

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. 2015-CP-46-002460

Morningstar Fellowship Church,

v.

York County, South Carolina,

Appellant/Respondent

Respondent/Appellant

RECORD ON APPEAL
Volume II

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SC Court of Appeals

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STATE OF SOUTH CAROLINA,)
COUNTY OF YORK)
MORNINGSTAR FELLOWSHIP)
CHURCH)
Plaintiff,)
vs.)
YORK COUNTY, SOUTH CAROLINA)
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

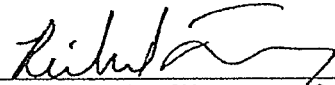
2013 CP4600246

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

York, South Carolina

Dated: January 24, 2013



Plaintiff/Attorney for Plaintiff

Address: 600 S. College Street Charlotte, NC 28202

FILED-RECEIVED
2013 JAN 24 PM 4:00
DAVID HAMILTON
C.C. CP & GS.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

SIXTEENTH JUDICIAL CIRCUIT

MORNINGSTAR FELLOWSHIP
CHURCH,

Plaintiff,

vs.

YORK COUNTY,
SOUTH CAROLINA,

Defendant.

Civil Action No.: 2013 CP 4600 246

COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER RELIEF

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Plaintiff Morningstar Fellowship Church ("Morningstar Church"), for its complaint against York County, South Carolina ("York County"), alleges as follows:

FACTUAL ALLEGATIONS

1. Morningstar Church is a nonprofit corporation organized under the laws of the State of Mississippi. Morningstar Church conducts business and owns real property in York County, South Carolina.

2. York County is a political subdivision of the State of South Carolina.

3. York County is subject to jurisdiction in this Court for the claims asserted herein and venue is proper in this County.

4. In September, 2006, Morningstar Church acquired approximately 52 acres of unique property in York County, consisting of a 20-story, partially completed tower, a hotel conference center, and various smaller buildings.

5. At the time the property was acquired by Morningstar Church, it was abandoned and derelict. The property had originally been used for religious purposes as a part of the PTL Club ministry, which abandoned the property approximately twenty (20) years ago. Since then,

several persons and entities unsuccessfully attempted to use the property. When Morningstar Church acquired the property, the property had been abandoned for approximately seven (7) years.

6. Morningstar Church's plan for the property included renovation of the existing tower (the "Tower") for residential use.

7. On January 13, 2008, Morningstar Church and York County entered into a Development Agreement (the "Agreement"). The Agreement recites that one of its purposes was "to assure [Morningstar Church] of the standards, rules and regulations which will apply to the Development, which is a significant, unique capital improvement project..." The Agreement further recites that it was entered into pursuant to S.C. Code Ann. § 6-31-10, *et seq.*

8. The Agreement recites that it is effective for a period of five (5) years and shall thereupon terminate unless extended by mutual agreement. Section X., ¶ C. provides, however, that "[t]he 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 . . . 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."

9. Morningstar Church began feasibility work and engineering studies immediately after the Agreement was signed. It also began a significant effort at pre-selling units. The interest was real, and Morningstar Church had over 100 prospective purchasers evidenced by financial commitment.

10. Feasibility and engineering expenses eventually approximated \$1.2 million. Morningstar Church submitted a preliminary site plan in the fall of 2008. The parties continued

to discuss the scope and terms of that plan for many months. York County did not deliver a formal approval of the plan which made it difficult to move forward in a meaningful way with construction.

11. 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 Church for its review and was never executed by Morningstar Church. This compounded the problems described in paragraph 10. Morningstar Church did not consider the project to be in jeopardy at that point. It simply believed that the County was in no real rush to get started.

12. However, the lack of formal approval of the site plan delayed the development process. Morningstar Church continued to work on the project, and expended significant funds on architectural work.

13. The parties met in February 2010 to try to move the project issues to resolution. Morningstar Church pointed out that the steps necessary for site approval had not been followed.

14. Rather than continuing to work towards completion of the project, the County began to take steps that made it impossible to move forward. On or about March 5, 2010, York County notified Morningstar Church that it was allegedly in default under the Agreement because Morningstar Church had not provided the County with bid, performance and payment bonds as discussed in Section IV., ¶ C. of the Agreement. Prior to the notice of default, however, the County had never provided Morningstar Church with any notice that the site plan had been approved by the County. The bonding process, therefore, had not been started.

15. Following receipt of the notice of default, Morningstar Church and York County

participated in a mediation process as contemplated by the Agreement. That mediation, however, proceeded for over 18 months, and has not produced any resolution of the dispute.

16. York County continued to persist in its position that Morningstar Church defaulted under the Agreement. The stalled mediation process has served as another hurdle preventing Morningstar Church from developing the property, and delayed and hindered Morningstar Church's ability to move forward with its development plans.

17. The notice of default from the County ground all work on the project to a halt, has caused Morningstar Church to suffer serious financial losses, and has also caused numerous purchasers of units within the Tower to withdraw from their reservation agreements. The cancellation of these agreements has made it considerably more difficult for Morningstar Church to obtain the financing necessary to move forward with the project. The allegation of a default by Morningstar Church has also severely damaged Morningstar Church's ability to proceed with the project upon the terms and within the schedule set out in the Agreement.

FOR A FIRST CAUSE OF ACTION
(DECLARATORY JUDGMENT)

18. The allegations in paragraphs 1 – 17 are incorporated herein by reference.

19. York County contends or has contended that Morningstar Church breached the Agreement.

20. There exists a real and justiciable controversy between the parties regarding whether Morningstar Church or York County breached the Agreement.

21. The Court has the power, pursuant to Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, to construe the Agreement and declare the parties' rights and obligations under it.

22. Morningstar Church is entitled to a declaration from the Court that:

- a. Morningstar Church was not obligated to provide York County with bid, performance and performance bonds before receiving approval of the site plan;
- b. Morningstar Church did not default under the Agreement;
- c. York County materially breached the Agreement;
- d. York County's material breach of the Agreement occurred at a time when Morningstar Church had not defaulted under the Agreement; and
- e. Morningstar Church has been damaged as a result of York County's material breach of the Agreement.

FOR A SECOND CAUSE OF ACTION
(BREACH OF CONTRACT)

- 23. The allegations in paragraphs 1 – 22 are incorporated herein by reference.
- 24. The Agreement constitutes a contract between Morningstar Church and York County.
- 25. The Agreement was executed for good and valuable consideration.
- 26. Morningstar Church fulfilled all of its obligations under the Agreement. Alternatively, any obligations unfulfilled by Morningstar Church were caused by York County's acts or omissions, as described above.
- 27. York County materially breached the Agreement in all of, but not limited to, the following ways:
 - a. By failing to provide notify Morningstar Church when or if the site plan had been approved, as provided in the Agreement;
 - b. By defaulting Morningstar Church without grounds or justification;
 - c. By failing to participate in the mediation process in good faith; and

d. By breaching the implied covenant of good faith and fair dealing inherent in the Agreement.

28. York County's breaches of the Agreement are material and have proximately caused substantial damages to Morningstar Church, 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.

29. Morningstar Church is entitled to a judgment against York County for all damages proximately caused by York County's breach of the Agreement.

FOR A THIRD CAUSE OF ACTION
(BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)

30. The allegations in paragraphs 1 – 29 are incorporated herein by reference.

31. There existed in the Agreement an implied covenant of good faith and fair dealing.

32. York County's conduct in wrongfully declaring a default and causing work on the Tower to cease, and in failing to participate in the mediation process in good faith are breaches of the Agreement and the covenant of good faith and fair dealing that is inherent within the Agreement.

33. The breach of the covenant of good faith and fair dealing has proximately caused Morningstar Church to suffer damages as alleged above.

34. Morningstar Church is therefore entitled to the relief set out in paragraph 29.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Morningstar Fellowship Church prays that the Court issue the following relief:

- a. A declaration pursuant to S.C. Code Ann. § 15-53-10, *et seq.*, as described in paragraph 22, above;
- b. An award in favor of Plaintiff and against Defendant for all damages proximately caused by Defendant's breach of the Agreement and of the covenant of good faith and fair dealing;
- c. An award of Plaintiff's reasonable attorneys' fees to the fullest extent allowed by law;
- d. That the Court tax the costs of this action against Defendant; and
- e. For such other and further relief as may be just and proper under the circumstances.

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January 24, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

FILED
CLERK OF COURT
YORK COUNTY, S.C.
2013 APR 25 AM 9:24

Morningstar Fellowship Church,)
)
Plaintiff,)

Civil Action No. 2013-CP-46-00246

v.)

ANSWER AND COUNTERCLAIMS
(JURY TRIAL DEMANDED)

York County, South Carolina,)
)
Defendant.)
_____)

Defendant York County, South Carolina ("York County") hereby answers and responds to the Complaint of plaintiff Morningstar Fellowship Church ("Morningstar") as follows:

FOR A FIRST DEFENSE
(General and Specific Denials)

1. Except to the extent specifically admitted herein, each and every allegation of the Complaint is denied.

PARTIES AND JURISDICTION

2. York County does not have sufficient information upon which to either admit or deny the allegations of Paragraph 1 of the Complaint and therefore denies them, and demands strict proof thereof.

3. The allegations of Paragraph 2 are admitted.

4. The allegations of Paragraph 3 are admitted.

5. The allegations of Paragraph 4 are admitted, upon information and belief.

6. The allegations of Paragraph 5 are admitted, upon information and belief.

7. York County does not have sufficient information upon which to either admit or deny the allegations of Paragraph 6 of the Complaint and therefore denies them, and demands strict proof thereof.

8. Responding to the allegations of Paragraph 7, York County admits that it entered into that certain Morningstar Development Agreement dated January 13, 2008, with Morningstar ("Development Agreement" or "Agreement"). The Development Agreement speaks for itself, and to the extent that the allegations contained in paragraph 7 contradict or add to the terms of the Development Agreement, they are denied.

9. Responding to the allegations of Paragraph 8 of the Complaint, the Development Agreement speaks for itself, and to the extent that the allegations contained in this paragraph contradict or add to the terms of the Development Agreement, they are denied.

10. York County does not have sufficient information upon which to either admit or deny the allegations of Paragraph 9 of the Complaint and therefore denies them, and demands strict proof thereof.

11. York County does not have sufficient information upon which to either admit or deny the allegations of the first sentence of Paragraph 10 of the Complaint and therefore denies them, and demands strict proof thereof. Further responding, York County admits that Morningstar submitted a site plan in the fall of 2008 and that, after extended discussions between Morningstar's engineers and County staff, York County approved the commercial site plan on August 9, 2009. The remaining allegations contained in Paragraph 10 are denied.

12. Responding to the allegations of Paragraph 11 of the Complaint, the Development Agreement speaks for itself, and to the extent that the allegations contained in this paragraph contradict or add to the terms of the Development Agreement, they are denied. Further

responding, York County admits that Morningstar never executed the non-reimbursable extension agreement. The remaining allegations contained in Paragraph 11 are denied.

13. York County denies the first sentence of Paragraph 12 of the Complaint. Further responding, York County does not have sufficient information upon which to either admit or deny the remaining allegations of Paragraph 12 of the Complaint and therefore denies them, and demands strict proof thereof.

14. Responding to the allegations of Paragraph 13, York County admits that the parties met in February of 2010. York County does not have sufficient information upon which to either admit or deny the allegations of Paragraph 13 of the Complaint and therefore denies them, and demands strict proof thereof.

15. The allegations of Paragraph 14 of the Complaint are denied. Further responding, York County admits that on or about March 5, 2010, it formally notified Morningstar of its default under the Agreement.

16. Responding to the allegations of Paragraph 15, York County admits that the parties have attempted to mediate this dispute, as contemplated by the Agreement, without success. The remaining allegations of Paragraph 15 are denied.

17. Responding to the allegations of Paragraph 16, York County admits that it contends that Morningstar has defaulted under the Development Agreement. York County does not have sufficient information upon which to either admit or deny the allegations of Paragraph 16 of the Complaint and therefore denies them, and demands strict proof thereof.

18. The allegations of Paragraph 17 of the Complaint are denied.

19. No response is required to the allegations of Paragraph 18 of the Complaint. To the extent any response is required, the allegations are denied.

20. Responding to the allegations of Paragraph 19 of the Complaint, York County admits that it contends that Morningstar has breached the Development Agreement.

21. The allegations of Paragraph 20 of the Complaint are denied.

22. The allegations of Paragraph 21 are admitted.

23. The allegations of Paragraph 22 of the Complaint, including all subparts, are denied.

24. No response is required to the allegations of Paragraph 23 of the Complaint. To the extent any response is required, the allegations are denied.

25. The allegations of Paragraph 24 are admitted.

26. The allegations of Paragraph 25 are admitted.

27. The allegations of Paragraph 26 are denied.

28. The allegations of Paragraph 27, including all subparts, are denied.

29. The allegations of Paragraph 28 are denied.

30. The allegations of Paragraph 29 are denied.

31. No response is required to the allegations of Paragraph 30 of the Complaint. To the extent any response is required, the allegations are denied.

32. The allegations of Paragraph 31 are admitted.

33. The allegations of Paragraph 32 are denied.

34. The allegations of Paragraph 33 are denied.

35. The allegations of Paragraph 34 are denied.

FOR A SECOND DEFENSE

(Failure to State Facts Sufficient to Constitute a Cause of Action)

36. The Complaint fails to state facts sufficient to constitute a cause of action and therefore should be dismissed pursuant to S.C.R. Civ. P. 12(b)(6).

FOR A THIRD DEFENSE
(Equitable Defenses)

37. Morningstar's claims are precluded by the equitable doctrines of waiver, unclean hands and equitable estoppel.

FOR A FOURTH DEFENSE
(Prior Material Breach)

38. Morningstar's failure to provide the information required under the Development Agreement, including but not limited to its failure to provide York County with information specified by Section IV.C.2 of the Agreement within 180 days of the date of approval of the commercial site plan, or otherwise, constitutes a material breach of the Agreement, which breach precludes Morningstar's claims for relief herein.

COUNTERCLAIMS

39. York County is a political subdivision of the State of South Carolina.

40. Morningstar is, upon information and belief, either a Mississippi nonprofit corporation or a North Carolina nonprofit corporation with its principal place of business in York County, South Carolina.

41. This action involves Morningstar's attempt to rehabilitate and complete development of certain commercial property located in York County, South Carolina, and described in the Development Agreement (the "Property"), including but not limited to a partially constructed apartment or hotel high rise tower (the "Tower"), and other related buildings constructed in the 1980s as part of a religious-based resort.

42. This court has jurisdiction and venue over the parties and the subject matter of these counterclaims, as the causes of action alleged herein arose in whole or in part in York County, South Carolina.

FOR A FIRST COUNTERCLAIM
(Declaratory Judgment)

43. The allegations set forth in paragraphs 1-42 are hereby incorporated by reference for all purposes as if restated verbatim.

44. The Development Agreement has a stated duration of five (5) years, after which the Agreement automatically terminates according to its terms unless extended by mutual written agreement.

45. The Development Agreement provides that Morningstar is required to provide certain evidence of economic feasibility for the project, including submitting construction contract documents and plans approved by the International Code Congress, submitting a preliminary engineering report of the cost of construction, and submitting bid, performance and payment bonds for review and approval by the County, as well as a demolition bond or financial equivalent in the amount projected as necessary to demolish the Tower based on its then current condition.

46. Under Section IV.C.2 of the Development Agreement, "[w]ithin 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 the County, then this Development Agreement shall be deemed null and void."

47. Section IV.C.2 of the Agreement further provides that, upon default under that paragraph, "the Tower shall be demolished, with all costs for its demolition borne by the Developer."

48. Morningstar's engineer of record, Power Engineering prepared and submitted a proposed commercial site plan on December 9, 2008. Discussions and revisions to the site plan

occurred between County staff and Power Engineering over the next nine months and the site plan was eventually approved by staff on August 24, 2009.

49. To date, Morningstar has failed to provide the information specified in Section IV.C.2 of the Development Agreement. In February of 2010, approximately 180 days after approval of the commercial site plan, Morningstar was verbally notified by County staff of its default under the Agreement for failure to provide the required financial information. In response, Morningstar stated that it was not aware that the 180 day period had commenced, that it was not prepared to provide the required financial information at that time, and that it could not commit to any particular time frame for providing such information to the County.

50. On March 5, 2010, York County provided written notice of default to Morningstar pursuant to the terms of the Development Agreement.

51. Morningstar has disputed that it is in default, despite continuing to fail to provide any of the information required of it under Section IV.C.2 of the Development Agreement.

52. A real and justiciable controversy exists between the parties regarding Morningstar's default, and York County's entitlement to exercise the remedy set forth in the Agreement to have the Tower demolished, with all costs for its demolition to be borne by Morningstar.

53. Based upon and due to the foregoing, York County seeks a declaration from this Court as follows:

- a. that the Development Agreement has terminated according to its express terms;
- b. that Morningstar is in default under the Agreement;

- c. that as a result of such default, the Development Agreement is null and void, and therefore deemed terminated; and
- d. that York County is entitled to demolish the Tower, with all costs for its demolition to be borne by Morningstar.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

54. The allegations set forth in paragraphs 1-53 are hereby incorporated by reference for all purposes as if restated verbatim.

55. The Development Agreement constitutes a binding contract, by which the parties agreed to certain duties and obligations relating to the redevelopment of the Property and Tower.

56. Specifically, the Agreement requires that Morningstar present a suitable commercial site plan to the County for approval, and that within 180 days of the County's approval of such site plan, Morningstar must produce specific information including, but not limited to "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 the County."

57. The Agreement states that the bid, performance and payment bonds specifically "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."

58. Morningstar's failure to provide the bid, performance and payment bond information required to be produced with 180 days of the commercial site plan approval, and its refusal to otherwise provide such information, constitutes a material breach of the Agreement, entitling York County to exercise any and all remedies provided for under the Agreement,

including but not limited to demolition of the Tower with all costs for such demolition charged to Morningstar.

59. York County has provided Morningstar with numerous opportunities to cure its material breach of the Agreement, or rebut the findings that Morningstar has failed to provide the necessary financial assurance information.

60. York County has participated in two mediations with Morningstar in a good faith attempt to resolve the parties' differences in this matter, to no avail.

61. As a result of Morningstar's breach, York County seeks and is entitled to an order authorizing it to proceed with the demolition of the Tower, and an award of damages in the amount of the costs incurred or to be incurred for its demolition.

FOR A THIRD COUNTERCLAIM
(Nuisance)

62. The allegations set forth in paragraphs 1-61 are hereby incorporated by reference for all purposes as if restated verbatim.

63. Under § 4-9-25, S.C. Code of Laws, 1976, as amended, York County has the authority to enact regulations and ordinances necessary and proper for preserving "the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them."

64. York County Code of Ordinances, Chapter 56, addresses 'Nuisances' existing within the County of York, and provides, *inter alia*, for the demolition and removal of abandoned, uninhabitable commercial structures; for the demolition of unfit dwellings; and, that the maintenance of dangerous structures is unlawful.

65. Morningstar has created or allowed conditions to exist on the Property that substantially and unreasonably interfere with the public health, safety, peace, comfort,

convenience and are of continuing nature producing a long-lasting effect so as to constitute a nuisance for which Morningstar is responsible to the community at large and to York County, and which is subject to removal or abatement at the instance of York County.

66. York County seeks an Order of the Court determining the Tower constitutes a 'nuisance' and requiring the immediate demolition and removal of the Tower, at a cost to be borne by Morningstar.

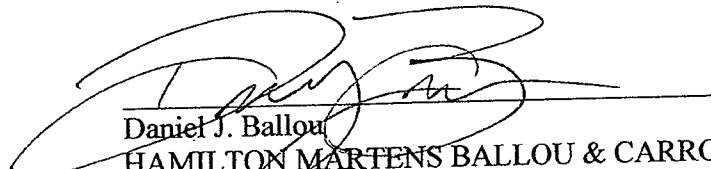
FOR A FOURTH COUNTERCLAIM
(Equitable Accounting)

67. The allegations set forth in paragraphs 1-66 are hereby incorporated by reference for all purposes as if restated verbatim.

68. Under the terms of the Development Agreement, Morningstar assumed the obligation to reimburse York County for the costs associated with demolition of the Tower in the event of breach, and agreed to provide a demolition bond to defray the costs of demolition in the event of its failure to complete the project. Morningstar has repeatedly refused to provide any evidence of financial ability to finance the work contemplated under the Development Agreement, including but not limited to the cost of demolition of the Tower, and has failed and refused to provide the required demolition bond. Under the circumstances of this case and the rights and obligations implicit in the Development Agreement, Morningstar should be required to provide an accounting of its finances available for or committed to the work contemplated under the Development Agreement.

WHEREFORE, York County prays for dismissal of the Complaint, for a jury trial on all issues so triable, for the declaratory relief sought herein, for judgment in its favor in the amount of actual and other damages on the Counterclaims, for reasonable attorney's fees if applicable, and for such other and further relief as the Court deems just and proper.

March 22, 2013



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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.

REPLY TO COUNTERCLAIMS

FILED-RECEIVED
2013 MAY -3 PM 4:13
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Plaintiff responds to Defendant's Counterclaims as follows:

1. Paragraph 39 is admitted.
2. Responding to paragraph 40, it is admitted that Morningstar was originally organized under Mississippi law but is properly authorized to do business in South Carolina.
3. Paragraph 41 is admitted.
4. Paragraph 42 is admitted.
5. Responding to paragraph 43, the responses to the preceding paragraphs as well as the original allegations of the complaint are restated and realleged as if fully set out are restated as if fully set out.
6. Responding to paragraph 44, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.
7. Responding to paragraph 45, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.
8. Responding to paragraph 46, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.

RBF

9. Responding to paragraph 47, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.
10. Responding to paragraph 48, it is admitted that portions of a draft commercial site plan were submitted and that the parties discussed it. It is denied that any alleged site plan approval was ever properly communicated to Plaintiff. The remaining allegations are denied.
11. Responding to paragraph 49, it is admitted that county staff began questioning Morningstar's performance under the Development Agreement. Morningstar responded by challenging any claim that it had not complied. The remaining allegations are denied.
12. Responding to paragraph 50, it is admitted that York County improperly noticed a default on March 5, 2010. The remaining allegations are denied.
13. Responding to paragraph 51, it is admitted that Morningstar has properly challenged any claim that it is in default. The remaining allegations are denied.
14. Paragraph 52 is denied, other than to admit that York County claims to be entitled to that relief.
15. Paragraph 53 accurately states York County's claims. It is denied that it is entitled to the relief requested.
16. Responding to paragraph 54, the responses to the preceding paragraphs as well as the original allegations of the complaint are restated and realleged as if fully set out.
17. Paragraph 55 is admitted.
18. Responding to paragraph 56, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.
19. Responding to paragraph 57, the Development Agreement is in writing, and is the best evidence of its contents. The remaining allegations are denied.
20. Paragraph 58 is denied.

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21. Paragraph 59 is denied.
22. Responding to paragraph 60, it is admitted that the parties have participated in multiple mediations. The remaining allegations are denied.
23. Paragraph 61 is denied.
24. Responding to paragraph 62, the responses to the preceding paragraphs as well as the original allegations of the complaint are restated and realleged as if fully set out.
25. Responding to paragraph 63, it is admitted that the statute is properly cited. It is denied that the relief requested is appropriate.
26. Responding to paragraph 64, it is admitted that Chapter 56 deals with Nuisances, and provides for certain remedies. It is denied that Chapter 56 is implicated by any of the allegations of this case.
27. Paragraph 65 is denied.
28. Responding to paragraph 66, it is admitted that York County seeks such relief. It is denied that York County is entitled to it. The remaining allegations are denied.
29. Responding to paragraph 67, the responses to the preceding paragraphs as well as the original allegations of the complaint are restated and realleged as if fully set out.
30. Responding to paragraph 68, it is admitted that the Development Agreement imposes certain obligations of both parties. It is denied that Morningstar has failed to perform or that Defendant is entitled to the relief requested.

AFFIRMATIVE DEFENSES

1. Defendant has breached the contract it seeks to enforce.
2. Defendant's claims are barred by waiver.
3. Defendant's claims are barred by unclean hands.
4. Defendant's claims are barred by the doctrine of equitable estoppel.
5. Defendant's claims are barred by laches.

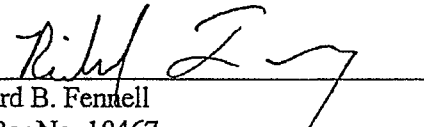
WHEREFORE, Plaintiff prays the Court:

1. For the relief prayed for in the Complaint;
2. To grant Defendant nothing on its counterclaims;
3. For a trial by jury;
4. To tax the costs of this action against Plaintiff; and
5. For such other relief as the Court deems appropriate.

This 2 day of May, 2013.

RBF

JAMES, MCELROY & DIEHL, P.A.

By: 

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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
County of York	)	2013-CP-46-00246
	)	
MorningStar Fellowship Church,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
York County, South Carolina,	)	
	)	
Defendant,	)	
	)	

June 19th, 2014
York, South Carolina

BEFORE:

THE HONORABLE S. JACKSON KIMBALL, JUDGE.

APPEARANCES:

RICHARD B. FENNELL, ESQ.
Attorney for the Plaintiff

DANIEL J. BALLOU, ESQ.
Attorney for the Defendant

MICHAEL K. KENDREE, ESQ.
Attorney for the Defendant

AMINAH R. HARDY, RPR, CVR-CM
Official Court Reporter

EXHIBITS

No.	Description	Page

(No exhibits were marked.)

P R O C E E D I N G S

THE COURT: This the defendant's motion for summary judgment or partial summary judgment?

MR. BALLOU: That's correct, Your Honor. May it please the Court. Your Honor, Dan Ballou on behalf of York County in this case. With me is Michael Kendree, the York County attorney co-counsel for the defendant in this case. This case involves, as you most likely know, the Heritage Tower Hotel which is located in Fort Mill, a 21-story partially completed tower that was begun in the 1980s by the PTL organization.

THE COURT: Let me stop you a second.

(A discussion was held off the record.)

MR. BALLOU: Of course, this building was begun in the 1980s, and with the bankruptcy of PTL, construction came to a screeching halt. And with a partially completed structure, concrete structure of the building and some of the lower levels were partially finished, and as you go higher up, it becomes less and less complete and has, frankly, dominated the skyline of the Regent Park area of Fort Mill area for a generation, 25-plus years.

This property was acquired by the plaintiff, MorningStar Fellowship Church in 2004. And as set forth in our memorandum, it was apparent from that transaction there was no value assigned to that hotel structure as

1 opposed to the rest of the property. And the documents
2 underlying that transaction frankly indicate --

3 THE COURT: Talking about the sale to Coleson from
4 Coleson?

5 MR. BALLOU: From Coleson to Morning Star. Included
6 covenants to take down the hotel, included all kinds of
7 representations the hotel was going to come down. And, in
8 fact, we believe and think the evidence would ultimately
9 show that the plan at the time of the acquisition would
10 not be part of it, of MorningStar's development, but that
11 changed very soon after the acquisition.

12 Ultimately, once MorningStar determined that it
13 wanted to try to salvage the hotel, they prevailed upon
14 York County to enter into a development agreement because
15 of limitations under their contractual agreements for the
16 acquisition of the properties under the zoning, under
17 the -- there were time deadlines that were going to
18 require the demolition of the hotel.

19 And instead the county did enter into an agreement --
20 the development agreement which is attached as Exhibit A
21 to the memorandum that the county has filed and has also
22 attached, I believe, as Exhibit A to the memorandum of
23 opposition -- it's a substantial document that one -- that
24 is kind of the center of all that you'll hear about today.
25 That was a heavily negotiated documents, one that both

1 sides were represented by counsel and included as a
2 reflection of the concerns of the parties, as to how the
3 redevelopment of this hotel and rehabilitation of the
4 hotel would occur, some very specific milestones that had
5 to be achieved prior to any further construction on
6 development. And several of those milestones as set forth
7 in the development agreement included specific default
8 provisions that say if you don't meet this milestone, the
9 agreement is void, the hotel comes down at the cost of
10 MorningStar.

11 THE COURT: Right.

12 MR. BALLOU: So the issue that we're here on today,
13 Your Honor, is this. One of those milestones was the
14 application and submittal and ultimate approval of a
15 commercial site plan. And in paragraph 4(c) of the
16 development agreement on page 5, the bottom, one of the
17 milestones negotiated by the parties says as follows --
18 and I'll just read this into the record. "Within 180 days
19 of county approval of the commercial site plan for the
20 property, should developer or its contractor be unable to
21 obtain bid performance and payment bond from an A-plus
22 best rated insurer or letters of credit for a national
23 banks or substantial equivalent acceptable to county, then
24 this development agreement shall be deemed null and void.
25 At such time the towers shall be demolished with all costs

1 for its demolition borne by the developer."

2 THE COURT: For the record, I thought you said
3 paragraph 4. It's paragraph C(2).

4 MR. BALLOU: Subsection 4.

5 THE COURT: At page 5.

6 MR. BALLOU: Subsection -- of section 4 -- I begin on
7 page 4, so that continues on page 5.

8 THE COURT: C(2). Okay.

9 MR. BALLOU: It's 4(c)(2). And so that's really the
10 critical contractual provision that we're looking at in
11 this case. And what it clearly says is there's a
12 submittal, there's a site plan approval, they have 180
13 days to provide what, in essence, is the final assurance
14 they can actually complete the project and that this won't
15 become yet another burden on the county, on the community,
16 of an unfinished building that causes all the problems
17 that have been experienced over the years.

18 So there are some undisputed facts in this case. One
19 is that MorningStar, in the process of obtaining site plan
20 approval, hired a company called Power Engineering. Power
21 Engineering are licensed, registered engineers. They
22 are -- do this kind of work development work, and they
23 were hired by MorningStar to assist, among other things,
24 in obtaining the site plan approval described in the
25 paragraph we just read. Power, in fact, submitted the

1 original application in December of 2008, and that began
2 what is the typical process of site plan approval in York
3 County, which involves the submittal of site plan,
4 comments from the county, responses to the comments and
5 additional information required, resubmittal, and that
6 process continues until you get to a final approval. York
7 County provided those comments as set forth in the
8 affidavits of Dave Yarnes and Pat Selvi (phonetic) to
9 Power Engineering. Power Engineering was the designated
10 agent of MorningStar in the context of applying for site
11 plan approval.

12 THE COURT: That culminated in the notice of approval
13 dated 8/24/2009.

14 MR. BALLOU: Absolutely. And that document was
15 generated as a result of the direct communications between
16 Power Engineering and specifically Gerald Lee, who is no
17 longer employed at Power Engineering, but we took his
18 testimony and it's included in the record. He believed
19 this site plan had been approved October 24, 2009.

20 THE COURT: All right. Now, I know that and I don't
21 want to preempt Mr. Fennell, but clearly in reading
22 this -- all this, yesterday this says storm water
23 management and sediment and erosion control plan notice of
24 approval.

25 MR. BALLOU: That's correct.

1 THE COURT: But from Ms. Bollier's affidavit I read
2 yesterday -- do I understand -- it was a question that I
3 had. Do I understand that this is tantamount to approval
4 of the entire site plan?

5 MR. BALLOU: Your Honor, attached as Exhibits G and H
6 to the original memorandum are two different documents.
7 And one is the report of the notice of the planning
8 department, indicating each of the department's approvals
9 and reflecting that Gerald Lee came in on the 18th of
10 August and provided a last remaining information that was
11 required. And so the last piece of information, his
12 testimony was clear -- on page 97 of his deposition that
13 once he received that final notice on August 24th, he
14 was done.

15 THE COURT: Hang on a second. Let me read that note.
16 I didn't read that. When this note references a plan set,
17 does it mean the entire site plan or just the erosion
18 control plan?

19 MR. BALLOU: Which note are you referring to?

20 THE COURT: The one that's page 2 of 2, the Bates
21 stamp is 146. The note, the August 24th note.

22 MR. BALLOU: If you look at Exhibit G, status of each
23 of the departments, engineering status, approved; sewer,
24 approved; roads, approved; fire prevention, approved,
25 planning originally is conditional. And then August 24,

1 planning notes that this note has been on the plans.
2 Storm water conditional, and following the second on
3 page 46, Bates stamp 146, the note reflecting Gerald Lee's
4 personal visit to York County to provide the information
5 to complete that. Zoning, conditional, following page 147
6 is the zoning compliance permit.

7 THE COURT: As I -- okay. As I understand it, you
8 can't get -- is that a DHEC permit or county permit?

9 MR. BALLOU: That's a county permit, Your Honor.

10 THE COURT: You can't get the DHEC permit -- correct
11 me if I'm wrong. You can't get the DHEC permit without
12 the site plan being approved.

13 MR. BALLOU: That's exactly what Gerald Lee testified
14 to.

15 THE COURT: Okay. And the county can't issue a
16 zoning compliance permit until there's DHEC approval. Am
17 I correct, or am I wrong on that?

