THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2015-CP-46-002460

Morningstar Fellowship Church, Appellant/Respondent

v.

York County, South Carolina, Respondent/Appellant

RECORD ON APPEAL
Volume I

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

FILED-RECEIVED
2014 JUL 17 PM 3:38
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

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.

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.

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. **Morningstar's Third Cause of Action.**

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

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

47

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

Morningstar Fellowship Church	York County South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	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/ S. Jackson Kimball 3063 7/16/2014
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 July 17, 2014, and a copy mailed first class or placed in the appropriate attorney's box on July 17, 2014, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

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.

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

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

FILED-RECEIVED
2014 SEP 29 AM 9:42
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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"

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

#2

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

Morningstar Fellowship Church	**York County South Carolina**
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	**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/S. Jackson Kimball — 3063 — 9/25/2014
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 September 29, 2014, and a copy mailed first class or placed in the appropriate attorney's box on September 29, 2014, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

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.

FILED-RECEIVED
2015 FEB -3 AM 8:29
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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.

#1004

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

#2 ODH

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

#3 004

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

#4

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

#5 004

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

#6 DDH

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

#7 0084

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).

#8 GGH

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.

#9 09H

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**

#10 GWH

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. **"Petition Regarding Interest" to York County Council**

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.

11

#11 BBH

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

#12904

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

Morningstar Fellowship Church	York County South Carolina
PLAINTIFF(S)	DEFENDANT(S)
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: ORDER ON DEFENDANT YORK COUNTY'S MOTION TO EXCLUDE DAMAGES AND MOTION IN LIMINE

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 2/2/2015

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 **February 3, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **February 3, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

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.

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

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**

2015 NOV 10 PM 2:42

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

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DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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
A

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.

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." *Kiuttz 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

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

47

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

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2014 SEP 29 AM 9:12
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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
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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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2015 FEB -3 AM 8:29
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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
v.) 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.

#1004

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

#4 DDH

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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#5 DDH

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.

#9 09/11

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

#10 COH

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.

11

#11

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

#12 BA

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

Morningstar Fellowship Church	York County South Carolina
PLAINTIFF(S)	DEFENDANT(S)
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	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 PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	David Hamilton
Court Reporter	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.

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

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 MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

FILED-RECEIVED
2014 APR 30 PM 3:11
DAVID HAMILTON
YORK C.C.P.&G.S.
YORK COUNTY, S.C.

Defendant York County moves for summary judgment, pursuant to Rule 56 S.C.R. Civ. P. on the grounds that there are no material issues of fact in dispute regarding each of the Plaintiff's causes of action as well as the County's counterclaims for declaratory judgment and as to liability for breach of contract and York County is entitled to judgment in its favor as a matter of law.

This motion is based upon the arguments set forth in the accompanying Memorandum of Law, the provisions of Rule 56 S.C. R. Civ. P and supported by the pleadings, the sworn testimony of record, publicly recorded orders, property records, and the applicable statutory and case law. Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P. that he had no duty to consult with opposing counsel prior to filing this motion.

April 29, 2014

Daniel J. Ballou
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Michael K. Kendree
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ATTORNEYS FOR THE DEFENDANT

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 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

FILED-RECEIVED
2014 APR 30 PM 3:17
DAVID HAMILTON
C.C.C.C.P. & G.S.
YORK COUNTY, SC

In support of Defendant's Motion for Summary Judgment or Partial Summary Judgment, York County states as follows:

STATEMENT OF FACTS

This case arises from a development agreement entered into by Morningstar Fellowship Church ("Morningstar") and York County pursuant to S.C. Code Ann. §6-31-10, et seq. (2004)(the "Development Agreement" or "Agreement"). **Exhibit A**, Morningstar Development Agreement, recorded May 5, 2008. The Development 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").

PTL began construction on the Tower in 1986, but with the dramatic collapse of its ministries and bankruptcy in 1987, all work on the hotel abruptly ceased, leaving a partially constructed and progressively deteriorating shell that has dominated the Fort Mill skyline for a generation. Prior to its purchase by Morningstar, the property had been owned by Regent Carolina Corporation. In the summer of 2004, Regent contracted to sell property consisting of 162 acres to Coulston Enterprises, Inc., which in turn had agreed to sell 52 acres, including the

Tower, to Morningstar for $1,600,000.00. See, **Exhibit B**, Agreement for the Purchase and Sale of Real Property, dated July 6, 2004.

The Tower's demolition was made a specific contractual requirement of Morningstar's purchase from Coulston Enterprises. **Exhibit B**, at ¶¶ 3, 12.3, 30. Morningstar described the Tower as "abandoned and derelict" at the time it was purchased and did not even inspect the Tower prior to purchasing the property. Complaint at ¶ 5; Plaintiff's Objections and Responses to Defendant's First Set of Interrogatories ("Answers to Interrogatories"), No. 7. Moreover, Morningstar promised Coulston that it would demolish the Tower within 24 months of closing or else pay Coulston an additional $300,000.00, while acknowledging that York County could still require the demolition of the Tower anyway. **Exhibit B**, at ¶12.3. Likewise, Morningstar's deed contained a specific easement allowing Coulston to enter the property to demolish the Tower if Morningstar failed to do so. **Exhibit C**, Title to Real Estate dated September 27, 2004 at p. 4. 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 PD Development Plan specifically required Morningstar to demolish the Tower by January 0f 2007.

Despite these contractual requirements, as well as Morningstar's repeated assurances and the recorded covenant requiring demolition of the Tower, Morningstar changed course after acquiring the property and announced a strategy to complete construction of the Tower and redevelop it for residential use. Morningstar engaged Mr. Roe 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. See, **Exhibit D**, Letter from Greenway to Joyner, December 14, 2005.

Faced with increasing pressure from the County to demolish the Tower, Morningstar proposed entering into a development agreement that provided a framework for either the completion or demolition of the Tower within five years, the stated duration of the Agreement. **Exhibit A.** Section XII.B, p. 20. The Development 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 tangible evidence of appropriate financing within 180 days of site plan approval. Paragraph IV.C.2. of the Development 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.
>
> **Exhibit A**, at p. 5.

Morningstar engaged Power Engineering ("Power") to serve as its engineer of record in dealings with York County and designated Power as the County's point of contact. **Exhibit E**, Site Plan Development Guide Checklist, December 3, 2008, Power 132-138. Gerald Lee was assigned by Power as project manager in early 2009, and he communicated directly with Morningstar's construction manager Pat Selvey throughout the site plan approval process. **Exhibit F**, Excerpt from Deposition of Gerald Lee, at pp. 14-18; 38-40; 82-83. After several rounds of comments and changes extending through the spring and summer of 2009, the Tower site plan was approved by York County on August 24, 2009. **Exhibit G**, Commercial Site Plan

Approval Documents, Morningstar 000145-147; **Exhibit H**, Notice of Approval, Power 110. **Exhibit F**, Lee Depo., at pp. 58-59, 68-69; 90-93, 97.

Despite site plan approval, Morningstar failed to provide any bid, performance or payment bond, any letter of credit or any other evidence of the financial viability of the project as required by the Development Agreement with 180 days, or any time thereafter. York County formally notified Morningstar in writing on March 5, 2010, that its failure to comply with Section IV.C.2 constituted a default under the Agreement. **Exhibit I**, Letter from James E. Baker to Rick Joyner et al., March 5, 2010. The County nevertheless continued discussions to allow Morningstar an opportunity to cure its default well beyond the Development Agreement's 60 days cure period. Despite two attempted mediations, the parties have been unable to resolve their differences in this case, and Morningstar filed suit on January, 24, 2013.

In its Complaint, Morningstar seeks a declaration that it is not in default under the Development Agreement, despite the fact that it did not, and to this day has not, provided any of the required evidence of financial viability contemplated and required by Section IV.C.2 of the Agreement. On the contrary, Morningstar brazenly contends that York County breached by holding Morningstar to the letter of the Agreement. Morningstar also alleges a claim for breach of contract, contending that York County failed to provide notice of site plan approval, declared default without grounds or justification, failed to mediate in good faith, and breached the covenant of good faith and fair dealing. Finally, Morningstar re-states the alleged breach of the covenant of good faith and fair dealing as a third cause of action based on the same allegations of the Second Cause of Action for breach of contract. For the reasons stated herein, no genuine issue of material fact exists as to each of these causes of action, and York County is entitled to summary judgment as a matter of law.

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). Once the moving party shows a lack of evidentiary support for the nonmoving party's claims, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial in order to avoid summary judgment. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). 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). Where the nonmoving party has the burden of proof, it is that party's obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. Id. Where a nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, the moving party is entitled to judgment as a matter of law. Id.

ARGUMENT

Morningstar's Complaint arises from three fundamental and groundless allegations: (1) that York County failed to notify it of site plan approval; (2) that York County breached the Agreement by holding Morningstar in default for failing to provide financial information specifically required by the Agreement; and (3) that York County failed to mediate in good faith. Morningstar's three causes of action are fundamentally a single claim for breach of contract

restated several different ways. No genuine issue of material fact exists to support these claims, and summary judgment is appropriate as to all causes of action. Likewise, York County is entitled to summary judgment on its counterclaims for declaratory relief and breach of contract regarding Morningstar's breach of the Development Agreement.

1. York County Notified Morningstar of Site Plan Approval On August 24, 2009.

Morningstar's claim that York County failed to notify it of site plan approval is objectively and demonstrably wrong. Keeping in mind that the Agreement does not require any particular form of notification of site plan approval, Morningstar's own engineers testified that approval was given on August 24, 2009. **Exhibit F**, Lee Depo. at 58-59, 68-69; 90-93, 97. The normal site plan approval process involves multiple rounds of submittals, staff review, staff comments and responses, either directly by a developer or through its designated agents and engineers, which in this case was Power Engineering. **Exhibit F**, Lee Depo., at pp. 30-32. Power had been designated as the point of contact with York County staff, and communications between them began early on in the site plan approval process, and continued for many months without any complaint whatsoever by Morningstar. **Exhibit F**, Lee Depo., at p. 83-84. Lee was Power's project manager for the Tower project, and testified that he regularly communicated with Pat Selvey at Morningstar throughout the site plan approval process, beginning in January of 2009, and provided Morningstar with regular status reports. **Exhibit F**, Lee Depo., at p. 14-16.

Morningstar's responses to discovery requests are revealing of its position in this case. In response to Request to Admit No. 4, it states: "**Plaintiff admits that Power engineering was authorized to communicate with Defendant regarding aspects of the proposed construction project. However, matters of contract compliance were beyond the scope of that agency.**"

Exhibit J, Plaintiff's Response to Defendant's Request to Admit No. 4. When asked to admit that York County notified Power of the approval of the site plan on August 24, 2009, Morningstar responded: **"Plaintiff does not have sufficient information to admit or deny what York County claims to have submitted to Power Engineering, Inc. It is denied that any such acceptance was properly communicated to Plaintiff."** **Exhibit J**, Plaintiff's Response to Defendant's Request to Admit No. 6.

Reading these responses in the light most favorable to it, Morningstar does not argue whether site plan approval was issued on August 24, 2009. Instead, it contends that Power was somehow not authorized to receive notice of site plan approval, since it believes site plan approval was a matter of "contract compliance," or that approval was not "properly communicated" to Morningstar so as to begin the 180 day time limit to produce evidence of financial viability. However, even these arguments fall by the wayside in light of the language of the Agreement and Morningstar's own statements to Power and others.

Power provided numerous detailed responses to County staff comments on behalf of Morningstar and submitted multiple drafts of the site plan over the 10 months the plan was being developed **Exhibit F**, Lee Depo., at 28-31; 43-48. The exchange of information included multiple rounds of comments and responses moving toward a final approved site plan, and Lee conveyed regular status reports to Morningstar at each stage. **Exhibit F**, Lee Depo., at 83-84.

Likewise, it is clear that Morningstar was fully apprised of the status of site plan review in the weeks preceding approval. The majority of the work performed by Power to prepare and revise the site plan was complete by the spring of 2009. **Exhibit F**, Lee Depo., at 81. On May 6, 2009, Morningstar's project manager Dave Yarnes wrote to one of Morningstar's lenders, Community One Bank, asking to modify the terms of a $1.5 million loan, writing:

> [t]his has been an incredible year for us as we continue to move forward here with the Heritage International Ministries Tower Project. **As far as major milestones, our site plan is in the final round of the submittal process with York County and a Site Plan Issuance is imminent.** We are mostly finished with all of our major professional fields, such as architecture, engineering, site engineering and others.
>
> **Exhibit F**, Lee Depo., at 44-46; **Exhibit K**, (emphasis added).

While the Tower site plan had been approved on August 24, 2009, Morningstar claimed it needed to be formally notified of this fact by Power, and in November of 2009, withheld payment from Power on this basis. **Exhibit L**, Excerpt from Deposition of Derrick Boyte, at 26-29. In an email exchange between Morningstar and Power dated January 20, 2010 attempting to resolve unpaid invoices, Morningstar stated that it had withheld payment because:

> the contract that was signed says that MorningStar will receive notification from Power that our site plan has been approved by York County. As soon as we hear from Power that our site plan has been approved, the contract will be complete and my manager will release the last $1,000."
>
> **Exhibit M**, Emails between Power Engineering and Morningstar Ministries, December 16, 2009 – January 21, 2010.

The following day, January 21, 2010, Boyte responded:

> I do not understand why Pat thinks the project is not approved. I have attached copies of the approvals from York County and SCDHEC from November. The SCDHEC approval was the only thing we were waiting on and that was sent directly to Pat Selvey. As for copies of stamped approved plans, York County will not release those until a preconstruction meeting is held with your contractor. Hope this resolves the issue.
>
> **Exhibit M.**

In this revealing internal exchange Morningstar claimed that Power had allegedly not notified Morningstar that its site plan had been approved, and used this as a pretext to withhold payment on Power's invoice. Derrick Boyte quickly dispelled this excuse, and eventually Morningstar paid its bill. **Exhibit L**, Boyte Depo., at pp. 29-30.

Significantly, on November 25, 2009, Morningstar received a grading permit from the South Carolina Department of Health and Environmental Control ("SCDHEC") on November 25, 2009 for the Tower project. **Exhibit N**, Letter from SCDHEC to Pat Selvey, Re: Heritage Tower Project, Power 111. An approved site plan is a prerequisite to obtaining a grading permit, evidencing that Morningstar had presented an approved site plan to SCDHEC prior to that date. **Exhibit F**, Lee Depo., at pp. 71-75.

Morningstar has **never** claimed that its site plan was not approved in August of 2009, as its engineers understood. Instead, it claims notifying Power of this approval was insufficient and that it is entitled to some other form of notice neither required nor contemplated under the Agreement. Just as Morningstar used non-existent requirements in its contract with Power as a reason to avoid paying its bill, it has used the same tactic to avoid the consequences of its failure to meet the timetable it agreed to in the Development Agreement.

Despite the fact that by January of 2010 the issue was squarely in the open, the Plaintiff has to this day failed to provide any bond, letter of credit or substantial equivalent as required under Section IV.C.2. **Exhibit J**, Plaintiff's Response to Defendant's Request to Admit No. 8. Nor can Morningstar claim surprise at the significance of providing evidence of financing, since as early as July of 2008, it had provided a timetable to York County specifically describing a proposed schedule for obtaining long term financing and identifying contacts purportedly made with specific potential lenders. **Exhibit O**, Email from Pat Selvey, July 17, 2008, Re: State of the Tower Report – 7.17.2008; Morningstar 000134-135. The Development Agreement required Morningstar to provide tangible evidence to the County's satisfaction that long term financing was in place to insure the completion of the Tower project within a specific period of time after

site plan approval. Morningstar recognized the significance of this provision, failed to provide the required evidence and is in breach of the Agreement.

2. **York County Properly Declared Default Under The Agreement.**

Morningstar does not dispute that it has failed to provide any of the information required under Section IV.C.2. of the Development Agreement. Instead, it argues that the County's declaration of default somehow breached the Agreement. This argument belies the fundamental fact that Morningstar's own uncured failure to meet the terms of the Agreement is the reason for its default. Having not received the evidence of financial viability Morningstar agreed to provide, York County properly declared default. The County's March 5, 2010 letter to Morningstar carefully followed the terms of the Agreement regarding Remedies on Default, (**Exhibit A**, pp. 14-16), and afforded Morningstar ample opportunity to address its failure to provide the necessary information. Exercising rights specifically allowed or contemplated under a contract cannot constitute a breach of that contract or a breach of the covenant of good faith and fair dealing. Adams v. Creel, 320 S.C. 274, 465 S.E.2d 84 (1995). The provisions of the Agreement very clearly spell out the consequences of Morningstar's failure to obtain the necessary bonds or substantial equivalent, and it cannot now complain that it is being treated unfairly or contrary to the Agreement.

3. **York County Mediated in Good Faith.**

Finally, Morningstar curiously alleges that York County failed to mediate this dispute in good faith. Recognizing the obligation to mediate after an alleged default is found in Section X.C. of the Agreement, York County attended two attempted mediation sessions in an effort to resolve the issues surrounding Morningstar's default. Neither of these attempts at mediation was successful. The Complaint contains no allegation of any fact indicating a lack of good faith by

York County before, during or after mediation, but merely states that the effort "has not produced any resolution of the dispute." Complaint at ¶ 15. Unsuccessful mediation is not bad faith.

Likewise, the Complaint alleges no violation of any rule under the South Carolina Alternative Dispute Resolution Rules that could possibly form the basis for any claim of bad faith or failure to comply with the ADR Rules. So too, the matters discussed between the parties at mediation, including views, suggestions, admissions (if any), proposals, and all related records created for use in the mediation are confidential pursuant to SC ADR Rule 8, and the parties have not stipulated to their disclosure or otherwise waived any rights to confidentiality under the Rules.

In the meantime, it remains wholly undisputed that Morningstar has failed to make any effort to cure its default for over two and half years after receiving notice under the Agreement. There exists little question why mediation of this case has failed, given Morningstar's refusal to produce the financial information required under Section IV.C.2. to show that its plan for the Tower is economically viable. Ignoring this fundamental fact, Morningstar seeks to blame its default on York County, and characterizes the County's efforts to hold to the terms of the Agreement as somehow lacking good faith.

South Carolina does not recognize a cause of action for breach of the covenant of good faith and fair dealing independent of a claim for breach of contract. RoTec Services, Inc. v. Encompass Svcs., Inc., 359 S.C. 467, 597 S.E.2d 881 (2004). Morningstar's Third Cause of Action attempts to assert the implied covenant as a separate claim, but is nothing more than a recasting of the same allegations as the First and Second Causes of Action, and should be dismissed.

CONCLUSION

No genuine issue of material fact exists that Morningstar's commercial site plan submitted by Power Engineering was approved by York County on August 24, 2009. Morningstar failed to provide bid, performance and payment bonds or suitable letters of credit or other equivalent to York County with 180 days of that date, or any time thereafter. The resulting uncured default was not caused by York County but by Morningstar itself. Accordingly, and for the reasons set forth herein, summary judgment in favor of York County on each of Morningstar's causes of action, as well as on York County's counterclaims for declaratory judgment and breach of contract is appropriate.

April 16, 2014

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ATTORNEYS FOR THE DEFENDANT

4840-8105-4741, v. 1

2008000017332
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON
05-05-2008 At 09:49 am.
AGREEMENT 54.00
OR Vol 10017 Page 95 - 143

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

MORNINGSTAR DEVELOPMENT AGREEMENT

THIS MORNINGSTAR DEVELOPMENT AGREEMENT (this Agreement) is entered into this 13th day of January, 2008, by York County, a unit of government organized and existing pursuant to the laws of the state of South Carolina (County), and Morningstar Fellowship Church, its successors and assigns (the Developer) (County and the Developer are hereafter collectively referred to as the "Parties").

RECITALS:

WHEREAS, by deed recorded on September 28, 2006 in Book 6582 at Page 28, in the Office of the Clerk of Court, York County, South Carolina, Coulston Enterprises, Inc., a South Carolina corporation, conveyed to Developer a parcel of approximately 52 acres of real property identified as Tax Map No. 7290000014, which is located within a private development known as Regent Park in Fort Mill Township, York County, South Carolina, as more fully shown and described on **Exhibit A** attached hereto (the Property);

WHEREAS, the Property is unique within the County in that the Property has improvements consisting of a 20-story Tower (Tower), a church, school, bunkhouses and retreat center, ingress and egress to which is across private roads not owned by Developer, fronting in part on a man-made lake;

WHEREAS, the Developer wishes to rehabilitate and complete development of the Tower, for use and occupancy by Age Target 55 and older, with no children, which includes active senior adult and assisted and skilled nursing home residents, and to continue developing the remaining 52 acres of the Property upon which already exists a church, school, retreat center and bunkhouses (the Development), pursuant to the zoning standards set forth in the Morningstar Planned Development District Standards attached hereto as **Exhibit B**, the Official Zoning Map of York County, as amended (including by the Morningstar Fellowship Church PD Plan), as well as in accordance with all applicable state and local laws and regulations;

WHEREAS, County agrees to the completion of the Development by the Developer, pursuant to the Morningstar Planned Development District Standards, upon the terms and conditions set forth herein;

WHEREAS, the Parties desire for County to impose certain provisions of the Interim Development Ordinance (IDO), adopted by the York County Council on June 18, 2007, upon the Development for Developer to satisfy in connection with the completion of the Development, upon the terms and conditions set forth herein; and

WHEREAS, in order to assure the Developer of the standards, rules and regulations which will apply to the Development, which is a significant, unique capital improvement project, and in order to direct County's control over the Property, which is within its limits, by imposing certain requirements and restrictions thereon, the Parties enter into this Development Agreement pursuant to and in accordance with S.C. Code Ann. § 6-31-10 et seq. (Rev. 2004).

EXHIBIT
A
73

WITNESSETH:

NOW, THEREFORE, in consideration of the foregoing preambulary recitals and the mutual covenants and agreements contained herein, the Parties hereby agree as follows.

I. DEFINITIONS

A. Age Target 55 – A category of residential use that is targeted for adults over the age of fifty-five, who have no children currently living in the residence.

B. Bunkhouses – Two sixteen unit residential buildings located on the Property to be used as rental apartments.

C. Major Modification – Pursuant to S.C. Code Ann 6-31-60, a major modification to this Agreement requires public notice and hearing before the modification can be effected. The Parties agree that a major modification is one which changes the beneficial use of the Property. The following are examples of major modifications to this Agreement:

1. Increase in density or intensity of use of the Development;

2. Change in permitted uses of the Development;

3. Increased overall impervious coverage or square footage of structures;

4. Increased demand for traffic circulation and public utilities;

5. Decrease in public or private open space or on-site amenities; and

6. Increased numbers of dwellings.

D. Minor Modifications – These are modifications that do not require public notice and hearing prior to implementation but do require administrative approval. The Parties agree that a minor modification is one which does not change the beneficial use of the Property. The following are examples of minor modifications to this Agreement.

1. Changes in the location and type of landscaping and/or screening so long as the approved character and intent are maintained;

2. Changes in the orientation of portions of parking areas so long as the effectiveness of the overall site circulation and parking are maintained. Parking areas shall not be relocated any closer than twenty (20) feet from any residential structure or ten (10) feet from any street or right-of-way lines and the number of required parking spaces shall not be reduced by the relocation;

3. Changes in the location of sidewalks or pathways; provided that the continuity of pedestrian circulation remains;

4. The reorientation, but not complete relocation of structures;

5. Changes that will not impact properties or uses outside of and adjacent to the Development; and

6. Redesign of open space that does not decrease the recreational, buffering, or environmental benefits of the open space; and

7. Modifications to the roof design of the Tower, provided such modifications do not affect the structural integrity of the Tower.

E. Morningstar Fellowship Church PD Plan or PD Plan - The graphical depiction of the Development included as a part of the Morningstar PD attached hereto as a part of Exhibit B.

F. Morningstar Planned Development District Standards or Morningstar PD – The guidelines attached to this Agreement as Exhibit B, which provide greater detail as to the standards for development and uses of the Property.

G. Open Space - For purposes of this Agreement and as used herein, the term "open space" shall mean and refer to land used for recreation, amenity or buffer, freely accessible to all residents of the Development, which may be vacant or unimproved, or improved by buildings or structures within which are allowed recreational uses or amenities.

H. Private Hospitality – A category of commercial use, which includes a retreat facility.

I. Private Retail – A category of commercial use, including a cafeteria, merchandise shop, convenience store, hair salon, restaurant and nurses' station (which may be staffed on occasion by a doctor), which are only available for use by residents or guests of residents.

J. Tower – The twenty (20) story building located on the Property.

II. OPEN SPACE ON THE PROPERTY

A. Designation of Open Space. A minimum of twenty (20%) percent of the Development must be designated as permanent Open Space. Open Space shall be located within the Development as shown on the PD Plan attached hereto as a part of **Exhibit B.** The specific requirements for Open Space are set forth in the Morningstar PD attached hereto as Exhibit B. To the furthest extent practicable, the provisions of York County Ordinance § 155.429 shall be harmonized with this Section II, Open Space on the Property. County may consider certain variations from the definition of Open Space contained in York County Ordinance § 155.429, i.e., roof top gardens or green roofs. All Open Space shall constitute a common element available for use by all residents of the Development.

III. DEVELOPMENT AMENITIES

A. On-Site Amenities. Within the Open Space on the Development, Developer shall provide amenities available to all residents of the Development, in accordance with Ordinance §155.216.

B. Number of Amenities. Pursuant to York County Ordinance § 155.216, because the Development will not exceed 500 residential units, the Developer is required to provide a minimum of three (3) different amenities within the Development.

C. Allowable Amenities. The following are allowable amenities within the Development: swimming pool (indoor or outdoor) sized to comply with NRPA standards; a clubhouse or senior center; basketball, volleyball, shuffleboard or other sports court; one (1) picnic area with a minimum size of two thousand five hundred (2,500) square feet, including a minimum of one (1) picnic table and one (1) barbeque grill pit; and any other amenity approved by County in advance of construction thereof.

IV. ECONOMIC FEASIBILITY

A. Construction Contract and Plans. Developer shall cause to have prepared AIA construction contract documents and plans for the rehabilitation and completion of the development of the Tower, as well as any other construction in the Development in accordance with the Morningstar PD, as well as all applicable state laws and regulations, and any local laws in effect on the date of final approval of this Agreement. The construction contract documents and plans for the Tower shall set forth that any rehabilitation and/or completion of the Tower for residential occupancy shall meet or exceed the 2003 ICC building code requirements as approved and adopted by the State of South Carolina and York County by ordinance as of the date of this Agreement.

In connection with issuance of building permits for the Development, County shall promptly provide the construction contract documents and plans to the Plan Review Division of the International Code Congress (ICC) in Birmingham, Alabama. The ICC shall conduct its review; and, upon completion shall either recommend approval, rejection, or approval with modifications. Upon receipt of the ICC's recommendation(s) for the project, the County shall review for compliance with Chapter 150, Building Regulations, of the York County Ordinances, in effect on the date of final approval of this Agreement. Should the ICC recommend approval of the contract documents and plans, the County shall issue permits in conformity with the ICC's recommendation and terms contained herein. Should the ICC reject or recommend approval with modifications, the County shall issue a letter of requested changes to the Developer which shall within no later than 45 days provide alternate plans in conformity with the requested changes. Any modifications to the construction contract documents and plans submitted by Developer in response to an ICC recommendation must be re-transmitted to the ICC for review and evaluation of conformity with initial ICC recommendations. In all events, the County must approve the construction contract documents and plans and issue a building permit prior to any construction activity occurring at the Development.

The County and Developer recognize that there is no precise way to estimate the time period for ICC review; and therefore, neither party to this Agreement can claim any harm or hardship relative to the period of time during which the ICC review process takes place. In the event the ICC determines that rehabilitation of the Tower is infeasible from an engineering standpoint, in that designated ICC standards for engineering integrity cannot be met, regardless of the plans for rehabilitation by Developer, then this Agreement shall be voided and the Tower shall be demolished with all costs borne by the Developer.

Any modifications to the construction contract documents and plans during construction / renovation of the Tower that affect the structural or life and safety design of the Tower shall be submitted to the ICC for a recommendation of approval.

B. **Preliminary Engineering Report of Cost of Construction.** Upon approval by County of the construction contract documents and plans, Developer shall cause to have prepared a preliminary engineering report of the cost of construction. County may review the preliminary engineering report of the cost of construction in advance of Developer seeking bids, upon written request by County.

C. **Bonds or Letter of Credit.**

1. Prior to Developer's completion of the contract documents for rehabilitation and/or completion of the Tower for residential occupancy, Developer shall submit to County the specimen bid, performance and payment bonds, for County to approve as to form, with such approval not to be unreasonably withheld. In addition to the bid, performance and payment bonds, which, collectively, provide County with financial assurance that the contractor awarded the job of rehabilitation and/or completion of the Tower is insured to finish the job for the amount of the bid, in accordance with the contract documents and with payment to all subcontractors and suppliers, Developer shall furnish to County prior to issuance of any building permit for the Tower, a demolition bond or financial equivalent, in the amount projected as necessary to demolish the Tower based upon its current condition, upon which County may draw or make claim, but only in the event of a Failure to Complete the Project. Should there be a Failure to Complete the Project, County may demolish the Tower and defray the cost thereof by drawing down the entire principal amount of the demolition bond or financial equivalent. As used herein, "Failure to Complete the Project" means and refers to: i) the general contractor not satisfactorily completing the work within six months after demand for satisfactory completion; ii) the performance bond surety not undertaking its contractual responsibility to hire a substitute contractor to finish the work within six months after demand is made on the performance bond; and iii) Developer or its assignee not re-letting the work to another contractor or otherwise arranging for the work to be done in accordance with the contract documents within six months after termination of the contractor.

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.

V. ROAD CONNECTIVITY

A. Traffic Impact Analysis. County requires Developer to undertake a traffic impact analysis (TIA) as a part of County's evaluation of the impact of the Development on the area roads located in the County pursuant to York County Ordinance § 154.035. The purpose of the TIA is to outline mitigation measures that are necessary for road infrastructure to accommodate the increased traffic demands created by the Development. The criteria to be included in the TIA shall be as set forth in Ordinance § 154.035(A)(1); the findings of the TIA shall be held subject to the traffic service standards set forth in subsection (A)(5); and the contents of the TIA report shall meet the requirements of (A)(7), all as attached hereto at Exhibit C. County shall follow the process for the review and evaluation of the TIA, assist in the preparation of the TIA, and shall report its findings with respect thereto, in accordance with (A)(8) and (A)(9), respectively, also as set forth on Exhibit C. Based upon the density of the Development as less than 500 residential units, which shall be reflected in the project description section of the TIA as the designated use, and which shall be shown on the approved PD Plan for the Development, the scope of the required TIA includes the following intersections and background developments: Regent Parkway / Highway 21, AO Jones / Springfield Parkway, Dorman / Harrisburg Road, Starlight Drive / Regent Parkway / Railroad, New Fort Mill High and Elementary Schools, Bloom grocery store, Baden Village, and Haden Hall. As of the date of entry into this Agreement, County has approved the required TIA.

B. Public Roads. The 52-acre development is currently accessed via private roads in the Regent Park development. Should the roads within the Development be accepted for ownership and maintenance by the County, public road access to the Development would be available. Any dedication of the private access roads must meet County road standards in effect at the time of dedication to County and have been approved by the County Council for acceptance into the County's maintenance system. All proposed public roads within the Development shall be required to meet the County's road standards at the time of dedication. If Regent Parkway is accepted for ownership and maintenance by the County, Developer shall pay its fair share for the cost of maintenance of Regent Parkway for two (2) years after dedication, based upon the percentage of use of Regent Parkway by Developer, including its contractors and residents, compared to cumulative use of Regent Parkway by all, including Developer, the same as any other user of Regent Parkway during this two (2) year period. Any roadway-related improvement or new road construction shall meet all County and SCDOT transportation standards.

C. Private Roads. Developer does not own or control the roads within the Regent Park development. In the event Developer has any right or other legal basis for improving or ensuring the improvement of Regent Parkway located within the Regent Park development, Developer is willing and hereby covenants that, if there are increased traffic demands on Regent Parkway attributable to the Development, Developer shall contribute financially on a pro-rata basis with others whose developments or use of Regent Parkway have rendered the level of service of the road unacceptable to County, based upon the percentage of use of Regent Parkway by Developer, including its contractors and residents, compared to

cumulative use of Regent Parkway by all, including Developer. Developer's right to use of and access to the private roads within the Regent Park development is set forth in the Title to Real Estate dated September 27, 2004, recorded September 28, 2004 in Book 06582 at Page 00028, in the Office of the Clerk of Court, York County, South Carolina.

VI. NONPUBLICLY-OWNED UTILITIES

A. Planned Development Standards. The Developer shall cause any Non Publicly-Owned Utilities provider or its contractor to install the Non Publicly-Owned Utilities in compliance in all respects with the Morningstar PD and any other aesthetic requirements which may be applicable to the Development.

VII. PUBLICLY-OWNED UTILITIES

A. Water and Sewer Service . York County has the willingness and capability to serve the development with water and sewer service. However, demands on the County's water distribution system and loadings on its sanitary sewer collection system are not known at this time. Developer is to submit anticipated flow rates for County's review and evaluation of the effects on the utility systems. Water and sewer system extensions and/or upgrades to the County's existing utility system required to serve the Development (but not any other area(s)) are to be provided by Developer. Booster pump stations for the service to the Tower and fire suppression systems and associated storage and pumping requirements are to be constructed, owned and maintained by the Developer. Prior to site plan approval, Developer shall sign the County's non-reimbursable extension agreement if there is a proposed extension or relocation of existing County-owned water and sewer lines. Developer is to pay water and sewer system fees in accordance with County Ordinances in effect at the time of the execution of this Agreement.

B. Existing Easement Agreement . Developer acknowledges there are existing County-owned utility easements on the Property recorded in Deed Book 1778, Pages 120 through 185. All site plan submittals by Developer shall show these easements and approximate locations of the utility lines. Should field investigations reveal the exact locations of these utility lines differ from those described in Deed Book 1778, Pages 120 through 185, Developer shall notify the County and have the utility lines surveyed by a land surveyor registered in the state of South Carolina. Developer shall have amended easements with revised surveyed line locations recorded with the York County Clerk of Court. Should a new easement be recorded with the Clerk of Court due to the identification of utilities in the field, the width of the permanent easement shall be twenty (20) feet in width (being ten (10) feet to the left and ten (10) feet to the right of the centerline of the existing water and sewer lines). The revised easement shall be for full, permanent and perpetual right, privilege, right-of-way and easement to go in, through, over, under and across the strip of land identified as easement for the purpose of laying, constructing, excavating, operating, maintaining, inspecting, protecting, repairing, removing, renewing and/or replacing one or more lines of similar or different sizes, facilities, fixtures, equipment, pipes, meters, pumps, tanks, valves, connections, appliances and all appurtenant equipment for the testing, purification treatment, impoundment, detention, discharge, transfer, conveyance and disposal of sewage and/or water, together with the full and perpetual right, privilege and

easement of access, ingress and egress to go over, under, through, across or upon property of the grantor for the purposes aforesaid.

C. Future Easement Agreement. In the future, if Developer submits to County a site plan that includes the proposed extension or relocation of County-owned utility lines, Developer shall sign a non-reimbursable extension agreement prior to site plan approval. For any future utility lines, extensions, or relocations of existing County-owned utility lines on property owned by Developer, Developer shall assign to County, at the time of dedication thereof to County, a full, permanent and perpetual right, privilege, right-of-way and easement to go in, through, over, under and across a strip of land twenty (20) feet in width (being ten (10) feet to the left and ten (10) feet to the right of the centerline of the water and/or sewer line) for the purposes of laying, constructing, excavating for, operating, maintaining, inspecting, protecting, repairing, removing, renewing or replacing one or more lines of similar or different sizes, facilities, fixtures, equipment, pipes, meters, pumps, tanks, valves, connections, appliances and all appurtenant equipment for the testing, purification, treatment, impoundment, detention, discharge, transfer, conveyance and disposal of sewage and/or water, together with the full and perpetual right, privilege and easement of access, ingress and egress to go over, under, through, across or upon property of the grantor for the purposes aforesaid. On any property not owned by Developer, County shall grant Developer an encroachment permit for the installation of utility lines and appurtenances if within road rights-of-way owned by County; and if the utility lines are to be located on private property, Developer shall be required to acquire easement from the property owner and have it dedicated to the County. For utilities to be dedicated to the County, Developer shall install, construct, relocate if necessary, and convey all water and/or sewer lines, appurtenances, and easements to the County, at no cost to the County, as described in detail in the non-reimbursable extension agreement.

VIII. STORM WATER MANAGEMENT, WETLANDS AND SOLID WASTE DISPOSAL

A. Storm Water Management.

1. Construction Requirements. Developer agrees that Developer shall be solely responsible for designing and constructing a storm water runoff and drainage system for any improvements to the Property made after the date hereof, including the Tower which is being rehabilitated and completed, (hereafter, Storm Water System), in accordance with the requirements of SC DHEC, and other applicable federal, state and local laws and regulations (the Storm Water Management Plan). The Storm Water Management Plan shall comply in all respects with the requirements of the South Carolina Storm Water Management and Sediment Reduction Act of 1991, S.C. Code Ann. § 48-14-10 et seq., and shall be subject to the approval of applicable state and local authorities. Any required approval by County of the Stormwater Management Plan shall not be unreasonably withheld.

All storm drainage features (i.e. storm drain piping, ditches, utility conflicts, and water quality and detention ponds shall be designed using ground profiles and/or contours generated from field surveys certified by a South Carolina professional land surveyor. Field surveys shall be tied to the South Carolina State Plane Coordinate System as defined by the North American

Datum of 1983 (NAD83) and mean sea level as defined by the North American Vertical Datum of 1988 (NAVD88). Profiles generated from GIS information shall not be accepted by County.

2. Design Standards. Developer shall utilize the natural or constructed reservoir located on the Property as a part of the Storm Water Management Plan to the extent feasible. Developer must demonstrate that existing features utilized will meet all current requirements of applicable law. This Plan shall be reviewed and approved by the County Engineer or his designee prior to the start of any construction pursuant to the Storm Water Management Plan. Developer, at its expense, shall perform, at a minimum, weekly inspections of the silt fencing and associated stormwater management and sediment control features to assure its integrity. A report of each inspection shall be provided to County within twenty-four (24) hours of the inspection. Inspections shall also be performed after all significant rain events and in accordance with SC DHEC's Construction General Permit requirements. All storm drainage easements not centered on property lines shall be surveyed, and shown on the Final Plat.

3. On-Site Storm Water. Maintenance of all temporary and permanent erosion and stormwater management outside public rights-of-way is the responsibility of Developer or its designee. County reserves the right to perform work in these areas should Developer or its designee not properly maintain these areas causing potential danger to the integrity of any roadway or County owned infrastructure. Should County be required to maintain these areas, Developer or its designee shall be billed for costs incurred by County.

B. Wetlands. If required under applicable laws, Developer shall submit a wetlands delineation proposal to the Army Corps of Engineers. The Developer shall comply with the conditions of any wetlands permits and other wetlands regulations affecting the Property, including any protective covenants that may be imposed by the Army Corps of Engineers. All correspondence to and from the Army Corps of Engineers relating to wetlands shall be supplied to the County Environmental Compliance Division. Written approval may be necessary from FEMA, ACOE and SC DHEC for any disturbance of wetlands, creeks and flood plain prior to issuance of any grading permit.

C. Solid Waste Removal. Developer shall be responsible for the disposal of all waste materials generated through the demolition and construction phases of the project. Waste materials are to be disposed in an approved regulatory manner and certain waste materials may be buried on site upon approval by County in accordance with County ordinances in effect as of the date of disposal. Developer may use hardened concrete, cured asphalt, brick, and block that have not been in direct contact with hazardous constituents (e.g., pesticides, etc.), petroleum products, or painted with lead based paint as structural fill in accordance with applicable state and local laws and regulations. Materials buried for structural fill shall be buried free of voids that may cause long term surface subsidence or sink holes. Other construction and demolition debris, such as drywall, dimensional lumber (i.e., 2x4, 2x6), metals, glass, roofing felt, shingles, paper, and plastic, shall not be buried on site.

Developer is responsible for costs associated with the transportation and disposal of waste materials and may contract with a solid waste removal provider to furnish solid waste

removal services to the Development. Recycling of waste materials (e.g. brick, concrete, asphalt and metal) is encouraged.

In the event of any conflict between this Agreement, County ordinances and SC DHEC regulations, the most stringent of the guidelines, ordinances or laws over solid waste removal and any burial of certain waste materials, shall take precedence.

D. Roadside Ditches. Developer, or its representatives, shall not pipe or fill in roadside ditches nor discharge lot or roof drainage systems into roadside ditches, enclosed roadside drainage systems, or road rights-of-way without submitting a road encroachment permit (if applicable) or discharge plan to County for approval.

IX. DEVELOPMENT STANDARDS

A. Morningstar PD and Plan. Developer shall improve the Property in strict compliance with the terms, covenants and provisions of the Morningstar PD, including the PD Plan made a part thereof, and applicable local, state and federal laws and regulations.

B. Zoning Requirements. Except as otherwise provided in this Development Agreement (including the Morningstar PD and PD Plan), the Development shall conform in all respects to the requirements of Chapter 155 of the York County Ordinances (Zoning Ordinance), in effect on the date of final approval of this Agreement. Developer shall also specifically meet all of the requirements and procedures associated with a Planned Development District (PD) as set forth in Sections 155.205 through 155.215 of the Zoning Ordinance and with a Land Development Agreement as set forth in S.C. Code Ann. § 6-31-10. Unless specifically displaced by this Agreement (including the Morningstar PD and PD Plan), all local laws and regulations shall remain in full force and effect.

C. Designated Uses

1. Allowable Uses of the Tower. The Tower shall be renovated and completed by Developer for use and occupancy by Age Target 55 and older, with no children, which includes active senior adult and assisted and skilled nursing home residents. As part of the development of the Tower, Developer shall offer certain private retail amenities to residents of the Tower, their guests, Morningstar staff and conference and church attendees. These private retail amenities may include a convenience store, hair salon, restaurant and nurses' station (which may be staffed on occasion by a doctor). These are the permitted, allowable, approved and adopted uses for the Tower. The specific requirements for each type of designated and allowable use within the Tower are set forth in greater detail in the Morningstar PD attached hereto as Exhibit B. The locations of each type of designated and allowable use within the Tower are shown on the PD Plan attached hereto, which forms a part of Exhibit B.

2. Allowable Uses of the Development. Currently, Developer has constructed and is operating a retreat center, a school offering classes from kindergarten through twelfth grade and an associate's degree program, a church and certain private retail facilities, including a merchandise shop and a cafeteria. In connection with these existing facilities on the Property, the allowable land uses of the Property will include church, school, residential, private retail and private hospitality services, as well as such other future uses as may be designated by Developer and allowed by County. The specific requirements for each type of designated and allowable use within the Development are set forth in greater detail in the Morningstar PD attached hereto as Exhibit B. The locations of each type of designated and allowable use within the Development are shown on the PD Plan attached hereto, which forms a part of Exhibit B.

3. Future Uses. Any addition to the above allowable uses shall constitute a major modification to this Agreement and require public notice and hearing, as more particularly set forth in S.C. Code Ann. § 6-31-60 (Rev. 2004), as well as supplementation to the Morningstar PD, including the PD Plan attached thereto.

4. Specific Uses of the Development.

a. Residential. Residential uses, limited to Age Target 55 and older with no children, which includes active senior adult and assisted and skilled nursing facilities, along with appropriate amenities, may be built within the Development on that portion of the Property identified on the PD Plan as the Grand Tower, in accordance with the terms and conditions set forth below. The Tower shall not exceed 250 dwelling units. The total residential component of the Development shall not exceed 300 dwelling units.

i. The Tower shall meet all of the requirements of the Zoning Ordinance, with the following exception. In the event of a conflict between the Zoning Ordinance and this Agreement, the requirements of this Agreement shall prevail, but not over the attached Morningstar PD and Plans which shall ultimately control and govern.

ii. The Tower shall have wet sprinkler fire protection systems, in accordance with the 2003 ICC Standards.

iii. In addition to the Tower, the two bunkhouses located on the Property shall be designated as residential units available for rent. These two bunkhouses represent a total of 32 residential units, in addition to the 250 dwelling-unit limit for the Tower.

b. Church and School. Church and school uses, which include a sanctuary, church office and a school building housing classrooms and offices, have already been built within the Development on that portion of the Property identified for church and school use.

c. Private Hospitality. Private hospitality uses, which include a retreat center, have already been built within the Development on that portion of the Property identified for private hospitality use. Developer may also construct a multi-use facility in the Development, which could include a gymnasium and additional sanctuary space. Construction

of this building is a potential addition to the Development, which may be constructed during the five year period of this Agreement.

d. Private Retail. Private retail uses, such as a cafeteria and merchandise shop, currently exist in the Development. Additional private retail uses, such as a convenience store, hair salon, restaurant and nurses' station (which may be staffed on occasion by a doctor) will exist within the Tower, in accordance with the terms and conditions set forth in this Agreement.

5. Limitations on Land Use. The land uses in the Development are limited to those set forth in the Morningstar PD and as shown on the PD Plan incorporated therein.

D. **Bufferyards.** Bufferyards to be constructed in the Development shall be natural with existing plant material retained. In those limited instances where minimal vegetation exists and topography constrains grading of surrounding land, Developer may request permission from County planning staff to disturb the bufferyard. The bufferyard requirements are more particularly set forth in the Morningstar PD and are located in areas as shown on the Plans incorporated therein.

E. **Access to the Property**. The Developer shall grant representatives of County and other governmental agencies having jurisdictional rights over the proposed development access to the Property for inspection purposes at all reasonable times.

F. **Signage.** All signage in the Development shall conform to the requirements of the York County Ordinances §§ 155.470-155.480 and the specifications set forth in the Morningstar PD.

G. **Surface Ratio.** The maximum impervious surface ratio will not exceed 80% of the Development. Setbacks shall be measured from the prescriptive road right-of-way for Star Light Drive along the western and southern portions of the property and from the property lines along the northern and eastern portions of the property. These requirements are more particularly set forth in the Morningstar PD and are depicted in areas as shown on the Plans incorporated therein.

H. **Parking.** Parking space requirements shall be coordinated with the planning and zoning departments during submittal of construction drawings. Existing parking as depicted on the Plans which form a part of the Morningstar PD shall be verified during the design and renovation phases of the rehabilitation and completion of the Tower.

Parking Required (For Existing Uses)

Existing Sanctuary/Hotel = 543 spaces
Food Court/Convention Center = 375 spaces
Main Street = 108 spaces
Bunkhouses = 32
Grand Tower = 420 spaces

Total: * 1,478 spaces

** A minimum of 50% of the sanctuary capacity will be from onsite Tower/Hotel occupants. Also, a minimum of 1/3 of the convention center occupants will be from the Hotel/Tower.*

Adjusted Parking Required (for overlapping uses)
Total Parking Required = 1,478 spaces
Less ½ of Existing Sanctuary requirement = (112 spaces)
Less 1/3 of Convention Center Requirement = (123 spaces)
Total Adjusted Parking Required = 1,243 spaces

Total Existing Parking Provided = 1,377 spaces (as depicted on the PD Plan)

The dimensions of the parking area in the Development are 1250' X 600'.

In the event additional structures are built in the Development that would require additional parking spaces, Morningstar has the right to use any excess parking spaces then in existence as a credit toward any future parking requirements.

I. **Building Height.** The maximum building height for the Tower shall be 280 feet.

X. REPRESENTATIONS, WARRANTIES, DEFAULT AND REMEDIES

A. **General Representations and Warranties by Developer**. Developer represents, warrants and covenants as follows.

1. Developer is a church, validly existing and in good standing under the laws of the state of South Carolina, created or formed under the laws of the state of North Carolina.

2. The execution, delivery and performance of this Agreement have been duly authorized by Developer.

3. No approval, authorization or consent of any governmental or regulatory authority is required to be obtained or made by Developer in order for Developer to enter into and perform its obligations under this Agreement.

4. In connection with Developer's obligations under this Agreement, Developer shall comply with all applicable federal, state and local laws and regulations and shall obtain all required federal, state, and local permits and licenses.

5. The performance of this Agreement by Developer and each employee provided by Developer will not violate any contracts or agreements with third parties or any third party rights including, but not limited to, any non-compete agreements, non-disclosure agreements, patents, trademarks or intellectual property rights.

6. Developer shall construct any improvements within the Development in accordance with the ordinances, rules, regulations and other applicable federal, state and local laws, including County's zoning regulations, ordinances and land development regulations, and with this Agreement and the Morningstar PD, including the Plans attached thereto.

B. Default.

1. The nonperformance by County of any term, covenant, or condition of this Agreement which is not cured within 60 days after written notice thereof shall constitute an event wherein Developer may exercise its options under Section X (C) below.

2. On behalf of the County, the York County Planning Director and/or the Planning Director's designee shall review the project and this Agreement at least once every six (6) months, at which time Developer will demonstrate its efforts and actions to comply with the terms of this Agreement. If, as a result of a periodic review, the County reasonably finds and determines in good faith that Developer has committed a material breach of the terms or conditions of this Agreement, then County will so notify Developer in writing, within a reasonable time after the periodic review, such notice setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing Developer a reasonable time, not more than 60 days in which to cure the material breach.

3. If the Developer fails to cure any material breach discovered through periodic review within the time period provided, then the County unilaterally may terminate or modify this Agreement; provided, that the County has first given the Developer the opportunity: (1) to rebut the County's finding and determination; or (2) to consent to amend this Agreement to meet the concerns of the County with respect to the findings and determinations.

C. Remedies on Default.

Regarding rights under this Agreement, the County will look solely to the developer/property owner as to any rights it may have against the developer, and hereby waives any right to assert claims regarding this Agreement against individual members of the developer/property owner membership. Likewise, developer/property owner agrees to look solely to the County as to any rights it may have against the County under this Agreement, and hereby waives any right to assert claims for personal liability against individuals acting on behalf of the County, its County Council members, agencies, boards, or commissions.

Upon receipt of notice from the non-defaulting party that it believes the other party to be in material breach under this Agreement, the other party shall either (i) use good faith efforts to attempt to cure the breach within the time stated in the notice of the breach, or (ii) notify the non-defaulting party that it disputes that party's determination that it has breached this Agreement.

In the event that the alleged defaulting party disputes the alleged breach, the Parties agree to negotiate in good faith with each other in order to resolve the situation to their mutual satisfaction. If such negotiation fails to resolve the dispute within 60 days or if the

alleged defaulting party fails to cure a material breach within the time given, the Parties agree that the dispute as to whether a breach exists shall be resolved through mediation, with mediation being a condition precedent to instituting legal or equitable actions within the courts of South Carolina.

Developer and York County shall endeavor to resolve claims, disputes, or other matters in question between them by mediation in an informal process in which a third-party mediator facilitates discussions between the parties. The parties may designate a mediator mutually agreeable to both York County and Developer to conduct the mediation. Mediation shall be conducted in accordance with the mediation provisions of the South Carolina Circuit Court Alternative Dispute Resolution Rules. The mediation shall be conducted in York County, South Carolina. A request for mediation shall be filed in writing with the other party to this Agreement, and legal or equitable proceedings shall be stayed pending mediation for a period of sixty days from the date of the request for mediation is filed, unless stayed for a longer period of time by agreement of the parties or court order. The cost of a third-party mediator will be shared equally by the parties.

If the parties reach an agreement during the mediation process, they shall reduce the agreement to writing and sign it with their attorneys, if any. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

No waiver of a breach of any of the covenants, promises, or provisions contained in this Agreement shall be construed as a waiver of any succeeding breach of the same covenant or promise or any other covenant or promise thereof. In no event shall any failure by either party to fully enforce any provision of this Agreement be construed as a waiver by such party of its right to subsequently enforce, assert, or rely upon such provision.

Nothing herein is intended to limit or preclude County from pursuing the surety or issuer of the letters of credit, to the extent allowable by law, should Developer fail to cure a material breach of this Agreement covered by any such bonds or letters of credit. Nothing in these provisions shall be deemed to (i) limit the applicability of any otherwise applicable statutes of limitation or repose; or (ii) following the completion of any mediation proceeding held pursuant to this Paragraph, limit the right of County to exercise any self-help remedies such as setoff or any judicial remedies to improve collection of any judgment, such as attachment, or to obtain from a court provisional or ancillary remedies such as (but not limited to) injunctive relief, writ of possession or the appointment of a receiver. County may only exercise such other or additional remedies after the pendency of such mediation proceeding brought pursuant to this Agreement. The exercise by County of such other or additional remedies shall not constitute a waiver of the rights of any party, including the Developer, to mediate the merits of the controversy or claim arising hereunder occasioning resort to such remedies.

If the mediation results in a finding that Developer has materially breached this Agreement, Developer shall thereafter have a reasonable period of time, but not to exceed 60 days to cure the material breach. In the event that Developer is unable to cure the breach within a reasonable time, then County may terminate this Agreement unless Developer shall consent to modify the terms hereof in order to meet the concerns of County with respect to the findings and

determinations of the mediator(s) as set forth above. Such modification may include, without limitation, an extension of the term of this Agreement in order to permit more time to comply with its requirements. In the event that this Agreement is terminated, said termination shall not affect (a) zoning regulations applicable to the Property set forth herein, or (b) any portion of the Property (i) which has been previously transferred upon York County Council approval to bona fide third party owners, (ii) which is then improved consistent with this Agreement, or (iii) as to which there are outstanding approved plats or building permits issued in conformity with this Agreement. In the event that the Developer is unable or unwilling to cure the breach within a reasonable time and the County elects not to terminate this Agreement, the County shall be entitled to such remedy or remedies of injunction and/or specific performance or judicial modification of this Agreement consistent with the findings resulting from mediation.

The Parties acknowledge that market conditions may, and will likely, affect the pace and character of the development of the Property. Therefore, the Parties agree that they shall take into account, and shall direct the mediator(s) to take into account, any change in market conditions, demographics or similar matters when deliberating disputes or negotiating for future modifications to this Agreement made pursuant to this Paragraph.

If the mediation results in a finding that County has materially breached this Agreement, County shall thereafter have a reasonable period of time, but not to exceed 60 days to cure the material breach. In the event that County is unable to cure the breach within a reasonable time, then Developer shall be entitled to such remedy or remedies of injunction and/or specific performance or judicial modification of this Agreement consistent with the findings resulting from mediation.

D. Force Majeure. Notwithstanding any contrary term or provision of this Agreement, no liability or breach shall result from the delay or nonperformance caused by circumstances beyond the reasonable control of the party affected, including, without limitation, Acts of God, fire, flood, snowstorm, war, government action, riot, and civil disturbance.

XI. MISCELLANEOUS TERMS AND CONDITIONS

A. Relationship of the Parties. This Agreement creates a contractual relationship between the Parties. This Agreement is not intended to create, and does not create, the relationship of master/servant, independent contractor/employer, partnership, joint venture, or any other relationship where one party may be held responsible for acts of the other party.

B. Consistency with the County's Comprehensive Plan and Land Use Regulations. This Agreement is consistent with the 2004 York County Comprehensive Plan and current regulations, as amended to the date of this Agreement (Current Regulations). Whenever express or implied substantive provisions of this Agreement are inconsistent with the applicable standards set forth in the Current Regulations, the standards set forth in the Current Regulations and the standards set forth in this Agreement shall, to the extent possible, be considered *in pari materia* to give effect to both the Current Regulations and this Agreement; provided, however, that in the event of a conflict, and subject to the provisions of 6-31-80, the standards set forth in this Agreement shall govern. In the event of a dispute between the parties to this Agreement as

to whether a provision in the Comprehensive Plan or Current Regulations is inconsistent with express or implied substantive provisions of this Agreement, the parties must first submit such disputed interpretation to County Council and must wait seven days after such submittal before invoking the remedies afforded them under this Agreement.

C. Schedule for Completion; Time is of the Essence. Time is of the essence with respect to Developer's and County's performance under this Agreement.

D. Assignment and Assumption. Developer shall not sell, convey, assign, transfer, hypothecate, encumber or permit or suffer any encumbrance of all or any portion of Developer's interest in this Agreement other than in connection with a sale or other transfer of all or any portion of the Property as set forth below unless approved in writing in advance by County, which approval shall not be unreasonably delayed or withheld. Any attempt to so transfer or encumber any such interest in contravention hereof shall be void. Any transfer or encumbrance of any interest shall be subject to this Agreement, which is recorded in the chain of title to the Property.

E. Caption Sections. Paragraphs, titles, headings and captions contained in this Agreement are inserted only for convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

F. Waiver and Severability. If any part of this Agreement, for any reason, is declared invalid or void, such declaration shall not affect the remaining portions of the Agreement which shall remain in full force and effect as if this Agreement had been executed with the invalid portion eliminated. However, if any provision which has been declared invalid or unenforceable shall be a provision that would prevent or materially impair the continued and complete performance of this Agreement by Developer and/or County, then Developer and County hereby agree that they will use their best efforts to renegotiate that term or provision in order to otherwise render the Agreement valid and enforceable. If either Developer or County decides not to enforce a provision of this Agreement, such decision in favor of non-enforcement shall not constitute a complete and full waiver of the right of that entity in the future to enforce that provision of the Agreement in the event of any subsequent breach or failure to comply in full with that provision of the Agreement.

G. Governing Law. Except to the extent that this Agreement may be governed by any federal law, including federal bankruptcy law, this Agreement shall be governed by, construed and interpreted under, and enforced exclusively in an accordance with the laws of the state of South Carolina, and the courts of the state of South Carolina shall have exclusive jurisdiction with respect to any dispute arising hereunder, unless such dispute is mitigated in accordance herewith.

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

With Copy to:

James W. Sheedy, Esq.
Spencer & Spencer, P.A.
226 East Main Street, Ste. 200
P. O. Box 790
Rock Hill, SC 29730

To County:

James E. Baker
County Manager
York County
6 South Congress Street
P. O. Box 66
York, SC 29745

With Copy to:

Melvin B. McKeown, Jr., Esq.
McKeown Law Firm
P. O. Box 299
York, SC 29745-0299

I. Execution in Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, and all of which shall constitute but one and the same instrument. Any such counterpart may be signed by Developer and/or County as long as each has signed one or more of the counterparts.

J. No Construction Against Drafter. County and Developer hereby acknowledge that they have each drafted or participated in the drafting of this Agreement, have reviewed this Agreement and have been afforded an opportunity to consult with an attorney. County and Developer concur that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of any provision of this Agreement.

K. Covenant to Sign Other Documents. County and Developer acknowledge that consummation of the transaction contemplated hereby may require the execution prior hereto, contemporaneously herewith and/or sometime hereafter of certain documents in addition to this

Agreement which each of them, by their signatures herein below, covenants, represents and warrants that they will promptly do.

L. Modification and Amendment. Except as provided below, no change, amendment or modification of this Agreement shall be effective unless signed in writing by both Developer and County and any major modification of this Agreement can only be approved by County after public notice and a hearing. In the event any state law is enacted or modified after the execution of this Agreement, which state law conflicts with any term or provision of this Agreement, this Agreement shall be automatically modified or suspended to the extent necessary to bring this Agreement into compliance with such law.

M. Terms of this Agreement Controlling. Except as otherwise specifically provided herein above, in the event of any inconsistency or conflict between any term, covenant or condition of this Agreement and any other document pertaining to this Agreement, including, but not limited to, any applicable zoning provisions, all terms, covenants and conditions of this Agreement shall in all respects be controlling, and any contrary term, covenant or condition in any other document, or any amendment or modification thereof, is hereby displaced, except for the Morningstar PD (as amended), including the Plans incorporated therein, which shall govern and prevail over this Agreement.

N. Entire Agreement. Except as otherwise provided herein, this Agreement shall constitute the entire and full agreement and understanding between Developer and County, and shall supersede all prior and/or contemporaneous agreements, understandings and discussions between them, written and/or oral, all of which shall be deemed merged into this Agreement and shall be of no further force and effect.

O. Developer's Successors and Assigns. As used herein, the term "Developer" shall include Morningstar Fellowship Church, together with the successors, assigns and successors in title of said entity with respect to all or any portion of the Property, as applicable.

P. Non-Discriminatory Treatment. County shall not impose any fees, charges or other requirements on or against Developer, the Property, the Development or any use or user of the Development (the "Development Parties") which are or have the effect of being applicable solely, or in substantial part only, to the Development Parties or which are or has the effect of being in excess of or different from similar fees, charges or requirements imposed against other parties, property or uses within the County. It is the intent of this requirement that fees, charges and other requirements imposed by County be generally uniform throughout County and that the Development Parties pay such fees and charges at rates no greater than those otherwise imposed by County, and the Development Parties comply with such requirements the same as any other party in the County.

XII. EFFECTIVENESS OF AGREEMENT

A. Conditions Precedent to Effectiveness of this Agreement. The effectiveness of this Agreement is contingent upon the happening of the following events.

1. PD Plan and Planned Development District Standards. Approval by County of Developer's PD Plan for the Development and Morningstar Planned Development District Standards, both of which shall operate as an amendment to the Official Zoning Map of York County and relieve Developer of the notice of violation of the Regent Park PD.

2. Statutory Requirements. The public hearing, notice and publication requirements set forth in S.C. Code Ann. § 6-31-50 (Supp. 2000) must be satisfied.

3. Recordation of this Agreement. It is understood and agreed that within fourteen (14) days after the Effective Date, County must record the Agreement with the Clerk of Court for York County so that the Agreement appears in the chain of title to the Property.

B. Effective Date of this Agreement. This Agreement shall become effective upon the occurrence of all of the contingencies set forth in Paragraph A of this Section. However, if County is unable to accomplish all of the conditions precedent on or before May 31, 2008, then this Agreement shall, at the option of the Developer, terminate. Because the Property is fifty-two (52) acres, this Agreement shall have a duration of five (5) years, at the end of which the Agreement shall terminate. Pursuant to S.C. Code Ann. 6-31-60(A)(2), the Parties have the right to extend the termination date of this Agreement by mutual written agreement.

IN WITNESS WHEREOF, Developer and County have caused their respective names to be subscribed hereto, all on the date set forth above.

Witnesses:

DEVELOPER

Morningstar Fellowship Church

By: _____
Rick Joyner, President

YORK COUNTY

By: _____
Houston O. Motz, Council Chairman

Attest: _____
James E. Baker, County Manager

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

PROBATE

Personally appeared before me the witness whose name first appears above, and made oath that he/she saw the within named Rick Joyner, President of Morningstar Fellowship Church, sign, seal and as its act and deed, deliver the within written Development Agreement; and that he/she with the other witness whose name appears above, was present and witnessed the execution thereof.

Pat Sells
Witness

Sworn to before me this 28 day
of April, 2008

Thomas Petrino

Notary Public for York County
My Commission Expires: 3-29-16

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

PROBATE

Personally appeared before me the witness whose name first appears above, and made oath that he/she saw the within named Houston O. Motts, Council Chairman, York County Council, sign, seal and as its act and deed, deliver the within written Title to Real Estate; and that he/she with the other witness whose name appears above, was present and witnessed the execution thereof.

