it anticipated receiving from future sales over five years. Yarnes at 594-597. Mr. Yarnes testified that he prepared an undated preliminary operating statement containing the proposed calculation, but could not identify who compiled the information contained within the operating statement or when it was compiled. Yarnes at 598. He further stated that the information contained in the spreadsheet was obtained from other projections within the same document and had not been verified by Morningstar's own accountants. Id., at 598-601. Moreover, Morningstar has offered no evidence that any person who made any reservation for a unit in the Tower withdrew that reservation because of the declaration of default by the County.

Not only has Morningstar failed to provide any detail or evidence supporting its blanket allegation of lost income, but any assertion that such alleged damages were the proximate result of any activity by the County is pure speculation. Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450-51 (Ct. App. 2008)(holding that a claim for lost prospective profits, requires proof that such profits: (1) were reasonably certain to have been realized; and (2) can be ascertained and measured from the evidence produced with reasonable certainty); *see also* Petty v. Weyerhaeuser Co., 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct.App.1986).

Here, Morningstar has simply proposed a number, $7,187,421.00, which it contends, without any objectively measurable support, constitutes an amount of lost income over the next 5 years on a project that was not complete and had no funding in place. No back up for this

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calculation exists in any of the documents provided to the County, no methodology has been proposed to calculate it, and no witness has been identified who would substantiate it. So too, no evidence from any witness has been provided to substantiate the reason for any reservation holder to request a refund of their reservation, or whether such refunds had anything to do with the actions of the County.

In Drews Co., Inc., v. Ledwith-Wolfe Assoc., Inc., 296 S.C. 207, 371 S.E.2d 532 (1988), our Supreme Court discussed the requirements for establishing an evidentiary basis for claiming lost profits. Under Drews, recovery of lost profits for a new business requires a showing that the profits were lost as a natural consequence of the breach of contract, that they were foreseeable at the time the contract was made, and that they be established with reasonable certainty. 296 S.C. at 213.

The profits that Morningstar seeks to recover were allegedly the result of lost sales of life leases in the Tower. At the time of the declaration of default, and in fact as the reason for the default, Morningstar was unable to provide evidence of financial viability of the project. Therefore, there is no evidence that profits of any kind were the natural consequence of the declaration of default, even if it were a breach of the Agreement. Moreover, in response to the County's interrogatories, Morningstar concedes that many of the "Priority Reservation Applications" it claims were refunded because of the County's alleged breach occurred before the County declared default. Morningstar's Response to Defendant's Interrogatories No. 11 and 12. Similarly, lost profits could not have reasonably been in the contemplation of the parties without evidence that the project was financially viable. 296 S.C. at 213.

Even more crucially, Morningstar is unable to establish lost profits with any reasonable certainty. As noted in Drews, an owner's expectations, unsupported by any particular standard

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or fixed method for establishing net profits, are wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty. 296 S.C. at 214. As a result, I conclude that Morningstar's alleged lost profits were not a natural consequence of the declaration of default, were not within the reasonable contemplation of the parties and find that they cannot be ascertained or measured from the evidence produced with any reasonable certainty and that they should therefore be excluded.

B. THE COUNTY'S MOTIONS *IN LIMINE*

1. Evidence of Settlement Discussions and Mediation

Morningstar's complaint includes allegations that the County did not negotiate "in good faith" as the parties attempted to resolve their dispute prior to litigation. Complaint ¶¶ 27.c. and 32. The County seeks to prevent the introduction of any testimony concerning the parties' settlement discussions, including discussions occurring in connection with the parties' failed attempts at mediation. The County further seeks to specifically exclude the following exhibits, which have been identified by Morningstar as trial exhibits:

29.	Carl Epps May 3, 3010 Letter	MorningStar 17443-17445
30.	Jim Baker Letter July 14, 2014	MorningStar 17460-17462
31.	Yarnes Letter January 3, 2011	MorningStar 17441-17456
32.	Carl Epps Aug. 12, 2010 Letter	MorningStar 17527-27529
33.	Jim Baker June 24, 2010 Letter	MorningStar 17437-17439
34.	Yarnes January 3, 2011 Letter	MorningStar 17460-17462
35.	Carl Epps March 3, 2011 Letter	MorningStar 17430-17432
36.	Yarnes June 30, 2011 Letter	MorningStar 17433-17444
37.	MorningStar Mediation Responses	MorningStar 155-197

South Carolina has long held that "evidence of disclosures made by either party to the other, directly or indirectly, in negotiations for a compromise" is inadmissible for purposes of

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establishing liability or damages. Woodward v. Southern Ry. Co., 88 S.C. 453, 70 S.E. 1060, 1061 (1911). More recently, South Carolina has adopted Rule 408 S.C. R. Evid., which provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering to accept, valuable consideration in compromising or attempting to compromise a claim which was disputed as to validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . .

Rule 408 S.C. R. Evid.

South Carolina's Rule 408 is identical to Federal Rule of Evidence 408. It "is broader than the common law exclusionary rule in many jurisdictions and excludes from evidence *all statements made in the course of settlement negotiations*." Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir. 1988)(comparing Federal Rule 408 to common law exclusionary rules)(italics added). The purpose of Rule 408 "is to encourage the parties to be able to meet and attempt to settle claims outside of court . . . through "frank and open discussion of the strengths and weaknesses of each side's case." Polk v. BP Amoco Chem. Co., 586 F. Supp. 2d 619, 622 (D.S.C. 2008).

Like Evidence Rule 408, South Carolina's mediation rules encourage the parties to engage in "frank and open discussion" and also unequivocally state that "[c]ommunications during a mediation settlement conference shall be confidential." S.C. ADR Rules, Rule 8. In fact, Rule 8 provides:

> [T]he parties and any other person present *shall* maintain the confidentiality of the mediation and *shall not* rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding. . . .

Id. (italics added).

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Morningstar contends that it seeks to introduce evidence of information exchanged and positions taken in mediation "to demonstrate the County's failure to properly follow the dispute resolution procedures required under the Development Agreement," which is itself a basis alleged by Morningstar for its claim of breach of the Agreement. I therefore find and conclude that all such communications, statements and other information is inadmissible under Rule 408 and ADR Rule 8. These rules make clear that statements and correspondence exchanged by parties during the course of settlement discussions or mediation may not later be introduced as evidence at trial. Accordingly, all such evidence is excluded.

2. Subjective Views of Former York County Councilman Buddy Motz

Morningstar also seeks to offer evidence in the form of emails and live testimony from former York County Councilman Buddy Motz concerning his alleged views of Morningstar's ministry. (Plaintiff's pretrial Ex. 18. "Motz January 22, 2010 email - County Production p. 656"). Mr. Motz is the apparent author of an email that includes unflattering comments about Morningstar and its perceived connection to the former owner of the subject property, PTL Ministries. Morningstar seeks to introduce Mr. Motz's testimony and email as evidence of the County's bias and its alleged motivation for declaring Morningstar in default of the Agreement.

Even if Mr. Motz harbored personal bias against Morningstar, his alleged bias cannot be imputed to the County. Furthermore, Morningstar's attempt to introduce Mr. Motz's personal views and emailed comments as evidence of the County's alleged bias is not permitted. In Bear Enterprises v. County of Greenville, the South Carolina's Court of Appeals admonished a landowner for "interrogating" individual members of the Greenville County Council in an attempt to demonstrate that the County had arbitrarily denied the landowner's rezoning request.

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319 S.C. 137, 139 n.1, 459 S.E.2d 883, 885 n.1 (Ct. App. 1995). As the Court of Appeals stated in that case,

> We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.

Id. The Court of Appeals criticized the landowner's tactics as "inappropriate," even though "the County did not object to the procedure." Id. In this case, York County *does* object to Plaintiff's planned interrogation of Mr. Motz, a former member of York's County Council.