18 MR. BALLOU: That's correct. And then Exhibit H is
19 the final approved which was Billy Pain (phonetic) for
20 storm water.

21 THE COURT: Was notice of approval?

22 MR. BALLOU: Notice of approval. That's correct.

23 THE COURT: All right.

24 MR. BALLOU: And Mr. Lee's testimony was that when he
25 received that final August 24, letter, that was the last

1 piece of the puzzle. That was the last bit of information
2 he was waiting for, and at that point, he believed and
3 understood that the site plan had been approved.

4 THE COURT: What about the note that -- the stamp
5 rather on that notice that says received November 23,
6 2009?

7 MR. BALLOU: We don't know why that was -- that date
8 is indicated. It is near the time of the -- I think the
9 following or one of the near exhibits in the part of the
10 packet is the DHEC permit, which was November 9, I
11 believe. So it was around that same time. I believe -- I
12 don't know why that date is there.

13 THE COURT: What exhibit is the DHEC permit? I
14 didn't see that.

15 MR. BALLOU: It is Exhibit N.

16 THE COURT: N.

17 MR. BALLOU: Yes, sir. November 25th.

18 THE COURT: Let me get there. All right. The DHEC,
19 let's see. The DHEC letter is dated November 25th,
20 2009. Received approval. Of course, it's received,
21 stamped received by Power December 3rd, dated
22 November 25th. It references some kind of coverage as
23 of a date, November 25.

24 MR. BALLOU: Your Honor, we believe it's
25 significant --

1 THE COURT: Here's what I'm asking: Is this the DHEC
2 NPDES approval?

3 MR. BALLOU: That's the storm water permit. That's
4 the clearing and grading permit that allows them to move
5 dirt.

6 THE COURT: How could the county give site plan
7 approval without -- prior to having this?

8 MR. KENDREE: I can't speak to that question, Your
9 Honor. I have to supplement our documents. The very last
10 piece of permission that the county issues is the zoning
11 compliance.

12 THE COURT: Yes, sir.

13 MR. KENDREE: And once that's issued, it's my
14 understanding is that the county has completed its review.

15 THE COURT: I know I'm jumping on you, but I'm trying
16 to get this fixed in my mind, because reading both sides
17 of this it all wandered, as usual. The -- which exhibit
18 again, Mr. Ballou -- here is it. The notice of approval
19 was Exhibit H, and this is approval by the county, right?

20 MR. BALLOU: That's correct.

21 THE COURT: Which one was the zoning compliance
22 letter?

23 MR. BALLOU: It was Bates stamped 147. It is the
24 third page of Exhibit G.

25 THE COURT: Third page of Exhibit G. Okay.

1 MR. BALLOU: And it states it was issued August 28,
2 2009, at the very bottom of the page.

3 THE COURT: Yes. We still don't know why the
4 "received at Power" on November 20, whatever it was, is on
5 there?

6 MR. BALLOU: We don't, Your Honor. And in all
7 candor, the testimony from Power Engineering revealed they
8 were in a state of turmoil in 2009 in the process of this
9 trial. Had closed the Charlotte office. Gerald Lee's
10 last date was around the time of final approval.
11 Admittedly -- and I think this was made reference in the
12 response memorandum. He got confused as to which year he
13 was talking about, whether it was 2009 or 2010, but he was
14 very clear when he left, he understood the plan was
15 approved. And he had been communicating with Mr. Selvi
16 and with MorningStar throughout the entire process and
17 there was no question this approval was imminent, and
18 that's what MorningStar told its own lenders three months
19 before this approval occurred.

20 THE COURT: Well, imminent doesn't count. The
21 agreement says approval.

22 MR. BALLOU: Well, one of the issues that has been
23 raised in the case is whether or not MorningStar is
24 charged with notice of the status of this approval.

25 THE COURT: By virtue of its engineers?

1 MR. BALLOU: By virtue of its engineers. That's
2 correct. And what we offer that evidence as there was
3 communication, they can't say that -- that they weren't
4 being told what was going on by the engineers, because
5 it's clear that as of -- as far as May is concerned, they
6 were and this was a priority for them.

7 THE COURT: I know the agreement doesn't say notice
8 of approval. It says approval.

9 MR. BALLOU: That is correct. That is correct.
10 Frankly --

11 THE COURT: Within 180 days of county approval of the
12 commercial site plan. It doesn't say anything about
13 notice of approval. It's not like a notice of intent to
14 appeal, have to receive notice of -- as approval. Okay.

15 MR. BALLOU: And that's exactly right, Your Honor.
16 And one of our arguments is if they wanted to put a
17 defined notice requirement under that provision, they
18 certainly could have negotiated that. They didn't. It's
19 not in the contract. So 180 days goes past in January of
20 2010. There is a communication from MorningStar to the
21 county saying, We're making all this progress, and at that
22 point, the county says, Well, where are the -- where are
23 the bonds, because your 180 days are about to zero run
24 out. And that's when things in this transaction really
25 fall apart, because at that point, MorningStar takes the

1 position we didn't know, we didn't know the clock was
2 running, we didn't think you were in a hurry, we thought
3 we had five years. All these kinds of excuses came out
4 about why they haven't been able to get the bonds that are
5 required under the agreement. And in March of 2010
6 pursuant to the agreement, the county declares them in
7 default. And so there was a response to a default, there
8 were two mediations that occurred after the fact to try to
9 resolve this. They were both unsuccessful.

10 THE COURT: Let's look at the mediation language
11 here. Page 14, 15.

12 MR. BALLOU: Under remedies on default.

13 THE COURT: Yes, sir.

14 MR. BALLOU: And that basically says there's an
15 opportunity to cure. There's a process in place to try to
16 resolve differences, which is a prerequisite to filing a
17 lawsuit. What that provision -- paragraph C does not do
18 is limit any remedies. It says here are some specific
19 prerequisites for pursuing litigation, which were
20 followed. Keeping in mind MorningStar filed this
21 litigation, county did not. But the -- this language says
22 nothing here is intended to limit or preclude county from
23 pursuing the surety or letters of credit or other remedies
24 set forth in that next to last paragraph on page 15.

25 So they attempted to mediate it. The issue, again,

1 was whether or not there was substantial financial backing
2 bonds or substantial equivalent to justify the --
3 proceeding on this construction project. The evidence
4 would show that the cost of renovations is probably in the
5 neighborhood of 40 million dollars. That's an awful lot
6 of money, and it's no surprise that lenders and sureties
7 and other financial equivalents were hesitant to loan on
8 that or to secure that kind of debt, but we are where we
9 are. They could not obtain the bonds. That is
10 undisputed.

11 THE COURT: What do you mean "could not"? With
12 finality could not, or have not?

13 MR. BALLOU: They have not.

14 THE COURT: Okay.

15 MR. BALLOU: They could not within the 180 days and
16 they have not since.

17 THE COURT: They did not. Not they could not. We
18 just know they did not, right.

19 MR. BALLOU: That's correct. Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. BALLOU: So the lawsuit is filed in January of
22 2013, and they allege three causes of action. First cause
23 of action, declaratory judgment essentially seeking a
24 declaration that they were not required to provide bonds
25 and that by holding to the terms of the agreement, York

1 County somehow breached the agreement. And breach of
2 contract, breach of covenant in good faith and fair
3 dealing are essentially duplicative of that same position,
4 that they weren't bound by notice to Power Engineering.
5 The clock had not started. They did not have to provide
6 the bonds, and there was no basis to declare a breach.
7 And that's the basis of their lawsuit in this case.

8 Our first position, Your Honor, is under the terms of
9 the agreement there was no requirement for any specific
10 notice of site plan approval. It simply says site plan
11 approval, and to take the position now they're entitled to
12 a certified mail notice provision set forth under the
13 agreement for notices required under the agreement, that
14 somehow since we didn't provide them with certified mail,
15 that it's not valid. They never disputed that Power
16 Engineering obtained site plan approval. In fact, in the
17 responses to the request to admit, I think their position
18 is we don't know what Power Engineering did, but it
19 doesn't matter because you were obligated under the notice
20 provision to give us certified mail of site plan approval.

21 THE COURT: If we were to assume -- this wouldn't
22 happen -- just gave approval within the confines of its
23 own staff, and didn't even tell Power about the approval,
24 would you be able to declare a default based on 180 days?

25 MR. BALLOU: That's an interesting hypothetical, Your

1 Honor, and I think under the terms of the agreement, the
2 onus is on the developer, as it always is, to pursue their
3 project. This is not the county's project.

4 THE COURT: That's the five-year limitation, is it
5 not?

6 MR. BALLOU: I think that's both.

7 THE COURT: The term of the agreement.

8 MR. BALLOU: That's right. So had MorningStar never
9 submitted for site plan approval?

10 THE COURT: In five years it would be up.

11 MR. BALLOU: In five years it would be up. They did
12 submit. That is an interactive process. That is a
13 process of submittal and comment and interaction and
14 response, and I think that's assumed and that is
15 understood as the process that is to be defined in this
16 case. There's no special procedure in this agreement for
17 site plan approval. So I think under your hypothetical,
18 if they had just internally said, Yup, it's approved, but
19 didn't get around to telling Power or MorningStar, I think
20 arguably they might have been in default. That's not the
21 facts of this case. Because the facts of this case as
22 Gerald Lee testified to are that he was actively involved
23 in this interaction and on October 24, 2009, this site
24 plan was approved.

25 THE COURT: And the agreement as -- has there ever

1 been any extension of the agreement?

2 MR. BALLOU: There has not.

3 THE COURT: So it expired January 7, 2013?

4 MR. BALLOU: That issue hasn't come up but --

5 THE COURT: By its terms, all other things being
6 equal, the agreement would have expired January 7.

7 MR. BALLOU: There's an issue as to the effective
8 date of it, Your Honor. I think the last day of recording
9 was in May of --

10 THE COURT: '13?

11 MR. BALLOU: Eight. So arguably would have --

12 THE COURT: In any event, it's been more than five
13 years.

14 MR. BALLOU: That's right. So really the issue is
15 simple. Did the clock start to run? And our position is
16 under the clear terms of this agreement, under the clear
17 facts as before the Court, there is no genuine issue of
18 material fact that it did.

19 THE COURT: Now -- and again in reading through it,
20 if I were to grant the county's motion, what would the
21 effect of that be?

22 MR. BALLOU: Well, we have two motions.

23 THE COURT: Well, I know that.

24 MR. BALLOU: If you were to grant summary judgment as
25 to all of the causes of action, that leaves our

1 declaratory judgment that the contract has been in breach
2 and that would authorize us to proceed to direct the
3 demolition and charge the cost of demolition to
4 MorningStar.

5 THE COURT: In other words, the county could proceed
6 with the demolition? A ruling in favor of the county in
7 this case would allow the county to proceed with
8 demolition at its cost and charge MorningStar.

9 MR. BALLOU: It would allow that. Because at such
10 time the towers shall be demolished with all costs for its
11 demolition being borne by the developer.

12 THE COURT: Right.

13 MR. BALLOU: Arguably, MorningStar could agree to
14 demolish at its own cost.

15 THE COURT: I understand.

16 MR. BALLOU: But one way or the other, the end result
17 would be the demolition of the tower.

18 THE COURT: Okay.

19 MR. BALLOU: So -- and that really is two sides of
20 this coin. On the one hand, they have said that York
21 County is in breach by not giving it certified -- not
22 giving MorningStar certified mail notice of site plan
23 approval, that was a breach, that declaring it MorningStar
24 in default in March of 2010 based on the expiration of 180
25 days was a breach, which clearly the county was allowed to

1 do under the agreement, and frankly required to do.

2 THE COURT: What are the issues of fact, if any?

3 MR. BALLOU: I see none, Your Honor. I think the
4 terms of the agreement are clear on their face, they're
5 not ambiguous, and as far as any claim for breach of
6 contract against the county, there are no questions of
7 material fact. And I think the logical conclusion of that
8 is that we're entitled to an order that they have not
9 complied with paragraph 4(c)(2) of the development
10 agreement and that as a result, the county is entitled to
11 proceed with efforts to demolish the tower.

12 THE COURT: All right. Mr. Fennell?

13 MR. FENNELL: Thank you, judge. Rich Fennell on
14 behalf of the plaintiff, MorningStar Fellowship Church. I
15 agree with Dan that the fundamental issue in the case is
16 whether the clock started on August 24th of 2009. The
17 notices that have been presented --

18 THE COURT: So to really focus that, if the clock
19 started on August 24th, 2009, not admitting that it
20 does.

21 MR. FENNELL: Yes, sir.

22 THE COURT: Assuming that to be true, and I'm not
23 assuming that. I'm not finding that. At this point,
24 assuming that to be true, what would be the county's
25 remedy?

1 MR. FENNEL: If the clock started on August 24th,
2 2009, the remedy would be -- and you ruled us against us
3 on all issues?

4 THE COURT: Yes.

5 MR. FENNEL: The remedy would be that they would
6 have an order from you saying that they have permission to
7 go on the property and tear down the tower and charge us
8 with the cost.

9 THE COURT: Okay.

10 MR. FENNEL: So I think we said basically the same
11 thing, but that's how I read it.

12 THE COURT: I want to be clear about that. Go ahead.

13 MR. FENNEL: So couple of different points that are
14 pre-imminent. The most important is that as you can tell
15 from Dan's introductory remarks, I know the tower has been
16 a point of frustration for the county for a long time, but
17 the PTL experience doesn't matter.

18 THE COURT: No, I agree with you on that.

19 MR. FENNEL: The fact the tower has been there 25
20 years doesn't matter.

21 THE COURT: I agree. Zero.

22 MR. FENNEL: What matters is what the contract says
23 and what the county's rights are both inside the contract
24 and outside the contract.

25 THE COURT: I agree.

1 MR. FENNELL: To take care of this development.

2 THE COURT: I agree. And MorningStar's rights.

3 MR. FENNELL: Yes, sir.

4 THE COURT: Yes, sir.

5 MR. FENNELL: So that notice is necessary because the
6 site plan approval is a watershed event.

7 THE COURT: The question is not whether it's
8 necessary, but whether it's called for.

9 MR. FENNELL: Yes, sir. And even though there's not
10 a provision in the contract that says that you have to
11 send the notice by a particular date, under the implied
12 duty of good faith which applies to every contract in
13 South Carolina, given the importance of site plan
14 approval, there's no way you can interpret the contract to
15 require anything other than that MorningStar be told that
16 the clock has started, because it's game over. The county
17 can't be permitted and still comply with the duty of good
18 faith attached to its contract to hold it in its back
19 pocket, and that's what we contend happened in the case
20 whether intentionally or not. We contend it was
21 intentional after January 2010. But whether or not
22 intentional or not, as of August 24, 2009, nobody from
23 MorningStar knew that there had been site plan approval.

24 THE COURT: How about MorningStar's agent?

25 MR. FENNELL: No, sir. The deposition testimony is a

1 little bit different than what Mr. Ballou was representing
2 to you, and I don't think it's an intentional
3 misstatement.

4 THE COURT: Let me -- let's deal with that. Let me
5 deal with the agreement first.

6 MR. FENNELL: Yes, sir.

7 THE COURT: I read through it, and there are specific
8 provisions in the agreement that require notice.

9 MR. FENNELL: Yes, sir.

10 THE COURT: And there's the one provision typical in
11 any agreement that says this is how you give notice.

12 MR. FENNELL: Yes, sir.

13 THE COURT: And the omission of the requirement of
14 notice from this particular set of facts or as it applies,
15 shall we say, to site plan approval seems intentional. I
16 mean, there are provisions in the agreement that require
17 notice?

18 MR. FENNELL: Yes, sir.

19 THE COURT: And as I've already said, the way you
20 give notice. By its omission in this context, the context
21 of the site plan approval, that seems to me to be
22 intentional, and if it's intentional, how do we treat it?

23 MR. FENNELL: I understand your point, Judge, but
24 again getting back to duty of good faith -- because this
25 is a game changer. The site plan approval, if we don't

1 provide those, we don't provide the bonds within 180 days,
2 we got to tear the tower down.

3 THE COURT: That's right.

4 MR. FENNELL: It's game over. And because of the
5 importance of the provision, you've got to imply that
6 someone's got to tell us that the clock has started. And
7 whether it's inadvertent or not, whether someone missed it
8 or not, you cannot read this contract coincided with the
9 duty of good faith any other way. Because again, you
10 can't give the county the right to hold it in their pocket
11 and to tell us in January we meant to give you site plan
12 approval or we actually did in August, and you're now 130
13 days 150 days into the process.

14 THE COURT: Well, you have an estoppel defense to
15 that if they raise that issue, which is an equitable
16 defense which would deal with the question of the fairness
17 of it all.

18 MR. FENNELL: Yes, sir.

19 THE COURT: But I don't see that.

20 MR. FENNELL: Well, fundamentally --

21 THE COURT: That hasn't been raised.

22 MR. FENNELL: Well, if that's the issue, then we move
23 to amend the reply to assert estoppel. I don't know if I
24 asserted it as an affirmative defense or not.

25 THE COURT: I don't think so.

1 MR. FENNELL: And I can check in just a minute. But
2 fundamentally, the argument has been since I pled it is
3 breach of duty of good faith, and estoppel is basically
4 the same thing.

5 THE COURT: Okay.

6 MR. FENNELL: They've got to let us know.

7 THE COURT: That's the first leg.

8 MR. FENNELL: Yes, sir.

9 THE COURT: The MorningStar contention that notice is
10 necessarily implied.

11 MR. FENNELL: Yes, sir.

12 THE COURT: I understand that. Let's deal with the
13 question of whether notice was given.

14 MR. FENNELL: Yes, sir.

15 THE COURT: And the form of notice.

16 MR. FENNELL: First, with respect to the deposition
17 testimony of Mr. Power and Mr. Lee -- or rather Mr. Boyd
18 and Mr. Lee, I've cited the most important portions of
19 their depositions in my brief. And both of them when they
20 were asked after they reviewed the different documents,
21 Mr. Lee is more -- the most specific. I show Exhibit 14,
22 which is the notice of approval.

23 THE COURT: Let me find that. I got it here.

24 MR. FENNELL: Page 5 of the brief.

25 THE COURT: Well, I've got the attachment to his

1 deposition. Which page?

2 MR. FENNELL: It's Boyd page 28 and Lee.

3 THE COURT: 28? Lee? Yeah, give me Lee. I'm
4 looking at Lee right now. What you've given me begins
5 with 85.

6 MR. FENNELL: Right. And the provision I'm citing
7 from is from the deposition excerpt that Mr. Ballou put in
8 his brief, and I didn't put the page number. I apologize
9 for that.

10 THE COURT: Do you know what page it is, Mr. Ballou?
11 You said it was cited in your brief, Mr. Fennell?

12 MR. FENNELL: Yes, yes, it is. The back and forth is
13 cited in the brief and --

14 MR. BALLOU: Your Honor, if I may, I've got the
15 original deposition if you'd like me to submit those to
16 the Court.

17 THE COURT: No, let's just deal with what I've got
18 right now.

19 MR. FENNELL: The relevant portion of the examination
20 at that point begins with, "I show Exhibit 14," which is
21 the notice of approval.

22 THE COURT: That's what I need to know. What page --
23 is there a cite to that? There's not. Where is that?
24 Let me see. That's Boyd's deposition.

25 MR. FENNELL: It begins on page 57 and then it's 58

1 and 59.

2 THE COURT: We're talking about Lee?

3 MR. FENNELL: Yes, sir, Mr. Lee's deposition.

4 THE COURT: 57.

5 MR. FENNELL: Yes, sir. 57 and 58.

6 THE COURT: I do need something, then. I don't think
7 I have that. All right. All right. Go ahead.

8 MR. FENNELL: And you'll see from that exchange that
9 Mr. Lee was talking about Exhibit 14 and asking the same
10 questions about it or making the same points about it that
11 you were, which is that though it says notice of approval,
12 it's not a notice of approval of a site plan. It's a
13 notice of approval of a particular part of the
14 development. And what Mr. Lee said clearly in his
15 deposition of what he was waiting for at the time before
16 he left, which was August 18, 2009, which will become
17 important again in a minute, at the time that he left what
18 everyone was looking for was a formal notice of approval
19 from the county that you got everything and that you're
20 done. And when asked in his deposition, he had never seen
21 it. And there's a possible reason for that, again,
22 because he left, but then Mr. Boyd made the same
23 statements. Mr. Boyd said on page 28 of his deposition
24 that everyone was waiting from a letter from York County
25 saying the plans were approved. But there's not a copy of

1 the plans themselves. Would you have received that or
2 would Gerald have received that? It would have come to
3 the office and been filed.

4 THE COURT: I don't have Mr. Boyd's deposition. Who
5 is Mr. Boyd again?

6 MR. FENNELL: Mr. Boyd was the successor to Mr. Lee.
7 And Mr. Boyd is more adamant about the subject of site
8 plan approve, and as you read through the deposition
9 you'll see the reason is because he was trying to get paid
10 by MorningStar. But he did say in his deposition as it
11 indicated in the brief that everyone was looking for a
12 formal letter from the county saying everything is done.
13 You have site plan approval. And he thought it existed,
14 but he didn't know where it was.

15 THE COURT: I'm sorry, let's back up. Say that
16 again?

17 MR. FENNELL: He said in his deposition are you aware
18 of such a letter existing? I have not --

19 THE COURT: Where are you?

20 MR. FENNELL: On page 28.

21 THE COURT: All right.

22 MR. FENNELL: Are you aware of such a letter
23 existing? I have not personally laid eyes on it. I've
24 been told that it exists. And we did some pretty
25 extensive document production from Power Engineering, and

1 it's not there. And it's not in any of the documents that
2 the county has sent.

3 THE COURT: Let me stop you just a second while I
4 read this. When did he go to work for...

5 MR. FENNELL: He was there at the same times as
6 Mr. Lee. They overlapped, but Mr. Boyd took over
7 Mr. Lee's job responsibilities according to Mr. Lee in
8 August of 2009. Yes, sir.

9 THE COURT: And the approval was when?

10 MR. FENNELL: That's what we've been trying to figure
11 out.

12 THE COURT: The alleged approval.

13 MR. FENNELL: The document that's been cited as
14 approval.

15 THE COURT: Exhibit G was?

16 MR. FENNELL: Exhibit G.

17 THE COURT: Dated what.

18 MR. FENNELL: August 24 of 2009. That's correct.

19 THE COURT: So Mr. Boyd took over Mr. -- the other
20 guy.

21 MR. FENNELL: Lee.

22 THE COURT: Mr. Lee's job prior to -- prior to the
23 date of this approval.

24 MR. FENNELL: Yes, sir, right around the same time.

25 THE COURT: Okay. And he says -- starting on page 28

1 again, there's an exchange. There was a concern for you
2 that they hadn't received the stamped plans. Answer, "No,
3 the plans at that point -- it's my understanding at this
4 point the plans were approved."

5 MR. FENNELL: Yes. But everyone was waiting for a
6 formal notice of that approval.

7 THE COURT: There's no notice required under the
8 language of the contract.

9 MR. FENNELL: I understand that point, but factually,
10 on the ground at the time, that's what everyone was
11 waiting for.

12 THE COURT: What time period is he talking about in
13 that answer?

14 MR. FENNELL: August of 2009. And then going
15 forward. And then there's the next correspondence back
16 and forth between power and MorningStar is about getting
17 paid. And as you read through Lee and you read through
18 Boyd, what becomes clear is both of them thought they were
19 done in August of 2009, sure enough. But they had not
20 received formal confirmation from the county of that fact.
21 And that's what everyone was looking for was that formal
22 confirmation from the county that now it's over.

23 THE COURT: Isn't there a difference between
24 confirmation and the actual act?

25 MR. FENNELL: Not really, because you can't just rely

1 on I thought we had done everything we were supposed to do
2 at site plan approval. If you started a development --

3 THE COURT: No, I agree with that. I don't disagree
4 with that, but if Mr. Pain -- if the words out of
5 Mr. Pain's mouth to Mr. Lee or Mr. Boyd it is approved,
6 what is that?

7 MR. FENNELL: It would be site plan approval.

8 THE COURT: Okay.

9 MR. FENNELL: But you don't have any evidence to that
10 effect. And what you do have is -- don't want to be
11 repetitive but you have both of the engineers saying that
12 we were waiting for formal approval to get over what I was
13 just mentioning a few moments ago, which is we think we
14 have formal approval. In the affidavit that's submitted
15 from Mr. Selvi who was the construction manager or the
16 assistant construction manager on-site.

17 THE COURT: But he said in his deposition, Boyd, now,
18 at that point my understanding at this point the plans
19 were approved. It's just the county does not give you
20 copies of them until you have the precon -- presume he
21 mean preconstruction meeting.

22 MR. FENNELL: Yes, sir.

23 THE COURT: Just one second. And he says there's a
24 letter that exists.

25 MR. FENNELL: Yes. And that's what everyone has been

1 looking for and no one has ever found. The only letters,
2 the only documents that have been presented are the ones
3 that are attached as exhibits. And you have the status
4 checklist that's Exhibit G, and then you have the notice
5 of approval, Exhibit H, which again is August, dated
6 November received, that says you are now approved with
7 respect to storm water. You've got to put everything
8 together. You've got to go through that status report
9 from August where it's says approval, approved,
10 conditional, conditional, conditional then, go to another
11 document where it seems like one of the conditions is
12 relieved and then the second document, maybe this is the
13 second conditional has been approved. And then a final
14 document which was floating somewhere, God knows where
15 between August and December to say perhaps the third
16 conditional has been taken care of, and it's time for you
17 to go. MorningStar can't bid plans it thinks might have
18 been approved, and that what you need to do to be able to
19 get a bond. You need to be able to bid plans and if all
20 you have in August is your engineer saying that I think
21 we're approved, you don't have approval.

22 THE COURT: No, you don't. You have the plans.

23 MR. FENNELL: But you don't have approved plans. You
24 don't have plans.

25 THE COURT: Apparently you did have approved plans.

1 You didn't have them in your possession, but apparently
2 they had been approved.

3 MR. FENNELL: But that's what we say didn't happen.
4 And it didn't happen until.

5 THE COURT: I think all you're saying is you didn't
6 get notice. You're not saying they weren't approved, are
7 you?

8 MR. FENNELL: Because approval is a formal process.
9 Approval is something that has to be documented and they
10 didn't until November of 2009, the best they can do to
11 finally document the approval. And they've been saying
12 throughout the clock started in August.

13 THE COURT: So -- hold on. Let us deal with that a
14 second. So you agree that -- so many things up here. Do
15 you agree that the notice of approval is notice of
16 approval of the project?

17 MR. FENNELL: I don't.

18 THE COURT: The site plan, I mean.

19 MR. FENNELL: I don't. What I'm saying is that's
20 their best day to be able to say if you put this document
21 together with every other document in our development file
22 that tracks the progress of the development, you can
23 figure out eventually that you have site plan approval.
24 So their best day is that took place on November 23rd,
25 2009, and they started contending in January when they

1 realized there was an opportunity to make the tower come
2 down that it was in August and then said the same thing in
3 the notice to MorningStar which became public. And once
4 it became public according to our offer -- once it became
5 public, we were incapable of bidding the plans, because
6 nobody wanted to do business with us anymore. The world
7 thought the tower was coming down.

8 THE COURT: So then what's the -- what's your remedy
9 to be able to stay -- to have forever to build -- complete
10 the tower?

11 MR. FENNEL: No, there's two particular roads the
12 project could go down. You asked about genuine issues of
13 material fact. Genuine issues of material fact would be
14 whether what I just said was actually true. Whether the
15 notice of default had anything to do with MorningStar's
16 inability to be able to get the bonds in place and proceed
17 along and finish the project.

18 THE COURT: It doesn't have to -- have anything --
19 they could intentionally not do it and be in default.
20 They don't have anything to do with whether they were able
21 to. If they don't do it in 180 days, doesn't matter why
22 they didn't do it, they're in default.

23 MR. FENNEL: No, sir. The point I was making was
24 trying to make was that MorningStar says you breached when
25 you declared us in default before the 180 days had run.

1 My burden at trial --

2 THE COURT: When did the -- when would the 180 days
3 have run?

4 MR. FENNEL: Under my state of the facts it never
5 started.

6 THE COURT: Still?

7 MR. FENNEL: Yes. It never started. Under the best
8 case I think the county has, it started November 23, 2009.

9 THE COURT: How can you say it's never -- assuming
10 everything was still hunky-dory, how can you say it's
11 never started? Don't you have notice of approval?

12 MR. FENNEL: No, there was never a formal notice of
13 approval.

14 THE COURT: That isn't what the agreement says.

15 MR. FENNEL: I understand, but again because of the
16 importance this, there needs to be a formal a notice you
17 can look at --

18 THE COURT: Importance? Look. I'm going to tell you
19 right now, it looks to me -- the interpretation of the
20 contract is a matter of law. It's not a question of fact.
21 The contract says -- and it appears to me from the
22 entirety of the body of the contract that notice and
23 receipt of notice in respect to certain elements of the
24 contract was negotiated and included in the contract.
25 However, in respect to the approval of the site plan,

1 there is not a notice provision. My construction of it is
2 that the parties intended that.

3 MR. FENNEL: Even if you end up holding that, Your
4 Honor, which I hope you'll rethink, again the best case
5 scenario is November 23, 2009, for site plan approval.
6 And because they said it was in August, everything isn't
7 done until November 23rd, 2009.

8 THE COURT: What about Mr. Lee's visit to the county
9 office?

10 MR. FENNEL: When Mr. Lee says he thinks he has site
11 plan approval, that's not site plan approval. You don't
12 have final notice of approval of the storm water issues
13 until November. And they've been saying since January
14 that it all started in August. And because of that fact,
15 their notice was defective when they said you were in
16 default as of March the 1st when you couldn't provide us
17 with these bonds. And since they sent that notice out,
18 that killed the project. And there's a whole bunch of
19 genuine issues of material fact that float from that that
20 I can prove that actually killed the project. And then
21 the second --

22 THE COURT: That's your damages question.

23 MR. FENNEL: The second road the case could go down
24 is that the contract is over, sure enough, it expired May
25 of 2013. And the county feels like they have remedies

1 because they have a zombie tower that's standing up, there
2 are plenty of ways for them to deal with it. But it
3 doesn't have anything to do with this contract. Under the
4 terms of the contracts, they defaulted. They breached the
5 agreement when they sent out a notice of default which
6 became public -- which became all the world got to see it.
7 That default occurred in March of -- March of 2010.

8 THE COURT: Why are --

9 MR. FENNEL: The 180 days had not run.

10 THE COURT: Why is that a breach of the contract?

11 MR. FENNEL: Because --

12 THE COURT: It's just an error. I mean -- assuming
13 the facts as you state them, it's an erroneous notice.

14 MR. FENNEL: You can't declare a default under the
15 mediation provisions unless there's a default. And in
16 this case, they declared a default without there being a
17 default. Section 10 starts the whole process, and under
18 section 10 if you believe there's a default, you give
19 notice. And they breached the agreement when they sent a
20 notice out that was false.

21 THE COURT: So then you are back to saying there
22 hadn't been approval?

23 MR. FENNEL: Correct. Rather the approval would
24 be -- under your set of facts, the approval would be
25 effective as of November 23rd. When they took the last

1 step that was necessary in order to give the approval,
2 which was sending the notice -- now there's two separate
3 things. One is the notice that's required to MorningStar
4 under the contract, and then the second issue is the
5 notice that's required to give to the engineer under the
6 site plan approval process. There wasn't approval until
7 the final step was taken. And the final step was taken
8 when notice was received by the engineer now storm water
9 is approved. At that point, under their set of the facts,
10 that's when site plan approval was granted at that point.
11 Whether that was then required to be sent to MorningStar
12 in the formal process I've suggested is a different
13 question. But there was no approval until November. And
14 regardless, the default as I've indicated, the default
15 wasn't right. And the default is -- according to our
16 proof is what killed the project, what kept us from
17 completing the...

18 THE COURT: How is Power not MorningStar's agent for
19 the purpose of knowing about approval?

20 MR. FENNELL: We said in response to our request for
21 admissions that we did not give them authority to receive
22 notice about contract compliance issues. So you've got a
23 general agent, specific agent --

24 THE COURT: How does that work since the engineer is
25 the one dealing with contract compliance?

1 MR. FENNELL: Yes, sir. And I believe MorningStar
2 would be obligated to tell the county at that point that
3 our agency is limited. And there's no evidence to suggest
4 that ever happened.

5 THE COURT: Say that again?

6 MR. FENNELL: There's no evidence to suggest that
7 MorningStar ever told the county that Power Engineering's
8 agency is limited in these respects.

9 THE COURT: Well, wouldn't they be bound, since Power
10 was their apparent agent?

11 MR. FENNELL: Yes, sir.

12 THE COURT: So it really is a question of whether A
13 there was approval and B whether the contract requires
14 notice.

15 MR. FENNELL: Yes, sir. And C would be whether the
16 county complied with the dispute resolution provisions of
17 the document.