Witness

Sworn to before me this 18th day
of ~~February~~, 2008

Notary Public for S.C.
My Commission Expires: Aug. 25, 2010

EXHIBIT A

EXHIBIT A

All that certain piece, parcel, or tract of land consisting of 52.00 acres as shown and depicted as "Tract – 1 52.00 Acres" on a plat of survey entitled "Boundary Survey for Morningstar Fellowship Church, Located in the Fort Mill Township, York County, South Carolina" dated August 11, 2004, revised September 7, 2004, and September 9, 2004, prepared and certified by Robert R. Medford, S.C.P.L.S. #11065 of Fisher-Sherer, Inc., Engineering & Surveying, recorded in Plat Book C-318 at Page 6 in the Clerk of Court's Office for York County, South Carolina; which plat is incorporated herein by reference and having such metes and bounds, courses and distances as by reference to said plat will more fully appear;

Further, a non-exclusive easement, appurtenant to the Property, for purposes of ingress, egress, and regress to and from the Property, over and across that portion of the right-of-way of Regent Parkway from its intersection with the right-of-way of U.S. Highway 21 and extending for a distance of approximately 2.0 miles to the northernmost boundary of a certain tract of land of 52.00 acres as depicted in Plat Book C-318 at Page 6 in the Clerk of Court's Office for York County, which non-exclusive easement shall be subject to terms of that certain Cost Sharing and Maintenance Agreement for the portion of Regent Parkway located between U.S. Highway 21 and the Norfolk-Southern Railroad tracks as entered into between Coulston Enterprises, Inc., Regent Park Corporation, and Regent Carolina Corporation, dated September 27, 2004 and recorded in Record Volume 6581 at Page 314 in the Clerk of Court's Office for York County, South Carolina;

Subject to a non-exclusive easement reserved in favor of Regent Carolina Corporation, its successors and assigns, as set forth in a deed from Regent Carolina Corporation to Coulston Enterprises, Inc., dated September 27, 2004, and recorded in Record Volume 6581 at Page 311, in the Clerk of Court's Office for York County, S.C., over, across, and through that portion of that roadway known as Regent Parkway, as the same now exists or as may be modified in the future, commencing near the northwestern corner boundary of the Property where Regent Parkway now enters said property, and continuing at a right-of-way width of sixty-six feet (66') across the Property, to a terminating point near the southeastern corner of the Property where Regent Parkway now enters other adjoining properties now or formerly owned by Regent Carolina Corporation, or as such properties may be owned in the future by Regent Carolina Corporation's successors and assigns in ownership, which easement shall be for purposes of ingress, egress and regress, and shall be deemed appurtenant to said properties of Regent Carolina Corporation, and its successors and assigns; and

Further subject to and reserving a second non-exclusive easement, extending from the terminus of the easement above at the northernmost boundary of the aforesaid 52.00 acre tract, along a sixty-six foot (66') right-of-way known as Regent Parkway, as the same now exists or may be modified in the future, and running through and across the said 52.00 acre parcel to the northernmost boundary of a 108.00 acre tract of land depicted in Plat Book C-318 at Page 5 in the Clerk of Court's Office for York County,

which easement shall be for purposes of ingress, egress, and regress to and from properties located within said 108.00 acre tract.

EXHIBIT B

PLANNED DEVELOPMENT DISTRICT STANDARDS

For

MORNINGSTAR FELLOWSHIP CHURCH

I. Statement of General Facts, Conditions, and Objectives

A. **Property Owner:** Morningstar Fellowship Church

B. **Property Size:** Approximately 52 acres

C. **York County Tax Map No.:** 729-00-00-014

D. **Frontage:** Approximately 2,000 lf along Farm House/Starlight Drive located approximately 750' south of the intersection of Farm House Road and Regent Parkway.

E. **Statement of Purpose:** Morningstar is developing this 52 acre parcel as a planned development district to create a religiously-affiliated residential and retreat facility in northern York County. Through the implementation of a planned development district, Morningstar will be able to utilize a 20 story tower (Tower), rather than demolish this building. The Tower will be used as an Age Targeted 55 residential building for active adult and assisted and skilled nursing care. In addition to the Tower, Morningstar plans to continue developing the remaining acreage, including further renovations to the retreat facility, school and sanctuary. The result shall be a blend of use relationships throughout the 52 acre site.

II. Definitions

A. Age Target 55 – A category of residential use that is targeted for adults over the age of fifty-five, who have no children currently living in the residence.

B. Bunkhouses – Two sixteen unit residential buildings located on the Property to be used as rental apartments.

C. Major Modification – Pursuant to S.C. Code Ann 6-31-60, a major modification to this Agreement requires public notice and hearing before the modification can be effected. The Parties agree that a major modification is one which changes the beneficial use of the Property. The following are examples of major modifications to this Agreement:

1. Increase in density or intensity of use of the Development;

2. Change in permitted uses of the Development;

3. Increased overall impervious coverage or square footage of structures;

4. Increased demand for traffic circulation and public utilities;

5. Decrease in public or private open space or on-site amenities; and

6. Increased numbers of dwellings.

D. Minor Modifications – These are modifications that do not require public notice and hearing prior to implementation but do require administrative approval. The Parties agree that a minor modification is one which does not change the beneficial use of the Property. The following are examples of minor modifications to this Agreement.

1. Changes in the location and type of landscaping and/or screening so long as the approved character and intent are maintained;

2. Changes in the orientation of portions of parking areas so long as the effectiveness of the overall site circulation and parking are maintained. Parking areas shall not be relocated any closer than twenty (20) feet from any residential structure or ten (10) feet from any street or right-of-way lines and the number of required parking spaces shall not be reduced by the relocation;

3. Changes in the location of sidewalks or pathways; provided that the continuity of pedestrian circulation remains;

4. The reorientation, but not complete relocation of structures;

5. Changes that will not impact properties or uses outside of and adjacent to the Development; and

6. Redesign of open space that does not decrease the recreational, buffering, or environmental benefits of the open space; and

7. Modifications to the roof design of the Tower, provided such modifications do not affect the structural integrity of the Tower.

E. Morningstar Fellowship Church PD Plan or PD Plan - The graphical depiction of the Development included as a part of the Morningstar PD attached hereto as Exhibit A.

F. Morningstar Planned Development District Standards or Morningstar PD – The guidelines contained in this document, which provide greater detail as to the standards for development and uses of the Property.

G. Open Space - For purposes of this Agreement and as used herein, the term "open space" shall mean and refer to land used for recreation, amenity or buffer, freely accessible to all residents of the Development, which may be vacant or unimproved, or

improved by buildings or structures within which are allowed recreational uses or amenities.

H. Private Hospitality – A category of commercial use, which includes a retreat facility.

I. Private Retail – A category of commercial use, including a cafeteria, merchandise shop, convenience store, hair salon, restaurant and nurses' station (which may be staffed on occasion by a doctor), which are only available for use by residents or guests of residents.

J. Tower – The twenty (20) story building located on the Property.

III. General Standards

A. Open Space – Pursuant to York County Ordinance § 155.209 and 155.429, there shall be at least twenty percent (20%) of the Development that is designated permanent open space, as such term is defined in the Development Agreement. Open Space shall be located within the Development as shown on the PD Plan attached hereto as **Exhibit A.** Open space in the Development shall be designed to encourage appropriate character and use and/or to protect the environmentally sensitive areas of floodplain, wetlands, perennial stream channels, and designated significant areas consistent with the Comprehensive Plan of York County, South Carolina.

B. Pedestrian Access – Morningstar will provide pedestrian access, such as walkways and sidewalks between all uses in the Development.

C. Onsite Amenities – The Development consists of more than one hundred fifty (150) residential units, but fewer than five hundred (500) and, as a result, three onsite recreational amenities are required. The following are allowable amenities within the Development: swimming pool (indoor or outdoor) sized to comply with NRPA standards; a clubhouse or senior center; basketball, volleyball, shuffleboard or other sports court; one (1) picnic area with a minimum size of two thousand five hundred (2,500) square fee, including a minimum of one (1) picnic table and one (1) barbeque grill pit; and any other amenity approved by County in advance of construction thereof.

IV. Land Use Designations

A **Residential** – The uses contained within the Development shall include residential use, which is specifically described as follows. The residential sections of the Development will be for the use and occupancy by Age Target 55 and older, with no children, which includes active senior adult and assisted and skilled nursing home residents. The Tower shall be the location of this use and the total residential units in the Tower shall not exceed 250. In addition to the Tower, there are two bunkhouses located

in the Development which shall be available for rent. The total number of residential units shall be no more than three hundred (300) units.

B. **Church** – Currently, there is a facility located within the Development which is utilized as a church and includes a structure identified on the PD Plan as a sanctuary. This facility shall be used for Morningstar Fellowship Church to conduct church services and certain other religiously-affiliated activities.

C. **School** – Currently, there is a facility located within the Development that is utilized as a school building and houses classrooms and offices. In the school, Morningstar conducts classes for grades kindergarten through twelfth grade. In conjunction with the University of North Carolina, Morningstar also has within the school a two year program offering associates degrees and plans to expand the program to offer bachelor and other advanced degrees

D. **Private Hospitality** – Morningstar currently operates a retreat facility in the Development patronized by various religious groups throughout the United States and abroad. This facility includes both living quarters and meeting rooms that are reserved by various religiously-affiliated groups using the retreat facility for meetings and conferences. These groups also use, to some extent, the sanctuary as well. Morningstar may also construct a multi-use facility in the Development, which could include a gymnasium and additional sanctuary space. Construction of this building is a potential addition to the Development, which may be constructed during the period of the Development Agreement.

E. **Private Retail** – In conjunction with the renovations and rebuilding of the Tower, Morningstar also plans to utilize certain portions of the Tower for private retail use. These private retail uses may include a hair salon, convenience store, nurses' station (sometimes staffed by a doctor) and a restaurant. These private retail uses of the Tower will be available only to the residents of the Tower, their guests, Morningstar staff and conference attendees and will not be open to the public. The hair salon shall offer certain personal care/personal hygiene services, including those of a barber, beautician and other similar services. The convenience store shall sell certain food stuffs and toiletries to the residents of the Tower, for their convenience. Finally, the restaurant shall provide the residents of the Tower with a convenient onsite dining establishment within which they may dine and entertain their guests.

In addition to the private retail facilities located in the Tower, the retreat facility also contains certain private retail uses, such as a cafeteria and merchandise shop. Again, these facilities are not open to the public, but are open to Morningstar staff and those groups who patronize the retreat facility.

F. **Land Use Percentages.** The Land Use Percentages of the Development are as set forth below.

The Development contains 863,899 square feet of building space. The following Land Use percentages are based on a percentage of the total square feet of building space for the Development.

1. Residential

a. Bunkhouses – 1% of the total square footage (10,529 square feet)

b. Main Building (Hotel and Suites) – 18% of the total square footage (157,600 square feet)

c. Tower (Condominium Units) – 34% of the total square footage (293,607 square feet)

2. Church – 4% of the total square footage (33,656 square feet)

3. School – 3% of the total square footage (23,590 square feet)

4. Private Hospitality – 12% of the total square footage (101,225 square feet)

5. Private Retail – 9% of the total square footage (79,386 square feet)

6. Mechanical/Circulation/Toilets – 19% of total square footage (164,306 square feet)

The Tower contains 407,560 square feet of building space. The following Land Use percentages are based on a percentage of the total square feet of building space for the Tower.

1. Residential – 72% of total square footage (293,607 square feet)

2. Private Retail – 16% of total square footage (64,727 square feet)

3. Mechanical/Circulation/Toilets – 12% of total square footage (49,226 square feet)

V. Standards for Development

A. Bufferyards are depicted on the PD Plan. The required bufferyards are located along the existing and new road frontage (30' bufferyard) as well as the northern property line adjacent to Zenith Avenue (10' bufferyard). The bufferyard along the existing frontage of Farm House/Starlight Drive will be satisfied using the existing berms and plantings. The 30' bufferyard located adjacent to the future Starlight Road relocation along the southern property line (as depicted on the PD Plan) will be satisfied as follows:

6 Canopy Trees (per 100 lf)
6 Understory Trees (per 100 lf)

24 Shrubs (per 100 lf)

The 10' bufferyard located adjacent to Zenith Avenue (as depicted on the PD Plan) will be satisfied as follows:

4 Understory Trees (per 100 lf)
6 Shrubs (per 100 lf)

All bufferyards shall meet the requirements of York County Zoning Ordinance §§ 155.400 – 155.413 of the York County Zoning Ordinance enacted as of the date the Morningstar PD is approved. In addition to the bufferyard requirements, all trees located within the Development shall comply with the Tree Conservation Ordinance, York County Zoning Ordinance §§ 155.530 through 155.539.

B. **Parking Development Standards** - All parking located in the Development shall comply with the requirements of York County Zoning Ordinance §§ 155.440 – 155.446.

Parking Required (For Existing Uses)
Existing Sanctuary/Hotel = 543 spaces
Food Court/Convention Center = 375 spaces
Main Street = 108 spaces
Bunkhouses = 32
Grand Tower = 420 spaces
Total: * 1,478 spaces

** A minimum of 50% of the sanctuary capacity will be from onsite Tower/Hotel occupants. Also, a minimum of 1/3 of the convention center occupants will be from the Hotel/Tower.*

Adjusted Parking Required (for overlapping uses)
Total Parking Required = 1,478 spaces
Less ½ of Existing Sanctuary requirement = (112 spaces)
Less 1/3 of Convention Center Requirement = (123 spaces)
Total Adjusted Parking Required = 1,243 spaces

Total Existing Parking Provided = 1,377 spaces (as depicted on the PD Plan)

In the event additional structures are built in the Development that would require additional parking spaces, Morningstar has the right to use any excess parking spaces then in existence as a credit toward any future parking requirements.

The dimensions of the parking area in the Development are 1250' X 600'.

C. **Street access** - Street access to the Development via Regent Parkway (a privately owned road) is provided for in Deed Book 06582 Page 0028. This access allows a connection to Hwy 21 (a public road). All access points in the Development located on Zenith Drive shall comply with a curb cut requirement of 250 feet and all access points on Star Light Drive shall comply with a curb cut requirement of 150 feet.

D. **Shading (Shade Trees)** – Shading in the Development shall be provided in accordance with York County Zoning Ordinance § 155.534. All trees planted within the Development shall comply with the Tree Conservation Ordinance, York County Zoning Ordinance §§ 155.530 through 155.539, including the Appendices and Guidelines referenced in § 155.539.

E. **Signage** – All signage in the Development shall conform to the standards set forth in York County Zoning Ordinance § 155.288.

F. **Setbacks** – Setbacks within the Development are graphically depicted in detail on the PD Plan and are set forth below as follows:

Front: 50' (Major Street)
25' (Minor Street)
Side: 25'
Rear: 25'

Setbacks shall be measured from the road right-of-way.

G. **Impervious surface areas** – The impervious surface areas within the Development are depicted on the PD Plan and shall not exceed 80% for the entire Development.

H. **Maximum building height** – The maximum heights of buildings are graphically depicted on the PD Plan. The tallest building in the Development shall be the Tower, the height of which shall not exceed 280 feet.

I. **Density** – The Tower is included in the Development and the Development is subject to and in compliance with York County Zoning Ordinance § 155.209(B)(2) requiring a density of eighteen (18) units per gross acre.

J. **Stormwater Plans** - Prior to construction of any new structure or the renovation of the Tower, an overall stormwater concept plan will be submitted for review and approval by York County Engineering Department, Environmental Compliance Division. This plan will schematically show potential locations for stormwater measures for water quality and water quantity controls. The intent of the design will be to utilize the existing pond for water quality treatment. Calculations can be done to determine the effectiveness of this treatment. In other areas such as parking lots that do not drain into the existing pond, other methods for water quality treatment such as bio-retention islands and/or catch basin inserts may be utilized. Prior to any construction, a detailed design with supporting calculations will be submitted for approval by York County Engineering

Department, Environmental Compliance Division. This design will be done in accordance with regulations by SC DHEC and York County ordinances as applicable. The preliminary plans for treatment of stormwater may change through the planning process, with input from York County.

K. **Screening and Fencing** – Developer plans to utilize landscape plantings to improve the overall visual quality of the development. More detail as to the appropriate landscape elements is provided in Subsection A Bufferyards. Developer plans to retain existing vegetation where practical and to use plantings to minimize visual impacts of parking areas.

V. Developer Standards and Understandings

A. Developer understands that it shall be responsible for the installation and maintenance of all improvements, protective devices, open space and bufferyards.

B. Developer has been informed by York County of the requirements of the County Zoning Ordinance, Stormwater Management and Sediment Control Ordinance, Subdivision Ordinance and Building Code, except as otherwise provided in the Development Agreement, these Standards and the PD Plan.

C. Developer understands that submittals must be made to and approvals obtained from all applicable planning and development services departments prior to grading or construction

D. Developer understands that once the Morningstar PD is approved no changes can be made to the signage plan, permitted uses, restrictive covenants, bufferyard/landscaping standards, and open space standards unless approved by the County Council through the normal rezoning process.

E. The anticipated construction schedule and phasing of the Development is depicted on **Exhibit B** attached hereto.

VI. Administrative Procedures

A. Authorization for a Modification

1. Major Modifications, as defined herein, in all or a portion of the exterior boundaries of the Morningstar PD shall follow the same procedures as required for the approval of a Planned Development District pursuant to York County Ordinance §§ 155.205 through 155.216.

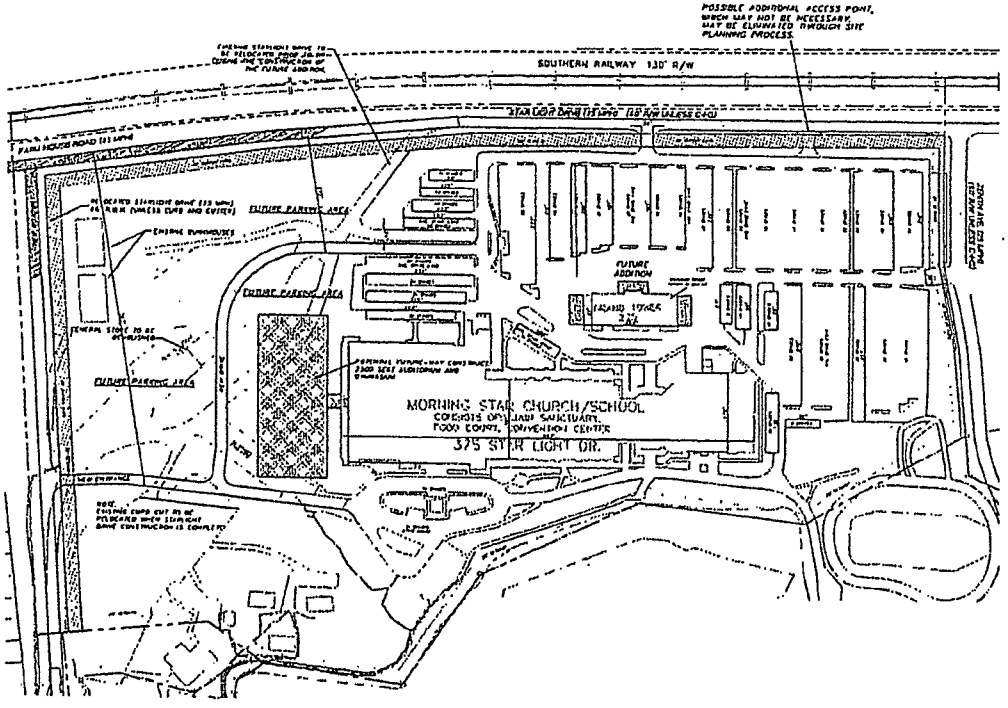
2. Authority to make Minor Modifications, as defined herein, shall be granted to Planning Director and County Engineer, or their designees. The Zoning Administrator shall have the duty to determine whether any specific modification is a Major Modification, as specified above, provided that Developer shall have the right to

have any request for modification processed as a Major Modification, notwithstanding the provisions hereof.

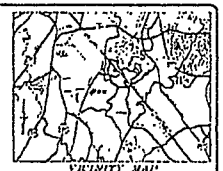
EXHIBIT A

(To the Morningstar PD Standards)

1) MAXIMUM IMPERVIOUS SURFACE RATIO WILL NOT EXCEED 80% OF THE PROJECT AREA.
FRONT PROPERTY SETBACK FROM A MAJOR OR MINOR STREET IS 50 FEET OR 35 FEET.
2) PARKING SPACE REQUIREMENTS FOR ALL FUTURE WORK / ADDITIONS BEYOND COMPLETION OF GRAND TOWER SHALL BE COORDINATED WITH THE PLANNING AND ZONING DEPARTMENT DURING SUBMITTAL OF CONSTRUCTION DRAWINGS.
3) EXISTING PARKING SHOWN SHALL BE VERIFIED DURING DESIGN/RENOVATION OF GRAND TOWER.
4) MAXIMUM BUILDING HEIGHT OF THE GRAND TOWER IS TO BE 280 FEET FROM FINAL GRADE.



GRAPHIC SCALE



SITE INFORMATION
TAX ID#: 729-00-00-014
SITE: 32.0 ACRES
CURRENT ZONING: PD

OPEN SPACE
REQUIRED OPEN SPACE (20%): 10.4 ACRES
OPEN SPACE PROVIDED: 13.87 ACRES (26.7%)

OPEN SPACE HATCH:

BUFFER:

PROPOSED ASPHALT:

IMPERVIOUS AREA
BUILDINGS: 4.88AC
ROAD: 1.23AC
PARKING: 29.34AC
TOTAL IMPERVIOUS: 35.98AC (69%)

PERVIOUS AREA
OPEN SPACE 13.87AC
BUFFER AREA 2.15AC
TOTAL IMPERVIOUS: 16.02AC (31%)

PREPARED BY
POWER ENGINEERING COMPANY, INC.
ENGINEERS - PLANNERS - SURVEYORS

MORNINGSTAR FELLOWSHIP CHURCH
PD PLAN
POST HILL TOWNSHIP, YORK COUNTY, SOUTH CAROLINA

SHEET 1 OF 2 SHEETS

PARKING CALCULATIONS

EXISTING MAIN BUILDING (SANCTUARY & HOTEL - 4 LEVELS)

USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
SANCTUARY (LEVEL 1): SEATING AREA	900 SEATS	1 SPACE PER 4 SEATS	225
SANCTUARY (LEVEL 1): KITCHEN	2,640 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 1): STAGE AREA	2,784 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 1): OFFICES	2,721 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 1): CIRCULATION	10,485 SF	OVERLAPPING USE	0
HOTEL (LEVEL 1): SINGLE ROOMS	66 ROOMS	1 SPACE PER ROOM	66
HOTEL (LEVEL 1): OFFICES	2,828 SF	OVERLAPPING USE	0
HOTEL (LEVEL 1): CLASSROOMS	2,155 SF	OVERLAPPING USE	0
HOTEL (LEVEL 1): MAIL ROOM	707 SF	OVERLAPPING USE	0
HOTEL (LEVEL 1): CIRCULATION	9,177 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 2): OFFICES	6,952 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 2): CIRCULATION	2,939 SF	OVERLAPPING USE	0
HOTEL (LEVEL 2): SINGLE ROOMS	66 ROOMS	1 SPACE PER ROOM	66
HOTEL (LEVEL 2): CIRCULATION	9,177 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 3): CONFERENCE	2,755 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 3): OFFICES	2,666 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 3): CIRCULATION	2,711 SF	OVERLAPPING USE	0
HOTEL (LEVEL 3): SINGLE ROOMS	66 ROOMS	1 SPACE PER ROOM	66
HOTEL (LEVEL 3): CIRCULATION	9,177 SF	OVERLAPPING USE	0
SANCTUARY (LEVEL 4): OFFICES	3,249 SF	OVERLAPPING USE	0
HOTEL (LEVEL 4): SINGLE ROOMS	66 ROOMS	1 SPACE PER ROOM	66
HOTEL (LEVEL 4): CIRCULATION	8,939 SF	OVERLAPPING USE	0
		TOTAL REQUIRED SANCTUARY/HOTEL	549

BUNKHOUSES

USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
BUNKHOUSE 21	18 BEDROOMS	1 SPACE PER ROOM	18
BUNKHOUSE 22	15 BEDROOMS	1 SPACE PER ROOM	15
		TOTAL REQUIRED BUNKHOUSES	33

EXISTING MAIN BUILDING (FOOD COURT/CONVENTION CENTER)

USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
FOOD COURT	6,470 SF	OVERLAPPING USE	0
KITCHEN	7,538 SF	OVERLAPPING USE	0
MEETING ROOMS (OCCUPANCY 1000)	18011 SF	1 SPACE PER 4 PEOPLE	375
CIRCULATION/MISC.	13,424 SF	OVERLAPPING USE	0
DINING	11,116 SF	OVERLAPPING USE	0
		TOTAL REQUIRED FOOD COURT/CONVENTION CENTER	375

EXISTING MAIN BUILDING (MAIN STREET - 3 LEVELS)

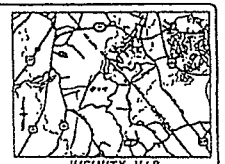
USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
CLASSROOMS (LEVEL 1)	14,630 SF	OVERLAPPING USE	0
MERCHANTILE (LEVEL 1)	14,838 SF	OVERLAPPING USE	0
CIRCULATION (LEVEL 1)	24,424 SF	OVERLAPPING USE	0
CLASSROOMS (LEVEL 2)	5,885 SF	OVERLAPPING USE	0
OFFICES (LEVEL 2)	8,805 SF	OVERLAPPING USE	0
1 BEDROOM RESIDENTIAL UNITS (LEVEL 2)	22 UNITS	1 SPACE PER ROOM	22
CIRCULATION (LEVEL 2)	6,867 SF	OVERLAPPING USE	0
1 BEDROOM RESIDENTIAL UNITS (LEVEL 3)	78 UNITS	1 SPACE PER ROOM	78
CIRCULATION (LEVEL 3)	6,867 SF	OVERLAPPING USE	0
		TOTAL REQUIRED MAIN STREET	100

PROPOSED ADDITION TO MAIN BUILDING (SANCTUARY/GYM)

USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
SANCTUARY (2,500 SEATS)	33,000 SF	1 SPACE PER 4 SEATS	625
GYMNASIUM	12,000 SF	OVERLAPPING USE	0
		TOTAL REQUIRED SANCTUARY/GYM	625

EXISTING GRAND TOWER WITH ADDITIONS (TWENTY LEVELS)

USE DESCRIPTION	SF/# UNITS	REQUIRED PARKING PER SF/UNIT	REQUIRED PARKING SPACES
GROUND LEVEL CONCOURSE	21,492 SF	OVERLAPPING USE	0
SECOND LEVEL CONCOURSE	21,693 SF	OVERLAPPING USE	0
RESIDENTIAL UNITS (1 BEDROOM)	89 UNITS	1 SPACE PER UNIT	89
RESIDENTIAL UNITS (2+ BEDROOMS)	110 UNITS	2 SPACE PER UNIT	220
RESTAURANT SPACE (LEVEL 21)	6,000 SF	OVERLAPPING USE	0
KITCHEN (LEVEL 21)	2,000 SF	OVERLAPPING USE	0
		TOTAL REQUIRED GRAND TOWER	420



VICINITY MAP

PARKING SUMMARY

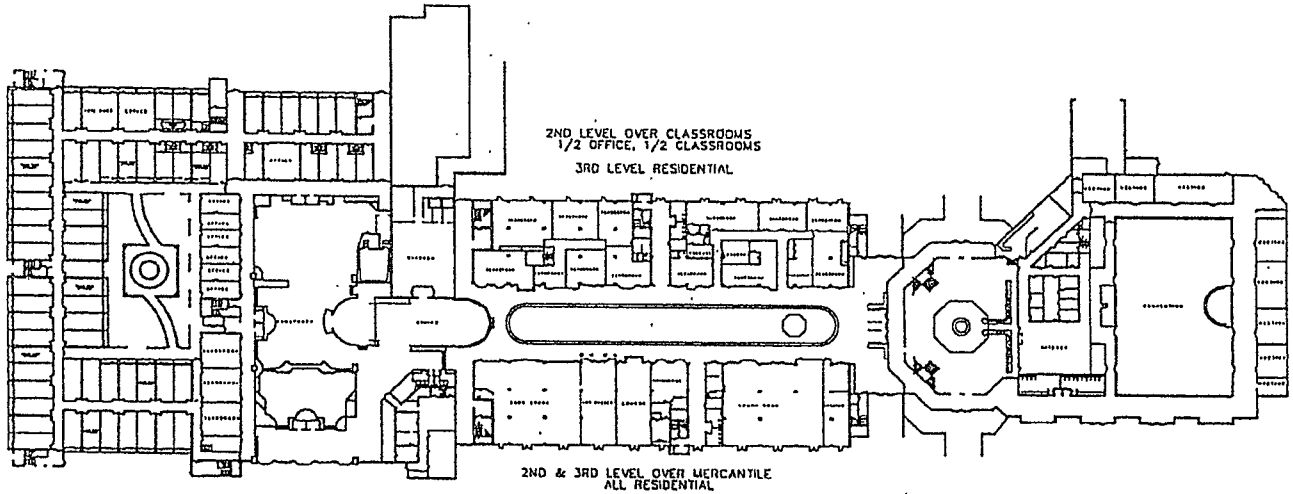
PARKING REQUIRED (FOR EXISTING USES)
EXISTING SANCTUARY/HOTEL = 549 SPACES
FOOD COURT/CONVENTION CENTER = 375 SPACES
MAIN STREET = 100 SPACES
GRAND TOWER = 420 SPACES
BUNKHOUSES = 33 SPACES

TOTAL PARKING REQUIRED = 1,478 SPACES

ADJUSTED PARKING REQUIRED (FOR OVERLAPPING USES)
TOTAL PARKING REQUIRED = 1,478 SPACES
LESS 1/3 OF SANCTUARY REQUIREMENT = (112) SPACES
LESS 1/3 OF CONVENTION CENTER REQUIREMENT = (123) SPACES

TOTAL ADJUSTED PARKING REQUIRED = 1,243 SPACES

TOTAL EXISTING PARKING: 1377 SPACES
1) PARKING TO MEET THE CURRENT REQUIREMENTS OF YORK COUNTY.
2) AREAS DESIGNATED AS "FUTURE PARKING" TO BE USED FOR ANY REQUIRED PARKING AREAS TO MEET THE PROPOSED/NEW USE (I.E. SANCTUARY/GYM)



EXISTING MAIN BUILDING

1:100

REVISIONS | BY

PREPARED BY
POWER ENGINEERING COMPANY, INC.
ENGINEERS - PLANNERS - SURVEYORS
CHARLOTTE, NC

MORNINGSTAR FELLOWSHIP CHURCH
PD PLAN
FORT MILL TOWNSHIP, YORK COUNTY, SOUTH CAROLINA

-110-

SHEET 2 OF 2 SHEETS

EXHIBIT B

(To the Morningstar PD Standards)

MorningStar Tower Project — Development Schedule / TIMELINE

DESCRIPTION	07 Oct	07 Nov	07 Dec	08 Jan	08 Feb	08 Mar	08 Apr	08 May	08 Jun	08 Jul	08 Aug	08 Sep	08 Oct	08 Nov	08 Dec	09 Jan	09 Feb	09 Mar	09 Apr	09 May	09 Jun	09 Jul	09 Aug	09 Sep	09 Oct	09 Nov	09 Dec	10 Jan	10 Feb	10 Mar	10 Apr	10 May	10 Jun	10 Jul	10 Aug	10 Sep	10 Oct	10 Nov	10 Dec	11 Jan	11 Feb	11 Mar
A/E Design Documents	X	X	X																																						
Owner Review/Approval	X	X	X																																						
Permits & Fees / ICC/York				X	X	X	X	X	X																																
Bid Pkg. Release & Award										X	X	X	X																												
Mobilization / Staging																X	X	X																							
Demo and Clean up																			X	X	X	X																			
Div. Nos. 1-14 Up-Fit																							X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Div. Nos. 1-4 New Const.																							X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Div. Nos. 15-16 Up-Fit																							X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Div. Nos. 15-16 New Const.																							X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Project Close-Out																																						X	X	X	X	X
Owner Occupancy																																								X	X	X

This Development Schedule was prepared as a cooperative effort between Capitol Building Consultants, MorningStar Fellowship and Concept Arc Intl.
Capitol Building Consultants is a licensed Commercial Building Consultant & Cost Estimator.
Concept Arc Intl is a licensed Commercial Architect.
MorningStar Fellowship is a licensed Commercial General Contractor.

This timeline is not meant to represent exact dates, rather it is a depiction of the schedule as planned representing the length of time needed for the scope of work.
Delays due to weather, permitting processes and even the availability of certain building materials cannot be accurately predicted by the developer or planners.

Construction Divisions

(Based on the Construction Specification Index)

Division	Description
01	General Requirements
02	Site Construction
03	Concrete
04	Masonry
05	Metals
06	Wood and Plastics
07	Thermal and Moisture Protection
08	Doors and Windows
09	Finishes
10	Specialties
11	Equipment
13	Special Construction
14	Conveying Systems
15	Mechanical
16	Electrical

EXHIBIT C

II. Clearing Limitations

§ 154.012 Limitations.

(A) No person shall proceed with any construction work on the proposed subdivision, including grading, clearing, or grubbing, before obtaining preliminary plat approval and approval of the construction plans by the County Engineer. Construction work shall be the carrying out of any building activity or the making of any material change in the use or appearance of any structure or land. Limited selective clearing may be authorized by the County Engineer and Planning Works Director provided that the applicant has demonstrated the selective clearing will not affect grand trees on the site or degrade surface water quality.

(B) The applicant may clear sight lines for surveys and provide access for boring equipment when necessary, provided that any related disturbance of the site is the minimum needed to obtain required information for the final engineering plans.

III. Platting Process

Staff shall review the existing platting process to ensure that it achieves the purposes of the subdivision ordinance in accordance with State Law.

('77 Code, § 16-3(VI)) (Ord. passed 1-3-00; Am. Ord. 5001, passed 9-17-01; Am. Ord. 2302, passed 7-15-02)

IV. Traffic Impact Analysis

§ 154.035 STREETS.

(A) Traffic Impact Analysis

The intent of this section is to provide the information necessary to allow decision-makers to assess the transportation implications of traffic associated with a proposed development, to address the transportation-related issues associated with development proposals that may be of concern to neighboring residents, business owners and property owners, and to provide a basis for negotiation regarding improvements and funding participation in conjunction with an application for development. This section establishes requirements for the analysis and evaluation of transportation impacts associated with proposed developments.

(1) **Purpose**

A Traffic Impact Analysis will be required for certain permitted and Special Exceptions, Subdivisions and Site Plans exceeding specific trip generation thresholds. The purpose of a Traffic Impact Analysis will be to:

(a) evaluate traffic operations and impacts at site access points under projected peak period traffic loads;

(b) evaluate the impact of site-generated traffic on affected intersections in the vicinity of the development site;

(c) evaluate the impact of site-generated traffic on the quality of traffic flow within a reasonable distance of the site of development;

(d) evaluate the impact of the proposed development on residential streets in the vicinity of the site;

(e) ensure that site access and other improvements needed to mitigate the traffic impact of the development meet commonly accepted engineering design standards;

(f) ensure that adequate facilities for pedestrians, transit users and bicyclists have been provided;

(g) identify transportation infrastructure needs and related costs created by the development and cost sharing for the needed improvements.

(2) **Applicability**

Traffic Impact Analysis shall be required for any Land Use Plan Amendment, amendment to the Zoning Map, Subdivision, Special Exception Permit, Rezoning or Site Plan under the following described conditions:

(a) The proposed development will generate more than 125 cumulative trips per acre per day at full occupancy, according to most current versions of the ITE Trip Generation Informational Report or comparable research data published by a public agency or institution, and which will generate, based on the size of the development, 750 or more average daily trips; or

(b) The proposed development will concentrate 1,500 or more trips per day through a single access point; or

(c) The proposed development will include 30 or more dwelling units taking sole access from an existing or planned local residential or neighborhood street; or

(d) The proposed development will include a drive-through facility or structural parking lot entrance that will result in traffic spillover onto local residential, neighborhood or arterial streets.

(e) Any residential project accessing an arterial street.

(3) Waiver

The requirements of this section for a Traffic Impact Analysis may be waived by the Planning Director and County Engineer when it is determined that such report is not necessary to determine needed road improvements or that no unsafe or hazardous conditions will be created by the development as proposed.

(4) Preparation

The traffic impact analysis shall be prepared by a Licensed Professional Engineer or qualified AICP planner with no less than five years experience in the preparation of traffic analyses.

(5) Traffic Service Standards

The standards for traffic service that shall be used to evaluate the findings of traffic impact studies are:

(a) Level of Service

For collector or local streets, a Level-of-Service (LOS) "C" or better shall be maintained. On any arterial or higher order street a LOS "D" or better shall be maintained. Level of service will be measured for segments and intersections using ITE standards for LOS calculation. Where the existing LOS is below these standards, the traffic impact analysis shall identify those improvements required to ensure that development related traffic demands result in no net reduction in LOS, and identify additional improvements needed to raise the level of service to the standards on the applicable street to the adopted LOS standard.

(b) Number of Access Points

The number and spacing of access points shall comply with applicable County, State and AASHTO standards.

(c) Residential Street Impact

Average Daily Traffic (ADT) on residential streets shall be within the ranges spelled out in the Thoroughfare Plan for the class of street involved. No non-residential development shall increase the traffic on a residential street with at least 300 average daily trips by more than 25%.

(d) Internal Circulation

On-site vehicle circulation and parking patterns shall be designed so as not to interfere with the flow of traffic on any public street and shall accommodate all anticipated types of site traffic.

(e) Safety

Access points shall be designed to provide for adequate sight distance and appropriate facilities to accommodate acceleration and deceleration of site traffic.

(f) Curb Space Use Plan

Details shall be provided on curb space use on public streets along the edge of the development site when it is intended that such areas be used for parking, parking space access, delivery and loading zones, passenger zones, taxi cab stands, bus stops, fire zones and/or other official/emergency zones. This review shall include a description of existing conditions prior to development, and proposed changes

resulting from the development, including a description of any loss or gain in curb space use by the activities intended.

(6) Coordination with SCDOT

The applicant shall coordinate with the SCDOT and local road authorities to determine whether planned roadway or intersection improvements affect the capacity of the roadway or designs of roadways or access points proposed by the applicant.

(7) Contents

A Traffic Impact Analysis shall contain information addressing the factors listed below.

(a) Site Description

The report shall contain illustrations and narrative that describe the characteristics of the site and adjacent land uses as well as expected development in the vicinity which will influence future traffic conditions. A description of the proposed development including access plans, staging plans and an indication of land use and intensity, shall be provided.

(b) Study Area

The analysis shall identify the geographic area under study and identify the roadway segments, critical intersections and access points to be analyzed. The applicant shall meet with the County Engineer to establish the study area prior to conducting the study. At a minimum, the study shall encompass all site access points, all intersections adjacent to the site and the first signalized intersection along each road serving the site, provided that the intersection is no further than three miles from the site. The criteria that define the scope for each TIA may vary depending on the size and type of development. Additional factors may be added to the study by the County Engineer if there are known areas of concern that may be impacted by the development, including but not limited to existing congested areas and existing residential development.

(c) Existing Traffic Conditions

The report shall contain a summary of the data used in the analysis of existing traffic conditions, including:

1. traffic count and turning movement information, including the sources, dates and times of traffic count information used in the report;
2. correction factors that were used to convert collected traffic data into representative design hour traffic volumes;
3. roadway characteristics, including the design configuration of existing or proposed roadways, existing traffic control

measures (speed limits, traffic signals, etc.) and existing driveways and turning movement conflicts in the vicinity of the site; and

4. the existing LOS for roadways and intersections without project development traffic using methods documented in the Special Report 209: Highway Capacity Manual, published by the Transportation Research Board, or comparable accepted methods of evaluation. LOS shall be calculated for the weekday peak hour and, in the case of uses generating high levels of weekend traffic, the Saturday or Sunday peak hour as determined by the County Engineer.

(d) Horizon Year(s) and Background Traffic Growth

The report shall identify the horizon year(s) that were analyzed in the study, the background traffic growth factors for each horizon year, and the method and assumptions used to develop the background traffic growth. Unless otherwise approved by the County Engineer, the impact of development shall be analyzed for the year after the development is expected to be at full occupancy.

(e) Traffic Assignment

The report shall identify projected design hour traffic volumes for roadway segments, intersections or driveways in the study area, with and without the proposed development, for the horizon year(s) of the study.

(f) Mitigation/Alternatives

In situations where the traffic level of service standards are exceeded, the report shall evaluate each of the following alternatives for achieving the traffic service standards:

1. identify where additional right of way is needed to implement mitigation strategies;
2. identify suggested phasing of improvements where needed to maintain compliance with traffic service standards; and
3. identify the anticipated cost of recommended improvements.

(8) Process for the Review and Preparation of a Traffic Impact Analysis

The following steps provide an outline of the steps to be included in the preparation and review of a Traffic Impact Analysis:

(a) The County Engineer shall be consulted for assistance in determining whether a Traffic Impact Analysis needs to be prepared for a proposed development application;

(b) The County Engineer and Planning Director shall meet with applicants to identify study issues, assumptions, horizon years and time periods to be analyzed, analysis procedures, available sources of data, past and related studies, report requirements and other topics relevant to study requirements.

(c) Following initial completion of a traffic impact analysis, the report shall be submitted to the Planning Director for distribution to the staff of all jurisdictions involved in the construction and maintenance of public roadways serving the development;

(d) Within ten working days, staff shall complete an initial review to determine the completeness of the report and shall provide a written summary to the applicant outlining the need for any supplemental study or analysis to adequately address any deficiencies. A meeting to discuss the contents and findings of the report and the need for additional study may be requested by the applicant;

(e) Following a determination that the technical analysis is complete, staff shall prepare a report outlining recommendations that have been developed to address the findings and conclusions included in the study regarding the proposed development's access needs and impacts on the transportation system. Depending on the type of application, the recommendations may be presented to the Planning Commission or County Council.

(f) In the case of a Traffic Impact Analysis showing deficiencies requiring mitigation within the public right-of-way, negotiations based on the conclusions and finding resulting from the traffic study shall be held with the County Engineer, Planning Director and County Attorney. A Development Agreement, detailing the applicant's responsibilities and the County's responsibilities for implementing identified mitigation measures, shall be prepared following the negotiations for final action by County Council and the applicant.

(9) Report Findings

If staff finds that the proposed development will not meet applicable service level standards, staff shall recommend one or more of the following actions by the public or the applicant:

(a) Reduce the size, scale, scope or density of the development to reduce traffic generation;

(b) Divide the project into phases and authorize only one phase at a time until traffic capacity is adequate for the next phase of development;

(c) Dedicate right-of-way for street improvements;

(d) Construct new streets;

(e) Improve intersection design and/or signalization;

(f) Expand the capacity of existing streets;

(g) Redesign ingress and egress to the project to reduce traffic conflicts;

(h) Alter the use and type of development to reduce peak hour traffic;

(i) Reduce background (existing) traffic;

(j) Eliminate the potential for additional traffic generation from

undeveloped properties in the vicinity of the proposed development;

(k) Integrate non-vehicular design components (e.g., pedestrian and bicycle paths or transit improvements) to reduce trip generation;

(l) Recommend approval of the development contingent upon making improvements or addressing items required to mitigate traffic and access issues and impacts;

(m) Contribute to an improvement that provides needed capacity, is on the capital improvements program or is approved to be added to the capital improvements program; or

(n) Recommend denial of the application for development for which the traffic study is submitted.

V. Development Agreements

154.038 DEVELOPMENT AGREEMENTS

(A) **Purpose.** The purposes of a Development Agreement are coordinate the provision of adequate public facilities with the timing of development and otherwise document the terms of subject developments in accordance with State Law (Title 6, Chapter 31 S.C.sec 6-31-10 Code). The Development Agreement may incorporate the provisions of a Development Bonding Agreement.

(B) **Applicability.** A Development Agreement is a voluntary agreement between the County and an applicant that may be required by the County when an applicant decides to proceed with a development that would not otherwise be approved due to one or more of the following conditions:

1. The County finds that there is the need to coordinate the provision of adequate public facilities, which may include water, sewer, stormwater, transportation, school or other mutually agreed-upon public facilities, with development generating the need for those facilities;
2. The County finds that there is the need for specific development conditions associated with a planned development; or
3. The County finds that there is the need to document other specific conditions applicable to the timing, intensity, location or design of a development.

(C) **Contents.** While each Development Agreement will be unique to the applicable development, agreements may include any of the following provisions:

1. Description of required on-site and/or off-site improvements;
2. Assignment of the timing and responsibility for provision of required improvements;
3. Assignment of funding responsibilities for required improvements;
4. Establishment of a phasing plan for development;

AGREEMENT FOR THE PURCHASE
AND SALE OF REAL PROPERTY

THIS AGREEMENT is made and entered into this 30th day of June, 2004, (the "Effective Date") by and between Coulston Enterprises, Inc., a South Carolina corporation (herein referred to as "Seller"), and Morningstar Fellowship Church, an eleemosynary corporation (hereinafter referred to as "Purchaser").

WITNESSETH:

WHEREAS, Seller desires to sell to Purchaser and Purchaser desires to acquire from Seller certain real property and improvements more particularly described hereinafter upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, for and in consideration of the premises, the mutual covenants and agreements herein set forth, and for other good and valuable consideration, the receipt, adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, Seller and Purchaser do hereby covenant and agree as follows:

1. **Agreement to Buy and Sell.** Upon the terms and conditions set forth in this Agreement, Purchaser agrees to buy from Seller, and Seller agrees to sell to Purchaser, all of that certain real property consisting of approximately 52 acres, as more particularly described in Exhibit A attached hereto and by reference made a part hereof (hereinafter referred to as the "Land"), together with Seller's right, title and interest in any and all buildings and improvements located on the Land (the Land, improvements, and the foregoing easements being hereinafter referred to collectively as the "Property"). This Agreement is expressly contingent upon Seller obtaining clear title to the Property prior to closing. If Seller does not obtain title to the property prior to the Closing Date, then this Contract shall be void.

2. ***Earnest Money.*** Simultaneously with the execution of this Agreement by Purchaser, Purchaser shall deliver the sum of Twenty Five Thousand Dollars ($25,000.00) to Coulston Enterprises, Inc. as Earnest Money for the purposes of this Agreement (the "Earnest Money" or "Deposit"), to be applied as part payment of the Purchase Price at Closing, or to be disbursed in accordance with the provisions of Section 4.3 hereof. The Deposit shall be nonrefundable for any reason other than Seller's default of this Agreement, which would include the failure of Seller to obtain title to the property prior to the Closing Date. Provided Purchaser has not given Seller written notice of its election to terminate this Agreement as provided in Section 4.3, within one (1) business day following the conclusion of the Inspections Period, Purchaser shall deposit an additional Twenty Five Thousand Dollars ($25,000.00) as Earnest Money with the Seller (the $50,000.00 total now constituting the "Earnest Money" or "Deposit"). The entire amount of the Earnest Money shall then be non-refundable for any reason except provided in Section 12.1. The failure of Purchaser to

EXHIBIT
B

deposit the additional Twenty Five Thousand Dollars ($25,000.00) on or before one (1) business day following the end of the Inspections Period shall constitute, without the requirement of notice, an immediate default by Purchaser under this Agreement, and Seller shall retain the Twenty Five Thousand Dollars ($25,000.00) Deposit.

3. **Purchase Price.** Purchaser shall pay to Seller, in consideration of the conveyance of the Property to Purchaser, the purchase price of One Million Six Hundred Thousand Dollars ($1,600,000.00) (the "Purchase Price"), which Purchase Price shall be paid by Purchaser to Seller at the Closing (as hereinafter defined) by cashier's check or by wire transfer of immediately available funds. Purchaser represents that it has the financial ability to pay the Purchase Price and Purchaser's obligations hereunder are not subject to a financing contingency. In addition, Purchaser agrees to demolish and remove the approximately twenty (20) story structure commonly known as the Heritage Tower within twenty four (24) months of Closing. Such demolition and removal constitutes an integral part of the consideration for this Agreement.

4. *Due Diligence.*

4.1 Purchaser shall at all times during the Inspections Period (as defined below) have the privilege of going upon the Property with Purchaser's agents or engineers as needed to inspect, examine and survey the Property. Said privilege shall include the right, at Purchaser's sole expense, to make soil tests, borings, percolation tests and other tests to obtain other information necessary to determine surface, subsurface, environmental and topographic conditions. Purchaser hereby indemnifies and agrees to hold Seller harmless from and against any claims or damages incurred by Seller as a result of persons or firms entering the Property on Purchaser's behalf pursuant to the privileges granted under this Section 4. Purchaser further agrees to repair any damage to the Property caused by such tests and restore the Property to its pre-test condition. Purchaser's indemnity obligations set forth above shall survive any termination of this Agreement.

4.2 In the event Purchaser elects to terminate this Agreement as provided herein, within ten (10) days following Seller's written request therefor, Purchaser agrees to deliver to Seller a copy of all surveys, engineering studies, development plans, and the like, that Purchaser may have in Purchaser's possession relating to the Property, and shall assign to Seller, if assignable, all licenses and permits procured by the Purchaser relating to the Property.

4.3 Purchaser shall have sixty (60) days after the Effective Date (the "Inspections Period") to examine the Property as provided in Section 4.1 above and Section 5 below. If Purchaser, in Purchaser's sole discretion, determines that the Property is unsuitable for Purchaser's intended use, Purchaser may terminate this Agreement at any time prior to the end of the Inspections Period by giving Seller written notice thereof. In the event of such termination, the Deposit shall be retained by Seller, and this Agreement shall be deemed of no further force and effect, and Purchaser and Seller shall have no further rights, obligations or liabilities hereunder except for Purchaser's indemnity obligations which shall survive the termination of this Agreement. In the event Purchaser

does not give Seller written notice of its election to terminate this Agreement prior to the expiration of the Inspections Period, Purchaser shall be contractually bound to increase the Deposit by Twenty Five Thousand Dollars ($25,000.00) and to close the transactions contemplated herein or forfeit the Deposit of Fifty Thousand Dollars ($50,000.00).

5. Title to Property.

5.1 Seller represents and warrants to Purchaser that Seller shall convey fee simple record title to the Land and shall deliver title to the Land free and clear of all monetary liens and encumbrances, excepting only real property ad valorem taxes not yet due and payable. Purchaser agrees that title to the Property shall be subject to the permitted exceptions set forth in Exhibit C and all other defects and non-monetary encumbrances not agreed by Seller in writing to be cured by Closing (the "Permitted Exceptions"). Seller shall promptly commission a survey (the "Survey") to be prepared and delivered to Purchaser and Seller and which shall be used to determine the exact property lines of the Property to be conveyed.

5.2 Purchaser shall have thirty (30) days after the Effective Date during which to examine title to the Property and to inspect the Survey commissioned by Seller and advise Seller in writing of any defects or objections affecting the title to the Property disclosed by such title examination and/or Survey.

5.3 Seller shall have the right but not the obligation to cure any such defects and objections to title set forth in Purchaser's notice delivered to Seller as provided in 5.2 above. Within five (5) business days following receipt of Purchaser's notice, Seller shall advise Purchaser of its intention with respect to the title issues raised by Purchaser. In the event Seller elects not to cure any or all defects and objections on or before the Closing, Purchaser shall elect, in writing on or before the end of the Inspections Period, to either (i) terminate this Agreement, in which event the Earnest Money shall be immediately paid to Purchaser, and this Agreement shall be deemed of no further force and effect and Purchaser and Seller shall have no further rights, obligations or liabilities hereunder, except for Purchaser's indemnity obligations which survive the termination of this Agreement; or (ii) accept title to the Property subject to such defects and objections. The failure of Purchaser to make this election shall bind Purchaser to close on this contract as provided herein or lose the entire Earnest Money Deposit as provided in Section 4.3.

6. Closing and Closing Date.

6.1 Closing Date. The consummation of the sale by Seller and the purchase by Purchaser of the Property (herein referred to as the "Closing") shall be held on or before the date which is forty-five (45) days after the expiration of the Inspections Period at Wilson Law Firm in Fort Mill, South Carolina.

6.2 Closing Deliveries By Seller to Purchaser. At least five (5) business days prior to the Closing Date, Seller shall use reasonable efforts to deliver or cause to be delivered to Escrow Agent (or if appropriate, Seller shall deliver to Purchaser at the Property on the Closing Date) the following items:

(a) A Limited Warranty Deed (or local law equivalent) ("Deed"), substantially in the form attached to this Agreement as Exhibit D, duly executed and acknowledged by Seller and in recordable form approved by the Title Company, conveying the real property and improvements to Purchaser, subject to the Permitted Exceptions and including the conveyance and reservation of the Easements unless said conveyance and reservation is set forth in a separate Grant of Easement and Easement Agreement which shall be executed and delivered in the same manner as the Deed;

(b) A Transferor's Certificate of Non-Foreign Status ("FIRPTA Certificate") in the form attached to this Agreement as Exhibit E duly executed by Seller;

(c) A bill of sale ("Bill of Sale") substantially in the form attached to this Agreement as Exhibit F, duly executed by Seller;

(d) Two (2) original counterparts of a Partial Assignment of York County Waste Water Contract ("Partial Assignment of York County Waste Water Contract") substantially in the forms attached to this Agreement as Exhibit J-1duly executed by Seller;

(e) A No Lien, Possession and Gap Affidavit substantially in the form attached to this Agreement as Exhibit L, duly executed by Seller;

(f) Such corporate resolutions, certificates of good standing and/or other similar corporate documents relating to Seller as may be reasonably required by the Title Company in connection with the transaction contemplated by this Agreement;

(g) Two (2) original counterparts of the Cost Sharing and Road Maintenance Agreement ("Cost Sharing and Road Maintenance Agreement") substantially in the form attached to this Agreement as Exhibit M duly executed by Seller;

(h) Two (2) original counterparts of the Grade Crossing Sharing Agreement ("Grade Crossing Sharing Agreement") substantially in the form attached to this Agreement as Exhibit N duly executed by Seller; and,

(i) Keys, safe and lock combinations, to the extent they exist and are in Seller's possession, to the Improvements on the Real Property.

6.3 Closing Deliveries By Purchaser to Seller. At least five (5) business days prior to Closing Date Purchaser shall use reasonable efforts to deliver or cause to be delivered to Escrow Agent the following items:

(a) The Grant of Easement and Easement Agreement duly executed which shall provide access to others on that portion of Regent Parkway running through the Property (i.e. parallel to the railroad tracks and past the General Store to the Property's boundary with an approximately 403 acre tract leading to the timeshare/campsite area);

(b) Such corporate resolutions, certificates of good standing and/or other similar corporate documents relating to Purchaser as may be reasonably required by Seller or the Title Company in connection with the transaction contemplated by this Agreement;

(c) Two (2) original counterparts of the Cost Sharing and Road Maintenance duly executed by Purchaser;

(d) Two (2) original counterparts of the Grade Crossing Sharing Agreement duly executed by Purchaser;

6.4 Delivery by the Closing Date. By 11:00 a.m. Eastern Time on the Closing Date, Purchaser shall deliver the Purchase Price, as adjusted to Wilson Law Firm. While Seller and Purchaser shall use reasonable efforts to deliver the items listed in Sections 6.2 and 6.3 above within five (5) business days prior to Closing, Seller or Purchaser shall only be in default as a result of failing to deliver or make available, as applicable, the items set forth in Sections 6.2 and 6.3 on the Closing Date.

6.5 By Purchaser and Seller. Purchaser and Seller shall each execute and/or deliver a closing statement. In addition Seller and Purchaser hereby designate Wilson Law Firm as the "Reporting Person" for the transaction pursuant to Section 6045(e) of the Internal Revenue Code, if applicable.

7. Conditions to Closing.

7.1 Conditions Precedent to Purchaser's Obligations. The Closing and Purchaser's obligations with respect to this transaction are subject to the following conditions precedent: (a) Seller shall have delivered or made available the items described in Section 6.2(a), 6.2(b), 6.2(i), 6.2(k), 6.2(l), 6.2(m) and 6.2(p) on or before the Closing Date; and (b) on the Closing Date Seller's obligations with respect to title to the Property shall be able to be satisfied as required under Section 5.1 and 5.3 this Agreement. The conditions set forth in this Section 7.1 are solely for the benefit of Purchaser and may be waived only by Purchaser, with such waiver to be in writing to

Seller. Provided Seller is ready, willing and able to satisfy the conditions of (a)and (b) above on the Closing Date then any failure on the part of Purchaser to close the transaction on the Closing Date shall constitute an immediate default under the Agreement and the Deposit shall be retained by Seller.

7.2 Conditions Precedent to Seller's Obligations. The Closing and Seller's obligations with respect to this transaction are subject to the following conditions precedent: (a) Purchaser's delivery to Escrow Agent, on or before 11:00 a.m. Eastern time on the Closing Date, of the Purchase Price as adjusted by the net amount of the payments, prorations and adjustments required under this Agreement; (b) Purchaser's delivery of the items to be delivered pursuant to Section 6 of this Agreement on or before the Closing Date; (c) each of Purchaser's representations, warranties and covenants set forth in this Agreement shall be true and correct and complied with in all material respects on and as of the Closing Date. The conditions set forth in this Section 7.2 are solely for the benefit of Seller and may be waived only by Seller, with such waiver to be in writing to Purchaser.

8. Expenses and Prorations. All real property ad valorem taxes applicable to the Property shall be prorated as of the date of Closing between Seller and Purchaser, said proration to be based upon the most recently available tax rate and valuation with respect to the Property; provided, however, that upon the issuance of the tax bills for such taxes for the year of Closing, Purchaser and Seller shall promptly make such adjustments as may be necessary to insure that the actual amount of such taxes for the year of Closing shall be prorated between Purchaser and Seller as of the date of Closing. Seller shall, at the Closing, pay all transfer, grantor or documentary taxes due and payable in connection with the recording of the deed from Seller to Purchaser and Seller's attorneys' fees and expenses. Purchaser shall, at Closing, pay the recording fees with respect to the deed from Seller to Purchaser, all title examination fees, the cost of the owner's title insurance premium for the policy insuring Purchaser, Purchaser's attorneys' fees, and all other expenses incurred by Purchaser in acquiring the Property. Seller shall pay any confirmed governmental assessments, if any, and Purchaser shall take title subject to all pending assessments, if any. All operational expenses and revenues attributable to the Property shall likewise be prorated as of the date of Closing between Seller and Purchaser.

9. (Intentionally Omitted.)

10. No Representations or Warranties.

10.1 No Side Agreements or Representations; As-Is Purchase. Purchaser represents to, and covenants with Seller that Purchaser is a sophisticated Purchaser and that Purchaser is familiar with the current condition of the Property and that the improvements have suffered significant deterioration since Seller's acquisition of the improvements. Purchaser acknowledges that a fundamental component of the transaction contemplated by this Agreement is that the Property being sold hereunder is being sold "as-is where-is and

with all faults," Seller shall have no obligation to correct, remedy, or repair any aspect of the Property. Purchaser further acknowledges and agrees that Purchaser will accept all of the Property at closing in its then current condition "as-is where-is and with all faults," subject only to the provisions of Section 14 with respect to condemnation. Seller and Purchaser agree that the Property shall be sold "as-is, where is, with all faults" with no right of set-off or reduction of the Purchase Price and such sale shall be without representation or warranty of any kind, express or implied, written or oral including, without limitation, warranty of income potential, marketability, suitability, operating expenses, uses, merchantability or fitness for a particular purpose, or condition or title, and Purchaser hereby acknowledges that Seller (on its own behalf and on behalf of its employees, affiliates, and agents) does hereby disclaim and renounce any representation or warranty, express or implied, written or oral, except as is expressly set forth in this agreement. For the purposes of this agreement, the term "as-is where-is" shall mean (without limitation thereof) as-is where-is with respect to: (a) the physical and environmental condition of the property, including defects seen and unseen and conditions natural and artificial; (b) the title to the Property; (c) the matters set forth in any other documents, reports, memoranda or financial projections furnished to Purchaser; and/or (d) all laws, ordinances, rules and regulations to which the Property is subject under any applicable governmental or regulatory jurisdiction. Purchaser further acknowledges that Seller, in entering into this Agreement, is relying on Purchaser's express acknowledgment of and agreement to the provisions of Sections 10.1, 10.2 and 10.3.

Seller's Initials Purchaser's Initials

10.2 Release. Purchaser and anyone claiming by, through or under Purchaser hereby fully and irrevocably releases Seller and its respective employees, officers, directors, representatives, agents, servants, attorneys, affiliates, parent companies, subsidiaries, successors and assigns, and all persons, firms, corporations and organizations acting on their behalf, from any and all claims that it may now have or hereafter acquire against Seller or any of its respective employees, officers, directors, representatives, agents, servants, attorneys, affiliates, parent companies, subsidiaries, successors and assigns, and all persons, firms, corporations and organizations acting on their behalf for any costs, loss, liability, damage, expenses, demand, action or cause of action arising from or related to any and all matters, construction defects, errors, omissions or other conditions, latent or otherwise, geotechnical, seismic, title or environmental, affecting the Property or any portion thereof.

Seller's Initials Purchaser's Initials

10.3 Purchaser expressly agrees to the extent that Seller is furnishing to Purchaser copies of any documents or information furnished pursuant to request by Purchaser, that such documents or information is furnished to Purchaser for informational purposes only and without representation or warranty as to the accuracy or completeness of the contents of same. Purchaser covenants and agrees that it has conducted such review as it

12.2 Default by Purchaser Failure to Close. In the event of a default under this agreement by Purchaser, Purchaser and Seller agree that it would be impractical and extremely difficult to estimate the damages suffered by Seller as a result of Purchaser's failure to complete the purchase of the Property pursuant to this agreement, and that under the circumstances existing as of the date of this Agreement, the liquidated damages provided for in this section represent a reasonable estimate of the damages which seller will incur as a result of such failure. Therefore, Purchaser and Seller do hereby agree that a reasonable estimate of the total net detriment that Seller would suffer in the event that Purchaser defaults and fails to complete the purchase of the Property is an amount equal to the amount of the Deposit including any accrued interest thereon; said amount shall be the full, agreed and liquidated damages for the breach of this Agreement by Purchaser and shall be Seller's exclusive remedy for Purchaser's breach of this Agreement (except for Purchaser's indemnity obligations under Section 29.1, which may also be enforced by Seller). Upon exercise by Seller of the above remedy the Agreement shall be terminated. The payment of such amount as liquidated damages is not intended as a forfeiture or penalty.

Seller's Initials: _____ Purchaser's Initials: _____

12.3 Default by Purchaser – Failure to Complete Demolition. In the event Purchaser fails to demolish and remove the partially constructed structure commonly known as the Heritage Tower and to restore the site to a clean unimproved condition within twenty four (24) months following Closing, Purchaser shall pay Seller the sum of $300,000.00 immediately with no further obligation to Seller to demolish and remove the partially constructed structure, however, York County may require the structure to be either completed or demolished. It is understood that a component of the calculation of the Purchase Price was the commitment by Purchaser to expend the funds necessary to raze and remove the Tower and that such removal benefits Seller. Seller intends to rely on such razing in connection with the sale of the Property to Purchaser. This amount ($300,000) shall be the full agreed and liquidated damages for Purchaser's breach of Section 30 hereof and such amount is not intended as a forfeiture or penalty but rather as the parties agreed upon loss suffered by Seller as the result of the failure of Purchaser to have such demolition and removal and removal completed.

