STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
Morningstar Fellowship Church,)	Civil Action No. 2013-CP-46-00246
Plaintiff,)	
)	ORDER ON DEFENDANT YORK COUNTY'S MOTION TO EXCLUDE DAMAGES AND MOTION *IN LIMINE*
v.)	
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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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

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