18 THE COURT: Tell me about that.

19 MR. FENNELL: Well, they're very dense and hard to
20 figure out what's supposed to happen when there's a
21 dispute. But this is how I read it. When there's a
22 dispute, you have to give notice. The other side has 60
23 days to dispute the notice.

24 THE COURT: To dispute the notice or to cure.

25 MR. FENNELL: To dispute the notice or to cure, and

1 if there's a dispute --

2 THE COURT: Stop one second. I'm looking -- and if
3 I'm in the wrong paragraph, tell me, but I'm looking at
4 10(b)(2). If as a result of a periodic review the county
5 reasonably finds and determines in good faith that the
6 developer has committed a material breach of the terms or
7 conditions of this agreement -- I'm sorry. You okay? --
8 of the agreement, then the county will so notify developer
9 in writing within a reasonable time after the periodic
10 review, dot-dot-dot.

11 MR. FENNELL: Right.

12 THE COURT: And providing developer a reasonable
13 time, not more than 60 days in which to cure?

14 MR. FENNELL: Yes.

15 THE COURT: It doesn't say anything about in which to
16 change the notice.

17 MR. FENNELL: That's when you start the mediation
18 process.

19 THE COURT: Right.

20 MR. FENNELL: So in that 60 day period if there's not
21 a cure and not an agreement that there's been a default or
22 amendment to the contract or some the other things that
23 paragraph 10 talks about, then you start the mediation
24 process. And under the mediation process, each party gets
25 to choose to mediator et cetera and they make their

1 presentation and this is where it gets really dense and
2 hard to figure out. But the parties are supposed to
3 instruct the mediator they are to take into account a
4 number of different things, including financial realities
5 in trying to help them mediate the dispute. And the
6 mediator at some point is supposed to make a finding about
7 who's at fault and that never happened in this case.

8 THE COURT: I'm looking at that paragraph, that
9 market conditions.

10 MR. FENNELL: Yes, sir.

11 THE COURT: That doesn't modify the term of the
12 contract, does it?

13 MR. FENNELL: No but.

14 THE COURT: How can it modify the terms of the
15 contract?

16 MR. FENNELL: No, it adds to the term of the
17 contract.

18 THE COURT: Five years. Let's talk about --
19 unfortunately, this all started when things were about to
20 dip.

21 MR. FENNELL: Yes, sir.

22 THE COURT: Are you saying based on that paragraph
23 because of the economic recession, the -- that MorningStar
24 would be entitled to an extension of the five-year term of
25 the contract to permit recovery before it had to perform?

1 MR. FENNELL: No. What I'm saying is that the
2 parties were obligated to take that into account in the
3 mediation process. There's not enough in the contract for
4 you to be able to determine what the consequence is of not
5 paying attention to the financial realities. There's not
6 an "or else" provision that's attached to it. But when
7 you look at Mr. Yarnes' affidavit and he describes the
8 mediation process, you understand why it's all important.
9 Because the mediation process is pretty well spelled out,
10 and it's pretty obvious from the contract that the parties
11 intended to resolve this, to resolve problems and to get
12 the tower built. And what Mr. Yarnes says took place in
13 the mediation process was that every time they asked him
14 to provide financial information, they got it, and every
15 time they asked him to provide plans, they got it and they
16 just kept moving the goal line. Because the decision had
17 already been made when they had the gotcha moment in
18 January when they realized that Morning Star didn't know
19 the clock had started on their requirement to produce
20 bonds and it was just done. And the mediation process the
21 word that's used.

22 THE COURT: When they were told MorningStar didn't
23 know?

24 MR. FENNELL: Pardon.

25 THE COURT: They were told that MorningStar didn't

1 know. They didn't agree that MorningStar didn't know.

2 MR. FENNELL: And I wouldn't expect them to. But
3 when they found -- when they learned evidence or found
4 evidence that MorningStar did not know or said it didn't
5 know that the clock had started. It was the gotcha moment
6 and everything that happened since that point has been
7 complete converse to what the agreement calls for, which
8 is a genuine good faith effort to try to move the project
9 forward.

10 THE COURT: But what is -- what good faith has
11 MorningStar shown in that regard?

12 MR. FENNELL: That's.

13 THE COURT: If it matters at all.

14 MR. FENNELL: That's another question of fact.
15 According to Mr. Yarnes' affidavit, he went and got
16 everything he was told to get in order to try to get the
17 case resolved, and every time he would provide information
18 to MorningStar, they -- to the county, the county would
19 say it's not enough, you need to do more. And the goal
20 posts just kept shifting and shifting and shifting.

21 THE COURT: Okay.

22 MR. FENNELL: And that is, again completely converse
23 to what the agreement calls for. So that would be the
24 third area that we would say is the -- serves as a basis
25 to deny the motion for summary judgment.

1 THE COURT: Okay.

2 MR. FENNELL: It goes back to the point I made
3 initially, and I know Your Honor agreed with me, but it's
4 an important point. We can't let the frustrations with
5 this building lead to an unjust decision and this --

6 THE COURT: I'm not frustrated with the building.
7 All I have to do is make a judicial decision.

8 MR. FENNELL: I know you're not, but I know the
9 county is.

10 THE COURT: That doesn't have anything to do with it.

11 MR. FENNELL: And the frustration is what led to what
12 happened in January, which was again, we got them, we got
13 them because they didn't know or they say they didn't know
14 they were supposed to get these bonds. There's no way
15 they're going to be able to get the bonds, and we can kill
16 the project and they did. And we're asking to not let
17 that happen.

18 THE COURT: And the basis upon which you're asking is
19 to say there was a required notice provision.

20 MR. FENNELL: Yes, sir.

21 THE COURT: All right. Thank you. Mr. Ballou?

22 MR. BALLOU: Thank you, Your Honor. Address the
23 point of the obligation under mediation.

24 THE COURT: Yes, sir.

25 MR. BALLOU: There is no requirement for the issuance

1 by the mediator of findings. It does discuss that if a
2 mediator issues findings then certain things will happen.

3 THE COURT: Where are we now?

4 MR. BALLOU: On page 15 of the development agreement.

5 THE COURT: Yeah.

6 MR. BALLOU: For instance, that last paragraph.

7 THE COURT: If, yeah, okay.

8 MR. BALLOU: So to suggest that paragraph or that
9 provision requires certain affirmative acts by a mediator
10 is simply not found in the contract. Now, and frankly my
11 experience with mediators is that mediators don't make
12 findings, that typically they there to facilitate a
13 settlement between the parties and they don't
14 themselves --

15 THE COURT: It says if mediation results in a
16 finding.

17 MR. BALLOU: So if it does, then certain things might
18 happen. I don't think that suggests that.

19 THE COURT: That resulted in a finding.

20 MR. BALLOU: That's right, which would presumably be
21 by agreement of the parties. Never happened. The second
22 point I want to make, Your Honor, on page 5 of the
23 development agreement, failure to complete or to obtain
24 the bond is not the only requirement that results in what
25 we would contend is a self-executing default by

1 MorningStar. The first paragraph on that page talks about
2 ICC review. In the event ICC determines -- this is the
3 International.

4 THE COURT: Code Committee.

5 MR. BALLOU: Code Congress. If ICC determines that
6 rehabilitation is infeasible dot-dot-dot, then this
7 agreement shall be voided and tower shall be demolished
8 and all costs borne by developer. Again, there is no
9 notice. If ICC determines it, this is what happens. In
10 paragraph C(1), about middle of the page. Should there be
11 a failure to complete the project, county may demolish the
12 tower and defray the costs by drawing down the amount of a
13 demolition bond that was never provided. And paragraph --

14 THE COURT: I'm sorry, where? That's a pretty long
15 paragraph.

16 MR. BALLOU: It's right about in the middle. Starts
17 with, "Should there be a failure to complete the
18 project" --

19 THE COURT: Yes. Go ahead.

20 MR. BALLOU: Then under the paragraph we're talking
21 about today, paragraph C(2), again, this is a heavily
22 negotiated agreements. If the parties had wanted to
23 provide some specific notice provisions for these events
24 to trigger, they could have done so and they didn't. Now,
25 finally, Your Honor, there's been some discussion about

1 Gerald Lee and the requirement of Power Engineering to
2 kind of piece together all the different components of
3 site plan approval. Page 97 of Gerald Lee's deposition,
4 Your Honor. And I asked Mr. Lee --

5 THE COURT: All right.

6 MR. BALLOU: On Exhibit 14, the notice of approval,
7 the time this was issued August 24, 2009, at least. If we
8 look at the documents the notes from the comment notes,
9 this was the only thing that was outstanding, correct?

10 Yes. To my knowledge, correct.

11 Even though this is specific to the storm water, you
12 weren't expecting anything else?

13 Right.

14 Because you've been approved?

15 Right.

16 And you're not aware of any requirement there be
17 anything, a notice of approval, a written notice of
18 approval like this, are you?

19 No.

20 That was just based on your experience with Richland
21 county?

22 Right.

23 There's no requirement notice. Mr. Lee acknowledges
24 he was basing this upon his experience with other
25 counties, but he is unequivocal he had been approved.

1 This project had been approved on August 24, 2009. Thank
2 you.

3 THE COURT: Okay.

4 MR. FENNELL: Can I make two clean up points?

5 THE COURT: No I think I understand everything.

6 MR. FENNELL: Just one with respect to what was pled?

7 THE COURT: What was pled?

8 MR. FENNELL: Yes, sir.

9 THE COURT: Yes, sir.

10 MR. FENNELL: In the reply I did plead equitable
11 estoppel as a bar to the claims.

12 THE COURT: Any cases you guys want to submit to me?
13 This -- what I've reviewed is long on facts and short
14 on...

15 MR. BALLOU: Your Honor, there was some case law
16 about apparent authority. I don't think that's an issue
17 going forward based upon -- or counsel appears to me they
18 stipulate -- correct me if I'm wrong that Gerald Lee had
19 apparent authority to bind MorningStar into dealings with
20 the county?

21 THE COURT: No, I don't think he -- I think maybe I'm
22 incorrect, but I thought he said that -- that Power did
23 not have authority to receive notice of approval.

24 MR. BALLOU: I think that's what they put in their
25 request to admit but I think -- correct me if I'm wrong,

1 Rich, but I think the position is there was no limitation
2 given by MorningStar to York County.

3 THE COURT: He also said that.

4 MR. BALLOU: Yes.

5 THE COURT: He said that.

6 MR. BALLOU: So my position is we don't think -- we
7 can certainly submit case law if you would like on the
8 question of apparent authority. We don't think that's
9 really the issue.

10 THE COURT: You don't need to do that. All right.
11 That will conclude the hearing.

12 (A discussion was held off the record.)

13 THE COURT: I made a copy of this for myself and
14 neglected to ask you about it. If you all each would
15 briefly address it. What effect does Chapter 31 of Title
16 6 have on this, specifically section 6-31-90? That has to
17 do with periodic review, which is what is actually
18 referenced in the agreement, and the language which sort
19 of tracks this statute. And then it --

20 MR. BALLOU: Could you give me that cite again?

21 THE COURT: Section 6-31-90.

22 MR. BALLOU: Thank you.

23 THE COURT: Maybe Mr. Kendree knows more about that
24 than the rest of us. Do you?

25 MR. KENDREE: I have to look at it, Your Honor.

1 THE COURT: Anybody give that any thought?

2 MR. FENNELL: No, sir.

3 THE COURT: Hearing none, look at it.

4 MR. FENNELL: Yes, sir.

5 THE COURT: Okay. Thank you.

6 MR. BALLOU: Thank you, Your Honor.

7 MR. FENNELL: Thank you, Judge.

8 (Whereupon, the proceedings were concluded.)

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STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

August 31st, 2014

Arnold L. Hardy

Aminah R. Hardy, RPR, CVR-CM



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STATE OF SOUTH CAROLINA	}	COURT OF COMMON PLEAS 2013-CP-46-00246
<u>COUNTY OF YORK</u>		
MorningStar Fellowship Church,	}	TRANSCRIPT OF RECORD
Plaintiff,		
vs.		
York County,		
<u>Defendant.</u>		

September 18, 2014
York, South Carolina

B E F O R E:
THE HONORABLE S. JACKSON KIMBALL, III, JUDGE.

A P P E A R A N C E S:
RICHARD B. FENNELL, ESQ.
Attorney for the Plaintiff
DANIEL J. BALLOU, ESQ.
MICHAEL K. KENDREE, SR., ESQ.
Attorneys for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

SEPTEMBER 18, 2014

THE COURT: MorningStar v. York County. What I have is the Defendant's motion to reconsider.

MR. BALLOU: That's correct, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. BALLOU: Dan Ballou and Michael Kendree, on behalf of the Defendant, York County.

Your Honor, before you this morning is the county's motion for reconsideration of the order granting partial summary judgment in this case.

The partial amount -- and we are not contesting the amount that was granted -- the portion that was granted, but the rest.

THE COURT: I understand.

MR. BALLOU: The first basis of our motion to reconsider, Judge -- and if you may recall, the original motion contended that MorningStar had notice of site plan approval under the development agreement between the parties.

THE COURT: Right.

MR. BALLOU: That that notice was given to its agent, Power Engineering.

THE COURT: I think my order says so.

MR. KENDREE: Right.

1 MR. BALLOU: That's right. I think all that
2 is undisputed. And we certainly are not contesting
3 those facts.

4 The Court found, I believe, in the order that
5 there was a question of fact as to an issue of
6 reasonable notice to be implied as to the county.

7 THE COURT: Which boils down to a question, at
8 least in my mind -- and, believe me, I struggled
9 with it -- of whether it is a question of fact to
10 be decided or whether that notice that was given,
11 and I found was given, was sufficient.

12 MR. KENDREE: That is correct.

13 MR. BALLOU: And so we've got a contract that
14 provides for approval -- it doesn't saying anything
15 about notice -- and then a timeline that runs off
16 of that approval that the Plaintiffs allege did not
17 occur and that as a result the actions of the
18 county were somehow a breach of that contract.

19 THE COURT: Correct.

20 MR. BALLOU: The question is do we imply a
21 term of reasonable notice -- the sufficiency of
22 that notice that was given -- under the contract.

23 THE COURT: Yes, sir.

24 MR. BALLOU: So the first basis that we would
25 ask the Court to reconsider this order really goes

1 to the fundamental question of agency. And that it
2 is undisputed, I believe, that the agent, Power
3 Engineering, received notice that the site plan had
4 been approved.

5 THE COURT: Let me elaborate on that. It
6 appeared from -- and I read a lot of stuff -- it
7 appeared from the record that that engineer thought
8 that there was approval of the site plan. The
9 document -- mens rea -- the documents that went
10 along with that were not clear about what approval
11 was given by the documents. But there wasn't any
12 question in my mind from the deposition of those
13 engineers that the engineer thought that the site
14 plan was approved.

15 MR. BALLOU: And the documents that were
16 relied upon by the engineer -- at least in his
17 belief -- included the electronic reports and a
18 notice of approval from the zoning compliance, if
19 you recall.

20 THE COURT: Yes. You are talking about the
21 form that was titled Approval -- on its face was
22 Approval of Storm Water Management, or something
23 like that?

24 MR. BALLOU: Well, no, not the DHEC approval
25 letter. There was a packet that was provided to

1 the engineer that included the electronic report of
2 the planning department that said: Building codes,
3 check.

4 THE COURT: Yes.

5 MR. BALLOU: Zoning, check.

6 THE COURT: I remember that.

7 MR. BALLOU: Then a separate document, a
8 Commercial Zoning Compliance Permit, that was also
9 included in that whole packet.

10 THE COURT: All right, let me see that again.

11 MR. BALLOU: And, unfortunately, this is my
12 only copy of this.

13 THE COURT: That is all right. I just want to
14 look at it.

15 MR. BALLOU: Yes, sir. This is a --

16 THE COURT: Hopefully it will jog my memory.

17 (Pause.)

18 MR. BALLOU: So it was in fact a combination
19 of documents.

20 THE COURT: Yes. Okay, I remember this. Yes.

21 MR. BALLOU: And at the bottom of that
22 document was a note that: Consult with the
23 development agreement.

24 THE COURT: Excuse me?

25 MR. BALLOU: At the bottom of the document is

1 a note to --

2 THE COURT: Special Conditions?

3 MR. BALLOU: At the very bottom, I believe,
4 down here, under Special Conditions.

5 THE COURT: Yes, Special Conditions. Okay.

6 MR. BALLOU: Okay. So this is the information
7 that is being provided to MorningStar's engineers.

8 THE COURT: And does that form -- it mentions
9 the engineers. Does it show transmission of that
10 to the engineers?

11 MR. BALLOU: Yes, I believe it does. In fact,
12 that is what -- in Gerald Lee's testimony, his
13 evidence, his deposition, he testified: Yes, I got
14 this.

15 THE COURT: Okay. And it is dated August 28,
16 2009; right?

17 MR. BALLOU: That's correct. That's correct.
18 And that is a final document, which is that zoning
19 compliance, which you get when all the other boxes
20 have been checked, and that is what on the 28th or
21 the 20th, that is what was transmitted to Gerald
22 Lee.

23 THE COURT: All right.

24 MR. BALLOU: So there really isn't a question
25 that Gerald Lee had the information in front of him

1 to determine that site plan approval had occurred.

2 And so --

3 THE COURT: Information, yes.

4 MR. BALLOU: That's right.

5 THE COURT: That's right.

6 MR. BALLOU: And as the agent of MorningStar,
7 our first argument is, in light of that evidence,
8 that notice is imputed as a matter of law to the
9 principal, to MorningStar.

10 And we understand the argument that Gerald Lee
11 was not authorized to make interpretation of the
12 contract, and those kind of things. But this isn't
13 a question -- this is a question of factual notice.
14 And as a factual matter, that occurred in August of
15 2009.

16 And, in fact, the August 28th notice from the
17 zoning department, zoning compliance letter, was
18 even after Gerald Lee himself knew that he had it,
19 because he was there. He came --

20 THE COURT: You mean the November
21 transmission?

22 MR. BALLOU: No, no. August 28th he already
23 knew he had site plan approval because he had come
24 to York County.

25 THE COURT: That's right. He came personally

1 and met with -- I have forgotten the guy's name --
2 but met with the building official. They checked
3 off some things, added some things. And on that
4 basis, the engineer understood it was approved.

5 MR. BALLOU: That's right.

6 So the first argument is agents got notice,
7 that's imputed as a matter of law to MorningStar.

8 The next basis for this motion, Your Honor, is
9 what I believe may be a misinterpretation of the
10 position of MorningStar as to notice.

11 THE COURT: All right.

12 MR. BALLOU: The order that you issued --

13 THE COURT: What page?

14 MR. BALLOU: On Page 5.

15 THE COURT: Uh-huh.

16 MR. BALLOU: The last full paragraph in the
17 middle of that.

18 THE COURT: The foundation of MorningStar?

19 MR. BALLOU: The foundation of MorningStar's
20 claim that the county did not give MorningStar
21 notice of the approval of the site plans for the
22 project.

23 Skipping down a couple of sentences: It
24 contends that it did not know that the site plan
25 was approved in August of 2009 and the procedure

1 for giving notice under the agreement was not
2 followed.

3 THE COURT: Uh-huh.

4 MR. BALLOU: In opposition to our motion,
5 MorningStar submitted the affidavit of Pat Selvey.
6 And the affidavit of Pat Selvey I believe was very
7 clear on this point. He does not say: We did not
8 know that the site plan had been approved.

9 THE COURT: That's right.

10 MR. BALLOU: What he says is that: We did not
11 get a stamped set of plans.

12 THE COURT: Right. But they also took the
13 position that the contract required that those
14 notices be given in writing to -- not Selvey, but
15 some other guy.

16 MR. BALLOU: Well, that's right. That's
17 right. And he was implicating the notice
18 provisions under the development agreement, which
19 the Court concluded did not apply to this
20 situation.

21 THE COURT: Correct.

22 MR. BALLOU: And on Page 2 of the Selvey
23 affidavit: To my knowledge the county failed to
24 produce a -- he has italicized here -- stamped site
25 plan for our engineer or to us, which, according to

1 the county's procedure, is the only approval that
2 is real or binding.

3 He is not testifying here, Your Honor, that
4 they did not know that the site plan had been
5 approved.

6 And, in fact, since this motion was originally
7 heard, we've taken Mr. Selvey's deposition. And
8 Mr. Selvey is now in Africa indefinitely. And so
9 we took his deposition under a trial testimony
10 deposition.

11 THE COURT: Uh-huh.

12 MR. BALLOU: And we know what he is going to
13 say. And that is exactly what he says. And I have
14 talked with counsel and --

15 THE COURT: Did you question him about whether
16 he knew, but just didn't -- whether he in fact
17 knew, but just didn't receive a set of stamped
18 plans?

19 MR. BALLOU: On Page 85 --

20 THE COURT: Do I have that?

21 MR. BALLOU: You don't, Your Honor.

22 THE COURT: That's okay. Unless you have got
23 a condensed copy, I don't need to see it.

24 MR. BALLOU: And I can provide a copy of this.
25 In light of the nature of the motion to reconsider,

1 I have not asked to supplement it, but since it is
2 consistent with the affidavit --

3 THE COURT: That's fine.

4 MR. BALLOU: -- it is clarifying.

5 THE COURT: All right.

6 MR. BALLOU: On August 19th Gerald Lee says:
7 Since we did not have approval before, we did not
8 push this issue. This was a billing issue, as you
9 might recall.

10 THE COURT: Right. Right.

11 MR. BALLOU: But now that we do, I need to
12 bring it up. This is on August 19th of 2009.

13 THE COURT: I'm sorry, who is this?

14 MR. BALLOU: This is Power Engineering, the
15 lead engineer, talking to Pat Selvey.

16 THE COURT: Talking to Selvey, but this is
17 Selvey's deposition?

18 MR. BALLOU: Correct. That's correct.

19 THE COURT: Go ahead and start over again.

20 MR. BALLOU: On Exhibit 6, on August 19th,
21 Gerald Lee says: Since we did not have approval
22 before, we did not push this issue. But now that
23 we do, I need to bring it up -- meaning their
24 bills.

25 THE COURT: This is Lee telling Selvey?

1 MR. BALLOU: Correct. Okay. That is what he
2 says.

3 What was the question? He told you we have
4 approval.

5 And the answer is: He did. Right there on
6 August -- is that August 19th? I'm just saying
7 just because he said it don't make it true. That
8 is all. Gerald is a good guy, but we understood
9 there was still one more hoop we had to jump
10 through -- meaning the stamped set of plans.

11 That is what Pat Selvey has been waiting on.
12 And that is what his testimony was in the
13 affidavit. That is what his testimony is -- was
14 consistently in the deposition.

15 THE COURT: Uh-huh.

16 MR. BALLOU: He was not questioning the
17 sufficiency of the communication. It doesn't
18 matter what Gerald Lee had told him. Until Gerald
19 Lee was going to provide Pat Selvey with a stamped
20 site plan, Pat Selvey did not consider the site
21 plan approved. And that is the standard that
22 MorningStar is trying to impose on this contract.

23 It is undisputed there was no requirement in
24 that contract for a stamped set of plans as a
25 trigger for this calculation. So --

1 THE COURT: Right.

2 MR. BALLOU: So the position of MorningStar,
3 which I think has been consistent, which I think
4 may have been misinterpreted in the order, is not
5 that they didn't know that the site plan had been
6 approved, but that it doesn't matter. Until we get
7 a stamped set of plans, we don't have any
8 obligation under this agreement.

9 And that is why he italicized that in his
10 affidavit and that is why he is so clear in his
11 testimony in his deposition.

12 THE COURT: Did I quote that notice paragraph
13 in the order? I don't think I did. I quoted the
14 one they wanted to rely upon.

15 MR. BALLOU: On Page 2 at the bottom.

16 THE COURT: Yes, thank you. Let me read that
17 real quick.

18 (Pause.)

19 THE COURT: Okay.

20 MR. BALLOU: And so given the argument that
21 MorningStar is making in this case that either they
22 are entitled to notice under the notice provision,
23 which the Court has already rejected --

24 THE COURT: Right.

25 MR. BALLOU: -- or that they were entitled to

1 a stamped set of plans before the 180 days started
2 to run -- which, again, is nowhere found in that
3 contract -- there is no question of fact that York
4 County informed Power Engineering, and, in fact,
5 Power Engineering informed MorningStar, that the
6 site plan had been approved.

7 THE COURT: Let me see the deposition.

8 MR. BALLOU: Your Honor, if you would like a
9 copy of the affidavit as well.

10 THE COURT: Is this Exhibit 6 attached
11 somewhere? Are we talking about e-mail? Does
12 Exhibit 6 -- it refers to this Exhibit 6?

13 MR. BALLOU: That's correct.

14 THE COURT: And they read from the bottom to
15 the top?

16 MR. BALLOU: That's correct.

17 THE COURT: Okay. Go ahead.

18 MR. BALLOU: So, Your Honor, if you view this
19 case in the posture in which the evidence for the
20 Plaintiff is really framing the issues, the
21 question is whether or not MorningStar, (a), can
22 avoid liability -- responsibility -- when its agent
23 gets notice. Can it willfully ignore the terms of
24 the agreement and, say -- and impose some new term
25 of the stamped site plan to avoid responsibility.

1 THE COURT: I don't buy that anyway.

2 MR. BALLOU: So as -- and there really isn't
3 any question of fact as to that sequence of events.
4 That summary judgment really should have been
5 granted on those claims. If in fact MorningStar
6 had notice and chose to ignore it because of some
7 issue it came up with, they did so at their peril.

8 And so we think that the Court should
9 reconsider its denial of summary judgment because
10 the reasonable issue of fact isn't there anymore.
11 The reasonable sufficiency of --

12 THE COURT: Genuine issue of fact.

13 MR. BALLOU: The genuine issue -- let me back
14 up. The sufficiency of notice -- the issue of the
15 sufficiency of the notice really doesn't do
16 anything, because the evidence is that Pat Selvey
17 ignored notice. He knew this had happened. But in
18 his mind believed that there was a requirement of a
19 stamped site plan for the clock to begin.

20 THE COURT: Here is the one thing that
21 concerns me. That e-mail that we are talking
22 about -- I remember reading it -- the note from the
23 engineer, from Lee, says, in so many words: I went
24 there, we made additions, I signed off, I
25 understand they will be sending an approval letter.

1 MR. BALLOU: Which they did.

2 THE COURT: In November?

3 MR. BALLOU: No, that was the August 28th
4 zoning letter that we just looked at.

5 THE COURT: That is the zoning -- okay, go
6 ahead.

7 MR. BALLOU: And so that is exactly what
8 happened.

9 THE COURT: So you contend that the zoning
10 compliance form was the notice anticipated by Lee?

11 MR. BALLOU: No, I believe that that was -- I
12 would contend that the zoning compliance letter was
13 the --

14 THE COURT: May I see that again, please?

15 MR. BALLOU: Yes.

16 THE COURT: The zoning compliance letter. Was
17 it in there?

18 MR. BALLOU: That is at Exhibit 3 and it is
19 dated August 28th.

20 THE COURT: Exhibit 3 to the deposition.
21 Commercial Zoning Compliance Permit. And all we
22 were talking about -- the Paragraph 2 -- all the
23 notice provision -- Paragraph 2 of the contract --
24 provided, Paragraph -- Section 4(c)(2) --

25 MR. BALLOU: Correct.

1 THE COURT: -- provided was related only to a
2 site plan?

3 MR. BALLOU: That's right. Approval of the
4 commercial site plan.

5 THE COURT: All right. And this was
6 transmitted to whom, Lee?

7 MR. BALLOU: To Gerald Lee.

8 THE COURT: The permit repeatedly says: See
9 site plan, See site plan, See site plan, Special
10 Conditions, See site plan, Comply with development
11 agreement, See site plan for additional
12 requirements.

13 MR. BALLOU: And that is the process.

14 THE COURT: Okay. All right.

15 MR. BALLOU: So we think there is enough here
16 for you to take a second look at that.

17 THE COURT: Can I hold on to this?

18 MR. BALLOU: I can give you the original if
19 you like.

20 THE COURT: No, thank you.

21 MR. BALLOU: Okay. You can have that one
22 then.

23 THE COURT: I just want to borrow this one.
24 You have got one if you need it.

25 Okay. Anything else?

1 MR. BALLOU: So the final argument, Your
2 Honor, is that even if after all this you conclude
3 that there is a remaining genuine issue of material
4 fact as to the sufficiency --

5 THE COURT: A scintilla of evidence to support
6 a remaining issue of -- genuine issue of fact
7 remaining.

8 MR. BALLOU: Even if you get to that point,
9 what are we talking about here, Your Honor, the
10 issue is whether or not MorningStar complied with
11 the terms of the agreement. Under the --

12 THE COURT: There isn't any question but what
13 they did not comply with the financing --

14 MR. BALLOU: No question at all.

15 THE COURT: I don't believe anybody -- in
16 fact, they say they couldn't have.

17 MR. BALLOU: Right. So the implication of
18 this is that the timeline -- if MorningStar is
19 correct, the timeline did not begin and there
20 wasn't an obligation. But there is evidence of
21 approval, there is evidence of communication of
22 that approval, of acknowledgment of that approval
23 by the agent. Under those facts the county was
24 entirely within its rights under the development
25 agreement to require compliance with Section 2 that

1 we just read.

2 And the only allegation is that the county
3 wrongfully declared default and caused this project
4 to fail.

5 The county is entitled to protect its interest
6 under the agreement, and all it did was assert the
7 right to declare default under the agreement. And
8 so we should not have to try the case of whether or
9 not MorningStar is entitled to collect damages just
10 because all the county did was pursue its rights
11 under the contract.

12 We acknowledge that if this is a question of
13 fact, we may have to go to the jury on whether or
14 not MorningStar breached, which would entitle the
15 county to have the tower demolished. That is a
16 separate issue.

17 THE COURT: What would be the -- if I reverse
18 myself, what would be the result?

19 MR. BALLOU: Well, if you reverse yourself as
20 to all of it, obviously --

21 THE COURT: Well, no.

22 MR. BALLOU: Just as to that, to --

23 THE COURT: My order deals -- the order deals
24 only with this business of the tearing down the
25 building.

1 MR. BALLOU: Right. And so what we would
2 contend, Your Honor, that if there is a question of
3 fact as to reasonable notice, the only issue that
4 should be tried is whether or not the county is
5 entitled to enforce that provision.

6 THE COURT: Well, that would be part and
7 parcel of the whole thing. I don't agree with
8 that. The question is -- my question is, if I
9 reverse myself and held that there was notice,
10 therefore there was a default, what is the result?

11 MR. BALLOU: The result is then, I would
12 believe, that, as the agreement says, then the
13 development agreement shall be deemed null and
14 void, at such time tower shall be demolished, the
15 costs borne by developer.

16 THE COURT: Would that preclude all of the
17 claims of MorningStar?

18 MR. BALLOU: If they were in breach of the
19 development agreement.

20 THE COURT: If they failed to comply with this
21 Paragraph 4(c)(2), what claims would remain -- and
22 were therefore in default as to that -- what claims
23 would remain of theirs?

24 MR. BALLOU: I suggest none of their claims
25 would remain, Your Honor.

1 THE COURT: I haven't reread the complaint.

2 Okay. Anything else?

3 MR. BALLOU: We do have a cause of action on
4 the county on behalf -- for nuisance, and those
5 kind of things.

6 THE COURT: For what?

7 MR. BALLOU: For nuisance. But that is all
8 tied into our contention the development agreement
9 was breached and what remedies and what actions the
10 county is entitled to take as a result.

11 THE COURT: Okay.

12 MR. BALLOU: Thank you, Your Honor.

13 THE COURT: All right, Mr. Fennell.

14 MR. FENNELL: Yes, Your Honor. Richard
15 Fennell, on behalf of MorningStar.

16 First, with respect to the notice of zoning
17 compliance, I may be missing it, but I don't see it
18 as one of the exhibits to Gerald's deposition.

19 THE COURT: Three.

20 MR. FENNELL: Gerald Lee's deposition.

21 MR. BALLOU: It is Selvey's deposition.

22 MR. FENNELL: I understand. But I thought
23 that what you were saying is that Gerald said in
24 his deposition that he had actually received that
25 document.

1 MR. BALLOU: Well, I'll refer to that
2 deposition, but I understand that was part -- that
3 was a packet he testified he obtained.

4 MR. FENNELL: All of the exhibits are attached
5 to that copy of the transcript.

6 THE COURT: Let me say --

7 MR. FENNELL: I don't see it.

8 THE COURT: I recall reading -- I recall
9 reading that information in consideration of the
10 motion.

11 MR. FENNELL: Yes, sir.

12 THE COURT: It was clearly an issue raised and
13 argued at the motion.

14 MR. FENNELL: No question. But the issue is
15 whether Mr. Lee ever said that he saw it.

16 Now, what we have been arguing since the first
17 time we argued this motion --

18 THE COURT: Well, let me stop you there.

19 MR. FENNELL: Yes, sir.

20 THE COURT: Are you saying that if Mr. Ballou
21 finds in that deposition that Mr. Lee said he
22 saw -- received this zoning compliance permit, that
23 notice is given?