Seller's Initials: _____ Purchaser's Initials: _____

13. Possession of Property. Except as otherwise provided herein, and as may be set forth in the Exhibits hereto, Seller shall deliver to Purchaser possession of the Property on the date of Closing. Purchaser agrees that it is acquiring the Property in "AS IS" condition as of the Closing Date and as such, all risk of loss due to casualty or other damage to the Property shall be on Seller and no such loss or damage shall affect Purchaser's obligation to purchase the Property hereunder or cause any reduction in the Purchaser Price. All insurance proceeds attributable to any casualty loss or damage occurring prior to Closing shall be allocated to Purchaser

13.1 Intentionally Omitted.

13.2 Intentionally Omitted.

13.3 York County Waste Water Contract. At Closing, Purchaser agrees to assume the York County Waste Water Contract as it relates to the Real Property and Improvements. Purchaser acknowledges that the assignment of the York County Waste Water Contract is subject to the prior approval of York County. Purchaser acknowledges and agrees that approval by York County of the assignment of the York County Waste Water Contract shall not be a condition to Closing and in the event that as of the Closing Date, York County has not approved such assignment, Purchaser shall nevertheless be obligated to close the transaction. Promptly after the Effective Date Seller and Purchaser shall, request the approval of York County to the partial assignment of the York County Waste Water Contract to Purchaser with respect to the Real Property and Improvements. Purchaser agrees that the rights under the York County Waste Water Contract to collect tap fees (including, without limitation, tap fees attributable to the Real Property) shall not be assigned to Purchaser, but shall remain property of others and constitute an Excluded Asset under this Agreement. The partial assignment of the York County Waste Water Contract shall be done pursuant to Assignment and Assumption of Contract substantially in the form attached hereto as Exhibit I. In the event that as of the Closing Date the consent of York County has not yet been obtained, Seller agrees to reasonably cooperate with Purchaser post closing to obtain York County's consent to the assignment.

13.4 Grade Crossing Agreement. Purchaser acknowledges that Seller shall not be obligated to transfer or convey the Grade Crossing Agreement; however Seller agrees, subject to Seller's remaining interest in the grade crossing, the Excluded Assets, and any property of Seller or Seller's affiliate remaining east of the railroad tracks, to enter into an agreement with Purchaser sharing on an equitable basis rights, if any and obligations in the grade crossing, including rights, if any, to defend any action brought to close the grade crossing. Such an agreement shall be without representation or warranty by Seller of its interests equitable or otherwise, if any, in the Grade Crossing Agreement or the grade crossing. The form of such agreement shall be attached hereto as Exhibit N.

13.5 Cost Sharing and Maintenance Agreement. As part of its obligations as owner of the Property, Purchaser agrees to pay on an annual basis a fair and equitable pro rata share of the operating expenses, landscaping and improvement costs associated with the operation, maintenance and repair of that certain right of way currently known as "Heritage Boulevard" and with respect to that certain right of way currently known as "Regent Parkway," the portion of Regent Parkway situated between its intersection with U.S. Highway 21 and the Norfolk Southern Railroad tracks located approximately 1.9 miles from said intersection. Seller and companies affiliated to Seller owning properties adjacent to said right of ways or utilizing said right of ways in their business

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operations shall also likewise agree to pay a fair and equitable pro rata share of such expenses and costs along with the Regent Park Community Owner's Association. The parties agree to enter into at Closing a Cost Sharing and Road Maintenance Agreement substantially in the form attached hereto as Exhibit M, which terms shall include, without limitation, that it shall be binding on the parties' successors and assigns in ownership. Purchaser acknowledges that notwithstanding the Cost Sharing and Maintenance Agreement Seller reserves the right at any time to dedicate all or any portion of either Regent Parkway or Heritage Boulevard as either a County or State maintained road or to convey all or any portion of said roads to the Regent Park Community Owner's Association.

14. **Condemnation.** In the event the Property or any material portion or portions thereof, shall be taken or condemned by any governmental authority or other entity prior to the date of Closing, or in the event Purchaser receives notice of a proposed taking prior to the date of Closing, Purchaser shall have the option of either (a) terminating this Agreement by giving written notice thereof to Seller, whereupon all Earnest Money shall be immediately refunded to Purchaser and this Agreement and all rights and obligations created hereunder shall be of no further force or effect, or (b) requiring Seller to convey the remaining portion of the Property to Purchaser pursuant to the terms and provisions hereof and to transfer and assign to Purchaser at Closing all of Seller's right, title and interest in and to any award made or to be made by reason of such condemnation. Seller and Purchaser hereby further agree that Purchaser shall have the right to participate in all negotiations with any such governmental authority relating to the Property or to the compensation to be paid for any portion or portions thereof condemned by such governmental authority or other entity. For the purpose of this Section 14, the term "material" shall mean any portion of the Property with a value in excess of Three Hundred Thousand Dollars ($300,000.00). In the event less than a material portion of the Property is taken or condemned by any governmental authority or entity prior to the date of Closing, Purchaser shall not have the right to terminate this Agreement as a result of such taking or condemnation and Seller shall transfer and assign to Purchaser all of Seller's right, title and interest in and to any award made or to be made by reason of such condemnation.

15. **Broker's Commission.** The parties agree that no broker has been involved in this transaction and that no broker's commission is due. Seller shall and does hereby indemnify and hold harmless Purchaser from and against any claim for any real estate sales commission, finder's fees, or like compensation in connection with the sale contemplated hereby and arising out of any act or agreement of Seller. Likewise, Purchaser shall and does hereby indemnify and hold harmless Seller from and against any claim for any real estate sales commission, finder's fees or like compensation in connection with the sale contemplated hereby and arising out of any act or agreement of Purchaser.

16. **Notices.** Any notices which may be permitted or required hereunder shall be in writing and sent to the address set forth below, and shall be deemed to have been duly given as of the date and time (a) the same are personally delivered, or (b) if mailed, two (2) days after the deposit thereof with the United States Postal Service, postage prepaid, to be mailed by registered or certified United States mail, return receipt requested, or (c) if delivered by overnight courier guaranteeing next

business day delivery, one (1) business day after the deposit thereof with a reputable overnight courier with all delivery charges prepaid, or (d) the date delivery of the same is refused.

SELLER:

Coulston Enterprises, Inc.
130 Heritage Boulevard
Fort Mill, SC 29715
Attention: Earl Coulston, President
Telephone: _____
Facsimile: _____

PURCHASER:

Morningstar Fellowship Church

_____

336-921-4278 - 4279 Fax

17. General Provisions. No failure of either party to exercise any power given hereunder or to insist upon strict compliance with any obligation specified herein, and no custom or practice at variance with the terms hereof, shall constitute a waiver of either party's right to demand exact compliance with the terms hereof. This Agreement contains the entire agreement of the parties hereto, and no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein shall be of any force or effect. Any amendment to this Agreement shall not be binding upon any of the parties hereto unless such amendment is in writing and executed by both Seller and Purchaser. The provisions of this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, personal representatives, successors and assigns. At the election of Purchaser, this transaction shall be closed in the name of and the deed delivered to its nominee or assigns. Time is of the essence for this Agreement. This Agreement and all amendments hereto shall be governed by and construed under the laws of the state of South Carolina. This Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which taken together shall constitute one and the same agreement. All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all genders, the singular shall include the plural and vice versa. The headings inserted at the beginning of each paragraph are for convenience only, and do not add to or subtract from the meaning of the contents of each paragraph. Seller and Purchaser do hereby covenant and agree that such documents as may be legally necessary or otherwise appropriate to carry out the terms of this Agreement shall be executed and delivered by each party at the Closing.

18. Day for Performance. Wherever herein there is a day or time period established for performance and such day or the expiration of such time period is a Saturday, Sunday or holiday, then such time for performance shall be automatically extended to the next business day. Time is of the essence for the dates and times stated in this Agreement.

19. Survival of Provisions. All covenants, warranties and agreements set forth in this Agreement shall survive the Closing of the transaction contemplated hereby and shall survive the execution or delivery of any and all deeds and other documents at any time executed or delivered under, pursuant to or by reason of this Agreement, and shall survive the payment of all monies made under, pursuant to or by reason of this Agreement.

20. Severability. This Agreement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. If any provision of this Agreement, or the application thereof to any person or circumstance, shall for any reason and to any extent be invalid or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby but rather shall be enforced to the greatest extent permitted by law.

21. General. Wilson Law Firm may have agreed to act as escrow agent for the convenience of the parties. Escrow Agent shall not be liable: (a) to any of the parties for any act or omission to act except for its own negligence or willful misconduct; (b) for any legal effect, insufficiency, or undesirability of any instrument deposited with or delivered by Escrow Agent or exchanged by the parties hereunder; (c) for any loss or impairment of funds that have been deposited in escrow while those funds are in the course of collection, or while those funds are on deposit in a financial institution, if such loss or impairment results from the failure, insolvency or suspension of a financial institution; (d) for the expiration of any time limit or other consequence of delay, unless a properly executed written instruction has been delivered to Escrow Agent instructing Escrow Agent to comply with or extend such time limit; or (e) for any default, error, action or omission of either Seller or Purchaser. Escrow Agent shall be entitled to rely, in good faith, on any document or paper received by it from Purchaser or Seller, or their respective legal counsel, believed by Escrow Agent, in good faith, to be bona fide and genuine. Purchaser agrees that Brian C. Wilson of Wilson Law firm, shall be allowed to serve as Escrow Agent and such service shall not disqualify his representation of both Buyer and Seller in this transaction.

22. Time of the Essence. Seller and Purchaser hereby acknowledge and agree that time is strictly of the essence with respect to each and every term, condition, obligation and provision hereof.

23. Professional Fees. In the event of the bringing of any action, arbitration or suit by a party hereto against another party hereunder by reason of any breach of any of the covenants, agreements or provisions on the part of the other party arising out of this Agreement, then in that event the prevailing party shall be entitled to recover from the other party all costs and expenses of

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the action, arbitration or suit, and actual attorneys' fees. For the purposes of this Section 23, the prevailing party shall be the party that successfully prosecutes or defends against an action and prevails on the merits or central issues of the action.

24. [INTENTIONALLY OMITTED].

25. **Intentionally Omitted.**

26. **Seller's Individual Liabilities.** No director, officer, employee or agent of Coulston Enterprises, Inc., or Seller, or their other respective affiliates, shall ever have any personal liability for obligations entered into on behalf of Seller, or their respective affiliates and the assets of any such individuals shall not be subject to the claims of any person or entity relating to the obligations of Seller or any of their respective affiliates.

27. **Confidentiality.** Unless otherwise agreed to in writing by Seller and Purchaser, or until the Closing occurs, each party will keep confidential this Agreement, the transactions contemplated by this Agreement, and all documents, financial statements, reports or other information provided to, or generated by, either party related to the Property; provided, however, that upon a default by Purchaser hereunder, the provisions of this Section shall no longer be binding on Seller. Purchaser acknowledges that the confidentiality requirements are a material part of this Agreement and the transaction. **Until Closing actually occurs, neither party shall, without the other party's prior written approval, make or issue any communication in connection with this Agreement to the general public in any manner nor make or issue any communication in connection with this Agreement to any third parties other than to (a) those employees, agents and independent contractors of Seller or Purchaser who are actively and directly participating in the negotiation and execution of this Agreement, or the financing of the purchase of the Property; or (b) any third parties from which consent is needed with respect to any assignment hereunder. Purchaser and Seller agree that prior to Closing neither party shall make any form of announcement in any manner regarding the agreement, its existence, its terms or the proposed acquisition of the Property by Purchaser without the other party's prior written consent.** Purchaser expressly covenants and agrees that it shall not disclose any code compliance, environmental or any other matters to governmental or other authorities without the express prior written approval of Seller. Upon any termination of this Agreement for any reason, Purchaser shall promptly return to Seller copies of all documents or other information pertaining to the Property provided to Purchaser by Seller. The provisions of this Section 27 shall survive the termination of this Agreement other than by Closing. **The Purchaser shall have the express right to communicate with its membership and supporters, including, but not limited to via Morningstar Fellowship Church's mailing list and directly in person, regarding the financial terms of this Agreement for purposes of its membership fundraising efforts to procure funds for the purchase price, however, no public notice or announcement shall be made to other sources.**

Seller's Initials: _____ Purchaser's Initials:

28. Arbitration of Disputes.

28.1 Any post Closing controversy or claim arising out of or relating to this Agreement or to any agreements or instruments relating hereto or delivered in connection herewith, including, but not limited to, a claim based on or arising from an alleged tort shall, at the request of either Purchaser or Seller, be determined by arbitration in accordance with the Federal Arbitration Act (9 U.S.C. Section 1 et seq.) and/or South Carolina Law. The parties shall have twenty (20) days from the institution of an arbitration request to agree upon an arbitrator. In the event the parties are unable to agree upon an arbitrator, Purchaser shall select one arbitrator, Seller shall select one arbitrator, and the two selected arbitrators shall select a third arbitrator, and the three arbitrators so selected shall then arbitrate the dispute. The arbitration shall be conducted in Fort Mill, South Carolina. Any controversy in interpretation or enforcement of this provision or whether a dispute is arbitrable, shall be determined by the arbitrator. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The institution and maintenance of an action for judicial relief or in pursuit of an ancillary remedy does not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration.

Notice: By initialing in the space below you are agreeing to have any post Closing dispute arising out of the matters included in the 'Arbitration of Disputes' provision decided by neutral arbitration as provided by South Carolina law and you are giving up any rights you might possess to have the dispute litigated in a Court by jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal unless such rights are specifically included in the 'Arbitration of Disputes' provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of South Carolina law. Your agreement to this arbitration provision is voluntary.

Notwithstanding the foregoing, Seller and Purchaser agree that the following controversies shall be excluded from the arbitration requirements of this section: (a) any action for specific performance; (b) each and every controversy asserted in any action brought by a third party and in which Seller or Purchaser are named or joined defendants (including counterclaims and third party defendants); (c) each and every controversy brought by Purchaser or Seller against a third party; and/or (d) each and every controversy not related to the Agreement, Closing or Property and/or (e) any controversy or dispute governed by the provisions of Section 29 below.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION.

Seller's Initials_____ Purchaser's Initials

28.2 In the event a controversy or dispute between Seller and Purchaser arises prior to or at Closing which results in either party refusing to Close the transaction, then the parties shall have fifteen (15) days within which to attempt to resolve or cure the controversy or dispute and to Close the transaction. In the event that such controversy or dispute is not resolved within such fifteen (15) day period, the transaction shall be deemed terminated, without any liability or obligation on the part of Seller, the balance of the Purchase Price shall be returned to Purchaser and Seller shall retain the Deposit, provided however Seller shall not be entitled to retain the Deposit in the event Seller is unable to deliver the Closing documents required in Section _____ hereof, or is unable to deliver title to the Property as required in Section _____ hereof.

29. Indemnifications.

29.1 Indemnification by Purchaser. Purchaser agrees to indemnify, defend and hold Seller and its officers, agents, attorneys, employees, shareholders, directors, parents, subsidiaries and affiliates harmless for, from and against any and all claims, demands, liabilities, costs, expenses (including, but not limited to, reasonable attorneys' and paralegals' fees and expenses through all administrative, trial, appellate and bankruptcy proceedings or otherwise), damages, losses, cause or causes of action and suit or suits of any nature whatsoever arising out of or related to: (a) any claims based on the actions of Purchaser prior to the Closing Date in connection with the Property: (b) the failure to comply with the terms of any Operational Contracts, or licenses or permits or agreements related to the operation of the Property from and after the Closing Date; (c) the failure to comply with the landlord's obligations under any of the Leases from and after the Closing Date; (d) [intentionally omitted]; (e) the failure to comply with the terms of the York County Waste Water Contract on and after the Closing Date; (f) any misrepresentation, breach of, or failure to comply with any representation or any other provision, warranty or covenant in this Agreement by Purchaser or in any document delivered at Closing to Seller pursuant to this Agreement; and/or (g) any other matter for which Purchaser has indemnified Seller under this Agreement.

29.2 Indemnification by Seller. Subject to Purchaser's purchase of the Property at Closing "as is, where is" in its then current state and condition, and with all faults as more particularly set forth above in this Agreement, Seller shall indemnify, defend, and hold Purchaser, and its officers, agents, attorneys, employees, shareholders, directors, parents, subsidiaries and affiliates harmless for, from and against any and all claims, demands, liabilities, costs, expenses (including but not limited to reasonable attorneys' and paralegals' fees and expenses through all administrative, trial, appellate and bankruptcy proceedings or otherwise), damages, losses, cause or causes of action and suit or suits of any nature whatsoever arising out of or related to any breach of any representation, warranty or covenant as set forth in this Agreement by Seller. Notwithstanding any provision in this Agreement to the contrary, Seller shall not be required to indemnify, defend or hold Purchaser harmless from and against any losses, costs or liabilities whatsoever arising out of or relating to (a) the condition of the Property, all improvements located thereon, including without limitation any construction or other physical defects or any laws, ordinances or regulations relating

thereto; (b) any matters which are the subject of Purchaser's representations, warranties or covenants in this Agreement; (c) any conditions, exceptions or items related to the title to the Property including without limitation the matters set forth in the Title Commitment or Permitted Exceptions; (d) the Timeshare operations, including without limitation Seller's contributions to Timeshare reserve accounts; (e) the assignment or partial assignment of either the York County Waste Water Contract or, including without limitation the validity of either the assignment or partial assignment thereof; and/or (f) any item, matter, occurrence or condition which was known or should have been known to Purchaser after undertaking reasonable due diligence prior to the Closing Date.

Survival. The provisions of this Section 29 shall survive Closing or any termination of this Agreement.

30. **Demolition of Heritage Tower.**

Purchaser shall cause the structure commonly known as the Heritage Tower to be razed and removed within twenty four (24) months following Closing. This obligation shall be binding on Purchaser's successors and assigns and shall survive Closing and may be enforced as provided in Section 12.3 by Seller or by Seller's successors or assigns. The provisions of this Section 30 shall survive Closing. Notwithstanding any other provision of the Agreement to the contrary, after the site is restored to a clean unimproved condition, the site may be redeveloped. York County may require the Tower to be razed and removed.

31. **Contribution towards extension of Regent Parkway to Dorman Road.** **Purchaser shall pay the sum of Two Hundred Thousand ($200,000) to Seller at the time the road extension is approved by York & Lancaster Counties and within 90 days after construction is commenced and notice thereof is given in writing to the Purchaser by Seller. This paragraph shall survive closing and shall be appertanant to and run with the land. If Purchaser fails to pay within 90 days as promised, then interest shall accrue on the outstanding balance at the rate of eighteen (18%) per annum until paid.**

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Seller has caused this Agreement to be executed (in multiple originals, one of which is retained by each party hereto) this 6 day of July, 2014, as an offer to Seller upon the terms and conditions herein contained.

SELLER:
COULSTON ENTERPRISES, INC., a South Carolina Corporation

Earl Coulston (SEAL)
By: Earl Coulston
Title: President

IN ACCEPTANCE HEREOF, Purchaser has caused this Agreement to be executed (in multiple originals, one of which is retained by each party hereto) by its duly authorized officer this ___ day of _____, 20____, as an acceptance of the foregoing offer of Purchaser.

PURCHASER:
Morningstar Fellowship Church an Eleemosynary Corporation

_____ (SEAL)
By:
Its:

Attest: _____ (SEAL)

LIST OF EXHIBITS TO
Agreement for the Purchase and Sale of Real Property
By and Between Coulston Enterprises, Inc. and Morningstar Ministries

Exhibit A	-	*Land Description*
Exhibit D	-	Deed form
Exhibit E	-	FIRPTA Certificate form
Exhibit F	-	Bill of Sale form
Exhibit G	-	OMITTED.
Exhibit J	-	OMITTED.
Exhibit J-1	-	Partial Assignment of York County Waste Water Contract form
Exhibit K	-	OMITTED.
Exhibit L	-	No Lien, Possession and Gap Affidavit form
Exhibit M	-	Cost Sharing and Road Maintenance Agreement form
Exhibit N	-	Grade Crossing Sharing Agreement form
Exhibit O	-	OMITTED.
Exhibit P	-	OMITTED.

EXHIBIT A
Real Property Description

Regent Carolina Corporation--52 Acres more or less

[ALL ACREAGE AMOUNTS ARE ESTIMATED]

Deleted: 6/29/04

EXHIBIT B
EXCLUDED ASSETS

1. Cash, bank accounts and investment accounts;

2. Account Receivables, accruing prior to the Cut Off Time;

3. Regent Cable System and Regent Cable Television Lease;

4. Developer's right to payments (Tap Fees or Tap Certificates) under that certain agreement dated November 1, 1993, between New Heritage Carolina Corporation (now known as Regent Carolina Corporation) and York County, South Carolina regarding transfer of Seller's wastewater treatment plant and related facilities, rights and interests in return for York County's agreement to provide County's water supply and wastewater treatment to the project development. (Also excluded at this time as a result of the York County agreement are approximately four acres of land on which Seller's wastewater treatment plant was located which are to be deeded back to Seller from York County.);

5. All vehicles owned by Seller; and

6. Regent Park Golf Course and Golf Course Easements;

7. Approximately ten (10) acres of land in Mecklenburg County located at the end of Sam Meeks Road.

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EXHIBIT C
PERMITTED EXCEPTIONS

1. Easements reserved to Seller, its assigns and and its predessors-in-title for access, ingress, egress and regress to and from Excluded Assets;

2. Intentionally Omitted.

3. Norfolk Southern/Railroad Grade Crossing Agreement(s), Norfolk Southern/Railroad Golf Course Tunnel Agreement, and Norfolk Southern/Railroad Right of Way;

4. Rights of residents and others to use Regent Parkway and/or Heritage Boulevard;

5. Utility easements (general and specific);

6. Flood zones, wetlands, dams, and riparian rights for branches, streams and ponds, etc.

7. York County Waste Water Contract;

8. All other defects and non-monetary encumbrances not agreed by Seller in writing to be cured by Closing.

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EXHIBIT D
DEED FORM

LIMITED WARRANTY DEED

THIS LIMITED WARRANTY DEED (this "Deed") is made as of the day of , 200___, (the "Agreement") by _____ (collectively "Seller") whose address is _____, _____, _____, (the "Grantor"), to and for the benefit of , and _____, ("Purchaser"). a _____ Corporation, whose address is _____ (the "Grantee"). The Grantee's Tax I.D. number is _____.

WITNESETH:

That the Grantor, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to it in hand paid by the Grantee, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, conveyed, and sold, and does hereby grant, bargain, convey, and sell unto the Grantee, its successors and assigns, certain land lying, situated and being in _____ County, _____, more particularly described on Exhibit "A" attached hereto and by this reference incorporated herein (the "Property").

Together with all rights-of-way, streets, alleys, easements, strips or gores, tenements and hereditaments appurtenant to the Property;

Together with all buildings, improvements, structures, and fixtures located thereon or attached or used in connection therewith.

To have and to hold the same, and all the estate, right, title, interest, lien, and equity whatsoever of the Grantor with respect to the same either in law or in equity, to the proper use and benefit of the Grantee forever in fee simple.

This conveyance is subject to those matters listed in Exhibit "B" attached hereto and by this reference incorporated herein.

Grantor does hereby covenant with Grantee that, except for the [Permitted Exceptions] noted on Exhibit "B" attached hereto, at the time of the delivery of this Limited Warranty Deed, the Property was free from all encumbrances made by Grantor, and that Grantor will warrant and defend the Property against the lawful claims and demands of all persons claiming by, through or under Grantor, but against none other.

[PROVISIONS RELATED TO REGENT CABLE LEASE TO BE INSERTED]

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IN WITNESS WHEREOF, the Grantor has caused this instrument to be executed as of the day and year first above written.

Signed, sealed and delivered
in the presence of:

"SELLER"

_____
Name:_____

By:_____
Name:_____
Its:_____

_____
Name:_____

STATE OF)
) ss:
COUNTY OF)

The foregoing instrument was acknowledged before me this _____day of _____, 200__, by _____, as _____ of _____ on behalf of the corporation. He/She is personally known to me or produced _____ as identification and did take an oath.

Signature:_____
Name:[Type or Print]_____
Title: Notary Public
Serial No., if any:
My commission expires:

(SEAL)

Delaware: 6/29/04

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EXHIBIT E
FIRPTA CERTIFICATE FORM

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding tax is not required upon the disposition of a U.S. real property interest by _____, the undersigned hereby certifies the following on behalf of _____.

1. _____ is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. _____'s Federal tax identification number is _____.

3. _____'s office address is _____.

_____ understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punishable by fine, imprisonment, or both.

_____ understands that transferee intends to rely on the representations contained in this Affidavit in connection with the U.S. Foreign Investment in Real Property Tax Act (94 Stat. 2682, as amended).

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete and I further declare that I have authority to sign this document on behalf of _____.

"SELLER"

_____

By: _____
Name: _____
Title: _____

Sworn to and subscribed before me this the _____ day of _____, 200___.

_____
Notary Public

My Commission Expires: _____

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EXHIBIT F
BILL OF SALE FORM

Pursuant to the terms of that certain Purchase and Sale Agreement dated _____, 200___, (the "Agreement") by and between _____, (collectively "Seller"), and _____, ("Purchaser"), and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller does hereby sell, transfer and convey to Purchaser without recourse representation or warranty, all of Seller's right, title and interest in and to the personal property owned by Seller and which is located on and used in connection with the operation of the improvements on the real property, known as the _____, located in the City of _____, County of _____, State of _____ and more particularly described in Exhibit A attached hereto, but not including personal property excluded by the terms of the Agreement.

The terms and conditions regarding the transfer of the personal property are set forth in the Agreement and are hereby incorporated herein by reference. Subject to the provision of the Agreement, Purchaser accepts such personal property in its "AS-IS" condition and "WITH ALL FAULTS". Seller specifically disclaims all express or implied warranties regarding the existence or condition of such personal property, including, without limitation, the implied warranties of merchantability and suitability for a particular purpose.

Date: _____, 200___

"SELLER"

By: _____
Name: _____
Title: _____

"PURCHASER"

By: _____
Name: _____
Title: _____

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EXHIBIT J-1
PARTIAL ASSIGNMENT OF YORK COUNTY WASTE WATER CONTRACT FORM

PURSUANT to the terms of that certain Purchase and Sale Agreement dated _____, 2004, (the "Agreement") by and between REGENT CAROLINA CORPORATION, a South Carolina Corporation ("Assignor") and _____, a _____ ("Assignee"), and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee agree as follows:

1. On or about November 1, 1993, Assignor as Developer entered into a certain Agreement with York County (the "Wastewater Agreement") regarding the transfer to York County of Assignor's water and wastewater system in exchange for certain consideration including, without limitation, payment of Tap fees and reservation to Assignor of certain water and wastewater capacity to serve development needs. The Wastewater Agreement is attached hereto as Exhibit A and incorporated herein by reference. On or about February 28, 1997 that certain Deed for Utility Systems, Real and Personal Property, Grant of Easements and Rights of Way and Assignment of Easements and Rights of Way (the "Deed") was recorded in Volume 1778 page 120 in the York County Register of Deeds.

2. Certain provisions of the Wastewater Agreement and the Deed apply to and in effect encumber the Property (as that term is defined in Section 1(ll) of the Agreement).

3. The Wastewater Agreement and the Deed also have application to property being retained by Assignor and property owned by Assignor's affiliate, all of which is contiguous to or in the vicinity of the Property being sold to Assignee.

4. Assignee accepts and assumes ownership of the Property subject to the Wastewater Agreement and the Deed and assumes and agrees to keep, perform and fulfill all of Assignor's obligations under the Wastewater Agreement or the Deed which pertain to the Property and which are required to be kept, performed and/or fulfilled under the Wastewater Agreement or the Deed, effective from and after the date hereof.

5. Assignee specifically agrees that excluded from this Partial Assignment are Developer's rights to payments from York County under the Wastewater Agreement. It is understood and agreed by Assignee that all Tap Fee and Tap Certificate payments to be made to Developer from York County including without limitation, any Tap Fees or Tap Certificates attributable to Assignee's Real Property, shall remain the property of Assignor and are not transferred hereunder to Assignee.

6. In the event Assignee conveys, transfers or sells any portion of the Property, such conveyance, transfer or sale shall be subject to this Partial Assignment and

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Assumption of Rights and Benefits of York County Wastewater Agreement and no such transfer, conveyance or sale shall relieve Assignee from the terms of this Partial Assignment and Assumption of Rights and Benefits of York County Wastewater Agreement without the written consent of Assignor.

7. The covenants, obligations and indemnities of the parties with respect to this Partial Assignment and Assumption of Rights and Benefits of York County Wastewater Agreement are set forth in the Agreement and are incorporated by reference as if fully set forth herein. To the extent so provided in the Agreement, such covenants, obligations and indemnities of the parties shall survive the Closing of the purchase and sale of the Property to which this Partial Assignment and Assumption of Rights and Benefits of York County Wastewater Agreement relates.

8. The consent of York County to this partial assignment, if available as of Closing, is attached hereto as Exhibit B.

IN WITNESS WHEREOF, the undersigned have executed the within instrument as of the _____ day of _____, 2004.

"ASSIGNOR"

By: _____
Name: _____
Title: _____

"ASSIGNEE"

By: _____
Name: _____
Title: _____

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EXHIBIT L
NO LIEN, POSSESSION AND GAP AFFIDAVIT FORM

STATE OF _____)
)
COUNTY OF _____)

BEFORE ME, an officer duly authorized to administer oaths and take acknowledgments, personally appeared _____, as _____ of _____, (the "Seller"), who, after being first duly sworn under oath, deposes and says as follows:

1. Inducement. That this affidavit is made to induce (i) _____, a _____ corporation, ("Purchaser"), to purchase the Property (as hereinafter defined) from the Seller and (ii) _____ (the "Title Company") to issue Title Commitment No. _____ having an effective date of _____ at _____ (the "Title Commitment") and the policy of title insurance thereunder insuring the title to the Property.

2. Property. That this affidavit is given in connection with that certain real property located _____ County, State of _____, more particularly described in Exhibits A attached hereto and made a part hereof (the "Property").

3. No-Lien. There have been no improvements, alterations or repairs to the Property by the Corporation during the past ninety (90) days for which the cost thereof remains unpaid, and further that there have been no claims for labor or materials furnished for repairing or improving the Property during the past ninety (90) days for which a claim or construction lien could be legally filed against the Property.

4. Possession. With respect to the Property (i) the Seller is in full, exclusive, open, peaceful and undisputed possession of the Property, and (ii) there are no tenants, guests, licensees, invitees or other parties (collectively, "Possessor(s)") in or on (or entitled to be in or on) any part of the Property, except for (a) guests and occupants of the hotel located upon the Property, and (b) the tenants in possession identified in Exhibit "B" attached hereto and made a part hereof.

5. Gap. There are no matters pending against the Seller that would give rise to a lien that would attach to the Property between the effective date of the Title Commitment and the date of recording of the Deed, and neither Affiant nor the Seller has nor will execute any instrument that could adversely affect the title or interest to be insured under the Title Commitment.

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"SELLER"

By: _____
Name: _____
Title: _____

SWORN TO and SUBSCRIBED before me this day of , 200___. Affiant is personally known to me or has produced as identification.

Signature: _____
Name:[Type or Print]_____
Title: Notary Public
Serial No., if any:_____
My commission expires:_____

(SEAL)

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EXHIBIT M
COST SHARING AND ROAD MAINTENANCE AGREEMENT FORM

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

COST SHARING AND ROAD MAINTENANCE AGREEMENT

THIS COST SHARING AND ROAD MAINTENANCE AGREEMENT (this "Agreement") is made this ____ day of _____, 200___, by and between _____, a _____ (hereinafter "Grantee") and REGENT CAROLINA CORPORATION, a South Carolina corporation, and its subsidiary, REGENT PARK CORPORATION, a South Carolina corporation (collectively hereinafter "Grantors").

WITNESSETH:

WHEREAS, on the date of this Agreement, Regent Carolina Corporation sold and conveyed to Grantee's predecessor-in-interest fee simple title to the Property, as hereinafter defined; and

WHEREAS, Regent Park Corporation is the owner of the Roads, as hereinafter defined, and as developer of the Regent Park residential and golf course community, has encumbered a portion of the real properties situated adjacent thereto by subjecting the properties to the Declaration, as also hereinafter defined; and

WHEREAS, the Declaration creates an obligation of the Regent Park Community Owners' Association members for assessment with respect to properties commonly used and enjoyed by its members, including but not limited to maintenance and upkeep of roads and right-of-ways jointly used by the Declarant and members of the Association;

WHEREAS, Section 9.11 of the Declaration requires that Declarant, Regent Park Corporation, its successors and assigns, be obligated to the Regent Park Community Owners' Association (the "Association") for assessment with respect to any such Common Property under the Declaration used by Declarant in common with the Association's members; and

WHEREAS, in connection with Grantee's purchase and acquisition of the Property, certain easements have been or will be conveyed on the date of this Agreement by Grantors to Grantee for non-exclusive use of the Roads by Grantee, said Roads being within the definition of Common Property as set forth in the Declaration due to their common use with members of the Association; and

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WHEREAS, Regent Carolina Corporation and Regent Park Corporation now own various Development Parcels, as hereinafter defined, for which the Roads either now, or in the future, shall provide a means of ingress and egress to such properties; and

WHEREAS, in anticipation of existing and additional use of the Roads by Grantee and Grantors for ingress and egress to the Property and Development Parcels, the parties have set forth below their agreements and understanding for the sharing of costs and expenses for the Roads;

NOW, THEREPORE, as part of the material consideration paid and given to Regent Carolina Corporation by Grantee for the sale and conveyance of the Property, and in consideration of Ten Dollars ($10.00) paid by Grantee to Regent Park Corporation, the receipt and sufficiency of all consideration hereby acknowledged, Grantee and Grantors do hereby agree as follows:

1. Certain Definitions.

(a) "Benefiting Properties" shall mean the Property, Development Parcels, and all properties subject to the Declaration for which the owners, and/or their lessees, tenants, invitees, or occupants thereof make use of the Roads; reference being made to Exhibit "B" hereto for a general depiction of properties which may be included therein.

(b) "Declaration" shall mean that certain Restated and Amended Declaration of Covenants, Restrictions and Limitations and Provisions for Membership in Regent Park Community Owners' Association, Inc., dated August 8, 1994, as amended, duly recorded in Record Volume 1070 at Page 87 in the Office of the Clerk of Court for York County, South Carolina.

(c) "Development Parcels" shall mean any of the real property owned by Regent Carolina Corporation and/or Regent Park Corporation, their successors and assigns, within those properties as depicted in Exhibit "B" attached hereto, and for which the owners, and/or their lessees, tenants, invitees, or occupants thereof, make use of the Roads.

(d) "Property" shall mean the real property located in the County of York, State of South Carolina, described in the attached Exhibit "A" and upon which a hotel facility and other improvements are currently located.

(e) "Roads" shall mean that certain private right-of-way currently known as "Heritage Boulevard" and, with respect to that certain right-of-way currently known as "Regent Parkway," the portion of Regent Parkway situated between its intersection with U.S. Highway 21 and the Norfolk Southern Railroad tracks located approximately 1.9 miles from said intersection.

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(f) "Road Expenses" shall mean with respect to the Roads, including improvements and landscaping located within said right-of-ways: (i) all reasonable operating expenses and costs incurred by Grantors or their successors and assigns for the maintenance, landscaping, irrigation, cleaning, repair, replacement, insuring and lighting, including the cost of labor, equipment and materials required therefore; and (ii) the amount of annual reserves necessary for future maintenance and/or replacement. Said expenses shall include without limitation those related to:

(g) The Roads and any improvements thereon as well as traffic lights, signs, pedestrian pathway systems, or other rights-of-way which are a part of or relate to the Roads and which primarily or secondarily serve the Property whether or not the primary or secondary means of access;

(h) Directional signage, street signage, and signs intended for the purpose of community identification located at the entrance and along Regent Parkway and Heritage Boulevard;

(i) Street lighting along Regent Parkway and Heritage Boulevard.

2. Sharing of Costs. In consideration of the easements given by Regent Park Corporation to Grantee for use of the Roads for ingress and egress to the Property, Grantee hereby agrees on behalf of itself, and its successors and assigns, to pay, on an annual basis, subject to the terms and provisions of this Agreement, to Regent Park Corporation, or any successor or assign to Regent Park Corporation's ownership or operation of the Roads, including but not limited to the Association, its respective pro rata share of the Road Expenses. Grantee's pro-rata share shall be determined as equal to the percentage of land (acreage) included within all of the Property as compared to all land (acreage) located within all of the Benefiting Properties, with said percentage then multiplied by the total Road Expenses incurred or budgeted for the annual period for computation of the pro-rata share amount. The parties have determined and agreed that the Property includes _TBD____ acres of land, and the Benefiting Properties include approximately _52___ acres of land. Accordingly, Grantee's applicable percentage of the total Road Expenses each year shall be _TBD___%.

3. Payment of Grantee's Pro-Rata Share. Grantee's pro-rata share of the Road Expenses shall be paid to the owner (or operator of the Roads as designated by owner), annually in the discretion of the billing entity, within thirty (30) days of billing.

4. Default. In the event of a default of any party, or its successors and assigns, of its obligations under this Agreement, Regent Park Corporation, or its successors and assigns in ownership of the Roads, or Grantee or any Grantor, and their successors and assigns, shall be entitled to bring an action (a) at law to recover: (i) the sums expended by the non-defaulting party which were the obligation of the defaulting party, or (ii) the sums due by the defaulting party, which sums recovered shall then be used for payment of Road Expenses; or (b) in equity for specific performance

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or injunctive relief to compel the defaulting party's performance, and (c) for its reasonable attorneys' fees arising out of such default. Notwithstanding the above, disputes arising out of default as to the respective requirements and obligations contained in this Agreement, and which can not otherwise be resolved by Grantee and Grantors, their successors and assigns, may be by either party submitted to mediation under rules and a setting to be determined by the parties at that time.

5. Notices. All notices, requests, or other communications required or permitted to be given hereunder shall be in writing and shall be either (a) delivered by hand, (b) mailed by United States registered mail, return receipt requested, postage prepaid, (c) sent by a reputable, national overnight delivery service (e.g., Federal Express, UPS, Airborne, etc.) or (d) sent by facsimile (with the original being sent by one of the other permitted means or by regular United States mail) and addressed to each party at the applicable address set forth herein. For purposes of this Agreement, notice shall be deemed given on the date by which it was actually received by the intended party (with the date of receipt of facsimile notice being deemed such date of actual receipt of notice and not the date of receipt of the follow-up notice by other means as hereinabove provided).

Grantors: Coulston Enterprises, Inc.
130 Heritage Blvd.
Fort Mill, SC 29715
Attn: Earl Coulston
Telephone: (803) 547-9844
Facsimile (803) 547-9845

With a copy to: Brian C. Wilson, Esq.
9351 Founders Street
Fort Mill, SC 29708
Telephone (803) 548-1988
Facsimile: (803) 548-1990
Email: brian.wilson@scbar.org

Grantee: _____
_____
_____
Telephone (___) _____
Facsimile (___) _____
Attention: _____

With a copy to: _____
_____
_____
_____
Telephone: _____
Facsimile: _____

6. *Miscellaneous.* In the event any provision hereof is held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of any other provision hereof. This Agreement contains the entire agreement of the parties hereto with respect to the subject matter hereof, and no representations, inducements, promises or agreements, oral or otherwise, not expressly set forth herein shall be of any force or effect. All titles or captions of the paragraphs set forth in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement, or the intent of any provision hereof.

7. Recordation. This Agreement will be recorded in the Office of the Clerk of Court for York County, South Carolina.

8. Binding on Assigns. This Agreement shall be binding upon and for the benefit of Grantors and Grantee and their respective successors and assigns. This instrument shall not be amended, modified, or terminated without the prior written consent of both Grantee and Grantors, or their respective successors-in-title which is the then owner of the Property and the Roads, having first been obtained.

9. Termination of Grantee's and Grantors' Obligations. In the event of sale or transfer of ownership of the Roads or the Property, the sale or transfer shall release the grantor thereof from obligations pursuant to this Agreement occurring or arising subsequent to the sale or transfer and such obligations shall thereafter be the obligation of the then owner of the Property or the Roads, as the case may be. Notwithstanding, in the event title to the Roads is subsequently conveyed for the purpose of road maintenance or the Roads are otherwise dedicated at some time in the future to York County or the State of South Carolina, it is intended that the obligations of the parties shall survive to the extent of Road Expenses which continue to be incurred for the maintenance of landscaped right-of-ways, signage, street lighting, etc. along the Roads commensurate with previous standards of maintenance and upkeep for the Roads.

10. Governance of Laws. THIS AGREEMENT AND ALL RIGHTS AND OBLIGATIONS CREATED HEREBY SHALL BE GOVERNED BY THE LAWS OF THE STATE OF SOUTH CAROLINA AND THE UNITED STATES OF AMERICA.

11. Attorneys' Fees. In the event any party hereto or their respective successors and assigns should default under any of the provisions of this Agreement and the parties should employ attorneys or incur other expenses for the enforcement or performance or observance of any obligation

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| 334044-(7/1/04)

or assessment on the part of the defaulting party or the defense of said allegations, the prevailing party shall be entitled to recover reasonable attorneys' fees and expenses incurred.

IN WITNESS WHEREOF, Grantors and Grantee have caused this Agreement to be duly executed on the date first above written.

WITNESSES: Grantee:

_____,
A _____

By: _____,
Name: _____
Title: _____

_____

_____

WITNESSES: Grantors:

COULSTON ENTERPRISES, INC.,
A South Carolina corporation:

_____

By: _____
Name:a. Earl Coulston
Title:President

_____

Deleted: 6/29/04

154044- (7/1/04)

MORNINGSTAR_012127

STATE OF _____)
) ACKNOWLEDGMENT
COUNTY OF _____) under SC Code §30-5-30(C)

I , do hereby certify that _____,a
_____, _____, by _____, its _____,
personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the _____ day of _____, 200___.

_____(SEAL)
Notary Public for _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF YORK) under SC Code §30-5-30(C)

I , do hereby certify that COULSTON ENTERPRISES, INC., by its President, A. Earl Coulston, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the _____ day of _____, 200___.

_____(SEAL)
Notary Public for South Carolina
My Commission Expires: _____

Deleted: 6/29/04

| 154044-7/1/04

MORNINGSTAR_01212

EXHIBIT N
GRADE CROSSING SHARING AGREEMENT FORM

STATE OF SOUTH CAROLINA)
) ASSIGNMENT AND AGREEMENT
COUNTY OF YORK)

Pursuant to the terms of that certain Purchase and Sale Agreement dated _____, 200__ (the "PSA") by and between REGENT CAROLINA CORPORATION, a South Carolina corporation ("Seller") and _____, a _____ ("Purchaser") and for good and valuable consideration the receipt and sufficiency of which is hereby acknowledged Seller and Purchaser agree as follows:

1. Pursuant to the terms of the PSA, Seller contemporaneously with the execution of this Agreement, is conveying to Purchaser's predecessor-in-interest approximately 52 acres and improvements (the "Real Property") located east of the railroad tracks as generally shown on Exhibit A attached hereto and incorporated by reference. Also as shown on Exhibit A attached

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154044-CHRD

MORNINGSTAR_01212

hereto is the grade crossing ("Grade Crossing") pursuant to which the road known as Regent Parkway crosses the railroad tracks. The Real Property includes a portion of the Grade Crossing.

2. Seller acquired the properties located on each side of the Grade Crossing on or about December 14, 1990 and Seller has since that date utilized the Grade Crossing as a means of access for vehicular traffic traveling to and from the property located east of the railroad tracks. Seller has not entered into a separate formal grade crossing agreement with the railroad for the use of the Grade Crossing.

3. As part of the conveyance of the Real Property to Purchaser pursuant to the terms of the PSA, Seller also hereby conveys and assigns and Purchaser hereby assumes what, if any, equitable interest in the Grade Crossing now vested in Seller which naturally would run with and be a part of the Real Property being conveyed to Purchaser.

4. Seller and Purchaser agree that for so long as they respectively utilize the Grade Crossing, they will share on an equitable basis crossing expenses charged by the railroad with respect to the maintenance, upkeep and other charges related to the Grade Crossing. Seller and Purchaser agree that this provision shall be binding on Seller's and Purchaser's successors and assigns to the extent such successor or assign continues the utilization of the Grade Crossing for access to property owned by such successor or assign.

5. In the event the railroad should attempt to close the Grade Crossing, Seller and Purchaser agree to reasonably cooperate, in accordance with their respective interests in the Grade Crossing, at the time of such attempted closing, with respect to the defense of any such action by the railroad to close the Grade Crossing.

6. This Agreement is governed by the terms of the PSA and is not intended to supercede or modify the provisions of the PSA with respect to Grade Crossing, including without limitation the provisions of Section 6.4 of the PSA. Seller makes no representation or warranty regarding its interests in the Grade Crossing or the interests conveyed by this Agreement.

IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be duly executed on the date first above written.

WITNESSES:

Purchaser:

_____

A_____

By: _____,
its General Partner

_____

_____

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WITNESSES:

Seller:

REGENT CAROLINA CORPORATION,
A South Carolina corporation:

_____

By: _____
Name: _____
Title: Vice President

Deleted: 6/29/04

| 154044-(7)(NX)

MORNINGSTAR_012

RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE

Return to:
Brian C. Wilson, P.A.
P.O. Box 3211
Fort Mill, SC 29708

DATE 9-29-04
TAX MAP NO. 729-?
INITIALS AC / dh

000205648
RECORDED 09/28/2004 11:46:38AM
Bk:06582 Ps:00028 Pages:4
Fee:10.00 State:4160.00
County:1760.00 Exempt:
David Hamilton, Clerk of Court
York County, SC

52.00 Acres

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF YORK)

KNOW ALL MEN BY THESE PRESENTS, that **COULSTON ENTERPRISES, INC.**, a South Carolina corporation, for and in consideration of the sum of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS ($1,600,000.00) to it in hand paid at and before the sealing of these Presents, by **MORNINGSTAR FELLOWSHIP CHURCH**, having a mailing address of P.O. Box 440, Wilkesboro, N.C. 28697 (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said **MORNINGSTAR FELLOWSHIP CHURCH**, its Successors and Assigns, forever, the following described property, to wit:

SEE EXHIBIT "A" LEGAL DESCRIPTION ATTACHED HERETO.

The property conveyed herein is a portion of the property conveyed to the Coulston Enterprises, Inc. by Deed of Regent Carolina Corporation, dated September 27, 2004, and recorded in the Office of the Clerk of Court for York County, South Carolina, in Record Book 6581 at Page 311.

The within described parcel being a portion of Tax Map Number 729-1, and all of Tax Map Number 729-12 as designated by the York County Assessor's Office.

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said **MORNINGSTAR FELLOWSHIP CHURCH**, its Successors and Assigns, forever.

AND the said COULSTON ENTERPRISES, INC. does hereby bind itself and its successors to warrant and forever defend all and singular the said premises unto the said **MORNINGSTAR FELLOWSHIP CHURCH**, its Successors and Assigns, against itself and its successors and assigns lawfully claiming through or under Grantor, but against none other.

EXHIBIT
C

WITNESS the Hand and Seal of COULSTON ENTERPRISES, INC. by its authorized officers, this 27th day of September in the year of our Lord Two Thousand and Four and in the two hundred and twenty-ninth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

COULSTON ENTERPRISES, INC. (SEAL)

By: _____
Earl Coulston
Its: President

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

ACKNOWLEDGEMENT
under SC Code §30-5-30(C)

I BRIAN C. WILSON, do hereby certify that COULSTON ENTERPRISES, INC. by EARL COULSTON, its President, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 27th day of September, 2004.

_____ (SEAL)
Notary Public for South Carolina
My Commission Expires: 5-16-2005

BK06582 PG0029

EXHIBIT "A"
LEGAL DESCRIPTION TO DEED FROM
COULSTON ENTERPRISES, INC. TO MORNINGSTAR FELLOWSHIP CHURCH

ALL that certain piece, parcel, or tract of land consisting of 52.00 acres as shown and depicted as "Tract – 1 52.00 Acres" on a plat of survey entitled "Boundary Survey for Morningstar Fellowship Church, Located in the Fort Mill Township, York County, South Carolina" dated August 11, 2004, revised September 7, 2004, and September 9, 2004, prepared and certified by Robert R. Medford., S.C.P.L.S. #11065 of Fisher-Sherer, Inc., Engineering & Surveying, recorded in Plat Book C-318 at Page 6 in the Clerk of Court's Office for York County, South Carolina; which plat is incorporated herein by reference and having such metes, bounds, courses and distances as by reference to said plat will more fully appear;

FURTHER, a non-exclusive easement, appurtenant to the Property, for purposes of ingress, egress, and regress to and from the Property, over and across that portion of the right-of-way of Regent Parkway from its intersection with the right-of-way of U.S. Highway 21 and extending for a distance of approximately 2.0 miles to the northernmost boundary of a certain tract of land of 52.00 acres as depicted in Plat Book C-318 at Page 6 in the Clerk of Court's Office for York County, which non-exclusive easement shall be subject to the terms of that certain Cost Sharing and Maintenance Agreement for the portion of Regent Parkway located between U.S. Highway 21 and the Norfolk-Southern Railroad tracks as entered into between Coulston Enterprises, Inc., Regent Park Corporation, and Regent Carolina Corporation, dated September 27, 2004, and recorded in Record Volume 6581 at Page 314 in the Clerk of Court's Office for York County, South Carolina;

SUBJECT TO a non-exclusive easement reserved in favor of Regent Carolina Corporation, its successors and assigns, as set forth in a deed from Regent Carolina Corporation to Coulston Enterprises, Inc., dated September 27, 2004, and recorded in Record Volume 6581 at Page 311, in the Clerk of Court's Office for York County, S.C., over, across, and through that portion of that roadway known as Regent Parkway, as the same now exists or as may be modified in the future, commencing near the northwestern corner boundary of the Property where Regent Parkway now enters said property, and continuing at a right-of-way width of sixty-six feet (66') across the Property, to a terminating point near the southeastern corner of the Property where Regent Parkway now enters other adjoining properties now or formerly owned by Regent Carolina Corporation, or as such properties may be owned in the future by Regent Carolina Corporation's successors and assigns in ownership, which easement shall be for

BK06582 PG0030

purposes of ingress, egress, and regress, and shall be deemed appurtenant to said properties of Regent Carolina Corporation, and its successors and assigns; and

FURTHER, SUBJECT TO AND RESERVING a second non-exclusive easement, extending from the terminus of the easement above at the northernmost boundary of the aforesaid 52.00 acre tract, along a sixty-six feet (66') right-of-way known as Regent Parkway, as the same now exists or as may be modified in the future, and running through and across the said 52.00 acre parcel to the northernmost boundary of a 108.00 acre tract of land depicted in Plat Book C-318 at Page 5 in the Clerk of Court's Office for York County, which easement shall be for purposes of ingress, egress, and regress to and from properties located within said 108.00 acre tract, and shall be appurtenant to all said properties within the described 108.00 acre tract;

FURTHER, SUBJECT TO AND RESERVING the easement and right, but not the obligation, to go upon the premises to demolish and remove the partially constructed "Heritage Tower".

BK06582 PG0031

York County
south carolina

YORK COUNTY GOVERNMENT

Planning & Development Services

Building & Codes Division
(803) 909-7200

Stormwater Division
(803) 909-7250

Planning Division
(803) 909-7220

Zoning Division
(803) 909-7230

Administration
(803) 909-7240

CERTIFIED MAIL
7004 2890 0000 1671 6494

December 14, 2005

Mr. Rick Joyner
Morningstar Fellowship Church
9700 Regent Parkway
Fort Mill, South Carolina 29715

Ref: The Towers Hotel, Regent Park, Fort Mill, SC
Structure located in the 9700 block of Regent Pkwy., Fort Mill, SC
Tax map reference number 7290000014
Zoned: Planned Development District (PD)

Dear Mr. Joyner:

This letter is written in response to a telephone conversation with Mr. Roe Messner, wherein Mr. Messner stated the desire to renovate and complete the Towers Hotel in Regent Park, Fort Mill, SC. On January 10, 2005 the York County Council gave final approval for a PD Development Plan submitted by Mr. Earl Coultson. Item #42 of the conditions for approval, which is noted on the approved plan, is that the Towers Hotel will be demolished within two years of the rezoning approval date.

After further review of the York County South Carolina Code of Ordinances, this department denies your request to renovate and complete the Towers Hotel located on the above referenced property as it is inconsistent with the approved plan. This determination is based upon the following York County Code of Ordinances Planned Development District (PD), Sections 155.205 through 155.215, and more specifically noted as follows:

- **Section 155.206 Permitted Uses.**
"Any use, proposed by a developer and considered by the County Council as compatible to other nearby uses within and beyond the district, may be permitted in the districts upon approval by the County Council. Thereafter, the uses permitted in the district will be restricted to those listed, approved and adopted, and any future addition to these uses will constitute a major change."

- **Section 155.215 Changes in Approved Plans.**
"(B) Major changes will include, but will not be limited to, decreases in development standards, changes to Council's approved conditions and changes requiring administrative review and approval (for example, reduction in setback

EXHIBIT
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and/or buffer, increasing number of lots, reduction in off-street parking, and the like). Major changes must be approved by the County Council through the amendatory process as prescribed herein."

Based upon the foregoing determination denying your request to renovate and complete construction of the Towers Hotel, the following options are available to you to pursue potential resolution of the matter:

1. Have the Towers Hotel demolished within two (2) years of the rezoning approval date of 1/10/05 as originally agreed.

2. Make application to the York County Council requesting to amend the original rezoning as a Planned Development (PD) District.

3. Appeal this determination of the Zoning Department within thirty (30) days by making an appeal application to the York County Zoning Board of Appeals stating the errors that you contend have been made in our interpretations of the zoning code as they pertain to the Planned Development (PD) District. To preserve and perfect your appeal, it must be filed with the Department within thirty (30) days of your receipt of this letter. **Failure to appeal this determination within thirty (30) days will be considered a waiver of your administrative remedies**.

Unless one of the above-stated options is timely implemented, any action inconsistent with the approved PD plan for the property and/or this determination may result in violation(s) of the York County Code of Ordinances. Violations will result in further action by this department which may include but not be limited to, a summons being issued to appear before a county magistrate, fines of $465.00 per day per offense, and this file being turned over to the county attorney's office to pursue legal action compelling compliance with the approved PD plan and/or seeking injunctive relief and abatement of any violation.

If you have additional questions regarding this matter, please contact me at (803) 909-7242.

Sincerely,

Eric Greenway AICP

Eric Greenway
Planning Director

cc: Mr. Roe Messner
Mr. Earl Coulston
Gary Bass, Building Official
Michael Kendree, Assistant County Attorney

SITE PLAN DEVELOPMENT GUIDE CHECKLIST

Commercial projects for review, must submit the following to the York County Development Coordinating Center for distribution at 1070 Heckle Blvd, Suite 105, Rock Hill, SC 29732.

(1) $500.00 Site Plan Review Fee and the Applicable Environmental Compliance fee [Site Plan will not be accepted without any and all fees attached]

(2) Completed Site Plan Development Guide Checklist; [Site Plan will not be accepted without a completed Site plan development guide attached]

Project Name or Development Name: Heritage Tower Project

Name and Address that comments should be sent to:

Joe Hammond
Power Engineering
13310-A Southridge Drive
Charlotte, N.C. 28273

Phone Number: (704) 525-9275 EXT. 109

Fax Number: (704) 525-2515

Email Address: jhammond@powereng.net

Property Owner: Morning Star Church

Tax Map Number: 729-00-00-457

Description of Proposed Land Use: Commercial, 6212 units for Renewal (Tax-)

Water & Sewer Service Provider for this project (must be filled-in): York County

(3) Eight (8) Copies of the Site Plan [Drawn to Scale]

(4) One (1) 11x17 of the Site Plan

(5) Performance Standards Agreement

(6) All Environmental Compliance Control Forms

Indicate the page number where each department(s) requirements can be found in your Commercial Guide Checklist Review and or support documents. If an item is not applicable, put N/A. The department reserves the right to modify this checklist at anytime. This form is to be used as a checklist in helping to obtain an approved site plan from York County Planning & Development Services.

This is not to be construed as containing all items, documents, or written information to be addressed or required by York County Zoning and Development Standards Ordinance.

EXHIBIT
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The following minimum requirements for Zoning must be demonstrated on (1) one page indicated as the proposed site plan.

GENERAL ZONING INFORMATION TO BE INCLUDED ON SITE PLAN

(1) All sheets Name of development, developer's name, addresses and phone number; Section 155.594 of the York County Commercial Development Standards

(2) C1.1 Tax map reference number; Section 155.594 of the York County Commercial Development Standards

(3) C1.1 Existing zoning district; Section 155.594 of the York County Commercial Development Standards

(4) All sheets Date of plans (with dates of revisions); Section 155.594 of the York County Commercial Development Standards

(5) All sheets Scale (must be standard engineer's scale); Section 155.594 of the York County Commercial Development Standards

(6) All sheets North arrow (north must always be oriented toward top of page); Section 155.594 of the York County Commercial Development Standards

(7) All sheets Name, address, phone number and seal of individual or firm preparing the site plan. (Not required if individual is developer); Section 155.594 of the York County Commercial Development Standards

(8) Cover Vicinity map. (Map showing general location of site); Section 155.594 of the York County Commercial Development Standards

(9) C1.1 Property boundary description and dimensions. (Property lines must match county records.) Any discrepancies in lot lines must be approved by the subdivision department. Leased lots should be shown as dashed lines and labeled as such, and all development standards must be shown around recognized property boundaries. Benchmark and tie lines must be indicated with coordinates); Section 155.594 of the York County Commercial Development Standards

(10) (C1.1) Street frontage; Section 155.594 of the York County Commercial Development Standards

(11) C1.1 Size of lot. (Acreage or square footage of land); Section 155.594 of the York County Commercial Development Standards

(12) C1.1 Size of site to be developed. (Acreage or square footage of developed land); Section 155.594 of the York County Commercial Development Standards

(13) C1.1, C3.1 Pre and post development topography of site (must use contour intervals of two or five feet); Section 155.594 of the York County Commercial Development Standards

14) C1.1 Adjacent property owner's names; Section 155.594 of the York County Commercial Development Standards

(15) C1.1 Adjacent property uses (Example: vacant, residential, commercial, and the like ;) Section 155.594 of the York County Commercial Development Standards

(16) C1.1 Required setbacks to be placed around interior perimeter of property lines; (Should be indicated as a dashed line).NOTE: No structures are allowed in setbacks: Section 155.594 and 155.428 of the York County Commercial Development Standards

(17) C1.1 Required bufferyards (should be indicated as a dashed line) to be placed around perimeter property lines. (Include type, distance, plants and required structures). NOTE: No buildings, parking spaces, driveways, drainage devices, or other structures are allowed in required bufferyards; Section 155.594, 155.412, and 155.286 of the York County Commercial Development Standards

18) C1.1 Location of all existing structures; Section 155.594 of the York County Commercial Development Standards

(19) C1.1 Use of all existing structures; Section 155.594 of the York County Commercial Development Standards

(20) C1.1 Dimensions of all existing structures and elevations; Section 155.594 of the York County Commercial Development Standards

(21) C1.1, C2.1 Location of all proposed structures; Section 155.594 of the York County Commercial Development Standards

(22) C2.1 Dimensions of all proposed structures; Section 155.594 of the York County Commercial Development Standards

(23) C2.1 Use of all proposed structures; Section 155.594 of the York County Commercial Development Standards

(24) C1.1, C2.1 Heights of building (generally cannot exceed 50 feet); Section 155.594 of the York County Commercial Development Standards

(25) C2.1 Proposed location and dimensions of existing and proposed parking spaces, aisle widths and driveway widths. (Label as proposed or existing.) NOTE: Regular spaces - 9 feet by 19 feet and handicapped spaces - (13 feet by 19 feet overall).Section 155.594, 155.440, 155.441, and 155.445 of the York County Commercial Development Standards

(26) C2.1 Label parking spaces, ingress/egress, and driveways as gravel or paved surfaces (parking must be paved if more than ten parking spaces are required); Section 155.594 of the York County Commercial Development Standards

(27) C2.1 Indicate how parking spaces will be separated from walkways, sidewalks, streets or alleys, and required yards (can be a wall, fence, curbing, or other pre-approved protective devices); Section 155.594 of the York County Commercial Development Standards

(28) C2.1 Indicate barriers along driveways and parking areas to control entrance and exit of vehicles and pedestrians (can be landscaping, curbing, or other pre-approved protective devices); Section 155.594 of the York County Commercial Development Standards

(29) C2.1 Indicate how individual parking spaces will be marked (can be indicated with painted lines, curbs, or other means. Not applicable for areas with less than ten required spaces); Section 155.594 of the York County Commercial Development Standards

(30) C2.1 Indicate that 10% of the impervious surface areas (buildings, graveled, and paved areas) will be landscaped to break up the expanse of paving (not applicable if required parking is less than 20 spaces);Section 155.594 of the York County Commercial Development Standards

(31) C1.1, C2.1 Traffic circulation plan (arrows to indicate traffic flow);Section 155.594 of the York County Commercial Development Standards

(32) C1.1 Exact ratio (percentage) of impervious surfaces (areas that do not absorb rain) to lot area. Formula = total impervious surface area ÷ total site area = %; Section 155.594 of the York County Commercial Development Standards

(33) C1.1 Exact ratio of open space, where required by development standards, indicate the area to be dedicated as open space (with hatched symbol), the type of open space, and how dedicated area will be maintained and preserved (for example, deed restricted, maintained by homeowner's association, dedicated and accepted by a land trust with federal tax status, and the like); Section 155.594 and 155.429 of the York County Commercial Development Standards

(34) C1.1 Indicate speed limit(s) of public road(s) adjacent to or accessed by the proposed development (number of curb cuts allowed will be determined by the speed limit); Section 155.594, 155.425 and 155.286 of the York County Commercial Development Standards

(35) C2.1 Widths of curb cuts and driveways (20-foot minimum and 40-foot maximum); Section 155.594, 155.425, and 155.286 of the York County Commercial Development Standards

(36) C.1.1 Distance from proposed curb cuts to adjacent curb cuts and street intersections. This distance should be measured from centerline to center and from centerline to right-of-way intersecting lines. NOTE: Exact location of adjacent curb cuts and access points must be indicated on the site plan; **Section 155.594, 155.425, and 155.286 of the York County Commercial Development Standards**

(37) C.1.1 Distance between buildings; **Section 155.594 of the York County Commercial Development Standards**

(38) C.2.1 → Per Note Exterior lighting plan for required parking spaces (must be adequate for night use or submit a statement indicating site not to be used at night. Also, add note that lights will not interfere with traffic or residential areas); **Section 155.594 of the York County Commercial Development Standards**

(39) C.3.1, C.4.2 Approximate location and size of existing and proposed storm sewers, sanitary sewers, water lines, culverts, septic systems, and wells; **Section 155.594 of the York County Commercial Development Standards**
C.1.1 &

(40) C.4.2 Location of all existing/proposed fire hydrants within 500 feet of the proposed development; **Section 155.594 of the York County Commercial Development Standards**

(41) C.1.1 Existing and proposed easements and existing and proposed rights-of-way (gas line, telephone line, power line, road rights-of-way, and water and sewer easements). NOTE: If utility lines run longitudinally within a bufferyard, the width of the bufferyard must be increased by the same amount that is cleared for the placement of the utility lines; **Section 155.594 of the York County Commercial Development Standards**

(42) C.1.1 Approximate location of telephone, gas, and power lines; **Section 155.594 of the York County Commercial Development Standards**

(43) N/A Signage plan (must show location and size or must place a statement on site plan indicating sign to be permitted separately); **Section 155.594 of the York County Commercial Development Standards**

(44) Noted The zoning department may establish additional requirements, including the submission of legal affidavits stating an applicant's and/or property owner's intent to comply with applicable codes, for site plan approval, and in special cases, may waive a particular requirement if, in its opinion, the inclusion of that requirement is not essential to a proper assessment of the project. **Section 155.594 of the York County Commercial Development Standards**

BUFFERYARD AND TREE ORDINANCES REQUIREMENTS

(1) Indicate if the proposed site has any grand trees with a 32 inch diameter or greater. **Section 155.533 of the York County Commercial Development Standards** N/A
C.2.1 &

(2) C.4.1 Show all required landscaped islands and provides square footage of each. A landscaped area, not less than 250 square feet, with a minimum width of eight feet, is required for every 15 parking spaces, with each landscaped area having at least one large maturing tree of two inches caliper. These areas are to be spaced throughout the parking and circulation areas so that no parking space is more than 75 feet from a tree; **Section 155.534 of the York County Commercial Development Standards**

(3) C.1.1 Show additional landscaped areas are required, in an amount not less than 10% of impervious parking area (C.4.1) & (C.2.1) which shall include one large maturing tree of 3 inches DBH for every 1,600 square feet of additional landscaped area required. Please refer to definition of impervious area for these calculations, which must be shown on the proposed site plan; **Section 155.534 of the York County Commercial Development Standards**

(4) C.4.1 Show calculation of total caliper inches required for the site; **Section 155.534 of the York County Commercial Development Standards**

(5) ✓ Provide a survey of existing trees (show size and species); **Section 155.534 of the York County Commercial Development Standards**

(6) ✓ Other existing healthy trees to be preserved for credit; **Section 155.534 of the York County Commercial Development Standards**

(7) N/A Show the boundaries of the tree protection barricade around the tree; **Section 155.534 and 155.539 of the York County Commercial Development Standards**

ADD THE FOLLOWING NOTES TO SITE PLAN: See Sheet C1.2

(1) No Certificate of Occupancy will be issued until the proposed development is in compliance with the approved plan. Section 155.536 of the York County Commercial Development Standards

(2) Additional Information will be required for York County Building and Codes on the Handicap Parking.