Similarly, the Supreme Court cited Bear Enterprises with approval in finding that subpoenas for county council members were properly quashed by the trial court in Greenville Co. v. Kenwood Enters., 353 S.C. 157, 175 577 S.E.2d 428 (2003), *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). As Justice Waller noted, "[w]hat County Council members' motivations were for passing the Ordinance simply is not a proper inquiry." Id. Likewise, what the personal motivations Mr. Motz or any other member of County Council may have had in voting to hold Morningstar in default is not a proper inquiry in this case, and all such evidence is hereby excluded.

3. **Motion to Exclude Evidence of Damages**

The County's Motion in this regard is a restatement of its Motion to Exclude Damages dealt with previously in this Order, and is granted for the reasons set forth herein.

4. **Evidence or Argument that is Contrary to the Court's Prior Substantive Rulings**

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The County seeks to exclude any evidence or argument that is contrary to the court's prior substantive rulings in this case. In particular, the County seeks to preclude Plaintiff from introducing testimony or argument that the parties' Agreement required the County to deliver notice of site plan approval to Plaintiff by certified mail. Morningstar agrees that it cannot argue that notice by certified mail was required by the language of the Agreement, but seeks to argue that it should be permitted to state that it expected notice in that fashion given the gravity of the consequences of default. I find that nothing in Judge Kimball's Orders in this case precludes Morningstar from arguing that it expected notice by certified mail of site plan approval, and decline to exclude testimony or argument to that effect.

5. <u>"Petition Regarding Interest" to York County Council</u>

Finally, Morningstar seeks to introduce a "Petition Regarding Interest" that it contends was submitted to the York County Council in February 2011 (Pl. Ex. 6 - "Petition Regarding Interest - MorningStar 103-131"). The petition post-dates the County's declaration of default by eleven months, and has no probative value to the issues for trial – whether the County breached the Agreement; whether Morningstar defaulted on the Agreement; and what rights, remedies and obligations the parties possess under the Agreement. The "Petition Regarding Interest" that Morningstar seeks to introduce is not relevant or probative to any of those issues, and further is clearly an out of court statement offered for the proof of the matter asserted, i.e. that there was a market for the Tower project if it could have been completed. Accordingly, it is hearsay barred by Rule 801, S.C. R. Evid. Moreover, the petition is likely to be misconstrued or misunderstood by the jury, and its potential to cause unfair prejudice, confusion of the issues, or to mislead the jury substantially outweighs any probative value of the document. Rule 403 S.C. R. Evid. Accordingly, such evidence is excluded from the trial of this case.

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CONCLUSION

IT IS THEREFORE ORDERED that York County's Motion to Exclude Damages be, and is hereby GRANTED; that York County's Motions *in limine* 1, 2, 3 and 5 are hereby GRANTED, and that its Motion *in limine* 4 is DENIED.

AND IT IS SO ORDERED.

Daniel D. Hall
Resident Judge
Sixteenth Judicial Circuit

York, South Carolina
February 2, 2015

4843-6187-9329, v. 1

#12004

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Morningstar Fellowship Church,

Plaintiff,

vs.

York County, South Carolina,

Defendant.

ORDER FOR PARTIAL SUMMARY JUDGMENT

Case No. 2013CP4600246

This matter came before me on June 19, 2014, upon Defendant's Motion for Summary Judgment or Partial Summary Judgment. Present and representing the parties at the hearing were: Richard B. Fennell for Plaintiff; and, Daniel J. Ballou and Michael K. Kendree for Defendant. Based on the record before the Court, the applicable law, and the arguments of counsel, I make the following findings and conclusions.

FACTUAL BACKGROUND

This case arises from a development agreement entered into by Morningstar Fellowship Church ("Morningstar") and York County ("County") pursuant to S.C. Code Ann. § 6-31-10, *et seq.* (1976, as amended)(the "Development Agreement" or "Agreement"). The Development Agreement concerns, among other things, the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower ("Tower"), a 21-story condominium planned to have been part of the former PTL Ministries ("PTL") development in the Regent Park area of Fort Mill, South Carolina.