24 MR. FENNELL: No. Because of what I was about
25 to say with respect to what Gerald said without

1 questioning his deposition, which it is on Page 58
2 of the deposition transcript, which is that he was
3 expecting something formal from the county, just
4 like everybody else was expecting something formal
5 from the county. And he was expecting it.

6 THE COURT: He got it.

7 MR. FENNELL: Not according to him. He was
8 expecting something --

9 THE COURT: Did he say he didn't receive this?

10 MR. FENNELL: No. He said he didn't receive
11 what he was expecting, which was a formal notice of
12 site plan approval from the county. And that is on
13 Page 58 of his deposition.

14 And then when Dan cross-examined him, he said:
15 That is not based on any experience with York
16 County, is it?

17 And he said: No, it is not.

18 THE COURT: It is Richland County.

19 MR. FENNELL: Yes, sir. It is based on my
20 experience in Richland County and the development
21 business.

22 His partner, Mr. Boyte, said on Page 29 of his
23 deposition: I'm sure there is a formal letter from
24 the county somewhere, because we went through the
25 same issues. How do you put together all these

1 pieces of paper and know that you have site plan
2 approval?

3 THE COURT: Well, frankly, I thought that much
4 of the argument of the Plaintiff was pretextual. I
5 think the claims that had to do with -- for
6 example, the needing to have further approval in
7 any event of some offsite work -- I have forgotten
8 what it was now -- I don't know if -- it was
9 drainage, wasn't it, site drainage or storm
10 drainage, or something like that? I'm telling you,
11 the only question in my mind is was the notice that
12 the Plaintiff received sufficient.

13 MR. FENNELL: Yes, sir.

14 THE COURT: Under the contract.

15 MR. FENNELL: Yes, sir. And then under the
16 contract implying a term of reasonableness as you
17 put in your order.

18 THE COURT: Are you abandoning now the
19 argument that the notice had to comply with the
20 notice paragraph of the contract?

21 MR. FENNELL: Not at all. But you have told
22 me enough times that I lose on that that I don't
23 feel like I need to say it again.

24 THE COURT: Okay.

25 MR. FENNELL: But with respect to what you put

1 in your order, that there is a reasonableness
2 requirement that needs to be engrafted onto the
3 contract because of the significance of the
4 consequences of this, then you have to go back to
5 those issues -- and Mr. Lee is an impartial
6 participant in this process -- said: I was
7 expecting a formal notice from the county and never
8 got it.

9 THE COURT: Well, what about that question?
10 Why has what he is expecting got anything to do
11 with whether he received reasonable notice?

12 MR. FENNELL: Because it is evidence that what
13 MorningStar was expecting was in fact reasonable.

14 THE COURT: No, what MorningStar was expecting
15 was not reasonable. They expected a set of stamped
16 site plans.

17 MR. FENNELL: That is according to Mr. Selvey.
18 That is what Mr. Selvey thought --

19 THE COURT: That is way beyond reasonable.

20 MR. FENNELL: -- would be reasonable.

21 THE COURT: He is not the engineer.

22 MR. FENNELL: Yes, sir.

23 THE COURT: And, furthermore, he wasn't the
24 guy responsible, was he? What was other fellow's
25 name?

1 MR. FENNELL: Dave Yarnes.

2 THE COURT: No. I can't remember. It was
3 another guy. Go ahead.

4 MR. FENNELL: Pat Selvey did most of the leg
5 work for MorningStar until Pat left MorningStar.
6 So was he the guy responsible? Ultimately I guess
7 it was Rick Joyner that was responsible.

8 THE COURT: That is who it was.

9 MR. FENNELL: Yes, sir.

10 THE COURT: Somewhere in all this they claimed
11 that Joyner -- that the notice had to be given to
12 Joyner. And patently that is incorrect?

13 MR. FENNELL: Because of what it says in the
14 contract.

15 THE COURT: Well, that is wrong.

16 MR. FENNELL: Yes, sir. I know you have ruled
17 against us on that. But there is a provision in
18 the contract that says these sorts of things have
19 to be sent certified to Rick Joyner.

20 But, again, getting back to what is
21 reasonable, Pat Selvey explained it very well in
22 his affidavit and explained the same thing in his
23 deposition. You can't go on what somebody says.
24 He testified honestly in his deposition, consistent
25 with his affidavit: Yes, the Power guys told me

1 that they had done all their work.

2 THE COURT: I agree with you, Mr. Fennell,
3 that my -- I have concern with just being told of
4 something that was that important.

5 MR. FENNELL: Right. Because you can't go
6 down and get permits. You can't start the building
7 process, you can't go to an insurance company, you
8 can't go to a bank and say, Fund this process.

9 THE COURT: If you got this you can.

10 MR. FENNELL: I don't know the answer --

11 THE COURT: If you have got the zoning
12 compliance permits you can.

13 MR. FENNELL: I don't know the answer to that.
14 Because it doesn't say "site plan has been
15 approved" on it.

16 THE COURT: Every reference to evidence of
17 approval refers you to the site plan.

18 MR. FENNELL: Yes, sir, but it doesn't say
19 whether or not the site plan has been approved or
20 what has been approved. Again, you have got to go
21 back to putting documents together.

22 THE COURT: Are you telling me the engineer
23 doesn't know that?

24 MR. FENNELL: The engineer would know to go
25 find documents. But what they are saying is again

1 inconsistent with what Boyte says was supposed to
2 happen and Lee said was supposed to happen, which
3 is very consistent with what MorningStar said is
4 supposed to happen: Before I can go to a lender
5 and get funding, I have to have something that I
6 can show them and say, We are ready to go, we have
7 got site plan approval. And I can't show them --

8 THE COURT: What you have to show them is that
9 you've got --

10 MR. FENNELL: I've got --

11 THE COURT: -- a zoning compliance approval.

12 MR. FENNELL: And I have got to go from zoning
13 compliance to site plan, and then site plan
14 approval, according to York County, consists of
15 going through the checklist from August, July, June
16 and March.

17 THE COURT: That is exactly what was done when
18 he went there and signed off on the plans.

19 MR. FENNELL: Yes.

20 THE COURT: That was a final --

21 MR. FENNELL: Yes, sir.

22 THE COURT: -- completion of -- I don't think
23 anything disputes that.

24 MR. FENNELL: Nobody disputes that. Nobody
25 disputes, yes. The Power guys have said that there

1 was nothing left to be done. But the MorningStar
2 guys -- and they were our agents -- and now we have
3 had the argument before about their authority.
4 Nobody from MorningStar -- there is nothing in
5 record to indicate that anybody from MorningStar
6 ever said Power's authority is limited in any way,
7 other than --

8 THE COURT: That's right.

9 MR. FENNELL: -- other than that what is in
10 the contract.

11 THE COURT: That's right.

12 MR. FENNELL: And you have already ruled
13 against us on that. And I don't want to argue
14 about that. But what I do want to say is that you
15 can't say that Power knows -- because they have
16 been through six months of dealing with this
17 stuff -- that if you look at document A, B, C, D,
18 and E and add them all together you know what the
19 project looks like.

20 THE COURT: Well, here is what he said in that
21 e-mail.

22 MR. FENNELL: Yes, sir.

23 THE COURT: He said: Since we didn't yet --
24 and I'm paraphrasing -- Since we didn't yet have
25 approval, I was reluctant to bill you.

1 MR. FENNELL: Yes, sir.

2 THE COURT: But now since we have it, we need
3 to talk about us being paid, because we haven't
4 been paid since January, and this is August.

5 MR. FENNELL: Absolutely. And then that --

6 THE COURT: Pretty clear that he knew it was
7 approved?

8 MR. FENNELL: Yes.

9 THE COURT: Okay.

10 MR. FENNELL: But is it clear that he knew
11 that there was site plan approval that you can use?
12 It is a different thing to say that, I have
13 approval in my mind than it is to say that, I have
14 documents that I can turn into a bond.

15 And going to a bonding agent or a lending
16 agent and say, Trust me because Gerald Lee told me
17 I have site plan approval, isn't going to work.

18 And that is what I think formed the basis of
19 what you wrote in your order.

20 THE COURT: There is nothing in the record to
21 suggest what requirements there were by any bonding
22 agency or anything else.

23 MR. FENNELL: Pat Selvey's affidavit. Pat
24 Selvey's affidavit, yes, sir.

25 THE COURT: Let me see it. You had it, didn't

1 you, Mr. Ballou?

2 MR. BALLOU: I do.

3 MR. FENNELL: Paragraph 6 through 9.

4 THE COURT: Hang on just a minute.

5 (Pause.)

6 THE COURT: What he says is: The performance
7 bonds require approved site plans that have been
8 stamped by the county.

9 It seems to me that is a different -- that is
10 saying something different from whether the plans
11 were approved.

12 MR. FENNELL: That's correct.

13 THE COURT: Nothing stopped them after
14 August the 26th or 20th, or whatever it was, from
15 having Power, their engineer, who would be the ones
16 who had the plans.

17 MR. FENNELL: Yes, sir.

18 THE COURT: Give them the plans so that they
19 could go and get financing, if that is what
20 financing required.

21 MR. FENNELL: Yes, sir. But Power would not
22 have the plans. The approved set of plans are with
23 the county.

24 THE COURT: Well, go to the county and get
25 them. Send Power to the county to get them.

1 MR. FENNELL: Yes, sir. And I don't remember
2 if this is in the record or not, but what ended up
3 happening was that that happened in January. I
4 think it is in the e-mails that we gave to you.
5 That there was a conversation with Power
6 Engineering and Power Engineering told the folks at
7 MorningStar: We can't get those plans, you can't
8 get those plans until you have a preconstruction
9 meeting.

10 And then after they sent that e-mail to
11 MorningStar is when MorningStar paid Power. So
12 Power never took --

13 THE COURT: Why didn't they tend to it before
14 then?

15 MR. FENNELL: They didn't know the clock had
16 started, is what Yarnes and Selvey are saying in
17 their affidavit.

18 THE COURT: They say they didn't personally,
19 but their agent did.

20 MR. FENNELL: I don't know that the agent even
21 thought about it, or if there is anything in the
22 record that would indicate that the agent even
23 thought about the clock starting, or if they knew
24 that there --

25 THE COURT: They may not. I agree with you,

1 they may not. Nor -- I don't recall anything in
2 the record either that says that -- let me find it.
3 To my knowledge, county failed to produce stamped
4 site plan for our engineer, which, according to the
5 county's procedure, is the only approval that is
6 real or binding.

7 There is no evidence of that in the record
8 other than that statement.

9 MR. FENNEL: Yes, sir, other than him saying,
10 That is my history. And if you look up a couple of
11 paragraphs, he talks about other projects with the
12 county.

13 THE COURT: Go ahead.

14 MR. FENNEL: And then Yarnes --

15 THE COURT: The deal is -- he really is only
16 saying foul -- he is crying foul because he
17 didn't -- nobody gave him a set of stamped site
18 plans.

19 MR. FENNEL: Yes.

20 THE COURT: A site plan stamped by the county.

21 MR. FENNEL: And what he is testifying to is,
22 based on his experience, that is site plan
23 approval.

24 THE COURT: Well, his experience -- what has
25 his experience got to do with the provision in the

1 contract?

2 MR. FENNELL: Well, we're not really talking
3 about provision of contract, we're talking about a
4 provision that you implied into the contract, which
5 is that there needs to be some sort of reasonable
6 notice to let MorningStar know that the clock has
7 started.

8 So, again, you know, although I'm not
9 conceding the point, I understand because you have
10 told me enough, that that dog doesn't hunt.

11 But with respect to the sufficiency of the
12 notice, for a finder of fact to determine that that
13 clock had started, that requires more evidence.
14 And it requires more evidence in order to determine
15 whether Mr. Lee is being reasonable when he says:
16 Well, the county should have said something more
17 formal, because everybody was expecting something
18 more formal, something that would say that, You
19 don't have to look at nine months' worth of
20 documents to figure this out, here is one document
21 that will show you that you have site plan
22 approval.

23 Or Mr. Boyte, who was much more antagonistic,
24 but Mr. Boyte said in his deposition on Page 29:
25 Isn't there some letter? There is a letter

1 somewhere from the county that says specifically
2 you have site plan approval. Because he was being
3 asked about one particular document that dealt with
4 one particular aspect of site plan approval.
5 Because to say put it all together and you're okay
6 doesn't go. To say that somebody at Power
7 Engineering told me that somebody at the county
8 told them that somebody else told them that there
9 was site plan approval doesn't go. This is a
10 real --

11 THE COURT: Say that again.

12 MR. FENNELL: To go to a bank, to go to a
13 lender, to go to an insurance company and say, I
14 have site plan approval. How do you know? Because
15 my engineer told me that somebody at the county
16 told them that somebody else said that they had
17 site plan approval.

18 THE COURT: That is pretextual to say that.
19 They have or can get. When they know there is
20 approval they have or can get stamped site plans.

21 MR. FENNELL: If there would have been a
22 preconstruction meeting, yes, sir. And what my
23 case would rest on is that they don't have
24 sufficient notice to know that they are supposed to
25 do that. They don't know that the county has put

1 them on the clock. And if they had known that the
2 county had put them on the clock, they could have
3 gotten started in August.

4 And it can't be a gotcha type provision,
5 especially with the county development agreement,
6 because the statute says plenty about that, that
7 development agreements ought to be construed in a
8 way that you can have projects be completed.

9 And if this is a gotcha, that is inconsistent
10 with the statute, it is inconsistent with the
11 fundamental laws regarding duty of good faith
12 implied in all contracts, then the county should
13 have said something that said, You have site plan
14 approval, the clock has started.

15 THE COURT: It is not a gotcha. I know they
16 contended it was a gotcha when they got Jim
17 Bakker's letter.

18 MR. FENNELL: Yes, sir. But the reason why I
19 say that it is a gotcha is because this is so
20 important, this leads to the destruction of the
21 tower and the loss of millions of dollars in value.
22 There should have been a letter or an e-mail saying
23 that, We have issued site plan approval, the clock
24 has started.

25 And I believe that is what you were getting at

1 in your order was for a finder of fact to determine
2 whether or not Fennell is right, but that is the
3 argument, that is the facts. And this is a gotcha
4 type situation.

5 THE COURT: No, it is not a gotcha type
6 situation. Their engineer knew of approval and
7 there was transmitted to the engineer -- did you
8 find that in the deposition?

9 MR. BALLOU: I did not, Your Honor.

10 THE COURT: -- this zoning compliance permit,
11 which is what engineers typically get.

12 MR. FENNELL: Right. And if you go back
13 through Gerald's deposition he also said very
14 candidly, I think I left right around this same
15 time, so I'm not sure what I saw and what I didn't
16 see.

17 And I'm not saying anything about Dan, I have
18 got all the respect in the world for Dan, but there
19 is no evidence in the record that would indicate
20 that Gerald saw that or Gerald would have thought
21 that complied with what he thought that MorningStar
22 was going to get, which is -- and I know I'm being
23 repetitive -- something simple. One line, You have
24 got site plan approval. Two lines, You have got
25 site plan approval, the clock has started. This is

1 millions of dollars.

2 THE COURT: Well, could have done lots of
3 things. And MorningStar could have done lots of
4 things.

5 MR. FENNELL: Absolutely.

6 THE COURT: And their engineer apparently
7 could have done lots of things.

8 MR. FENNELL: Yes, sir.

9 THE COURT: But what they could have done
10 doesn't have anything to do with whether --

11 MR. FENNELL: Unless you are dealing with what
12 is reasonable, then what could have matters a lot.

13 THE COURT: All right. Anything else?

14 MR. FENNELL: No, sir.

15 THE COURT: Thank you.

16 MR. BALLOU: Very briefly, Your Honor.

17 THE COURT: It has got to be very brief.

18 MR. BALLOU: If there was a desire to include
19 something more in terms of communicating site plan
20 approval, this was a heavily negotiated document,
21 Mr. Selvey was at the table negotiating these
22 terms, understood the significance, understood how
23 these projects proceed, understood from his own
24 engineers that site plan approval had occurred.
25 And his own testimony is: Just because Gerald Lee

1 says it don't make it true. That was a very
2 telling comment. At that point he is at his peril,
3 MorningStar is at their peril.

4 THE COURT: I want you to find for me -- not
5 now -- find for me in Lee's deposition where he
6 either did or didn't receive the zoning compliance
7 permit.

8 I mean, you know, I think it is pretty obvious
9 that I was struggling with the issue. I do not
10 think the county did a gotcha thing. I think that
11 MorningStar has made arguments to try to avoid a
12 harsh result that don't hold any water. The
13 arguments, that is. But the fact is it is indeed a
14 difficult result.

15 Further, there is the whole history of this
16 thing, which indicates that the county has been
17 very patient with MorningStar.

18 At one time they had the ability to demand it
19 be taken down long ago, and they didn't do it.
20 There wouldn't have been any question about it.

21 I need to think it through. And I want to see
22 if Mr. Lee -- find for me where Mr. Lee -- what
23 pertains to Mr. Lee receiving this package after
24 the August meeting. And, Mr. Fennell, you
25 certainly have the same latitude to find something

1 that negates that.

2 MR. FENNELL: Yes, sir.

3 THE COURT: And just send that -- both of you
4 send that to me by e-mail. I will consider it and
5 rule on the motion.

6 MR. FENNELL: Yes, sir. Thank you, Your
7 Honor.

8 MR. BALLOU: Thank you, Judge.

9 (WHEREUPON, the proceedings were concluded.)

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(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 18th day of September, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 28, 2015

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
County of York	)	2013-CP-46-00246
	)	
MorningStar Fellowship Church,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
York County, South Carolina,	)	
	)	
Defendant.	)	

February 2nd, 2015
York, South Carolina

BEFORE:

THE HONORABLE DANIEL D. HALL, JUDGE.

APPEARANCES:

RICHARD B. FENNELL, ESQ.
Attorney for the Plaintiff

DANIEL J. BALLOU, ESQ.
Attorney for the Defendant

MICHAEL K. KENDREE, ESQ.
Attorney for the Defendant

AMINAH R. HARDY, CM
Official Court Reporter

EXHIBITS

No.	Description	Page
1A	Deposition of Rick Joyner	5
2A	Deposition of Dave Yarns volume I	5
2B	Deposition of Dave Yarns volume II	5
2C	Deposition of Dave Yarns volume III	5

P R O C E E D I N G S

1 THE COURT: We're on the record in the record of
2 MorningStar Fellowship Church versus York County, South
3 Carolina. Civil action 2013-CP-46-00-246. This case was
4 scheduled for trial and for day certain for today. Last
5 week, the Court met with attorneys for the plaintiffs and
6 attorneys for the defendant in chambers in Lexington last
7 week where I was holding court. At that time, we had a
8 pretrial discussion about some of the facts and issues in
9 the case. Also at that time, the defendant county had
10 filed a motion for an order excluding damages sustained by
11 the plaintiff and a motion in limine that I think there
12 were five parts to that motion with the Court.
13

14 We discussed those motions with both parties in
15 chambers, and then the Court issued a ruling on those
16 motions to the parties last week. And based on those
17 rulings, the Court was informed by the plaintiff that they
18 intended to appeal the motion excluding damages and some
19 of the motions in limine. And so I think -- is that where
20 we are, Mr. Fennell?

21 MR. FENNELL: Yes, Your Honor, Rich Fennell on behalf
22 of plaintiff Morningstar Fellowship Church. We understand
23 your rulings. We've reviewed the draft order granting the
24 motions in limine and granting the motion to exclude
25 damages. Based on the breadth of the ruling, we believe

1 that we have to and, in fact -- have a right to and, in
2 fact, have to appeal now. So we'd like to note the appeal
3 on the record. We'll serve and file the notice of appeal
4 tomorrow.

5 THE COURT: And again, I have looked over the
6 proposed motion by the county and there was just one part
7 of page 2 the plaintiff wanted to insert some language.
8 Without any objection from the county and the defense
9 attorney, and we will make those changes then make that
10 order the order of the Court. Mr. Ballou?

11 MR. BALLOU: That's correct, Your Honor. Dan Ballou
12 on behalf of the defendant York County. We will make the
13 change requested by counsel for plaintiff to the proposed
14 order and send it to you later on this morning. You have
15 accurately stated our understanding of where we are today.
16 I do have for the court file the original copies of
17 depositions of Dave Yarns and volume III of deposition of
18 Rick Joyner. I will have sent to the Court volume I and
19 II of Joyner deposition as well to be included as the
20 original transcripts of the depositions for the Court's
21 file.

22 THE COURT: If you would hand those up to -- I assume
23 the proper procedure is to hand those up to the court
24 reporter and let her mark those, and then we'll make those
25 part of the record. And then anything else he -- I guess

1 anything else that either of y'all want to make part of
2 the record, I'll be here all week. The court reporter
3 will be here all week, and I guess we can mark those when
4 they come to make them part of the record. Is that the
5 proper procedure?

6 MR. FENNELL: Yes, Your Honor.

7 MR. BALLOU: Correct. All right.

8 THE COURT: Anything else we need to take up?

9 MR. FENNELL: Not from the plaintiff.

10 THE COURT: From the defendant?

11 MR. BALLOU: Nothing further from the defense.

12 THE COURT: Thank you. Enjoyed working with y'all
13 last week, and that concludes this matter as of today.

14 (Exhibits 1a, 2a, 2b, and 2c were marked.)

15 (Whereupon, the proceedings were concluded.)
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

I, Aminah R. Hardy, CM, Official Court Reporter
for the 16th Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the hearing of
the captioned case, relative to appeal, in the Court of
Common Pleas for York County, South Carolina, on the 2nd
day of February, 2015.

April 21st, 2015

Aminah R. Hardy

Aminah R. Hardy, CM

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STATE OF SOUTH CAROLINA.

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MORNINGSTAR FELLOWSHIP CHURCH,

Plaintiff,

Case No.

-against-

2013-CP-46-00246

YORK COUNTY,

Defendant.

-----x

October 27, 2015

York, S.C.

B E F O R E :

HONORABLE DANIEL HALL, Judge.

A P P E A R A N C E S :

RICHARD FENNELL, Esquire
Attorney for the Plaintiff

DANIEL BALLOU, Esquire
Attorney for the Defendant

Aileen Butler
Official Court Reporter

EXHIBITS.

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
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1 THE COURT: We are on the record in civil matter,
2 2013-CP-46-00246, Morningstar Fellowship Church, the
3 plaintiff, versus York County, South Carolina, the
4 defendant.

5 I think where we are procedurally, what brings us
6 here today, is that the Court issued an Order. The
7 defendant filed a motion to exclude damages and in
8 addition a motion In Limine. The Court heard that
9 motion on the record and issued an Order dated
10 February the 2nd of 2015. After that the county, the
11 defendant, filed a motion for entry of judgement, or
12 entry of partial judgement.

13 The plaintiff had filed an appeal of the Court's
14 Order and that appeal did go up to the Court of
15 Appeals. This Court never issued a ruling on the
16 entry of judgement or partial judgement that was
17 initially made during the time of the appeal. In fact
18 the Court of Appeals in their Order remanding this
19 matter back states in their opinion dated 4-16 --
20 April the 16th, 2015, in fact responded to applicant,
21 indicates it has filed a motion for entry of judgement
22 and the motion is pending before the Circuit Court.
23 And so this Court never ruled on that motion and it
24 appears that the defendant has since on October the
25 22nd filed a renewed motion for entry of judgement in

1 the matter and we have had a status conference shortly
2 before then and for whatever reason we didn't take up
3 that matter at that point.

4 So we have this motion for an entry of judgement or
5 partial judgement that the Court has never ruled on.
6 It is still pending and we need to dispose of that.
7 So that's why I asked you to come here today. I think
8 we need to dispose of that on the record. So what I
9 would like to do, Mr. Ballou, unless you all have a
10 different way of approaching this, you made the
11 motion. I will ask -- and you have filed a brief and
12 Mr. Fennell has filed a brief on behalf of
13 Morningstar, but I would like for the purpose of the
14 record Mr. Ballou if you will state why we are here,
15 the basis for the motion and any legal basis by which
16 the Court should grant your motion and then I will be
17 glad to hear from Mr. Fennell and his position on what
18 you stated and then I do intend to issue a ruling some
19 time tomorrow morning.

20 MR. BALLOU: Thank you, Your Honor. May it please
21 the Court, Dan Ballou on behalf of the defendant York
22 County.

23 Your Honor has summarized the chronology that I
24 think is important to understand for purposes of
25 dealing with the motion that is before you. The

1 motion to exclude damages, and as the Court correctly
2 noted, was entirely a separate motion from the motion
3 In Limine which was filed just prior to trial.

4 THE COURT: Let me tell you all this. I may have
5 my head down writing. I don't mean any disrespect to
6 you. I am listening to you. I am listening, but I am
7 also trying to take notes too. So don't take that as
8 a personnel affront if I'm looking down.

9 MR. BALLOU: I appreciate that.

10 The motion to exclude damages was filed early on in
11 the case prior to really the bulk of discovery in the
12 case. It was filed around the same time as Judge
13 Kimball was resolving the motion for Summary Judgement
14 as to notice which was essentially liability as to the
15 contract claim, and of course Judge Kimball narrowed
16 the issues for trial to the question of reasonable
17 notice. Did the plaintiff get reasonable notice of
18 the approval of the site plan that was part of the
19 development agreement timeline and if it did then that
20 triggered certain obligations and information under
21 that development. So that issue was dealing with --
22 that Judge Kimball was dealing with.

23 Right around the time of Judge Kimball's Order on
24 reconsideration we filed our motion to exclude
25 damages, frankly under the concern that the

1 allegations of damages filed in the Complaint we felt
2 it would have some issues as to their ability to prove
3 a basis to go forward on this damage. So we filed
4 that motion early on, and then conducted discovery,
5 including depositions of Dave Yarnes, Dave Herr,
6 (Phonetics) Rick Joyner. Probably well over one
7 thousand pages of deposition transcripts resulting
8 from discovery. Substantial documents produced by
9 both sides were involved in these depositions and when
10 it came time at the conclusion of those depositions we
11 asked for a hearing at the same time it was a motion
12 for In Limine.

13 Now the Order that was rendered in February
14 actually combined both of these motions; the motion to
15 exclude damages and the motion In Limine. But we want
16 to be clear that the motion to exclude damages really
17 goes to the admissibility of all of those damages, the
18 ability of the plaintiff to put forth a sufficient
19 evidentiary basis to go forward on that claim for
20 damages. And as the Court considered these issues and
21 considered the deposition testimony transcripts that
22 were submitted by both sides, and I think you can
23 fairly characterize that as in the nature of a motion
24 for summary judgement although it wasn't styled that
25 way because when we filed it we expected there was

1 going to be an argument as to whether or not some of
2 those would be summary judgement or not.

3 In any event, the Court obtained voluminous
4 documents, deposition transcripts and rendered the
5 Order. So what I don't believe we are here today,
6 Your Honor, is to reargue that motion, and reconsider
7 that Order. There has been no motion for
8 reconsideration of that Order. Frankly there hasn't
9 been any supplemental discovery produced that could
10 rise to a reason to reconsider that Order.

11 That Order in our opinion is the law of the case,
12 and as it goes to the admissibility and the ability of
13 the plaintiff to proceed on its claim for money
14 damages, and in fact that is the way that the parties
15 have proceeded and is reflected in the memorandum that
16 was submitted both to this Court and to the Court of
17 Appeals.

18 We have all been operating understanding that Order
19 effectively eliminated that element of the cause of
20 action for breach. So where we got an Order that bars
21 the plaintiff from proceeding for its claim for money
22 damages because of its inability to meet its
23 evidentiary burden of proof to even get it to the jury
24 on those claims, the question becomes what is the
25 effect of that Order. And that's why as soon as we

1 got the Order from the Court granting our motion to
2 exclude damages we turned around and filed that motion
3 for entry of judgement. And in our view that is the
4 logical predicate to the motion to exclude damages.
5 If they can't prove damages they can't prove breach of
6 contract, and if they can't prove breach of contract
7 this Court should enter judgement as least to that
8 claim. And so the motion for entry of judgement filed
9 on February 4th, I believe, was basically saying, look
10 judge, you had excluded their damages. They can't go
11 forward on those damages, and as a result let's clean
12 up this case. Let's take that off the table. Issue a
13 judgement as to the breach of contract claim and we
14 still have to go forward with trial as to the issues
15 set forth in Judge Kimball's Orders denying summary
16 judgement. Which again, is the question whether there
17 is reasonable notice and the question of reasonable
18 notice goes to the question of whether or not the
19 plaintiff was in default under the development
20 agreement. So if you look at this case really as two
21 parallel and mirror imaged arguments over these
22 development agreement.

23 The plaintiff says the county didn't do what it is
24 suppose to do and so there was a breach of contract
25 and a claim of damages as a result. The county's

1 position in the reverse is the plaintiff did not
2 produce the information; the development agreement
3 required within 180 days of site plan approval and not
4 necessarily they styled as breached, but rather what
5 the contract says is default. So we got the
6 plaintiff's breach and you got the county's claim for
7 default, and the significance of default is that if
8 the county is successful in proving and establishing a
9 trial that there was a default under the development
10 agreement, the development agreement itself provides
11 that the plaintiff will be responsible for tearing
12 down the tower at its cost. So there is a remedy for
13 default built into this contract that the parties all
14 agreed to and negotiated, that the basis of the
15 county's counterclaim is that they did not provide the
16 information that was required under the DA; the
17 development agreement. The contract by its own terms
18 goes into a default and as a result we would be
19 entitled to an Order declaring that the plaintiff is
20 required to demolish the tower at its expense. So
21 that's the county's counterclaim. That is the issue
22 that we acknowledge we are going to try that case.
23 That is what Judge Kimball determined there was a
24 question of reasonable notice because if the plaintiff
25 is able to establish that there was not a reasonable

1 notice as set forth in Judge Kimball's Order, then
2 arguably they would be able to say, well, we are not
3 in default and so they would go back to a contract
4 that is not in default and there hasn't been a breach
5 and we will deal with that at that point.

6 This is a plaintiff's case and so they brought this
7 claim for breach. This Court has concluded that it
8 can not -- the plaintiff's can not move forward on
9 their claim for money damages. And so, what we are
10 asking the Court to do and what we had done initially
11 and then amended and now prior to trial are asking for
12 a ruling on, is that the effect of the Order granting
13 our motion to exclude damages should be an Order
14 granting judgement on those claims. And that's the
15 way the parties have been operating since February of
16 2015. That's how we understood the Order and we don't
17 think it's appropriate to try and get back in to
18 reconsidering that. But we think really the question
19 is now what do we do. How do we clean up this case
20 procedurally. And in fact as the court noted that's
21 exactly how Judge Few, the Court of Appeals, saw it.
22 The reason that when the plaintiff immediately
23 appealed the Order and we opposed the appeal we moved
24 to dismiss the appeal on the grounds that it was
25 interlocutory; not immediately appealable on the

1 grounds that there was no final Order yet. But we
2 have filed a motion to get one. And Judge Few agreed.
3 He said, look -- and he invited the plaintiff once the
4 judge -- the Court rules in that Order and enters
5 judgement then there is nothing stopping the plaintiff
6 from appealing at that point and the interlocutory
7 nature of that Order is removed. Because the basis of
8 the appeal was that the Order was of the nature that
9 effected the substantive rights of one of the claims
10 that the plaintiff had. We are not here to argue
11 whether or not it does but at least for purposes of
12 appellant record there are was no Final Order that the
13 Court of Appeals could review.

14 THE COURT: All right. Then my question is and
15 then procedurally we call that a Rule 54-B motion?

16 MR. BALLOU: Well, we have styled it under 54 --
17 under 56 because I think under the rules since the
18 Court has received the materials --

19 THE COURT: All right, and so that's my question.
20 I need you just educate me on what is the legal basis
21 by which I issue a final judgement?

22 MR. BALLOU: The legal basis would be that the
23 plaintiff -- that the Court has now issued an Order
24 that eliminates an essential element of the
25 plaintiff's cause of action for breach of contract

1 damages. If the plaintiff can not prove damages they
2 can not prove a breach. And so under Rule 58, upon a
3 decision by the Court, 58 A-2 granting of the relief,
4 the Court shall promptly prepare the form of the
5 judgement, shall direct counsel to prepare the form of
6 the judgement to attach to the decision. So we really
7 think that either under 58 or under a 56 summary
8 judgement analysis this Court is -- is fully
9 authorized and properly should enter judgement. Take
10 that claim off the table as we get ready for trial and
11 limit the issues that would go in front of the jury.

12 THE COURT: All right. Thank you Mr. Ballou.

13 Mr. Fennell, I will be glad to hear from you.

14 MR. FENNEL: Thank you, Judge.

15 It could be that I and maybe Dan, misunderstood
16 what you told us back in chambers. I have written
17 twice in response to his motion for entry of
18 judgement. Something similar to what he just said.
19 Which is that when the February 2nd Order and February
20 3rd Order was entered that eliminated an essential
21 part of my second cause of action for damages and that
22 I agree that judgement should be entered on that
23 claim.