(3) The site is subject to the York County Tree Ordinance. Section 155.534 of the York County Commercial Development Standards

(4) Choose from one of the following the proposed site conditions: Wooded, Partially Wooded, Traditionally cleared, or cleared. Section 155.534 and 155.539 of the York County Commercial Development Standards

(5) State in a narrative form how the Tree Ordinance requirements will be met: existing, new, or a combination. Section 155.534 of the York County Commercial Development Standards

(6) All trees will be planted in accordance with the Tree Ordinance and shall meet the American Standard for Nursery Stock (ANSI, 1990, Part I).Section 155.534 and 155.539 of the York County Commercial Development Standards

(7) All trees are to be nursery grown, burlap and ball (B&B) preferred. Minimum tree size is 2" caliper (measured 6" above root ball), 8' minimum height for single stem. Section 155.534 and 155.39 of the York County Commercial Development Standards

(8) All trees are to be nursery grown, burlap and ball (B&B) preferred. Minimum tree size is 8 feet in height; with a maximum of three to five stems or trunks. Section 155.534 and 155.539 of the York County Commercial Development Standards

(9) Planting shall meet standard planting details (tree ordinance guidelines appendix). Each tree shall be adequately watered and mulched. Staking and guying are optional; trunk wrap can be used but is not encouraged. No exposed wires shall directly touch tree trunk or branches. Section 155.534 and 155.539 of the York County Commercial Development Standards

(10) State the total number of parking spaces and amount of impervious parking area. Section 155.534 of the York County Commercial Development Standards

(11)The maintenance of required bufferyards will be the responsibility of the property owner. All such yards will be properly maintained so as to assure continued buffering. Dead trees will be removed; debris and litter will be cleaned; and fences will be maintained at all times. Failure to do so is a violation of this chapter and may be remedied by the zoning administrator in the manner prescribed for other violations. Section 155.409 of the York County Commercial Development Standards

(12) Property owners must follow a routine schedule of watering, fertilization, pest control and pruning. Periodically after the date of original approval of the development, the site shall be re-inspected for continued compliance with the original requirements of this chapter. Trees, which are determined to be dead, diseased, damaged or malnourished according to Guideline A, shall be corrected. Section 155.537 of the York County Commercial Development Standards

(13)Trees that die as a result of the contractor's negligence to these specifications shall be removed and replaced by the owner with a new tree planted per mitigation tree chart in the tree ordinance guidelines and as directed by the appropriate authority. Section 155.539 of the York County Commercial Development Standards

ENVIRONMENTAL COMPLIANCE DIVISION REQUIREMENTS

THE FOLLOWING ITEMS ARE REQUIRED ON ALL PLANS; HOWEVER, ADDITIONAL INFORMATION WILL BE REQUIRED FOR PROJECTS DISTURBING MORE THAN ONE (1) ACRE. PLEASE CHECK WITH STORMWATER/SEDIMENT CONTROL OFFICE AT (803) 684-8571 FOR ADDITIONAL INFORMATION.

✓(1) N/A Location and elevation of drainage ways and flood ways * Plan 1-6 of Stormwater report

✓(2) * Number and date of the FEMA panel where property is shown (CAN BE OBTAINED BY CONTACTING THE BUILDING AND CODES DEPARTMENT AT (803) 909-7200 OR 1-800-922-7271) OR THE STORMWATER DEPARTMENT AT (803) 684-8571. Note on C-1 thru Streets

✓(3) * See Pud Plan for future Roadway improvement Specify if this project will be impacted by proposed road improvements

✓(4) N/A Specify location and type for any on site disposal of construction debris, cellulose material, or other waste

✓(5) * See 2-1 - 2-3 of Storm water Report Provide the names of the soils and their general characteristics from the York Soil Survey or the Soil Conservation Service (803-684-3137) or online at the GIS link at www.yorkcountygov.com.

✓(6) C1-1, C3-1 Describe the proposed grading and earth disturbing activities including:
- (a) Surface area to be disturbed (in square feet or acres)
- (b) Use a thick line to indicate the grading limits on the plan (CANNOT EXTEND INTO REQUIRED BUFFERYARDS)
- (c) Use shading to show areas where soil will be stockpiled or borrowed,
- (d) Sketch the erosion control measures to be installed to stabilize these areas
- (e) Describe provisions to preserve topsoil
- (f) Provide any unusual details of site grading
- (g) Provide design details of the structural controls (CONSTRUCTION ENTRANCE, SILT FENCE, ETC...)

(7) C3-3 Provide a time schedule and sequence of operations indicating the anticipated starting and completion dates of each land disturbing activity operation as well as the date by which final stabilization will occur

(8) N/A Provide a maintenance schedule indicating when the measures are to be checked, cleaned and removed

(9) C3-3 Provide a seeding and mulching schedule that indicates the rate and amount of Seed and mulch that is to be applied

(10) → cover Sheet on Plans
___ The statements below must be placed on site plan and signed by the developer or the financially responsible party. (Signing on this checklist is not sufficient)

Applicant's Certification

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."
"I (We) hereby certify that to the best of my knowledge, these plans contain all information required by the Zoning Ordinance of York County SC and as referenced by this application.
"I (We) hereby certify that all land disturbing activities including clearing, grading, construction and/or development will be done pursuant to this plan and agree to indemnify any person damaged by failure to comply with the approved plan. County and state authorities will be allowed to enter upon the project site provided they present appropriate credentials."

Date _____ Permit Applicant _____

(11) ✓ Complete the attached appropriate STORMWATER REPORTING FORM.

(12) → submitting fee
___ If site is greater than 1.0 acre of disturbance, submit a check made out to SCDHEC in the amount of $125.00 for NPDES general permit fee.

The Stormwater Management and Sediment Control Ordinance of York County require that a Grading Permit be issued prior to any land disturbing activity regardless of area to be disturbed. The application for a Grading Permit to disturb or change land in York County shall be accompanied by a non-refundable fee according to the following schedule:

✓ FEES: $75 per disturbed area (minimum of $50)
$50 re-review fee for re-submittal

CHECKLIST COMPLETED BY:

PRINTED NAME Joe Hemmert SIGNATURE [signature] DATE 12-3-08

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
MORNINGSTAR FELLOWSHIP CHURCH, PLAINTIFF, -VS- YORK COUNTY, SOUTH CAROLINA, DEFENDANTS.	)	CA No. 2013-CP-46-00246

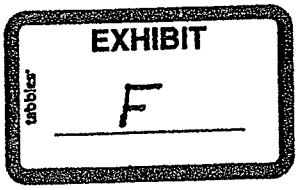
DEPOSITION OF GERALD A. LEE

COLUMBIA, SOUTH CAROLINA

MARCH 20, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM



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Rains was let go?
A Johnny came up to assess the situation, but I was basically in charge of the office from that point on.
Q And that would be John Stephenson?
A No, Johnny Johnson, --
Q Johnny Johnson.
A -- the president of the company.
Q Okay. And so, from 2008 until you were let go, you were basically in charge of the Charlotte office?
A 2008 until March of 2009, when they shut it down.
Q Were you Derrick Boyte's supervisor?
A Yes.
Q Did you start working on the Morningstar Fellowship project before you went up to Charlotte?
A No.
Q You said when you went to Charlotte, that was one of the projects they wanted you to work on.
A Right.
Q And we talked about the parking lot a little bit and these bunk houses. When Keith Rains was your supervisor up to 2008, would you communicate directly with the people at Morningstar or would Keith Rains communicate with the people at Morningstar?

A Until I got there, Keith did; but I then took over the management responsibilities, and I had the direct contact with the parties.
Q And who, at Morningstar, did you directly communicate with?
A Pat Selvey.
Q And who is he?
A He was just my contact with them.
Q Do you know anything about his background?
A I don't remember his capacity or whatever. I just remember his name.
Q In your --
A And then he signed the permit applications, he gave me the checks for the review fees, so --
Q In your experience in dealing with Pat Selvey, did it appear to you that he was an engineer or a developer or have any particular expertise in the development field?
A In my few meetings, he just acted as a developer.
Q Okay. So how would you communicate with Pat Selvey?
A I'd bring whatever we were working on, at the time, that needed his review and we -- We had a development meeting, a coordination meeting at Heritage USA one time, where the architect was

there. It was a coordination meeting.
Q And was that coordination meeting while Keith Rains was still with Power?
A Yes, Keith was still there at the time.
Q So you and Keith attended this meeting --
A No, just me.
Q Just you?
A (Indicating yes)
Q Even though Keith was the direct contact -- or the direct contact between Power and Morningstar, he sent you to that meeting.
A Right.
Q Okay. And tell me what happened at that meeting.
A The architect was there, I was there, the mechanical and plumbing guys were there, and we just sat around and discussed coordination issues.
Q And was this before the parking lot and bunk house projects were really underway?
A We were in the process of working on those, at the time; that's hence, the coordination -- the need for coordination meetings.
Q Had your work begun on the Tower project, at that time?
A The only thing we were doing for the Tower was supplying a fire sprinkler, a new fire sprinkler

line to the Tower.

Q Okay. But you were not in the process of obtaining site plan approval, for instance, at that time.

A Well, yeah, the parking lot with a site plan. You know, it was sitting in the middle of our parking lot.

Q Was there a separate site plan approval process for this parking lot -- for the parking lot improvements, as opposed to the Tower project itself?

MR. FENNELL: Objection. Go ahead.

BY THE WITNESS:

A They were connected because the parking lot improvement was for the Tower.

Q Right. But is it your testimony that the -- When you say parking lot improvements, there was a process -- Let me back up. There was a process that you went through with York County to obtain site plan approval for the Tower itself, correct?

A Yes.

Q And is it your testimony that the parking lot improvements you mentioned earlier was part of that process, or was there a separate submittal and comment and resubmittal process with York County specific to just the parking lot?

MR. FENNELL: Objection. You can answer.
BY THE WITNESS:
A The parking lot, which was all I had -- my part of the scope of this thing. The development was all one big project. There were several little pieces and parts to that project, one being, you know, the parking lot. My involvement was getting that parking lot approved.
Q Okay. But eventually, you had more involvement over getting the Tower site approved; didn't you?
A In what way? I don't follow that one.
Q Well, so is it your testimony that, in obtaining site plan approval for the Tower -- in the process of obtaining site plan approval for the Tower, your responsibility was only limited to the parking lot?
A The bunk house layout was important. The lake that was there, we had to make an adjustment to the outlet structure on the lake to handle an increase in runoff. In the parking lot, they wanted water quality control devices installed. There was issues about the traffic impact. They had a traffic impact study done. All that stuff had to be, you know, looked at, as part of this project.
Q And all that would be part of the site plan approval process for the Tower --

Q It would be normal, would it not, to submit to the developer, your client, a copy of what you'd submitted to the County, correct?
A That is correct.
Q And that's what this reflects.
A Yes.

Whereupon - Document marked as Deposition Exhibit 4.

Q Okay. I show you what is marked Exhibit 4. Can you identify that document?
A It's a transmittal letter from Joe Hammond to -- it doesn't specify. It says just to Morningstar, a copy of the plans in PDF.
Q And what's the date of this transmittal?
A January 21, 2009.
Q So this is about six weeks after the first transmittal, correct?
A That is correct.
Q Do you have any knowledge as to what happened between the first transmittal and this document?
A No, sir.
Q What would typically happen, in the development process, between the initial transmittal and a transmittal six weeks later, preliminary plans in digital format?

MR. FENNELL: Objection.
BY THE WITNESS:
A The owner may've requested a set of PDF plans to give to the other -- the architect, the MEP's, you know, for coordination issues. That's typically why we would supply them with PDF's.
Q Okay. Under the Remarks section, what does it say?
A Final digital copies will be issued once approval has been received from York County.
Q What does that mean to you?
A They were expecting to get approval from York County on what was submitted.
Q And that Power would do what?
A They would issue a final set of documents upon that approval.

Whereupon - Document marked as Deposition Exhibit 5.

Q I show you what's marked Exhibit 5. What does this appear to be?
A This is a transmittal letter from Joe Hammond to Shannon Catoe at York County Zoning.
Q And what is reflected that would have been enclosed with this transmittal?
A Revised plans, the developer's agreement with six

copies of enlarged PD plan, Comment Responses, Letter from David Hughes, Revised NOI and SWPP, and checks.

Q Okay. And what's the date of this transmittal?

A January 29, 2009.

Q So about eight days after Exhibit 4, you received Exhibit 5.

A (Indicating yes)

Q And again, this is all on the same project, Heritage Tower Project 6218. Based on what appears to have been enclosed with Exhibit 5, can you tell me what happened between the original submittal in December of 2008 and January 29, 2009?

A Apparently, there was review comments sent out and revised the plans when they resubmit it.

Q Tell me a little bit about this process of submittal and comment. How does that typically proceed?

A The County prepares a list of comments and they are sent back to us, Power Engineering. We review them, address the comments and resubmit it.

Q So would it be fair to say that this process involves, in the first instance, looking at the checklist?

A Right.

Q What does the County want to see on your plan?
A Right.
Q You do your best to comply with the checklist.
A Right.
Q Make the submittal, and that's what happened in December.
A Yes.
Q The County looks at it and sometimes they like it, sometimes they don't, they make comments, --
A Right.
Q -- right? Okay. And then they send you back those comments and say, well, you missed this or you missed that or we need more information on --
A Right.
Q -- such and such. And then you go back and you try to address those comments and resubmit.
A Yes, sir.
Q And it's a back-and-forth process between you, as the engineer for the developer, and the County, as the approving authority --
A Yes.
Q -- to get to that point of site plan approval.
A That is correct.
Q Okay. And so, on January 29 of 2009, a set of revised plans is submitted.

A Yes.
Q Also, is submitted DA agreement with 6 copies of enlarged PD plan. What does that mean?
A I want to say that's a developer's agreement.
Q But you don't know what developer's agreement that might have been.
A No.
Q And then comment response, what is that?
A We take their response letters and we do written responses to each one telling them how we addressed them.
Q Okay. Letter from David Hughes. Who's David Hughes?
A I don't recall who Davis Hughes is.
Q Any idea why you would include a letter from David Hughes in this submittal?
A It would've been something that they would've requested in the comments.
Q Okay. In January of 2009, was Keith Rains still with Power Engineering?
A Yes, he was.
Q Do you know what day, approximately, when he left?
A It was sometime over the summer.
Q So, at least at this point in time, Keith was still supervising --

A Yes.
Q And so what did you do, when you reviewed these comments?
A We needed to figure out how to address each one so we can get an approval.
Q And how long do you recall that it took you to address all of the problems that were recited in this --
A Oh, I don't --
Q -- review comment?
A I don't even -- I don't recall.
Q But it wasn't something you could do in a day.
A No. No.
Q It took some time.
A Yes.

Whereupon - Document marked as Deposition Exhibit 8.

Q I'm showing you what's been marked as Exhibit 8. Can you identify that document?
A This is my transmittal back to York County of the revised plans.
Q Okay. Is it fair to say that this document was generated, as a result of the work you did in responding to Exhibit 7, the review comments?
A Yes.

Q Why did you sign this document, instead of having Joe continue to sign it?
A Because I was now in charge of this thing.
Q Was this perceived as a problem project, at this point? Were you brought in to kind of fix things or were -- Tell me about that.
A There was quality issues with the work that was coming out of the Power Engineering office in Charlotte, as a result of Keith Rains's lack of management of the office.
Q Okay.
A That's just some background on this thing.
Q Okay.
A There was poor work coming out of that office. I was brought up there to help out. And I was upset by this stuff, so I took over this project.
Q Why were you upset by it?
A Because I don't stand for poor work.
Q Was Keith Rains gone as of March 31, 2009?
A No, he was still there.
Q What was his role, when you were there? When you were working on this project, what was his role?
A He was supposed to be managing the office.
Q When you say supposed, does that mean he actually wasn't?

A Is Keith Rains being under scrutiny here?
Q No, I --
A No. To my knowledge, he was not doing a good job.
Q Okay. Were there any conversations, that you were aware of, between Power Engineering and Morningstar about you taking over this project?
A Not to my recollection.
Q Nobody at Morningstar asked, what's going on? Why isn't Keith involved in this project anymore?
A Not to my recollection.
Q Did you have any conversations with Morningstar to tell them you're now in the Charlotte office and taking over this project?
A I believe I discussed it with Pat.
Q Tell me about that conversation.
A I think it was just one of the meetings that Keith sent me to, and I just told them that I would be the contact.
Q Would that meeting have occurred before or after Exhibit 8 was prepared?
A It probably would've been before.
Q How about Exhibit 5, January 29th; would that meeting have occurred before or after --
A No, I don't believe it did.
Q So sometime between January and March of 2009 --

comments, so I --

Q Okay. Did you have any conversations with Pat Selvey, after March 31st of 2009, or anyone else at Morningstar, about the status of the submittals?

A I don't recall.

Q When you say you don't recall, is it possible you did?

A Possible, yes. They were trying to build the rest of this stuff, and there was lots of coordination meetings and stuff. So I'm sure we met. We had phone conversations.

Q How many phone conversations do you think you had?

A I don't --

Q More than 10?

A It wouldn't have been that many.

Q Okay. Did you ever sense any frustration from Morningstar as to the time it was taking to get site plan approval?

A No.

Q Did you ever sense any sense of urgency from Morningstar about moving this project forward?

A Not that I can recall.

Whereupon - Document marked as Deposition Exhibit 9.

Q I'm going to show you a document that's been

marked as Exhibit 9 and you -- I have no reason to believe you've ever seen this document, but it is a letter purported to be from Dave Yarnes, Project Manager, Heritage International Ministries, the Heritage Towers project, to a man named Willie Hargrave, dated May 6th, 2009. Would you read that first paragraph out loud, please?

A This has been an incredible year for us as we continue to move forward here with the Heritage International Ministries Tower Project. As far as major milestones, our site plan is in the final round of the submittal process with York County and a Site Plan Issuance is imminent. We are mostly finished with all of our major professional fields, such as architecture, engineering, site engineering and others.

Q Okay. Do you recall any conversation with a man by the name of Dave Yarnes about the status of the site plan process, in this case?

A I don't recall talking with Dave Yarnes. I may have, but I don't recall.

Q You don't recall ever talking to Dave Yarnes specifically?

A Right. I don't remember him, is all I can say.

Q Okay. Were there other people, besides Pat Selvey,

that you spoke with at Morningstar?
A The ones that come to mind are just the architect and Pat Selvey.
Q So the architects that we -- maybe one of the folks that we looked at earlier had been -- received copies of the submittals --
A Right.
Q -- and Pat Selvey.
A Right.
Q Heritage International Ministries, are you familiar with that name?
A No.
Q Do you have any reason to believe that this document refers to any project other than the Heritage Tower?
MR. FENNELL: Objection.
BY THE WITNESS:
A No. It clearly says the Ministries Tower project.
Q Is there any way that Dave Yarnes could have learned that site plan issuance is imminent, if not from Power Engineering?
MR. FENNELL: Objection.
BY THE WITNESS:
A Pat Selvey may've told him.
Q And Pat Selvey would've learned from you.

A Right.
Q Do you remember discussing with Pat Selvey, in approximately May of 2009, that site plan -- the process was moving forward?
A I don't recall specifically, but I'm sure we were getting close.
Q Do you recall any discussions with Pat Selvey, in May of 2009, about the site plan?
A I don't recall.

Whereupon - Document marked as Deposition Exhibit 10.

Q Mr. Lee, I'm showing you what's been marked as Exhibit 10.
A All right.
Q Can you identify that document?
A It is a transmittal from me to York County on the Heritage Tower Project, revised construction drawings, revised stormwater calcs, comment response summary and checks.
Q So this is a third submittal.
A Right.
Q After the March 31st submittal.
A Right.
Q So three or four months later, at some point during the process, you'd gotten comments back from York

County.

A (Indicating yes)

Q And then resubmit, responding to those comments.

A Right.

Q Would you flip over to the next page? Can you identify the next two pages?

A Those are my responses to their comments.

Q Dated July 7, 2009?

A That is correct.

Q And so this is Plan Number 3, so at least the third submittal, although, if we count the original submittal, and then there was a resubmittal in January --

A Yeah.

Q -- and then a resubmittal in March --

A Right.

Q -- and then a resubmittal in July, is this actually submittal to plan four, or is there a reason --

A They're calling it plan three. I don't know what that plan number means.

Q And what are you doing, in this letter dated July 7, 2009?

A Responding to their specific comments of how we addressed each item.

Q Do you recall going through the process of

preparing that letter?
A Yes.
Q What do you recall about this round of submittals and comments?
A Nothing. We're just addressing the comments.
Q Am I correct to understand that when you first came on to this project after the January submittal and you saw all the work that had to be done to bring it up to par, there was some frustration with the process, at that point.
A Right.
Q Were you continuing to feel a frustration with this process, at this point?
A No, we were making progress on this thing.
Q You felt this was moving forward.
A Right.
Q Getting close to approval.
A Right.
Q Would you have sent a copy of this resubmittal in July of 2009 to Morningstar?
A I don't recall for sure, but that would've been standard practice.
Q Would it have been standard practice for you to send a copy of the letter attached -- the July 7th letter to Morningstar?

this document?
A It's a letter from Billy Payne to me.
Q Saying what?
A And it's saying -- basically, saying it's been approved by Stormwater.
Q And that's all you were waiting for, at that point.
MR. FENNELL: Objection.
BY THE WITNESS:
A No, this is just Stormwater approval.
Q What else needed to be approved by York County as of this date?
A I would imagine York County Planning would issue an approval, if everything -- if everybody -- if all the departments had signed off it.
Q And so the documents that we saw previously telling Power Engineering that everything they've asked for has been accomplished --
A Right.
Q -- would be enough --
MR. FENNELL: Objection.
BY MR. BALLOU:
Q -- in your opinion; is that right?
MR. FENNELL: Objection.
BY THE WITNESS:
A Typically, you would get something from the County,

not the department, when the project is finally approved.

Q Was this project finally approved?

A In our eyes, it was. We had met all -- We had satisfied all the department comments.

Q And did you tell Morningstar that you had satisfied all department comments?

A I'm sure we did, in one way or another; but I don't recall.

Q Did you send a copy of this Notice of Approval, Exhibit --

A I don't -- I don't recall.

Q -- 14? How would you have notified Morningstar?

MR. FENNELL: Objection.

BY THE WITNESS:

A Phone call, e-mail.

Q Do you recall sending an e-mail?

A I don't recall.

Q Do you recall sending any e-mails to Morningstar?

A I -- Been a long time ago.

Q So, as you sit here today, you can't remember ever, one way or the other, whether you ever sent an e-mail to Morningstar.

A Well, I'm sure I sent e-mails to Pat Selvey, but I don't recall.

Columbia office.
A Right.
Q And to your understanding, took over the projects you had been working on.
A Right.
Q Okay. Just so I'm clear, your testimony is you don't recall ever personally notifying Morningstar by e-mail, letter or phone call -- or do you recall notifying them that the County had approved the site plan?
A No.
MR. FENNELL: Objection.
BY THE WITNESS:
A I don't recall.
Q But would it have been your practice to notify your developer when site plan approval was received?
A Of course.
Q When you left Power Engineering, did you believe site plan approval had been received?
A I remember the meeting with Billy Payne and signing -- putting the notes on the drawings he wanted, and that was my understanding that our plans were then approved.
Q Okay. Have you reviewed the development agreement between York County and Morningstar?

A No, not in detail.
Q Did you ever have any discussions with Morningstar or anyone about any of the dates contained in the development agreement?
A No.
Q Did anybody tell you that site plan approval started a time limit on the development agreement?
A There was a discussion in one meeting with York County where the planning and zoning administrator mentioned that there was a timeline in the developer's agreement. But, I believe, at that time, they were still drafting the developer's agreement, that the timeline had not started yet. And that's the only discussion I recall.
Q So you recall a discussion, even before the development agreement was finalized, about the timeline?
A Yes. And this was mentioned, that they were working on this developer's agreement.
Q This would've been way before the process we just --
A This probably would've been in March.
Q But, if the development agreement was signed prior to March, it would've been sometime prior to the date of the development agreement.

A For Morningstar to do to -- It was explained to us they needed to finish the building.
Q Okay. Is that what your --
A Or get permits. I think they had to -- so much time to get permits --
Q Okay.
A -- on the building.
Q Was it your impression that those timelines were important to York County's position in the development agreement?
A I would imagine, since they mentioned it, yeah.
Q Did anyone say anything about that comment --
A No.
Q -- or acknowledge that comment?
A Not that I recall.
Q Nobody said, yes, we understand.
A Not that I recall.
Q Okay. But that was a comment that was made to the group and not just to you.
A Right.

Whereupon - Document marked as Deposition Exhibit 15.

Q I'm going to show you Exhibit 15. Have you ever seen a letter similar to Exhibit 15?
A Oh, yeah.

Q What is that?
A This is a DHEC approval of the land disturbance.
Q Okay. In the process of developing a property like this, does the DHEC approval letter -- is the timing of that dependant at all upon the site plan approval by the County?
A Yes.
Q In what way?
A The County has to approve the plan first, then it gets submitted to the state to issue the state permit. This is a state permit.
Q And so this permit doesn't get issued until site plan approval --
A Right.
Q -- is issued.
A Right.
Q And this letter was issued to Pat Selvey; wasn't it?
A Yes, it was.
Q Did you ever have any conversations with Pat Selvey about obtaining the DHEC permit?
A This is after my time here. But, no, I have not seen this letter.
Q This says it was received by Power Engineering December 3rd of 2009. And, looking at the

information handwritten on the top corner -- top right corner, can you tell me who was indicated as receiving a copy of this?

A John Stephenson and Derrick Boyte.

Whereupon - Document marked as Deposition Exhibit 16.

Q I show you Exhibit 16. Can you identify that document, sir?

A This is the NOI for the land disturbance permit.

Q And what is an NOI?

A The application for a land disturbance permit.

Q Okay. And, on the second page, this contains your signature; does it not?

A Yes, it does.

Q Do you recall signing this document on or about March 31st of 2009?

A Yes, I do.

Q Tell me about the process of submitting this document.

A This probably had to be revised, in response to some of the review comments we received in March.

Q Okay.

A And so the document would've been revised and, of course, we'd have to get Pat Selvey's signature on it again to resubmit the revised document. And I

would sign it, and it would go with a check for $125 in with the County submittal. After the County approved it, then that would be forwarded to the state.

Q And, again, this occurs -- The County approves it after they have approved the site plan.

MR. FENNELL: Objection.

BY THE WITNESS:

A DHEC approves it only after the County approves the site plan.

Q Okay. Typically, how long does it take for DHEC to approve these after the County has --

A It's usually within three or four weeks.

Q Okay. And is there a date --

A But it's after they receive it.

Q Okay. Is there a date indicated for the issuance by DHEC of the permit?

A It was 11/25/09, is what this thing says.

Q Okay. Do you recall any conversations with Pat Selvey or anyone at Morningstar regarding the NOI or the issuance by DHEC of a permit?

A No. I no longer worked here.

Q How about before you left?

A I had to get him to sign this.

Q Did you ever tell him that, in the process of

development, this would be issued after the County issued site plan approval?

A I'm sure I explained the process to him at one point.

Q And would the timing of the site plan approval, prior to issuance of the permit, be part of that conversation?

A I'm sure, yes.

Whereupon - Document marked as Deposition Exhibit 17.

Q I'm going to show you what's been marked as Exhibit 17 and ask if you've ever seen a document like this before?

A Yeah, this is our billing worksheet.

Q And so how was a document like this generated?

A From our time sheets.

Q So you keep time sheets on -- Is it on a daily basis you're entering --

A Right.

Q -- what you've done on a particular project?

A Yes.

Q And attaching it to a particular file?

A Yes.

Q And this file is 62180.21?

A 6218 refers to the project number, 021 is just

Q And the last invoice, last two pages of this, what's the date of that invoice?
A April 14th, 2009.
Q Percent Complete is a hundred, right?
A Right.
Q Were you ever involved with preparing invoices or having input into these, other than putting your time into the system?
A We reviewed the draft of the invoices.
Q Would you ever have indicated a hundred percent complete prior to obtaining site plan approval?
A If I felt it was a hundred percent complete, yes.
Q Do you recall that being the case with this project?
A I would say yes.
Q So, as of March 31st -- or as of April 14th, 2009, was the work a hundred percent complete on this project?
A I considered it a hundred percent.
Q Even though there were additional comments and responses that would be involved.
A They were very minor; but, yes.
Q The engineering work, drafting work, substantive work had been completed.
A Yes.

authorized Power Engineering, and you specifically, to communicate directly with York County?

MR. FENNELL: Objection.

BY MR. BALLOU:

Q Did they?

A Yes.

Q Were you aware of any restrictions placed on the scope of your authority to communicate with York County?

A No.

Q Based on that letter to Heritage -- to the bank regarding Heritage Tower, Community One Bank, is there any doubt in your mind that you did, in fact, communicate with Morningstar about the status of this project?

MR. FENNELL: Objection.

BY THE WITNESS:

A There was no doubt in my mind. I'm -- We regularly, routinely notify the client of the status of their projects.

Q Did you ever receive a complaint from Morningstar that they didn't get information from you?

A I don't recall receiving any.

Q You're not aware of any?

A I'm not aware of any.

Q If you were working on a project like this, what would happen if you don't get site plan approval?

MR. FENNELL: Objection.

BY THE WITNESS:

A They wouldn't be able to build the project.

Q If you had been in regular communication, and you were in regular communication with the York County staff, seeking to obtain site plan approval in this case -- and I think your testimony was that you had received site plan approval --

MR. FENNELL: Objection.

BY THE WITNESS:

A Yes.

Q Yes?

A Yes.

Q If you had not understood that you received site plan approval -- If you understood that you had not received site plan approval, what would you have done?

A There would obviously be more review comments. We would have to address the comments.

Q And, if there weren't any more review comments, but you hadn't received site plan approval, what would you have done?

A We would've had to receive comments. I imagine,

A Right.
Q Can you remember of another instance in your dealings with the County in which a document that was sent to you came three months after it was dated?
A No.
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q And you never saw this document before this deposition; did you?
A No.
Q So, when you testified earlier that, you know, based on the documents that you've seen that showed notice of approval, you didn't know those documents existed until you walked in this room; did you?
MR. BALLOU: Objection.
BY THE WITNESS:
A Right.
Q So, when you said that you -- You know, your testimony is that there was a notice of approval or site plan approval, that's based on something that you understand as of now, right?
MR. BALLOU: Object to the form.
BY THE WITNESS:
A As of when I went and signed those drawings for

Billy Payne.

Q Sir?

A When I went and met with Billy Payne and put those notes on the drawing, that was my understanding that the plans were approved.

Q But your understanding as to having received notice from the County, you didn't know that --

A No. No, I --

Q -- until today.

A Derrick may've told me -- called me up and told me; but, no, --

Q Okay.

A -- I don't recall, you know. Like, you know, these dates are just blowing my mind, because I was not working here then.

Q Okay. Now, regardless of the dates, whether it said today or five years ago, you've never seen this document before; have you?

A Not that I can recall.

Q And, in your testimony, you were talking about -- when these documents were being shown to you -- Well, until we get the official approval letter. Do you remember that?

A Right.

Q What were you talking about when you testified

about until we get the official approval letter?
A Normally, when we go through this process locally here with Richland County, we'll get individual department approvals. But it's not officially approved until we get a letter from Richland County Planning and Development --
Q Okay. And --
A -- that says the project has met all the requirements and is approved.
Q All right. And until today, you were expecting to see some form of official approval letter --
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q -- from the County, that you never saw, right?
A I -- This letter right here says we got stormwater approval.
Q Yes, sir.
A It does not say we have official approval.
Q Yes, sir. But, if you can take yourself back into real time, you were expecting to get an official approval letter from York County --
A Yes.
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q -- similar to your experience with Richland County.

A Yes. Yes.
Q And was this the first project that you had worked on with the York County officials?
A Yes.
Q I know you've tried really hard to be honest with us, and we both appreciate that. But, is it fair to say that much of your testimony today has been best guess?
MR. BALLOU: Object to the form.
BY THE WITNESS:
A The dates are sketchy. It has been a long time.
Q In particular, the first six exhibits that you saw, when you were asked to interpret those exhibits -- or rather, 2 through 6 -- if you'd get those in front of you, and then tell me whether you'd ever seen those documents before you --
A Yes.
Q -- came in this room?
A Well, 2, no.
Q But you testified and you interpreted that document based on your best guesses, right?
A Right.
Q And how about 3?
A These were -- When I got up there, they were preparing these documents to go out until, you

EXAMINATION - (By Mr. Ballou)

Q On Exhibit 14, this Notice of Approval, at the time that was issued August 24th, 2009, at least, if we look at the documents -- the notes from the -- the comment notes, this was the only thing that was outstanding, correct?

A Yes. To my knowledge, yes.

Q And so, even though this is specific to the stormwater, you weren't expecting anything else.

A Right.

Q Because you've been approved.

A Right.

Q And you're not aware of any requirement that there be anything -- a Notice of Approval, a written Notice of Approval like this; are you?

A No.

Q That was just based on your experience with Richland County.

A Right.

Q Okay. Your involvement, reflected by the billing records, shows that on December 1st, two-and-a-half hours review; the 3rd, three hours review; the 4th, three hours review; the 8th, two-and-a-half hours review and sign construction drawings.

A Yeah.

COMMENT LISTING OF ALL REVIEWS
YORK COUNTY DEVELOPMENT COORDINATING CENTER

20080392 PROJECT NAME: HERITAGE TOWER PROJECT

PLAN NUMBER: 4
PLAN TYPE(S): SITE

Phase	Section	1st Lot	2nd Lot

Eng-water-sewer

STATUS	SPECIFIC DIVISION COMMENTS
Approved	

Engineer-roads

STATUS	SPECIFIC DIVISION COMMENTS
Approved	

Fire Prev.

STATUS	SPECIFIC DIVISION COMMENTS
Approved	

Planning

STATUS	SPECIFIC DIVISION COMMENTS
Conditional	Please add a note to the plans, that should SCDOT request that portion of Starlight Drive be closed due to safety concerns between the school and potential stacking at the railroad tracks, the TIA will need to be revised to reflect those changes. August 24th, 2009: Planning notes that this note has been placed on the plans. To expedite the review of the re-submitted documents, please submit a letter outlining the changes made to each of the items listed above. If further information is needed regarding this portion of the plan review, please contact Sarah Rayfield in the Planning Department at 803.909.7233 or sarah.rayfield@yorkcountygov.com

Stormwater

STATUS	SPECIFIC DIVISION COMMENTS
Conditional	1. Per York County Ordinance Section-152.41.A.10.i., Flumes are not an acceptable means of runoff conveyance. Please propose an alternative method for conveyance and either come by and revise the text by hand and initial the revision on each page that reflects the flume notation. 2. On sheet C.1.7, please include the wall at the proposed flume location to be part of the demolition activities. The wall must be partially demolished due to the proposed inlet and associated RCP shown. This can be completed as part of item #1. 3. We will require a check for NPDES permitting made payable to SCDHEC in the amount of $125 prior to approval. 4. Even though this project has been issued a "Rejection" status, all of these items can probably be completed in the offices of York County with the assistance of the engineer of record. If all of the plans can be obtained and either sheets replaced or hand revised, then approval can be issued. FYI: Due to the fact that I had to place comments in Plan Tracking, an approval could not be

EXHIBIT
G
-211-

(200803924 continued)

issued...although....Gerald Lee.....call me to setup this time to fix these couple of items and if all other departments have approved your project.....then after revisions are made...then I can approve.....Billy Payne

08-18-2009
Mr. Gerald Lee (Engineering Manager for Power Engineering) came by my office today (at lunch time 12:00) and placed the required TIA note to sheet C 1.0 as note # 27 per Mrs. Sarah Rayfield review comment. These note(s) was physically hand written, dated and initialled by the engineer of record, on each plan set witnessed by Mr. Billy Payne-York County Env. Compliance Plans examiner. Mr. Gerald Lee also revised the plan set sheets that previously stated "Proposed Flume" within the parking lot area to read "Proposed Concrete Curb Opening". Mr. Gerald Lee also placed one note on each plan set demolition sheet to state that "A portion of the existing wall shall be removed for the installation of proposed RCP". No other revisions were made to this submittal and will be approved by Billy Payne for NPDES permitting.

Zoningcom

STATUS **SPECIFIC DIVISION COMMENTS**
Conditional Approved per conditions outlined and indicated on site plan on the improvements to the roads and Development Agreement.

YorkCounty
south carolina
1070 Heckle Blvd Ste 107
Rock Hill S.C. 29732
Fax:803-909-7227

YORK COUNTY GOVERNMENT
Planning & Development Services

Customer Service Division
(803) 909-7200
Building & Codes Division
(803) 909-7201
Planning Services Division
(803) 909-7220
Zoning Services Division
(803) 909-7230
Administration
(803) 909-7240

Commerical Zoning Compliance Permit

Project Description:
Heritage Tower

Plan Tracking: Number
20080392

Zoning Permit #
ZC-091595

Tax Map Number:
7290000457

Type of Work
Heritage Tower Project

Project Name:
Heritage Tower Project

Zoning Disrtrict:
PD (Custom)

Community
Fort Mill, SC 29715

Property Address:
225 Starlight Dr
Fort Mill, SC 29715

Building Height

Total Access Drives
see site plan

Access Drive Width
see site plan

Structure Setbacks Requirements:
Front: see site plan
Rear: see site plan
Right: see site plan
Left: see site plan

Buffer Yard Type:
Front: see site plan
Back: see site plan
Left Side: see site plan
Right Side: see site plan

Buffer Yard Structure/Plants:
Front: see site plan
Back: see site plan
Left Side: see site plan
Right Side: see site plan

Parking Lot Requirements:

Parking Spaces	Parking Size	HC Spaces	HC Size
see site plan	see site plan	see site plan	see site plan

Special Conditions:

Seeconditions under site plan and site must comply with the Development Agreement.See site plan for additional requirements along with all requirments of the Devleopment Agreement.

Applicant
Power Engineering

Zoning Official
Shannon Catoe

Date Issued
Aug 28 2009

Fee $100.00

York County
south carolina

YORK COUNTY GOVERNMENT

Engineering Department

NOTICE OF APPROVAL

RECEIVED
NOV 23 2009
POWER ENGINEERING CO., INC.

DATE: 08-24-2009

TO: Power Engineering Company, Inc.
Mr. Gerald Lee, PE
138 Westpark Boulevard
Columbia, South Carolina 29210

FROM: Billy J. Payne Jr., York County Stormwater Plans Examiner-CSPR

SUBJECT: **Heritage Tower Project**, Storm-water Management and Sediment and Erosion Control Plan, Permit #**08-152** Tax Map # **7290000457.**

I have reviewed the Storm-water Management and Sediment Control plan for the above project. The submittal met the requirements of the Storm water Management and Sediment Control Ordinance of York County. Please call 803-684-8571 48 hours in advance in order to schedule a time for the pre-construction meeting so that the grading permit can be issued. This meeting will occur on-site with a representative from our office, the financially responsible party and the grading contractor. This grading permit must be posted at the job site prior to beginning land disturbance.. Please note that the York County does not issue the preliminary grading permit until the financial responsible person has received the NPDES permit from SCDHEC.
The Storm water Management and Sediment Control Office must be notified at least 48 hours prior to commencing land disturbance. Additionally, this office should be contacted should the plans require revision for any reason. Revisions of the Storm water Plan may require additional review and approval.
Failure to comply with either of these procedures is a violation of the ordinance.

THE APPLICANT IS RESPONSIBLE FOR OBTAINING APPROVALS FROM OTHER COUNTY, STATE AND FEDERAL DEPARTMENTS OR AGENCIES. STORMWATER MANAGEMENT AND SEDIMENT CONTROL REVIEW AND APPROVAL DOES NOT GUARANTEE NOR IMPLY SUBDIVISION, ZONING, OR BUILDING AND CODE REVIEW OR APPROVAL.
If you have any questions, contact me at the telephone number provided.
Thank you

Billy Payne
Environmental Code Compliance Plans Examiner

EXHIBIT
H

Post Office Box 148, 6 South Congress Street, York, South Carolina 29745-0148
Telephone: (803) 684-8571 Fax (803) 684-8596 Web: www.yorkcountygov.com

March 5, 2010

VIA CERTIFIED MAIL

Mr. Rick Joyner, President
MorningStar Fellowship Church
375 Starlight Drive
Fort Mill, South Carolina 29715

Mr. Dave Yarnes, Vice President
MorningStar Ministries
375 Starlight Drive
Fort Mill, South Carolina 29715

James W. Sheedy, Esquire
Spencer & Spencer, P.A.
Post Office Box 790
Rock Hill, South Carolina 29730

Dear Mr. Joyner, Mr. Yarnes, and Mr. Sheedy:

On January 13, 2008, York County and MorningStar Fellowship Church entered into a Development Agreement under which MorningStar agreed to develop a tract of land in Fort Mill Township of York County in accordance with Planned Development District standards and the Development Agreement between the County and MorningStar dated January 13, 2008. The Planned Development District standards and the Development Agreement set forth standards for the development including development of open space, development amenities, engineering reports, bonds, roads, public utilities, storm water management requirements, development standards and other requirements for the proposed development of the property.

The site plan for this commercial development was approved by York County officials on August 19, 2009, with approvals by the County Zoning Department on August 19, 2009; the County Engineering Department on July 28, 2009; and Environmental Compliance on August 19, 2009.

Under Section IV. C of the Development Agreement, MorningStar, as the developer, is required to submit to the County bid, performance and payment bonds which provide the County with financial assurance that the contractor awarded the job of rehabilitation and/or completion of the Tower is insured to finish the job for the amount of the bid and to provide to the County, prior to the issuance of any building permit for the Tower, a demolition bond or financial equivalent in the amount projected as necessary to demolish the Tower upon which the County may draw or make a claim upon failure to complete the Project.

6 South Congress Street, Post Office Box 66, York, South Carolina 29745-0066
Telephone: (803) 684-8511 Fax: (803) 684-8550 Web: www.yorkcountygov.com

EXHIBIT
I

Under Section IV. C. 2 of the Development Agreement, if the Developer is unable, within 180 days of County approval of the commercial site plan for the property to obtain bid, performance and payment bonds or letters of credit, the Development Agreement is deemed null and void and at such time, the Tower must be demolished at the expense of the developer, MorningStar.

More than 180 days has elapsed since the approval of the commercial site plan, and MorningStar has not met its obligation to provide bid, performance and payment bonds, a demolition bond or a letter of credit for the completion of the Project or the demolition of the Tower.

This letter constitutes a notice of default by MorningStar for breach of its obligations to provide bid, performance and payment bonds, a letter of credit or a demolition bond or its financial equivalent under Section IV. C of the Development Agreement. As provided in Section X. B of the Development Agreement, York County reasonably finds that the Developer has committed a material breach of the terms and conditions of the Development Agreement, and MorningStar, as the Developer, is required to cure the material breaches of the Development Agreement within sixty (60) days of the date of this letter or the County, as provided in Section X. B. 3 and IV C. 2 may unilaterally terminate or modify the Development Agreement.

MorningStar will be provided an opportunity to rebut the County's findings and determination or to consent or amend the Development Agreement to meet the concerns of the County with respect to its findings and determinations. If you dispute the County's findings of a default in the performance of a material covenant of the Development Agreement, you may negotiate with York County in good faith in order to resolve the situation to the mutual satisfaction of both parties, and if the material breaches referenced in this letter are disputed, the dispute as to a breach may be resolved through mediation under the Development Agreement as a condition precedent to the institution of legal or equitable actions in South Carolina Courts.

If mediation results in a finding that MorningStar has materially breached the Development Agreement, it shall have a reasonable period of time not to exceed sixty (60) days to cure the material breach.

Please respond to this Notice of Default directly to me with copies to Susan Britt, York County Planning Director and Melvin McKeown, York County Attorney.

Yours very truly,

James E. Baker
County Manager

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendants.

PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST REQUEST FOR ADMISSIONS

Plaintiff objects and responds to Defendant's First Request for Admissions as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's First Request for Admissions to the extent that they purport to require the disclosure of information or documents which are protected by the attorney-client privilege or work product doctrine. Any document produced which would otherwise be privileged is not a waiver of any remaining privilege or protection from discovery.

2. Plaintiff objects to these discovery requests to the extent that they purport to expand the requirements of the South Carolina Rules of Civil Procedure.

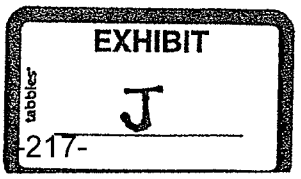
3. All documents will be available for inspection at the law offices of James, McElroy & Diehl, P.A. 600 South College Street, Charlotte, North Carolina or will be alternatively produced in a fashion and at such time to be agreed upon.

4. As this case is still in the early stages of discovery, Plaintiff will supplement these responses when further information warrants it.

REQUEST FOR ADMISSIONS

1. The document attached hereto as Exhibit "A" is a true, correct and genuine copy of the Development Agreement.

RESPONSE: It is admitted upon information and belief that a document that appears to be the public record of the Development Agreement is attached as Exhibit A.



2. That Morningstar contracted with Power Engineering, Inc. for services including the preparation of a commercial site plan regarding the Property.

RESPONSE: Plaintiff admits that Power Engineering was one of multiple firms it contracted with to work on the site plan, among other things.

3. That Power Engineering, Inc. submitted a proposed commercial site plan for the Property on Morningstar's behalf for review by York County staff on December 9, 2008.

RESPONSE: Admitted.

4. The Morningstar authorized Power Engineering, Inc. to communicate with York County staff regarding the proposed commercial site plan for the Property.

RESPONSE: Plaintiff admits that Power engineering was authorized to communicate with Defendant regarding aspects of the proposed construction project. However, matters of contract compliance were beyond the scope of that agency.

5. That York County approved the commercial site plan submitted by Power Engineering, Inc. on behalf of Morningstar on August 24, 2009.

RESPONSE: Denied.

6. That York County notified Power Engineering, Inc. of the approval of the commercial site plan for the Property on August 24, 2009.

RESPONSE: Plaintiff does not have sufficient information to admit or deny what York County claims to have submitted to Power Engineering. It is denied that any such acceptance was properly communicated to Plaintiff.

7. That Morningstar learned of York County's approval of the commercial site plan for the Property on or before September 1, 2009.

RESPONSE: Denied.

8. That since August 24, 2009, Morningstar has not provided to York Country any draft or final bid, performance or payment bond(s) or letter(s) of credit as evidence of Morningstar's financial ability to complete Developer's work under the Development Agreement.

RESPONSE: It is admitted that Morningstar has not provided a draft or final bid, performance or payment bond or letter of credit.

9. That since August 24, 2009, Morningstar has not provided to York County any other documentary evidence of Morningstar's financial ability to complete Morningstar's work under the Development Agreement.

RESPONSE: Denied.

10. That since August 24, 2009, Morningstar has not provided to York County evidence that Morningstar has secured any final, unconditional commitment for financing of any portion of Morningstar's work under the Development Agreement.

RESPONSE: Admitted.

11. That since August 24, 2009, Morningstar has not secured any final, unconditional commitment for financing of Morningstar's work to renovate, rehabilitate or reconstruct the Tower.

RESPONSE: Admitted.

12. That York County notified Morningstar on February 4, 2010 that Morningstar had not provided any bid, performance or payment bonds, letter of credit or other evidence of Morningstar's financial ability to complete Morningstar's work under the Development Agreement.

RESPONSE: Admitted.

13. That since February 4, 2010, Morningstar has not provided to York County any draft or final bid, performance or payment bond(s) or letter(s) of credit as evidence of Morningstar's financial ability to complete Morningstar's work under the Development Agreement.

RESPONSE: It is admitted that Morningstar has not provided any draft or final bid, performance or payment bond or letter of credit since February 4, 2010.

14. That since February 4, 2010, Morningstar has not provided to York County any other documentary evidence of Morningstar's financial ability to complete Morningstar's work under the Development Agreement.

RESPONSE: Denied.

15. That since February 4, 2010, Morningstar has not provided to York County evidence that Morningstar has secured any final, unconditional commitment for financing of any portion of Morningstar's work under the Development Agreement.

RESPONSE: Admitted.

16. That Morningstar purchased real property consisting of approximately 3.56 acres located in York County, South Carolina, on or about January 6, 2009, for a purchase price of $3,900,000.00.

RESPONSE: Admitted.

17. That Morningstar borrowed $2,000,000.00 from Alliance Bank and Trust, Gastonia in connection with the purchase of approximately 3.56 acres located in York County, South Carolina, on or about January 6, 2009, for a purchase price of $3,900,000.00.

RESPONSE: Admitted.

18. That Morningstar borrowed $1,100,000.00 from Supra Southern, LLC in connection with the purchase of approximately 3.56 acres located in York County, South Carolina, on or about January 6, 2009, for a purchase price of $3,900,000.00.

RESPONSE: Admitted.

19. That the document attached hereto as Exhibit "B" is a true, correct and genuine copy of the Title to Real Estate by which Morningstar acquired title to the Property that is the subject of the Development Agreement from Coulston Enterprises, Inc.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Title to Real Estate by which Morningstar acquired title to the property from Coulston Enterprises, Inc. is attached as Exhibit B.

20. That the document attached hereto as Exhibit "C" is a true, correct and genuine copy of the Mortgage from Morningstar to First Citizens Bank & Trust Company recorded September 28, 2004, in the amount of $1,300,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to First Citizens Bank & Trust Company is attached as Exhibit C.

21. That the document attached hereto as Exhibit "D" is a true, correct and a genuine copy of the Assignment of Rents from Morningstar to First Citizens Bank & Trust Company recorded September 28, 2004.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Assignment of Rents from Morningstar to First Citizens Bank & Trust Company is attached as Exhibit D.

22. That the document attached hereto as Exhibit "E" is a true, correct and genuine copy of the satisfaction of the Mortgage from Morningstar to First Citizens Bank & Trust Company recorded October 14, 2005.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the satisfaction of the Mortgage from Morningstar to First Citizens Bank &T rust Company is attached as Exhibit E.

23. That the document attached hereto as Exhibit "F" is a true, correct and genuine copy of the satisfaction of the Assignment of Rents from Morningstar to First

Citizens Bank & Trust Company recorded October 14, 2005.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the satisfaction of the Assignment of Rents from Morningstar to First Citizens Bank & Trust Company is attached as Exhibit F.

24. That the document attached hereto as Exhibit "G" is a true, correct and genuine copy of the Mortgage from Morningstar to Evangelical Christian Credit Union recorded September 1, 2005, in the amount of $8,800,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to Evangelical Christian Credit Union is attached as Exhibit G.

25. That the document attached hereto as Exhibit "H" is a true, correct and genuine copy of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union recorded September 1, 2005.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union is attached as Exhibit H.

26. That the document attached hereto as Exhibit "I" is a true, correct and genuine copy of the UCC Financing Statement from Morningstar to Evangelical Christian Credit Union recorded September 1, 2005.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the UCC Financing Statement from Morningstar to Evangelical Christian Credit Union is attached as Exhibit I.

27. That the document attached hereto as Exhibit "J" is a true, correct and genuine copy of the satisfaction of the Mortgage from Morningstar to Evangelical Christian Credit Union recorded February 29, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the satisfaction of the Mortgage from Morningstar to Evangelical Christian Credit Union is attached as Exhibit J.

28. That the document attached hereto as Exhibit "K" is a true, correct and genuine copy of the satisfaction of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union recorded February 29, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the satisfaction of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union is attached as Exhibit K.

29. That the document attached hereto as Exhibit "L" is a true, correct and genuine copy of the Mortgage from Morningstar to Evangelical Christian Credit Union recorded March 3, 2008, in the amount of $11,500,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to Evangelical Christian Credit Union is attached as Exhibit L.

30. That the document attached hereto as Exhibit "M" is a true, correct and genuine copy of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union recorded March 3, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Assignment of Rents from Morningstar to Evangelical Christian Credit Union is attached as Exhibit M.

31. That the document attached hereto as Exhibit "N" is a true, correct and genuine copy of the partial release of Mortgage from Morningstar to Evangelical Christian Credit Union recorded May 30, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the partial release of Mortgage from Morningstar to Evangelical Christian Credit Union is attached as Exhibit N.

32. That the document attached hereto as Exhibit "O" is a true, correct and genuine copy of the Mortgage from Morningstar to CommunityOne Bank, N.A. recorded May 23, 2008, in the amount of $1,500,000.00

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to CommunityOne Bank, N.A. is attached as Exhibit O.

33. That the document attached hereto as Exhibit "P" is a true, correct and genuine copy of the Mortgage from Morningstar to CommunityOne Bank, N.A. recorded May 23, 2008, in the amount for $1,500,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to CommunityOne Bank, N.A. is attached as Exhibit P.

34. That the document attached hereto as Exhibit "Q" is a true, correct and genuine copy of the Mortgage from Morningstar to Alliance Bank and Trust, Gastonia recorded January 6, 2009, in the amount of $2,000,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to Alliance Bank and Trust is attached as Exhibit Q.

35. That the document attached hereto as Exhibit "R" is a true, correct and genuine copy of the Assignment of Rents from Morningstar to Alliance Bank and Trust, Gastonia recorded January 6, 2009.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Assignment of Rents from Morningstar to Alliance Bank and Trust is attached as Exhibit R.

36. That the document attached hereto as Exhibit "S" is a true, correct and genuine copy of the Mortgage from Morningstar to Supra Southern, LLC recorded January 6, 2009, in the amount of $1,100,000.00.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Mortgage from Morningstar to Supra Southern, LLC is attached as Exhibit S.

37. That the document attached hereto as Exhibit "T" is a true, correct and genuine copy of the Title to Real Estate by which Morningstar acquired title to 3.56 acres, Tax Map Number 7290000025 from Supra Southern, LLC, recorded January 6, 2009.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Title to Real Estate by which Morningstar acquired title to 3.56 acres, Tax Map Number 7290000025 from Supra Southern, LLC is attached as Exhibit T.

38. That the document attached hereto as Exhibit "U" is a true, correct and genuine copy of the satisfied mortgage from Morningstar to Supra Southern, LLC dated October 5, 2009.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the satisfied mortgage from Morningstar to Supra Southern, LLC is attached as Exhibit U.

39. That the document attached hereto as Exhibit "V" is a true, correct and genuine copy of the Bill of Sale and Assignment of Lease for Hangar Unit #401 by and between Morningstar and 9265 Bravo, Inc., recorded May 14, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Bill of Sale and Assignment of Lease for Hangar Unit #401 by and between Morningstar and 9265 Bravo, Inc. is attached as Exhibit V.

40. That the document attached hereto as Exhibit "W" is a true, correct and genuine copy of the Quit Claim Bill of Sale and Assignment of Lease to Hangar Unit #401 by and between Morningstar and William B. Whisenaut, recorded July 16, 2008.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Quit Claim Bill of Sale and Assignment of Lease to Hangar Unit #401 by and between Morningstar and William B. Whisenaut is attached as Exhibit W.

41. That the document attached hereto as Exhibit "X" is a true, correct and genuine copy of the Dissolution of Easement recorded February 13, 2008, dissolving the easement previously reserved by Coulston Enterprises, Inc. to go onto the Property to demolish and remove the Tower.

RESPONSE: It is admitted upon information and belief that a document which appears to be the public record of the Dissolution of Easement previously reserved by Coulston Enterprises, Inc. is attached as Exhibit X.

This 15 day of May, 2013.

JAMES, MCELROY & DIEHL, P.A.

By: Richard B. Fennell

Richard B. Fennell
S.C. Bar No. 10467
rfennell@jmdlaw.com
600 S. College Street
Charlotte, NC 28202
704-372-9870
704-333-5508 (facsimile)
Attorneys for Plaintiff

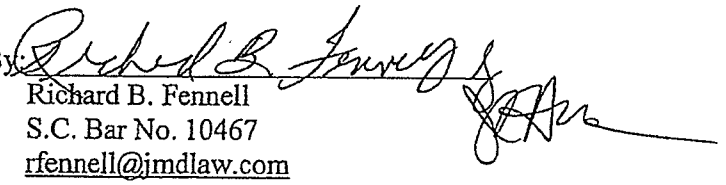
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS** has this date been delivered to COUNSEL for Defendant by facsimile, by electronic mail and by depositing a copy of same in the United States Mail, sufficient postage prepaid, addressed to him as follows:

Daniel J. Ballou
W. Keith Martens
Hamilton Martens Ballou & Carroll, LLC
P.O. Box 10940
Rock Hill, SC 29731

Michael K. Kendree
York County Attorney
P.O. Box 299
York, SC 29745

JAMES, MCELROY & DIEHL, P.A.

By: 

Richard B. Fennell
S.C. Bar No. 10467
rfennell@jmdlaw.com
600 S. College Street
Charlotte, NC 28202
704-372-9870
704-333-5508 (fax)
Attorneys for Plaintiff

This 15th day of May, 2013.

HERITAGE
TOWERS

Dear Willie Hargrave,
Community One Bank:

May 6th, 2009

This has been an incredible year for us as we continue to move forward here with the Heritage International Ministries Tower Project. As far as major milestones, our site plan is in the final round of the submittal process with York County and a Site Plan Issuance is imminent. We are mostly finished with all of our major professional fields, such as architecture, engineering, site engineering and others.

We have had a significant sales effort and today we have 109 paid reservations towards 189 total units available. Not only is the number of units exciting but we continue to increase the volume of reservations month by month as the months go by.

Our draw downs on our current note with Community One have been noticeably less than anticipated. As of to date we have only spent $470,363.37 out of $1,500,000, (approximately 1/3 of the total funds requested).

The reason for this has been two-fold:
One, our marketing plan changed significantly as the economic climate changed. Fortunately, we have retained the number one senior housing marketing firm in the country and their expertise and understanding of the impact of this current economic situation has had on our target has kept us on track. While our initial sales ramp-up was slower getting started than we had originally projected, paid reservations remain robust and new paid reservations are coming in every week.

Two, as you are aware, the Senior Housing Bond Market all but disappeared last fall. Only two significant senior housing bonds funded between Oct 2008 and March 2009. We have retained Raymond James as our bond agent and we will place our long term debt within one year.

At this time, we are requesting an extension of our funding contract for 1 year to allow us to finish our marketing, pre-sales, building design and execute long term financing. Our budget has not changed; this is simply a term adjustment. We expect to hold the same terms and conditions as was in our first contract and are looking forward to a confirmation of this in writing.

Sincerely,

Dave Yarnes
Project Manager
Heritage Towers Project
Heritage International Ministries

EXHIBIT
K

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

MORNINGSTAR FELLOWSHIP CHURCH,

PLAINTIFF,

-VS-

YORK COUNTY, SOUTH CAROLINA,

DEFENDANTS.

CA NO. 2013-CP-46-00246

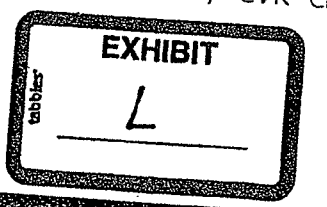
DEPOSITION OF DERRICK E. BOYTE

COLUMBIA, SOUTH CAROLINA

MARCH 20, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM



Stormwater Department; so, if there was stormwater questions, you know, she would've been there. But, like I say, I do not know specifically who was there that day.

Q Okay.

A I'd have to look at the comments.

Q Do you recall doing any work on the Morningstar Tower Project after that meeting with the County?

A No, sir, I don't.

Q And you testified you didn't know whether this was a fixed-fee contract or --

A I have not seen the contract.

Q And do you ever recall any discussions with anybody about being upside-down on this project or --

A At the very end, when we were attempting to get paid for the work, I was involved with -- Since I was the only one in the engineering department left from Charlotte, I did have some e-mail correspondence back and forth trying -- attempting to get paid the final invoices that we had billed.

Q And what were the issues y'all were dealing with, at that point in time, trying to get paid?

A What type of issues are you referring to?

Q What were the subject of the e-mails? I mean, what --

A It was just, you know, we have an outstanding invoice, you know, can we receive payment, and why have we not received payment.

Q Was there any reason given why payment hadn't been received?

A One e-mail was -- The only e-mail that I recall seeing was the fact that they had not received copies of the stamped plans from the County.

Q Okay. Was this before or after Gerald was let go?

A I don't recall the exact date of when this e-mail was.

Q If he was still with Power, he would've been copied on an e-mail like that; wouldn't he?

A Not necessarily. When it comes to billing and stuff like that, there was no need to have three or four people in the office dealing with it.

Q Do you ever recall talking with Gerald about the fact that Morningstar hadn't received a copy of the stamped plans?

A No, I do not.

Q What did you do, in response to that e-mail, when you were told that they hadn't received copies of stamped plans?

A As I recall, from the e-mail that I wrote back to them, that they would not receive stamped -- copies

of the stamped approved plans until the pre-con meeting was held.

Q Okay.

A And it had not been set up.

Q And so that wasn't a concern for you that they hadn't received the stamped plans.

A No, the plans, at that point -- My understanding was, at that point, the plans were approved. It's just the County does not give you copies of them until you have the pre-con.