PTL began construction on the Tower in 1986, but with the dramatic collapse of its ministries and bankruptcy in 1987, all work on the Tower ceased. This left a partially constructed shell that has progressively deteriorated. It now requires major repairs and reconstruction to be rehabilitated and completed to a usable condition.

Prior to its purchase by Morningstar, the subject property was owned by Regent Carolina Corporation ("Regent"). In the summer of 2004, Regent contracted to sell property consisting of 162 acres to Coulston Enterprises, Inc. ("Coulston"). In turn, in July, 2004, Coulston agreed to sell 52 acres, including the Tower, to Morningstar for $1,600,000.00. Demolition of the Tower was made a specific contractual requirement of Morningstar's purchase from Coulston.

EXHIBIT
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In its Complaint, Morningstar describes the Tower at the time of its purchase as "abandoned and derelict." Morningstar avers that PTL ". . . abandoned the property approximately twenty (20) years ago." Complaint at ¶ 5. It further alleges that although others had attempted, unsuccessfully, to use the property, it had been abandoned approximately seven years prior to the purchase from Coulston. *Id.* Morningstar did not inspect the Tower prior to purchasing the 52 acre tract. The tract also contained other significant improvements.

Further, Morningstar contracted with Coulston that it would demolish the Tower within 24 months of closing, or pay Coulston an additional $300,000.00. It also acknowledged that York County could still require the demolition of the Tower anyway. Morningstar's deed also contained a specific easement allowing Coulston to enter the property to demolish the Tower, presumably in the event Morningstar failed to do so. Coulston remained involved in the redevelopment of the property, and submitted a proposed PD Development Plan to York County on behalf of Morningstar, which was approved in January of 2005. That Plan specifically required Morningstar to demolish the Tower by January, 2007.

Notwithstanding the foregoing contractual provisions, and after acquiring the property, Morningstar announced its intention to complete construction of the Tower, and redevelop it for residential use. In pursuit of that intention, Morningstar engaged Roe Messner ("Messner"), a real estate developer specializing in church properties, to develop plans for redevelopment of the Tower. In the Fall of 2005, Messner requested that York County allow Morningstar to renovate and complete the Tower. On December 14, 2005, York County rejected that request, citing the requirements of the existing PD Development Plan.

In response, Morningstar proposed entering into a development agreement that provided a framework for either the completion or demolition of the Tower within five years, which was the stated term of the Agreement. The Agreement reflects that the County would not agree to an indefinite time frame for Morningstar to complete the Tower project, and further required specific benchmarks Morningstar was required to meet along the way. Specifically, Morningstar was required to produce evidence of satisfactory financing for the project within 180 days of site plan approval. Section IV.C.2. of the Agreement provides:

> 2. Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer.

In pursuit of its plan, Morningstar engaged Power Engineering ("Power") to serve as its project engineer to handle dealings with York County, and designated Power as the entity with which the County would correspond. Gerald Lee ("Lee"), then the manager of Power's Charlotte office, was assigned by Power as project manager in early 2009, and he communicated directly with Morningstar's construction manager, Pat Selvey, concerning the site plan approval process. There were rounds of comments and changes through the spring and summer of 2009 concerning the site plan.

On August 18, 2009, Lee met with Billy Payne ("Payne"), the County's Stormwater Plans Examiner, and made some additions and corrections to the plans. Following that, Lee considered that the site plan had met all requirements for final approval. On August 24, 2009, Payne issued a "Notice of Approval" pertaining to the "Heritage Tower Project, Storm-water Management and Sediment and Erosion Control Plan." The "Notice of Approval" indicates that it was received by Power on November 23, 2009. Morningstar asserts that it had no direct knowledge of site plan approval until early 2010, through an exchange of emails and meeting between Morningstar and County representatives.