24 The only response, or the reservation in my
25 response was in our initial motion they wanted to have

1 judgement entered on the first cause of action which
2 is an awkwardly phrased declaratory judgement, and
3 then in the second it was to have judgement entered on
4 the whole case. And I think both of those requests
5 are improper. The reason why the declaratory
6 judgement and the way that I plead it becomes an issue
7 is because the issues that I asked for you to declare
8 are basically part of my affirmative defenses to their
9 breach of of contract claim, and if the first cause of
10 action and the second cause of action judgement is
11 entered as to both of those I was worried it would
12 limit my ability to present evidence as to my
13 affirmative defenses as to their breach of contract
14 claim. Going back to what I said initially, I was
15 under the impression when I heard you in chambers a
16 few weeks ago that you were revisiting everything and
17 that you wanted to hear all of the evidence in the
18 context of trial, and that you would either make the
19 same decision, make a different decision, but that you
20 did not feel bound by your rulings in February because
21 you wanted to hear all the evidence in that context.
22 And your well within --

23 THE COURT: Well, let me stop you there. I think
24 you are exactly right. I think that is what I
25 communicated at the time and today I believe that I

1 was erroneous in -- in putting us in that position. I
2 bear the burden of that. But that's also why I felt
3 like we needed to have a hearing today --

4 MR. FENNELL: Yes, sir.

5 THE COURT: -- because we had not -- we had not
6 -- and erroneously at that time we had, and I lend us
7 to that point, but we had not -- the Court had not
8 ruled on the pending motion that Mr. Ballou had filed
9 and which was referenced by the Court of Appeals and
10 then which he filed and renewed. And so I do
11 apologize if I put us in this sort of awkward position
12 again.

13 You understood correctly where I thought we were
14 during that in chambers meeting, but I think where we
15 are today I am convinced is the proper path we should
16 be taking.

17 MR. FENNELL: Yes, Your Honor so if the Court has
18 decided that its ruling in February is still the law
19 of the case and is inclined to follow what it ruled
20 back then then I really don't have anything that I can
21 say, even if I wanted to that would defend against
22 their motion as to entry of judgement as to my second
23 claim. I stand by the things that I said with respect
24 to the first claim in the affirmative defenses.
25 Damages is not part of a affirmative defense that says

1 you breached a contract first and because you breached
2 the contract first you can't sue me for this breach.
3 Damages would be a part of an affirmative claim asking
4 for -- asking for relief as a result of that, but if
5 your February ruling stands I can't argue that, and I
6 readily admitted it. I readily admitted it a couple
7 of times.

8 The reason why I thought Your Honor was inclined to
9 revisit the ruling is because the arguments that we
10 had in February were really motion In Limine-type
11 arguments. The motion to exclude damages was not
12 couched as Rule 56 motion. We didn't argue as a 56
13 motion. It was motion In Limine-type event, and South
14 Carolina law, I believe, says that a motion In Limine
15 is a motion In Limine, and that you shouldn't enter
16 judgement based on rulings on motions In Limine. You
17 should hear how the trial plays out. I think that is
18 what the law is, and we'll figure that out when we go
19 on appeal. But again, if Your Honor is inclined to
20 stand by the ruling in February I respect that and I
21 understand it, but I would ask you in your ruling that
22 it not enter judgement as to my first claim. I think
23 that there is a way procedurally that Dan and I can
24 agree on how we can try the case that isn't going to
25 make it so messy. But the second cause of action I

1 believe is gone if Your Honor is inclined to stand by
2 the February ruling. And Judge Kimball has already
3 dismissed the third cause of action.

4 THE COURT: All right. Thank you.

5 MR. BALLOU: Your Honor, if I may address the
6 issue that counsel touched on with regards to the two
7 claims -- two causes of action that were presented
8 that remain; the breach and declaratory judgement.
9 Our position -- and I apologize with the amended
10 motion that I filed, but I will inform the Court that
11 my experience at least with other judges -- Judge
12 Kimball in particular -- that if I did not ask for
13 partial summary judgement he would look at it as it is
14 all or nothing. So I wanted to make sure that the
15 Court was comfortable that I was asking this Court to
16 parse out what it felt was appropriate and dismiss
17 what should be if it felt that not all of the case
18 should be dismissed, and clearly we have
19 counterclaims. I want to make sure that at least the
20 Court had the flexibility to issue the kind of Order
21 that would do justice to the case.

22 Now, the merits of the motion as it relates to the
23 declaratory judgement action is something I haven't
24 touched on yet. Our position on that, Your Honor, is
25 simply that the declaratory action plead by the

1 plaintiff is essentially a derivative claim of the
2 breach of contract claim. So, the position on that
3 motion was simply that if the breach of contract claim
4 is gone there really isn't a declaratory judgement to
5 render. I would readily admit however that the
6 declaratory judgement is really two sides of the same
7 coin. It's a declaratory judgement as to the
8 development agreement and to whether or not there was
9 a default and whether or not there was an excuse for a
10 default and what the implications of the facts
11 surrounding notice, communication between the parties
12 and that's really what is left to be tried. So, I
13 think there is a basis to dismiss all of those causes
14 of action, but certainly if the Court is willing to
15 dismiss the breach of contract claim -- and I agree
16 with Rich that we can structure the presentation of
17 evidence as to the reasonable notice issue that we've
18 been fighting about all along so that we can
19 streamline that for trial.

20 MR. FENNEL: Yes.

21 THE COURT: Well, where would that -- if I granted
22 the defense's motion for entry of judgement, where
23 does that leave us? Does that -- I mean, obviously
24 Mr. Fennell would then be in a position for his client
25 to determine whether they are going to appeal that

1 ruling. And I assume then if I rule that way you
2 appeal then we have no trial until the appeal is
3 completed.

4 MR. FENNELL: Yes, Your Honor.

5 MR. BALLOU: I think you have three -- really two
6 options. You can grant the judgement as to just the
7 breach. You could grant the judgement as to both the
8 plaintiff's causes of action, but in either case as
9 Judge Few indicated, once that Order is entered if the
10 plaintiff chooses this he can appeal immediately. If
11 they don't we try the case and if they want to appeal
12 after that they can do that. That will be the
13 question for the plaintiff.

14 THE COURT: What does the trial look like if I
15 granted your motion?

16 MR. FENNELL: I think if you grant the defendant's
17 motion the defendant becomes the plaintiff and the
18 plaintiff would then be able to put on evidence as --

19 THE COURT: Of the default. We get into the issue
20 of default and whether the jury is going to require --
21 find that the judge needs to issue an Order requiring
22 Morningstar to tear the building down.

23 MR. FENNELL: And that will be an issue that we
24 will have to argue on as to how I interpret that
25 particular provision in the contract. But the only

1 issue for trial would be whether the notice that was
2 given -- because Judge Kimball found that notice was
3 in fact given, was reasonable under all the
4 circumstances. And then we would have a trial as to
5 what all the circumstances means and secondarily a
6 trial as to whether that notice was reasonable.

7 THE COURT: Okay.

8 MR. BALLOU: I think that is a fair assumption.

9 THE COURT: Anything else?

10 MR. FENNELL: No, sir.

11 THE COURT: All right. Thank you all. Again, I
12 apologize for putting you in this position where you
13 have to come back and keep beating this horse to
14 death. I'm responsible for that. But we will do our
15 best to be sure that we are clear in the Order.

16 MR. FENNELL: Yes, Your Honor.

17 MR. BALLOU: Thank you.

18 THE COURT: Thank you all.

19 END OF TRANSCRIPT
20
21
22
23
24
25

C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 27th day of October, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 28, 2015

Aileen Butler

STATE OF SOUTH CAROLINA
COUNTY OF YORK

COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No: 2013-CP-46-00246

MORNINGSTAR FELLOWSHIP
CHURCH,

Plaintiff,

vs.

YORK COUNTY, SOUTH
CAROLINA,

Defendant.

Volume II
Deposition of Rick Joyner
January 20, 2015
At 9:30 a.m.

Taken at:
Hamilton Martens Ballou & Carroll, LLC
Rock Hill, South Carolina

Reported by LeShaunda Cass-Byrd, CSR, RPR

1 economy than we initially thought to get to this
2 milestone. But given the time constraints of our
3 development agreement, we should have plenty of time
4 to complete everything within the five years allotted
5 for our PD plan. Please feel free to contact us with
6 any questions about our project."

7 That is what he writes?

8 A. Yes.

9 Q. Okay. On January 12th of 2010, he does not
10 ask where is our site plan approval, does he?

11 A. No.

12 Q. Even though he had asked you several months
13 earlier about the site plan and you instructed him to
14 wait until after --

15 A. I'm not sure that it was him that asked me.
16 It could have been he or Dave.

17 Q. Okay. Do you recall any conversation with
18 Pat Selvey about the significance of a stamped set of
19 plans?

20 A. No.

21 Q. Pat Selvey never told you that he
22 considered that a site plan was not approved until he
23 received a stamped set of plans?

24 A. No. And that doesn't -- just Pat saying
25 that doesn't mean that's the case anyway.

1 Q. And that is not Morningstar's position?

2 A. That is not our position at all. I mean,
3 you have got to have those stamped plans. But you
4 know, are you -- those -- that is not what tells you
5 it's done. The letter tells you it's done.

6 Q. So is it Morningstar's position that the
7 only way to comply with Paragraph 2 on Page 5 of the
8 development agreement is by the delivery of York
9 County of a registered or certified letter, notifying
10 you, Rick Joyner, that the site plan had been
11 approved?

12 A. Absolutely. It's clear. That is the
13 agreement.

14 Q. And if -- strike that.

15 And is it Morningstar's position that
16 anything short of a certified or registered letter
17 containing a notice of site plan approval is
18 insufficient to start any time periods running under
19 the development agreement?

20 A. Absolutely. You've got to have that
21 letter. Lenders got to have the letter. Everybody
22 has got to -- nothing happens without that.

23 Q. And is it Morningstar's position that the
24 fact that a certified or registered letter containing
25 a written notice of site plan approval, the fact that

1 that was not delivered to you is a breach of the
2 development agreement?

3 A. Absolutely.

4 Q. And how was that a breach of the
5 development agreement?

6 A. It's in the agreement. Because it's part
7 of the agreement. And I wanted it in the agreement
8 because I am the one that has to pull the trigger on
9 all of this. I'm the one ultimately responsible. So
10 if I don't get the letter, if I don't -- I want to be
11 sure I get the notice and I know. Because then
12 everything changes in our organization. And I have
13 got to be the one to make that happen. But that is
14 standard business. Yeah, that is...

15 Q. And how was Morningstar damaged by not
16 receiving a certified or registered written notice of
17 site plan approval?

18 A. The first thing is we didn't know that the
19 meter had started running, so we were not geared up.
20 We weren't -- we hadn't pulled the trigger on our
21 sales and on our marketing, on our financing, on
22 anything else. You know, we are just moseying along,
23 not -- you know, we are doing -- we are working.
24 working hard. But not doing things we would have had
25 to do to get the -- the 180-day, you know,

STATE OF SOUTH CAROLINA
COUNTY OF YORK

COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
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CHURCH,

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Defendant.

Volume III

Deposition of Rick Joyner
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At 9:30 a.m.

Taken at:
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Reported by LeShaunda Cass-Byrd, CSR, RPR

1 being sought by MorningStar in this case. Let me read
2 a statement to you, and we will start from there.

3 It says on Page 4 of the pretrial brief,
4 MorningStar further contends that it has lost the
5 value of the work in place, 11,887,719, because of the
6 County's actions if the tower is in fact demolished.

7 Is that MorningStar's position as to that
8 element of damages?

9 A. Yes.

10 Q. Okay. I'm going to show you -- these are
11 separate exhibits. This is 36, 37.

12 36 is a Statement of Probable Cause For
13 Completion of Heritage Towers. 37 will be Capital
14 Consultants, January 30th, 2007, Statement of Probable
15 Cost. 38 will be Capital Building Consultants Summary
16 of Probable Costs.

17 A. Uh-huh (affirmative).

18 Q. And 39 will be Capital Building Consultants
19 Statement of Probable Construction Costs. Just so
20 we've got these marked.

21 (Defendant's Exhibits 36, 37, 38 and
22 39 were marked for identification.)

23 BY MR. BALLOU:

24 Q. All right. So let's start with Exhibit 36,
25 Statement of Probable Costs for Completion of Heritage

1 Towers.

2 Have you reviewed that document before
3 today, sir?

4 A. I believe so.

5 Q. Okay. And what do you understand that
6 document to be?

7 A. Statement of probable costs.

8 Q. And what does that mean to you?

9 A. Well, this is, you know, a best estimate of
10 what it would cost to finish the tower.

11 Q. Okay. And this is a document that was
12 prepared by Mr. Eddie J. Brown, CPE --

13 A. Uh-huh (affirmative).

14 Q. -- correct?

15 Who is Eddie J. Brown, CPE?

16 A. The best of my recollection, he was a part
17 of an accounting firm that we were -- contracted to do
18 the studies on the feasibility of finishing the tower.

19 Q. Do you know what he did to prepare this
20 document?

21 A. That's a long time ago. I'm sorry.

22 Q. Okay.

23 A. But hopefully, he did a -- did a good job.

24 Q. So this was done at a time when MorningStar
25 was trying to determine what the cost to restore the

1 tower was going to be?

2 A. Correct.

3 Q. And prior to the entering into the
4 Development Agreement?

5 A. Yeah.

6 Q. Okay. And the Statement of Probable Costs
7 For Completion of Heritage Towers starts with, Number
8 1, a current day cost model for 308,547 square feet
9 with no site work, of 45,109,375, right?

10 A. Correct.

11 Q. And do you understand that number to
12 represent the current day cost of building the tower
13 from scratch?

14 A. Not from scratch. But I believe it was --
15 no, I believe it was finishing that tower.

16 Q. With no site work?

17 A. Correct.

18 Q. Okay. To complete that tower, it would
19 cost \$45 million?

20 A. That is what it appears.

21 Q. Okay. Number 2, Statement of Probable
22 Costs salvageable work in place, 11,889,719. What do
23 you understand that number to represent?

24 A. The value of the building as it stood in
25 its present condition.

1 Q. The total value or the value of the
2 materials that would not have to be --

3 A. Well, it was --

4 MR. FENNELL: Objection.

5 Go ahead.

6 BY MR. BALLOU:

7 Q. Well -- so tell me again what you
8 understand that to mean.

9 A. The estimated -- that was the low number of
10 the estimated value of the building as it stood right
11 then.

12 Q. Is that what salvageable work in place
13 means to you?

14 A. Correct.

15 Q. And so how does that number relate to the
16 \$45 million number?

17 A. Well, that should be subtracted off.

18 Q. Why?

19 A. Because we've already got that much done.

20 Q. Okay.

21 A. You know.

22 Q. Okay. So that is the value of the
23 partially constructed building that you don't have to
24 spend in order to complete the project?

25 A. Correct.

1 Q. All right. For a subtotal probable cost of
2 33,219,656?

3 A. Correct.

4 Q. Okay. And then Number 3, cost opinion of
5 clean-up and demolition at the existing building,
6 539,950.

7 what clean-up and demolition of the
8 existing building did you understand had to be done?

9 A. Well, that include things like the brick
10 facade was coming off in parts. Our study showed we
11 would not have to remove the whole brick facade but
12 just sections.

13 Q. Okay.

14 A. And, you know, just all of the other
15 general clean-up. We were going to have strip out a
16 lot of the rooms that had been partially completed.

17 Q. And so there was work in place that was not
18 salvageable, right?

19 A. Yes.

20 Q. And so that demolition of that work that
21 was not salvageable would be included within this
22 Number 3?

23 A. Yes.

24 Q. As you understand it?

25 A. Uh-huh (affirmative).

1 Q. Okay. All right. Number 4, opinion of
2 cost for adding plus or minus 80,000 square feet to
3 the existing building while achieving current code
4 requirements.

5 What was the 80,000 square feet
6 representing?

7 A. Well, you know, when we -- preliminary
8 studies, you know, a big concern was bringing it up to
9 present seismic standards --

10 Q. Uh-huh (affirmative).

11 A. -- that could be substantial. So instead
12 of -- they just wanted -- you know, the way engineers
13 think, pour a bunch of concrete, and we can fix this,
14 and it would cost that.

15 I said, well, let's just don't pour a bunch
16 of concrete. Can we add square footage that is usable
17 while doing that? Let's come with up a plan where
18 it's not just wasted concrete, but where it braces the
19 building sufficiently to meet those standards but
20 gives us additional square footage that is sellable
21 and adds to the value of building.

22 Q. Where was that additional square footage
23 going to go?

24 A. Well, it was -- it really -- you know, how
25 the building is -- it's kind of wide and narrow. You

1 really need to brace it this way (indicating) for the
2 seismic standards. So I -- I believe we looked at a
3 number of different ways to do it, to just build out
4 on both ends in a way that would brace it this way
5 (indicating). But, you know, like I said, I wanted to
6 do it in a way that added value, so it's not just
7 throwing \$18 million away.

8 And then we -- when we actually got into
9 it, one of the reasons the numbers changed was they
10 said it was built so well, it already met the
11 standards --

12 Q. Okay.

13 A. -- inside. The -- we didn't have to do
14 that.

15 Q. And that item was \$18 million?

16 A. That's what it was then.

17 Q. Okay.

18 A. Uh-huh (affirmative).

19 Q. And so with the current day cost of
20 completion, minus the salvageable work in place --

21 A. Uh-huh (affirmative).

22 Q. -- plus clean-up, plus the additional
23 80,000 square feet, you were contemplating came to a
24 total probable cost of 51,759,606?

25 A. Correct.

1 Q. All right. And the amount that MorningStar
2 is seeking in damages for loss of the value of the
3 work in place is the 11,889,719?

4 A. Correct.

5 Q. All right. And Exhibit 37 more
6 specifically relates to that number, does it not?

7 A. Yes.

8 Q. What does that say?

9 A. Having physically visited the subject
10 building, reviewed all available design documents as
11 prepared by James C. Thompson, Architect, it is our
12 opinion that the current day cost of the salvageable
13 work in place for this building is in the range of
14 11,889,719.

15 Q. And who signed that?

16 A. Eddie Brown.

17 Q. Okay. And Exhibit 38, what is that?

18 A. These are Capital Building Consultants
19 Summary of Probable Cost.

20 Q. Do you understand that Exhibit 3 is a
21 breakdown of how Eddie Brown reached the number of
22 11,889,719?

23 A. It does appear that way.

24 Q. And that's just a calculation of the
25 salvageable concrete, steel, whatever he felt was --

1 could be used in the project to complete the
2 renovation of the building?

3 A. Correct.

4 Q. Okay. And Exhibit 39, Statement of
5 Probable Construction Costs. Is it your understanding
6 that that page relates to the first number on
7 Exhibit 36, which is the current day cost model?

8 A. It appears that way.

9 Q. Okay. And so all of these documents
10 support this -- in your opinion, this statement from
11 Eddie Brown as to probable cost for completion of
12 Heritage Towers, that is where those numbers come
13 from?

14 A. Correct.

15 Q. Okay. The 11,887,719 is the value of the
16 work in place that would not have to be paid for if
17 you complete the tower?

18 A. Correct.

19 Q. All right. Are you aware -- has Mr. Brown
20 prepared any other documents supporting his assessment
21 of what the salvageable work in place or what the lost
22 value of the tower would be or any other documents
23 that MorningStar intends to offer in support of this
24 claim for damages at trial?

25 A. He may have. I'm not aware.

1 Q. You are not aware?

2 A. No.

3 Q. Okay. Has Mr. Brown given you any
4 statement that indicates that his assessment of these
5 numbers is no longer correct?

6 A. No.

7 Q. Okay. You intend to have him at trial to
8 testify to this?

9 A. Yes.

10 Q. And MorningStar contends that it has lost
11 this value because of what the County has done?

12 A. Correct.

13 Q. If the tower is in fact demolished?

14 A. Yes.

15 Q. Okay. Under what circumstances will the
16 tower be demolished, sir?

17 A. If we could not -- went in there and found
18 out there had been further deterioration. And, you
19 know, that we -- it just -- what was there has
20 deteriorated beyond what could be restored and
21 repaired.

22 Q. And do you know whether or not that is the
23 case?

24 A. No, we don't. We would have to do redo all
25 of the studies to find out.

1 Q. And in fact, don't you have experts who
2 have submitted reports in this case, sir, that say
3 that they have in fact inspected the building as
4 recently as 2014?

5 A. 2014?

6 Q. Has Stewart Engineering come back to
7 inspect this building since the filing of this
8 lawsuit?

9 A. I'm not aware of that.

10 Q. You are not aware of that?

11 A. I don't recall that at all.

12 Q. You don't recall --

13 A. They may have had a walk-through or
14 something. They definitely have not gone back to do
15 their -- you know, I mean, that involves x-raying the
16 walls, the floor. I mean, no, they haven't done that.

17 Q. But the point is you don't know whether or
18 not --

19 A. We won't know until we get back and redo
20 the studies.

21 Q. And it's your contention that all of the
22 studies need to be redone in order to determine
23 whether or not the tower can still be repaired and
24 restored?

25 A. Start from scratch, we are going to have to

1 go back to Stewart and say, we got to do this again.

2 Q. Who determined that you are going to have
3 to start from scratch?

4 A. Well, we received word from, you know, the
5 County basically that this has certainly been
6 deteriorated to the point where it's not going to be
7 able to be restored now. Now, I'm considering that,
8 no, I want to check that out again, you know.

9 Q. Well, let's go back to your allegation that
10 the loss -- that MorningStar has lost 11,887,719
11 because of the County's actions if the tower is in
12 fact demolished.

13 A. Correct.

14 Q. And your testimony is that if the tower has
15 deteriorated to the point that it can no longer be
16 restored, it would have to be demolished?

17 A. That is true.

18 Q. Under what other circumstances would the
19 tower be demolished?

20 A. Well, the only other are that we have taken
21 this through all of the appeals and never won.

22 Q. So you lose?

23 A. Yeah, we lose.

24 Q. And have you ever heard of a case where a
25 party lost the lawsuit and was awarded damages?

1 A. I haven't heard of a case like that.

2 Q. Is it your contention that if MorningStar
3 loses this case, it should be entitled to 11,887,719?

4 A. Well, we're not going to lose. We're going
5 to keep appealing or whatever.

6 Q. That is not my question, sir. My question
7 is, do you contend that if MorningStar loses this
8 case, it is entitled to a damages award of 11,887,719?

9 A. I do believe we're --

10 MR. FENNEL: Objection.

11 Go ahead.

12 THE WITNESS: Okay. Yes, I do. I
13 believe we are entitled to those damages.

14 BY MR. BALLOU:

15 Q. If you lose?

16 A. Yes. I don't know else to answer that.

17 Q. Okay. So if your engineers determine that
18 it can't be salvaged, if you lose, under what other
19 circumstances as you sit here today will the tower be
20 demolished?

21 A. That is it.

22 Q. Okay. And your testimony, as we sit here
23 today, is that you are not aware that your own
24 engineers have conducted an inspection of the building
25 and concluded that the building is in essentially the

1 same state it was in in 2008?

2 A. I am not aware of that. And I can't
3 imagine it being done because I would have heard of
4 that.

5 Q. And you are not aware that your engineers
6 and your architect have rendered an opinion that the
7 cost to renovate and restore this building has not
8 significantly changed since 2008?

9 A. Well, let me --

10 Q. Yes or no, and then you can explain. Do
11 you understand that to be the case?

12 A. I -- no, I do not.

13 Q. Okay.

14 A. Now, to explain, they may have done a brief
15 walk-through or something and given an opinion. But
16 that is an opinion that I would not consider an expert
17 opinion if it's -- or I wouldn't say not expert, but
18 it would not be sufficient. I mean, to really
19 determine that to be true, you're talking -- we've got
20 to go back in, we've got to do the x-rays, the --
21 everything from scratch, because there has been such a
22 period of time that has passed.

23 Q. And so your position, MorningStar's
24 position is that the -- the -- if J.C. Woodall and
25 Stewart Engineering, Chris Herron, Stewart

1 Engineering, rendered an opinion that the building can
2 be completed without a substantial increase in cost,
3 that is not an acceptable opinion to MorningStar?

4 A. No. If they have done the research to the
5 degree they put their stamp on it, which rendering an
6 opinion is not the same as stamping the thing and
7 putting their name on it, basically. Until they put
8 their stamp or their name, it's just an opinion. And
9 it may be an educated opinion, but it's not verifying
10 that this can be redone.

11 Q. Because we don't know?

12 A. At this point, we don't know.

13 Q. You've got no basis to say whether or not
14 the building can be restored based on its current
15 state?

16 A. We've got --

17 MR. FENNEL: Objection.

18 Go ahead.

19 THE WITNESS: Correct. We've got to
20 do the studies again.

21 BY MR. BALLOU:

22 Q. Okay. And so -- strike that.

23 And so MorningStar doesn't know whether or
24 not it's entitled to 11,889,719, does it?

25 A. We do know. We are entitled to that. That

1 is how much the County would have cost us.

2 Q. But you don't know if the tower has to be
3 demolished, do you? You just testified you don't
4 know, didn't you?

5 A. Yeah, I said if we go in and if we find out
6 differently that it can be restored, then that number
7 wouldn't need to be adjusted, and I would work on
8 adjusting it.

9 Q. And you haven't done that today?

10 A. We can't. There is no way we can.

11 Q. So the answer is no, you have not --

12 A. No.

13 Q. -- done that today?

14 A. Have not done it today.

15 Q. A week before trial?

16 A. We've -- there is no way to do it. I mean,
17 these are extensive studies and all that will have to
18 be done, that we can't just go and spending all of
19 that until we know that we can move forward on this.

20 Q. And so the cost of -- the value of the
21 salvageable work in place right now is a matter of
22 pure speculation, isn't it?

23 A. Not pure speculation. I'd say very
24 educated, very clear and specific studies that have
25 estimated the value of that building.

1 Q. That have not occurred?

2 MR. FENNELL: Objection.

3 THE WITNESS: That have not occurred?

4 BY MR. BALLOU:

5 Q. Didn't you say that these studies
6 haven't --

7 A. No, the orig- -- the ones that set the
8 value of that building have occurred.

9 Q. And my question to you is, under what
10 circumstances are you entitled to that, and your
11 testimony was, you don't know whether or not the
12 building can be restored.

13 A. That is correct. And this is what I would
14 propose in working out. And I can't, you know, speak
15 because I do have a board of directors and all, and I
16 do have to submit certain things to them. But if we
17 win this case, we win across the board, and it said
18 that value was deprived of us, I would be absolutely
19 fine to put that number in escrow and say, okay, let's
20 go in, let's do the studies.

21 Let's just say we find out that it's only
22 that you need -- it's only going to cost a million
23 more. Then I don't want that money from the County if
24 it -- if in fact we get in there and we find that that
25 has -- you know, is salvageable, we can go forward. I

1 think that it should be in escrow because we could
2 have lost the whole thing. If we lose and that
3 building cannot be restored, we're due that. If we
4 find out it's only going to cost a certain amount, I
5 think it should be taken that the County cost us that
6 money, and we should be able to take that out of the
7 escrow. And I would be glad for the rest to be
8 returned to the County.

9 Q. So if your engineers have testified that
10 there is no increase -- no substantial increase in the
11 cost of the work to restore the tower since 2008?

12 A. If under the full study, when we get back
13 in and do the whole thing, Stewart Engineering,
14 everyone, to really verify the safety and everything
15 else of that building, then I would -- that's -- I
16 would agree to that.

17 Q. And so if MorningStar wins this case --

18 A. Uh-huh (affirmative).

19 Q. -- and the testimony of their engineers is
20 that there is no substantial increase in the cost of
21 repair and restoration, how much is MorningStar do you
22 believe entitled in damages on this account?

23 A. On that account? Whatever additional costs
24 we do have to -- that maybe will have to be borne to
25 finish that building.

1 Q. whatever that might be?

2 A. whatever it might be.

3 Q. As proven in trial?

4 A. As proven by the engineers and the study
5 and the work after we get this going.

6 Q. At trial?

7 A. At trial? Not at trial.

8 Q. We are going to trial in ten days.

9 A. Yes.

10 Q. And MorningStar will have to put up
11 evidence of its damages, right?

12 A. And we are putting that up.

13 Q. Okay. And whatever that difference is
14 between the cost to complete in 2008 and the cost
15 today, if the building can be restored, is your
16 element of damages?

17 A. From that number.

18 Q. Okay. Given the information that is
19 available to MorningStar today, can you state with any
20 reasonable certainty what those additional costs are?

21 A. No.

22 Q. Okay.

23 (Defendant's Exhibit 40 was marked for
24 identification.)

25 BY MR. BALLOU:

1 Q. Okay. All right. Administration, tell me
2 again who development staff is?

3 A. This is the team that was put together
4 about this project.

5 Q. Okay. And who did that include?

6 A. That included Dave, Pat, Gary, Tiffany
7 Taylor for a period of time -- during this period of
8 time Tiffany would have been in there. All the
9 support staff.

10 Q. Okay. We previously looked at the prior
11 version of this spreadsheet, and under Administration,
12 it says Development Staff -- and this is on
13 MorningStar Document 153 -- Development Staff, and on
14 the side it says Project Manager and Director of
15 Salvage. Okay.

16 A. Yes.

17 Q. Is that not the same calculation that was
18 included at the top for construction staff, sir?

19 A. I don't believe it is, no. There may have
20 been some overlap but...

21 Q. Who was responsible for differentiating
22 between development staff under administration and
23 construction staff under construction?

24 A. Dave Yarnes.

25 Q. Dave Yarnes did that?

1 A. He was responsible for that.

2 Q. And have you reviewed his work on that?

3 A. I did review it, and I thought it was
4 accurate.

5 Q. And when Dave Yarnes included himself and
6 Pat Selvey and Gary Sanderson under construction
7 staff, and included himself and Pat Selvey and Gary
8 Sanderson under administration development staff, how
9 did you understand he differentiated between those two
10 line items?

11 A. It would have been the time they were
12 allotting to the different duties.

13 Q. And so is it your contention that Dave
14 Yarnes went through the process of differentiating not
15 only what time was included on the tower project but
16 what time on the tower project was allocated to
17 construction versus administration?

18 A. Well, the --

19 Q. Did he do that?

20 A. I assume that he did.

21 Q. You don't know that?

22 A. No, I was not involved in it.

23 Q. All right. Did you instruct Dave Yarnes to
24 do that?

25 A. I instructed Dave to get accurate numbers

1 for all of these things.

2 Q. And those were your instructions to him?

3 A. Yes.

4 Q. And you haven't independently verified
5 whether or not he in fact did that?

6 A. I went through the numbers. We went
7 through them in the last couple of days, reviewed
8 them, and felt like we -- these are as conservative --
9 they're real, they were real costs, but they're
10 conservative. I think our costs are higher than this
11 on all of these.

12 Q. And so you went through and you verified
13 what he had done?

14 A. As much as I could, to the degree that I
15 could.

16 Q. Okay. And so how did you verify that a
17 certain cost would be allocated to Dave Yarnes for
18 development staff versus Dave Yarnes for construction
19 staff in Cycle 1?

20 A. Well, the construction is dealing with the
21 construction of the tower. The development includes
22 the marketing and everything else. I thought they
23 were -- I thought he got it right.

24 Q. Right. So how did you -- how did you
25 distinguish between those two?

1 A. Well, the construction is you are talking
2 about the structure -- building the building.

3 Q. Right.

4 A. The rest is everything dealing from finance
5 to marketing to the development of the project.

6 Q. And so how did you go through Dave Yarnes'
7 time in Cycle 1 and allocate some time --

8 A. I didn't do that. Dave did that. I just
9 looked at the backup he had for that stuff, and I
10 thought it was very -- very -- very well done.

11 Q. Okay. And so you don't know how he went --
12 what process he went through to allocate certain time
13 to construction versus certain time to administration?

14 A. Not specifically.

15 Q. Okay. Only Dave knows that?

16 A. Dave would know that.

17 Q. Anyone else?

18 A. Possibly.

19 Q. Who?

20 A. People in the accounting department that
21 worked on it.

22 Q. Who?

23 A. I wouldn't know.

24 Q. Okay.

25 A. Whoever he used.

1 Q. All right. And we've got this training for
2 Microsoft Project. You are seeking to be reimbursed
3 for the cost of having your staff trained on a
4 Microsoft program?

5 A. Yes.

6 Q. And is it your contention that those people
7 would have to be retrained on this program?

8 MR. FENNEL: Objection.

9 THE WITNESS: They possibly would not
10 even be retrained on this program. I think
11 this program is now obsolete. It's just
12 old and obsolete. I don't think it's
13 usable at all. I did ask him that.