Q Okay. Did it appear to you that Morningstar was using the fact that they hadn't received stamped plans as a reason not to pay Power, pay a bill?

A Well, that was their first response and they -- As I recall, they did pay, you know, once we had -- because, we did have -- I believe we would've received a letter from York County saying the plans are approved, which is not a copy of the plans themselves.

Q Would you have received that or would Gerald have received that?

A It would've come to the office and been filed.

Q Are you aware of such a letter existing?

A I have not personally laid eyes on it. I've been told that it exists.

Q Okay. Let me show you what's marked, well, let's see, Exhibit 19, that one with my notes on it. And this is the Accounts Receivable Ledger?
A (Indicating yes)
Q There are payments under this file for a variety of invoices, and I'll refer you to the first section where it says 62180.21 and there's a payment in April of 2009. Do you see that?
A Yes.
Q And then a payment November 2nd of 2009.
A Okay.
Q And then a payment on April 28th of -- Well, actually, let's go down a little bit -- made a payment on January 20th of 2010, and then a payment on April 28th of 2010. Do you see those?
A Yes, I do.
Q Do you know whether those payments were associated, in any way, with the conversation that you just described about Morningstar wanting a copy of the stamped plans?
A As I recall, they were; at least, the $1,000, the very last payment on 4/28.
Q So you think that conversation would've occurred as late as 4/28/2010?
A As I recall, it was January that I had that e-mail,

of that year; and 4/28 is when we actually received the --

Q Did you have any conversations with Pat Selvey or anybody else at Morningstar about when site plan approval was either going to be issued or had been issued?

A Other than the e-mail correspondence I had just mentioned, no.

Q And that would've been in January of 2010?

A I believe so.

Q Let's see, here. Let me show you what's been marked as Exhibit 14.

A Okay.

Q Have you ever seen this document before?

A My initials are at the top, so I probably -- it made it to my desk. But, as general rule, since I was the one full-time employee from Charlotte left, everything got copied to me, no matter where -- what project it involved.

Q There's a dash and a question mark. Do you know what that refers to?

A She was questioning who else needed a copy of it, at the time.

Q And this would be Jenni writing these notes?

A Yes.

Dan Ballou

From: Pat Selvey <patselvey@gmail.com>
Sent: Thursday, January 21, 2010 9:18 AM
To: Patricia Smith
Cc: Derrick E. Boyte; Jenni Cooper
Subject: Re: FW: Morningstar Fellowship Church open invoices

Derrick,

I desire to clear this matter up for you as soon as possible.
I will process your check this week and accounting should print it early next week.
I will need a signature from Power Eng to release the final payment. If you or a representative are not able to come to our office, I would be happy to email the release to you and you can sign and scan back to me and then I can mail the check.

Which do you prefer?

Pat

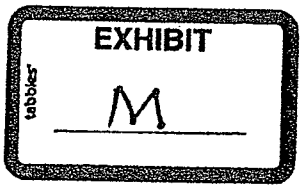
From: Derrick E. Boyte [dboyte@powereng.net]
Sent: Thursday, January 21, 2010 8:51 AM
To: Patricia Smith
Cc: Jenni Cooper
Subject: RE: Morningstar Fellowship Church open invoices

Patricia,
I do not understand why Pat thinks the project is not approved. I have attached copies of the approvals from York County and SCDHEC from November. The SCDHEC approval was the only thing we were waiting on and that was sent directly to Pat Selvey. As for copies of stamped approved plans, York county will not release those until a preconstruction meeting is held with your contractor. Hope this resolves the issue.

Please let me know if you have any other questions.

Derrick

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Wednesday, January 20, 2010 6:00 PM
To: Jenni Cooper
Cc: Derrick E. Boyte
Subject: RE: Morningstar Fellowship Church open invoices



Dear Jenni,

The contract that was signed says that MorningStar will receive notification from Power that our site plan has been approved by York County. Because we have not received this approval yet, my manager decided to hold back this $1,000.00. As soon as we hear from Power that our site plan has been approved, the contract will be

complete and my manager will release the last $1,000.

I emailed Derrick Boyte concerning this information, on behalf of my manager (Pat Selvey) on November 9, 2009.

If you have any other questions, please let me know.

Thanks,
Patricia

From: Jenni Cooper [mailto:jenni@powereng.net]
Sent: Wednesday, January 20, 2010 10:58 AM
To: Patricia Smith
Subject: RE: Morningstar Fellowship Church open invoices

Patricia,

We received a check in the mail today but the check was for $2,593.04, not the full amount outstanding of $3,593.04. There is a still an outstanding balance of $1,000.00 on Invoice #1416. Would you please look into this and find out when we should receive that outstanding amount. Please let me know if you need anything to get this payment made.

Thanks for your help tracking this payment down.

Jenni

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Monday, January 18, 2010 11:17
To: Jenni Cooper
Subject: RE: Morningstar Fellowship Church open invoices

Jenni,

I heard back from Accounting and they are going to put the check in the mail today (check number 90053). If you do not receive it by the end of the week, please let me know.

Have a good week,
Patricia

From: Jenni Cooper [mailto:jenni@powereng.net]
Sent: Thursday, January 14, 2010 3:31 PM
To: Patricia Smith
Subject: RE: Morningstar Fellowship Church open invoices

Patricia,

Thanks for the prompt response. If you could let me know when that is put in the mail I would appreciate it.

Thanks again,
Jenni

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Thursday, January 14, 2010 15:28
To: Jenni Cooper
Subject: RE: Morningstar Fellowship Church open invoices

Jenni,

Thanks for your email. I am sorry that this has not gotten in the mail yet. I was told by Accounting yesterday that they got behind over the holidays with cutting checks. They processed my request for a check to be sent to you several weeks ago, however did not create the check. They told me they plan to get this cut and mailed tomorrow. I can email you verification when this happens if you like.

If you have any questions, please give me a call, (803) 547-9615. If I can't help clarify, our Project Manager, Pat Selvey can help.

Thank you,
Patricia

From: Jenni Cooper [mailto:jenni@powereng.net]
Sent: Thursday, January 14, 2010 3:15 PM
To: Patricia Smith
Subject: RE: Morningstar Fellowship Church open invoices

Patricia,

As of today, 1/14/10, I still have not received payment on these outstanding invoices. Could you please check on that for me and let me know when to expect payment?

Thanks,
Jenni

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Monday, December 21, 2009 13:29
To: Jenni Cooper
Subject: RE: Morningstar Fellowship Church open invoices

Jenni,

Thanks for your email and invoices attached. I noticed that my records on how much MorningStar owed Power was not the same as what you sent me, so upon further investigation I found that we had not received the invoice number 0017721. I am going to adjust our amount and put in the paperwork soon for our Accounting to put a check in the mail.

If you have any questions, feel free to let me know.

Thank you and Merry Christmas,
Patricia

From: Jenni Cooper [mailto:jenni@powereng.net]
Sent: Wednesday, December 16, 2009 10:29 AM
To: Patricia Smith
Subject: Morningstar Fellowship Church open invoices

Patricia,

I have attached copies of the invoices you requested, as well as an Aged Accounts Receivable list which shows the total amount due and an Accounts Receivable Ledger which shows all billings and payments made for this project.

The original amount due for Invoice #0001416 was $2,398.00, but a payment was made and the outstanding balance on that invoice is $1,000.00. The full amount is due for Invoice #0017721 ($2,593.04). That brings the total due to complete payment on this project to $3,593.04.

Please let me know if you have any questions or need additional information.

Thank You,

Jenni Cooper

Power Engineering Company, Inc.

(803) 216-8777

621E
JTS
OR

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

November 25, 2009

RECEIVED

DEC 03 2009

POWER ENGINEERING CO., INC.

PAT SELVEY
MORNINGSTAR CHURCH
375 STARLIGHT DR
FORT MILL SC 29715

RE: HERITAGE TOWER PROJECT, **York County**; File number: 46-09-11-15

Dear Pat Selvey:

The Department of Health and Environmental Control (Department or DHEC) has received approval of and the Notice of Intent for the above-referenced project from **York County**. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project was granted coverage under the 2006 CGP on **November 25, 2009**. This project's general permit coverage number is **SCR10M044**. The total disturbed area for this site is **4.8 acres**. This NPDES coverage expires on **11/25/2014**, 5 years from the date of issuance.

The inspections for this site must be performed by qualified personnel who meets the requirements list in Section 3.10.D of the 2006 CGP. Qualified personnel must be one of the following:

1. SWPPP preparer
2. Person under direct supervision of SWPPP preparer
3. Person who has been certified through a Construction Site Inspector Certification Course that has been approved by DHEC (see our website for a list of approved courses)
4. Person with registration equivalent of SWPPP preparer
5. Person under direct supervision of person with registration equivalent to SWPPP preparer

Because this project is part of a larger common plan for development or sale (LCP), all applications for future land-disturbing activities that are part of this LCP (phases, outparcels, etc.) should include the above-referenced file number (46-09-11-15), NPDES coverage number (SCR10M044), and project name HERITAGE TOWER PROJECT.

An as-built survey(s), signed and sealed by a S.C. Licensed Land Surveyor or Professional Engineer, should be submitted to **York County** for all detention structure(s) on this site. The survey(s) should show grades, contours, and depths for all structure(s) and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/ or analysis must be accepted by **York County** before a Notice of Termination (NOT) can be submitted to the Department.

The 2006 CGP can be downloaded at the following website: http://www.scdhec.gov/environment/water/docs/finalcgp.pdf or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies with the approved SWPPP and the minimum requirements of the 2006 CGP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone number of the EQC office are as follows:

Lancaster EQC Office
2475 DHEC RD
LANCASTER SC 29720
803-285-7461

EXHIBIT

N

Gmail

dave yarnes <dyarnes@gmail.com>

Re: Tower update 6.10.2008

1 message

Pat Selvey <patselvey@gmail.com> **Thu, Jul 17, 2008 at 5:14 PM**
To: Buddy Motz <b.motz@relianceadm.com>, Buddy Motz <Buddy.motz@yorkcountygov.com>, Paul Lindemann <Paul.Lindemann@yorkcountygov.com>
Cc: "Britt, Susan" <Susan.Britt@yorkcountygov.com>, "Pettine, David" <David.Pettine@yorkcountygov.com>, dave yarnes <dyarnes@gmail.com>, Gary Sanderson <gws717@gmail.com>, Rick Joyner <rickjoy@aol.com>

To the York County Council and Staff

I have attached an update for your convenience showing where we are in our plan for the Heritage Tower Project.

Please keep this report confidential.

Thank you,

Pat Selvey

HERITAGE TOWERS 375 Star Light Dr. Fort Mill, SC 29715
patselvey@gmail.com (O) 803.547.9615 (F) 803.547.9667

State of the Tower Report 7.17.docx
17K

EXHIBIT
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O

THIS REPORT IS CONFIDENTIAL. IT MAY NOT BE SHARED OR COPIED WITHOUT WRITTEN PERMISSION FROM THE SENDER.
THIS REPORT INCLUDES FORWARD THINKING PLANS THAT ARE SUBJECT TO FLUCTUATIONS IN MARKET CONDITIONS.

State of the Tower Report - 7.17.2008

(A chronological order of expected events for the Heritage Tower Project)

Concept Plans TO Permittable Plans:

Structural engineering firm Stewart Engineering is 100% complete with the "Existing Conditions Survey". Core samples, X-rays and various site analyses have been completed and analyzed. Engineering plans can now be completed and readied for Permit application.

Critical Path:

Bond requirements and Due Diligence for permanent financing include establishing a Sales Office for Marketing & Presale activity. This is a requirement for the bond process, even though our clients are from our own constituency. We are in the process of hiring staff and establishing offices for presale presentations.

CURRENT APPLICATIONS:

Much of our efforts are now focused in two areas:

(1) Legal Contracts allowing us to properly collect 10% deposits and begin the Bond Requirement Process that ultimately results in 70% pre-sale as evidenced by 10% on deposit.
(2) A model unit that will be established offsite

Near Term Convertible Financing:

Private Issue Bond proposal for *Friends & Family* continues to be reviewed by a group of our backers & partners.
This instrument will likely prove to be a tremendous help with the lion share of construction debt.

*** The permitting process will begin here ***

Long Term Financing:

Out of 14 invitations, we still have **FIVE** institutions adjusting their terms to compete for our business.
Bergin Capital/BB&T has issued our first engagement letter.
Johnson Mortgage has issued our second engagement letter.
This competition process has the potential to save our ministry over $140,000 per month in interest.

Permit Process:

This following process has been approved by local and national officials:

- Permittable plans will be completed.
- The **Site Plan** will be submitted to YC and the **Construction Plans** will be submitted to ICC in Birmingham on the same day.
- These two plan review processes are estimated to take about 4 months.

Performance Bond:

We are in talks with Shelco and two other unnamed Commercial Contractors from Charlotte.
All of which will be able, along with us, to secure proper bonding for performance.
The firm that will assign the risk and issue the bond is in a "ready when you are" state.

THIS REPORT IS CONFIDENTIAL. IT MAY NOT BE SHARED OR COPIED WITHOUT WRITTEN PERMISSION FROM THE SENDER.
THIS REPORT INCLUDES FORWARD THINKING PLANS THAT ARE SUBJECT TO FLUCTUATIONS IN MARKET CONDITIONS.

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT 2013-CP-46-00246
MORNINGSTAR FELLOWSHIP CHURCH, **Plaintiff,** vs. YORK COUNTY, SOUTH CAROLINA, **Defendant.**	MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff MorningStar Fellowship church (MorningStar) responds to Defendant's Motion for Summary Judgment as follows:

I. STATEMENT OF THE CASE

MorningStar purchased the old PTL property in 2004. That property had multiple improvements and structures located on it, including a twenty-one (21) story building (the Tower). MorningStar's original intention was to tear the Tower down. The Tower was incomplete and had stood dormant for many years. MorningStar changed course after an investigation revealed the Tower to be structurally sound. MorningStar began exploring the market for multifamily, retirement style housing. The market seemed very strong and the idea fit a niche in the overall concept for the MorningStar property. It began to take the steps necessary to complete and redevelop the Tower into such a facility. Yarnes Affidavit, ¶¶ 4-5.

A detailed Development Agreement relating to the Tower was negotiated with the County over many months and executed in January, 2008. It contained a five (5) year time horizon, but also contained the following language:

> The Parties acknowledge that the market conditions may, and will likely, affect the pace and character of the Property. Therefore, the Parties agree that they shall take into account...any change in market conditions, demographics or similar matters when deliberating disputes or negotiating for future modifications to this Agreement made pursuant to this paragraph.

FILED-RECEIVED
2014 JUN 19 PM 2:49
DAVID HAMILTON
C.C.P.&G.S.
YORK COUNTY, SC

Both sides, then, anticipated delays and built their understanding into the Agreement. The project was complicated because of the length of time during which the Tower had simply stood there without any construction activity. Moving it forward was a mutually beneficial goal. Yarnes Affidavit, ¶¶ 7-10.

MorningStar kept working, however, and delivered a prelimanry site plan for the County's consideration in December, 2008. The economy had begun to teeter, and development nationwide came to a halt. MorningStar continued to try to get this site plan into final form throughout 2009. There appeared to be no problems between the parties. MorningStar continued to wait for formal notification that the site plan was approved, but simply assumed that the County was in a rush to begin actual construction. Yarnes Affidavit, ¶¶ 15-16.

Things changed in early 2010. Pat Selvey sent a progress update to the County on January 12, 2010. This sparked an internal email debate about the Tower among County representatives, and about MorningStar, in general. A portion of an email sent from Jim Baker to the entire council reads as follows:

> "I have no idea whether there is a realistic probability that MorningStar will complete this project. However, more than anything else, staff and I believe the Council should take a strong stance and give notice of default to MorningStar if they cannot provide the financial assurances that were promised in a Development Agreement they signed on April 28, 2008. Again, the intial stages of this process will not necessarily be public and will take substantial time. However, I wanted to give everyone some advance notice about this upcoming deadline because this project has been so prominent in the public's eye."

Britt email, January 22, 2010, County production p. 657.

The response from Buddy Motz reads as follows:

> "Thanks Jim. I see them as being made in the same mold as the old PTL, and just as scheming. They are only out to fleece the investors of the units and bilk them for every dime they can get. The County has delayed this for too long and I see no reason for us to allow them to continue further. It would not be accepted for other businesses and it should not be allowed for them."

Motz email, January 22, 2010, County production p. 656..

The County had begun contending a week earlier, for the first time, that site plan approval had been granted in August, 2009. Yarnes Affidavit, ¶ 19. This was critically important, because the Development Agreement contains the following language:

> Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contract 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.

The County demanded the bonds or alternative financial assurances be presented by the end of February. The parties to the email exchange knew their position was going to result in litigation, and appear to have recognized that what they were asking for could not be delivered. *See e.g.* Britt email, January 22, 2010, County production pp. 660-661. A commercial site plan is a set of drawings that disclose information relating to infrastructure, landscaping, traffic flow, parking and the location of the anticipated improvements. Yarnes Affidavit, ¶ 14. It is a necessary first step in getting accurate pricing for any development. Selvey Affidavit, ¶¶ 5-8. MorningStar had not received any communication from the County about the site plan for many months. Yarnes Affidavit, ¶¶ 16-18. The Development Agreement contemplates the negotiation and execution of a "Non-Reimbursable Extension Agreement" connected to utilities on the site prior to site plan approval. This had never even been discussed. Yarnes Affidavit, ¶¶ 16-18. MorningStar was not in a position, then, to get definitive bid information. Without accurate pricing, it is impossible to supply the necessary information to purchase performance bonds. Selvey Affidavit, ¶¶ 8-10. There was simply no way to scramble and comply with the County's demands. Yarnes Affidavit, ¶ 22.

MorningStar's representatives met with County representatives on February 4, 2010. They attempted to explain the predicament MorningStar was being placed in, but were met with a response consistent with the Motz email. They were accused of not having the ability to complete the project, and of taking people's money improperly. Selvey Affidavit, ¶ 11. Yarnes Affidavit, ¶¶ 23-24. David Yarnes sent a letter on

February 17, 2010 setting out the problems with the notice issue, but there was changing the County's position. Yarnes Affidavit, ¶¶ 25-26.

A formal notice of default was sent on March 5, 2010. The news was picked up in the media. The results were dramatic, and devastating. Reservations were cancelled, and the project came to a stop. MorningStar continued and continues to try to move the Tower project forward, but has not been able to. It has attempted to provide all information the County has requested, but it has been apparent that demolition is the only acceptance option. This litigation is the result of that reality. Yarnes Affidavit, ¶ 28.

II. ANALYSIS

A. MorningStar Never Received Notice that Its Site Plan was Approved.

This case centers in large measure around whether the Development Agreement required MorningStar to produce the bonds or other evidence of financial ability to complete the Tower described in Section IV(C) of the Development Agreement prior to York County's Default Notice dated March 5, 2010. This Notice was picked up by the media, which announced to the world that the Agreement contained just such a requirement, and that MorningStar failed to comply. The County based its position on a claim that the 180 day deadline to provide that information was triggered on ether August 18 or August 24, 2009, with approval of MorningStar's site plan. It points to two documents attached to its memorandum as Exhibits G and H as evidence of that fact. MorningStar contends that it had no idea that the clock had started, or that the site plan had been approved prior to January. It had not done any of the work necessary to secure the bonds because of that fact, and was not able to comply in the short time provided by the County.

There is no evidence that the County ever told anyone at MorningStar that the site plan had been approved. The documents cited to as evidence of site plan approval were not sent to MorningStar. Exhibit G was in the MorningStar files (as evidenced by its bates number), but it shows that it was printed by the County on February 4, 2010, rather than August 24, 2009. It was given to MorningStar's representatives at the February 4 meeting described. Exhibit H is dated August 24, 2009, but is date stamped as received on November 23, 2009 by Power Engineering. Neither can be credibly claimed to evidence site plan approval. Exhibit H is entitled "Notice of Approval," but refers only

to stormwater issues. Exhibit G is more specific, but is merely a status update on different aspects of the development. It references the site plan in multiple places, and makes it plain that the site plan is an independent document. MorningStar was waiting on the final approved version of that plan in order to get definite bids for the project. Even though the site plan process was prolonged, MorningStar did not have reason to suspect that the plan had been approved. Section VII., ¶ A. of the Agreement states that "[p]rior to site plan approval, Developer shall sign the County's non-reimbursable extension agreement" providing for relocation and extension of water and sewer lines. Section VII., ¶ C. reiterates this requirement. The non-reimbursable extension agreement was not provided to MorningStar for its review and was never executed by MorningStar. This was an important part of site plan approval and a proper analysis of construction costs. MorningStar did not consider the project to be in jeopardy at that point, though. It simply believed that the County was in no real rush to get started.

The County's claim that it communicated with Power Engineering clearly about these matters doesn't hold up. Gerald Lee and Jack Boyte of Power Engineering were both deposed, and had trouble remembering much of substance. Mr. Lee testified about the problems Power Engineering had on the job, and its economic difficulties. Gerald dep. pp. 85-88. He was candid about his inability to remember dates. He claims to have actually left prior to August 18, 2009, and his timesheet entries stop after July 7, 2009. Gerald Lee dep. pp. 85-88. He continued to work through the issues raised by the County prior to his departure, and dealt with comments from different County departments along the way. He believes that Power engineering had done everything it was required to do, but remembered expecting a formal notice of acceptance of the site plan from York County that never came:

Q. I show Exhibit 14. Can you identify this document?

A. It's a letter from Billy Payne to me.

Q. Saying what?

A. And it's saying --- basically, saying it's been approved by stormwater.

Q. And that's all you were waiting for at that point?

A. No, this is just stormwater approval.

Q. What else needed to be approved by York County as of this date?

A. I would imagine York County Planning would issue an approval, if everything --- if everybody --- if all the departments had signed off on it.

Q. And so the documents that we saw previously telling Power engineering that everything they've asked for had been accomplished ---

A. Right.

Q. Would be enough

Mr. Fennell: Objection.

By Mr. Ballou

Q. --- in your opinion, is that right?

Mr. Fennell: Objection

A. Typically, you would get something from the County, not the department, when the project is finally approved.

Derrick Boyte testified similarly:

Q. Okay. Did it appear to you that MorningStar was using the fact that they hadn't received stamped plans as a reason not to pay Power, pay a bill?

A. Well, that was their first response and they --- As I recall, they did pay, you know once we had --- because we did have --- I believe we would've received a letter from York County saying the plans are approved, which is not a copy of the plans themselves.

Q. Would you have received that or would Gerald have received that?

A. It would've come to the office and been filed.

Q. Are you aware of such a letter existing?

A. I have not personally laid eyes on it. I've been told that it exists.

Boyte Dep. p. 28.

That "something from the County" never came, and hasn't been produced by the County. It was never generated. Mr. Lee also had no explanation for Exhibit H not being received until three (3) months after it is dated. Gerald Lee Dep. pp. 89-91. There is simply no evidence that would show, as a matter of law, that MorningStar knew that the 180 day period had started until January 13, 2014, when the County first raised its claim to Pat Selvey.

The parties attempted to deal with this notice issue in the Development Agreement. It requires that notices be delivered in a very specific manner to each party. Clarity on this point was important to MorningStar, given its size and the number of people working on the Tower project. Any notice to MorningStar is required to be delivered by certified mail addressed as follows:

> Rick Joyner
> President, MorningStar Fellowship Church
> 375 Starlight Drive
> Fort Mill, SC 29715

South Carolina recognizes the importance of complying with agreed to notice provisions in contracts. Hammond v. Tilghman Lakes, 295 SC 152, 153, 367 SE2d 446, 447 (Ct. App. 1988). There is no evidence of actual notice in this case, and MorningStar has presented evidence to show the prejudice resulting from the County's failure to comply. It enabled the County to create a claimed breach, where none would have existed, and move the Tower project inexorably towards failure and demolition. This is not a new position for MorningStar. David Yarnes spelled out the problems and issues raised in the complaint as early as February 17, 2010 and asked the County to work with MoningStar to resolve them and get the project moving to where it could be bonded. Yarnes Affidavit, ¶ 25. The County instead chose to view the notice problem as a pressure point, and a way to shut the project down.

B. **York County's Conduct Amounts to a Breach of Contract.**

This dispute resolution provisions of the Development Agreement are set forth in Section 10. As stated, MorningStar warned the County of the impact of any claimed default related to the site plan on the project as a whole. Its warnings have been borne

out over the course of time. Site plan approval was a watershed moment. If the County truly felt that the 180 day clock had started, it should have notified MorningStar pursuant to the Notice provisions of the contract. Failure to do so was a breach, and precludes the County from asserting a breach claim of its own. Swinton Creek Nursey v. Edisto Farm Credit, 334 S.C. 469, 487, 514 SE2d 126, 135 (S.C. 1999).

C. **The County is Not Entitled to Pursue Remedies Related to the Breaches It Claims**

The County's counterclaims all have at their foundation a claim that MorningStar has breached Section IV(c) of the Development Agreement. It has moved for summary judgment on its declaratory judgment and breach of contract claims. As stated, MorningStar contends that questions of fact remain regarding whether it had notice that the 180 day time period referenced in that Section began to run. There is no question of fact, however, as to whether the County complied with the Development Agreement's Dispute Resolution provisions prior to asserting these claims. In particular, Section (c) states:

> If the mediation results in a finding that Developer has materially breached this Agreement, Developer shall have a reasonable period of time, but not exceed 60 days to cure the material breach. In the event the Developer is inable to cure the breach within a reasonable time, then Cuonty may terminate this Agreement unless Developer shall consent to modify the terms hereof in order to meet the concerns of County with respect to the findings and determinations of the mediator(s) as set forth above...
>
> In the event that the Developer is unable or unwilling to cure the breach with a reasonable time, and the County elects not to terminate this Agreement, the County shall be entitled to such remedy or remedies of injunction and or specific performance or judicial modification of this Agreement consistent with the findings resulting from mediation.

There is no evidence that the mediator ever made a finding that MorningStar was in default, or that MorningStar was ever given the steps it was required to take in order to cure it. The County's remedies (if any) with respect to the tower, then, must come from a source independent of the Development Agreement.

III. CONCLUSION

Defendant's motion should be denied for the reasons stated.

JAMES, MCELROY & DIEHL, P.A.

By: _____

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This the 19 of June, 2104.

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

MORNINGSTAR FELLOWSHIP CHURCH,

PLAINTIFF,

-VS-

YORK COUNTY, SOUTH CAROLINA,

DEFENDANTS.

CA No. 2013-CP-46-00246

DEPOSITION OF GERALD A. LEE

COLUMBIA, SOUTH CAROLINA

MARCH 20, 2014

COPY

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

after a certain period of time, we'd have to call the County and say, what's going on?

Q And that didn't happen in this case.

A No. Not to my knowledge, no.

MR. BALLOU: That's all I've got. Thank you.

THE WITNESS: All right.

MR. BALLOU: Counsel may have questions for you.

MR. FENNELL: I do.

E X A M I N A T I O N - (By Mr. Fennell)

Q Mr. Lee, I'm Rich Fennell. I represent Morningstar.

A All right.

Q Let's begin with the notion that you were a hundred percent complete, I think you testified, as of March 31st, 2009. Do you remember that?

A Yes.

Q Can you get Exhibit 17 in front of you?

A All right.

Q And I believe you followed up by saying that the work that you did after that wasn't important or wasn't significant?

A All right.

Q Can you count the hours with me that you spent performing work after March 31st, 2009?

A Zero.
Q Sir?
A Zero.
Q No, after --
A Oh, March.
Q Yes, sir, after March 31st, 2009. I've got, on the first sheet, seven and a half.
A Yeah, three and a half, five, three, five, three and a half, three, three, five, four, three, three, two and a half, six, three and a half, three.
Q And I added that up to be about 57 hours.
A All right.
Q Has it still be significant after March 31st, 2009, in your mind?
A We thought we were done.
Q Okay. But you performed 57 more hours of work after --
A Yes.
Q -- you thought you were done?
A Yes.
Q Can you explain that? Why you had to perform 57 extra hours --
A There were --
Q Hold on a minute.
A All right.

Q Why you had to perform 57 hours of work after you were done?
A Various review comments that we were receiving back from York County.
Q And was this a contract on a time-and-materials basis, or was it a flat fee?
A It was a lump-sum.
Q Okay. And, as of March 31st, 2009, had you drawn down the entire fee?
A I wouldn't be privy to that, but I'm sure we had expended everything.
Q Yes, sir. So, as of March 31st, 2009, you knew, from that point going forward, you weren't going to get paid, right?
A Right.
Q So all --
A Without a change order, right.
Q Yes, sir. So all the work that you did after that, you were just going to have to -- basically, you were just going to have to eat.
A Right.
Q And you would agree with me, would you not, that Power Engineering was in financial difficulty, at the time?
A Times were slow, yes.

Q For Power Engineering and a lot of other people, right?
A Yes.
Q So having to perform 57 hours of work without getting paid was a bit of an irritant; was --
A Right.
Q -- it not?
A Right.
Q And are you certain that you were done as of July 7, 2009, when you say that all your time was recorded?
A Yes.
Q So any document that you've seen that indicates that you did work after July 7, 2009, that would be a mistake?
A Right.
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q Can you look through these time sheets and see if you can find anybody performing work after July 7, 2009, on behalf of Power Engineering?
A Possibly could've.
Q Well, just look through the documents and see if you can find something.
A Derrick Boyte had time.

Q Yes, sir, that's on page six?
A Yes.
Q Look through the rest of it and see if you see anything else.
A No.
Q All right. Now, Mr. Boyte indicates that he met with the client to discuss County roadway comments twice. Do you see that?
A Yes.
Q And then he met with the County on September 3rd, 2009. Do you see that?
A Yes.
Q And that would be after August 24th, when, supposedly, the County had issued site plan approval?
A Right.
Q Now, can you put Exhibit 14 in front of you, please?
A All right.
Q You mentioned, in your testimony, something that jumps out at me, which is the date of -- the Notice says October 24, 2009.
A Right.
Q And then it's marked as being received November 23rd, 2009?

A Right.
Q Can you remember of another instance in your dealings with the County in which a document that was sent to you came three months after it was dated?
A No.
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q And you never saw this document before this deposition; did you?
A No.
Q So, when you testified earlier that, you know, based on the documents that you've seen that showed notice of approval, you didn't know those documents existed until you walked in this room; did you?
MR. BALLOU: Objection.
BY THE WITNESS:
A Right.
Q So, when you said that you -- You know, your testimony is that there was a notice of approval or site plan approval, that's based on something that you understand as of now, right?
MR. BALLOU: Object to the form.
BY THE WITNESS:
A As of when I went and signed those drawings for

Billy Payne.
Q Sir?
A When I went and met with Billy Payne and put those notes on the drawing, that was my understanding that the plans were approved.
Q But your understanding as to having received notice from the County, you didn't know that --
A No. No, I --
Q -- until today.
A Derrick may've told me -- called me up and told me; but, no, --
Q Okay.
A -- I don't recall, you know. Like, you know, these dates are just blowing my mind, because I was not working here then.
Q Okay. Now, regardless of the dates, whether it said today or five years ago, you've never seen this document before; have you?
A Not that I can recall.
Q And, in your testimony, you were talking about -- when these documents were being shown to you -- Well, until we get the official approval letter. Do you remember that?
A Right.
Q What were you talking about when you testified

about until we get the official approval letter?
A Normally, when we go through this process locally here with Richland County, we'll get individual department approvals. But it's not officially approved until we get a letter from Richland County Planning and Development --
Q Okay. And --
A -- that says the project has met all the requirements and is approved.
Q All right. And until today, you were expecting to see some form of official approval letter --
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q -- from the County, that you never saw, right?
A I -- This letter right here says we got stormwater approval.
Q Yes, sir.
A It does not say we have official approval.
Q Yes, sir. But, if you can take yourself back into real time, you were expecting to get an official approval letter from York County --
A Yes.
MR. BALLOU: Object to the form.
BY MR. FENNELL:
Q -- similar to your experience with Richland County.

A Yes. Yes.
Q And was this the first project that you had worked on with the York County officials?
A Yes.
Q I know you've tried really hard to be honest with us, and we both appreciate that. But, is it fair to say that much of your testimony today has been best guess?
MR. BALLOU: Object to the form.
BY THE WITNESS:
A The dates are sketchy. It has been a long time.
Q In particular, the first six exhibits that you saw, when you were asked to interpret those exhibits -- or rather, 2 through 6 -- if you'd get those in front of you, and then tell me whether you'd ever seen those documents before you --
A Yes.
Q -- came in this room?
A Well, 2, no.
Q But you testified and you interpreted that document based on your best guesses, right?
A Right.
Q And how about 3?
A These were -- When I got up there, they were preparing these documents to go out until, you

know, Joe signed them.
Q So, again, when you were asked to interpret those documents, you were doing the best you could, and it's --
A Right, just based on --
Q -- just a best guess.
A -- you know, this is our standard transmittal letter.
Q Yes, sir. And then, based on standards in your work history, when you transmit something to a client, do you keep a formal record of that?
A Yes, the copy's supposed to go in the file.
Q All right. So, if you transmitted any of the documents that you were shown after Exhibit 6 to your client, there should be a notice of transmittal from you to the client?
A Either that or an e-mail that says we've sent this. I can't recall whether we actually physically sent a letter.
Q Completely understand. But I'm just trying to find out your normal course of doing things.
A Right.
Q Do you keep written evidence of I sent this to the client on that date?
A We try to, yes.

Q No, I'm talking about you, in particular.
A I do, yes.
Q Okay. So if that's not in the files, that either means it didn't exist or somebody else lost it.
A Possible, yes.
Q Okay.
A Or it was just an e-mail note.
Q All right. Now, do you recall sending any e-mails or written correspondence to anyone at Morningstar regarding your meeting with Billy in the middle of August?
A I don't recall.
Q Do you recall that meeting being of sufficient importance that you would expect that there would be some written documentation of your communication with Morningstar about it?
A It would've been significantly important, yes.
Q Okay. So, if you thought it was important, at the time, you would've either sent an e-mail or written a letter?
A Or called them and told them we were done.
Q But, if you called them -- and I'm not fussing at you about them. I'm --
A Right.
Q -- just trying to find out, you know, the way you

do stuff. If you called them, would you write notes and say, today I called --

A No.

Q -- Pat Selvey and told them about my meeting with ---

A No, I don't keep a phone log.

Q Got you. If Dave Yarnes walked in the room, could you identify him?

A No.

Q Did you ever communicate by e-mail with him?

A I don't recall.

Q How about with --

A That was mainly through Pat Selvey.

Q Yes, sir. And how about Rick Joyner; would you recognize him, if you saw him?

A No.

Q Ever hear his name before I just mentioned it?

A No.

Q And I believe that Dan covered this, but you're not purporting to be familiar with the terms of the agreement between our clients as to how notices are supposed to be transmitted?

A No.

MR. FENNELL: All right. That's all I have.

MR. BALLOU: Couple of clean-up.

EXAMINATION - (By Mr. Ballou)

Q On Exhibit 14, this Notice of Approval, at the time that was issued August 24th, 2009, at least, if we look at the documents -- the notes from the -- the comment notes, this was the only thing that was outstanding, correct?

A Yes. To my knowledge, yes.

Q And so, even though this is specific to the stormwater, you weren't expecting anything else.

A Right.

Q Because you've been approved.

A Right.

Q And you're not aware of any requirement that there be anything -- a Notice of Approval, a written Notice of Approval like this; are you?

A No.

Q That was just based on your experience with Richland County.

A Right.

Q Okay. Your involvement, reflected by the billing records, shows that on December 1st, two-and-a-half hours review; the 3rd, three hours review; the 4th, three hours review; the 8th, two-and-a-half hours review and sign construction drawings.

A Yeah.

Q Is it your testimony that the documents that were included in Exhibit 2, that were the initial submittal -- going back to the beginning of the submittal process?
A I recall the documents that went with that, but I don't recall that particular document.
Q Okay. So you don't recall the transmittal letter.
A No.
Q But all the other documents that were transmitted --
A Yeah.
Q -- was what you were doing; wasn't it?
A Yes.

MR. BALLOU: Okay. Thank you. That's all I've got.

E X A M I N A T I O N - (By Mr. Fennell)

Q But, Mr. Lee, you don't know that.
A Huh?
Q All you know is what that transmittal letter says, right?
A Well, the application's in there. It's got my -- Someone typed my name in there, so I was working on the project, at the time.
Q Yes, sir, I understand.
A But I did not sign that application yet, so --

Q And the transmittal letter, you just saw today for the first time.
A Huh?
Q And the transmittal letter, you just saw today for the first time; yes?
A Right. I don't recall that letter. Joe probably just put all that together and sent it out.
Q And Exhibit 14 -- I'm getting a bit redundant. But Exhibit 14 that was just handed to you again --
A Yeah.
Q -- you never saw that until today; did you?
A That's that thing? No.
Q Okay.
A I don't recall seeing that.
Q You don't recall it, or have you ever seen it?
A I don't recall seeing it.
Q Because it was issued after you left --
A After I was terminated, yes.
Q And it talks about you doing things after you stopped doing work. It says that you did things, --
A The dates --
Q -- but that you didn't do them, right?
MR. BALLOU: Object to the form.
BY THE WITNESS:

A There's something screwy with the dates on that letter.
Q I think we'd all agree with that.
MR. FENNELL: No further questions.
MR. BALLOU: One more clean-up.
E X A M I N A T I O N - (By Mr. Ballou)
Q On Exhibit 2, if you'd flip about seven or eight pages in, there is the NOI.
A (Indicating yes)
Q You've found that?
A Yeah.
Q And, on page two of the NOI -- and this is signed by Pat Selvey on 12/2/08 around the time that you started working on this project, --
A Yeah.
Q -- who's indicated as the SWPPP preparer?
A That's me.
Q That's you. You're the -- under Operator Information. So you were, in fact, involved in the draft and preparation of documents that were included. And so the only document in Exhibit 2 that you have not seen, prior to today, is the cover letter itself.
A Right.
MR. BALLOU: All right. That's it.

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 **Motion for Reconsideration**

FILED-RECEIVED
2014 JUL 29 PM 2:59
DANIEL E. HAMILTON
C.C.P. & G.S.
YORK COUNTY, S.C.

Pursuant to Rule 59(e) S.C. R. Civ. P., York County (the "County") moves for reconsideration of the Order For Partial Summary Judgment ("Order") in this matter, which was filed on July 17, 2014. Counsel received notice of the entry of the Order on July 16, 2014, and filed this motion within ten (10) days thereafter. The County respectfully submits that the Special Circuit Judge misapprehended or misapplied the undisputed facts and governing law in his Order. Plaintiff requests that the Court reconsider its Order in view of the following:

1. In denying the County's motion for summary judgment as to Morningstar's breach of contract claim, the court overlooked the fact that Morningstar's agent had notice of site plan approval by August 24, 2009.

As the court recognized in its order, "the foundation of Morningstar's claim [for breach of contract] is that the County did not give Morningstar notice of the approval of the site plan for the project." Order at 5. While the court properly concluded that the parties' Agreement did not require that notice of site plan approval be given in any particular form, the court found that a question of fact exists concerning the "reasonable sufficiency" of the notice that the County did provide. In so ruling, the court created a question of fact where none exists, and overlooked the fact that Morningstar's agent had actual knowledge of site plan approval by August 24, 2009.

In its order, the court properly found that Power Engineering was Morningstar's agent for purposes of obtaining site plan approval from the County; that Power had received documents indicating the County approved Morningstar's site plan; and that the County considered the site plan to be approved on August 24, 2009. Order at 6. Overlooked by the court is the uncontroverted evidence that Power had *actual* notice of site plan approval by August 24, 2009. Indeed, Gerald Lee, of Power Engineering, testified that by August 24, 2009 he knew Morningstar's site plan had been approved by the County. Lee Depo. at 97. Given this testimony, there can be no question regarding the "sufficiency" of the County's notice – the person responsible for obtaining site plan approval on behalf of Morningstar actually knew that approval had been granted. In denying the County's motion for summary judgment, the trial court overlooked this critical piece of evidence.

2. The trial court's order does not recognize that Power's knowledge of site plan approval is imputable to Morningstar as a matter of law.

Even though the court recognized that Power was Morningstar's agent, in denying the County's motion for summary judgment, the court failed to consider that Power's knowledge of site plan approval was imputable to Morningstar as a matter of law. Under South Carolina law, knowledge obtained by agent during a transaction pertaining to a matter within the scope of agency is imputable to the principal. Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 497-98 (1979)(citing Am.Jur.2d, Agency, § 273, et seq.; 3 C.J.S. Agency 498 § 432, et seq.). Furthermore, a principal is deemed to have constructive knowledge of all material facts its agent obtains while acting within the scope of its agency. Id.; *see also* American Freehold Land Mortgage Co. v. Felder, 44 S.C. 478, 22 S.E. 598 (1895); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1943)). This rule is based on the

agent's duty to communicate all material information to the principal and the presumption that the agent has done so. 23 S.C. Jur. Agency § 94.

Because Morningstar's agent had actual knowledge of site plan approval by August 24, 2009, Morningstar also had knowledge of approval. The court's order fails to consider that Morningstar was bound by its agent's knowledge. *See* Dorman v. Campbell, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998)(home purchasers charged with notice of information contained in letter sent to their attorney; fact that home purchasers did not actually receive letter was "irrelevant, for knowledge of the information in [the] letter was imputed [to purchasers] through their agent.").

3. The court's order erroneously concludes that the sufficiency of the County's notice of site plan approval is a question of fact to be resolved by a fact finder.

In denying the County's motion for summary judgment, the Court concluded that an issue of fact exists as to whether the County's notice of site plan approval, as communicated to Morningstar's agent, was reasonably sufficient. Order at 6. However, since the facts surrounding notice by the County are undisputed, the sufficiency of such notice appears to be a question of law, and not a question of fact. Bower v. National Gen'l. Ins. Co., 342 S.C. 315, 318, 536 S.E.2d 693, 695 (Ct. App. 2000)(sufficiency of offer of UIM coverage is question of law to be decided by court); Thompson v. Bank of SC, 21 S.C.L. 77, 83 (Ct. App. L. 1838)(sufficiency of notice of dishonor is question of law); *see also* Benton v. Mut. of Omaha Ins. Co., 500 N.W.2d 158, 160 (Minn. Ct. App. 1993) ("courts consistently have held that the factfinder determines whether notice was given, but the courts determine as a question of law whether a written notice was adequate").

At trial, the evidence from Power will be the same as set forth in Gerald Lee's deposition: that based upon the personal meeting between Gerald Lee and Billy Payne on August 18, 2009

and the receipt of the Notice of Approval from Billy Payne on August 24, 2009, Lee understood that Morningstar's site plan was approved. There is no factual question whether the County gave notice of site plan approval to Morningstar's agent. The only remaining question is a question of law, and as a matter of law this court should conclude that the County's notice of site plan approval was sufficient to trigger Morningstar's performance obligations under the Agreement.

4. The court should have granted summary judgment as to Morningstar's claim for breach of contract, because there is no evidence that the County failed to grant approval of Morningstar's site plan or that the County failed to notify Morningstar's agent of site plan approval. Consequently, as a matter of law, the County could not have breached the parties' Agreement and the court should have granted summary judgment as to Morningstar's second cause of action.

Morningstar and York County allege distinct, and competing, claims against one another for breach of the Development Agreement. Morningstar asserts that York County breached by declaring default on March 5, 2010, while the County contends that Morningstar breached by failing to provide bonding information within 180 days following the County's approval of Morningstar's commercial site plan. The remedy sought by the County is the demolition of the Tower at Morningstar's expense, while the remedy sought by Morningstar is a judgment for money damages.

Morningstar's alleged breach of the parties' Agreement (and the County's alleged right to enforce the Agreement) hinges upon whether, and when, Morningstar had notice that it was "on the clock" to provide bonding information for its proposed project. If, as Morningstar contends, the County did not provide "sufficient" notice of site plan approval more than 180 days before the County declared Morningstar in default of the Agreement, then Morningstar has a defense to the County's counterclaim for breach of contract. However, those same facts do not give Morningstar an affirmative claim for breach of contract against the County.

At its core, and with respect to this litigation, the Agreement required the County to perform two acts: (a) approve or disapprove Morningstar's site plan; and (b) communicate the County's approval or disapproval of the site plan to Morningstar.[1] It is undisputed that the County performed each of those acts. The County's contractual performance or alleged breach does not turn on the "sufficiency" of its communication with Morningstar's agent – only its right to enforce the Agreement (or to hold Morningstar in breach) is determined by the "sufficiency" of that communication. If, as Morningstar alleges, the County did not provide sufficient notice to place Morningstar "on the clock" to provide bonding information, at worst, the County may not have the present right to require demolition of the Tower.

It does not, however, follow that the County breached the parties' Agreement by declaring Morningstar in default. As the Court noted at oral argument, viewing the evidence in the light most favorable to Morningstar, at best the County's declaration of default was an error, an erroneous notice, and not a breach. In fact, to preserve its rights and remedies under the Development Agreement, the County was required to provide notice of default, which then triggered the extended and contractually-agreed upon mediation process under the Agreement. For Morningstar to contend that the County became liable for damages simply by preserving its contractual rights and declaring default ignores the clear intent of the Agreement. Even if a question of fact exists as to whether the County may require demolition of the Tower, Morningstar's claim for breach of contract and money damages should be dismissed as a matter of law. Morningstar has not presented any evidence that the County breached its duties under the Agreement.

[1] The court held that the duty to communicate approval was an implied term of the parties' Agreement. Order at 6.

This motion for reconsideration will be based upon the appropriate statutory and case law, the South Carolina Rules of Civil Procedure, and the record of the case. Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P. that he had no duty to consult with opposing counsel prior to filing this motion.

July 28, 2014

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Michael K. Kendree
YORK COUNTY ATTORNEY
P.O. Box 299
York, South Carolina 29745

ATTORNEYS FOR THE DEFENDANT

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 **Motion to Exclude Damages**

FILED-RECEIVED
2016 SEP 15 PM 1:50
DAVID HAMILTON
C.C.P.&G.S.
YORK COUNTY, SC

York County (the "County") respectfully moves an order excluding certain damages alleged to have been sustained by Plaintiff Morningstar Fellowship Church ("Morningstar") on the grounds that such claimed damages are not recoverable as a matter of law. In support of its Motion the County asserts a follows:

FACTS

Morningstar claims it has sustained damages resulting from the County's alleged breach of the Development Agreement by failing to give it notice by certified or regular mail of the approval of the site plan for the project, and by declaring default when Morningstar failed to provide required financial information within 180 days after approval of its site plan. The County has conducted extensive discovery in this case, including serving standard interrogatories. The County's Interrogatory No. 3, and Morningstar's response state 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"

A true and correct copy of Morningstar's Answers to Interrogatory No 3 is attached hereto as Exhibit "A" and incorporated by reference for all purposes.

On February 18, 2014, Morningstar served Plaintiff's Designation Regarding Experts, identifying several potential witnesses who are "expected to offer testimony which will be a hybrid of expert and fact witness evidence," including witnesses offered to testify as to the value of the Tower building, "the feasibility and anticipated economic performance of the tower project," an appraisal of the Tower, Morningstar's financial ability to complete the project, and the scope and cost of the project. A true and correct copy of Morningstar's Designation Regarding Experts is attached hereto as Exhibit "B" and incorporated by reference for all purposes.

ARGUMENT

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

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

The first component of damages described in Response 3 above, the "Loss of the Value of Tower," would only be recoverable if the County wrongfully caused the demolition of the Tower, and such damages were proximately caused by the County's actions. No matter what evidence Morningstar proposes to introduce, it cannot recover damages for "loss" of the Tower if

it has not in fact lost the Tower. While the County indisputably seeks to have the Tower demolished pursuant to the language of Section IV.C.2 of the Development Agreement, no action has been taken of any kind to do so. The County has specifically not pursued any efforts to demolish the Tower during the pendency of this case, and could only pursue demolition if it prevails at trial on its counterclaims against Morningstar. Until such time, Morningstar cannot show any "loss" whatsoever to support an award of damages. Likewise, if the County prevails, the loss of the Tower would be proximately caused by the findings of this Court, not by any actionable conduct by the County.

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." Consequently, Morningstar cannot establish any amount of damages resulting from "Loss of the Value of Tower," asserted in Response 3(a), and that component of damages should be excluded at 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." Response 3(b). Again, the only reason Morningstar could ever be entitled to an award of such damages would be if the

County had demolished the Tower, or taken other action depriving Morningstar of the benefit of its development costs. On the contrary, Morningstar has presumably incurred engineering, marketing, architectural, legal and development costs in the effort to restore the Tower, and nothing the County has done has diminished whatever value those costs and expenses may have had to the project. Morningstar argues that these costs are somehow an element of damages, when they were simply a component of the costs and expenses it assumed in its attempt to restore the Tower. Nor has any action by the County resulted in any additional cost to Morningstar, since its own engineer, Christopher R. Herron, P.E. stated on February 18, 2014, that "we do not believe the repair cost would have increased significantly since 2008 since most of the items that have increased damages were planned on being repaired or replaced in the original design."

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

Having produced over 18,000 pages of documents in discovery in this case, Morningstar has produced 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 damages, but any assertion that the 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, that it contends constitutes an amount of lost income over the next 5 years on a project that was not complete and has no funding in place. No back up for this 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. Moreover, many of the "Priority Reservation Applications" Morningstar claims were refunded because of the County's alleged breach occurred before the County declared default. *See* Morningstar's Response to Defendant's Interrogatories No. 11 and 12, attached hereto.

CONCLUSION

Morningstar simply cannot prove any damages resulting from any action by the County in this case, and the evidence it contends supports these claims should be excluded as a matter of law. The undersigned certifies that he attempted to resolve this motion with counsel prior to filing, but was unsuccessful.

September 12 2014

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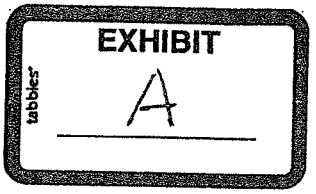
ATTORNEYS FOR THE DEFENDANT



STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	2013-CP-46-00246
MORNINGSTAR FELLOWSHIP CHURCH,	
Plaintiff,	PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST SET OF INTERROGATORIES
vs.	
YORK COUNTY, SOUTH CAROLINA,	
Defendants.	

Plaintiff objects and responds to Defendant's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they purport to require the disclosure of information or documents which are protected by the attorney-client privilege or work product doctrine. Any document produced which would otherwise be privileged is not a waiver of any remaining privilege or protection from discovery.

2. Plaintiff objects to these discovery requests to the extent that they purport to expand the requirements of the South Carolina Rules of Civil Procedure.

3. All documents will be available for inspection at the law offices of James, McElroy & Diehl, P.A. 600 South College Street, Charlotte, North Carolina or will be alternatively produced in a fashion and at such time to be agreed upon.

4. As this case is still in the early stages of discovery, Plaintiff will supplement these responses when further information warrants it.

INTERROGATORIES

1. Give the names and addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statement have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: The names and last know addresses of persons who Plaintiff believes to have knowledge of facts regarding this controversy is set forth on Exhibit A attached hereto and incorporated herein by reference. In addition Exhibit A contains a summary of the facts about which it is believed that person has knowledge. Plaintiff is

unaware of any statements written or recorded statements taken from any of these persons.

2. Set forth a list of photographs, plats, sketches or other prepared documents in your possession that relate to any claims or defenses in this action.

RESPONSE: Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure Plaintiff states that the answer to this interrogatories may be ascertained from the Documents that are being produced by the Plaintiff in this litigation. Those documents will be made available at a mutually convenient time and place as decided by the parties.

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 $7,187421.00**

Detailed information with regarding to how these damages are calculated may be determined from the information produced and made available pursuant to Rule 33 (c) of the South Carolina Rules of Civil Procedure.

4. List the names and addresses of any expert witnesses Morningstar proposes to use as a witness at the trial of this case.

RESPONSE: Plaintiff has not yet determined who it will designate as an expert witness at trial; however Plaintiff may use any of the professionals who are identified as fact witnesses on Exhibit A as expert witnesses

EXHIBIT B

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT**
COUNTY OF YORK	**2013-CP-46-00246**
MORNINGSTAR FELLOWSHIP CHURCH,)	
Plaintiff,)	**DESIGNATION REGARDING EXPERTS**
vs.)	
YORK COUNTY, SOUTH CAROLINA,)	
Defendant.)	

Pursuant to the scheduling order entered in this case, Plaintiff submits the following regarding expert testimony. Much of this evidence will be presented from the witnesses who participated in the Tower redevelopment project through 2010, when it stopped. These entities are expected to offer testimony which will be a hybrid of expert and fact witness evidence. It is expected that it will be consistent with the reports and plans that have been produced. They are set forth as follows:

GENERAL ECONOMICS OF THE PROJECT/DAMAGES

1. Multiple copies of the HTP business plan have been produced. They are bates numbered as follows: 11035-11120, 13259-13271, 13553-13632, 13633-13720, 13721-13809, 14968-15048, 15134-15154, 15155-15222, and 15277-15363. This document contains a valuation of the tower in 2007 and a proforma for the tower's expected financial performance put together by Moore Stephens & Lovelace.

2. **Moore Stephens & Lovelace** helped analyze the feasibility and anticipated economic performance of the tower project. Documents are found at 11066-11079, 11611-11613 and 11624-11626. Its address is: 1201 South Orlando Avenue, Suite 400, Winter Park, FL 32789.

3. Further analysis of the feasibility of the tower project was performed by **SB&A Integrated Marketing**. Documents are at 13366-13445. Its address is: 207 West Franklin Street, Richmond, VA 23220.

4. **Integra Realty Resources** appraised the entire site, with an analysis of the tower, as of July 28, 2005. The report is at 7035-7150.

FINANCIAL ABILITY TO COMPLETE THE PROJECT

5. Testimony regarding Morningstar's financial condition will be offered by **Capin Crouse, LLP** for the years 2010-2012. Documents are found at 11324-11343, and 11345-11360. Its address is: 1255 Lakes Parkway, Lawrenceville, GA 30043.

Testimony for the years 2007-2010 will be offered by **C. Dewitt Foard & Company.** Documents are located at 11363-11410. Its address is: 1001 Morehead Square Dr, Charlotte, NC 28203.

THE SCOPE AND COST OF THE PROJECT

6. Testimony related to the scope of the construction project will be offered by **Stewart Engineering**. Documents are located at 13838-13898, 14245-14305 and 14306-14366 and 16595-16655. Testimony will be offered through Christopher Herron at 200 S. College Street, Suite 720, Charlotte, NC 28202. Mr. Herron has been asked to update his opinions on the continued viability of the project based on the structural integrity of the building. His report is attached.

7. Testimony related to the cost to complete the construction project will be offered through **Choate Construction.** Documents are located at 948-1029, 15913-15918 and 15926-15931. Its address is: 2907 Providence Road, Charlotte, NC 28211.

Similar testimony will also be offered through **CBA Incorporated.** Documents are located at 603-947. Its address is: 1811 Sardis Road, North, Suite 207, Charlotte, NC 28270.

It will also be offered through **Capital Building Consultants.** Documents are located at 11864-11865, 15478-15481, 15673-15678, 15992-16017, 16743 and 16811-16812. Its address is 11040 Old US Highway 52, Winston-Salem, NC 27107, 336-775-1904.

8. Finally, testimony regarding the history of the project and its feasibility will be offered through **Jefferson C. Woodall**. His plans and a significant amount of documents related to his work and opinions have been produced. Mr. Woodall has also been asked to update his opinions, and his report it attached. His address is: 100 Reynolda Road, Winston-Salem, NC 27104.

JAMES, MCELROY & DIEHL, P.A.

By: _____

Richard B. Fennell
S.C. Bar No. 10467
rfennell@jmdlaw.com
600 S. College Street
Charlotte, NC 28202
704-372-9870
704-333-5508 (fax)
Attorneys Plaintiff

This the 16 of February, 2104.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Designation Regarding Experts** has this date been delivered to counsel for Defendant by depositing a copy of same in the United States Mail, sufficient postage prepaid, addressed to them as follows:

Daniel J. Ballou
W. Keith Martens
Hamilton Martens Ballou & Carroll, LLC
P.O. Box 10940
Rock Hill, SC 29731

Michael K. Kendree
York County Attorney
P.O. Box 299
York, SC 29745

JAMES, MCELROY & DIEHL, P.A.

By: _____

Richard B. Fennell
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704-372-9870
704-333-5508 (fax)
Attorneys for Plaintiff

This 18 day of February, 2014.

RESUME

STEWART

Christopher R. Herron, PE
Vice President / Manager of Structural Engineering

EDUCATION
Bachelor of Science
in Civil Engineering,
University of Connecticut
Storrs, CT, 1995

REGISTRATION
North Carolina #030560
South Carolina #24588
Connecticut #21454
Massachusetts #45811
Rhode Island #8097
New Hampshire #11297
Pennsylvania #71215
Virginia # 0402 042401
New York # 084394-1
Michigan # 6201053452
Maine # 11148

As Manager of Structural Engineering, Christopher is responsible for the client development, client service, and project management for Stewart's Structural and Special Inspections Departments. This includes project design and coordination, quality control, and financial performance. He has keen abilities in designing creative structural solutions and has extensive experience in steel, concrete, wood, and masonry for multiple project types in both the private and public sectors. Chris is located in the Charlotte office.

SELECTED EXPERIENCE

Morningstar Ministries PTL (Heritage) Tower, Fort Mill, SC – Chris was Project Manager for the structural assessment, code compliance, and design for the renovation and additions to this 21-story tower formerly owned by Heritage USA. The building was never occupied and remained exposed to the elements for nearly 3 decades. The project included a large scale structural assessment and remediation program. The building also needed to be brought up to the current code which required an extensive code study and structural evaluation. Once these portions of the project were completed the renovations of the project were designed and detailed which included modifications to the existing building and a two story addition. The structure is precast concrete planks on masonry bearing walls with lower levels composed of cast-in-place concrete.

Davidson College Renovations to Irwin, Akers and Knox Halls, Davidson, NC – Chris is serving as Structural Principal-in-Charge for the renovations of Irwin, Akers and Knox Residence Halls. Irwin, Akers and Knox are three identical residence hall facilities that were constructed in 1984. Each building is has 13 rooms on each of two floors, for a total of 52 beds per building. The three buildings house 156 students. The construction is concrete on load-bearing masonry with an exterior brick veneer and wood roof trusses. Each building will undergo a significant renovation to increase room size and form more welcoming common spaces.

Alexander Graham Middle School, Charlotte, NC – Chris served as Project Manager for the 4 phases of this project, which included a two story classroom addition totaling approximately 37,260 square feet, new gym and associated classrooms totaling approximately 19,575 square feet, and a dining room expansion totaling approximately 1,600 square feet.

North Carolina A&T State University, School of Education, Greensboro, NC – Chris was Project Manager for the structural engineering and special inspections services for this ACEC Grand Award winning design for the new school of education. The design included a 52-foot cantilever which was accomplished with three story welded steel trusses.

STEWART

February 18, 2014

Rich Fennell
James McElroy & Diehl Law
600 South College Street
Charlotte NC 28202

Re: Heritage Tower
Fort Mill, SC

Dear Mr. Fennell

Per your request, Stewart Engineering, Inc. has performed a walkthrough of the Heritage Tower to review the current condition of the building. We completed an existing conditions assessment in 2008 as part of the project to revitalize and renovate the building. We prepared a report dated July 11, 2008 that described our findings and offered our recommendations on how to repair the structural systems of the building. Our summary of the report stated:

"Overall, we believe the building can be repaired to bring it up to the strength indicated in the construction drawings. It will be a relatively extensive project based on the amount of grouting and steel beams which will need to be replaced. However, we believe the value of the building will far exceed the costs of repairing the structure."

We conducted a walkthrough with the architect and your office looking at the condition of the structure. We then had the person who did the original condition assessment spend most of a day walking each floor of the structure. The purpose of the second walk through was to determine the change in condition to the building. The current walk through wasn't as thorough as the original assessment however we were able to get a good understanding of the change in condition between 2008 and 2014.

Below are the notes from the walkthrough:

Floors 1 and 2 show little to no signs of worsening conditions to the structural elements. These floors were constructed with cast-in-place concrete columns and beams supporting hollow core concrete planks. There is a W16x26 steel beam that spans the distance of the elevator shaft walls that is supporting hollow core planks above, but this beam appeared to be in the same condition as it was during the initial walk through with slight visible rust on the surface.

Floors 3 to 14 show little to no signs of worsening conditions of the structural elements. The drywall on these floors show little to no signs of additional water damage and the walls appeared to be dry during today's walkthrough. The spray applied fireproofing is still intact on most of the steel L8x6x3/4 beams that span the corridors and support the hollow core planks for floors 3 to 10. There is slight to medium rust damage on the L8x6x3/4 beams spanning the corridors from floors 11 to 14. This is no change from the initial walkthrough performed in 2008.

Floors 15 to 21 there is extensive damage to the steel L8x6x3/4 beams that span the corridors. It appears that there is little to no change in the damage to the steel L8x6x3/4 beams for floors 15 and 16. The moisture on the CMU walls, floor, and ceilings increased on floors 17 and above. Water had saturated most of the fireproofing that covered the L8x6x3/4 beams and water was dripping between the joints in the hollow core planks over

200 SOUTH COLLEGE ST. SUITE 720 CHARLOTTE, NC 28202 T 704.334.7925 F 704.334.7926

STEWART

head on floors 18 to 21. The L8x6x3/4 beams spanning the corridors for floors 18 to 21 do show an increase in rust and increased lamination from the initial walkthrough in 2008.
There was a lot of water dripping from between the hollow core planks for the roof and the 21st floor during this walkthrough. The roof membrane has almost completely deteriorated in the center of the building and the tops of the concrete hollow core planks are visible in the center of the building when walking the roof. The roof membrane is not as badly deteriorated on the north and south ends of the building. There are trees and grass growing on the roof in some areas.

The exposed reinforcing steel at the bottom of the concrete beams at the north and south ends of the corridors that have been saw cut do not appear to show a significant increase of rusting for floors 3 to 20 since the walkthrough performed in 2008.

Based on our walkthroughs we believe that the building condition has worsened some since 2008. The increased deterioration occurred primarily in the upper floors. The items that have worsened were items that our structural drawings were indicating to be replaced already. There were a few items that were not indicated to be replaced previously which we would consider replacing due to the extended time of exposure. However, our opinion that the building can be repaired has not changed. From a structural standpoint we do not believe the repair costs would have increased significantly since 2008 since most of the items that have increased damage were planned on being repaired or replaced in the original design.

If we can be of any further assistance, please let us know.

Sincerely yours,

Christopher R. Herron, P.E.
Manager of Structural Engineering

File: S:\Projects\2007\R7055 - Heritage Tower\ADMIN\Correspondence\Letters and Memos\lt7055_20140218.doc

200 SOUTH COLLEGE ST. SUITE 720 CHARLOTTE, NC 28202 T 704.334.7925 F 704.334.7926

12 February 2014

Richard B. Fennell
Attorney at Law
James McElroy & Diehl, P.A.
600 South College Street
Charlotte, NC 28202

RE: Condition of Heritage Tower
Morningstar Ministries Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

Dear Mr Fennell:

I first became involved with the Heritage Tower in 2006 at the request of Morningstar Ministries Fellowship Church to determine if it was feasible to renovate and restore as a component of the ministries' facilities in Fort Mill, SC.