With regard to notices, the Agreement provides:

> H. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when mailed by certified or registered mail, postage prepaid, addressed as follows:
>
> To Developer:
>
> Rick Joyner, President
> Morningstar Fellowship Church
> 375 Star Light Drive
> Fort Mill, SC 29715

It is undisputed that no other document relating to official approval of the site plan was issued by the County, and no formal "notice" of the approval was sent to Joyner per the provision in the Agreement quoted above.

Morningstar did not provide any form of evidence of the financial backing of the project as required by the Agreement within 180 days from August 24, 2009, and has not to date. As a result, by letter from James Baker, the County Manager, dated March 5, 2010, the County formally notified Morningstar in writing that it was in default under the Agreement for its failure to comply with Section IV.C.2. of the Agreement. Pursuant to the Agreement, the County thereafter

allowed Morningstar an opportunity to cure the asserted default well beyond the Development Agreement's 60 days cure period, and beyond 180 days from the time it had given actual notice of the site plan approval directly to the responsible Morningstar employee. Subsequently, the parties have engaged in mediation as per the Agreement, but without resolution of the dispute.

Morningstar filed this action on January, 24, 2013. In its Complaint, Morningstar asserts three causes of action: a declaratory judgment; breach of contract; and, breach of covenant of good faith and fair dealing. Each is essentially based on these particulars of breach of contract: (1) failure to give notice of site plan approval; (2) declaring a default without any basis for doing so; (3) failure to participate in the mediation process in good faith; and, (4) breach of an implied covenant of good faith and fair dealing.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn from that evidence must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997).

In ruling on the motion, the court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct.App. 1994). Within this framework, summary judgment is appropriate when facts exist on which reasonable minds cannot differ, and it is not appropriate where further inquiry into the facts is desirable to clarify the application of law.

It is not, however, sufficient that the nonmoving party seeks to create an inference that is not reasonable, or an issue of fact that is not genuine, in order to avoid summary judgment. *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006); *see also*, *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). However, the non-moving party need only submit a mere scintilla of evidence to withstand a summary judgment motion in cases where the applicable burden of proof is a preponderance of the evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). Summary judgment is a drastic

remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

DISCUSSION

A. The Agreement.

The construction or interpretation of a written contract is a question of law for a court, where the language of the instrument is clear and unambiguous. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct.App.1992); *J.T.M. Co., Inc. v. Vane*, 283 S.C. 512, 323 S.E.2d 794 (Ct.App. 1984); *Stackhouse v. Pure Oil Co.*, 176 S.C. 318, 180 S.E. 188 (1935); *Huntley v. Sullivan*, 170 S.C. 391, 170 S.E. 664 (1933). "The court must enforce an unambiguous contract according to its terms, regardless of the contracts wisdom or folly, or the parties' failure to guard their rights carefully." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493 (Ct. App. 2004).

"To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect." *Id.*, 358 S.C. at 94, 594 S.E.2d at 493. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct.App. 2008).

The foundation of Morningstar's claim is that the County did not give Morningstar notice of the approval of the site plan for the project. All of Morningstar's claims flow from this pivotal assertion. It further asserts that notice must be in the form and manner specified in the Agreement for the giving of notice to parties. It contends that it did not know that the site plan was approved in August, 2009, and that the procedure for giving notice under the Agreement was not followed. It further contends that notice to its designated engineer-agent on the project was ineffective, because the termination-demolition clause a contractual issue, not a design or construction issue, and was therefore, beyond the scope of its engineers' agency. Thus, it asserts, the County has breached the Agreement by declaring a default.

I find and conclude that the Agreement does not require that Morningstar receive formal notice of site plan approval as specified in Article XI., § H., of the Agreement quoted herein.

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While if notice is given in the manner specified in the applicable provision it is conclusively deemed to have been given and received, the language does not exclude the giving and receiving of notice by other means. In fact, the record presented reveals that the progress of the project was monitored and communicated by other means, such as emails or direct interaction between Power and the County, and Power and Morningstar, throughout the approval process.