14 BY MR. BALLOU:

15 Q. What is Microsoft Project?

16 A. You know, it's a program for project
17 management.

18 Q. And it's your contention that the cost for
19 that is completely lost?

20 A. I believe so, yes.

21 Q. And you didn't -- MorningStar did not use
22 Microsoft Project on any other work --

23 A. No, not that I'm aware of.

24 Q. Okay. All right. Administration costs,
25 what does that reflect?

1 A. Administration costs.

2 Q. what does that mean?

3 A. All of the administration to backing up the
4 project to that point.

5 Q. So what does that include?

6 A. That can include everything from, you know,
7 staff support to -- I mean what it takes to administer
8 something like that, all of the studies, the time
9 spent, the meetings, the...

10 Q. what do you understand -- if I wanted to go
11 and look at what \$35,000 represents, what supports
12 that number \$35,000, what documents would I look to?

13 A. well, we went through the documents. I
14 can't specifically remember those. But I remember
15 saying, this looks valid. But I can't tell you
16 exactly now.

17 Q. You looked at all the documents that added
18 up to \$35,000?

19 A. We went through those over the last few
20 days.

21 Q. And so what documents were those?

22 A. I can't recall.

23 Q. Were they receipts?

24 A. I can't recall.

25 Q. You don't know what they were?

1 A. I can't recall.

2 Q. And you looked at them within the past few
3 days?

4 A. Yes.

5 Q. And you can't recall what documents --

6 A. I'm sorry, I've looked at so much stuff,
7 I've got mind overload.

8 Q. And so as we sit here today --

9 A. I remember looking at those --

10 Q. Let me finish my question.

11 A. Okay. Sorry.

12 Q. If I wanted to go back and verify what
13 expenses are classified as administration costs for
14 cycle 1, as we sit here today, can you tell me what
15 documents I would need to look at --

16 A. I cannot.

17 Q. -- to do that?

18 A. I cannot.

19 Q. Okay. All right. Marketing firm CRSA,
20 \$32,500. That was the original marketing company for
21 this project?

22 A. Yes.

23 Q. Who hired CRSA?

24 A. We did.

25 Q. Who was responsible for --

1 A. Dave.

2 Q. Dave was. And how long did CRSA work on
3 this project?

4 A. I don't know specifically.

5 Q. They worked a pretty short time, it was
6 about a month or two, didn't they?

7 A. No. No. It was much longer than that.

8 Q. Okay.

9 A. I'm sorry, I was thinking of SB&A. CRSA --
10 my mistake.

11 Q. Okay. So they only worked a short period
12 of time?

13 A. I can't confirm that.

14 Q. All right. And they were brought in by
15 Dave Yarnes?

16 A. Yes.

17 Q. Are they the ones that you testified to
18 earlier, sir, that you didn't -- you didn't approve of
19 because they weren't Christian or didn't know the
20 church?

21 A. You know, they may have been Christian.
22 They may have been -- that -- that wasn't the point.
23 The point was, you know, we didn't want just
24 Christians or -- in this thing. We were looking at
25 certain types of people that were mission-oriented,

1 that were -- I didn't feel like they really got the
2 plan and couldn't market this the way that I felt like
3 it needed to be to get the kind of people we wanted.

4 Q. And you made the decision to let them go?

5 A. I don't recall that. I probably did.

6 Q. Okay. What did they initially do for the
7 project before they were let go?

8 A. That, I am not aware of.

9 Q. Okay.

10 A. I do not remember.

11 Q. Did you have a discussion with Dave Yarnes
12 about the decision to let them go?

13 A. I'm sure I did.

14 Q. Do you recall that conversation?

15 A. No, I don't.

16 Q. Okay. And this represents invoices that
17 were paid by MorningStar to CRSA?

18 A. Should be directly related to invoices.

19 Q. Okay. Okay. I'm going to show you a
20 document marked 12309, MorningStar 12309, a purchase
21 order from MorningStar for \$20,000.

22 A. Yes.

23 Q. And is that -- is that part of this claim?

24 A. I'm not sure. It doesn't say on there.

25 Q. You don't know whether that is part of this

1 claim or not?

2 A. No, I don't.

3 Q. Dave Yarnes compiled this claim?

4 A. Dave Yarnes did.

5 Q. Okay. This is MorningStar Document 12307,
6 a purchase order for \$12,500.

7 A. That's correct.

8 Q. And those two documents --

9 A. Oh, wait a minute. It does say CRSA.

10 Q. Okay. And the other one, CRSA?

11 A. Correct. Both of them do.

12 Q. So that is 20,000 and 12,500, comes out to
13 \$32,500?

14 A. Correct.

15 Q. And that's what you're seeking here?

16 A. Yes.

17 Q. Okay. And you made the decision that they
18 were not right for this project?

19 A. Dave may have made the decision for this
20 one. I didn't think either one of them were going to
21 be our final marketing team, but I was open to it
22 and -- but I was not convinced either one of the
23 groups that we used were...

24 Q. But ultimately, you did not believe they
25 were right for this project, and they were let go?

1 A. One of us did. I'm not sure if myself or
2 Dave made that decision on CRSA.

3 Q. I'm going to show you the document
4 MorningStar 12297 and identify that.

5 A. It's a check for \$7,000.

6 Q. Payable from who to who?

7 A. Paid to MorningStar.

8 Q. Okay.

9 A. To the Heritage Tower project.

10 Q. Is that number calculated into the 32,500
11 that is --

12 A. I have no idea.

13 Q. If that was a check from Morning- -- from
14 CRSA to MorningStar, should that be included in the
15 amount paid to CRSA?

16 A. I have no idea.

17 Q. You have no idea. Okay.

18 A. This could have been a donation to us. We
19 received that from some companies. I don't -- I don't
20 know what it's for.

21 Q. Dated 1/20/2009.

22 Okay. Under marketing, again, we've got
23 sales staff meals of \$158. Sales staff equipment,
24 three computers, \$2,109.

25 Are those computers being used today?

1 A. I have no idea.

2 Q. You don't know?

3 A. I doubt it. Yeah.

4 Q. Why do you doubt it?

5 A. Because they're probably obsolete with
6 whatever was purchased then.

7 Q. If they were purchased in 2008, they were
8 used on this project?

9 A. They should have been, yes.

10 Q. And so the only reason that they wouldn't
11 be in use is because they are obsolete?

12 A. No -- I don't know about that.

13 Q. Okay.

14 MR. FENNEL: Are you at a point
15 where we can take a break?

16 MR. BALLOU: Yeah, we can take a
17 break.

18 (Recess taken.)

19 BY MR. BALLOU:

20 Q. Okay. Let's flip to Page 2 of this
21 exhibit, Cycle 2. Again, we've got four categories,
22 construction, legal and accounting, administration and
23 marketing, correct?

24 A. Correct.

25 Q. And construction, again, construction

1 staff?

2 A. Uh-huh (affirmative).

3 Q. Your testimony is Cycle 1 will be the same
4 for Cycle 2, wouldn't it?

5 A. Correct.

6 Q. Okay. And Concept Architecture, does that
7 just represent the invoices submitted to MorningStar
8 and paid during this cycle?

9 A. That were related to the tower.

10 Q. Right. And so your testimony as to whether
11 or not those -- that work would have to be redone is
12 the same as it would have been for Cycle 1?

13 A. Yes.

14 Q. All right. And that applies for all the
15 cycles with --

16 A. Yes.

17 Q. -- Concept Architecture?

18 A. Uh-huh (affirmative).

19 Q. Talbot & Associates, what work was Talbot &
20 Associates doing on this project?

21 A. Can you refresh my -- were they the --

22 Q. I think they were an engineering firm.

23 A. Talbot & Associates. I'm sorry, I'm still
24 brain dead. I'm more brain dead than I was the other
25 day. But if you can refresh my memory, I'll...

1 Q. Do you recall there being a lawsuit or a
2 claim by Talbot & Associates against MorningStar?

3 A. I -- I do remember something about that,
4 and we -- we disputed some of their invoices, and we
5 finally had to agree to a number. But we -- yeah,
6 they -- if that's the same firm, that would have been
7 an engineering --

8 Q. And so what -- do you know what work they
9 were doing for this project?

10 A. It was on this project, but I'm not sure
11 what -- if I'm not mistaken, theirs was the PP -- uh,
12 the mechanicals and...

13 Q. Okay. And have you received an opinion
14 from Talbot & Associates indicating that the work that
15 they did on this project is no longer valid and -- or
16 otherwise would need to be redone?

17 A. I have not.

18 Q. Okay.

19 A. Dave may have. But I don't think that's
20 necessary anyway. I think it's something we've got to
21 redo.

22 Q. Okay. And on what basis do you believe it
23 has to be redone?

24 A. Because of the time that has passed.

25 Q. And any other reason?

1 A. Yes. We've got to -- I mean, mostly the
2 time that has passed, and we've got to go through, and
3 whatever we thought may have been recoverable then or
4 usable we are going to have to research again.

5 Q. But if Talbot & Associates were to say, our
6 work -- we stand by our work, then you wouldn't have
7 to redo that, would you?

8 A. Possibly.

9 Q. You haven't done that analysis yet, have
10 you?

11 A. I haven't personally.

12 Q. Has anybody at MorningStar's done that
13 analysis?

14 A. I am not sure.

15 Q. Is anybody going to testify at trial that
16 they have done that analysis?

17 A. They could. If they have, they will
18 testify to that.

19 Q. Do you know who that would be?

20 A. I don't -- it would almost certainly be
21 Dave Yarnes but...

22 Q. Okay. All right. Stewart Engineering, do
23 you know what Stewart Engineering was billing for in
24 cycle 2 versus cycle 1?

25 A. It was the ongoing study of the structure.

1 Q. Okay. And your responses as to Stewart
2 Engineering in Cycle 1 would apply to Cycle 2 --

3 A. Yes.

4 Q. -- 3, 4, and 5?

5 A. Correct.

6 Q. Okay. Power Engineering in Cycle 2, you've
7 got two invoices -- or two entries here, one for
8 12,000 and one for 13,582.

9 And previously, you had those broken out as
10 one as civil for 12,000, one as survey for 13,582. Do
11 you recall that?

12 A. Yes.

13 Q. Okay.

14 A. I recall seeing them.

15 Q. Do you have any basis upon which you'll
16 testify that Power Engineering's civil work would
17 have -- is no longer valid and would have to be redone
18 in order to complete the tower project?

19 A. I -- on the same basis of the other
20 engineering, because of the passage of time and
21 conditions and everything else around, there has been
22 a lot of construction around there, yes, we would have
23 to redo all of that.

24 Q. That's your belief?

25 A. Yes.

1 Q. And Power Engineering has not expressed
2 that opinion to you?

3 A. They have not expressed it to me.

4 Q. Or to anyone at MorningStar, to your
5 knowledge?

6 A. To my knowledge, I don't know of any.

7 Q. Okay. And the same as to surveying, they
8 have not expressed -- Power Engineering has not
9 expressed to MorningStar, to your knowledge, any
10 opinion that the work they have performed on the
11 surveying as reflected in Cycle 2 would have to be
12 redone or is it for any reason no longer valid?

13 A. I am not aware of it.

14 Q. Okay. Morris Stephens & Lovelace,
15 continuing to do work on what?

16 A. Projections and...

17 Q. Okay. Has Morris Stephens & Lovelace
18 expressed to you or to anyone at MorningStar the
19 opinion that their work is -- would have to be redone?

20 A. No. And they would not have to. It's
21 obvious it would have to be redone.

22 Q. Okay. And that is your belief?

23 A. I think it's more than a belief. There's
24 no way we could use their projections back then for
25 today's conditions.

1 Q. Okay. Do you believe that Morris Stephens
2 & Lovelace could use their work they've already done
3 and simply update it to today?

4 A. I wouldn't see much value at all in them
5 being able to do that.

6 Q. And you're not an accountant?

7 A. I'm not accountant.

8 Q. You don't have a CPA?

9 A. Don't have a CPA.

10 Q. And have not spoken to Morris Stephens &
11 Lovelace on that issue?

12 A. No, I haven't.

13 Q. Administration, development staff,
14 training, administrative costs, the same answers as in
15 cycle 1?

16 A. Yes.

17 Q. And what basis do you have to say that the
18 administration costs of \$35,000 in cycle 2 would have
19 to be duplicated in order to complete the project?

20 A. Everything would have to be redone. I
21 mean, for that many years later, it would start all
22 over.

23 Q. So it's MorningStar's position that none of
24 the work done by any of the MorningStar staff under
25 administration or development or construction can be

1 used in any facet in any way if they are allowed to
2 complete the project?

3 A. I can't imagine any of that being used
4 today.

5 Q. Okay.

6 A. Being useful today. Heck, I would think
7 the costs would be way more because we're going to
8 have to retrain the administrative staff. We're going
9 to -- all of that.

10 Q. And --

11 A. Start over.

12 Q. -- have you gone to the effort of
13 determining what the approximate estimated cost of
14 administration and development staff to complete the
15 project would be?

16 A. No, we -- that would begin when we kicked
17 off the project again.

18 Q. Okay. And then marketing, sales staff,
19 payroll, contract labor, electronic and supplies and
20 meals.

21 Sales staff would include Dave Herr?

22 A. Dave Herr, correct.

23 Q. And who --

24 A. Whoever he had as his -- I think Angie
25 Davis was a part of that.

1 Q. And your testimony is that -- is it your
2 testimony that Dave Yarnes would know how that payroll
3 number was reached?

4 A. Yes.

5 (Off the record.)

6 BY MR. BALLOU:

7 Q. Okay. Let's go to Cycle 3, sir.

8 A. Okay.

9 Q. And again, we've got construction, legal
10 and accounting, administration and marketing. The
11 same answers as Cycle 2 and 1 as to Concept
12 Architecture, Talbot & Associates, Power Engineering,
13 correct?

14 A. Correct.

15 Q. Morris Stephens & Lovelace?

16 A. Correct.

17 Q. Development staff?

18 A. Yes.

19 Q. In Cycle 3 you have expenses -- expenses
20 for SB&A appearing, correct?

21 A. Yes.

22 Q. \$15,000 for the marketing plan?

23 A. Yes.

24 Q. And that's the marketing plan that we
25 looked at earlier in your deposition, isn't it, sir?

1 A. Yes.

2 Q. Okay. And that's the marketing plan that
3 was used by MorningStar in developing the marketing to
4 sell units and reser- -- prior reservation holders,
5 deposits, that whole process, all of that came out of
6 that marketing plan?

7 A. It helped -- it was helping us to get
8 there, what SB&A was doing. I mean, there was -- it
9 was going to be modified beyond that to actually
10 apply, but they were helping us to understand the
11 conditions, the environment, the people, the size
12 units that were probably going to be the most popular
13 then.

14 Q. And so they developed a marketing plan that
15 was adopted by MorningStar?

16 A. Well, it -- it was never adopted as far as
17 being, this was the one we're going to do.

18 Q. There was no other marketing plan, though,
19 in place was there, sir?

20 A. No, this was the main one. It would have
21 been developed from this core plan. We would have...

22 Q. And this was a marketing plan as
23 implemented by Dave Herr?

24 A. It would have been.

25 Q. Okay. And in fact, Dave Herr went through

1 the process of accumulating priority reservation
2 holders?

3 A. I think we started doing that before the
4 marketing plan was developed.

5 Q. Right. And that -- that was all part of
6 the plan, was to ramp up those priority reservation
7 holders?

8 A. And get them into deposits.

9 Q. Get them into deposits and get them into
10 sales?

11 A. Yes.

12 Q. Okay. And so this involves a marketing
13 plan, a focus group.

14 Did you participate at all in the focus
15 group?

16 A. No.

17 Q. But that was part of that presentation in
18 March of 2009 --

19 A. Yes.

20 Q. -- the results of that focus group?

21 And then three months of consulting, a
22 training week, and one two-day initiation of REPS.

23 Do you recall REPS being the program that
24 was used by the MorningStar marketing team to keep
25 track of its marketing efforts?

1 A. Yes.

2 Q. Okay. So that was something that was
3 brought to the MorningStar marketing team by SB&A?

4 A. I believe it was.

5 Q. Okay. And has SB&A represented to you or
6 to MorningStar that its work in preparing this
7 marketing plan and the work that it had done is no
8 longer valid for the marketing of this project?

9 A. They have not communicated that to me.
10 They may have to Dave Yarnes, but I'm not aware of it.

11 Q. Okay.

12 A. But the same thing applies.

13 Q. You believe it has to be done?

14 A. Yeah.

15 Q. At some point in time, the marketing effort
16 that Dave Herr was embarked upon shifted to Heritage
17 Court, did it not?

18 A. Yes.

19 Q. All right. And in fact, that same
20 marketing plan was applied to the Heritage Court
21 project, wasn't it?

22 A. I'm not aware that we used any of it.
23 That was almost -- you know, we really never did do
24 much marketing even for the Heritage Court.

25 Q. You marketed Heritage Court to priority

1 reservation holders, did you not?

2 A. We -- we did.

3 Q. In fact, the persons who have placed the
4 deposits on Heritage Court and who are living in
5 Heritage Court started as priority reservation
6 holders, didn't they?

7 A. They did.

8 Q. All of them?

9 A. Most -- I wouldn't say all of them did, no.

10 Q. Most of them?

11 A. I'm not even sure I could say most of them.

12 Q. You don't even know?

13 A. No.

14 Q. But a substantial number of them did,
15 didn't they?

16 A. I couldn't even say a substantial number.
17 I'm not sure what percentage --

18 Q. Where else would those depositors come
19 from?

20 A. Well, when we had conferences, we would do
21 what we called an informational meeting. We would
22 explain the court and what we were doing and ask if
23 there was anyone interested in learning about it, and
24 usually there was 50 or maybe more that would be
25 interested and come back and listen. And as -- my

1 understanding is almost all of them in the court came
2 more from those meetings and all than the priority
3 reservation holders.

4 Q. And the conferences were part of the
5 marketing plan originally from SB&A, weren't they?

6 A. I mean, we didn't do conferences to market
7 things, but we would market at our conferences. I'm
8 not sure that was in the SB&A plan, but it should have
9 been. It would have been. But it would have been
10 something we were doing anyway, or would have done
11 anyway.

12 Q. And so if marketing by having -- holding
13 conferences to bring people to the MorningStar campus
14 to show them what they might be purchasing was part of
15 the SB&A marketing plan --

16 A. I --

17 Q. -- that was part of also the Heritage Court
18 marketing plan, wasn't it?

19 A. I'm not -- I don't recall that being in the
20 SB&A marketing plan. I mean, they would have looked
21 at everything we're doing and see how they could use
22 each thing. But I -- I don't recall any of that being
23 a part of the SB&A. It -- it may have been. I just
24 don't recall.

25 Q. You just don't know?

1 A. No.

2 Q. On Cycle 4 for SB&A you have \$19,350 for a
3 conversion of res holders.

4 Res are reservations, aren't they?

5 A. Yes. I believe that is -- yes.

6 Q. Conversion of reservation holders, you are
7 seeking reimbursement from SB&A for \$19,350 for work
8 done to convert priority reservation holders to
9 deposits.

10 MR. FENNELL: Objection.

11 Go ahead.

12 BY MR. BALLOU:

13 Q. Is that correct?

14 A. It would have been preparation for that.
15 I'm not sure any of that was actually done at that
16 point, but it was preparing to -- a plan to do that.

17 Q. So you are asking on Cycle 4 of the
18 marketing for \$19,350 for expenses incurred by SB&A
19 for conversion of reservation holders, are you not?

20 MR. FENNELL: Objection.

21 THE WITNESS: We are asking -- you
22 know, this was the -- obviously what they
23 spent coming up with the plan for doing
24 that.

25 BY MR. BALLOU:

1 Q. Right.

2 A. Uh-huh (affirmative).

3 Q. For converting reservation holders?

4 A. Yes. I'm not sure they even finished that
5 plan.

6 Q. And the reservations holders that were
7 converted were converted to Heritage Court, weren't
8 they?

9 A. Some were. I believe there were some that
10 were on our plan for -- that were converted. I'm not
11 sure they were converted because of this plan or
12 because of, you know, how much we did.

13 Q. How many reservation holders were converted
14 to deposits on Heritage Tower?

15 A. All that I know of were two.

16 Q. So out of all --

17 A. Because we hadn't even started that yet,
18 but two wanted to jump the gun, they wanted to give us
19 their money ahead of time and...

20 Q. So out of all the reservation holders that
21 were converted to deposits, two of them were deposits
22 on the towers; is that your testimony?

23 A. I don't -- now, you're talking about of all
24 the reservation holders that converted to deposits on
25 the court, two of them were for the --

1 Q. Any of them?

2 A. I only recall two.

3 Q. Okay.

4 (Off the record.)

5 (Defendant's Exhibit 41 was marked for
6 identification.)

7 BY MR. BALLOU:

8 Q. Sir, I'm showing you what has been marked
9 as Exhibit 41, which is the report produced. It's
10 entitled Heritage Towers Deposit Report. However, it
11 is represented to me that this is a record of a
12 listing of deposits on Heritage Court. And this is
13 MorningStar document 19501 through 19510.

14 Do you have any reason to believe that this
15 does not reflect deposit report -- a report of
16 deposits on Heritage Court?

17 A. I would have to do some study to verify
18 that.

19 Q. Okay. I think we talked earlier about
20 Mr. and Mrs. Wiseman?

21 A. Correct.

22 Q. They are residents of Heritage Court,
23 aren't they?

24 A. Yes.

25 Q. And they are the very last page?

1 A. Yes.

2 Q. Take a look at this and tell me if you
3 recognize any depositor as somebody who is not a
4 resident of Heritage Court.

5 A. Now -- now, only -- let me finish this.

6 I only recognize three of these as being
7 residents of Heritage Court, but that is because I
8 don't know the names of all of the other people there.

9 Q. But the three you do recognize are
10 residents of Heritage Court?

11 A. I recognize three who are residents of the
12 court there.

13 Q. If you would assume with me, sir, that this
14 is in fact a record of the depositors on Heritage
15 Court and -- all of these names came off of priority
16 reservation lists, didn't they?

17 A. I don't know that.

18 Q. You don't know?

19 A. No.

20 Q. The total amount of deposits on this report
21 on the last page, \$5,003,115.70?

22 A. That's what it shows here.

23 Q. Okay. The bottom says, Generated by Sue
24 Sumner.

25 who is Sue Sumner?

1 A. I don't know that name.

2 Q. Okay. On the first page of this document,
3 do you recognize the signature at the bottom?

4 A. Dave Herr.

5 Q. That is Dave Herr's signature, isn't it?
6 On the first page, Larry Byrd and Susan
7 Byrd, Court Number 105, Bethany.

8 What is Bethany?

9 A. I think that's one of the models, one of
10 the -- I would say the designs of a unit.

11 Q. In the court?

12 A. Yes.

13 Q. Okay.

14 A. The same in the tower.

15 Q. Providence Suite 3035. What is Providence
16 Suite, under Evelyn Carlson?

17 A. I, you know, believe that is also another
18 design.

19 Q. In the court?

20 A. If it's in the court, it would be in the
21 tower, too.

22 Q. But this one is in the court?

23 A. I can't verify that. I assume it is. If
24 this is the court yard, as you say, presumably.
25 But -- and I may know every person here but know them

1 as Bill or know them as -- I just am terrible with
2 names. I can't keep up with my own kids sometimes.
3 But I do recognize three of these as being in the
4 court.

5 Q. The sale of units through life leases in
6 the court was accomplished by the MorningStar
7 marketing team, correct?

8 A. Yes.

9 Q. Dave Herr and the people working under him?

10 A. Yes.

11 Q. Dave Herr and his staff were the same
12 people who were initially selling units or
13 reservations in units in the tower?

14 A. Correct.

15 Q. And at some point in time, started selling
16 units in the court?

17 A. At some point in time.

18 Q. What effort has been made to go through the
19 invoices and expenses sought by MorningStar to be
20 reimbursed related to SB&A and any marketing expense
21 as between sales in the court versus sales in the
22 tower?

23 A. You know, I gave instructions, and I
24 believe the best effort was made to not include in
25 what we were seeking in reimbursement here anything

1 that we were able to use in the court or any time that
2 was spent in court marketing or anything like that,
3 that it was strictly related to the tower. If there
4 was some blending, like some of the time that was
5 spent on maybe both, assume that which is -- we're not
6 going to be able to recover was useless because of the
7 tower situation.

8 Q. Okay. And it's your testimony that in
9 Cycle 4, the \$19,350 conversion of reservation
10 holders --

11 A. As --

12 Q. -- have no benefit to the efforts to market
13 the court?

14 A. If it's on this list, it was related to the
15 tower and...

16 Q. Because you told Dave Yarnes that's what
17 you wanted?

18 A. Yes.

19 Q. Not because you -- as we sit here today,
20 you can testify that that in fact is the case?

21 A. On that particular line item, I would say
22 SB&A was dealing entirely with marketing plans that
23 were implemented. I don't know that we used any of
24 that, anything they came up with that for the
25 courtyard.

1 Q. You don't know?

2 A. Don't know.

3 Q. And Cycle 4 under Construction, you are
4 seeking reimbursement for \$1,758.41 from Jack
5 Ottinger.

6 A. Correct.

7 Q. In Cycle 4, which I think we determined was
8 up to November of 2009, what was Jack Ottinger doing
9 on behalf of MorningStar that he sought reimbursement
10 for?

11 A. That would be something to do with
12 construction. I know he was seeking to broker our
13 financing.

14 Q. What was Jack Ottinger doing in relation to
15 construction?

16 A. That's -- I'm not sure, unless it was
17 something to consult on the construction that would
18 have some bearing on the financing.

19 Q. His expenses -- he was out looking for
20 sources of financing for this project, wasn't he?

21 A. Correct.

22 Q. And as of Cycle 4, he had not delivered any
23 commitments to permanent or construction financing,
24 had he?

25 A. Well, you can't -- the commitment -- you

1 can't get commitments until way on down the road,
2 until you've got your permits and --

3 Q. The answer is no?

4 A. Correct.

5 Q. He didn't --

6 A. It's not possible.

7 Q. -- secure any commitments?

8 In fact, he's never delivered a final
9 commitment to finance the project?

10 A. No. But he has, and nobody could have.

11 Q. Okay.

12 A. That's not possible at that point.

13 Q. And the expenses you are seeking from Jack
14 Ottinger, you believe relate somehow to construction?

15 A. Well, this part -- being under
16 construction, he had something to do with the
17 construction.

18 Q. Do you know what his experience in
19 construction was?

20 A. I do not.

21 Q. Dave Yarnes put his expenses under
22 construction, right?

23 A. Yes. I know he had been involved in quite
24 a bit of construction in the past.

25 Q. Under marketing, what is sales collateral?

1 A. I'm going to have to defer on that. I'm
2 not sure.

3 Q. Don't know.

4 And Cycle 5, which begins on March of 2010,
5 the first sales of units in the court occurred in
6 March of 2010; is that your testimony?

7 A. I am not sure when those first sales took
8 place.

9 Q. Okay. And so SB&A's expenses in January
10 and February, December onsite, expenses for December,
11 conversion letter, can you testify as to whether or
12 not any portion of the expenses being sought in
13 Cycle 5 related to or benefited the marketing and
14 sales of units in the court?

15 A. They are not supposed to include that.

16 Q. They are not supposed --

17 A. And I have no knowledge of anything that
18 would have been -- would have been included there.

19 Q. And what knowledge do you have of the
20 process by which MorningStar went through to exclude
21 SB&A expenses related to the court?

22 A. They would have gone through a very tedious
23 examination to do that.

24 Q. By an examination, of what?

25 A. Of the invoices and the things, did we

1 would use anything here for that or --

2 Q. And did that happen?

3 A. It should -- it should have happened, yes.

4 Q. Do you know for a fact that it happened?

5 A. I wasn't there, but those were my
6 instructions and...

7 Q. Were you told that it happened?

8 A. Yes.

9 Q. By who?

10 A. That was -- that was the verification I
11 got, that these numbers were accurate.

12 Q. From Dave Yarnes?

13 A. Dave Yarnes, yeah.

14 Q. And he told you that he went through a very
15 tedious process of going through the SB&A documents --

16 A. I don't think he mentioned the SB&A. He
17 just mentioned that they had gone through that process
18 and eliminated or gotten these very accurate. As a
19 matter of fact, the -- that they were actually
20 conservative. They bent over to go the other way.

21 Q. Okay. What was Pat Selvey consulting for
22 in Cycle 5?

23 A. He had already left our employment, but we
24 would still call him in and use him for things and pay
25 him for that.

1 Q. How was he paid?

2 A. By check.

3 Q. On a contract basis?

4 A. Contract --

5 Q. Hourly basis?

6 A. I am not sure about that but...

7 Q. Okay. The total MorningStar is seeking for
8 this amount has been reduced from approximately
9 1.2 million to 819,460.89 --

10 A. Correct.

11 Q. -- that is correct?

12 It is not described in the draft of the
13 pretrial brief, but there has been made a claim in
14 this case for I think it was termed lost profits?

15 A. Yes.

16 Q. Are you aware of that?

17 A. Yes.

18 Q. You are familiar with that claim?

19 A. I am.

20 Q. There was discussion of whether or not
21 MorningStar was going to pursue that claim.

22 As you sit here today, does MorningStar
23 intend to pursue a claim for lost profits?

24 A. As we sit here today, we do.

25 Q. Is there any plan to reconsider that

1 intention?

2 A. I would like to present it to my board.
3 You know, that's a big number. I don't want to make
4 that decision on my -- you know, unilaterally, so...

5 Q. All right. Well, let's talk about the
6 basis for that claim.

7 As you understand that claim, is it in fact
8 a claim for lost profits on this project?

9 A. It would be lost income to the ministry.

10 Q. Lost income to the ministry?

11 A. From that project.

12 Q. And how does MorningStar calculate the
13 value of this claim for lost income from the project?

14 A. It was the proforma that -- that I believe
15 was probably the most accurate and workable, that
16 would have been real, and projecting out for five
17 years of what the -- the income that would have been
18 lost had we been able to do this project. We felt
19 like that was a conservative number. And, you know,
20 we could have gone out 10 or 15 years or whatever, but
21 we felt like was just do as conservative as we can,
22 but that it's based on a real proforma that was --
23 that we could have accomplished.

24 Q. Well, this was the claim that was prepared
25 by Dave Yarnes, correct?

1 A. Yes.

2 Q. All right. And this was based upon his
3 analysis of preliminary operating statements in a
4 version of the Heritage Towers Executive Summary,
5 correct?

6 A. I believe that is correct.

7 Q. Did you talk with Mr. Yarnes about how he
8 concluded the value of this claim?

9 A. I did.

10 Q. Okay. What did he tell you?

11 A. He told me this was, you know -- you know,
12 of all of the proformas, this was the one that was --
13 that he was basing this on, and I believe it was the
14 one that, yes, we could have certainly accomplished
15 this, and that it was an accurate reflection of what
16 we would be losing.

17 Q. Okay. I'll represent to you that in
18 Mr. Yarnes' deposition, we examined document -- it was
19 Exhibit 56, document MorningStar 214 through 227, an
20 undated Heritage Towers Project Executive Summary.

21 Have you examined that document before,
22 sir?

23 A. I have.

24 Q. Okay.

25 A. But it's been a while.

1 LLC. Projects out eight years, Year 1, 2, 3, 4, 5, 6,
2 7, 8. Do you see that?

3 A. I do.

4 Q. All right. And this is a statement of
5 current assets -- of assets and liabilities; is that
6 correct?

7 A. Correct.

8 Q. And then if you turn to the next page,
9 11070, Projected -- Heritage Towers, LLC, Projected
10 Statements of Operations, Revenues and Expenses.

11 A. (Witness complied.)

12 Q. Do you see that?

13 A. I do.

14 Q. All right. And on this statement,
15 MorningStar's accountants project a prospective
16 increase or decrease in net assets as a result of the
17 Heritage Towers' operations, did it not?

18 A. It did.

19 Q. Okay. In Year 1, your accountants project
20 a net decrease in -- a decrease in net assets of
21 \$5,144,000, right?

22 A. Where are you looking at that?

23 Q. The bottom of Year 1?

24 A. Correct. Yes.

25 Q. After Year 2, your accountants are advising

1 that they project a decrease in net assets of
2 \$2,950,000, correct?

3 A. That's what it shows.

4 Q. And Year 3 MorningStar's accountants are
5 projecting a net decrease -- a decrease in net assets
6 of \$1,743,000?

7 A. That's what it shows.

8 Q. Okay. So for the first three years, your
9 accountants are projecting a decrease in net assets of
10 approximately \$10 million?

11 A. That's what this shows.

12 Q. All right. And then it shows that in
13 Year 4 there is an increase of \$83,000 in net assets?
14 Correct?

15 A. Correct.

16 Q. Net -- Year 5, \$65,000?

17 A. Correct.

18 Q. Year 6, \$187,000? Correct?

19 A. Correct.

20 Q. In Year 7, \$320,000; in Year 8, \$463,000?

21 A. Correct.

22 Q. Do you see that?

23 A. Yes.

24 Q. So over the course of eight years, the net
25 assets for Heritage Towers, LLC, will decrease by

1 \$10 million, and then increase over time by
2 approximately 1 million?