Along with Morningstar's Construction Superintendent, I made a thorough onsite inspection of the Heritage Tower at that time. Based on my positive opinion of the condition of the Tower I assembled a team of professionals including Structural Engineers, Quantity Surveyors and other Consultants to develop an accurate estimate of the value of the Tower in place, a marketable design for its future use and the most cost effective methods to make that happen. This team began work in 2007/2008 and spent the next several years on this undertaking. In addition to detailed design and specification work the team also met with the International Building Code Council in their regional office in Birmingham, Alabama to insure that Code changes would not cause unreasonable challenges to the Project. After that meeting, confident of the feasibility of the Project in all aspects, the team finalized their work and the process culminated with the production of a complete Permit Application set of drawings and specifications for the renovation and restoration of the tower.

Preliminary cost estimates were made by a consulting General Contractor during the development of the Project documents beginning is 2008. After completion of the final Project documents in 2010 these documents were given to several General Contractors for pricing with the full intention of moving ahead with permitting and construction as soon as a contractor was selected.

At this same time the national and regional economy was experiencing a severe downturn, and financing became very difficult to obtain, whereas just months earlier financial institutions were very optimistic that the Project was fundable. In addition, marketing of the Project was further complicated by the efforts of York County officials at that time to have the Tower condemned. Since 2010, efforts have continued to market and develop the Project including redesign of some of the unit plans. At no time during the period from 2006 until now has the Project been abandoned or perceived as unfeasible.

My most recent inspection occured in early February 2014. At that time I made a full walk-through of all floors and areas and observed no significant deterioration to date since my original visit and believe the structure continues to be in a suitable state for renovation & restoration. In addition 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.

It is my understanding that all documents related to my work on the Tower Project since 2006 have been made available to York County. My resume' is attached herewith for your use.

Best regards,

Jefferson C. Woodall RIBA

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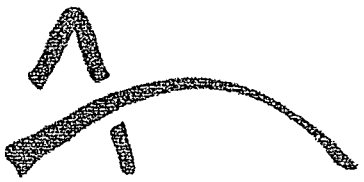

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- Maryland
- Virginia
- North Carolina
- South Carolina
- Georgia
- Tennessee
- Pennsylvania
- Alabama
- Louisiana
- Florida

- United Kingdom

NCARB

RIBA

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH, Plaintiff, vs. YORK COUNTY, SOUTH CAROLINA, Defendant.	)	PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE DAMAGES

FILED-RECEIVED
2015 JAN 23 PM 4:14
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Plaintiff Morningstar Fellowship Church ("Morningstar") respectfully submits this Memorandum of Law in Opposition to Defendant York County's Motion to Exclude Damages, as Morningstar's claimed damages are entirely recoverable as a matter of law.

FACTS

Since Morningstar's execution of the Development Agreement relating to the twenty-one story Tower in 2008, Morningstar has continuously sought to move forward its development plan. In pursuing the project, Morningstar necessarily incurred approximately $819,460.89 in associated engineering, marketing, legal, architectural, and development expenses. By January 2010, however, it became clear that York County (the "County") had determined that the only acceptable option for the Tower is demolition. See Motz Email, January 22, 2010, County production p. 656. The County has consistently taken steps, several of which constitute breaches of the Development Agreement, aimed at the eventual demolition of the Tower. Among other things, the County: failed to provide timely notice of the purported approval of the site plan for the project; demanded financial assurances without providing Morningstar the necessary time and information to obtain those assurances; publicly declared Morningstar in default of

the Development Agreement – devastating the project; failed to mediate in good faith and repeatedly claimed that the Tower must be torn down. The County's improper notice of default to Morningstar has made it impossible to move forward in any meaningful way. Morningstar had over 200 priority reservation holders before this controversy. That number dropped precitously after March 5, 2010. As a direct result of the County's breaches of contract, Morningstar is now facing the complete loss of the Tower, the loss of the benefit of the expenses it incurred in attempting to develop the Tower, and its unrealized income from the tower. Morningstar is entitled to damages for each of these injuries.

LEGAL ARGUMENT

I. Morningstar Is Entitled to Damages for the Lost Value of the Tower.

Morningstar has forecast evidence demonstrating that the County's breach of the Development Agreement is a result of the County's determination to have the Tower torn down. Indeed, in its Motion the County acknowledges that it "indisputably seeks to have the Tower demolished . . . ." Def. Motion at 3. The County argues that Morningstar is not entitled to damages for the value of the Tower because the County has not taken steps to demolish the Tower during the pendency of this litigation, and could not do so unless it prevails on its counterclaims at trial. In its counterclaims, however, the County contends that it has the right to demolish the Tower, with Morningstar either doing the work or paying the associated demolition costs. It appears to be a foregone conclusion that the Tower will be demolished. Nor is the value of the existing Tower speculative; rather, that value of the work in place was assessed at $11,887,719 in 2007.

The South Carolina Supreme Court has recognized that in the context of government takings, a jury may ascertain the value of just compensation for a given piece of property despite the fact that the condemnor's exercise of its right to take the property is optional. See Haig v. Wateree Power Co., 119 S.C. 319, 330-333 (S.C. 1922) (holding that the landowner could not claim compensation until the condemnor elected to take the property, but that if the condemnor delayed the taking the amount of just compensation would accrue interest). This rationale logically permits the lost value of the Tower to be awarded, though conditionally, in the event the County does elect to order the Tower's demolition and it is determined not to be necessary.

The County also argues that, should it demolish the Tower after prevailing in this action, the loss of the Tower would be proximately caused by *the Court*, rather than by the County's own actions. If the Tower cannot be completed, it is because of the County's actions. Proximate cause exists where the damage "would not have occurred 'but for' the defendant's" act, and was a "'natural and probable consequence'" of that act. Oliver v. S.C. Dep't of Highways & Public Transp., 309 S.C. 313, 316 (S.C. 1992). The County cannot contend that the demolition of the Tower is not a direct and foreseeable consequence of the County requiring that the Tower be torn down. The County's very argument that no damages for the Tower can be awarded because it has not yet chosen to demolish the Tower belies the fact that the Tower's destruction is dependent on the County taking action. A judgment in this action cannot cause the demolition of the Tower, but merely facilitate or prohibit it.

Lastly, the County argues that Morningstar has not shown any injury to the value of the Tower that was caused after the County declared Morningstar in default. If the

Tower must now be destroyed, it is because the County's actions kept it from being completed. Morningstar is entitled to recover damages in the amount of the existing Tower's value due to the County's certain demolition of the structure.

II. Morningstar Is Entitled to Damages for its Development Costs.

Based on the County's breach of the Development Agreement, Morningstar is also entitled law to recover damages for its development costs in pursuing the project. Morningstar may recover all damages that "either flow as a natural consequence of the breach or [were] reasonably within the parties' contemplation at the time of the contract." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595 (S.C. Ct. App. 1997). In Hawkins, the Court held that the parties to a sale and purchase agreement for land reasonably contemplated that seller's adjacent parcels would continue to be developed, and thus that the plaintiff seller was entitled to recover the diminution in value of those adjacent parcels when the purchaser failed to construct an access road to the parcels in breach of the agreement. Id. at 596-597.

The Development Agreement clearly contemplated a complex development project subject to delays, and envisioned each party acting in good faith to move the project along and provide proper notice of various steps along the way. Like the diminished property value in Hawkins, it was entirely foreseen and expected that Morningstar would incur significant engineering, marketing, architectural, legal, and development expenses in pursuing the project under the Development Agreement. Morningstar did in fact incur such expenses, totaling approximately $819,460.09. When the County breached the Development Agreement by wrongfully declaring Morningstar to be in default, a natural consequence of the County's breach was to deprive

Morningstar of the benefit of the expenses it incurred in trying to develop the Tower in reliance on their Agreement. Morningstar is therefore entitled to recover the amount it expended in developing the Tower.

III. Morningstar Is Entitled to Damages for Lost Profits.

In addition to being deprived of the benefit of the development expenses it incurred, Morningstar also suffered lost profits, as a direct and natural consequence of the County's actions. The County does not dispute that lost profits are recoverable for a breach of contract, but argues that whether Morningstar's lost profits were the proximate result of the County's actions is speculation. Lost profits can be established by facts "from which a reasonably accurate conclusion regarding the cause . . . can be logically and rationally drawn." Sterling Dev. Co. v. Collins, 309 S.C. 237, 242 (S.C. 1992). In Sterling, the Supreme Court affirmed a jury award for lost profits based on evidence that, but for the defendant's breach of contract with plaintiff, plaintiff's lease with Bi-Lo and the corresponding profits would still be in effect. Id. Similarly, Morningstar has forecast evidence that the number of reservations for the Tower dropped precipitously after March 5, 2010. But for the County's notice of default, in breach of the Development Agreement, it is logical and rational that those reservations would have been converted into deposits, and Morningstar would be availing itself of the corresponding income from the Tower during the five year period following the 2010 notice.

The County also argues that the amount of Morningstar's lost profits is speculative. The loss of profits in a breach of contract action need not be established with absolute certainty, but merely by facts "from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally

drawn." Sterling, 309 S.C. at 242; accord Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208 (S.C. Ct. App. 2008) (holding that "the law does not require absolute certainty of lost profits" in a tortious interference with contract claim and affirming award of lost profits where no client had left plaintiff company prior to defendant's actions). Morningstar has calculated the amount of lost income from the Tower to total $7,187,421 over five years. Morningstar's lost income is rationally based upon the amount of anticipated fees for the Tower spaces and associated revenue, and is therefore not speculative. Morningstar's proforma generated in real time shows the expected net operating income of the project, and is the basis for the lost profits claim. Morningstar limited its request to five (5) years in the interest of conservatism. This number may be open to challenge on cross-examination, but it should go to the jury.

Though the County claims Morningstar lacks the ability to finish the project, many of the obstacles are generated by the County itself. Morningstar has been unable to present meaningful completion and occupancy dates precisely because of the County's assertion that the Tower must be torn down. Moreover, Morningstar has forecast evidence and witnesses as to its ability to carry out the project at any stage but for the County's breach. Morningstar is entitled to its lost profits.

CONCLUSION

For the foregoing reasons, Morningstar respectfully prays the Court deny Defendant's Motion to Exclude Damages.

JAMES, MCELROY & DIEHL, P.A.

By: _____

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Dated: January 23, 2015.
Charlotte, North Carolina

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendant.

DEFENDANT'S MOTIONS IN LIMINE

FILED-RECEIVED
2015 JAN 26 PM 2:43
DAVID HARTLEY TOLL
CLERK C.P. & G.S.
YORK COUNTY, S.C.

Defendant York County moves *in limine* to preclude Plaintiff from introducing certain testimony and exhibits at trial.

I. Evidence of Settlement Discussions and Mediation

Plaintiff's complaint includes allegations that York County did not negotiate "in good faith" as the parties attempted to resolve their dispute prior to litigation. Complaint ¶¶ 27.c. and 32. The trial court should prohibit Plaintiff from seeking to introduce any evidence of York County's alleged "bad faith" in its settlement negotiations with Plaintiff. Specifically, York 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. York County also seeks to exclude the following exhibits, which have been identified by Plaintiff 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

York County is informed and believes that each of the above-listed documents was created and exchanged in connection with the parties' ongoing settlement discussions.

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, at least for purposes of 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).

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. The court should prohibit any attempt to introduce this evidence during the course of trial.

II. Subjective Views of Former York County Councilman Buddy Motz

The trial court should prohibit Plaintiff's Counsel from examining former York County Councilman Buddy Motz concerning his alleged views of Plaintiff's ministry, and should also preclude Plaintiff from attempting to introduce Mr. Motz's January 22, 2010 email as evidence at trial (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 Plaintiff's ministry and its perceived connection to the former owner of Plaintiff's property, PTL Ministries. Presumably, Plaintiff seeks to introduce Mr. Motz's testimony and email as evidence of the County's bias and its alleged motivation for declaring Plaintiff in default of the parties' Development Agreement.

Even if Mr. Motz harbored personal bias against Plaintiff's organization, his alleged bias cannot be imputed to the County. Furthermore, Plaintiff'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, 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. 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. The court should preclude Plaintiff from calling Mr. Motz as a witness at trial, or at least from examining him regarding his personal views of Plaintiff and Plaintiff's planned project. The court should also prohibit Plaintiff from attempting to introduce Mr. Motz's January 22, 2010 email as evidence.

III. Evidence of Plaintiff's Alleged Damages

York County has previously filed a motion to exclude Plaintiff from introducing certain evidence of its alleged damages at trial. A copy of that motion is attached and is incorporated by reference. *See* Exhibit A.

Deposition testimony of Plaintiff's Rule 30(b)(6) S.C.R. Civ. P. designee has also established that the majority of Plaintiff's damages claim is entirely speculative. During his deposition, which was completed on January 23, 2015, Plaintiff's CEO and 30(b)(6) designee, Rick Joyner, testified that Plaintiff's claim for lost business revenues (comprising $$7,187,421.00

of Plaintiff's damage claim) is based entirely upon undated "Preliminary Operating Statements" which were prepared by Plaintiff's employees. Those "Preliminary Operating Statements" are little more than a "guesstimate" of projected revenues, and are contradicted by financial reports certified by Plaintiff's own accountants. Plaintiff's 30(b)(6) designee also testified that $11,889,719 of Plaintiff's damage claim (described as "lost work in place" in Plaintiff's pre-trial brief) was based upon an assumption that the current condition of Plaintiff's Tower may require its demolition – an assumption discredited by Plaintiff's own experts. Plaintiff's representative candidly admitted that Plaintiff "did not know" if that assumption was correct, and that Plaintiff's damage figure "would need to be adjusted" if the assumption is incorrect. In fact, Plaintiff's designee proposed that, if Plaintiff prevailed on its "lost work in place" claim, Plaintiff's damage award could be placed in escrow, with any portion not actually spent returned to York County at some later date. When asked directly, "given the information that is available to Morningstar today, can you state with any degree of reasonable certainty what those costs are?" Plaintiff's 30(b)(6) designee responded "No." Plaintiff should not be permitted to introduce such speculative evidence of damages at trial.

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

The trial court should preclude Plaintiff from introducing any evidence or argument that is contrary to the court's prior substantive rulings in this case. In particular, York County seeks to preclude Plaintiff from introducing testimony or argument that the parties' Development Agreement required York County to deliver notice of site plan approval to Plaintiff by certified mail. In its complaint, Plaintiff alleged that York County breached the parties' Development Agreement by failing to provide "formal notice" of site plan approval. York County denied that allegation, and the issue has been hotly litigated by the parties throughout this case.

Plaintiff has contended throughout this litigation that the Development Agreement required York County to deliver "notice" of site plan approval to Plaintiff by certified mail. However, by order dated July 16, 2014 Judge Kimball ruled, as a matter of law, that the Development Agreement did *not* require York County to deliver notice of site plan approval in any particular form or manner. A copy of Judge Kimball's order is attached. *See* Exhibit B. York County submits that Judge Kimball's order constitutes the law of the case as to that issue. In light of Judge Kimball's prior ruling, Plaintiff should be prohibited from introducing evidence or argument at trial that York County was contractually required to deliver site plan approval by certified mail, or that its failure to do so constituted a breach of the Development Agreement.

V. "Petition Regarding Interest" to York County Council

Plaintiff should be precluded from introducing a "Petition Regarding Interest" that was apparently submitted to the York County Council in February 2011 (Pl. Ex. 6 - "Petition Regarding Interest - MorningStar 103-131"). That petition post-dates York County's declaration of default by eleven months, and has little or no probative value to the issues for trial – whether York County breached the Development Agreement; whether Plaintiff defaulted on the Development Agreement; and what rights, remedies and obligations the parties possess under the Development Agreement. The "Petition Regarding Interest" that Plaintiff seeks to introduce is not relevant or probative to any of those issues. York County believes that the petition is likely to be misconstrued or misunderstood by the jury, and that 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.

* * *

Each of these motions will be based upon the South Carolina Rules of Court, including the Rules of Evidence, Alternative Dispute Resolution Procedures and Rules of Civil Procedure,

as well as the relevant statutory and case law. Counsel certifies that, to his best knowledge and belief, there is good ground to support each of these motions *in limine*, and none is interposed for delay. Counsel further certifies that he had no obligation to consult with opposing counsel regarding the substance of these motions, and that such consultation would be futile.

January 23, 2015

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ATTORNEYS FOR DEFENDANT YORK COUNTY

4851-1612-5985, v. 1

EXHIBIT
sticker A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
)
Morningstar Fellowship Church,) CASE NUMBER: 2013-CP-46-00246
)
☐ Plaintiff)
)
v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET
)
York County, South Carolina,)
)
☒ Defendants.)

Plaintiff's Attorney: Richard B. Fennell, Esquire Address: James McElroy & Diehl, P.A. 600 South College Street, Charlotte, NC 28202 Phone: 704-372-9870 fax: 704-350-9325 e-mail: rfennell@jmdlaw.com	Defendant's Attorney: Daniel J. Ballou, Esquire Address: Hamilton Martens Ballou & Carroll, LLC P.O. Box 10940, Rock Hill, SC 29731 Phone: 803-329-7672 fax: 803-329-7678 e-mail: dan.ballou@hamiltonmartens.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Exclude Damages
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — September 11, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

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 **Motion to Exclude Damages**

York County (the "County") respectfully moves an order excluding certain damages alleged to have been sustained by Plaintiff Morningstar Fellowship Church ("Morningstar") on the grounds that such claimed damages are not recoverable as a matter of law. In support of its Motion the County asserts a follows:

FACTS

Morningstar claims it has sustained damages resulting from the County's alleged breach of the Development Agreement by failing to give it notice by certified or regular mail of the approval of the site plan for the project, and by declaring default when Morningstar failed to provide required financial information within 180 days after approval of its site plan. The County has conducted extensive discovery in this case, including serving standard interrogatories. The County's Interrogatory No. 3, and Morningstar's response state 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"

A true and correct copy of Morningstar's Answers to Interrogatory No 3 is attached hereto as Exhibit "A" and incorporated by reference for all purposes.

On February 18, 2014, Morningstar served Plaintiff's Designation Regarding Experts, identifying several potential witnesses who are "expected to offer testimony which will be a hybrid of expert and fact witness evidence," including witnesses offered to testify as to the value of the Tower building, "the feasibility and anticipated economic performance of the tower project," an appraisal of the Tower, Morningstar's financial ability to complete the project, and the scope and cost of the project. A true and correct copy of Morningstar's Designation Regarding Experts is attached hereto as Exhibit "B" and incorporated by reference for all purposes.

ARGUMENT

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

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

The first component of damages described in Response 3 above, the "Loss of the Value of Tower," would only be recoverable if the County wrongfully caused the demolition of the Tower, and such damages were proximately caused by the County's actions. No matter what evidence Morningstar proposes to introduce, it cannot recover damages for "loss" of the Tower if

it has not in fact lost the Tower. While the County indisputably seeks to have the Tower demolished pursuant to the language of Section IV.C.2 of the Development Agreement, no action has been taken of any kind to do so. The County has specifically not pursued any efforts to demolish the Tower during the pendency of this case, and could only pursue demolition if it prevails at trial on its counterclaims against Morningstar. Until such time, Morningstar cannot show any "loss" whatsoever to support an award of damages. Likewise, if the County prevails, the loss of the Tower would be proximately caused by the findings of this Court, not by any actionable conduct by the County.

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." Consequently, Morningstar cannot establish any amount of damages resulting from "Loss of the Value of Tower," asserted in Response 3(a), and that component of damages should be excluded at 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." Response 3(b). Again, the only reason Morningstar could ever be entitled to an award of such damages would be if the

County had demolished the Tower, or taken other action depriving Morningstar of the benefit of its development costs. On the contrary, Morningstar has presumably incurred engineering, marketing, architectural, legal and development costs in the effort to restore the Tower, and nothing the County has done has diminished whatever value those costs and expenses may have had to the project. Morningstar argues that these costs are somehow an element of damages, when they were simply a component of the costs and expenses it assumed in its attempt to restore the Tower. Nor has any action by the County resulted in any additional cost to Morningstar, since its own engineer, Christopher R. Herron, P.E. stated on February 18, 2014, that "we do not believe the repair cost would have increased significantly since 2008 since most of the items that have increased damages were planned on being repaired or replaced in the original design."

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

Having produced over 18,000 pages of documents in discovery in this case, Morningstar has produced 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 damages, but any assertion that the 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, that it contends constitutes an amount of lost income over the next 5 years on a project that was not complete and has no funding in place. No back up for this 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. Moreover, many of the "Priority Reservation Applications" Morningstar claims were refunded because of the County's alleged breach occurred before the County declared default. *See* Morningstar's Response to Defendant's Interrogatories No. 11 and 12, attached hereto.

CONCLUSION

Morningstar simply cannot prove any damages resulting from any action by the County in this case, and the evidence it contends supports these claims should be excluded as a matter of law. The undersigned certifies that he attempted to resolve this motion with counsel prior to filing, but was unsuccessful.

September 12 2014

Daniel J. Ballou
HAMILTON MARTENS BALLOU & CARROLL, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7609

Michael K. Kendree
YORK COUNTY ATTORNEY
P.O. Box 299
York, South Carolina 29745

ATTORNEYS FOR THE DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the within Motion to Exclude Damages was served on counsel for the Plaintiff and other parties of record via email and by depositing a copy of same in the United States mail, with sufficient postage annexed thereto, addressed as follows:

Richard B. Fennell, Esq.
James McElroy & Diehl, P.A.
600 South College Street
Charlotte, NC 28202

Attorney for Plaintiff

L. Melia Sweatt

This the 12 day of September, 2014.

EXHIBIT
A

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT 2013-CP-46-00246
MORNINGSTAR FELLOWSHIP CHURCH, Plaintiff, vs. YORK COUNTY, SOUTH CAROLINA, Defendants.	PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST SET OF INTERROGATORIES

Plaintiff objects and responds to Defendant's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they purport to require the disclosure of information or documents which are protected by the attorney-client privilege or work product doctrine. Any document produced which would otherwise be privileged is not a waiver of any remaining privilege or protection from discovery.

2. Plaintiff objects to these discovery requests to the extent that they purport to expand the requirements of the South Carolina Rules of Civil Procedure.

3. All documents will be available for inspection at the law offices of James, McElroy & Diehl, P.A. 600 South College Street, Charlotte, North Carolina or will be alternatively produced in a fashion and at such time to be agreed upon.

4. As this case is still in the early stages of discovery, Plaintiff will supplement these responses when further information warrants it.

INTERROGATORIES

1. Give the names and addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statement have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: **The names and last know addresses of persons who Plaintiff believes to have knowledge of facts regarding this controversy is set forth on Exhibit A attached hereto and incorporated herein by reference. In addition Exhibit A contains a summary of the facts about which it is believed that person has knowledge. Plaintiff is**

unaware of any statements written or recorded statements taken from any of these persons.

2. Set forth a list of photographs, plats, sketches or other prepared documents in your possession that relate to any claims or defenses in this action.

RESPONSE: Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure Plaintiff states that the answer to this interrogatories may be ascertained from the Documents that are being produced by the Plaintiff in this litigation. Those documents will be made available at a mutually convenient time and place as decided by the parties.

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 $7,187421.00

Detailed information with regarding to how these damages are calculated may be determined from the information produced and made available pursuant to Rule 33 (c) of the South Carolina Rules of Civil Procedure.

4. List the names and addresses of any expert witnesses Morningstar proposes to use as a witness at the trial of this case.

RESPONSE: Plaintiff has not yet determined who it will designate as an expert witness at trial; however Plaintiff may use any of the professionals who are identified as fact witnesses on Exhibit A as expert witnesses

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendant.

DESIGNATION REGARDING EXPERTS

Pursuant to the scheduling order entered in this case, Plaintiff submits the following regarding expert testimony. Much of this evidence will be presented from the witnesses who participated in the Tower redevelopment project through 2010, when it stopped. These entities are expected to offer testimony which will be a hybrid of expert and fact witness evidence. It is expected that it will be consistent with the reports and plans that have been produced. They are set forth as follows:

GENERAL ECONOMICS OF THE PROJECT/DAMAGES

1. Multiple copies of the HTP business plan have been produced. They are bates numbered as follows: 11035-11120, 13259-13271, 13553-13632, 13633-13720, 13721-13809, 14968-15048, 15134-15154, 15155-15222, and 15277-15363. This document contains a valuation of the tower in 2007 and a proforma for the tower's expected financial performance put together by Moore Stephens & Lovelace.

2. **Moore Stephens & Lovelace** helped analyze the feasibility and anticipated economic performance of the tower project. Documents are found at 11066-11079, 11611-11613 and 11624-11626. Its address is: 1201 South Orlando Avenue, Suite 400, Winter Park, FL 32789.

3. Further analysis of the feasibility of the tower project was performed by **SB&A Integrated Marketing**. Documents are at 13366-13445. Its address is: 207 West Franklin Street, Richmond, VA 23220.

4. **Integra Realty Resources** appraised the entire site, with an analysis of the tower, as of July 28, 2005. The report is at 7035-7150.

FINANCIAL ABILITY TO COMPLETE THE PROJECT

5. Testimony regarding Morningstar's financial condition will be offered by **Capin Crouse, LLP** for the years 2010-2012. Documents are found at 11324-11343, and 11345-11360. Its address is: 1255 Lakes Parkway, Lawrenceville, GA 30043.

Testimony for the years 2007-2010 will be offered by **C. Dewitt Foard & Company.** Documents are located at 11363-11410. Its address is: 1001 Morehead Square Dr, Charlotte, NC 28203.

THE SCOPE AND COST OF THE PROJECT

6. Testimony related to the scope of the construction project will be offered by **Stewart Engineering.** Documents are located at 13838-13898, 14245-14305 and 14306-14366 and 16595-16655. Testimony will be offered through Christopher Herron at 200 S. College Street, Suite 720, Charlotte, NC 28202. Mr. Herron has been asked to update his opinions on the continued viability of the project based on the structural integrity of the building. His report is attached.

7. Testimony related to the cost to complete the construction project will be offered through **Choate Construction.** Documents are located at 948-1029, 15913-15918 and 15926-15931. Its address is: 2907 Providence Road, Charlotte, NC 28211.

Similar testimony will also be offered through **CBA Incorporated.** Documents are located at 603-947. Its address is: 1811 Sardis Road, North, Suite 207, Charlotte, NC 28270.

It will also be offered through **Capital Building Consultants.** Documents are located at 11864-11865, 15478-15481, 15673-15678, 15992-16017, 16743 and 16811-16812. Its address is 11040 Old US Highway 52, Winston-Salem, NC 27107, 336-775-1904.

8. Finally, testimony regarding the history of the project and its feasibility will be offered through **Jefferson C. Woodall.** His plans and a significant amount of documents related to his work and opinions have been produced. Mr. Woodall has also been asked to update his opinions, and his report it attached. His address is: 100 Reynolda Road, Winston-Salem, NC 27104.

JAMES, MCELROY & DIEHL, P.A.

By: _____

Richard B. Fennell
S.C. Bar No. 10467
rfennell@jmdlaw.com
600 S. College Street
Charlotte, NC 28202
704-372-9870
704-333-5508 (fax)
Attorneys Plaintiff

This the 16 of February, 2104.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Designation Regarding Experts** has this date been delivered to counsel for Defendant by depositing a copy of same in the United States Mail, sufficient postage prepaid, addressed to them as follows:

Daniel J. Ballou
W. Keith Martens
Hamilton Martens Ballou & Carroll, LLC
P.O. Box 10940
Rock Hill, SC 29731

Michael K. Kendree
York County Attorney
P.O. Box 299
York, SC 29745

JAMES, MCELROY & DIEHL, P.A.

By: _____

Richard B. Fennell
S.C. Bar No. 10467
rfennell@jmdlaw.com
600 S. College Street
Charlotte, NC 28202
704-372-9870
704-333-5508 (fax)
Attorneys for Plaintiff

This 18 day of February, 2014.

STEWART

Christopher R. Herron, PE
Vice President / Manager of Structural Engineering

EDUCATION
Bachelor of Science
In Civil Engineering,
University of Connecticut
Storrs, CT, 1995

REGISTRATION
North Carolina #030560
South Carolina #24588
Connecticut #21454
Massachusetts #45811
Rhode Island #8097
New Hampshire #11297
Pennsylvania #71215
Virginia # 0402 042401
New York # 084394-1
Michigan # 6201053452
Maine # 11148

As Manager of Structural Engineering, Christopher is responsible for the client development, client service, and project management for Stewart's Structural and Special Inspections Departments. This includes project design and coordination, quality control, and financial performance. He has keen abilities in designing creative structural solutions and has extensive experience in steel, concrete, wood, and masonry for multiple project types in both the private and public sectors. Chris is located in the Charlotte office.

SELECTED EXPERIENCE

Morningstar Ministries PTL (Heritage) Tower, Fort Mill, SC – Chris was Project Manager for the structural assessment, code compliance, and design for the renovation and additions to this 21-story tower formerly owned by Heritage USA. The building was never occupied and remained exposed to the elements for nearly 3 decades. The project included a large scale structural assessment and remediation program. The building also needed to be brought up to the current code which required an extensive code study and structural evaluation. Once these portions of the project were completed the renovations of the project were designed and detailed which included modifications to the existing building and a two story addition. The structure is precast concrete planks on masonry bearing walls with lower levels composed of cast-in-place concrete.

Davidson College Renovations to Irwin, Akers and Knox Halls, Davidson, NC – Chris is serving as Structural Principal-in-Charge for the renovations of Irwin, Akers and Knox Residence Halls. Irwin, Akers and Knox are three identical residence hall facilities that were constructed in 1964. Each building is has 13 rooms on each of two floors, for a total of 52 beds per building. The three buildings house 156 students. The construction is concrete on load-bearing masonry with an exterior brick veneer and wood roof trusses. Each building will undergo a significant renovation to increase room size and form more welcoming common spaces.

Alexander Graham Middle School, Charlotte, NC – Chris served as Project Manager for the 4 phases of this project, which included a two story classroom addition totaling approximately 37,260 square feet, new gym and associated classrooms totaling approximately 19,575 square feet, and a dining room expansion totaling approximately 1,600 square feet.

North Carolina A&T State University, School of Education, Greensboro, NC – Chris was Project Manager for the structural engineering and special inspections services for this ACEC Grand Award winning design for the new school of education. The design included a 52-foot cantilever which was accomplished with three story welded steel trusses.

STEWART

February 18, 2014

Rich Fennell
James McElroy & Diehl Law
600 South College Street
Charlotte NC 28202

Re: - Heritage Tower
Fort Mill, SC

Dear Mr. Fennell

Per your request, Stewart Engineering, Inc. has performed a walkthrough of the Heritage Tower to review the current condition of the building. We completed an existing conditions assessment in 2008 as part of the project to revitalize and renovate the building. We prepared a report dated July 11, 2008 that described our findings and offered our recommendations on how to repair the structural systems of the building. Our summary of the report stated:

"Overall, we believe the building can be repaired to bring it up to the strength indicated in the construction drawings. It will be a relatively extensive project based on the amount of grouting and steel beams which will need to be replaced. However, we believe the value of the building will far exceed the costs of repairing the structure."

We conducted a walkthrough with the architect and your office looking at the condition of the structure. We then had the person who did the original condition assessment spend most of a day walking each floor of the structure. The purpose of the second walk through was to determine the change in condition to the building. The current walk through wasn't as thorough as the original assessment however we were able to get a good understanding of the change in condition between 2008 and 2014.

Below are the notes from the walkthrough:

Floors 1 and 2 show little to no signs of worsening conditions to the structural elements. These floors were constructed with cast-in-place concrete columns and beams supporting hollow core concrete planks. There is a W16x26 steel beam that spans the distance of the elevator shaft walls that is supporting hollow core planks above, but this beam appeared to be in the same condition as it was during the initial walk through with slight visible rust on the surface.

Floors 3 to 14 show little to no signs of worsening conditions of the structural elements. The drywall on these floors show little to no signs of additional water damage and the walls appeared to be dry during today's walkthrough. The spray applied fireproofing is still intact on most of the steel L8x6x3/4 beams that span the corridors and support the hollow core planks for floors 3 to 10. There is slight to medium rust damage on the L8x6x3/4 beams spanning the corridors from floors 11 to 14. This is no change from the initial walkthrough performed in 2008.

Floors 15 to 21 there is extensive damage to the steel L8x6x3/4 beams that span the corridors. It appears that there is little to no change in the damage to the steel L8x6x3/4 beams for floors 15 and 16. The moisture on the CMU walls, floor, and ceilings increased on floors 17 and above. Water had saturated most of the fireproofing that covered the L8x6x3/4 beams and water was dripping between the joints in the hollow core planks over

200 SOUTH COLLEGE ST. SUITE 720 CHARLOTTE, NC 28202 T 704.334.7925 F 704.334.7926

STEWART

head on floors 18 to 21. The L8x6x3/4 beams spanning the corridors for floors 18 to 21 do show an increase in rust and increased lamination from the initial walkthrough in 2008.
There was a lot of water dripping from between the hollow core planks for the roof and the 21st floor during this walkthrough. The roof membrane has almost completely deteriorated in the center of the building and the tops of the concrete hollow core planks are visible in the center of the building when walking the roof. The roof membrane is not as badly deteriorated on the north and south ends of the building. There are trees and grass growing on the roof in some areas.

The exposed reinforcing steel at the bottom of the concrete beams at the north and south ends of the corridors that have been saw cut do not appear to show a significant increase of rusting for floors 3 to 20 since the walkthrough performed in 2008.

Based on our walkthroughs we believe that the building condition has worsened some since 2008. The increased deterioration occurred primarily in the upper floors. The items that have worsened were items that our structural drawings were indicating to be replaced already. There were a few items that were not indicated to be replaced previously which we would consider replacing due to the extended time of exposure. However, our opinion that the building can be repaired has not changed. From a structural standpoint we do not believe the repair costs would have increased significantly since 2008 since most of the items that have increased damage were planned on being repaired or replaced in the original design.

If we can be of any further assistance, please let us know.

Sincerely yours,

Christopher R. Herron, P.E.
Manager of Structural Engineering

File: S:\Projects\2007\R7055 - Heritage Tower\ADMIN\Correspondence\Letters and Memos\lt7055_20140218.doc

200 SOUTH COLLEGE ST. SUITE 720 CHARLOTTE, NC 28202 T 704.334.7925 F 704.334.7926

12 February 2014

Richard B. Fennell
Attorney at Law
James McElroy & Diehl, P.A.
600 South College Street
Charlotte, NC 28202

RE: Condition of Heritage Tower
Morningstar Ministries Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

Dear Mr Fennell:

I first became involved with the Heritage Tower in 2006 at the request of Morningstar Ministries Fellowship Church to determine if it was feasible to renovate and restore as a component of the ministries' facilities in Fort Mill, SC.

Along with Morningstar's Construction Superintendent, I made a thorough onsite inspection of the Heritage Tower at that time. Based on my positive opinion of the condition of the Tower I assembled a team of professionals including Structural Engineers, Quantity Surveyors and other Consultants to develop an accurate estimate of the value of the Tower in place, a marketable design for its future use and the most cost effective methods to make that happen. This team began work in 2007/2008 and spent the next several years on this undertaking. In addition to detailed design and specification work the team also met with the International Building Code Council in their regional office in Birmingham, Alabama to insure that Code changes would not cause unreasonable challenges to the Project. After that meeting, confident of the feasibility of the Project in all aspects, the team finalized their work and the process culminated with the production of a complete Permit Application set of drawings and specifications for the renovation and restoration of the tower.

Preliminary cost estimates were made by a consulting General Contractor during the development of the Project documents beginning in 2008. After completion of the final Project documents in 2010 these documents were given to several General Contractors for pricing with the full intention of moving ahead with permitting and construction as soon as a contractor was selected.

At this same time the national and regional economy was experiencing a severe downturn, and financing became very difficult to obtain, whereas just months earlier financial institutions were very optimistic that the Project was fundable. In addition, marketing of the Project was further complicated by the efforts of York County officials at that time to have the Tower condemned. Since 2010, efforts have continued to market and develop the Project including redesign of some of the unit plans. At no time during the period from 2006 until now has the Project been abandoned or perceived as unfeasible.

My most recent inspection occured in early February 2014. At that time I made a full walk-through of all floors and areas and observed no significant deterioration to date since my original visit and believe the structure continues to be in a suitable state for renovation & restoration. In addition 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.

It is my understanding that all documents related to my work on the Tower Project since 2006 have been made available to York County. My resume' is attached herewith for your use.

Best regards,

Jefferson C. Woodall RIBA

Jefferson C. Woodall, RIBA

JEFFERSON C WOODALL, ARCHITECT
1100 REYNOLDA ROAD
WINSTON-SALEM, NC 27104
(336) 689-1362
jeffersonwoodall@gmail.com

Jefferson C. Woodall, RIBA

1100 Reynolda Road • Winston-Salem, NC 27104
(336)-689-1362 • jeffersonwoodall@gmail.com

Master of Science in Architecture - 1976
NORTH CAROLINA STATE UNIVERSITY Raleigh, NC.

Private Practice
Winston-Salem NC | Since 1980

Professor
Forsyth Technical Community College | 1991

Teacher
Boy Scouts of America | 1999

Seminar Presenter
Architecture Exchange East | 2004

- Maryland
- Virginia
- North Carolina
- South Carolina
- Georgia
- Tennessee
- Pennsylvania
- Alabama
- Louisiana
- Florida

- United Kingdom

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EXHIBIT
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JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600246

ATE OF SOUTH CAROLINA
OUNTY OF YORK
N THE COURT OF COMMON PLEAS

Morningstar Fellowship Church	York County South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	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/ S. Jackson Kimball
Circuit Court Judge

3063
Judge Code

7/16/2014
Date

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

For Clerk of Court Office Use Only

This judgment was entered on July 17, 2014, and a copy mailed first class or placed in the appropriate attorney's box on July 17, 2014, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

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.

RECEIVED
JUL 21 2014
Hamilton Mariens
Ballou & Carroll, LLC

SCANNED
7/21/14

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2014 JUL 17 PM 3:33
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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.

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.

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. **Morningstar's Third Cause of Action.**

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

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

47

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE

FILED-RECEIVED
2015 JAN 26 AM 10: 30
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

Plaintiff responds to Defendant's Motion in Limine as follows:

I. Evidence of Settlement Discussions and Mediation

The County moves to exclude any evidence of discussions during or concerning the mediation between the parties, on the grounds that compromise discussions are inadmissible under S.C. R. Evid. 408. Rule 408's prohibition of evidence of compromises is limited to evidence intended "to prove liability for or invalidity of the claim or its amount." Discussions of settlement negotiations or mediation efforts are not de facto inadmissible, but by the terms of the rule itself are only inadmissible when used for a specific purpose. Moreover, while the County correctly quotes the first half Rule 408, it ignores the final portion of the rule, which states that "[t]his rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

In fact, the County tacitly acknowledges that South Carolina case law restricting the admissibility of mediation discussions is limited to when such evidence is used to establish liability or damages. See Def. Motion at 2. For example, in Meehan v. Commercial Casualty

Ins. Co., 166 S.C. 496, 504 (S.C. 1932), the Supreme Court held that testimony concerning offers of compromise was admissible because the testimony was offered to establish an agency relationship, "and not for the purpose of showing that an offer of compromise had been made." The Fourth Circuit has similarly observed that the nearly identically Fed. R. Evid. 408 "which generally forbids testimony regarding compromises or offers to compromise, need not prevent a litigant from offering such evidence when he does not seek to show the validity or invalidity of the compromised claim." Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987); accord Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 655 (4th Cir. 1988); Polk v. BP. Amoco Chem. Co., 586 F. Supp. 2d 619, 622 (D.S.C. 2008) (analyzing evidence to determine whether it fell within the exception to Fed. R. Evid. 408: "This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.").

Here, Morningstar seeks to introduce evidence regarding information exchanged and positions taken in the parties' mediation not to prove liability or the validity of the underlying claim negotiated during the mediation, but rather to demonstrate the County's failure to properly follow the dispute resolution procedures required under the Development Agreement. Because evidence of the mediation is being introduced for a purpose other than that prohibited under Rule 408, it should be admitted.

II. Subjective Views of Former York County Councilman Buddy Motz

The County also moves to exclude, at a minimum, any testimony by Councilman Buddy Motz concerning his view of Morningstar and Mr. Motz's January 22, 2010 email espousing upon his views. Ideally, it appears, the County would prefer the Court to prevent Mr. Motz from

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

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

47

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendant.

PLAINTIFF'S PRETRIAL MEMORANDUM

FILED-RECEIVED
2015 JAN 26 AM 10: 32
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

I. STATEMENT OF THE CASE

MorningStar purchased the old PTL property in 2004. That property had multiple improvements and structures located on it, including a twenty-one (21) story building (the Tower). MorningStar's original intention was to tear the Tower down. The Tower was incomplete and had stood dormant for many years. MorningStar changed course after an investigation revealed the Tower to be structurally sound. MorningStar began exploring the market for multifamily, retirement style housing. The market seemed very strong and the idea fit a niche in the overall concept for the MorningStar property. The value of the work in place was put at $11,887,719, which made the project seem even more viable. MorningStar began to take the steps necessary to complete and redevelop the Tower into such a facility.

A detailed Development Agreement relating to the Tower was negotiated with the County over many months and executed in January, 2008. It contained a five (5) year time horizon, but also contained the following language:

> The Parties acknowledge that the market conditions may, and will likely, affect the pace and character of the Property. Therefore, the Parties agree that they shall take into account...any change in market conditions, demographics or similar matters when deliberating disputes or negotiating for future modifications to this Agreement made pursuant to this paragraph.

Both sides, then, anticipated delays and built their understanding into the Agreement. This is consistent with South Carolina Local Government Development Agreement Act,

which makes completion of projects a fundamental goal, and minimizes the importance of hard deadlines and technical defaults. The project was complicated because of the length of time during which the Tower had simply stood there without any construction activity. Moving it forward was mutually beneficial.

MorningStar kept working, and delivered a preliminary site plan for the County's consideration in December, 2008. The economy had begun to teeter, and development nationwide came to a halt. MorningStar continued, however, to try to get this site plan into final form throughout 2009. There appeared to be no problems between the parties. MorningStar thought site plan approval would come in the early spring of that year, but it did not. MorningStar continued to wait for formal notification that the site plan was approved, but simply assumed that the County was not in any rush to begin actual construction given the five-year time horizon.

Things changed in early 2010. Pat Selvey sent a progress update to the County on January 12, 2010. This sparked an internal email debate specifically about the Tower among County representatives, and about MorningStar, more generally. A portion of an email sent from Jim Baker to the entire council reads as follows:

> "I have no idea whether there is a realistic probability that MorningStar will complete this project. However, more than anything else, staff and I believe the Council should take a strong stance and give notice of default to MorningStar if they cannot provide the financial assurances that were promised in a Development Agreement they signed on April 28, 2008. Again, the initial stages of this process will not necessarily be public and will take substantial time. However, I wanted to give everyone some advance notice about this upcoming deadline because this project has been so prominent in the public's eye."

Britt email, January 22, 2010, County production p. 657.

The response from Buddy Motz reads as follows:

> "Thanks Jim. I see them as being made in the same mold as the old PTL, and just as scheming. They are only out to fleece the investors of the units and bilk them for every dime they can get. The County has delayed this for too long and I see no reason for us to allow them to continue further. It would not be accepted for other businesses and it should not be allowed for them."

Motz email, January 22, 2010, County production p. 656.

The County had begun contending a week earlier, for the first time, that site plan approval had been granted in August, 2009. This was critically important, because the Development Agreement contains the following language:

> Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contract 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.

The County demanded the bonds or alternative financial assurances be presented by the end of February. The parties to the email exchange knew their position was going to result in litigation, and appear to have recognized that what they were asking for could not be delivered. *See e.g.* Britt email, January 22, 2010, County production pp. 660-661. A commercial site plan is a set of drawings that disclose information relating to infrastructure, landscaping, traffic flow, parking and the location of the anticipated improvements. It is a necessary first step in getting accurate pricing for any development. MorningStar had not received any communication from the County about the site plan for many months. The Development Agreement contemplates the negotiation and execution of a "Non-Reimbursable Extension Agreement" connected to utilities on the site prior to site plan approval. This had never even been discussed. MorningStar was not in a position, then, to get definitive bid information. Without accurate pricing, it is impossible to supply the necessary information to purchase performance bonds. There was simply no way to scramble and comply with the County's demands.

MorningStar's representatives met with County representatives on February 4, 2010. They attempted to explain the predicament MorningStar was being placed in, but were met with a response consistent with the Motz email. They were accused of not having the ability to complete the project, and of taking people's money improperly.

David Yarnes sent a letter on February 17, 2010 setting out the problems with the notice issue, but there was changing the County's position.

A formal notice of default was sent on March 5, 2010. The news was picked up in the media. The results were dramatic, and devastating. Reservations were cancelled, and the project came to a stop. MorningStar continued and continues to try to move the Tower project forward, but has not been able to. It cannot present meaningful completion and occupancy dates because of the County's claims that it must tear down the Tower. It has attempted to provide all information the County has requested in order to convince it that the Tower can be completed, but it has been apparent that demolition is the only acceptance option. This litigation is the result of that reality.

STATEMENT OF THE FACTS AND ISSUES IN CONTROVERSY
(Sections II and III)

An order granting the County's motion for summary judgment in part and denying it in part has previously been entered by Judge Kimball. He denied the County's motion for summary judgment on MorningStar's breach of contract and declaratory judgment claim, and the County's motion to reconsider. A copy of the order is attached. The primary questions remaining after Judge Kimball's order relate to what notice was given to Morningstar of site plan approval, if any, and whether it complied with the required standards implied by all of the circumstances between the parties. MorningStar contends that it did not, and that the notice of default in spite of that fact was improper. That notice, in turn, devastated the project. Fundamentally, MorningStar could not sell units because it could not promise delivery dates. The County denies that. MorningStar further contends that it has lost the value of the work in place ($11,887,719), because of the County's actions if the Tower is in fact demolished. It has also presented evidence of lost profits of approximately $7,187,421. At a minimum, Morningstar has the right to recoup the money it spent attempting to develop the tower, or roughly $819,460.89. The law in South Carolina permits MorningStar to recover damages which "either flow as a natural consequence of the breach or [were] reasonable within the parties' contemplation at the time of the contract." Hawkins v. Greenwood Dev. Corp., 328 SC 585, 595 (SC Ct App 1997). The County contents that it is entitled to demolish the Tower and recoup the

cost from MorningStar. MorningStar contends that should not happen for all of the reasons stated.

IV. EXHIBITS

1.	Agreement for Purchase and Sale	MorningStar 7010-7027
2.	Dissolution of Easement	MorningStar 7028
3.	Title to Real Estate	MorningStar 7030-7034
4.	Photos of Rehabilitation of Property	MorningStar 283; 286-293
5.	Concepts Documents	MorningStar 14872-14895
6.	Petition Regarding Interest	MorningStar 103-131
7.	JC Woodall Letter Regarding Feasibility 1-26-07	MorningStar 11855
8.	Statement of Probable Cost (Value in Place)	MorningStar 11864-11865
9.	Statement of Fix Cost	MorningStar 15833-15834
10.	Development Agreement	
11.	Heritage Tower Business Plan	MorningStar 11035-11120
12.	Heritage Towers Executive Summary and Proforma	MorningStar 214-227
13.	Selvey January 12, 2010 email	Baker Exhibit 4
14.	January 13, 2010 Pettine to Selvey email chain	Yarnes Exhibit 27
15.	Britt January 13, 2010 email	Britt Exhibit 12
16.	Pettine January 20, 2010 email	Britt Exhibit 13
17.	Selvey January 21, 2010 email	MorningStar 18128-18133
18.	Motz January 22, 2010 email	County Production p656
19.	Britt January 22, 2010 email	Britt Exhibit 10, County Production p657-661
20.	Britt January 25, 2010 email	Britt Exhibit 11
21.	Pettine February 4, 2010 letter	Yarnes 28
22.	Yarnes February 12, 2010 letter	MorningStar 267
23.	Yarnes February 17, 2010 letter	MorningStar 268-273
24.	February 19, 2010 Ottinger Memo	MorningStar 133

25.	York County Default Notice	MorningStar 17522-17523
26.	March 9, 2010 Yarnes Letter	MorningStar 274
27.	March 26, 2010 Yarnes Letter	Yarnes 36
28.	Sowers to Eric Dixon email July 7, 2010	MorningStar 19087-19091
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 17446-17456
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 17433-17445
37.	MorningStar Mediation Responses	MorningStar 155-197
38.	Chronological Refunds	Yarnes 17
39.	Deposits by Quarter Bar Graph	MorningStar 6287
40.	Refunds by Quarter Bar Graph	MorningStar 6276
41.	Piper Jaffray Letter	MorningStar 17403-17409
42.	Exhibit D to Discovery Responses (Revised in Joyner Dep.)	
43.	Cost Summary	MorningStar 149-154
44.	Cost Summary	MorningStar 12133-12137
45.	Cost Summary	MorningStar 13190-13229
46.	Cost Summary	MorningStar 14663-14677
47.	JC Woodall Expert Designation	
48.	Chris Herron Expert Designation	
49.	Selvey Deposition	
50.	MorningStar Discovery Responses	
51.	Damages Summary (Drawn from Ex. 8, 12, 42)	

V. WITNESSES

1. Rick Joyner
2. Dave Yarnes
3. David Herr

4. Pat Selvey (by deposition)
5. JC Woodall
6. Chris Herron
7. Eddie Brown
8. Eric Sowers
9. Buddy Motz
10. Jim Baker
11. Susan Britt
12. Dave Pettine
13. Gerald Lee

VI. UNUSUAL MATTERS TO BE BROUGHT TO THE COURT'S ATTENTION

None to Plaintiff's knowledge.

VII. SETTLEMENT NEGOTIATIONS STATUS

The parties mediated the case twice, and were unable to settle it.

JAMES, MCELROY & DIEHL, P.A.

By: _____

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Charlotte, NC 28202
704-372-9870
704-333-5508 (fax)
Attorneys Plaintiff

This the 26 of January, 2015.

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

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.

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

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

47

January 12, 2011

VIA CERTIFIED MAIL & ELECTRONIC MAIL

Mr. Dave Yarnes, Vice President
MorningStar Ministries
375 Starlight Drive
Fort Mill, SC 29715

Carl B. Epps, III, Esquire
Nelson Mullins Riley & Scarborough
1320 Main Street, 17th Floor
Columbia, SC 29201

Mr. Rick Joyner, President
MorningStar Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

Dear Mr. Yarnes:

I was tremendously disappointed by the recent Morningstar Ministries proposal to make "temporary visual aesthetic improvements" to the Heritage Tower. When we met on November 4, 2010 and Morningstar indicated the desire to make a specific new proposal for York County's consideration prior to the scheduled mediation, County representatives asked that any such proposal address at least three critically important elements.

First, we wanted to see a proposal that addressed the repair or replacement of the existing building façade so that the exterior of the structure would be finished, even if financing and construction of the interior spaces in the building were further delayed. We were also assured the proposal to come would include an engineering assessment that would satisfy us that the

repairs or façade replacement being proposed was technically feasible and would be structurally sound. In addition, we discussed the inclusion of repairs, improvements and a general clean up of the parking lot so the entire site had a finished appearance when viewed from the building exterior.

Secondly, we asked that Morningstar present the County with a financing commitment based on the anticipated costs of these improvements that would ensure the necessary repairs or replacement of the façade could be undertaken immediately, if York County was willing to accept such a proposal.

Finally, we asked that Morningstar Ministries present an updated and detailed plan for completing the marketing and ultimate construction of the interior elements of the building in order for us to intelligently consider any associated request by Morningstar to amend the existing Development Agreement and provide the Church with more time to complete the entire project.

As far as I can tell, none of these requested items has even been mentioned in your proposal. Further, as a separate matter, I agree that any temporary fix would only add costs to the entire project. However, I want to emphasize and make it absolutely clear that the County has never, at any time, suggested Morningstar make temporary improvements to the Tower for aesthetic purposes. I have noted on at least two occasions that completing the intended renovations to the façade (which is obviously a necessary element of the overall building renovation) might be one means of demonstrating Morningstar's strong and continued resolve to make real progress toward complete renovation of the Tower and may address the surrounding community's aesthetic concerns at the same time. An unfunded expression of the intent to explore minimal and purely cosmetic improvements falls far short of County staff's expectations.

However, ultimately, this is a decision that must be made by the York County Council and I'd like to invite representatives of Morningstar Ministries to appear before the Council during the executive session portion of their agenda on Tuesday, January 18, 2011. This will give representatives of the Church the opportunity to present this proposal directly to the Council rather than having the proposal related to them through me. The meeting is in the Agricultural Building at 6 South Congress Street, York SC 29745 and the agenda starts at 6:00 p.m. The executive session begins immediately after the open portion of the agenda has concluded.

Other than this letter, I will not be offering any report or recommendation to the Council until after Morningstar Ministries has had the opportunity to advocate their proposal to the Council and answer any questions they may have.

Sincerely,

James E. Baker
York County Manager

cc: Melvin McKeown, York County Attorney

COUNTY MANAGER'S OFFICE

Post Office Box 66, 6 South Congress Street, York, South Carolina 29745-0066
Tel: (803) 684-8511 • Fax: (803) 684-8550

July 14, 2010

Mr. Rick Joyner, President
MorningStar Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

Mr. Dave Yarnes, Vice President
MorningStar Ministries
375 Starlight Drive
Fort Mill, SC 29715

Carl B. Epps, III, Esquire
Nelson Mullins Riley & Scarborough
1320 Main Street, 17th Floor
Columbia, SC 29201

James W. Sheedy, Esquire
Spencer & Spencer, P.A.
P. O. Box 790
Rock Hill, SC 29730

Re: Mediation under Development Agreement
between MorningStar Fellowship Church and York County

Gentlemen:

York County notified Morningstar Fellowship Church on March 5, 2010 that it is in default and has committed material breaches of the terms and conditions of the Development Agreement with York County by failing to provide bid, performance and payment bonds, a letter of credit or a demolition bond or its financial equivalent as required under Section IV. C. of the Development Agreement between York County and Morningstar. Morningstar was required to cure material breaches of the Development Agreement within sixty (60) days of the Notice which was given to Morningstar on March 5, 2010.

The Director of County Planning and Development Services and I met with Morningstar representatives in a good-faith effort to negotiate a resolution of the disputes between Morningstar and York County as required by the Development Agreement but Morningstar was unable to provide bid, performance and payment bonds or letters of credit or a viable and acceptable resolution of disputes as a result of such good faith discussions and negotiations.

EXHIBIT
label

YORK COUNTY GOVERNMENT CORRESPONDENCE IS PRINTED ON RECYCLED PAPER.

MORNINGSTAR_17460

More than sixty days have elapsed since Morningstar was notified that it is required to cure material breaches of the Development Agreement and the material breaches of the Development Agreement have not been resolved through negotiation. Section X. C. of the Development Agreement provides that if negotiation fails to resolve the dispute within sixty (60) days or if the alleged defaulting party fails to cure a material breach within the time given, the dispute as to whether a breach exists must be resolved through mediation as a condition precedent to the institution of legal or equitable actions.

On June 21, 2010, I notified Morningstar of the demand by York County for mediation to endeavor to resolve claims, disputes and other matters in question, consistent with Section X. C. of the Development Agreement.

The following certified mediators are acceptable to York County:

Robert Erwin
305 Main Street
Greenwood, SC 29646
Telephone: (864) 229-5010

Charles B. Ridley
P. O. Drawer 11783
Rock Hill, SC 29731
Telephone: (803) 324-4292

Terry Millar
P. O. Box 10590
Rock Hill, SC 29731
Telephone: (803) 324-3196

D. Reece Williams
P. O. Box 1390
Columbia, SC 29201
Telephone: (803) 256-2371

Please notify me in writing of your agreement to one of the mediators named above or suggest alternate mediators acceptable to Morningstar for consideration by York County within ten days of the date of this letter.

York County filed its Request for Mediation on June 21, 2010, and legal or equitable proceedings are stayed pending mediation for a period of sixty days from June 21, 2010 under the terms of the Development Agreement. If a mediator is not named and mediation proceedings are not conducted within that sixty-day period, which ends on or about August 20, 2010, York County will have the right to institute legal actions in the courts of South Carolina to obtain legal or equitable relief which may include cancellation and termination of the Development Agreement and demolition of the unrehabilitated and incomplete tower located on the property which is the subject of the Development Agreement.

Yours very truly,

James E. Baker
York County Manager

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

January 3, 2011

Via Certified Mail and Electronic Mail
James E. Baker
6 South Congress Street
Post Office Box 66
York, South Carolina 29745
county.manager@yorkcountygov.com

Melvin McKeown
26 West Liberty Street
Post Office Box 299
York, South Carolina 29745

Dave Pettine
1070 Heckle Blvd. Suite 105
Rock Hill, SC 29732-2863

Dear Mr. Baker,

At a meeting in the York County offices on November 4th, 2010, we had discussed numerous topics, one of which included MorningStar Fellowship Church providing a proposal for temporary visual improvements. As per our conversation, attached please find our response. We await your comments and believe this proposal to be a potential remedy to any and all complaints from the surrounding community concerning the Tower's visual appearance.

Sincerely,

Dave Yarnes
tbps

Cc: Rick Joyner, Carl Epps

EXHIBIT
tabbies

MORNINGSTAR_17446

Overview

York County has voiced that it has received complaints about the physical appearance of the Heritage Tower Project from its constituents and has asked MorningStar Fellowship Church and its development team to respond by developing a solution that would include *Proposed Site and Tower Temporary Visual Aesthetic Improvements.*

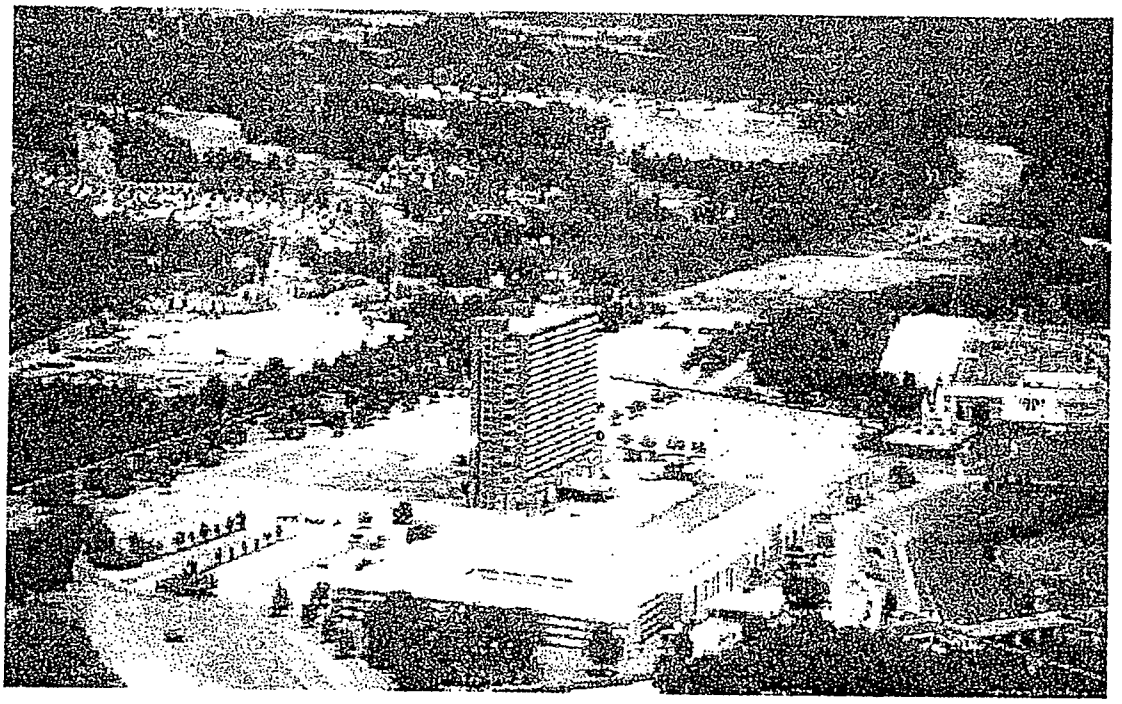
Background: The Towers' (and its immediate lot's) appearance has decayed after being vacant for a number of years; portions of the façade have failed while other areas were never completed. In addition, there have been issues of weather and vandalism over the years. Considerable effort has been expended by MorningStar Fellowship Church and its staff to review structural and safety concerns associated with any remediation.

In an attempt to continue the development of the Heritage Tower Project in a timely way and also to provide good will with the County, the staff of Morningstar Fellowship Church has developed a Proposed Site and Tower Temporary Visual Aesthetics Plan.

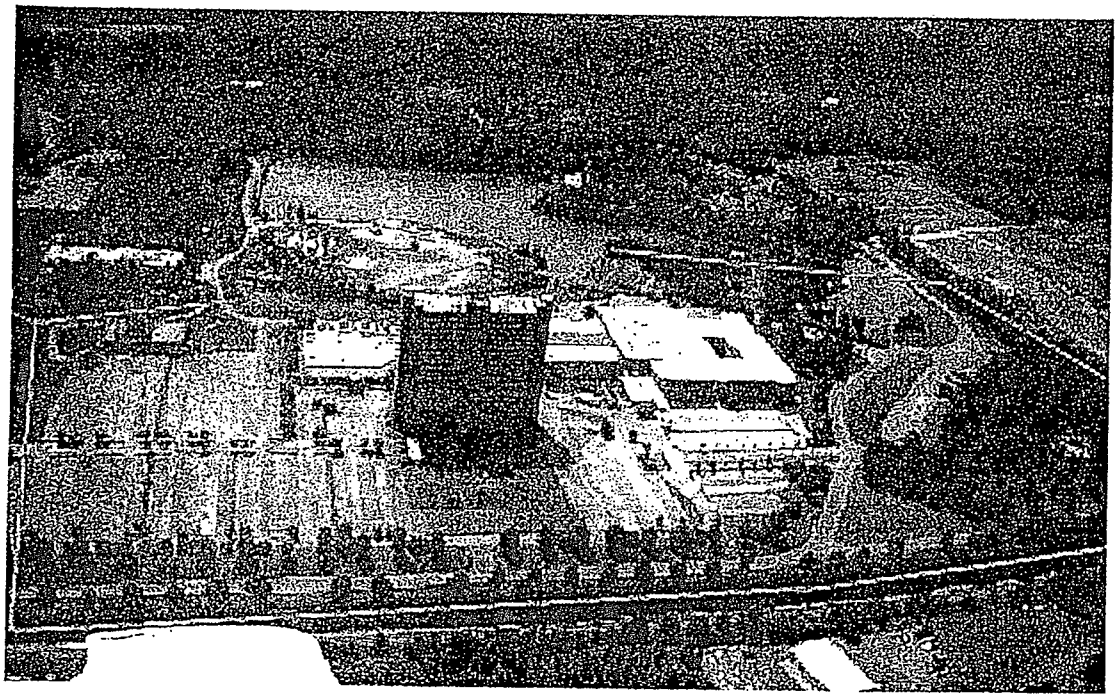
It's important to consider that any actions taken at this point by Morningstar to improve the aesthetics or to create any visual improvements are likely to be temporary as the project ultimately will require a more permanent redevelopment of the exterior of the building including windows, façade, room lines, parking lot and other visual aspects of the project. As these actions again are likely to be temporary the associated costs are likely to put significant additions to the budget in place.