Nevertheless, in looking into the intention of the parties, it is also relevant to consider ". . . the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts Resort Realty, Inc. v. Down'round Develoment Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). "In the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520-521, 386 S.E.2d 259, 262 (Ct.App. 1989).

Although Section IV.C.2. of the Agreement says only that the 180 days for compliance starts with approval of the site plan, it is not reasonable to suppose that no notice of such approval was required. Based on the record presented, and applying the required standard of review, I conclude that some standard of reasonable notice should be implied as part of this provision of the Agreement. It would make no sense to suppose that the County could secretly approve the site plan, then make no communication of such approval to Morningstar, or its responsible agent, and wait for the 180 days to elapse to declare a default.

By making such a conclusion, I do not intend to suggest that the notice given and relied upon by the County was not sufficient. Rather, I believe that such sufficiency is a question of fact based on the record presented. It is clear that Morningstar's engineer, Power, was designated as its representative and agent for dealing with the County on this project, and that part of Power's duties included dealing with the County on all aspects of approval of the site plan. Under the circumstances, the engineer would necessarily be the first to have knowledge of site plan approval.

Thus, I find and conclude that under the circumstances of this case and the parties' relationship, a full presentation of the facts pertaining to the reasonableness of the notice of approval of the site plan is appropriate. Such a conclusion precludes a grant of summary judgment on Morningstar's breach of contract and declaratory judgment causes of action.

B. <u>Morningstar's Third Cause of Action</u>.

Morningstar asserts a separate cause of action based upon a covenant of good faith and fair dealing. In this state, there is no separate cause of action for breach of the covenant of good faith

4. 6

and fair dealing. *Rotec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Hence, the County is entitled to a dismissal of the third cause of action.

CONCLUSION

Based on the findings and conclusions herein, the arguments presented, the exhibits submitted for the Court's consideration, and the applicable law, it is ordered that Defendant's Motion for Summary Judgment be denied as to Plaintiff's first and second causes of action. It is further ordered that Defendant's motion be granted as to Plaintiff's third cause of action.

AND IT IS SO ORDERED.

July 16, 2014

S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Morningstar Fellowship Church, Plaintiff, v. York County, South Carolina, Defendant.	)	Civil Action No. 2013-CP-46-00246 **ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR ENTRY OF JUDGMENT**

This matter comes before me on the Defendant's Renewed Motion for Entry of Judgment. Present and representing the parties at the hearing on October 27, 2015, were Richard B. Fennell for the Plaintiff, and Daniel J. Ballou and W. Keith Martens for the Defendant. Based upon the record before the Court, the applicable law, the papers filed by the parties and the arguments of counsel, I make the following findings and conclusions.

FINDINGS OF FACT

1. This case arises from a development agreement entered into by the Plaintiff, Morningstar Fellowship Church ("Morningstar") and the Defendant, York County ("County") pursuant to S.C. Code Ann. §6-31-10, et seq. (2004), recorded May 5, 2008 (the "Agreement"). The Agreement concerns, among other things, the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower, a 21-story condominium planned to have been part of the PTL Ministries development in the Regent Park area of Fort Mill, South Carolina (the "Tower").

2. The Agreement was the result of extended negotiations between Morningstar and the County, and provided for specific milestones to be met by

Morningstar in order to proceed with the project. The history behind the Tower project is set forth more fully in the Court's Order for Partial Summary Judgment dated July 17, 2014, a copy of which is attached hereto as **Exhibit A**, and which is incorporated herein by reference.

3. The parties' dispute involves competing allegations concerning performance under the Agreement, which contemplated the submission by Morningstar of a commercial site plan for approval by the County. It is undisputed that Section IV.C.2 of the Agreement requires Morningstar to provide specific information as to the project's financial viability to the County within 180 days of the County's approval of Morningstar's site plan. The Agreement further provides that should Morningstar be unable to produce the required financial information within 180 days of approval, the Agreement is deemed to be null and void, and "[a]t such time, the Tower shall be demolished, with all costs for its demolition borne by [Morningstar]." See, **Exhibit A**, pp. 2-4.