3 A. This is a projection of net assets. I
4 assume it includes -- well, it does include, like
5 depreciation and things like that. But this is not
6 connected to income.

7 Q. I know. I know.

8 A. Okay.

9 Q. But your accountants are telling you that
10 in the first three years your net assets are going to
11 go down by \$10 million.

12 A. What --

13 MR. FENNELL: Objection.

14 THE WITNESS: What we had prepared
15 for finances is the most conservative
16 projection possible.

17 BY MR. BALLOU:

18 Q. And yet, an accurate projection --

19 A. Well --

20 Q. -- you want it to be accurate, right?

21 A. We wanted it to be accurate as far as the
22 most conservative. It won't be any worse than this.

23 Q. And that's why --

24 A. The only surprises will be better ones.

25 Q. That's why you would have these prepared by

1 a CPA and not by Dave Yarnes?

2 A. Correct. Verified by a CPA.

3 Q. All right. Turn with me if you would to
4 11081.

5 A. (Witness complied.)

6 Q. Do you see that?

7 A. I do.

8 Q. And on this page, MorningStar's accountants
9 are -- provided detailed a Statement of Operations for
10 Year 1, showing revenues and expenses and net
11 operating income?

12 A. Correct.

13 Q. And according to your accountants, at the
14 end of Year 1, the net operating income would be
15 negative \$516,759?

16 A. That's what is shown here.

17 Q. That's different from what Dave Yarnes said
18 it would be, isn't it?

19 A. What Dave Yarnes said it would be?

20 Q. Yes, sir.

21 A. You mean in the other --

22 Q. Yes, sir.

23 A. It is different.

24 Q. In fact, he projected a net gain of net
25 operating income of --

1 A. Yeah. We had many different projections.

2 Q. Okay.

3 A. And they were all different.

4 Q. But this is the only one that was signed
5 off by your accountants?

6 A. I'm not sure it was the only one --

7 Q. It was.

8 A. -- signed off by the accountants. It was?
9 You are saying that?

10 Q. Let's go to Year 2, Page 11086.

11 A. (Witness complied.)

12 Q. Do you see that?

13 A. I do.

14 Q. As of Year 2, MorningStar's accountants are
15 projecting a net operating income of negative
16 \$208,184?

17 A. According to this.

18 Q. Not a positive number as projected by Dave
19 Yarnes?

20 A. That's this proforma.

21 Q. So when MorningStar was trying to determine
22 what the lost income from this project as the basis to
23 seek damages against the County in this case, why did
24 MorningStar choose to accept the preliminary report
25 prepared by Dave Yarnes instead of the Accountants

1 Report prepared by Morris Stephens & Lovelace?

2 A. I'm not sure this is the only one that the
3 accountants certified. We had so many different
4 proformas, which I was asking for.

5 Q. Okay. But they did certify this one
6 (indicating)?

7 A. They did certify this one (indicating).

8 Q. And they didn't certify the one that Dave
9 Yarnes prepared?

10 A. I am not aware -- I'm not sure --

11 Q. You are not aware that they did?

12 A. I'm not aware that they did or didn't.

13 Q. And so my question is, why did MorningStar
14 rely upon a calculation on a report, that you don't
15 know whether or not had been certified by anybody, as
16 a basis to determine a number of lost income from the
17 project as a basis for damages and not use the report
18 prepared by your own accountants?

19 MR. FENNEL: Objection.

20 But go ahead.

21 THE WITNESS: Well, there could be a
22 number of reasons. You know, throughout
23 this period we are looking at a changing
24 economic situation. We were looking at
25 best case, worst case, probable case. And

1 the one that we used, the one that -- that
2 we used for this thing is what we believe
3 is the probable losses from that.

4 BY MR. BALLOU:

5 Q. And that's the basis of your determination
6 that the report prepared by Dave Yarnes was the
7 probable result and that the report prepared by your
8 accountants was not?

9 A. We -- we had many prepared by the
10 accountants. We had many that we were looking at at
11 the time, and things were -- there were changing
12 conditions.

13 Q. Isn't it true that the reason you didn't
14 choose this report is because it showed a net loss?

15 A. No. We -- we chose what we thought was
16 what we were really going to lose because of this,
17 what we did lose because of this. We had many that
18 showed losses.

19 Q. Mr. Joyner --

20 A. Yeah.

21 Q. -- your accountants were telling you this
22 was going to be a very expensive project that was not
23 going to realize income for a long time, didn't they?

24 A. No. They -- on the worst case proformas
25 and all, that was a possibility. And that was a

1 Dep. Date: January 23, 2015
2 Deponent: Rick Joyner
3 Page No. _____ Line No. _____ Change to: _____
4 _____
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8 Page No._____Line No._____Change to:_____

9 _____

10 WITNESS SIGNATURE:_____

11 * * * * *

12 State of _____

13 County OF _____

14 Subscribed and sworn to before me this _____ day of
15 _____, 2014.

16 _____

17 _____

18 Notary Public

19 My Commission expires_____

20 (Seal)

21

22

23

24

25

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Morningstar Fellowship
Church,

Plaintiff,

vs.

CA No. 2013-CP-46-00246

York County, South
Carolina,

Defendants.

DEPOSITION OF DAVID YARNES
ROCK HILL, SOUTH CAROLINA

DECEMBER 17, 2014

VOLUME 1

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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1 BY MR. BALLOU:

2 Q. Let's talk a little bit about your role with
3 Morningstar. What was your title when you were
4 hired in approximately 2008?

5 A. I think I stated this earlier, but I honestly
6 don't remember.

7 Q. What were your responsibilities?

8 A. I think primarily was to engage in the
9 development of the Tower.

10 Q. Did you personally have any involvement in
11 the site plan approval process?

12 A. Again, I think we mentioned it and, no, I
13 didn't have a -- I believe the site plan was
14 approved prior to my coming.

15 Q. You believe the site plan had been approved by
16 York County ---

17 A. I'm sorry. I switched the terms of the
18 Development Agreement. I'm sorry. Can you
19 repeat the question?

20 Q. What, if any, involvement did you have or
21 responsibility did you have regarding the
22 submittal and approval of the commercial site
23 plan?

24 A. Well, I would have been active in helping
25 select the engineer that would have developed

1 the site plan. To my knowledge, he wasn't on
2 before me. I would have been active in helping
3 develop the site plan from a cost and utilities
4 standpoint, usefulness standpoint. I would
5 have done, you know, management meetings with
6 people discussing the site plan.

7 Q. So the engineers that were hired, that was
8 Power Engineering, correct?

9 A. We had several engineers at the time, but
10 Power, I believe was primarily engaged in
11 developing the site plan.

12 Q. They're the ones that actually submitted the
13 site plan to York County for review?

14 A. I don't know if we submitted it in conjunction
15 with them or if they submitted it.

16 Q. Who did you deal with at Power Engineering in
17 discussing the site plan or any changes or
18 aspects of the site plan?

19 A. Gosh, I honestly can't remember the names.
20 They changed.

21 Q. Do you recall somebody name Joe Hammond?

22 A. Can you repeat the name?

23 Q. Joe Hammond.

24 A. No. I don't recall a Joe Hammond. I may have
25 worked with him, but I don't recall the name.

1 Q. Do you recall Gerald Lee?

2 A. I do recall a man named Gerald Lee. I believe
3 I worked with him.

4 Q. Tell me about what work you did with Gerald?

5 A. If I'm recalling it correctly, if he's the
6 right person, I would have been at some
7 meetings where they would have shown us the
8 site plan, and we would have discussed various
9 aspects at those meetings, and options.
10 Possibly it was he that was -- At one point,
11 there was an issue concerning the lake and
12 water that was going into the lake. I think I
13 worked with him a little bit more on that. I
14 think I might have -- I can't recall. It
15 would've been things like that.

16 Q. What was Pat Selvey's responsibility as it
17 related to site plan review and approval?

18 A. Pat would have worked closely with the
19 engineers.

20 Q. Would he have been the first point of contact
21 with Morningstar, between the engineers?

22 A. I believe that would be true, yes.

23 Q. And would Pat bring you in as needed on
24 discussions regarding modifications or issues
25 related to the site plan?

1 A. Unless there was something that I was
2 specifically focused on, then I would
3 typically take the lead.

4 Q. And so the normal course would be --
5 Initially, the discussions between Power
6 Engineering and Morningstar would be with Pat
7 Selvey, but where it was felt your input was
8 necessary, then you would take the lead?

9 A. Yeah, either I would take the initiative or
10 Pat would bring me in on that. I would say
11 the majority of the contact with Power
12 Engineering would have had Pat as a contact.

13 Q. And so the process, as you understood it, it
14 involved that Power Engineering would -- or
15 that the site plan would have been submitted.
16 Comments received from the County to Power
17 Engineering that then would be relayed to
18 Morningstar and modifications or information
19 would be discussed and provided to submit for a
20 resubmittal of the site plan for additional
21 review? Is that how you understood it to
22 work?

23 A. There's just a lot of parts there. I'm going
24 to -- I don't mean to be disrespectful, but
25 if you could just take it part by part, it

1 shoulder to make sure that the information
2 that he was providing as to financing the
3 development of this project was accurate?

4 A. I don't think that's true, my job to look over
5 his shoulder. I mean, I --

6 MR. BALLOU: Let's mark this Exhibit 6.
7 Whereupon - Document marked as
8 Deposition Exhibit 6.

9 BY MR. BALLOU:

10 Q. This is a memo from you to Rick Joyner, dated
11 March 13th of 2008, Re: Bond Memo. Rick,
12 attached please find the bond documents that
13 we are going to send out to our "Friends of"
14 to develop some financing for the Tower. The
15 business plan is revised inside, as in the
16 cover letter, and the financials have been
17 changed. The business plan reflects more of
18 a Morningstar/Heritage vision than does the
19 one we are providing to commercial banks. Also,
20 it is scaled back. I have researched this
21 conceptually with legal and they have no
22 problem. I have not done a thorough legal
23 review of the document, but I feel we should
24 be good with it. Please review, as I would
25 like to set up a meeting with you as soon as

1 possible to discuss our distribution plan.

2 Were you asked to produce this document
3 for Rick's review?

4 A. I can't recall, but I don't think so.

5 Q. Why did you produce this thing?

6 A. I was researching and developing multiple
7 strategies for financing, at the time, and I
8 believe this was part of it.

9 Q. And this is part of the chronology that Pat
10 Selvey listed, the friends and family
11 financing component?

12 A. I think this is what he's referring to -- I'm
13 sorry, it's just escaped me here. I just saw
14 it, but my eyes aren't on it. If you can just
15 show me that part again, in this previous --

16 Q. Is it where -- under new term convertible
17 financing, a private issue bond proposed for
18 friends and family? Is that what this document
19 refers to?

20 A. I think it may, yeah. Let me just check the
21 dates here. I think it may, yes.

22 Q. So there are documents being provided to
23 commercial banks. This document was not,
24 correct?

25 A. This, possibly, would have been held to be

1 drafted by Raymond James, possibly.

2 MR. BALLOU: That's going to be our next
3 one.

4 Whereupon - Document marked as
5 Deposition Exhibit 7.

6 BY MR. BALLOU:

7 Q. Am I correct that the memo, on the first page
8 of Exhibit 7, when it says the business plan is
9 revised inside, as is the cover letter, does
10 Exhibit 8 represent the business plan that was
11 referenced?

12 A. Can you just do that again? I'm --

13 Q. Six and seven.

14 A. Can you say that again one more time?

15 Q. Exhibit 6 references, in the second paragraph,
16 the business plan is revised inside. My
17 question is, is Exhibit 7 the business plan
18 reference in Exhibit 6? And, on the second
19 page of the business --

20 A. Let me just go through that one first.

21 Q. Yes, sir.

22 A. So the question is, in this memo --

23 Q. Yes.

24 A. -- is it referring to this business plan?
25 I'm not sure.

1 Q. All right. Look on the second page of the
2 business plan. There's a box in the middle
3 of it. At the bottom of it, it says Business
4 Plan number 2008.8.28, provided to qualified
5 friends and family, date 3/1/2008.

6 A. I see the box. My concern is the top
7 paragraph on page three says, business plan
8 has been developed for those prospective
9 investors and financial institutions.

10 Q. Who prepared this business plan?

11 A. I believe that I would have had a large part
12 in the development of this business plan.

13 Q. Who else besides you?

14 A. Could have been Paul Towell, from Raymond
15 James. Could have been -- or Ron Shuck.
16 Could've been some of my internal staff from
17 New York that just helped me on the project,
18 Matt Swanson, Pat McCrory, Pat Selvey.

19 Q. But part of why you were hired to assist on
20 this project was to do things like prepare
21 business plans such as this. Isn't that
22 true?

23 A. I believe that was a large part of why I was
24 hired, to help prepare business plans and
25 help plan, in general.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Morningstar Fellowship
Church,

Plaintiff,

vs.

CA No. 2013-CP-46-00246

York County, South
Carolina,

Defendants.

DEPOSITION OF DAVID YARNES

ROCK HILL, SOUTH CAROLINA

DECEMBER 18, 2014

VOLUME 2

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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1 Q. So it was just prepared and put on a shelf.

2 A. I just can't recall. There's a lot of --

3 There's a number of variations of the
4 business plan, and there were different
5 people working together, but I just can't
6 recall.

7 Q. Did anybody, outside of Morningstar, get any
8 plan? If it wasn't this one, did they get
9 another variation of this?

10 A. Yes.

11 Q. Who received a business plan for the Heritage
12 Tower project?

13 A. Numerous people.

14 Q. Was it your responsibility to send out the
15 business plan to potential investors or
16 lenders?

17 A. On occasion.

18 Q. Who else had a responsibility to send out the
19 business plan to potential investors or
20 lenders?

21 A. Who had the responsibility or the ability?

22 Q. Well, first of all, who had the
23 responsibility?

24 A. I would say the group of people working with
25 the Tower project, at the time.

1 Q. Anybody who was working on the Tower project,
2 at the time, had the responsibility to send
3 out a business plan. Is that what you're
4 saying?

5 A. There were a group of people working on the
6 business plan, at that time.

7 Q. And who were those people?

8 A. I would say myself, Pat Selvey. I think Rick
9 would comment, possibly Ron Shuck, possibly,
10 Paul Towell. Some of my staff from New York,
11 including Matt Swanson, possibly Ben McCrory,
12 and then there was an admin person. His first
13 name was Jason. I can't remember. His
14 position would've been taken by Patricia Smith.

15 Q. This business plan is dated March, 2008.
16 Were there subsequent business plans with
17 later dates than March, 2008?

18 A. Yes.

19 Q. Have you provided those to your attorney?

20 A. Yes, to the best of my knowledge.

21 MR. BALLOU: I'll just put on the record
22 I haven't found anything past March of 2008.

23 MR. FENNELL: Step outside for a minute.
24 Whereupon - The deponent exits the
25 room while attorneys have off-record

1 discussion; after brief break, the
2 deposition resumes as follows:)

3 MR. BALLOU: Okay. We're back on.

4 BY MR. BALLOU:

5 Q. So, to make sure I understand, were any
6 business plans sent to any friends and family
7 investors?

8 A. I'm sure that they were. I recall reviewing
9 a business plan with Rick and a name named
10 Dick Fessler in Texas. I remember Graham
11 Pitt reviewing one. Beyond that, I can't
12 remember.

13 Q. Did any friends or family investors invest
14 in the Tower project, based upon the receipt
15 of a business -- well, first of all, did you
16 receive any investors from your friends and
17 family ---

18 A. Not to my knowledge.

19 Q. Would you refer to Exhibit 6, the last page
20 of this memo, entitled Proposed Terms to Assess
21 Interest.

22 A. Yes.

23 Q. Did you prepare that page, that document?

24 A. I believe I would have. I'm not certain, but
25 I believe I would have.

1 Q. Did you consult with anybody else about the
2 proposed terms to assess interest?

3 A. I'm not sure. Possibly, our legal team or
4 someone in legal, Paul Towell.

5 Q. So possibly Jim Sheedy and possibly Paul
6 Towell.

7 A. I think, as I recall, there were other legal
8 people that I would've had access to.

9 Q. Who else would that have been?

10 A. It could've -- I recall, on some occasions,
11 talking with legal that I would have known,
12 personally, including Tom Rickert. And,
13 other than that, I just can't recall.

14 Q. Who is Tom Rickert?

15 A. He's a friend, attorney, of mine.

16 Q. Where does he practice?

17 A. He practices in Salamanca, New York.

18 Q. Does he practice in the area of finance or
19 lending or securities?

20 A. No.

21 Q. What kind of practice does he have?

22 A. He has a local practice. I think he does
23 wills and trusts and things like that.

24 Q. So the proposed terms to assess interest that
25 you were having reviewed by Rick Joyner,

1 provided for 50 million dollars of the amount
2 of the loan, correct?

3 A. Yes.

4 Q. And that, it is anticipated that individuals
5 may participate in increments of not less
6 than \$500,000. Correct?

7 A. That's what it says.

8 Q. Who determined that point that this would be
9 for individuals to participate in increments
10 of not less than \$500,000?

11 A. Possibly, a corroboration of myself and
12 others.

13 Q. Who else would have corroborated on that?

14 A. The question, as I heard it, was who else
15 would've corroborated on this?

16 Q. Yes.

17 A. To the best of my knowledge, it would've been
18 myself; possibly, Pat Selvey; possibly, Rick
19 Joyner; possibly, Ron Shuck, Paul Towell at
20 Raymond James; possibly, Graham Pitt. I
21 can't recall others.

22 Q. The proposed terms to assess interest include
23 a term of 30 years, correct?

24 A. That's what it says.

25 Q. At a rate of 5.17 percent APR?

1 move the project forward as quickly as
2 possible?

3 A. Can you repeat that one more time?

4 Q. This statement, there was never any sense of
5 urgency to move the project forward as quickly
6 as possible. Did anybody from the County make
7 that statement to you?

8 A. Not that I'm aware of.

9 Q. So they were not part of the team that
10 concluded there was no sense of urgency.

11 MR. FENNELL: Objection.

12 BY THE WITNESS:

13 A. I believe we would've been in communication
14 with them. Our communication, possibly,
15 would've affected our view of the pace of the
16 project.

17 Q. That's right. And, in fact, your
18 communications with the County, through Pat
19 Selvey, were providing a chronological status
20 report, State of the Tower Report, did it
21 not, as we looked at today?

22 A. There's just several parts to that sentence.
23 If you can go line by line.

24 Q. Further down in this paragraph, you stated,
25 the economic problems that began to manifest

1 in 2008 brought most development to a halt.

2 A. Yes.

3 Q. What economic problems are you referring to?

4 A. I'm referring to general market conditions.

5 Q. Are you referring to anything internal or
6 specific to Morningstar?

7 A. I don't believe, in this sentence. I don't
8 believe so.

9 Q. And so what you're saying is that generally,
10 in 2008, the economic problems were apparent
11 and were causing problems in the market.

12 A. What I'm saying is that, in 2008, there were
13 economic problems, and they brought most
14 development to a halt.

15 Q. And you were aware of those economic
16 problems?

17 A. Generally, yes.

18 Q. And Rick Joyner was aware of those economic
19 problems?

20 A. I can't answer for Rick.

21 Q. Do you have any recollection of discussion
22 with Rick Joyner about the economic problems
23 that began to manifest in 2008?

24 A. Yes.

25 Q. Did you have such discussions with Pat

1 the sewer and water lines.

2 Q. And who did you have conversations with?

3 A. I can't remember. I wasn't personally
4 involved.

5 Q. Pat Selvey was involved, wasn't he?

6 A. I do remember, at one point, us having to try
7 to locate existing sewer and water lines on
8 the site with help of a third-party contract,
9 because the -- I believe the County's maps or
10 infrastructure maps were incomplete in that
11 area.

12 Q. Okay. That was locating water and sewer
13 lines. I'm saying were you personally
14 involved in any discussions with anyone from
15 the County about a proposed relocation or
16 extension of water and sewer lines?

17 A. I can just tell it to you this way. On
18 occasion, I would talk with the County about
19 the site plan, not very often. Pat,
20 typically, would talk with them. And, on
21 those occasions, we would talk about numerous
22 aspects of the site plan. Again, there was
23 an engineer and another person, but we would
24 review the site plan, and I believe that the
25 site plan has notation of the need for

1 changing incoming sewer and water.

2 Q. But you don't recall any specific
3 conversation on that issue with anyone at the
4 County.

5 A. I can't recall any specific conversation. No,
6 I can't.

7 Q. At the bottom of paragraph 16 in your
8 Affidavit, Morningstar did not consider the
9 project to be in jeopardy, at that point.
10 At what point are you talking about?

11 A. Let me just read it here, just to refresh
12 myself.

13 Q. Yes, sir.

14 A. And can you tell me the paragraph again?
15 Sixteen? I'm not seeing 16.

16 Q. The last -- next to the last sentence of
17 paragraph 16, beginning, Morningstar did not
18 consider.

19 A. I guess I'm referring to, as I recall, the
20 sense that the site -- the reimbursable
21 extension agreement wasn't signed.

22 Q. At that point in time that you're referring
23 to.

24 A. That's right.

25 Q. At that point, did you know that the County

1 had approved the site plan?

2 A. I don't believe so. I think I've said it
3 again. The first time that I heard or was
4 made aware was at the meeting with the
5 County.

6 Q. At or around the time of default.

7 A. At or around the time that the County accused
8 us of being in default.

9 Q. And last sentence, it simply believed that the
10 County was in no real rush to get started.

11 A. Yeah. That's a funny wording there, isn't
12 it?

13 Q. Why do you say that?

14 A. Well, it should be, possibly, we, instead of
15 it. I'm not sure what the it is referring to.
16 I'd have to read back.

17 Q. Would it refer to Morningstar?

18 A. Yeah, I think so.

19 Q. So Morningstar simply believed the County was
20 in no real rush to get started. Do you
21 recall any conversation with anybody at
22 Morningstar to the effect of the County is in
23 no real rush to get started?

24 A. I can't recall specifics, but I remember the
25 site plan being delayed. We thought -- I

1 guess we thought that we were just wanting to
2 get it right, you know, and we were
3 proceeding as, you know, at a good clip on
4 the development plan.

5 Q. But you don't recall anybody from the County
6 ever telling you or anyone else at
7 Morningstar that the County was in no rush to
8 get started.

9 A. The only conversations I would've had with
10 the County, at that point, would've been a
11 few meetings with some of their staff
12 involved in site plan approval, and it just
13 didn't seem like they were in a big hurry to
14 get the thing done.

15 Q. Why do you say that?

16 A. I guess the turnaround time on questions
17 would take a while and just didn't seem like
18 there was a big rush. And, other than that,
19 I'm just --

20 Q. In the spring and summer of 2009, you were
21 expecting site plan approval, weren't you?

22 A. We were looking -- We had submitted the site
23 plan, and we wanted it to be approved.

24 Q. In fact, you were telling your lenders that
25 site plan approval was imminent, didn't you?

1 A. I think we were communicating with people
2 that we felt that the site plan was going to
3 be coming.

4 Q. And so, in the summer of 2009, when you were
5 communicating with people telling them that
6 the site plan is imminent and that you
7 believed that the site plan was imminent, did
8 it not occur to you to call the County to ask
9 where the site plan was?

10 A. I think there was a lot of communication
11 going with the County, at that time.

12 Q. At the time of your communications that site
13 plan approval was imminent, in the spring and
14 summer of 2009, can you recall any specific
15 discussion with anyone at the County about
16 when site plan approval would occur?

17 A. Not myself specifically speaking with the
18 County. I think I've stated I met with them
19 on a couple of occasions. That would've been
20 my only specific discussion with members of
21 the County concerning site plan.

22 Q. And so the information as to the imminence of
23 the site plan approval, that was really
24 coming from your engineers, wasn't it?

25 A. I think we were -- I mean, I can't say. I

1 that any friends and family investors would
2 take subject to Community One's mortgage
3 interest in the Tower?

4 A. I'm not sure. We were changing the business
5 plan quite frequently. I can't remember
6 exactly if we reflected that or not.

7 Q. What kinds of things were you changing in the
8 business plan?

9 A. Typically, as we had more knowledge of the
10 facility and more knowledge of construction
11 costs, we were working on changing the size
12 and the type of units, and we were working to
13 bring the cost of construction lower. I
14 think there were also -- We were trying to
15 ascertain what would be the best financing
16 for the project, and then we were changing
17 the business plan to those factors.

18 Q. Did the economic climate of 2008 and 2009
19 result in any changes to the business plan?

20 A. I think so. Yeah, I think, originally, we
21 had larger, more expensive units.

22 Q. How else?

23 A. I think -- We were trying to really be frugal
24 about the construction.

25 Q. What does that mean?

1 A. We were trying to get the best -- We were
2 trying to bring our construction costs -- you
3 know, get things done at a cheaper, more
4 economical basis.

5 Q. Would the project team for the Heritage Tower
6 project meet on a regular basis?

7 A. Well, I would see Pat on almost a daily
8 basis. We typically would correspond through
9 Rick, by e-mail, and we would meet with J. C.
10 and others on an as-needed basis.

11 Q. Where, physically, was Pat Selvey's office,
12 in relation to yours?

13 A. I think, at that time, possibly across the
14 hall.

15 Q. And where, in relation to your office, was
16 Rick Joyner's office?

17 A. I think he was on the other side of the
18 building, as I recall, at that time.

19 Q. Did you not have daily contact with Rick,
20 personally; at that point in time, at least?

21 A. I don't think I would've had daily personal
22 contact with Rick, at that time.

23 Q. So the project team, as described in the
24 business plan -- First of all, to your
25 knowledge, did that project team change in any

1 of the other versions of the business plan?

2 A. I think so.

3 Q. In what way?

4 A. I think, at one point, we began to mention
5 our marketing team.

6 Q. Dave Herr?

7 A. Yes, and SB&A.

8 Q. And SB&A was the external marketing company
9 that you worked with?

10 A. That's correct.

11 Q. How about the project leadership team?

12 A. I believe we may have begun to mention other
13 key people, such as lenders or people that
14 were working with us on the project.

15 Q. Do you recall making reference to lenders or
16 other people working on the project in a
17 version of the business plan?

18 A. I think so. I think so.

19 Q. So my question earlier was did the project
20 leadership team meet on a regular basis to
21 discuss the project?

22 A. Components of the team would meet. As I
23 discussed, I would meet with Pat almost on a
24 daily basis; and then, you know, as I
25 discussed earlier, meet with the others.

1 that had given us commitments, and we were
2 continually seeking others.

3 Q. He asked, how did your conversation with Paul
4 Towell go on Friday? What conversation did you
5 have with Paul Towell on or around early June
6 of 2009?

7 A. Do you mind if I just read this again?

8 Q. Yes, sir.

9 A. It appears that my conversation with Paul
10 Towell was around the number of units that
11 were going to open and the price of the
12 units.

13 Q. Did Paul Towell ever express to you concerns
14 about the feasibility of the Tower project?

15 A. Paul Towell would continually talk to me
16 about the feasibility of the project.

17 Q. Did he ever tell you that he didn't think it
18 could work?

19 A. I don't believe so.

20 Q. Did he ever tell you he didn't think the
21 numbers worked?

22 A. I think I had to revise it on a number of
23 occasions.

24 Q. And, in fact, based upon your conversations
25 with Paul Towell, here on June 9th, you were

1 telling Jack Ottinger, in your reply e-mail,
2 that the financial projections have been
3 revised, right?

4 A. That appears to be so.

5 Q. We have scaled back the project a little bit
6 into a first phase that would include 157
7 rooms. Right?

8 A. Yes.

9 Q. And would slash the pool and a couple of
10 exterior amenities to bring the project cost
11 down considerably.

12 A. Yes.

13 Q. So you're still revising the financial plan
14 for this -- the business plan for this
15 project, at this point in time, aren't you?

16 A. We were continually revising it.

17 Q. And you're not going to get long-term
18 financing until you have a final business
19 plan, right?

20 A. Different people have committed to different
21 plans. Generally speaking, we were
22 continually revising the business plan and
23 proposing several variations and several
24 options and looking at different lenders and
25 comparing rates and terms, and continuing to

1 bring more people into the project.

2 Q. And so you were providing this information to
3 Jack Ottinger to give him something to take
4 to potential lenders.

5 A. I think he's asking me, after meeting Paul
6 Tower and Ron Shuck. Ron was employed as a CPA
7 to help us run financial projections on the
8 Tower. And, at the time -- Can you ask your
9 question again? I'm sorry, I lost my --

10 Q. You're providing this information of the
11 revisions to the business plan to Jack
12 Ottinger so he can use that in his efforts to
13 obtain long-term financing for the project.
14 Is that correct?

15 A. I think I was communicating with Jack. If
16 this answers your question, I was
17 communicating with Jack proposed revisions,
18 proposed scenarios, of which this was
19 possibly one.

20 Q. And this was possibly one of the proposed
21 scenarios that you were giving to Jack that
22 he would -- you expected him to use in
23 communication with long-term financing
24 lenders, right?

25 A. No disrespect, but this is just saying a part

1 of a conversation that I had. So I don't
2 know I'm giving him anything.

3 Q. Jack Ottinger, your testimony was, was
4 helping you secure long-term financing,
5 wasn't he?

6 A. Among other things, yes.

7 whereupon - Document marked as
8 Deposition Exhibit 13.

9 BY MR. BALLOU:

10 Q. I show you what's being marked as Exhibit 13,
11 an e-mail from Jack Ottinger to you, dated
12 June 20 of 2009. Take a minute to read that,
13 if you would, please.

14 A. Yes.

15 Q. What did you understand the purpose of this e-
16 mail to be?

17 A. I'm communicating to -- Oh, Jack is
18 communicating to me about a conversation he
19 had with me, and he's wanting me to have new
20 information sent to him so that he can talk
21 with Glenn and David and Rick.

22 Q. And Glenn and David, are those the two people
23 with their e-mail at the cc line?

24 A. Probably Glenn is. I don't recognize the
25 other one.

1 Q. Okay. Certus Management, what is that?

2 A. I honestly don't know.

3 Q. Jack says to you -- I am in the middle, about
4 two-thirds of the way down -- I understand the
5 limit of available cash you have now (about
6 \$500,000) and we need to prioritize the initial
7 raise of equity through a private placement,
8 keeping in mind the total needed to be raised,
9 based upon the financing method to be utilized.

10 A. Yes.

11 Q. Isn't he telling you, at this point, he
12 understands that this project has a limited
13 cash availability?

14 A. I think what he's referring to is possibly a
15 budget that we had for soft costs, and that
16 the soft costs had 500,000 left in the budget.

17 Q. And so the expenses on this project were
18 getting higher than expected, weren't they?

19 A. I don't think that's what this is referring
20 to, and I don't think that's the case.

21 Q. You don't think that's the case. You don't
22 think that a limit on available cash affected
23 the progress of this project, the ability of
24 this project to move forward?

25 A. No, I think what he's referring to is a

1 budget that we had for soft costs, in this
2 e-mail, and he's referring to how much we had
3 left in soft costs.

4 whereupon - Document marked as
5 Deposition Exhibit 14.

6 BY MR. BALLOU:

7 Q. I show you Exhibit 14, and e-mail from Lance
8 Williams to you. Who's Lance Williams?

9 A. He appears to be with Stewart Engineering.

10 Q. Who is Stewart Engineering?

11 A. Stewart Engineering is the structural
12 engineers for the project.

13 Q. This e-mail's dated July 7, 2009, correct?

14 A. (Indicating yes)

15 Q. It says, Dave, hope you are doing well. I
16 haven't heard much from J. C. regarding the
17 Tower renovation, and I wanted to touch base
18 on the status of the Tower renovation. Do
19 you see any movement in the next six to nine
20 months? Do you see that?

21 A. I do see that.

22 Q. Does it appear to you that he has not seen
23 much movement recently, to this e-mail, on
24 the Tower project, on the Tower renovation?

25 A. He's saying that, yes. Would you like me to

1 explain why?

2 Q. Sure.

3 A. I believe the majority of his work had been
4 completed, at that time. He was waiting for
5 some other things to be in place.

6 whereupon - Document marked as
7 Deposition Exhibit 15.

8 BY MR. BALLOU:

9 Q. I'm showing you Exhibit 15, an e-mail from
10 you to Jack Ottinger, dated July 21st, 2009.
11 Take a minute to review that, if you would,
12 sir.

13 whereupon - A recess was taken.

14 BY MR. BALLOU:

15 Q. Have you had an opportunity to review that
16 e-mail?

17 A. Yes.

18 Q. All right. Why did you send this e-mail to
19 Jack Ottinger?

20 A. It appears I'm updating him about some status
21 changes that we've had in the project.

22 Q. Okay. So the first paragraph, you say attached
23 find several files; one, bond anticipation
24 financing, original, is our preconstruction
25 budgets submitted to the bank. We had

1 originally adopted a larger budget, but were
2 unable to secure necessary financing. Our
3 budget is funded by a short-term loan through a
4 local - I guess you mean bank, not back - at
5 about five percent or so. Do you recall that
6 you were unable to secure necessary financing
7 for your larger budget and had to scale it back?