Actions Taken after November 4, 2010 Meeting with County Staff to Produce Temporary Visual Aesthetic Improvement Proposal

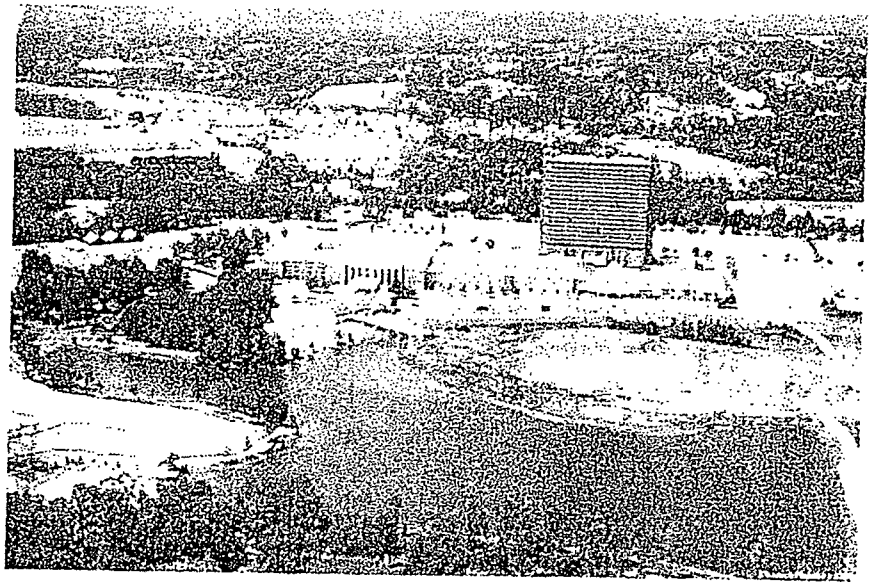
MorningStar has devoted its internal staff and continued to retain professionals to assess and develop a proposed plan that will have the highest impact from a visual aesthetic viewpoint. Care has been taken to assess the view of the Tower from the surrounding community (those communities off the MorningStar property on adjacent properties) and other properties within a 5 mile radius that are most likely to be effected by current views of the property.



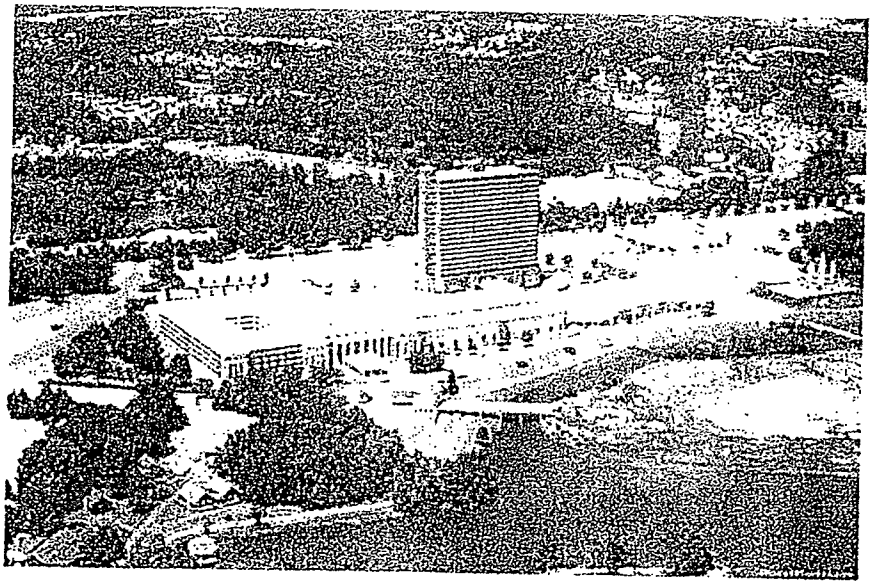
This aerial photo represents the approximate location of Heritage Towers as it relates to the property boundary of MorningStar Fellowship Church.



This aerial photo from a different view point also represents the approximate location of Heritage Towers as it relates to the property boundary of MorningStar Fellowship Church.

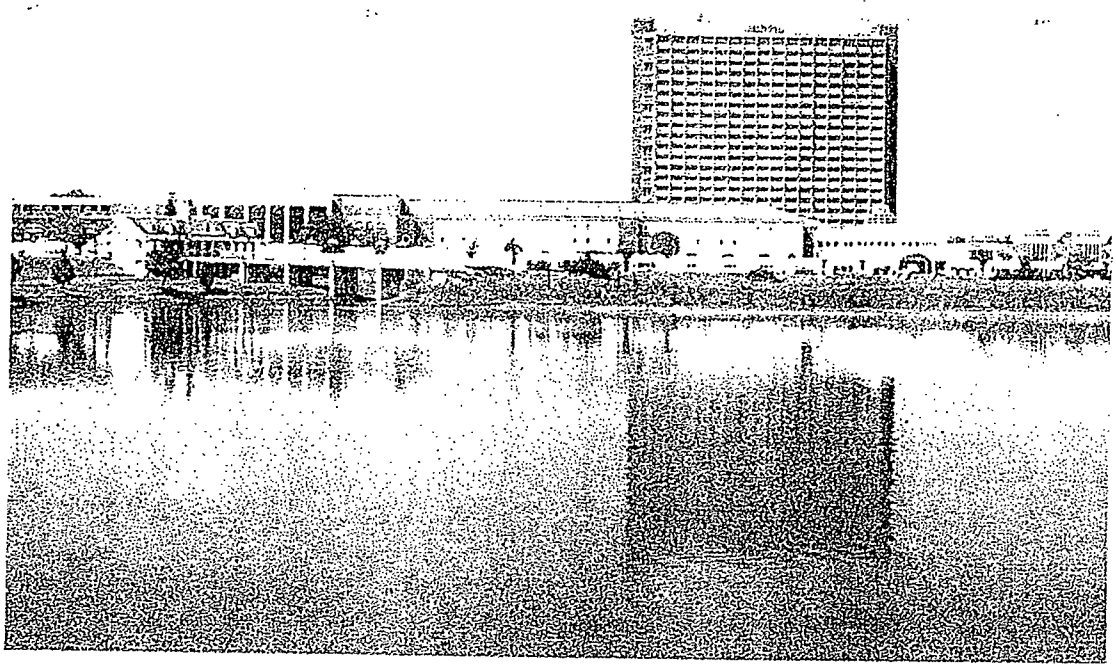


Aerial View from the Southeast



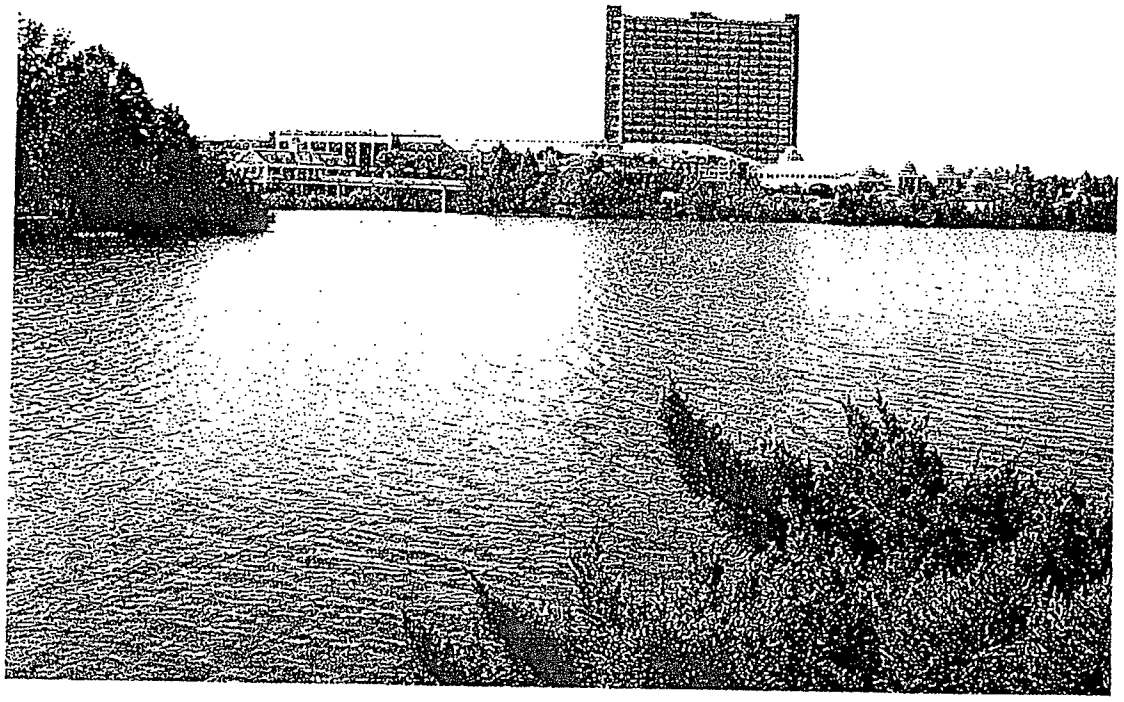
Aerial View from the Southwest

Next, the project team assessed the views of Heritage Towers and the most significant visual defects from various angles to develop a priority list of the most visible defects, various solutions and site conditions.



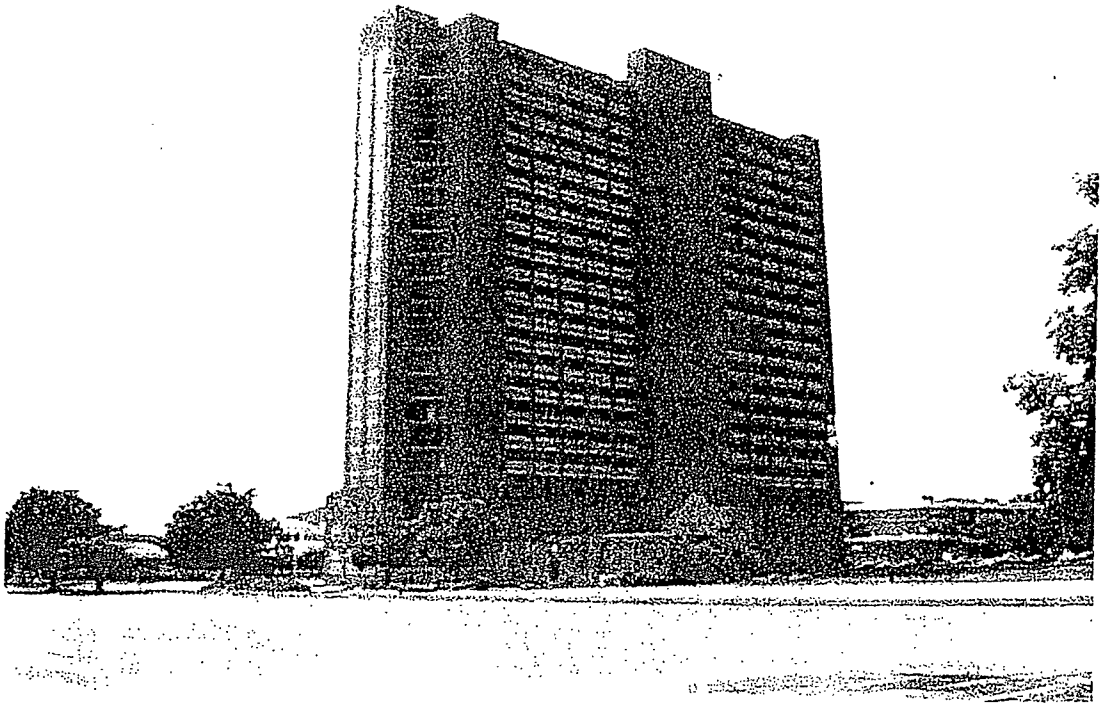
South to Southwest View facing Northwest

This non-retouched recent picture of the Heritage Campus from the south to southwest view represents the closest observation to the project from this angle. The property line goes directly to the lake line allowing the closest view point to be from across the lake. Also note the additional campus buildings which lie directly in front of the Tower obscuring the view of the first five floors.



Additional View from South

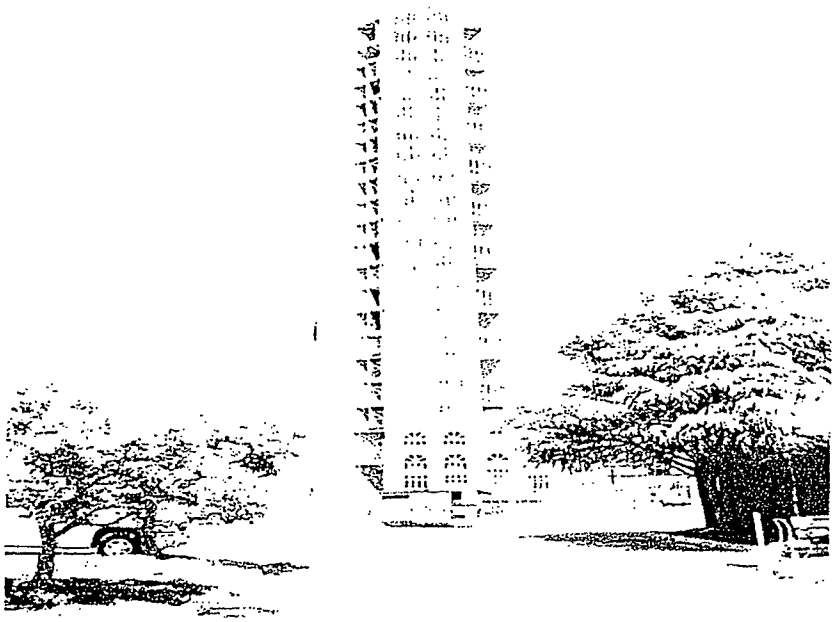
After research and analysis from the south to southwest view point, observing Heritage Towers from its closest off campus view point, it is suggested that no remediation is necessary.



West to Northwest View

This recent view of Heritage Campus from the west to northwest facing south represents the closest view of the Tower Project.

This missing section of brick is probably the most noticeable defect of the building as it stands. This section is presumed never to have been applied and is most likely the site of an attached building crane. Other missing areas of brick most likely have come from exposure to water damage. This is recommended to be the highest priority in terms of addressing the building's view from on-lookers. Also noticeable is the 6 foot steel chain link construction fence which secures the perimeter. The fence and surrounding grass pavement are also a high priority.



Northeast

This view from the northeast facing west shows an approximate 12 feet by 14 feet portion of brick that is missing. Also noticeable is a 5 foot section where the brick is detached from the building. This is the second highest priority section of the building as it relates to aesthetic appearances.

After review of existing conditions, MorningStar engaged a team to develop solutions to the Towers' temporary visual aesthetics' improvements, developing a priority list of the most effective possible improvements with an eye toward creating the best effect for surrounding properties off of the MorningStar site.

Next, a team was engaged in assessing cost for construction, impediments, debris removal, and other ramifications of aesthetic visual improvements, including site safety issues. This team worked to develop a proposed remediation program that is effective and able to be implemented.

Temporary Visual Aesthetic Improvement Proposal

1) Remove debris from the surrounding site enclosed within the construction perimeter fence.
2) Remove debris from roof of Tower building that is visible from nearest of site public viewpoints. This includes old adornments, temporary structures and also vegetation that has overgrown.
3) Remove any large areas of staining or graffiti on the Tower building that are visible from the nearest of site public viewpoints. This will be accomplished using industrial cleaning methods that may require a combination of solvents and or high pressure washing.
4) Temporarily conceal large areas of exposed concrete (where brick should be present but is currently missing) using industrial coating to match brick color. This process will require field testing and applicable permits. Coatings may include: polymers, latex coatings, paints, EFIS Systems.
5) Remove debris and vegetation from fence line.
6) Secure, reattach, or remove loose bricks from exterior building (where feasible) at the owners discretion. This process will require field testing and necessary permitting.
7) Remove any protruding debris or construction materials from window openings or exposed interior spaces.
8) Additionally, provide engineering report establishing the soundness of the existing structure and the steps necessary for further research and construction, through project completion.
9) Additionally provide architectural report delineating the overall scope of project, work completed to date, proposed modifications to existing structure, architectural drawings and the steps necessary for further research and construction, through project completion.

Need for Permitting and Field Testing

As mentioned in the "Temporary Visual Aesthetic Improvement Proposal" many areas of demolition, testing and construction will require necessary permitting. As the substrate of the exterior of the building has been reviewed by engineers but no field testing has been preformed the following may apply: the methodology and application of materials may need to be modified; weather conditions may become a factor especial if temperatures fall below manufactures recommended tolerances for application.

Site Safety

Site safety, especially during demolition, will be a primary focus. Extensive research has been performed to detail equipment and methods necessary for a safe and secure site. However, until field testing has been performed and appropriate equipment, materials and material handling systems have been tested, methods, materials, and equipment may need to be altered.

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
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Tel: 803.255.9751
carl.epps@nelsonmullins.com

August 12, 2010

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

James E. Baker
York County Manager
Post Office Box 66
York, South Carolina 29745-0066
county.manager@yorkcountygov.com

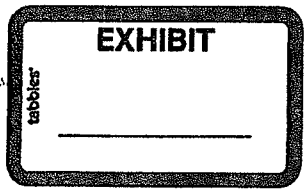
Melvin McKeown
York County Attorney
Post Office Box 299
York, South Carolina 29745
melvin.mckeown@yorkcountygov.com

Re: Morningstar Fellowship Church Development Agreement With York County
Our File No. 36271/01500

Dear Mr. Baker:

This will serve to acknowledge receipt of your letters of June 21 and July 14, 2010, regarding mediation of a dispute under the Development Agreement between York County and MorningStar Fellowship Church ("MorningStar").

As you are aware, MorningStar disputes that it is in violation of the Development Agreement. It has asked for appropriate documentation showing that the County approved its site plan on several occasions, commencing with Mr. Yarnes letter to you of February 17, 2010. Despite repeated requests for documentation of the County's approval of the site plan as required by the Development Agreement, none has been received. Further, the site plan was withdrawn by MorningStar in Mr. Yarnes' letter to you of February 17, 2010 for several reasons, one of which was caused by revisions to the plan based on information that the County was going to install a new sewer system through a proposed road on the site plan. Accordingly, the County's insistence that MorningStar provide it with a bid, performance, and payment bond or similar instrument is misplaced.



Despite MorningStar's denial that a breach of the Development Agreement has occurred and the lack of verification by the County that it has, the County continues to declare a Default under Section X.B ("Default"), and is pursuing remedies provided in the event of a Default under Section X.C ("Remedies on Default"). MorningStar has attempted to cooperate with the County to resolve any outstanding disputes, including the claim that a default has occurred, but from its viewpoint the County continues to follow a course that suggests to MorningStar that the County will ultimately attempt to force MorningStar to demolish the Heritage Tower. This, as has been pointed out, is a dramatic and devastating action for the County to take, and will result in very significant damages to MorningStar. Although the Development Agreement provides for specific steps to be taken in the event of a default, before any action can be initiated, a default must occur, and MorningStar has no evidence of an event of default having occurred. As of the date of this letter, MorningStar has no site plan in effect, it having withdrawn by Mr. Yarnes' letter of February 17, 2010, and the County's attempts to use it as the initiating date for an alleged default seems misplaced. I, again, on behalf of MorningStar, ask for a copy of the County's notice of approval of the site plan.

In my letter to you of May 3, 2010, I asked that we be allowed to meet with you to resolve the dispute as quickly as possible, which I repeat with this letter. While we are willing to engage a mediator if the County insists, it is my view that any dispute should be resolved quickly and as efficiently as possible, and I see no reason to engage a mediator without seeing if the dispute can be resolved on a more informal basis. If the Development Agreement needs to be modified, it is my hope and expectation that the parties to the Agreement can agree to a modification that fulfills everyone's needs.

If, however, the County is unwilling to meet my request for a meeting, we will agree to allow Robert Erwin to mediate the dispute. The first task for Mr. Erwin will be to determine whether a breach has occurred, and whether the required approval of the site plan was properly communicated to MorningStar prior to its withdrawal. Only if it is determined that the County properly approved the site plan prior to its withdrawal should the mediator be further involved unless both parties agree that it is beneficial.

MorningStar regrets that it finds itself in this position with the County. Successful development of the Heritage Tower will benefit the County in a myriad of ways, and MorningStar sincerely believes that it should be in partnership with the County, not in opposition to it. It wishes to work with the County to eliminate its concerns. Accordingly, it would be most appreciated if you will set aside time to meet with MorningStar representatives and me in order to resolve any disagreements and allow MorningStar to move forward with the development without facing the threat of the County attempting to demolish the Tower.

Please let me hear from you.

I am, of course, sending Mr. McKeown a copy of this letter and copying Mr. Pettine.

Very truly yours,

Carl B. Epps, III

CBEIII:eh
Enclosure
cc: Mr. Pettine

-#4823-7027-7895 v.1 -

June 21, 2010

Mr. Rick Joyner, President
MorningStar Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

Mr. Dave Yarnes, Vice President
MorningStar Ministries
375 Starlight Drive
Fort Mill, SC 29715

Carl B. Epps, III, Esquire
Nelson Mullins Riley & Scarborough
1320 Main Street, 17th Floor
Columbia, SC 29201

James W. Sheedy, Esquire
Spencer & Spencer, P.A.
P. O. Box 790
Rock Hill, SC 29730

Re: Notice and Request for Mediation under Development Agreement
Between MorningStar Fellowship Church and York County

Gentlemen:

By letter dated March 5, 2010, York County notified MorningStar Fellowship Church that MorningStar is in default for breach of its obligations to provide bid, performance and payment bonds, a letter of credit or a demolition bond or its financial equivalent under Section IV. C. of the Development Agreement between York County and MorningStar. MorningStar was further notified that York County reasonably found that Morningstar has committed material breaches of the terms and conditions of the Development Agreement and is required to cure such material breaches of the Development Agreement within sixty (60) days of the date of the notice, which was given on March 5, 2010.

MorningStar was provided an opportunity to rebut the County's findings and determination or to consent to or amend the Development Agreement to meet the concerns of the County with respect to the County's findings and determination.

MorningStar thereafter corresponded with various County officials and representatives disputing findings and determinations by the County.

York County received a letter of representation from Carl B. Epps, III by which MorningStar disputed the contentions that it is in default and has breached material terms of the Development Agreement.

MorningStar representatives have met with the Director of County Planning and Development Services and me in a good faith effort to negotiate a resolution of the disputes and situation to their mutual satisfaction. Although negotiations and discussions between MorningStar and York County have promoted a better understanding of the positions of the respective parties, MorningStar has been unable, within 180 days of County approval of the commercial site plan of the property to obtain or provide to the County bid, performance and payment bonds or letters of credit required under Section IV. C. of the Development Agreement.

The Development Agreement provides that if MorningStar is unable, within 180 days of County approval of the commercial site plan for the property, to obtain bid, performance and payment bonds or letters of credit the Development Agreement is deemed null and void, and the Tower must be demolished at the expense of MorningStar.

MorningStar is required to cure material breaches of the Development Agreement within sixty (60) days after notice of the material breach, as provided in Sections X. B. 3. and IV C. 2. of the Agreement.

Issues relating to material breaches of the Development Agreement by MorningStar and MorningStar's failure to cure the material breaches within sixty days after notice have not been resolved through negotiation.

Section X. C. of the Development Agreement provides that "if such negotiation fails to resolve the dispute within sixty (60) days or if the alleged defaulting party fails to cure a material breach within the time given, the Parties agree that the dispute as to whether a breach exists shall be resolved through mediation, with mediation being a condition precedent to instituting legal or equitable actions within the courts of South Carolina."

Disputes concerning material breaches of the Development Agreement and the failure to MorningStar to cure material breaches within the sixty-day period provided in the County's letter and notice of material breaches dated March 5, 2010, have not been resolved through negotiation.

This letter constitutes a Notice of Demand by York County to endeavor to resolve claims, disputes or other matters in question between MorningStar and York County through mediation as provided in Section X. C. of the Development Agreement between the parties. The Development Agreement requires that the parties designate a mediator mutually agreeable to both York County and MorningStar, the Developer; that mediation be conducted in accordance with the mediation provisions of the South Carolina Circuit Court Alternative Dispute Resolution Rules; that the mediation be conducted in York County; and that the costs of a third-party mediator will be shared equally by the parties.

York County will provide you with a list of qualified mediators acceptable to York County within the next ten days and requests that you designate one of the qualified mediators from the list provided within ten days after receipt of the list, failing in which, York County will seek the appointment of a mediator pursuant to the South Carolina Circuit Court Alternative Dispute Resolution Rules.

Yours very truly,

James E. Baker
County Manager

Nelson Mullins

Nelson Mullins Riley & Scarborough L.L.P
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.256.7500
www.nelsonmullins.com

Carl B. Epps, III
Tel: 803.255.9751
carl.epps@nelsonmullins.com

March 3, 2011

Via Electronic and Certified Mail

Melvin B. McKeown, Jr., Esquire
McKeown Law Firm
P.O. Box 299
York, SC 29745-0299

RE: Morningstar Ministries v. York County
Our File No. 36271/01500

Dear Melvin:

I wish to follow up on our mediation on January 26, 2011. MorningStar's Board has met and discussed the County's position, as well as the damage done to its efforts to complete the building and its marketing due to adverse publicity and negative comments made about the development, most of which has been the result of perceived negative comments coming from County spokespersons. This letter will confirm MorningStar's response to the questions that remained outstanding following the mediation.

First, I have attached a letter from J.C. Woodall, the chief architect on the Tower, explaining the impossibility of completely renovating the façade before and independently of deciding upon and making the interior repairs. Mr. Woodall is available to meet with the County representatives to discuss the lack of feasibility of doing as was suggested by the County during the mediation. Hopefully, the County will no longer attempt to require MorningStar to completely renovate the Towers' facade before finalizing its overall marketing and build out of the interior.

In order to eliminate any public complaints about the exterior of the Tower, however, MorningStar is prepared to repair the brick on the façade and replace brick that is missing. It will also remove debris from the building and the building site, clean the immediate grounds adjacent to the Tower, and replace and repair perimeter fencing. The repairs to the exterior of the Tower and its immediate site will be consistent with the presentation we made at the County council meeting and subsequently at mediation. These repairs could cost upwards of $100,000, and MorningStar is prepared to provide accounting information verifying that these

funds are in place and accessible immediately to perform the repairs. MorningStar believes it can commence repairs within two weeks of reaching an agreement with the County that allows it to move forward under a reasonable time frame and conditions.

The County will need to reset the date of the Development Agreement so that MorningStar has five years from finalizing an agreement to complete the Tower. The current Development Agreement will have to be further modified to tie the issuance of the demolition and any other bonding requirements into finalization of its building plan, not the site plan. Any claims that MorningStar is in default under the Agreement will have to be withdrawn.

Most importantly, MorningStar and the County cannot be perceived as adversarial. We will have to agree upon language wherein the County agrees publically that MorningStar is not in default under any agreements reached with it, and that the parties look forward to working together cooperatively for the benefit of York County and MorningStar Ministries. We will also need to agree that neither party will make subsequent statements that are perceived as negative unless and until a subsequent material default occurs. The manner and method of formalizing this agreement is subject to further discussion, but I think everyone agrees that we should work cooperatively, not as adversaries.

Other provisions in the Development Agreement may need to be modified, but these are the elements deemed essential from MorningStar's standpoint. MorningStar is not, however, inclined to modify the default provisions under the current Development Agreement, as without flexibility and the ability to negotiate resolution of any future disputes, one party or the other may be disenfranchised or exposed to serious unintended consequences.

I hope these letters will be favorably received, and that further disputes between the parties eliminated. The cost of failing to reach an agreement is too high for either party to withstand. Accordingly, we look forward to further discussions, if needed, and resolution of any remaining issues.

Very truly yours,

Carl B. Epps, III

CBEIII:ljs
Attachment
cc: Mr. James E. Baker (via email and certified mail)
Mr. David Yarnes (via email)
Mr. Rick Joyner (via email)

28 February, 2011

David Yarnes
Chief Operating Officer
Heritage Tower Project
Morningstar Ministries Fellowship Church
375 Starlight Drive
Fort Mill, SC 29715

RE: Mediation with York County

Dear David:

Thank you for bringing me up to speed regarding the mediation with York County. Again, I am sorry I was scheduled to be out of town and could not attend. Had I been able to attend, I believe I could have answered the questions posed by the County, and eliminated its continuing belief that the exterior of the building can be completely renovated independent of the other construction considerations. Please use this letter as you deem proper in any continuing dialogue with the County. I believe the County's stated position that the façade should be completely renovated as a first step, with the interior work to be completed over time, is based on a lack of appreciation of what MorningStar must do in order to renovate the Tower.

First of all, for Morningstar to completely renovate the exterior of the building, including replacing all the existing fenestration, is not feasible. I think Morningstar has made it clear that without exact knowledge of the resident mix, it cannot know the exact configuration of the windows or the façade. The replacement of the windows alone is estimated to cost roughly $4,500,000. Since Morningstar does not know, at this point, what the final configuration and appearance of the windows will be, to install windows now will waste much of its resources. Additionally, attempting to complete the façade, without having the final plans and product mix in place, leads to the same result. I had hoped that the County understood this, but perhaps it was not made as clear as I anticipated. The remainder of the work on the façade is anticpated to cost an additional $1,500,000, and much of it as well as the windows will likely have to be redone once the size and type of each unit is determined. To do as the County now asks is to require Morningstar to spend approximately $6,000,000, without a final plan for either the exterior or the interior, and no developers I know of are able to waste money of this magnitude in today's market.

The County's demand that the façade be completely refurbished at this point suggests a lack of appreciation of the stages of construction of a project of this size, the massive amount of careful planning required, and the priority of an efficient order of work. This is not an undertaking that can be made without detailed and careful planning, market analysis, and construction techniques.

I will be happy to meet with Mr. Baker and Mr. McKeown, or County Counsel, to review the staging of a project of this scope and magnitude to hopefully make everyone involved appreciate the necessity of careful planning, financing, and construction. To do what they are currently requesting is impractical and wasteful. After our presentation to the York County Council, during which I truly felt we had received an open and warm reception, I felt sure the County would negotiate in good faith with Morningstar to establish a plan based on the mutual goal of protecting this historic property, and would join us in establishing a reasonable schedule of work, to be conducted as soon as possible, to maintain the integrity of the structure and minimize the negative impact to the surrounding neighborhood due to the delays in restoration made necessary by the stagnant economy. If I can assist in further explaining the construction issues, and why the façade cannot be completely renovated as a finished product, I will be most happy to meet with the County or its representatives.

Best regards,

Jefferson C. Woodall, RIBA

JEFFERSON C WOODALL, ARCHITECT
1100 REYNOLDA ROAD
WINSTON-SALEM, NC 27104

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

June 30, 2011

Via Certified Mail and E-Mail
James E. Baker
York County Manager
Post Office Box 66
York, South Carolina 29745 - 0066
county.manager@yorkcountygov.com

Melvin McKeown
York County Attorney
Post Office Box 299
York, South Carolina 29745
melvin.mckeown@yorkcountygov.com

Cc: Bob Erwin
305 Main Street
Greenwood, SC 29646
rme@emeraldis.com

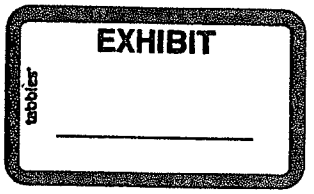
Gentlemen,

After careful review and consideration, MorningStar Fellowship Church believes it can accomplish largely the items requested by York County through the mediation process. It is our understanding though correspondence with mediator Bob Erwin and our attorney that the changes necessary to our proposal submitted to York County are in three specific categories:

1. MorningStar evidence $1,000,000 of funds toward development of the Tower
2. MorningStar provide the County with completed plans for the majority of the interior space
3. MorningStar provide the County with a due date for completing the final design and improvements to the façade

We believe this represents the items stated during the last phone conversation regarding the County's concerns brought forth in mediation efforts. However York County's counter proposal was not set forth in writing to our knowledge and therefore we hope these statements accurately represent the County's concerns.

Additionally, the items presented in our proposal dated January 3rd 2011, and further broadened and defined in a face to face mediation meeting on January 26th, we believe are largely achievable promptly based on further investigation, research and assessment.



MORNINGSTAR_17433

At this point MorningStar would like to schedule a meeting specifically to bring in technical expertise from a state certified architectural firm to discuss the particular details of some of the needed considerations for the exterior of the building, and also to discuss any "possible" delays that could take place during the renovation process and how MorningStar looks to overcome them.

Additionally, Morningstar would expect that York County's view of any violations would be amended accordingly and also any pertinent sections of the existing development agreement to be amended in a mutually beneficial way.

Again, MorningStar believes that after careful review we are able to comply with the requests brought forth by York County through mediation for the immediate improvement of the Tower.

We would propose a meeting with York County with mediation present for the purposes of reducing to writing our agreement and also to have our architectural firm present to identify potential constraints, and solutions and remedies as the exterior construction takes place. We feel that as we reduce these goals and time lines to writing its important our professional Architectural (and possibly our engineering) staff present to provide immediate validation to our proposal and timelines.

Also let this letter serve as a response to the email sent from Melvin McKeown dated June 2011 requesting that MorningStar put in writing the substance of a proposed mediation meeting so the agenda can clearly be set prior to the meeting time. We hope this meets that need and we look forward to this meeting.

At this meeting we can also provide: updated marketing information including total number of depositors, financial updates, sections of our engineering report with field testing, and sections of our architectural drawings.

Thank you for your anticipated response, we look forward to proceeding on the matters listed above.

Sincerely,

Dave Yarnes
Vice President

DKY:pss

Kendree, Michael

From: Britt, Susan
Sent: Friday, January 22, 2010 2:52 PM
To: Pettine, David
Subject: FW: Morningstar Development Agreement

FYI

Susan

Susan Britt, AICP
Director
York County Planning & Development Services
1070 Heckle Boulevard, Suite 105
Rock Hill, SC 29732-2863
Phone: 803.909.7242
Email: susan.britt@yorkcountygov.com

From: Motz, Buddy
Sent: Friday, January 22, 2010 2:51 PM
To: Baker, Jim; 'cmsinc@comporium.net'; Cox, Joe; 'starr7827@gmail.com'; Harmon, David; Huell, Tonya; Larson, David; McKeown, Melvin; Norris, Linda; 'plindemann@hotmail.com'; 'rlbtab@comporium.net'; Blake, Roy; '/O=YORKCOUNTYGOVEXCHANGE/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Teria.sheffield'; 'tfsmittysc@aol.com'; Moore, Anna
Cc: Britt, Susan
Subject: Re: Morningstar Development Agreement

Thanks Jim, I see them as being made in the same mold as the old PTL, and just as scheming. They are only out to fleece the investors of the units and bilk them for every dime they can get. The county has delayed this for to long and I see no reason for us to allow them to continue further. It would not be accepted for other businesses and it should not be allowed for them.

Thanks,
Buddy
Sent from my BlackBerry
Cell # 1-803-322-5654

From: Baker, Jim
To: Buddy Motz (buddy.motz@yorkcountygov.com); Chad Williams <cmsinc@comporium.net>; Cox, Joe (Joe.Cox@yorkcountygov.com); Curwood Chappell (starr7827@gmail.com) <starr7827@gmail.com>; Harmon, David; Huell, Tonya; Larson, David (david.larson@yorkcountygov.com); McKeown, Melvin; Norris, Linda; Paul Lindemann (plindemann@hotmail.com) <plindemann@hotmail.com>; rlbtab@comporium.net <rlbtab@comporium.net>; Roy Blake (roy.blake@yorkcountygov.com); Sheffield, Teria (Teria.Sheffield@yorkcountygov.com); Tom Smith (tfsmittysc@aol.com) <tfsmittysc@aol.com>; Wilson, Anna (Anna.Wilson@yorkcountygov.com)
Cc: Britt, Susan
Sent: Fri Jan 22 14:29:01 2010
Subject: Morningstar Development Agreement
All,

EXHIBIT
Exhibit
_____

A key milestone in the Morningstar Development Agreement (DA) is their obligation to provide a performance bond or letters of credit within 180 days of York County's approval of the commercial site plan as a prelude to beginning the construction process. This deadline comes at the end of February, 2010.

Recent discussions with Morningstar representatives have disclosed that they are highly unlikely to reach this goal in the near-term future. We have been told they need more time to sell advance "reservations" for units within the renovated tower in order to gain the financing commitments they need. Staff will be meeting with them soon and we plan to tell them the matter will be placed on the Council's executive session agenda for March 1, 2010 and, if they are not in compliance with the terms of the Development Agreement by that date, we plan to recommend the Council issue a notice of default under the Agreement.

Such a notice only starts the resolution process. The DA gives Morningstar another 60 days to negotiate a resolution to any claimed breach of the Agreement and even if we remain stalemated after 60 days, they can request mediation prior to any final action being taken.

I have no idea whether there is a realistic probability that Morningstar will complete this project. However, more than anything else, staff and I believe the Council should take a strong stance and give notice of default to Morningstar if they cannot provide the financial assurances that were promised in a Development Agreement they signed on April 28, 2008. Again, the initial stages of this process will not necessarily be public and will take substantial time. However, I wanted to give everyone some advance notice about this upcoming deadline because this project has been so prominent in the public's eyes.

Jim

MorningStar Mediation Agreement Response

March 5 2012

375 Star Light Drive • Fort Mill, SC 29715 • (803) 802-5544 • Fax (803) 548-8438

MorningStar
FELLOWSHIP CHURCH

Confidentiality Statement

As this document includes confidential financial information and is also a part of the confidential Mediation Process THERFORE this Information, data and drawings embodied in this Mediation Agreement Response are strictly confidential. By receiving this information, you are agreeing that you will not disclose this information to third parties without the prior written consent of MorningStar Ministries.

375 Star Light Drive • Fort Mill, SC 29715 • (803) 802-5544 • Fax (803) 548-8438

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

February 12, 2010

Via Certified Mail and E-Mail
James E. Baker
6 South Congress Street
Post Office Box 66
York, South Carolina 29745
county.manager@yorkcountygov.com

Melvin McKeown
26 West Liberty Street
Post Office Box 299
York, South Carolina 29745

Dear Sir,

In connection with our meeting at your offices on February 4, 2010 at 10:00 am we are in the process of reviewing, with legal counsel, any and all claims concerning the development agreement and matters stated at that meeting. Due to the serious nature of that meeting and the fact that if handled improperly actions could cause irreparable financial harm to MorningStar Fellowship and its projects, we are hereby requesting that no formal communication, actions, notices, inquiries, or meetings take place until we have had a chance to review with our legal counsel the meeting and matters discussed and reply to you in writing.

Sincerely,

Dave Yarnes
wbps

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

February 17, 2010

Via Certified Mail and E-Mail
James E. Baker
6 South Congress Street
Post Office Box 66
York, South Carolina 29745
county.manager@yorkcountygov.com

Melvin McKeown
26 West Liberty Street
Post Office Box 299
York, South Carolina 29745

Dear Sirs,

It is with considerable disappointment that I send the enclosed Notice of Dispute. On Thursday, February 4, 2010 at 10:00 am myself and Pat Selvey, in an attempt to discuss matters with York County informally and provide an update on progress, found it disheartening to find a large group of County employees and advisors assembled with little or no intention of discussing the project's merits or progress. It seems the sole intention and that "mind's were made up" to cause serious harm and detriment to the project by means of filing default without regard for the spirit, definition, due processes allowed for in the development agreement .

MorningStar Fellowship Church is heavily invested in the project and therefore takes these matters seriously. Comments made by James Baker, County Manager, said in the meeting that although "he is unaware of the progress" is "fully intent on advising county government to issue a notice of default". We find York County not working within good faith of agreement and therefore are issuing the following notice of dispute.

Again, on February 12th correspondence was sent to Mr. Baker and Mr. Melvin McKeown which stated concerning Morningstar Fellowship Church "we are in the process of reviewing, with legal counsel, any and all claims concerning the Development Agreement and matters stated at that meeting. Due to the serious nature of that meeting and the fact that if handled improperly actions could cause irreparable financial harm to MorningStar Fellowship Church and its projects," and "requesting that no formal

communication, actions, notices, inquiries, or meetings take place until we have had a chance to review with our legal counsel" and "reply to you in writing."

To which Mr. James Baker replied, "At our meeting, I indicated County staff intended to bring this matter to the attention of the York County Council at their meeting on March 1, 2010" thus allowing for no review, comment, Investigation or reasonable interest in our claims or financial harm that could be brought about by this hasty action.

Also in Mr. Baker's letter he stated, "If we haven't heard anything further, prior to March 1st, I will certainly bring Mr. Yarnes letter to the Council's attention along with our staff recommendations." This indicates a violation of several areas of the development agreement calling for reasonable time frames and also that without a single consideration the County staff had formulated "recommendations."

This serious course of action if not handled properly could cause disreputable harm financially to MorningStar Fellowship Church and its projects. We again iterate that **no communication in any public manner or public discussion, which could cause irreparable harm and significant damage to Morningstar Fellowship Church take place until our items of concern and dispute can be identified, and resolved.**

Attached please find an initial list off disputes, notices, rebuttals and suggestions for reasonable courses of action.

Sincerely,

David Yarnes
Vice President

Enc.

Notice of Dispute

Let this serve as an official notice of dispute concerning the development agreement by and between MorningStar Fellowship Church and York County. We ask that immediate action take place concerning the disputes and notices in order to prevent irreparable harm and significant damage to Morningstar Fellowship Church, and specifically **no communication in any public manner or public discussion, which could cause irreparable harm and significant damage to Morningstar Fellowship Church take place until items of concern and dispute can be identified, and resolved.**

According to the terms of the Development Agreement set forth on page 15, "Developer and York County shall endeavor to resolve claims, disputes and other matters in question between them by mediation in an informal process..." Further terms as outlined on Page 2, section D states: " Minor Modifications ... do not require public notice and hearing prior to implementation" and "minor modification is one which does not change the beneficial us of the Property." Be it known that, the Developer is bringing several individual instances of dispute, formally before York County identified in the following manner:

Item 1
No Proper Notice Given for "Site Plan Approval"

As per page 17 of the Development Agreement, section H notes, "All notices, certificates and other communications hereunder shall be deemed sufficiently given and shall be deemed given when mailed by certified or registered mailed, postage pre-paid, addressed as follows: To the Developer: Rick Joyner, President MorningStar Fellowship Church, 375 Star Light Drive, Fort Mill, SC 29715."

No notice of the Site Plan Approval has been provided to the developer as per the development agreement that we are aware of. Also stamped certified drawings of the Site Plan have not been provided to the developer or any party related to the developer. We in fact find little information delivered officially as per the terms set forth in the agreement for "notices, certificates, and communications." Also MorningStar Fellowship Church believes it can not take into account notices of substance unless provided in the above mentioned form.

Item 2
Significant Documentation Withheld

Stamped certified drawings of the Site Plan have not been provided to the Developer or any party related to the Developer. This documentation is vital in attesting to "what" was approved. We again, in fact, find little information delivered officially as per the terms set forth in the agreement for "notices, certificates, and communications." Also MorningStar Fellowship Church believes it can not take into account notices of substance unless provided in the above mentioned form.

Item 3
Change in Normal Protocol

It is our understanding that normal protocol for Site Plan Approval involves the distribution of stamped or certified drawings, clear communication as to the approval of various departments. Ambiguous documentation concerning the approval of drawings was made mention of in certain unofficial

documentation but it is impossible to ascertain a specific Site Plan, dates of critical notices which are normally provided and usually in the course of business. MorningStar Fellowship Church feels this is in violation to numerous sections of the Development Agreement.

Item 4
Attorney Not Present

Representatives of MorningStar Fellowship Church attended a meeting with representatives of York County on February 4, 2010 to informally discuss progress of the development of the Heritage Tower Project and matters concerning the Development Agreement. No notice was given that the County would have an attorney believed to be present, and as is usual and customary, therefore MorningStar Fellowship Church was not able to arrange to have themselves represented in that meeting by an attorney. It is our understanding, and is usual and ordinary in these matters, that should either party have legal counsel present during a meeting, the other party will be notified.

Item 5
Failure by York County Representatives to Comply with Sections of the Development Agreement

Page 14, section 2 of the Development Agreement implies that the County will review and discuss "Developers Efforts" during "Periodic Reviews" with the Developer.

MorningStar Fellowship Church welcomes and seeks any and all efforts by York County to work together cooperatively in a spirit of mutual benefit to make sure that it is presenting all necessary information including, thorough Progress Reports. Also we feel that using "Good Faith Efforts" York County should be providing clarification on requirements, interpretations and information. MorningStar Fellowship Church has had no such "Periodic Review" to its knowledge and has not been afforded "Good Faith Efforts" listed in this section.

Item 6
Failure by York County to Acknowledge Market Conditions

Page 16 of the Development Agreement clearly indicates "The parties acknowledge ... Market Conditions... and the parties agree to take into account...when deliberating disputes or negotiating." On Thursday, February 4, 2010 representatives of MorningStar Fellowship Church tried to verbally discuss Local Regional, National and International economic factors of an unprecedented historic nature with members of York County and were unilaterally dismissed as not relevant. MorningStar Fellowship Church finds this a grievous deviation from the language and spirit of the Development Agreement and a possible indication of malice.

Item 7
Failure to Allow Discussion in "Good Faith Efforts" as Allowed in the Development Agreement

On Thursday, February 4, 2010 representatives of MorningStar Fellowship Church tried to verbally discuss the Development Agreement, Progress of the Project, need for clarification and other areas in a "Good Faith" manner. Representatives of MorningStar Fellowship Church were told verbally by County Administrator James Baker that he had previously contacted members of York County Legislature informing them of a potential breach of contract and had predetermined to "advice for notice of

default" which would cause reputable and significant financial hardship to MorningStar Fellowship Church.

MorningStar Fellowship Church believes it was not afforded "Good Faith Effort" or given the ability to address in a reasonable "Good Faith" manner the progress of the project, potential obstacles as allowed for in the Development Agreement before escalating measures can be considered.

Item 8
Failure to Allow Discussion of Potential Non-material Changes to the Development Agreement

On Thursday, February 4, 2010 representatives of MorningStar Fellowship Church tried to verbally discuss possible potential non material changes to the Development Agreement. Representatives of MorningStar Fellowship Church were told verbally by County Manager James Baker that he had previously contacted members of York County Legislature informing them of a potential breach of contract and had predetermined to "advice for notice of default" which would cause irreparable and significant financial hardship MorningStar Fellowship Church.

MorningStar Fellowship Church believes it was not given the ability to address in a reasonable "Good Faith" manner potential non-material changes as allowed for in the Development Agreement before escalating measures can be considered.

Item 9
Comments and Actions Made Without Inquiry or Thoughtful Investigation, Sufficient Data or Request for Supporting Documentation

On Thursday, February 4, 2010 representatives of MorningStar Fellowship Church tried to verbally discuss the Development Agreement, progress of the project, need for clarification on minor issues and other areas in a "Good Faith" manner. Representatives of MorningStar Fellowship Church were told verbally by County Manager James Baker that he had previously contacted members of York County Legislature informing them of a potential breach of contract, had solicited their concurrence and had predetermined to "advice for notice of default" which would cause irreparable and significant financial hardship MorningStar Fellowship Church. MorningStar Fellowship Church believes in comments and actions made without inquiry, thoughtful investigation, sufficient data or request for supporting documentation as allowed for in the Development Agreement before escalating measures can be considered.

Additional Notices

Let the following serve as official notices concerning: the Development Agreement by and between MorningStar Fellowship Church and York County; the Intent of MorningStar Fellowship Church; and actions taken.

Notice to stay escalating measures before reasonable remedies, actions and inquiries

On Thursday, February 4, 2010 representative of MorningStar Fellowship Church tried to verbally discuss the Development Agreement, progress of the project, need for clarification on minor issues and other areas in a "Good Faith" manner. Representatives of MorningStar Fellowship Church were told verbally by County Manager, James Baker that he had previously contacted members of York County Legislature informing them of a potential breach of contract, had solicited their concurrence and had predetermined to "advice for notice of default" which would cause irreparable and significant financial hardship to MorningStar Fellowship Church. MorningStar Fellowship Church therefore serves notice to stay escalating measures before reasonable remedies, actions and inquiries and further **no communication in any public manner or public discussion, which could cause irreparable harm and significant damage to Morningstar Fellowship Church takes place until items of concern and dispute can be identified, and resolved.**

Notice of Withdrawal of Site Plan

Because of the above mentioned items of dispute, MorningStar Fellowship Church officially withdraws its application for Site Plan Approval until at such time, in its sole discretion, these matters have been sufficiently addressed including: ascertaining complete formal process, ascertaining fair and amicable treatment, understanding of protocol concerning the delivery of plans, and notices and timing involved.

Notice of Flawed, Incomplete and Contradicting information in the Development Agreement and Request for Modification

Because of the above mentioned items MorningStar Fellowship Church officially gives Notice of Flawed, incomplete and contradicting information in the Development Agreement and requests modification to provide clarity and continuity.

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

March 9, 2010

Via Certified Mail and E-Mail
James E. Baker
York County Manager
Post Office Box 66
York, South Carolina 29745 - 0066
county.manager@yorkcountygov.com

Melvin McKeown
York County Attorney
Post Office Box 299
York, South Carolina 29745

Cc: Susan Britt
York County Planning Director
1070 Heckle Boulevard, Building 106
Rock Hill, South Carolina 29732
susan.britt@yorkcountygov.com

Dear Sir,

In connection with our meeting at your offices on February 4, 2010 at 10:00 am, our letter dated February 12th 2010, and the letter and notices dated February 17th 2010 we have received no official response from yourselves or anyone at your organization. We have not so much as received a courtesy response that our information was received and is being reviewed. We have, sadly enough been made aware though the media of various remarks and comments by various officials regarding our project. These public statements were made with complete disregard to our requests made for further information, clarification and desire to reach an understanding in an informal meeting as is afforded in the development agreement. We are in the process of reviewing damages brought upon us by these actions.

We are hereby requesting that if any official information has been sent to us previously that we are unaware of, that evidence of such delivery be produced, including alleged site plan notifications. We are also requesting reasons for our previous communication being ignored.

Sincerely,

Dave Yarnes
wbps

DAVE YARNES
VICE PRESIDENT
MORNINGSTAR MINISTRIES

375 STAR LIGHT DRIVE
FORT MILL, SC 29715

TELEPHONE
(803) 802-5544 EXT. 378

E-MAIL
PSMITH@MORNINGSTARMINISTRIES.ORG

June 30, 2011

Via Certified Mail and E-Mail
James E. Baker
York County Manager
Post Office Box 66
York, South Carolina 29745 - 0066
county.manager@yorkcountygov.com

Melvin McKeown
York County Attorney
Post Office Box 299
York, South Carolina 29745
melvin.mckeown@yorkcountygov.com

Cc: Bob Erwin
305 Main Street
Greenwood, SC 29646
rme@emeraldis.com

Gentlemen,

After careful review and consideration, MorningStar Fellowship Church believes it can accomplish largely the items requested by York County through the mediation process. It is our understanding though correspondence with mediator Bob Erwin and our attorney that the changes necessary to our proposal submitted to York County are in three specific categories:

1. MorningStar evidence $1,000,000 of funds toward development of the Tower
2. MorningStar provide the County with completed plans for the majority of the interior space
3. MorningStar provide the County with a due date for completing the final design and improvements to the façade

We believe this represents the items stated during the last phone conversation regarding the County's concerns brought forth in mediation efforts. However York County's counter proposal was not set forth in writing to our knowledge and therefore we hope these statements accurately represent the County's concerns.

Additionally, the items presented in our proposal dated January 3rd 2011, and further broadened and defined in a face to face mediation meeting on January 26th, we believe are largely achievable promptly based on further investigation, research and assessment.

At this point MorningStar would like to schedule a meeting specifically to bring in technical expertise from a state certified architectural firm to discuss the particular details of some of the needed considerations for the exterior of the building, and also to discuss any "possible" delays that could take place during the renovation process and how MorningStar looks to overcome them.

Additionally, Morningstar would expect that York County's view of any violations would be amended accordingly and also any pertinent sections of the existing development agreement to be amended in a mutually beneficial way.

Again, MorningStar believes that after careful review we are able to comply with the requests brought forth by York County through mediation for the immediate improvement of the Tower.

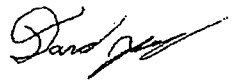
We would propose a meeting with York County with mediation present for the purposes of reducing to writing our agreement and also to have our architectural firm present to identify potential constraints, and solutions and remedies as the exterior construction takes place. We feel that as we reduce these goals and time lines to writing its important our professional Architectural (and possibly our engineering) staff present to provide immediate validation to our proposal and timelines.

Also let this letter serve as a response to the email sent from Melvin McKeown dated June 2011 requesting that MorningStar put in writing the substance of a proposed mediation meeting so the agenda can clearly be set prior to the meeting time. We hope this meets that need and we look forward to this meeting.

At this meeting we can also provide: updated marketing information including total number of depositors, financial updates, sections of our engineering report with field testing, and sections of our architectural drawings.

Thank you for your anticipated response, we look forward to proceeding on the matters listed above.

Sincerely,



Dave Yarnes
Vice President

DKY:pss

January 30, 2012

AGREEMENT

The parties, MorningStar Fellowship Church ("MorningStar") and York County, subject to approval by York County Council, agree as follows:

1. On March 5, 2012, MorningStar will provide York County with a scope of work and plan to repair the exterior of the Tower and a timetable to perform the work. The plan will include removal of the existing fence surrounding the parking lot and restoration of landscaping and lighting. MorningStar will also demonstrate its financial ability to perform the work described in this paragraph.

2. On March 5, 2012, MorningStar will also provide York County with the following deliverables:
   a. A date for substantial completion of the plans and specifications, including engineering drawings and construction schedule for completion of the Tower renovation;
   b. A date for receipt of a loan commitment, bond, or letter of credit; and
   c. A date by which construction of the Tower renovation will begin and end.

3. York County shall have the right to approve or disapprove the items provided pursuant to paragraphs 1 and 2 above, provided that such approval shall not be unreasonably withheld nor shall such disapproval be unreasonably given.

4. Upon approval of these items by York County, the notice of default shall be withdrawn; the previously submitted site plan shall be revised and resubmitted by March 12, 2012. The resubmission of the site plan shall not trigger any date for submission of bonds or otherwise, and the Development Agreement shall be modified to be consistent with this agreement, including appropriate adjustment of dates. The revised Development Agreement shall contain mutual releases for all acts or omissions through the date of its execution.

5. Failure to meet the milestone dates shall constitute a breach of the Development Agreement subject to the right to cure.

MorningStar Fellowship Church	York County
_____	_____
By:_____	By:_____
Its: _____	Its:_____

MorningStar
FELLOWSHIP CHURCH

Scope of Work and Plan to Repair Exterior, Including Time Table

Exterior

- Procure and install railings on the balconies of the North side 3rd floor of the Tower. (11 openings)
- Reinstall and secure existing rails on the 11th floor. (4 openings)
- Procure and install barriers at the four corners of the building on multiple floors.
- Reinstall storefront window on the 11th floor.
- Remove wood frames from the balconies of the 21st floor.
- Remove antennas, debris, wiring frame, and vegetation from roof.
- Paint wood walls and exposed wood at the base of the Tower.
- Re-secure all doors and access on 1st floor. (Replace doors locks and hinges where necessary.)

Fencing

- Non-essential fence to be removed. (Perimeter security fence must remain.)
- Tighten, secure, and repair proximity security fence.

Masonry

- Modify missing brick area on Northwest corner of Tower with custom masonry finish. (Bricks cannot be matched to existing brick or reinstalled until entire Tower surface is completed at a later date.)
- Amend staggered brick line on North face with custom masonry finish. (Bricks cannot be matched to existing brick or reinstalled until entire tower surface is completed at a later date.)

Landscaping

- Parking lot - Remove grass and debris.
- Parking lot - Remove dead wood on trees.
- Remove trees, brush, and debris from around electrical substation.
- Remove trees, brush, and debris from inside perimeter fence.
- Repaint curb at front of Tower with safety paint.

Lighting

- Install two 1,000-watt flood lights on canopy side of Tower.
- Install two 400-watt floodlights for front of Tower.
- Run additional circuit to handle added wattage for new fixtures.
- Repair existing lighting under canopy.
- Install six new 250-watt wall packs on sides of building.

Time Table

Work to start in 30 days (to coincide with permitting) with completion in six to nine months. (Depending on material ordering and availability, and weather conditions.)

375 Star Light Drive • Fort Mill, SC 29715 • (803) 802-5544 • Fax (803) 548-8438

MorningStar
FELLOWSHIP CHURCH

Mediation Agreement Responses

a) A date for substantial completion of the plans and specifications, including engineering drawings and construction schedule for completion of the Tower:

Response: Nine to fifteen months from the approval of this agreement.

b) A date for receipt of a loan commitment, bond, or letter of credit:

Response: On or before December 2014.

c) A date by which construction of the Tower renovation will begin and end:

Response: Construction will begin on or before August 2015 and construction finalizes February 2017.

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MorningStar
FELLOWSHIP CHURCH

Demonstration of MorningStar's financial ability to perform work as listed in the Scope of Work and Plan to Repair Exterior

375 Star Light Drive • Fort Mill, SC 29715 • (803) 802-5544 • Fax (803) 548-8438

SUPER SAVINGS STATEMENT

P. O. Box 1099
Gastonia, NC 28053
Member FDIC

(704) 865-1634
Telephone Banking
(866) 370-6420
www.AllianceBankandTrust.com

Statement Date: 12/30/11
Account: 10401091
Branch-004
Page 1 of 1

>02129 7304988 001 008215
MORNINGSTAR FELLOWSHIP CHURCH
375 STAR LITE DR
FORT MILL SC 29715

1/24/12

Protect Yourself! Everywhere you go somebody wants to steal your identity and money.
We have tools to help you protect yourself.

- Monitor your account often with online banking
- Keep PC security software up to date
- Bill Pay is a safe and easy way to manage bills

Never give out personal information unless you know who you are dealing with.
If you think you have been compromised, contact us immediately at 704-865-1634.

BALANCE SUMMARY

Beginning Balance	10/01/11	694,998.33
Deposits / Misc Credits	3	2,193.13
Withdrawals / Misc Debits	0	0.00
Ending Balance	12/31/11	697,191.46
Service Charge		0.00

SUPER SAVINGS — MORNINGSTAR FELLOWSHIP CHURCH — Acct: 10401091

Interest Paid	2,193.13
Interest Paid Year To Date	9,818.47
Annual Percentage Yield Earned (A.P.Y.E.)	1.26 %
Number of Days for A.P.Y.E.	92
Average Balance for A.P.Y.E.	695,728.78
Average Collected Balance	696,452
Minimum Balance	696,451

DEPOSITS

Date	Deposits	Activity Description
10/31	738.22	INTEREST EARNED
11/30	715.15	INTEREST EARNED
12/30	739.76	INTEREST EARNED

DAILY BALANCE SUMMARY

Date	Balance	Date	Balance	Date	Balance
10/31	695,736.55	11/30	696,451.70	12/30	697,191.46

Would you like your statement delivered to your email? Go to
www.AllianceBankandTrust.com and enter this Activation Code: 407D3913743

02129 7304988 002130 004259 00001/00001

MorningStar
FELLOWSHIP CHURCH

Resubmission of MorningStar's Site Plan

Resubmission of MorningStar's Site Plan must be completed in tandem with York County especially as it relates to municipal utility usage. The Development Agreement page 7 section VII. A. calls for the following:

"Developer is to submit anticipated flow rates for County's review and evaluation of the effects on the utility system. Water and sewer system extensions and/or upgrades to the County's existing utility system required to serve the Development (but not any other area(s)) are to be provided by Developer. Booster pump stations for the service to the Tower and fire suppression systems and associated storage and pumping requirements are to be constructed, owned and maintained by the Developer. Prior to site plan approval, Developer shall sign the County's non-reimbursable extension agreement if there is a proposed extension or relocation of existing County-owned water and sewer lines. Developer is to pay water and sewer system fees in accordance with county Ordinances in effect at the time of the execution of this Agreement."

We believe any resubmission of MorningStar's Site Plan closely follows this original language. Therefore a time table for resubmission of MorningStar's Site Plan must include meetings, discussions and approvals with York County representatives. We feel we can proceed promptly but in large part are dependent on appropriate employees of York County. It is anticipated this process should take approximately 60 days.

375 Star Light Drive • Fort Mill, SC 29715 • (803) 802-5544 • Fax (803) 548-8438

Heritage Tower and Morningstar Campus

Tower History Built but Never Opened

- Tower Construction began in 1985 in compliance with York County.
- Expected Opening Date was (July) 1987 All exterior condition have remained largely the same since construction.
- Neither York County nor any of its previous owners did anything to demolish or improve the Tower for 25 years.

MORNINGSTAR_000174

MorningStar Heritage Development Time Line

- MorningStar Purchased the Property September 2004.
- Mobilized restoration early in 2005.
- The Tower was a small portion of our overall development plan and originally thought to be unrepairable.
- Development Agreement (To Commence Tower Rebuild) was signed in January 2008. This was the first time in 23 years there was a plan for the Tower Renovation.
- Currently, most of the major requirements of the Development Agreement have been completed.
- Regent Park surrounding property experienced dramatic Real estate Appreciation due to Heritage Restoration.

MORNINGSTAR_000175

Completed MorningStar Renovations

Before

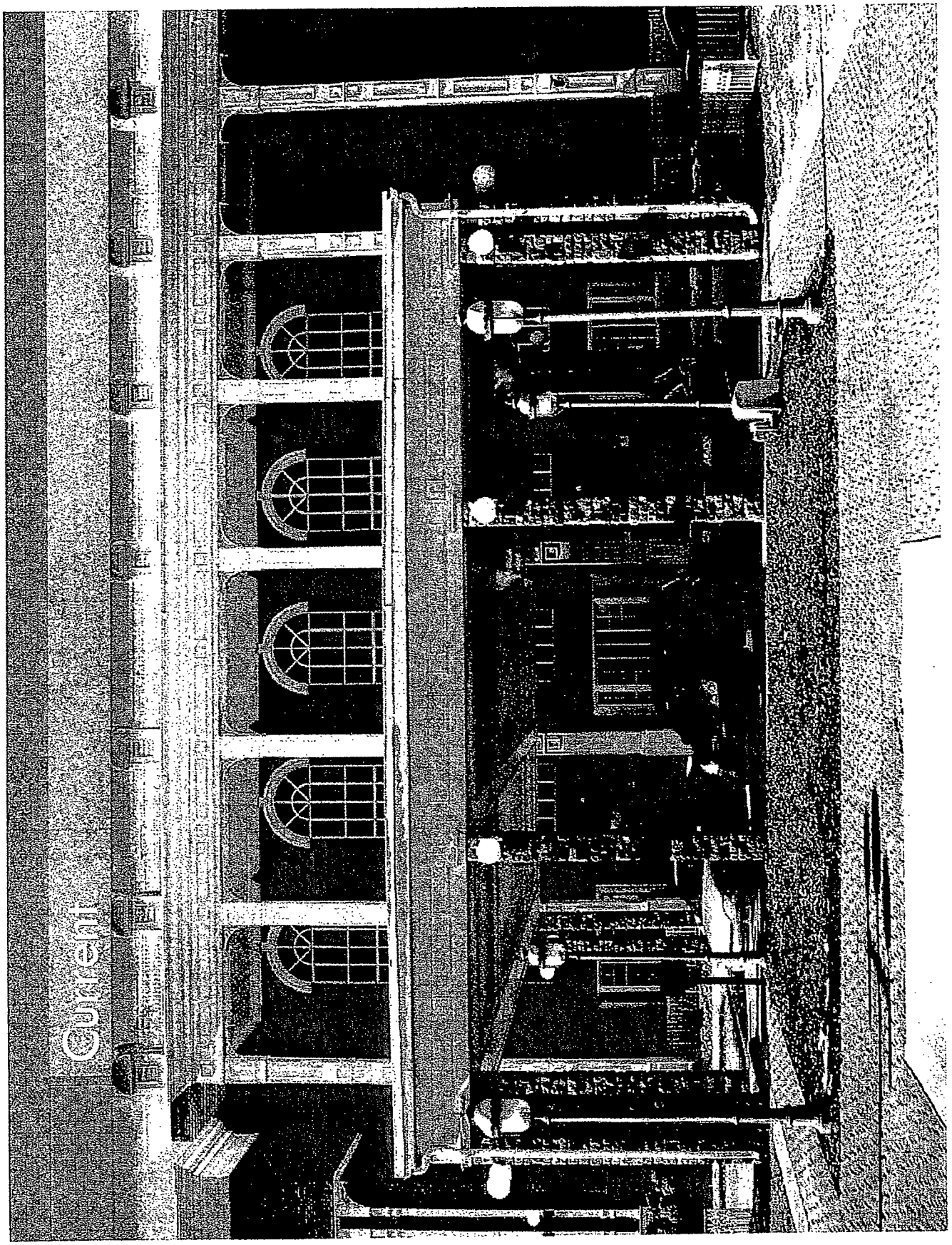
After

2004 The Morningstar Commercial Building Restoration

Before

Before

Before


Current

Current

MorningStar Tower Development

- Development Agreement signed January 13, 2008. This was the first release of ability to rebuild Tower.
- The County Issues Default March 5 ,2010 just two years into a 5 year agreement.
- On March 5, 2010
  - Most of the major items of the Development Agreement were fulfilled or in process Church Building, Bunk Houses, Retail areas, Retreat Center, Traffic Studies, Site Plan engineering, Structural Engineering, Marketing, etc.
  - We had 190 reservations in the Tower verified with deposits.
  - We were two weeks away from opening our model.
  - Several verifiable letters of commitment for financing in place.