4. The County approved the Morningstar site plan on August 24, 2009, and notified Morningstar's engineers of such approval. See, **Exhibit A**, p.3, see also, Order on Motion to Alter or Amend, September 29, 2014, a copy of which is attached hereto as **Exhibit B**, and which is incorporated herein by reference. Morningstar did not provide any form of evidence of the financial backing of the project as required by the Agreement within 180 days of August 24, 2009, and has not to date. See, **Exhibit A**, p.3. Nevertheless, Morningstar contends that it did not receive reasonable notice of site plan approval, and that therefore the 180 day time limit did not begin to run. Morningstar further contends that the alleged lack of reasonable notice as well as the

County's subsequent declaration of default constitutes a breach of contract for which it seeks an award of actual and consequential damages.

5. On January 24, 2013, Morningstar filed this lawsuit against the County alleging breach of contract, and seeking a declaratory judgment that it is not in default under the terms of the Agreement and that the County breached the Agreement. On March 25, 2013, the County answered denying breach, and asserting counterclaims for, among other things, breach of contract and declaratory judgment that Morningstar was in default under the Agreement.

6. On September 15, 2014, the County filed a Motion to Exclude Damages on the grounds that the damages alleged by Morningstar were not recoverable as a matter of law and that the evidence relied upon by Morningstar to support such damages was speculative and incompetent and therefore inadmissible as a matter of law. After reviewing extensive discovery, including interrogatory responses and numerous documents and depositions submitted by counsel for the parties, the Court agreed that Morningstar's claims to money damages were not supportable and that the evidence of damages was incompetent and inadmissible and should be excluded from the trial of this case. Order of February 3, 2015 ("Order"), a copy of which is attached hereto as **Exhibit C**, and which is incorporated herein by reference.

7. Morningstar mailed an initial Notice of Appeal on February 3, 2015. On February 4, 2015, the County filed a Motion for Entry of Judgment, which Motion was stayed during the initial appeal. The Court of Appeals dismissed Morningstar's appeal as interlocutory, and following remand, the County filed an amended Motion on May 18, 2015, which was renewed on October 20, 2015.

8. The County moves for judgment pursuant to South Carolina Rules of Civil Procedure 54(b), 56, and 58(a)(2) on the grounds that, in light of the February 3, 2015 Order, Morningstar cannot establish an essential element of its cause of action for breach of contract, and that the claim for breach of contract should be dismissed. The County further moves to dismiss Morningstar's cause of action for declaratory judgment as simply a recasting of its breach of contract claim, and likewise moves that it be dismissed.

9. At the hearing on this Motion, counsel for both parties agreed that Morningstar could not proceed on its breach of contract claim seeking money damages without evidence of such damages.

10. Based upon the papers filed herein, the prior orders of the Court, and the arguments of counsel, I find that Morningstar is unable to establish an essential element of its breach of contract cause of action, and that this cause of action should therefore be dismissed. I further find that Morningstar's cause of action for declaratory judgment is not fully subsumed within its claim for breach of contract, and I decline to enter judgment as to that claim at this time.

CONCLUSIONS OF LAW

1. In order to recover under a breach of contract cause of action, the plaintiff must establish by the greater weight of the evidence (a) that the parties entered into a binding contract, (b) that the defendant breached or unjustifiably failed to perform this contract, and (c) that the plaintiff has suffered damage as a direct and proximate result of the breach. See, Tom J. Ervin, Ervin's South Carolina Request to Charge - Civil § 22-13, at 181 (1994). 17A Am. Jur. 2d Contracts § 716.

2. Proof of damages is an essential element of a breach of contract claim and the inability to prove that element warrants dismissal of the claim. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009), see also, Collins Entertainment, Inc. v. White, 363 S.C. 546, 559-60 611 S.E.2d 262, 268-69 (Ct. App. 2005)(affirming directed verdict on contract cause of action where plaintiff failed to prove damages).

3. Because this Court has granted the County's Motion to Exclude Damages, entry of judgment in favor of the County as to Morningstar's cause of action for breach of contract is appropriate. S.C.R.Civ. P. 58(a)(2).

CONCLUSION

IT IS THEREFORE ORDERED that York County's Motion for Entry of Judgment be, and is hereby GRANTED in part and DENIED in part. Judgment shall be entered against Morningstar on its cause of action for breach of contract, but not as to its cause of action for declaratory judgment.

IT IS FURTHER ORDERED that this action is stayed until final disposition of any appeal from this order.

AND IT IS SO ORDERED.

Daniel D. Hall
Resident Judge
Sixteenth Judicial Circuit

York, South Carolina
November 9, 2015

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

PLAINTIFF(S)	DEFENDANT(S)
Morningstar Fellowship Church	York County South Carolina
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/Daniel D. Hall	2753	11/9/2015
Circuit Court Judge	**Judge Code**	**Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **November 10, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **November 10, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

Richard B. Fennell James, Mcelroy & Diehl, PA 600 S. College Street Charlotte, NC 28202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel Joseph Ballou PO Box 707 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745
Walter Keith Martens 130 E. Main Street Rock Hill, SC 29731

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

Morningstar Fellowship Church,

Plaintiff,

vs.

York County, South Carolina,

Defendant.

ORDER ON MOTION TO ALTER OR AMEND (RULE 59(e), SCRCP)

Case No. 2013CP4600246

This matter came before me on September 18, 2014, upon motion of Defendant, York County, pursuant to Rule 59(e), SCRCP, asking the Court to alter or amend the ruling in the Court's Order filed July 17, 2014. Representing Plaintiff was Richard B. Fennell, and representing Defendant was Daniel J. Ballou.

The purpose of Rule 59(e), SCRCP, is to request the trial judge to ". . . reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. *See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009); *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009).

Upon reviewing the record, particularly the specific deposition testimony and exhibits cited by Plaintiff, and the arguments of counsel, I find no matter presented that was not addressed expressly or by clear implication in the Order. I further find no basis for reconsideration or amendment of the ruling in the prior Order. However, I make the following comments for clarification. In doing so, I incorporate by reference the entirety of the factual background, discussion and analysis set forth in the prior order.

I reiterate that there is no genuine issue of fact concerning approval of the Morningstar site plan. Further, it is clear that such approval status was understood by Morningstar's agent, namely, its engineer responsible for the project, who is the person to whom the County would normally communicate notice of approval. It also appears that Morningstar's Pat Selvey was aware of approval. Morningstar's reliance on its assertion of an understanding that notice was accomplished, and the critical 180 day time period commenced, only upon receipt of a "stamped"

EXHIBIT
B

set of plans is misplaced. The language of the parties' agreement imposes no such requirement, and such a requirement is refuted by, and inconsistent with, the deposition testimony of Morningstar's engineers. The engineers anticipated a post-approval, but pre-construction, meeting prior to delivery of "stamped" sets of plans, which did not occur.

I view the only issue to be whether reasonable notice of approval was communicated, and knowledge of such approval was received, by Morningstar, either directly, or its agent. Applying, as is required, the very stringent "scintilla" standard, I do not believe summary judgment is appropriate to remove the issue of sufficiency of notice from consideration by the fact finder. As already stated in my prior order, I do not intend to suggest that the notice given and relied upon by the County was not sufficient, only that the applicable standard of review precludes summary judgment on that issue under the facts of this case.

Therefore, it is ordered that Plaintiff's Motion for Reconsideration (Rule 59(e), SCRCP) be, and the same hereby is, denied.

AND IT IS SO ORDERED.

September 25, 2014

S. Jackson Kimball
Special Circuit Court Judge
York County

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