MORNINGSTAR_000183

STATEMENT OF PROBABLE COST FOR COMPLETION OF "HERITAGE TOWERS"

1.	Current Day Cost Model (308,547 sf. no site work)	$45,109,375
2.	Statement of Probable Cost (Salvageable Work in Place)	($11,889,719)
	SUB TOTAL	$33,219,656
3.	Cost Opinion of Clean-Up and Demolition at the Existing Building	$539,950
4.	Opinion of Cost for Adding +/- 80,000 sf to the Existing Building while achieving Current Code Requirements	$18,000,000
	TOTAL PROBABLE COST	$51,759,606
	PROBABLE SF COST (388,547 sf)	$133.21

Respectfully submitted by:

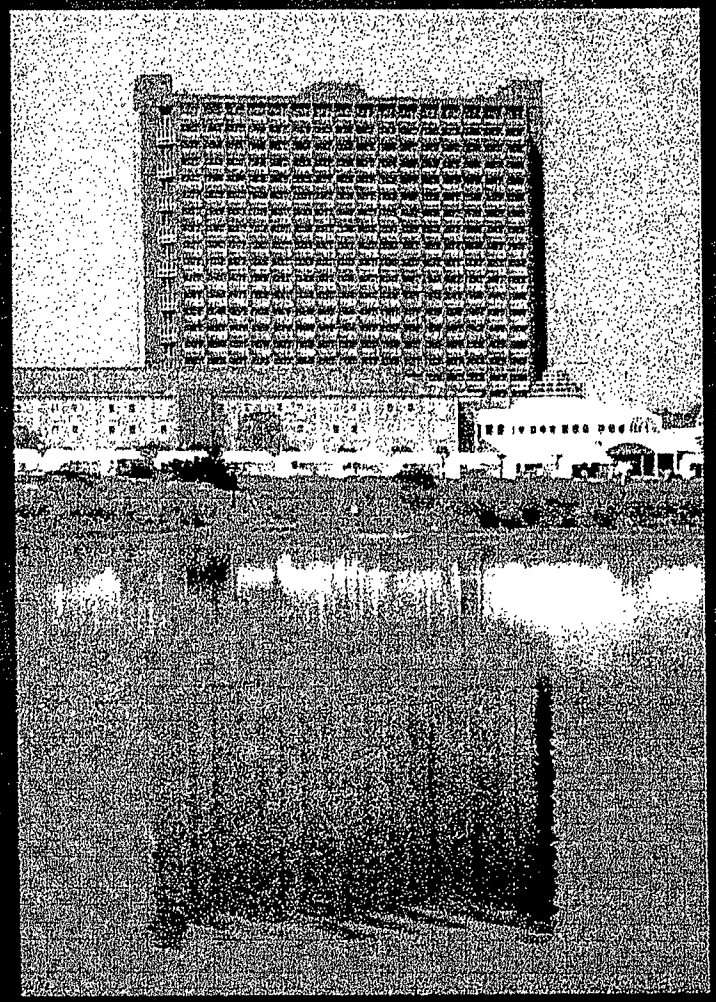
Eddie J. Brown,CPE

President

E. J. BROWN CERT. NO. 1384671 AMERICAN SOCIETY OF PROFESSIONAL ESTIMATORS PROFESSIONAL CONSTRUCTION ESTIMATOR

SEAL

Estimate of Tower's Existing Value



MORNINGSTAR_000184

Despite our protest York County Issues Default March 5 ,2010

- Morningstar
  - Immediately contested Default.
  - Warned of Financial Damages.
  - Requested informal resolutions.
  - Withdrew Site Plan.
- Despite the Default Notice MorningStar opened its Model in hopes of continuing development.

MORNINGSTAR_000185

MorningStar's Initial Response to Notice of Default
March 9, 2010

- No notices were given by York County.
- No Site Plan pre-meeting took place.
- Numerous areas of the Development Agreement ignored.
- Actions Taken by MorningStar.
  - Site Plan withdrawn.
  - Notification that York County's Actions would cause serious financial harm to Morningstar.

MORNINGSTAR_000186

York County

- Never acknowledged our official Notices.
- Made the Default Public.
- Effectively halted the project during April, 2010.

MORNINGSTAR_000187

The Development Agreement Clearly Calls for..

- Written Certified Notices of Correspondence.
- 5 year term to develop the Tower.
- Economic Downturn Clause.
- Ability to resolve issues informally.

MORNINGSTAR_000188

Development Agreement Excerpt

- Economic downturn language January 13, 2008
  - Page 16: "The parties acknowledge that market conditions may, and will likely, affect the pace and character of the development of the Property. Therefore, the Parties agree that they shall take into account, and shall direct the mediator(s) to take into account, any change in market conditions, demographics or similar matter when deliberating disputes or negotiating for future modifications to this Agreement."
  - In September 2008, the bankruptcy of the U.S. investment bank Lehman Brothers, and the collapse of the world's largest insurance company, AIG, triggered a global financial crisis and global recession, which cost the world tens of trillions of dollars; rendered 30 million people unemployed; and doubled the national debt of the United States.
  - Despite this language York County issues default.

MORNINGSTAR_000189

First and Only Mediation Session
January 18, 2011

- After only one session York County issues the following communication. June 23, 2011

"The York County Council has reaffirmed the county's position that it believes that no useful purpose would be served by scheduling another mediation session..." Letter is from Melvin McKeown

MORNINGSTAR_000190

Morningstar's Continued Request for Further Mediation Certified June 30, 2011

- **"...MorningStar Fellowship Church believes it can largely accomplish the items requested by York County through the mediation process...**
  1. MorningStar commits to $1,000,000 in funds toward development of the Tower.
  2. MorningStar to provide the County with completed plans for the majority of the interior space.
  3. MorningStar to provide the County with a due date for completing the final design and improvements to the façade.
- **...At this point MorningStar would like to schedule a meeting specifically to bring in technical expertise from a state certified architectural firm to discuss the particular details of some of the needed considerations for the exterior of the building, and also to discuss any "possible" delays that could take place during the renovation process and how MorningStar looks to overcome them....**
- **...We would propose a meeting with York County with mediation present for the purposes of reducing to writing our agreement and also to have our architectural firm present to identify potential constraints, and solutions..."**

MORNINGSTAR_000191

York County's Response to Morningstar Request for further Mediation and Resolve

- No Response.
- No Professional Acknowledgement.
- Morningstar abandoned hope of mediation.
- In July 2011 changed attorneys and hired Litigation Team and began processing suit for damages.
- On October 25, 2011 (four months later) MorningStar receives telephone call requesting further mediation.

MORNINGSTAR_000192

Results of Recent Mediation
January 30, 2012

On March 5, 2012, MorningStar will provide York County with a scope of work and plan to repair the exterior of the Tower and a timetable to perform the work. The plan will include removal of the existing fence surrounding the parking lot and restoration of landscaping and lighting. MorningStar will also demonstrate its financial ability to perform the work described in this paragraph.

1. On March 5, 2012, MorningStar will also provide York County with the following deliverables:
   a) A date for substantial completion of the plans and specifications, including engineering drawings and construction schedule for completion of the tower renovation;
   b) A date for receipt of a loan commitment, bond, or letter of credit; and
   c) A date by which construction of the Tower renovation will begin and end.
2. York County shall have the right to approve or disapprove the items provided pursuant to paragraphs 1 and 2 above, provided that such approval shall not be unreasonably withheld nor shall such disapproval be unreasonably given.
3. Upon approval of these items by York County, the notice of default shall be withdrawn; the previously submitted site plan shall be revised and resubmitted by March 12, 2012. The resubmission of the site plan shall not trigger any date for submission of bonds or otherwise, and the Development Agreement shall be modified to be consistent with this agreement, including appropriate adjustment of dates. The revised Development Agreement shall contain mutual releases for all acts or omissions through the date of its execution.

MORNINGSTAR_000193

Growth at MorningStar

- 800 ministries around the globe are members of MorningStar Fellowship of Ministries
- 280 conferences have been held at Heritage since MorningStar's purchase in 2005
- Tens of thousands of MorningStar parishioners and visitors have significantly impacted the York County economy Publishing - Most notable, MorningStar has 71 book titles in print through MorningStar Publications including over 1 million copies of Rick Joyner's best-selling book, The Final Quest
- TV / Video - Establishing a world-wide presence by reaching over 16 million potential viewers through our daily television program.
- MorningStar has more than 54 Million in total assets.
- Morningstar's Heritage Int'l Campus contains over 500,000 sq ft.
- With 504 rooms, Heritage Grand Hotel is the largest in South Carolina
- Heritage Int'l Campus also houses one of the largest conference centers in America
- This year students from 6 continents will be attending MorningStar University's York County campus
- CSCL (k-12 school) has been verbally praised as the greatest school in 4 states by the Lieutenant Governor of South Carolina.

MORNINGSTAR_000194

Currently Morningstar Desires

- To resume development of Heritage Towers.
- To bring needed revenue into York County.
  - The current and future effect of developing Heritage will generate between .4 and .5 new jobs per individual estimating the creation of 88 to110 new York County jobs.
  - Currently Morningstar Employs 115 employees.
  - Currently Morningstar brings over 20,000 visitors to York County Annually.

MORNINGSTAR_000195

Presentation of Proposal

- The MorningStar Proposal is Confidential (includes bank statements)
- The Proposal addresses the concerns of the Mediation Agreement.

MORNINGSTAR_000196

Heritage Tower and Morningstar Campus

2//2011

York County Council Members David Bowman, Bruce Henderson, Eric Winstead, William Roddey, Curwood Chappell, Britt Blackwell, and Chad Williams,

As York County Residents, we wanted to bring to your attention the importance of restoring the Tower on the Heritage Property in Fort Mill, SC. We hope you will see this project as an asset to the York County community and give it your full support.

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Samuel Gatlyn	910-916-9019	925 Gardenia St. Fort Mill SC. 29708	
Sarah Corcoran	8033223491	364 Tall Oaks Trl. Fort mill, SC 29715	
Pat Corcoran	3534 803-322-	364 Tall Oaks Tr Fort mill SC 29715	Pat Corcoran
Robert E. Ganus	803-327-3596	527 Trails End Rock Hill SC 29732	
Patricia J Ganus	803-327-3596	529 Trails End Rock Hill SC 29732	
Joseph Kim	803-746-4719	805 Lion Lane Fort Mill SC 29715	
Jason Healey	330-440-3848	375 starlight Drive Fort Mill, SC 29715	

MORNINGSTAR_000108

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Karen Wolfe	803-370-3723	2606 Celanese Rd. Rock Hill SC 29732	Karen Wolfe
DANIEL DENGAN	302-531-5855	1682 WILLIAMS RD FORT MILL SC	Daniel Dengan
David Savold	803 547 0268	912 Airford Way Fort Mill SC	
BEN MASON	980-722-3690	165 DELLAS LNAT ROCK HILL S.C 29732	
Ed & Jeanette TYNAN	803-326-2077	1976 SANDLEWOOD DR ROCK HILL, SC 29730	Jeanette Tynan Edward A Tynan
Josh & Jenn Miller	803818-1899 803-818-1935	505 Gilead Dr. York S.C. 29745	Jennifer L. Miller
Michael & Mickie Greeley	7045758021	354 Horton Grove Rd Fort Mill, SC 29715	Mickie Greeley
Ron & Melissa Mills	525-389-2846	927 Ferguson Mountain Ridge Rd	
KEY Dempsey	803-547-2599	659 HASTH DR FORT MILL SC 29715	Key Dempsey

MORNINGSTAR_000109

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Carie Deneau	803-370-2916	1682 Williams Rd · Fort Mill SC	Carie Dneau
Al Franklin	803-746-7977	249 Hyde Park Ln, Fort Mill 29708	Al Franklin
William Wiseman	803-802-9944	3024 Cabot Way, Fort Mill, SC 29715	
Nicole Freeman	7044498495	110 Rowntree Rd Fort Mill SC 29715	Nicole Freeman
Antwan Douglas	803-370-0182	2346 Worthy Boys Rd, RHSC	Antwan Douglas
Christopher Norberg	803-547-8098	3191 Hadden Hall Blvd, Fort Mill, SC	
Steven Yaffe	303-550-1703	721 Woburn Abbey dr Fort Mill SC 29715	Steve Yaffe
Theresa Anderson	803-370-6257	16079 molokai Dr. Tega Cay S.C. 29708	Theresa Anderson
Michelle Boyett	803-984-4972	644 Pinbrook Rd Rock Hill SC 29730	Michelle Boyett
Katy Norberg	8035478098	3191 Hadden Hall Blvd 29715	Katy Norberg

MORNINGSTAR_000110

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Dianne Thomas	3360287200	180 Embassy Dr Apt 102 Fort Mill SC 29715	Dianne Thomas
Sue Della Rocca	336-262-6506	722 Sandy Green Ct Fort Mill, SC 29715	Sue Della Rocca
Maria Fenore	980-297-5088	261 Heritage Pkwy Fort Mill SC 29715	Maria Fenore
Kay Scott	803-322-2733	1171 Steele Meadows Dr Ft Mill, S.C. 29715	Kay Scott
TONIANN MARTIN	704-582-1223	301 HORTON GROVE RD. Ft. Mill, SC 29715	Toni A. Martin
Corrie Byers	(803)280-5802	1062 Bayne Woods Ln Fort Mill, SC 29707	Corrie Byers
Bill NeSmith	812-344-2778	2905 Huckleberry Hill Fort Mill SC 29715	Bill NeSmith
Cristi Winkler	704-780-5033	1201 Palmetto Place Fort Mill, SC	Cristi Winkler
Kari Grant	803-391-1364	180 Embassy Drive Apt 308 Fort Mill, SC 29715	Kari Grant
Dorothy Wickman	803-328-8172	3963 Marshall Rd Rock Hill SC 29730	DOROTHY WICKMAN

MORNINGSTAR_000111

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Jane Lauber	803-547-1057	2894 Ashley Arbor. Fort Mill. SC 29715	Jane M. Lauber
Wendy Dinning	803-802-8626	378 Horton Grove Rd. Fort Mill, SC 29715	Wendy Dinning
Sharon Bailey	336-262-9430	588 Putting Dr. Fort Mill 29715	Sharon Bailey
Sue Radcliffe	803-548-6192	161 Snead Rd. Ft Mill 29715	Sue A Radcliffe
Kim Baldwin	8033964922	7163 Meyer Rd Ft Mill 29715	K Baldwin
Larry Baldwin	"	"	Larry Baldwin
Grace Ikkela	704 614 0030	2790 Dogwood Hills Ct. Ft. Mill, SC 29715	Grace Ikkela
Richard Whitmire	803-984-9958	513 Jacobs Ridge Fort Mill SC 29715	Richard Whitmire
Dave Reynolds	973-600-8240	419 Hunters Dance Rd, Fort Mill, SC 29708	Dave Reynolds
JANE DENNISON	803-548-6268	404 DELTA DR FM 29715	Jane D Dennison
James L. Dennison	803 548 6268	407 Delta Dr. Fort Mill 29715	James L. Dennison

MORNINGSTAR_000112

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Shawna Lawrence	(803)370-3643	3183 Cherry Rd Rock Hill, SC 29732	Shawna Lawrence
Jodi Lee	(803)547-2546	329 Wikes Place Dr Fort Mill, S.C. 29715	Jodi Lee
Kenna McCormick	803 493-5992	1702 Marble Rd apt 1c Fort Mill SC	Kenna McCormick
Josh Gray	803-207 0823	552 Chorus, Fort Mill, SC, 29715	Josh Gray
Ben Gray	717-435 7056	" "	Ben Gray
Amanda Tolley		109 Patterson St Fort Mill, SC 29715	Amanda Tolley
Martin Powell	980 875 0768	2914 Huckleberry Hill Dr Fort Mill 29715	Martin Powell
Paul Demaree		681 Williams RD 29715	Paul Demaree
Jon Siegrist	(803)-352-6999	2020 Cashaway Lane Fort Mill, SC 29715	Jonathan Siegrist

MORNINGSTAR_000113

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Debbie Ayers	803/548-3008	467 Crown Drive, Apt. # 102 Fort Mill, SC 29708	Debbie Ayers
Bob Scott	803-322-2733	121 Steele Meadows Ft. Mill, SC 29715	Bob Scott
Deborah Foster	704-904-4198	557 state st Apt Rock Hill, SC 29730	Deborah Foster
Erin Sewell	770-853-3716	180 Embassy Dr Apt # 101 Ft Mill, SC 29715	Erin Sewell
Dane Johnson	919-219-7744	7116 Ridgebrook Drive, Fort Mill, SC 29715	Dane Johnson
Becky Bradfield	803-367-3051	2070 Durand Rd. Fort Mill SC 29715	Becky Bradfield
Wm. Saltzman	803 324 3847	746 Newland Ct Rock Hill, S.C 29730	William A Saltzman
Yvonne Martinez	704.202.6517	643 Trent Holm Trail Fort Mill, SC 29715	Yvonne Martinez
Hilda Kyseth	803 616-0211	375 Star Light Dr, Suite 2093 Ft. Mill, SC 29715	Hilda Kyseth
Caroline Davis	678 5880745	869 Lion Lane Ft Mill SC 29715	Caroline Davis
Pat McClendon	704-612-1667	588 Rutledge Rd. Fort Mill	Pat McClendon

MORNINGSTAR_000114

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Katherine Tuck	704-575-2697	411 Scarlett Ln Fort Mill SC 29715	
[illegible]	[illegible]	3103 Tartanite Circle Fort Mill SC 29708	
Pamela Sharp	706-284-1406	1107 Palmyra Drive Tega Cay SC	
Mytheos Tsitsis	704-780-8851	708 South Branch Dr. Fort Mill, SC 29715	
Pamela Clancy	803-493-3492	626 Ravenwood Dr Fort Mill SC	
Julie Tuck	315-771-3446	320 Walkers Place Dr Fort Mill SC 29715	
Joe Tuck	315-771-0275	320 Walkers Place Dr Fort Mill SC 29715	
Mark Sinclair	SC 2 2 2 5 2 6 6	2073 Durand Co Fort Mill, SC 29715	
Rae Williams	803 242-6317	153 Diego Ln Ft Mill 29715	
Calvin Glazier	704-821-4194	311 Horton Grove Ft Mill	
Heather Hundley	803 370 5159	2010 Durand Rd Fort Mill SC 29715	

MORNINGSTAR_000115

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
NATHAN / Scott	803-493-4722	2010 Durand Rd, Ft. Mill	
Kathy McClellan	803-831-2685	104 Redcoat Dr Ft Mill	
Patti Lutz	352638-2932	12129 Woodholm Ct Tega Cay	
~~Patti Lutz~~	~~352638-~~		
~~Roberta~~ Reed	803 526-1158	1461 HARRIS RD FT MILL	
BZanamir	8035622551M	375 Starlight Dr. Ft. Mill	

MORNINGSTAR_000116

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
PHIL LAMB	803 547 5013	5086 MARIANA CT.	Phil Lamb
MATT MOORE	518-368-3241	2024 Cause Way Lane, Fort Mill, SC	Matt Moore
Joe Wilson	704 837 7274	1017 Bristol Thorne Court	Joe Wilson
Colleen Coney	267-357-1120	785 Star Light Drive Ft Mill SC 29715	Colleen Coney
Pearl Abraham	803 376-0598	306 Heritage Pkwy Ft Mill, SC	Pearl Abraham
Kristin Alston	7049536391	341 Horton Grove Rd Ft Mill	Kristin Alston
Terri Carter	803-207-5515	1160 Convention Dr. Fort Mill, SC 29715	Terri Carter
Aaron McKinney	803 367-6728	1660 Merritt rd. F.M. SC 29715	A. McKinney
Brandi Smith	803-984-8207	203 Redcoat Drive Ft Mill SC 29715	Brandi Smith

MORNINGSTAR_000117

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
Libby Wood	704-620-4440	375 Star Light Dr Fort Mill, SC	Libby Wood
Gina Harris	716 604-0345	438 Fisher Rd Fort Mill, SC	
Josh August	724-301-7625	375 Starlight Dr Fort Mill SC	
Kara Zullo	704-607-2035		
Jeremy J Anderson	704-201-4343	3 Gilded Canary Ct Fort Mill, SC	
Carrie Anderson	704 201-0035	6164 Cooks Station Way Fort Mill, SC	
Peter Bauerschmidt	(803) 322-6719	2922 Huckleberry Hill Fort Mill SC	
Vickie Fulmer	(803) 554-7699	2053 C Dutchman dr Rock Hill	
William Fulmer	803 554-7356	2053-C Dutchman dr, Rock Hill	
Lisa Beckenberg	803 396-0534	2922 Huckleberry Hill Fort Mill SC 29715	

MORNINGSTAR_000118

RESTORE THE TOWER

PRINTED NAME First/Last	PHONE NUMBER	ADDRESS	SIGNATURE
ANNIE DEMPSEY	803 547-2599	659 HOSTA FT MILL SC 29715	Annie Dempsey
Donna Reynolds	973 600-1938	419 Hunters Dance Rd. Fort Mill, SC 29708	Donna Reynolds
Virginia Lahey			
Trudy Gleeck	803 389 0914	251 Ashland Oaks Dr. Catawba, SC 29704	Trudy Gleeck
Erika Robinson	803-370-2911	721 Chelton Lane Fort Mill SC 29715	
Charles T. Robinson	803-370-2899	721 Chelton Lane Fort Mill S.C. 29715	
Jonathan Robinson	803.370 2804	721 Chelton Lane. Fort Mill SC 29715	
Nathanael Robinson	803-370 2042.	721 Chelton Ln Fort Mill S.C. 29715	

MORNINGSTAR_000119

STATE OF SOUTH CAROLINA COUNTY OF YORK MORNINGSTAR FELLOWSHIP CHURCH, Plaintiff, v. YORK COUNTY, SOUTH CAROLINA, Defendant.	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT CASE NO.: 2013-CP-46-00246 **PRETRIAL BRIEF**

York County submits the following for purposes of the pretrial conference in this matter:

1. **A concise, non-argumentative statement of the facts of the case.**

On or about July 6, 2004, Morningstar Fellowship Church purchased approximately 52 acres from Coulston Enterprises, Inc. for $1.6 Million, consisting of the former PTL Ministries property in Fort Mill, South Carolina (the "Property"), including what was previously known as Heritage Tower, a partially constructed 21-story condominium that was originally planned to have been part of the PTL Ministries (the "Tower"). The appraisals prepared at the time the Property was purchased and afterwards assign no value to the Tower, and state that the Tower adds no value to the Property.

Morningstar's contract to purchase the Property required it to demolish the Tower within 24 months. Morningstar had the Property zoned under a PD development plan that required demolition of the Tower by January 10, 2007. Nevertheless, Morningstar subsequently sought permission from York County to renovate and complete the construction of the Tower, but this request was denied by York County.

Morningstar thereafter initiated negotiations to enter into a development agreement pursuant to S.C. Code Ann. §6-31-10, et seq. (2004) with York County that would allow for the completion of the Tower under certain specified conditions and progress milestones. On or about the effective date of May 5, 2008, York County and Morningstar Fellowship Church entered into a development agreement (the "Development Agreement" or "Agreement") for the purpose of the intended completion, rehabilitation and remodeling of the Tower, among other things. Refusing to agree to an indefinite time frame for Morningstar to complete the Tower project, York County required specific benchmarks be included in the Agreement that Morningstar was required to meet along the way.

Specifically, to evidence the Tower project's financial viability, Paragraph IV.C.2. of the Development Agreement requires:

> 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.

Morningstar engaged Power Engineering ("Power") to serve as its project engineer to obtain site plan approval from York County, and designated Power as its representative and agent for dealing and communicating with York County on all aspects of site plan approval. Gerald Lee, then project manager of Power's Charlotte office, was assigned by Power as the Tower project manager in early 2009, and he communicated directly with York County planning officials and with Morningstar's construction manager, Pat Selvey, throughout the site plan approval process. The parties exchanged several rounds of comments and changes to the site plan through the spring and summer of 2009. At that time, Morningstar understood that site plan approval was imminent and provided this information to lenders and other third parties.

The Morningstar site plan received conditional approval on August 4, 2009, with the only condition being the addition of a few notes required to be on the plans. On August 18, 2009, Gerald Lee personally came to York to meet with Billy Payne, the County's Stormwater Plans Examiner, to add the final notes to the site plan and Lee was informed that the site plan was approved. The following day, Gerald Lee emailed Morningstar vice president Dave Yarnes to inform him that the site plan was approved, and to set up a meeting to discuss the payment of Power's outstanding invoices. On August 24, 2009, York County sent Power Engineering a letter enclosing the County's review notes indicating that the Morningstar site plan was approved.

It is undisputed that York County did not send written notice of site plan approval directly to Morningstar, but it clearly did provide verbal and written notice of approval to Power. In emails seeking payment on its invoices, Power notified Morningstar in August and September of 2009 that the site plan had been approved. In fact, Pat Selvey understood that the site plan was approved in August of 2009, but believed the 180 days did not begin to run until he received a stamped set of plans. Through the fall of 2009, Power continued communicating with Yarnes' assistant Patricia Smith in attempts to get its invoices paid.

In January of 2010, Selvey emailed York County to provide an update on the progress made on sales. In response, the County reminded him that the site plan had been approved in August and that the 180 day deadline was fast approaching. Selvey denied knowing that the site plan had been approved, and requested a meeting with the County to discuss. At the same time, Selvey had been included in Patricia Smith's ongoing discussion with Power Engineering about invoices, and Power representative Derrick Boyte again reminded him that the site plan had been approved in August.

Morningstar did not provide 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 within 180 days after August 24, 2009, and has not to date. At a meeting of the parties on February 4, 2010, York County inquired as to whether Morningstar would be able to deliver evidence of financing if it were allowed an extension of another 180 days. Morningstar replied that it could not commit to that time frame, and instead asked for an indefinite extension of time. York County could not agree to an indefinite extension, and on March 5, 2010, York 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.

The parties continued to negotiate and engaged in mediation as set forth in the Agreement, which resulted in an impasse. On January 24, 2013, Morningstar brought suit alleging claims for declaratory judgment and breach of contract, contending that York County breached the Development Agreement by not providing written notice of site plan approval to Morningstar, and by declaring default when Morningstar was unable to provide the information required under Section IV.C.2. in February of 2010.

York County has asserted counterclaims for breach of the Agreement based upon Morningstar's failure to provide the information required under Section IV.C.2. and seeks an order requiring the demolition of the Tower at Morningstar's cost pursuant to the terms of the Agreement.

3. **An objective statement of the facts in controversy.**

This action involves claims by Morningstar for breach of contract based on York County's approval of the Morningstar Tower site plan, and subsequent declaration of default. The terms and conditions of the Agreement are not disputed. Likewise, it is undisputed that Power Engineering was Morningstar's authorized agent in matters relating to site plan approval and that on or about August 24, 2009, York County communicated to Power that the Morningstar site plan met all County requirements and was approved. Further, it is undisputed that Power informed Morningstar of this information in August of 2009. Morningstar admits that it did not provide the financial and bonding information described in Section IV.C.2 of the Agreement to York County within 180 days of site plan approval, and has not since.

The facts in controversy surround the approval of the site plan by York County in August of 2009. In denying summary judgment to York County, Judge Kimball found that the sole issue of material fact was whether reasonable notice was communicated, and knowledge of site plan approval was received, by Morningstar, either directly or through its agent Power Engineering. Copies of Judge Kimball's orders are attached hereto.

Additionally, the facts surrounding Morningstar's allegations of damages are in controversy. York County has filed a Motion to Exclude Damages on this issue.

4. **The legal issues involved. This includes the law applicable to the cause of action and the defense.**

   a. Whether Morningstar is bound by notice given to its agent Power Engineering that the site plan had been approved.

   b. Whether the notice of site plan approval sent to Power Engineering was a breach of the Agreement.

   c. Whether York County's declaration of default was a breach of the Agreement.

   d. Whether Morningstar's failure to provide information described in Section IV.C.2 constitutes a default under the Agreement.

5. **A listing of exhibits, indicating those to which there is a disagreement and a listing of witnesses who may be called and, if available, their address and phone number.**

   a. Exhibits Proposed to be Offered at Trial by York County

      1. York County Zoning Application: MS 015868
      2. York County Zoning Denial Letter: MS 00198-199
      3. Agreement for the Purchase and Sale of Real Property, July 20, 2004: MS 7010-7027
      4. Title to Real Estate, September 28, 2004:MS 7030-7034
      5. Letter from York County to Morningstar, December 14, 2005;
      6. Selvey emails re: Morningstar Status; MS 18289, 18332, 134, 19237
      7. Morningstar Development Agreement, May 5, 2008: Yarnes Depo. Ex. 2
      8. Heritage Towers Business Plan: MS 11035-11120
      9. Executive Summary: MS 214
      10. SB&A Marketing Plan: MS 13352-13444
      11. Tower Principals Meeting Notes: MS 015482-484, 18494-496
      12. Moore Stephens Lovelace Engagement Letter: MS 012589-592
      13. Letter from Morningstar to CommunityOne Bank, May 6, 2009: COM 00487
      14. Heritage Tower Strategy Meeting Notes: MS 017856, MS 19311
      15. Emails between Yarnes and Ottinger: MS 17843, 17842, 18646-647, 17840, 18278, 18713, 6663
      16. Yarnes Affidavit

17. Selvey email to Joyner enclosing Steve Report: MS 17620-17623
18. Heritage Court emails: MS 18278; Yarnes Depo. Ex. 17.
19. Selvey Affidavit
20. Selvey email to Talbot: MS 18430-18431
21. Heritage Towers Priority Reservation Applications Numerical: MS 1260-63
22. Power Engineering Emails: Yarnes Depo Ex. 23-27
23. SC DHEC Permit: MS 17512-513
24. Purchase Order: MS 6649, 6785
25. Designation of Power as authorized representative to County : Response to Req. to Admit 3, 4
26. Email from Buchanan to Lee: MS 0053, Power production
27. Emails Selvey/Pettine: Yarnes 27, 28
28. Stamped plan and Commercial Zoning Compliance Permit: Yarnes 29
29. Notice of Default: MS 17522-523
30. MS Press Releases: MS 01354-01357, 17253-254
31. Emails Yarnes to Joyner
32. Email Yarnes to Joyner: MS 19104, Yarnes 43
33. Minutes of meeting of York County Council: Yarnes Ex. 33
34. Emails between York County and Morningstar regarding status reports on Tower Project, and approval of site plan. MS 143-147
35. Yarnes letter to Lindemann: Yarnes Ex. 36
36. Email btwn Yarnes and Ottinger: MS 18646-647, 17840; 133 Yarnes 15, 16, 42
37. Emails Herr/Ottinger: MS 006569-6570
38. Heritage Court Architectural plans: MS 000550-552 Yarnes 18
39. Charter Member Benefits: MS 002206
40. Email Selvey to Joyner: MS 19237-238
41. Deposit Report: MS19501-19510
42. Letter from Kimley-Horn and Associates, Inc., March 11, 2014.
43. Possible additional exhibits from Joyner deposition

ii. Deposition testimony of Pat Selvey

b. York County's Lay Witnesses
   i. Jim Baker
   ii. David Pettine
   iii. Gerald Lee
   iv. Derrick Boyte
   v. Susan Britt
   vi. Julie Buchanan

c. York County's Expert Witnesses
   i. Jason Manners, P.E.
   ii. Dean Penny, P.E.

5. Any unusual problems relating to evidence to be introduced, such as Business Records as Evidence Act," hearsay, use of depositions, etc.

Morningstar is expected to present testimony from Pat Selvey by way of video deposition. Several other witnesses including former York County Manager Jim Baker are located out of state and may be presented through deposition testimony.

York County has filed a Motion to Exclude Damages that has not been heard, and a Motion *in limine* to exclude certain evidence of damages alleged by Morningstar, and certain expert or fact testimony barred by hearsay. Copies of these Motions are attached.

York County intends to publish Morningstar's admissions concerning its failure to provide the financial information required under the parties' Development Agreement.

6. Any unusual question or matter which should be brought to the attention of the court.

Morningstar has asserted a claim for breach of contract based upon actions occurring during the mediation of the dispute prior to this lawsuit. Such matters are confidential under SC ADR Rule 8 and shall not be relied upon, or introduced as evidence in this proceeding.

7. A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

The dispute giving rise to this lawsuit was mediated prior to filing, and was unsuccessful. No further settlement discussions have occurred.

Respectfully submitted,

Daniel J. Ballou
W. Keith Martens
HAMILTON MARTENS BALLOU
& CARROLL, LLC
Post Office Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
ATTORNEYS FOR DEFENDANT YORK COUNTY.

January 16, 2015

FILED-RECEIVED
2015 FEB -4 PM 12:16
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

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,)	
v.)	MOTION FOR ENTRY OF JUDGMENT
York County, South Carolina,)	
Defendant.)	

Defendant York County moves for entry of judgment, pursuant to Rules 54(b), 56 and 58(a)(2), S.C.R. Civ. P. on the grounds that the previous Order of this Court has disposed of essential elements of the claims of Plaintiff Morningstar Fellowship Church ("Plaintiff"), that there is no just reason for delay in entry of judgment, and that there are no material issues of fact in dispute regarding the Plaintiff's causes of action as to breach of contract and declaratory judgment and York County is entitled to judgment in its favor as a matter of law.

This motion is based upon the Order dated February 3, 2015, excluding the Plaintiff's evidence of damages at trial of the case. A true and correct copy of the Order is attached hereto as Exhibit A. 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, Sunrise Continuing Care, Inc. v. Wright, 277 Va. 148, 671 S.E.2d 132 (2009). Because this Court has excluded the Plaintiff's proof of damages, effectively ending its case, the entry of judgment in favor of York County is appropriate.

Likewise, Plaintiff's declaratory judgment claim merely seeks a finding that the County breached the Development Agreement in question, which is a restatement of the separately pled contract claim. As the Declaratory Judgments Act is remedial and procedural in nature and does not independently create substantive rights or duties, the Order excluding Plaintiff's damages for the underlying claim for breach of contract renders its declaratory judgment action moot. Felts v. Richland County, 299 S.C. 214, 383 S.E.2d 261 (1989). Since the Plaintiff cannot proceed on its underlying contract claim, any declaration as to breach would be purely advisory and not a justiciable controversy under the Act. S.C. Code Ann. 15-53-10, et seq., City of Columbia v. Sanders, 231 S.C. 61, 97 S.E.2d 210 (1957)(noting that the Act does not require courts to give purely advisory opinions as to the issues sought to be raised.)

Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P. that he had no duty to consult with opposing counsel prior to filing this motion.

February 4, 2015

Daniel J. Ballou
W. Keith Martens
HAMILTON MARTENS BALLOU
& CARROLL, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7609

Michael K. Kendree
YORK COUNTY ATTORNEY
P.O. Box 299
York, South Carolina 29745

ATTORNEYS FOR THE DEFENDANT
YORK COUNTY

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: ORDER ON DEFENDANT YORK COUNTY'S MOTION TO EXCLUDE DAMAGES AND MOTION IN LIMINE

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 — Circuit Court Judge

2753 — Judge Code

2/2/2015 — Date

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

EXHIBIT A

For Clerk of Court Office Use Only

This judgment was entered on **February 3, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **February 3, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

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.

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

FILED-RECEIVED
2015 FEB -3 AM 8:29
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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

Morningstar Fellowship Church,) Civil Action No. 2013-CP-46-00246
)
Plaintiff,)
) ORDER ON DEFENDANT YORK
v.) 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.

#1 DM

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

#2 ORH

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

#3 004

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

#4 DDH

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

#5 09H

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

#6 DDH

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

#7 0084

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).

#8 DDH

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.

#9 004

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

#10 COA

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.

#11 904

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

COUNTY OF YORK

MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH CAROLINA,

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2013-CP-46-00246

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT

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2015 FEB 11 AM 11:18
YORK COUNTY, SC

Plaintiff Morningstar Fellowship Church ("Morningstar") responds to Defendant York County, South Carolina's ("York County") Motion for Entry of Judgment:

Morningstar agrees that the Court's rulings on York County's motions in limine in effect have determined the action as to Morningstar's claims for monetary relief. York County's motion sweeps broader than that, however, in asking for a judgment to be entered on all of Morningstar's claims. All of the claims raised in Morningstar's complaint arise out of issues which are also relevant to its defenses to York County's claims. A blanket judgment dismissing all of those claims may be argued as having preclusive effect on Morningstar's ability to defend itself at trial if the Court's rulings are upheld. York County's motion should be denied for that reason. The Court should not even get to that point, though. Morningstar's notice of appeal was served on February 3, 2015. It was filed in York County on February 4th, and mailed to the Court of Appeals in Columbia the same date. The Court of Appeals has received the notice. This Court, then, does not have jurisdiction to hear York County's motion. Rules 205 and 241, SCACR.

If this Court does rule on York County's motion, it should reject York County's argument that the declaratory judgment claim would be advisory in the absence of an underlying breach of contract claim. The Act, which is to be liberally construed, provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §§ 15-53-130, 15-53-20. Regardless of whether judgment is entered against Morningstar as to its breach of contract claim, its declaratory judgment should proceed nonetheless.

The Act further provides that "[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." Id. at § 15-53-30. A cause of action for declaratory judgment exists when there is a justiciable controversy, in other words, "when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (S.C. 1995). In Graham, the plaintiff sought a declaration of whether her insurance policy included coverage for underinsured motorists. Id. at 71-72, 459 S.E.2d at 845. Despite State Farm's argument that such a declaration was purely advisory until plaintiff obtained a judgment in excess of the at-fault driver's liability limits, the Supreme Court held that a ruling on the declaratory judgment issue was not advisory but "imperative to [plaintiff's] preservation of [its] rights." Id.

Here, Morningstar seeks a declaration as to whether York County breached the agreement in a number of ways, including whether a proper notice of site plan approval was received. As stated, Morningstar understands that the Court's order effectively resolves its claim for money damages. However, these issues are also relevant to Morningstar's defenses to York

County's claims. Entry of Judgment, as requested, is not appropriate. Morningstar's cause of action for declaratory judgment is thus based on a justiciable controversy, and York County is not entitled to the relief requested.

I. CONCLUSION

Morningstar respectfully requests the Court to deny York County's motion for entry of judgment for all the reasons stated.

JAMES, MCELROY & DIEHL, P.A.

By: _____

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Attorneys for Plaintiff

Dated: February 11th, 2015.
Charlotte, North Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

75108

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church, Appellant-Respondent,

v.

York County, South Carolina Respondent-Appellant.

MOTION TO DISMISS INTERLOCUTORY APPEAL

Respondent-Appellant hereby moves to dismiss the Appeal filed by the Appellant-Respondent. This Motion is made on the grounds that the Order of February 3, 2015, from which the Appeal is taken, is interlocutory and ~~not immediately~~ appealable.

February 9, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church, Appellant-Respondent,

v.

York County, South Carolina Respondent-Appellant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

The appeal arises from the Order of the Honorable Daniel D. Hall filed on February 3, 2015, regarding York County's Motion to Exclude Damages and Motion in Limine ("Order"). The Order finds and concludes that certain evidence that had been proposed by the Appellant-Respondent Morningstar Fellowship Church to be offered at the trial of this case should be excluded. A true and correct copy of the Order is attached hereto as Exhibit "A."

On February 4, 2015, in reliance upon Judge Hall's Order, York County filed a Motion for Entry of Judgment with the Clerk of the Circuit Court. That motion has not yet been heard and is still pending. On the same day, February 4, 2015, Morningstar filed this appeal.

The Order Morningstar has appealed from is not a final order, and is not immediately appealable. See, S.C. Dept. Transp. V. McDonald's Corp., 375 S.C. 90, 650 S.E.2d 473 (2007)(noting that a motion *in limine* is generally not immediately appealable); Ex parte Wilson,

367 S.C. 7, 625 S.E.2d 205 (2006)(interlocutory discovery order not immediately appealable). While York County has asked Judge Hall to enter final judgment in its favor on the basis of the Order, he has not yet done so prior to this appeal.

Out of abundance of caution, and without waiving its objection to the appealabilty of the Order, York County is filing and serving contemporaneously with this Motion a Notice of Cross Appeal. York County recognizes, given the current posture of this case, that its own appeal may also be premature.

February 5, 2015

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EXHIBIT
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A

M 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: **ORDER ON DEFENDANT YORK COUNTY'S MOTION TO EXCLUDE DAMAGES AND MOTION IN LIMINE**

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 — **Circuit Court Judge**

2753 — **Judge Code**

2/2/2015 — **Date**

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

For Clerk of Court Office Use Only

This judgment was entered on **February 3, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **February 3, 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 10940 Rock Hill, SC 29731
Michael Kurt Kendree Sr. PO Drawer 299 York, SC 29745

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.

FILED-RECEIVED
2015 FEB -3 AM 8:29
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

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.

#1004

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

#2 ODH

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

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

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

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

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

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).

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.

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

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. **"Petition Regarding Interest" to York County Council**

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.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2013-CP-46-00246

Morningstar Fellowship Church, Appellant,

v.

York County, South Carolina, Respondent.

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

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MEMORANDUM

I. Preliminary Statement

Pursuant to Rule 240, SCACR (2015), Morningstar Fellowship Church ("Appellant") respectfully responds to the Motion to Dismiss Interlocutory Appeal filed by York County ("Respondent"). Respondent's Motion should be denied because Judge Hall's Order excluding Appellant from offering evidence of damages allowing is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2).

II. Legal Argument

Appellant filed this action on January 24, 2013. The complaint raises claims for declaratory judgment, breach of contract, and breach of duty of good faith. (The complaint and answer are with counterclaim attached to the affidavit of Richard B. Fennell being filed contemporaneously with this Return). The claim for breach of duty of good faith was dismissed by order on summary judgment by the Honorable S. Jackson Kimball on July 16, 2014. Judge Kimball's order otherwise denied Respondent's Motion for Summary Judgment but held that the Development Agreement at issue in this case "does not require that Morningstar receive formal notice of site plan approval as specified ion Article XI, J or H of the Agreement quoted herein." Respondent filed a Motion to Exclude Damages on September 12, 2014. It also filed a Motion *in Limine* (which actually contained five motions) on January 23, 2015. Those motions were heard on January 26, 2015. The Honorable Daniel D. Hall granted all of the motions, except for one, by Order entered on February 3, 2015.

Appellant is appealing a number of different issues arising out of these orders. Fundamentally for this Motion, however, Judge Hall ruled that Appellant could not introduce any evidence of its damages. The effect of that ruling was to eliminate from consideration all of Appellant's plaintiff claims for affirmative relief, and reduce the case simply to a trial of Respondent's claims. Judge Hall's Order, then, effectively determined those claims sufficiently to be, immediately appealable under S.C. Code Ann. § 14-3-330(2) (2013). That section provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> * * *
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

S.C. Code Ann. § 14-3-330(2) (underscore added).

As set forth in the complaint, the underlying action is centered around Appellant's efforts to complete and redevelop a tower located on property it owns. The parties entered into a development agreement in 2008. The development process required Appellant to generate a site plan for approval by Respondent. The site plan was submitted in the fall of 2008. Respondent notified Appellant on March 5, 2010 that it was in default of the Agreement for failing to produce bid, performance and payment bonds within 180 days of site plan approval. Appellant contends that it did not receive notice of site plan approval, and therefore did not know that the 180-day clock had started.

Appellant further contends that the notice of default, among other breaches committed by Respondent, caused damages "including but not limited to the loss of the value of its investment in the Tower, the loss of individual sales of units in the Tower, and the loss of the market for near term sales of the remaining units in the Tower." Judge Hall excluded any evidence of those damages. This ruling was in error, and the error must be corrected before the case is tried. The finder of fact will certainly view the case in a different way if Appellant is precluded from explaining the ways in which Respondent's actions have caused it harm.

The analysis in State v Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) is not applicable in this case. Judge Hall did not simply make a ruling that a particular piece of evidence would not be presented to the jury based on the record as it stood. Rather, he excluded all of Appellant's evidence of damage, which effectively disposed of any claims Appellant had against Respondent for which it could recover relief and made it impossible for Appellant to proceed to trial on any of those claims. South Carolina courts have recognized that similar *in limine* rulings that suppress evidence and significantly impair the State's ability to prosecute a case are immediately appealable. See, e.g., Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (S.C. Ct. App. 1999); State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). The same rationale applies with equal force to civil cases in general where, as here, the ruling effectively dismisses any basis for which Appellant could be awarded damage. See, e.g. Widener v. Fort Mill Ford, 381 SC 522, 524, 674 S.E.2d 172, 174 (Ct. App. 2009) (holding that the trial court's dismissal of appellant's case

so the parties could arbitrate was immediately appealable because the dismissal finally determined the parties' rights).

III. Conclusion

Judge Hall's Order conclusively determined and disposed of Appellant's claims against Respondent for which it could recover damages, and deprived Appellant of any ability to obtain an appealable judgment on those issues. Accordingly, Judge Hall's Order is immediately appealable under S.C. Code Ann. § 14-3-330(2).

March 4, 2015

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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 RENEWED MOTION FOR ENTRY OF JUDGMENT OR PARTIAL JUDGMENT

2015 OCT 22 PM 2:33

Defendant York County renews its previously-filed motion for entry of judgment or partial judgment,[1] pursuant to Rules 54(b), 56 and 58(a)(2), S.C.R. Civ. P. on the grounds that the February 3, 2015 order of this court (hereinafter "Order") has disposed of an essential element of the claims of Plaintiff Morningstar Fellowship Church ("Plaintiff"), that there is no just reason for delay in entry of judgment, that there are no material issues of fact in dispute regarding the Plaintiff's causes of action for breach of contract and declaratory judgment, and that York County is entitled to judgment in its favor as a matter of law on each of Plaintiff's causes of action. A true and correct copy of the Order is attached hereto as Exhibit A.

The Order addressed two distinct motions: (a) Defendant's motion to exclude damages;[2] and (b) Defendant's motions *in limine* to exclude certain testimony and evidence at trial.[3] Order at 1. A portion of the Order (Section B) merely rules upon Defendant's motions *in limine*, and contains the court's preliminary rulings as to certain

[1] York County moved for entry of judgment on February 4, 2015. On May 18, 2015, York County filed an amended motion to clarify that it sought judgment or partial judgment in its favor. The court has not yet heard York County's motion.

[2] York County's Motion to Exclude Damages was filed September 15, 2014.

[3] York County's Motions in Limine were filed January 26, 2015.

evidentiary issues. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988)(ruling on motion *in limine* is preliminary ruling as to admissibility of evidence). However, the remainder of the Order (Section A) is not a preliminary ruling at all. Instead, it contains final, substantive rulings that Plaintiff's evidence is insufficient to support its claims for damages.[4] Of particular relevance, Section A of the Order contains the following findings of fact and conclusions of law:

As to Morningstar's claim for "Loss of Value to the Tower."

- "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." Order at 3.

- "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 of Tower" . . . and that *component of damages* is excluded from the trial of this case." Id. at 3-4 (emphasis added).

As to Morningstar's claim of Damages for Development Costs.

- "Deposition testimony reveals that Morningstar has made no attempt to verify whether any of the [development costs] 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. . . . 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 *becomes a matter of conjecture and speculation.*" Id. at 4.

- "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 the County. Accordingly, *such evidence has no real probative value* in ascertaining the amount of

[4] Plaintiff recognizes the substantive and "conclusive" nature of this court's rulings on damages. *See* Appellant's Return to Respondent's Motion to Dismiss Appeal, at 5 (filed March 4, 2015 in S.C. Ct. App. - Attached as Exhibit B.)("Judge Hall's Order conclusively determined and disposed of Appellant's claims against Respondent for which it could recover damages. . . .").

any actual damage property [sic – proximately(?)] resulting from such alleged breach." Id. at 4-5.

As to Morningstar's Claim for Lost Profits

- "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." Id. at 5.

- "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." Id.

- "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 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." Id.

- "Therefore, there is no evidence that lost profits of any kind were the natural consequence of the declaration of default, even if it were a breach of the Agreement." Id. (emphasis added).

- "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." Id. at 6-7 (emphasis added).

As these excerpts from the Order make clear, this court did not merely rule, preliminarily, that Plaintiff was precluded from introducing specific evidence in support of its damages claim. Rather, the court determined that Plaintiff's evidence is substantively deficient, such that it could not support *any* claim for damages.

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* Sunrise Continuing Care, Inc. v. Wright, 277 Va. 148, 671 S.E.2d 132 (2009). After several years of litigation and discovery, Plaintiff had ample opportunity to produce evidence supporting its claim for damages, but this court has concluded that Plaintiff's evidence of damages is legally insufficient. Because "the damages claimed by Morningstar *are not recoverable as a matter of law*,"[5] the Order effectively disposes of Plaintiff's breach of contract claim and obviates the need for trial. Entry of judgment in favor of York County as to that cause of action is now appropriate, as a matter of law.

Likewise, because Plaintiff's declaratory judgment claim merely seeks a finding that the County breached the Development Agreement, it is essentially a restatement of Plaintiff's separately pled contract claim. As the Declaratory Judgments Act is remedial and procedural in nature and does not independently create substantive rights or duties, the Order renders Plaintiff's declaratory judgment action moot. Felts v. Richland County, 299 S.C. 214, 383 S.E.2d 261 (1989). Since the Plaintiff cannot proceed on its underlying contract claim, any declaration as to Defendant's alleged breach would be purely advisory and not a justiciable controversy under the Act. S.C. Code Ann. 15-53-10, et seq., City of Columbia v. Sanders, 231 S.C. 61, 97 S.E.2d 210 (1957)(noting that the Act does not require courts to give purely advisory opinions as to the issues sought to be raised.)

Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P. that he had no duty to consult with opposing counsel prior to filing this renewed motion.

[5] *See* Order at 2-3 (emphasis added).

October 22, 2015

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STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK 2015 OCT 27 AM 10: 09	**SIXTEENTH JUDICIAL CIRCUIT** **2013-CP-46-00246**
MORNINGSTAR FELLOWSHIP CHURCH,	
Plaintiff,	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR ENTRY OF JUDGMENT OR PARTIAL JUDGMENT**
vs.	
YORK COUNTY, SOUTH CAROLINA,	
Defendant.	

Morningstar responds to the County's Renewed Motion for Entry of Judgment or Partial Judgment as follows:

Morningstar has acknowledged in the past that the Court's ruling on February 3, 2015 had the effect of determining the action as to Plaintiff's claims for monetary relief. The Order on Defendant's Motion to Exclude Damages is clear. Morningstar has never agreed with the order, however, and believes it to be in error procedurally and substantively. The Court indicated in chambers on September 29, 2015 that it wished to hear the evidence and revisit those matters in the context of the trial. In so doing, it may come to the same conclusion, or come to a different conclusion. The Court is well within its authority to do so, despite the earlier ruling (S.C. Rule Civ. P. 54(b)). Morningstar's argument on the damages issue was briefed in January, but for ease of reference, is summarized below.

LEGAL ARGUMENT

I. Morningstar Is Entitled to Damages for the Lost Value of the Tower.

Morningstar has forecast evidence demonstrating that the County's breach of the Development Agreement is a result of the County's determination to have the Tower torn

down. Indeed, in its original motion the County acknowledged that it "indisputably seeks to have the Tower demolished . . . ." Def. Motion at 3. The County argues that Morningstar is not entitled to damages for the value of the Tower because the County has not taken steps to demolish the Tower during the pendency of this litigation, and could not do so unless it prevails on its counterclaims at trial. In its counterclaims, however, the County contends that it has the right to demolish the Tower, with Morningstar either doing the work or paying the associated demolition costs. It appears to be a foregone conclusion that the Tower will be demolished if the County has its way either through this litigation or subsequent administrative proceedings. Morningstar's fundamental premise throughout this case is that the Tower could have been completed but for the County's default declaration. The value of the work in place at the Tower site was assessed at $11,887,719 in 2007. If the Tower must come down, Morningstar has lost that value.

The South Carolina Supreme Court has recognized that in the context of government takings, a jury may ascertain the value of just compensation for a given piece of property despite the fact that the condemnor's exercise of its right to take the property is optional. See Haig v. Wateree Power Co., 119 S.C. 319, 330-333 (S.C. 1922) (holding that the landowner could not claim compensation until the condemnor elected to take the property, but that if the condemnor delayed the taking the amount of just compensation would accrue interest). This rationale logically permits the lost value of the Tower to be awarded, though conditionally, in the event the County does elect to order the Tower's demolition and it is determined not to be necessary.

The County also argues that, should it demolish the Tower after prevailing in this action, the loss of the Tower would be proximately caused by *the Court*, rather than by the County's own actions. If the Tower cannot be completed, it is because of the County's actions. Proximate cause exists where the damage "would not have occurred 'but for' the defendant's" act, and was a "'natural and probable consequence'" of that act. Oliver v. S.C. Dep't of Highways & Public Transp., 309 S.C. 313, 316 (S.C. 1992). The County cannot contend that the demolition of the Tower is not a direct and foreseeable consequence of the County requiring that the Tower be torn down. The County's very argument that no damages for the Tower can be awarded because it has not yet chosen to demolish the Tower belies the fact that the Tower's destruction is dependent on the County taking action. A judgment in this action cannot cause the demolition of the Tower, but merely facilitate or prohibit it.

Lastly, the County argues that Morningstar has not shown any injury to the value of the Tower that was caused after the County declared Morningstar in default. As stated, if the Tower must now be destroyed, it is because the County's actions kept it from being completed. Morningstar is entitled to recover damages in the amount of the existing Tower's value due to the County's certain demolition of the structure.

II. Morningstar Is Entitled to Damages for its Development Costs.

Morningstar is also entitled to recover damages for its lost development costs in pursuing the project. Morningstar may recover all damages that "either flow as a natural consequence of the breach or [were] reasonably within the parties' contemplation at the time of the contract." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595 (S.C. Ct. App. 1997). In Hawkins, the Court held that the parties to a sale and purchase agreement

for land reasonably contemplated that seller's adjacent parcels would continue to be developed, and thus that the plaintiff seller was entitled to recover the diminution in value of those adjacent parcels when the purchaser failed to construct an access road to the parcels in breach of the agreement. Id. at 596-597.

The Development Agreement clearly contemplated a complex development project subject to delays, and envisioned each party acting in good faith to move the project along and provide proper notice of various steps along the way. Like the diminished property value in Hawkins, it was entirely foreseen and expected that Morningstar would incur significant engineering, marketing, architectural, legal, and development expenses in pursuing the project under the Development Agreement. Mr. Joyner testified at length about Morningstar's method of categorizing those expenses, and his own review of them in attempting to fulfill his obligations as a 30(b)(6) witness. Morningstar reduced this claim from $1,201,456.00 to $819,460.09 as a result of that review and an effort to tie them to the failure to complete the Tower as anticipated. The County's remaining points about this element of damage are simply cross examination issues. When the County breached the Development Agreement by wrongfully declaring Morningstar to be in default, a natural consequence of the County's breach was to deprive Morningstar of the benefit of the expenses it incurred in trying to develop the Tower in reliance on their Agreement. Morningstar is therefore entitled for a jury to determine the amount it should recover from those expenses incurred in developing the Tower.

III. Morningstar Is Entitled to Damages for Lost Profits.

Morningstar also suffered lost profits, as a direct and natural consequence of the County's actions. The County does not dispute that lost profits are recoverable for a breach of contract, but argues that whether Morningstar's lost profits were the proximate result of the County's actions is speculation. Lost profits can be established by facts "from which a reasonably accurate conclusion regarding the cause . . . can be logically and rationally drawn." Sterling Dev. Co. v. Collins, 309 S.C. 237, 242 (S.C. 1992). In Sterling, the Supreme Court affirmed a jury award for lost profits based on evidence that, but for the defendant's breach of contract with plaintiff, plaintiff's lease with Bi-Lo and the corresponding profits would still be in effect. Id. Similarly, Morningstar has forecast evidence that the number of reservations for the Tower dropped precipitously and the number of cancellations increased dramatically in early 2010, coincident with the start of this dispute. But for the County's notice of default, in breach of the Development Agreement, it is logical and rational that many of those reservations would have been converted into deposits, and Morningstar would be availing itself of the corresponding income from the Tower during the five year period following the 2010 notice. At the very least Morningstar should be permitted to put on its evidence and let a jury determine what profits have been lost because of the amount of time that has passed since default was declared.

The County also argues that the amount of Morningstar's lost profits is speculative. The loss of profits in a breach of contract action need not be established with absolute certainty, but merely by facts "from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally

drawn." Sterling, 309 S.C. at 242; accord Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208 (S.C. Ct. App. 2008) (holding that "the law does not require absolute certainty of lost profits" in a tortious interference with contract claim and affirming award of lost profits where no client had left plaintiff company prior to defendant's actions). Morningstar has calculated the amount of lost income from the Tower to total $7,187,421 over five years. Morningstar's lost income is rationally based upon the amount of anticipated fees for the Tower spaces and associated revenue, and is therefore not speculative. Morningstar's pro forma generated in real time shows the expected net operating income of the project, and is the basis for the lost profits claim. Morningstar limited its request to five (5) years in the interest of conservatism.

Rick Joyner and Dave Yarnes were asked thorough, exhaustive questions about the pro forma in their combined five (5) days of deposition testimony. See, e.g., Yarnes Dep. Tr. pp. 595-615. Both testified consistently that proforma generation was time consuming and ongoing throughout the project, and that a variety of assumptions were used to ensure accuracy. The County may cross-examine each again at trial, and a jury may decide that the lost profits measure is too speculative. It is for the jury to do that, though. There is no obligation to show the claimed damages are absolutely certain to occur in order for the issue to be submitted. Haltiwanger v. Baur, 258 S.C. 27, 186 S.E.2d 819 (1972). Enough work went into the performance to remove this damage claim from the realm of speculation and conjecture. Lockhart Power Co. v. Askew, 110 S.C. 449, 96 S.E. 685 (1918). A business owner may testify to lost profits if his testimony has a rational basis. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67

(1996). A jury should be able to consider the claim and weigh the County's attacks upon it in order to determine what, if anything, Morningstar is entitled to.

Though the County claims Morningstar lacks the ability to finish the project, many of the obstacles are generated by the County itself. Morningstar has been unable to present meaningful completion and occupancy dates precisely because of the County's assertion that the Tower must be torn down. Moreover, Morningstar has forecast evidence and witnesses as to its ability to carry out the project at any stage but for the County's breach. Morningstar is entitled to its lost profits.

IV. Morningstar Is Entitled to Proceed with Its Declaratory Judgment Claim.

Even if the Court holds to its earlier ruling regarding damages, it is important to note that the County's motion sweeps broader than simply a request to exclude damages or enter judgment on the breach of contract claims.[1] It is asking that judgment be entered on all of Morningstar's claims. The declaratory judgment claims raised in Morningstar's complaint arise out of issues which are also relevant to its defenses to the County's claims. A blanket judgment dismissing all of those claims may be argued as having preclusive effect on Morningstar's ability to defend itself at trial and present its affirmative defenses. The County's motion for judgment as to Morningstar's claim for declaratory judgment should be denied for that reason.

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[1] Regardless of the Court's decision with respect to damages, Morningstar should also be permitted to present evidence of the County's breach as a defense to the County's counterclaim that Morningstar breached the agreement. See, e.g., Int'l Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 728 (D.S.C. 1984) ("Where a party's performance is prevented by the other party to the contract, the first party's nonperformance is excused and does not constitute a breach.")

The Court should reject the County's argument that the declaratory judgment claim would be advisory in the absence of an underlying breach of contract claim. The Act, which is to be liberally construed, provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §§ 15-53-130, 15-53-20. Regardless of whether judgment is entered against Morningstar as to its breach of contract claim, its declaratory judgment claim should proceed nonetheless.

The Act further provides that "[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." Id. at § 15-53-30. A cause of action for declaratory judgment exists when there is a justiciable controversy, in other words, "when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (S.C. 1995). In Graham, the plaintiff sought a declaration of whether her insurance policy included coverage for underinsured motorists. Id. at 71-72, 459 S.E.2d at 845. Despite State Farm's argument that such a declaration was purely advisory until plaintiff obtained a judgment in excess of the at-fault driver's liability limits, the Supreme Court held that a ruling on the declaratory judgment issue was not advisory but "imperative to [plaintiff's] preservation of [its] rights." Id.

Here, Morningstar seeks a declaration as to whether York County breached the agreement in a number of ways, including whether a proper notice of site plan approval was received. As noted in the July 17, 2014 Order issued by the Honorable S. Jackson

Kimball (the "Summary Judgment Order"), "a full presentation of the facts pertaining to the reasonableness of the notice of approval of the site plan" is necessary. Summary Judgment Order, p. 6. Accordingly, the Order denied the County's request for summary judgment as to Morningstar's claims for breach of contract and declaratory judgment. For the same reasons, in an Order entered on September 29, 2014 (the "Reconsideration Order"), Judge Kimball denied the County's subsequent Motion for Reconsideration of the Summary Judgment Order, stating that he did "not believe summary judgment is appropriate to remove the issue of sufficiency of notice from consideration by the fact finder." Reconsideration Order, p. 2. Morningstar's cause of action for declaratory judgment is thus based on a justiciable controversy, and the County is still not entitled to entry of judgment, as requested.

CONCLUSION

For the reasons stated, Defendant's Renewed Motion for Entry of Judgment or Partial Judgment should be denied.

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