8 A. I can't remember what we were asking for
9 originally, but it appears that's the case.

10 Q. You don't recall that specifically?

11 A. I remember us soliciting several banks, at
12 this time, for what we would call
13 preconstruction financing, and I remember us
14 having, you know, different amounts that we
15 were looking for.

16 Q. And, being unsuccessful in securing the
17 necessary funding.

18 A. For the larger budget.

19 Q. The long-term financing portion of it,
20 right?

21 A. No, I believe this is the short-term
22 financing.

23 Q. You say, we have a term that runs through May
24 of 2010, at which time, the notes comes due,
25 and it is a general obligation of the ministry,

1 which gives us concern in this climate. Right?

2 A. Yes.

3 Q. So why did that give you concern in this
4 climate?

5 A. I guess we were hopeful -- I was hopeful that
6 the Tower project would stand on its own.
7 And it somehow became a concern of the
8 ministry that it would be hard in this -- the
9 climate that it was going through, at the
10 time.

11 Q. But the Tower project couldn't stand on its
12 own, at this point in time, could it?

13 A. The Tower project didn't have any revenue
14 coming in. It had finance through a short-
15 term -- It had finance through a loan on its
16 activities.

17 Q. That's right. It didn't have any revenue
18 coming in, did it?

19 A. No.

20 Q. And the church is spending money, borrowing
21 money, sinking money into this project, with
22 no money coming back out of it.

23 A. I don't think the church was sinking money
24 into it.

25 Q. It was borrowing money from Community One Bank,

1 as it described here, on a note that came due
2 in less than a year from this e-mail. Right?

3 A. It appears that, if the Tower project
4 couldn't fund it, then, at that time, it
5 would become a general obligation of the -- So
6 it appears the project got its funding itself.
7 That's what it appears to from here.

8 Q. Okay.

9 A. That's just kind of my recollection.

10 Q. This budget will get us through the permit
11 process to the point where building permits
12 are issued. You continue, there will be more
13 architectural and engineering fees left under
14 the current contracts with them, but they are
15 post permit.

16 A. Yes.

17 Q. We have stayed within the parameters of the
18 budget, as you will see from file two,
19 preconstruction financing, which shows all
20 areas of draw to our last draw. We have
21 expended approximately \$500,000 of our 1.2
22 million dollar budget. That 1.2 million dollar
23 budget was the soft cost budget for the
24 engineering, architectural and --

25 A. The soft cost for marketing --

1 Q. -- bridge funding, and that kind of stuff.

2 A. Yeah.

3 Q. All right. Most notably, we felt we would be
4 under way this time, so we have paused all
5 engineering and architectural work until I am
6 more sure of the end financing.

7 A. I think that's what it says, yes.

8 Q. At this point, structural engineering is about
9 25 percent of the way to permittable plans.
10 Architectural, once they receive engineering
11 drawings, could have permittable plans in maybe
12 two months. Site engineering is complete and
13 we are expecting the permit for that any day.

14 A. I think there's a misstatement. I don't
15 think it's structural engineering. I think
16 it's supposed to be PM&E engineering is about
17 25 percent.

18 Q. Okay. But the end of what I just read, site
19 engineering is complete and we are expecting
20 the permit for that any day. That's the
21 site plan approval, isn't it?

22 A. It appears to be.

23 Q. And, as of July 21st, 2009, you were
24 expecting that permit any day.

25 A. Site engineering is complete, and we are

1 expecting permit.

2 Q. Did you have any conversation with Jack
3 Ottinger about the significance of obtaining
4 the site plan approval as it relates to the
5 requirement to provide evidence of the
6 financing required under Section 4 of the
7 Development Agreement?

8 A. I -- There's a lot there. I would've had
9 conversations with Jack Ottinger about the
10 timeline of the project, about needs of the
11 project. He may or may not have had access to
12 the Development Agreement.

13 Q. You didn't ever send it to him, did you?

14 A. The Development Agreement?

15 Q. Yes, sir.

16 A. I can't remember.

17 Q. You can't remember any conversation with Jack
18 Ottinger discussing Section 4 of the
19 Development Agreement, as it relates to the
20 significance of site plan approval, can you?

21 A. Can you be more specific about --

22 Q. Did Jack Ottinger know that, upon site plan
23 approval, Morningstar was required, within
24 180 days, under the Development Agreement, to
25 provide the financial information under

1 Section 4?

2 A. I --

3 MR. FENNELL: Objection.

4 THE WITNESS: What's that?

5 MR. FENNELL: I said objection. Go ahead.

6 BY THE WITNESS:

7 A. I don't know if he did.

8 Q. You never had that conversation with him.

9 A. I don't recall having a specific conversation
10 about that with him.

11 Q. Further in this paragraph, like I stated
12 earlier, not knowing the length of time
13 before financing, I have paused any further
14 work since March.

15 A. That doesn't say that. It says, paused all
16 engineering in architectural work.

17 Q. Would you read that sentence for me, as it's
18 written? Like I stated earlier.

19 MR. FENNELL: I think you're in different
20 places.

21 BY THE WITNESS:

22 A. Which one is it?

23 Q. The last sentence of the second paragraph.

24 A. Okay. Like I stated earlier, not knowing the
25 length of time before financing, I have paused

1 any further work since March. I believe that's
2 referring to the engineering work.

3 Q. Dropping down a couple of lines, as an update,
4 we have 155 priority reservations now and are
5 looking to turn to solidifying deposits.

6 As of July 21st of 2008, did you have any
7 deposits converted from priority
8 reservations?

9 A. I don't think, to my recollection, we did. We
10 may've had one or two, but I don't think so.

11 Q. Did you understand that the lenders that were
12 considering long-term financing of this
13 project were looking to the number of deposits
14 as an indicator of the viability and the
15 feasibility of this project?

16 A. That's a big statement. Different lenders
17 were looking for different things.

18 Q. Did you have any lenders who said that they
19 would lend, based solely upon priority
20 reservations of a thousand dollars?

21 A. I can't recall.

22 Q. You can't recall any lender saying that they
23 would lend for -- based upon \$1,000 priority
24 reservations.

25 A. No, I can't recall that.

1 Q. The next statement, in addition, we have a new
2 set of financials, three pdf files based on
3 some new assumptions, which we extrapolated
4 into two files for easy view, where we have
5 scaled back the budget and also developed more
6 realistic 2009 projections.

7 why did you have to scale back the budget
8 and develop more realistic 2009 projections?

9 A. As I stated earlier, we felt that the larger,
10 more expensive units were no longer going to
11 be easy to sell; that the project needed
12 smaller, less expensive units.

13 Q. Flipping over to the next page, Jack Ottinger
14 replies to you, have received material. Will
15 start reviewing. Hope your sabbatical was
16 restful. I will catch up with you on
17 Wednesday, and we can set up our next
18 discussion. Did you take a sabbatical in 2009?

19 A. The Ministry takes a sabbatical every July.

20 Q. And what does that involve?

21 A. Most people take off during the month of July,
22 a sort of vacation, that type of thing. We
23 all coordinate it during that time.

24 Q. So, July 21st of 2009, were you on sabbatical
25 or were you not on sabbatical?

1 A. Apparently, I was working, if I'm sending
2 these out.

3 Q. So Jack knew you were on sabbatical. He
4 asked you how it was. Did you take off the
5 month of July?

6 A. I can't remember. I might have. I can't
7 remember what I did July 21.

8 Q Do you take off every July?

9 A. Typically, we all coordinate our vacation
10 during the month of July.

11 Q. And so, instead of calling it a vacation, you
12 call it a sabbatical?

13 A. Yeah, it's -- We tend to shut some of the
14 functions of the Ministry down for July and
15 give people rest.

16 Q. Is there any other formal sabbatical or
17 informal sabbatical program at Morningstar?

18 A. There may be, for pastors or something, if
19 they're -- There may be. Not that I'm aware
20 of, though. There may be. I'm just not
21 aware of it.

22 Q. They're not a seven-year sabbatical cycle
23 that pastors take?

24 A. I've heard of it. It's not in place in
25 Morningstar.

1 Q. Have you taken a sabbatical, at any point in
2 time, during -- Other than a vacation -- What
3 would otherwise be called a vacation, have
4 you taken a sabbatical during any point in
5 time with Morningstar?

6 A. No. I mean, other than the month of July
7 travel type of a thing.

8 Q. Okay. Had you worked with Jack Ottinger before
9 this project?

10 A. No, I don't believe so.

11 Q. How did you first come to meet him?

12 A. I think I heard about him through a friend of
13 mind, Kay Herimine or Jean Strite, that had
14 done some missions work with him in China --
15 or, no, North Korea. And they told me that
16 he had done a senior housing development.

17 Q. What kind of background work did you do to
18 figure out who Jack Ottinger was?

19 A. You know, I talked to him about some of the
20 projects that he did, and he talked to me
21 about some of the obstacles he'd been going
22 through. I think he was going through a
23 bankruptcy. And then I believe Ron Shuck did
24 background work on him, as well.

25 Q. What has Ron Shuck's background work revealed

1 about Jack Ottinger?

2 A. That he was part of a company that went
3 bankrupt. I can't remember exactly.

4 Q. Is Jack Ottinger an ordained minister?

5 A. I don't know. Probably -- Not through
6 Morningstar, I don't believe.

7 Q. Are you aware of any church that he's
8 associated with?

9 A. Not to my knowledge.

10 Q. Has Morningstar done any work with Jack
11 Ottinger since 2009?

12 A. I think he helped me revise some financial
13 documents or helped give me oversight, do
14 some consulting on some.

15 Q. What do you understand about Jack Ottinger's
16 bankruptcy?

17 A. I don't really know that much about it.

18 Q. You didn't do any independent investigation
19 of his financial dealings or problems?

20 A. No, I wasn't -- I would looked to him to have
21 that. No, I didn't.

22 Q. And yet he was consulting with Morningstar to
23 provide financial backers for this project.

24 A. Yeah, he would introduce us to lenders and he
25 would help us -- he would help me kind of

1 Court.

2 Q. And you have a single sales team between
3 Heritage Tower and Heritage Court, don't you?

4 A. Can you say that again?

5 Q. You have a single sales team selling Heritage
6 Court the same as Heritage Tower.

7 A. The same people that worked on Tower sales
8 now are primarily concerned with Court sales.

9 Q. And they have been since default.

10 A. I don't think there was a sale made before
11 default.

12 Q. Have you made any effort to determine whether
13 any reservations, priority reservations or
14 deposits have been withdrawn, because of the
15 Declaration of Default?

16 A. Definitely, the sales team would've been
17 working with all of the people withdrawing
18 deposits.

19 Q. That would be information the sales team
20 would have, right?

21 A. Largely, as the primary contact; but I -- you
22 know, I would've heard from them firsthand
23 during the time.

24 Q. And you're not aware of any specific
25 reservation holder or deposit holder who has

1 withdrawn their deposit or their reservation
2 specifically because of default.

3 A. During the time the default was declared,
4 there was all kinds of discussion from
5 reservation holders and misgivings of the
6 project, based on that.

7 Q. But that was with the sales team. That
8 wasn't with you, right?

9 A. No, I would speak with them, myself, as well.

10 Q. Okay.

11 A. I mean, not directly with any reservation
12 holders, I think. But I think -- Oh, I'm
13 sure people would've asked me about it and --

14 Q. But are you aware of any document, any
15 e-mail, any letter that indicates that a
16 depositor or a reservation holder is
17 withdrawing their reservation or their
18 deposit because of the default?

19 A. What we've got are all the reservation
20 holders, prior to default, and all the
21 reservation holders after; and, you know, I
22 think we have files on everybody and --

23 Q. And any such document --

24 A. -- spreadsheets.

25 Q. -- would be in those files, wouldn't they?

1 A. I think so.

2 Q. What is the loss of market value in year-term
3 sales?

4 A. It would be -- As we would sell a unit, it
5 is the loss of the value of the sale of
6 those units.

7 Q. What does that mean?

8 A. We would sell a unit, and there would be
9 money from that unit, and then there'd be
10 value to it.

11 Q. And have you calculated what the amount of
12 that component of your damages is?

13 A. Can you rephrase the question?

14 Q. Have you calculated that number?

15 A. I believe so, yeah.

16 Q. How have you calculated that number?

17 A. I believe we used a pro forma model of the
18 Tower and its sales and that operating income
19 derived from that.

20 Q. Is that a document that was prepared in
21 connection with this case?

22 A. I believe so.

23 Q. Has that document been provided to your
24 attorney?

25 A. I believe so.

1 MR. BALLOU: I don't believe that's been
2 provided or not. I haven't seen anything like
3 that. But I'd ask that if you could provide
4 it.

5 MR. FENNELL: Can we step out for a
6 second.

7 whereupon - A recess was taken.

8 BY MR. BALLOU:

9 Q. All right, Mr. Yarnes.

10 A. Yes.

11 Q. Did you assist you attorney in preparing
12 Responses to Interrogatories in this case?

13 A. I believe so, yes.

14 Q. In response to Interrogatory Number 3, the
15 Interrogatory asks, set forth an itemized
16 statement of damages, exclusive of pain and
17 suffering, claimed and sustained by
18 Morningstar. And the response was, A, Loss of
19 value of the Tower which Defendants seek to
20 have demolished, \$11,889,719. Do you recall
21 that?

22 A. Yes.

23 Q. Okay. Is it correct to assume that that
24 number comes from Eddie Brown's Statement of
25 Probable Cost Calculation?

1 A. I believe so, yes.

2 Q. Is there any other source of origin of that
3 figure to support that as the value of the
4 Tower?

5 A. Not that I can recall.

6 Q. Do you recall how much Morningstar paid for
7 the entire 52 acres, including the Tower?

8 A. I don't.

9 Q. Would you disagree with me if I told you it
10 was 1.6 million dollars?

11 A. It seems it may be in that neighborhood.

12 Q. Have you reviewed the appraisals of the
13 property, the real estate appraisals of the
14 Morningstar property?

15 A. No.

16 Q. Are you aware that the real estate appraiser
17 put zero value on the Tower, in appraising
18 the real estate, at the time of the
19 acquisition?

20 MR. FENNELL: Objection.

21 BY THE WITNESS:

22 A. I'm not aware of that.

23 Q. Would that affect your opinion as to the
24 value of the Tower?

25 MR. FENNELL: Objection.

1 THE WITNESS: Do I answer?

2 MR. FENNELL: Yes, sir.

3 BY THE WITNESS:

4 A. No, I don't think so.

5 Q. That value, 11,889,719, represents the cost of
6 construction of the salvageable
7 portion of that Tower, doesn't it?

8 A. Let me just be clear. I think the cost of
9 the construction of the Tower was probably
10 the 30 million dollar range. I'm not sure,
11 but it seems to be somewhere around there.

12 Q. Do you know what that number represents --
13 the 11,889 represents? Have you
14 independently verified what that means?

15 A. You're asking me several questions. Do you
16 mind just breaking them down one at a time?

17 Q. Have you independently verified what the 11
18 million dollars represents?

19 A. I believe the Brown's estimate is an
20 independent verification.

21 Q. And so, to really understand that number, I
22 need to talk to Eddie Brown.

23 A. I don't know how to answer that.

24 Q. You don't have any independent basis to
25 determine that's the value of the building.

1 A. I still would just again say I think Eddie
2 Brown's original assessment was an
3 independent validation of --

4 Q. That's what I'm asking you. If I want to
5 understand where that number comes from, I
6 need to talk to Eddie Brown, because you're
7 relying on his opinion, right?

8 A. I'm relying on his -- yeah, his
9 professional --

10 Q. The cost of engineering, marketing,
11 architectural, legal and development spent to
12 date, \$1,201,456. Where did that number come
13 from?

14 A. I think it was the culmination of those
15 items.

16 Q. Is that number represented by a calculation
17 somewhere that somebody performed to add these
18 components together?

19 A. I believe so, yes.

20 Q. And is that in a separate spreadsheet of some
21 kind or an analysis that says here is how
22 much we paid on engineering, here's how much
23 we paid on marketing, et cetera?

24 A. I believe so.

25 MR. BALLOU: Okay. I'll simply asked

1 that that be produced.

2 MR. FENNELL: Understood.

3 BY MR. BALLOU:

4 Q. Is it your understanding that this 1.2
5 million dollars is the amount that was
6 borrowed down on the Community One line of
7 credit?

8 A. No, it's representative of the expenses to
9 that amount.

10 Q. So are there dollars that were spent
11 independently of the Community One line of
12 credit that comprised part of this number?

13 A. Possibly.

14 Q. As your recollection of the calculation of
15 this number is concerned, have you broken out
16 how much represents borrowed money versus how
17 much was spent -- and I guess that would be
18 by Morningstar Fellowship Church itself?

19 A. No, I don't think I've broken that out. I
20 think I was just calculating the expenses.

21 Q. Lost income -- Section C, lost income from
22 reservation holders at the Towers over the next
23 five years. Why did you pick the next five
24 years?

25 A. I think, at the time, possibly, we were

1 discussing with the attorney about a
2 reasonable timeframe to assess that damage.

3 Q. Lost income from reservation holders. Who were
4 the reservation holders? Are those
5 priority reservation holders?

6 A. I believe that's what we were referring to
7 there, yes.

8 Q. Priority reservation holders have put down a
9 thousand dollars to hold their place in line,
10 correct?

11 A. Yeah.

12 Q. They haven't made any further commitment,
13 other than putting down a thousand dollars
14 towards a future purchase of some kind,
15 perhaps, right?

16 A. Can you say that again?

17 Q. They haven't made any further commitment to
18 purchase anything, and that thousand dollars
19 is fully refundable at any time for any
20 reason, isn't it?

21 A. I think that's true.

22 Q. And, in fact, you've had -- Even since
23 default, you've had people make reservations,
24 you've had people ask for refunds. Is that
25 correct?

1 A. I don't know if, since default, we've had
2 anybody make a reservation. I definitely
3 know we've had people remove reservations.

4 Q. Okay. The total here is \$7,187,421.

5 A. (Indicating yes)

6 Q. How did you reach that number?

7 A. That is the net operating income line of one
8 of the projections that we did on the revenue
9 generated by the Tower.

10 Q. What documents would I have to look at to
11 derive that number?

12 A. It was a net operating income line of a
13 business plan or a financial calculation of
14 the Tower.

15 Q. A net operating income line? Is that a line
16 in a spreadsheet, or is that a line of
17 credit, or was that a line of --

18 A. It's a line in a spreadsheet.

19 Q. Okay. And what kind of spreadsheet is this?
20 Does the spreadsheet have a title?

21 A. It would've been a financial projection of
22 the Tower.

23 Q. Who prepared that financial projection?

24 A. It could've been Ron Shuck or myself.

25 Q. When was that financial projection created?

1 A. I honestly can't -- I don't know.

2 Q. Was it created prior to filing a lawsuit?

3 A. I believe so.

4 Q. Was it created prior to the default, the
5 Declaration of Default?

6 A. I believe so.

7 Q. And so you've taken a financial projection,
8 prepared sometime prior to March of 2010, and
9 used that to project out, over the next five
10 years, what the income would have been, based
11 upon what kind of occupancy?

12 A. It would be the net operating income. I
13 think it's probably based on a 70 or 80
14 percent occupancy. I can't recall.

15 Q. Did you do the calculation yourself, or did
16 Ron Shuck do that calculation?

17 A. I think you've asked me that question, and I
18 think it was either Ron or myself. I can't
19 recall.

20 Q. Does Ron have information that would help me
21 understand where that calculation comes from?

22 A. Possibly, yes.

23 Q. What kind of information does he have? Does
24 he have any spreadsheets? Does he have any
25 other documents?

1 A. Yes, he would've had both.

2 Q. Where is Ron Shuck located?

3 A. He's located in Florida. I think he's
4 retired now.

5 Q. Have you asked him to preserve or collect
6 these documents relative to this case?

7 A. I believe we've asked his firm to -- I think
8 we've informed his firm.

9 Q. Have you received documents from his firm
10 relative to this case?

11 A. Over the course of doing business with him,
12 yes.

13 Q. Since this lawsuit was filed, have you
14 received documents from Ron Shuck or his firm
15 that you anticipate using to prove up your
16 case?

17 A. I'm not sure. I know we requested -- I
18 believe we requested documents from him.

19 Q. What's the name of his firm?

20 A. The name escapes me now. Moore, Stephens &
21 Lovelace.

22 Q. Did Ron Shuck, or the firm of Moore,
23 Stephens & Lovelace, help you in any other
24 ways in determining the amount of damages
25 Morningstar is claiming in this case?

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

MorningStar Fellowship Church,
Plaintiff,

)
)
)
)

-VS-

)
)
)
)
)
)

2013-CP-46-00246

York County, South Carolina,

Defendant.

DEPOSITION OF DAVID K. YARNES
ROCK HILL, SOUTH CAROLINA
JANUARY 9, 2015
VOLUME 3

REPORTED BY: Cathy L. Young, CVR-M

1 (Court Reporter marks Exhibit Number 23, Emails,
2 attached hereto.)

3 EXAMINATION CONTINUES BY MR. BALLOU:

4 Q. If you would, take a moment and read through this
5 collection of emails. There actually are -- let me
6 pull off the back page. That's going to be 24.

7 A. (Reviews documents.)

8 Q. Okay.

9 MR. BALLOU:

10 I think how we're going to do this actually is make
11 the first page 23, the next two pages 24, and the
12 last page 25.

13 (Court Reporter marks Exhibit Number 24, Emails,
14 attached hereto.)

15 (Court Reporter marks Exhibit Number 25, Emails,
16 attached hereto.)

17 EXAMINATION CONTINUES BY MR. BALLOU:

18 Q. The reason I'm breaking these up, I'm hoping this
19 will be clear as we talk about it. Exhibit 23, at
20 the bottom of that document is an email dated
21 August 19th, 2009, at 10:38 a.m., from Gerald Lee
22 to Patricia Smith; is that right?

23 A. (Reviews document.) It appears to be, yes.

24 Q. Do you recall that Gerald Lee would ever email you
25 directly, or would he send emails to you through

1 Patricia?

2 A. I can't recall. I don't believe I got that
3 directly from him.

4 Q. But as you said earlier, people would send emails
5 to Patricia Smith to make sure that you got them?

6 A. People would definitely send them to Patricia to
7 try to get them to me.

8 Q. Okay. Did you get this email?

9 A. I probably would have. I can't recall it
10 specifically, but I probably would have.

11 Q. Were you copied in emails that were sent to
12 Patricia?

13 A. Sometimes.

14 Q. So you didn't have a rule set up in your system
15 that if an email came into Patricia, it
16 automatically went to you as well?

17 A. No, we didn't have a rule like that set up.

18 Q. So how would you know that you were getting emails
19 that were directed to you that were sent to
20 Patricia?

21 A. I wouldn't know.

22 Q. You just trusted her to forward those to you?

23 A. Yes.

24 Q. You recall getting this one?

25 A. It seems to me I would have. I can't recall.

1 Q. All right. In this email, in fact, Gerald says, "I
2 do not have an email for Dave, so I'll send this
3 through you."

4 A. (Reviews document.) Uh-huh.

5 Q. "I had a meeting with York County yesterday to go
6 over the last of some minor changes they wanted on
7 the plans; and they actually allowed me to just
8 write the changes on the previously submitted
9 drawings. That is the last of the comments, and
10 it's my understanding that they will be issuing
11 their approval letter next. We probably need to
12 talk again to discuss where we need to go from
13 this point. Please call me at your earliest
14 convenience. There is also an issue of past due
15 billings. Since we did not have the approval on
16 the work, I did not push on the issue; but now that
17 we do, I need to bring it up. The last payment we
18 received from MorningStar, I believe, was back in
19 January, and it was a partial payment. We need to
20 get current with billings. Thanks." Do you recall
21 that message from Gerald?

22 A. No, I -- I can't.

23 Q. You have no recollection of receiving that message
24 from Gerald?

25 A. This email? No.

1 Q. Or the message that he had received this
2 information from the County, and that now that we
3 have approval, I need to bring up the issue of
4 billing?

5 A. I've seen it later on, but at the time, I -- I
6 don't believe I recall it.

7 Q. All right. Patricia Smith, above this, writes back
8 at 10:48 a.m., "Gerald, thank you so much for your
9 email. I will get this to Dave as soon as
10 possible, and let you know. We will look at what
11 we have on our side concerning invoices with Power
12 Engineering, and talk about this with you as well.
13 We are looking forward to moving forward with you
14 and Power." That's what she says, right?

15 A. (Reviews document.) Correct.

16 Q. All right. Now, the reason I broke these up is on
17 Exhibit 24, at the bottom of that page is that same
18 email from Gerald; but it looks like she has simply
19 replied to that email rather than continue the
20 chain that was begun on Exhibit 23; does that look
21 fair to you? Does that look like what's going on?

22 A. Can you just say that one more time?

23 Q. The bottom of Exhibit 24 --

24 A. Yes.

25 Q. -- is the same email on the bottom of Exhibit 23?

1 A. (Reviews document.) I believe that's correct,
2 yeah.

3 Q. On Exhibit 23, Patricia writes back to Gerald at
4 10:48 a.m., on Exhibit 23, right?

5 A. Yes.

6 Q. Later that day, at 1:52 p.m., she responds to him
7 again.

8 A. (Reviews document.) I'm not seeing where you're --

9 Q. Do you see above on Exhibit 24 --

10 A. Uh-huh.

11 Q. -- where it says, Patricia Smith to Gerald Lee,
12 August 19th, 2009, at 1:52 p.m.?

13 A. (Reviews document.) Yeah.

14 Q. All right. So she's responding back to that same
15 original email, and not continuing the conversation
16 before it?

17 A. I believe she's responding to this original email.

18 Q. All right. She says, "I was able to speak with
19 Dave, and we found that next week would work better
20 for his schedule to talk on the phone. There's a
21 conference going on Thursday through Saturday this
22 week, which will keep him pretty occupied just
23 about every moment. We have Monday, the 24th of
24 August, available for a conference call with Dave.
25 He has 10:00 a.m. or 10:30 a.m. available. I look

1 forward to hearing from you. Thanks, Patricia;" is
2 that what it says?

3 A. (Reviews document.) Yes.

4 Q. Did you get a copy of that response to Gerald?

5 A. Not that I can recall.

6 Q. Do you remember speaking with Patricia on or about
7 August 19th of 2009 about the content of the email
8 Dave sent at 10:38 that morning?

9 A. No, I don't recall.

10 Q. If Patricia Smith is telling Gerald that she spoke
11 with you, do you have any reason to believe that
12 was not accurate information?

13 A. No.

14 Q. In fact, you were getting ready for this conference
15 that was getting ready to come up later that month,
16 weren't you?

17 A. It appears to be.

18 Q. Okay. Patricia Smith told you Gerald's message
19 said we needed to talk, didn't she?

20 A. I can't recall.

21 Q. You have no recollection of that conversation?

22 A. I already said I don't.

23 Q. At a time when you understood that site plan
24 approval was imminent, is it your testimony that
25 you have no recollection of hearing a message that

1 said the site plan had been approved?

2 MR. FENNELL:

3 Objection.

4 WITNESS CONTINUES:

5 A. I don't recall the conversation.

6 Q. If Patricia Smith had told you that the site plan
7 had been approved, that'd be significant to you at
8 that point in time, wouldn't it?

9 MR. FENNELL:

10 Objection.

11 WITNESS CONTINUES:

12 A. You'd have to define that. The site plan was
13 important, we were looking for it. We were trying
14 to get it. I don't understand our -- I, you know -
15 -

16 Q. So your testimony today though is that you don't
17 recall any conversation with Patricia Smith where
18 she informed you of a call from Gerald Lee
19 indicating the site plan had been approved?

20 MR. FENNELL:

21 Objection.

22 EXAMINATION CONTINUES BY MR. BALLOU:

23 Q. Is that your testimony?

24 A. The -- I think it's the third time, that's exactly
25 what I'm saying.

1 Q. Okay.

2 A. Yeah, I don't recall the conversation.

3 Q. All right. Because, at that point in time, you
4 hadn't referred to the Development Agreement to
5 really understand what the significance of the site
6 plan approval was as far as the time of the
7 project, did you?

8 A. Is there a question?

9 MR. FENNELL:

10 Yes.

11 EXAMINATION CONTINUES BY MR. BALLOU:

12 Q. Yes, there is.

13 Q. What was the question?

14 A. At the time of this conversation, that Patricia
15 references when she says, "I was able to talk to
16 Dave," had you reviewed the terms of the
17 Development Agreement as it relates to the
18 timelines running from site plan approval?

19 A. I'm sure I would have reviewed the site plan prior
20 to this conversation.

21 Q. That's not my question.

22 A. I'm -- I'm sure I would have reviewed the
23 Development Agreement prior to this.

24 Q. And that's not my question, sir. My question is in
25 August of 2009 were you aware that the Development

1 Agreement required specific information to be
2 produced by MorningStar 180 days after site plan
3 approval?

4 A. I was aware that the site plan triggered a lot of
5 things into event -- into events.

6 Q. Like what?

7 A. I mean I think I was primarily concerned about
8 financing. I was concerned about finalizing the
9 site plan. I was concerned about the budget of the
10 project. I was, you know --

11 Q. Were you concerned that upon site plan approval
12 MorningStar had 180 days to provide the information
13 referenced in Section 4.C.2 of the Development
14 Agreement?

15 A. I don't recall being that concerned about that. I
16 mean I just -- I'm not sure, I can recall at the
17 time.

18 Q. Okay. You don't recall any discussions with Pat
19 Selvey, or Rick Joyner, or anyone else at
20 MorningStar, about the 180 days beginning in August
21 of 2009?

22 A. No, I can't recall those -- that conversation.

23 Q. Okay. On Exhibit 24, Gerald says, "Currently, I
24 have nothing on my schedule. Let me know what time
25 he would prefer, and I'll keep that time open."

1 of 2009?

2 A. (Reviews document.) No.

3 Q. Do you recall whether or not the conference call in
4 2009 may have been an attempt to complete the
5 conference call that was described in Exhibit 24?

6 A. I can't recall.

7 Q. Do you recall the subject of a conference call you
8 would have had with Derrick, or anyone at Power
9 Engineering, in September of 2009?

10 A. No.

11 Q. Derrick Boyte responds to Patricia Smith at 2:02
12 p.m., "I should be available either day as it
13 stands now. I will try to keep those days free
14 until I hear back from you. I do need one favor
15 from you. Can you check on the status of our
16 outstanding invoices associated with this project?
17 It was my understanding that it was being held
18 until approval, which we have according to the
19 County. It will help if we could collect the
20 outstanding balance this month." Did you ever see
21 this email? Did this email come to you either
22 directly or through Patricia Smith in September
23 2009?

24 A. I can't recall.

25 Q. Do you recall the subject of what you would be

1 having a conference call with Power Engineering
2 about in September of 2009?

3 A. No.

4 Q. What was Power Engineering doing on this project
5 other than obtaining site plan approval?

6 A. They were developing the site plan. I believe they
7 were coordinating utility placement. They were --
8 I believe, at one point, they were coordinating the
9 project about the effects on wildlife and the lake.
10 They may have done other projects for MorningStar,
11 I can't recall.

12 Q. After the site plan approval after August of 2009,
13 do you know whether Power Engineering was engaged
14 in any of those activities on this project?

15 A. I don't believe they were.

16 Q. So the site plan approval would have been the last
17 part of their work on this project?

18 A. I believe that's true.

19 Q. Okay.

20 (Court Reporter marks Exhibit Number 26, Emails,
21 attached hereto.)

22 EXAMINATION CONTINUES BY MR. BALLOU:

23 Q. If you could look at this document, it's going to
24 be marked Exhibit 26. It's a series of emails, so
25 take a few minutes. If you need to take a break.

1 I'm going to take a two or three minute break, but

2 --

3 A. Okay.

4 Q. If you want to, we can go off the record.

5 (OFF RECORD)

6 EXAMINATION CONTINUES BY MR. BALLOU:

7 Q. Mr. Yarnes, have you had an opportunity to review

8 Exhibit 26 --

9 A. Sorry, let me just take a quick moment. (Reviews
10 documents.) Okay.

11 Q. All right. Understanding that you were not
12 directly included on these emails but Patricia
13 Smith is, do you recall receiving copies or having
14 discussions with Patricia Smith about this exchange
15 of emails between Derrick Boyte and her in December
16 2009, January 2010?

17 A. I remember talking to Pat Selvey about these, and
18 possibly having him direct Patricia.

19 Q. All right, so tell me about your conversation with
20 Pat Selvey. When did you first talk with him about
21 the question of Power Engineering's invoices?

22 A. I can't recall, but it would have been somewhere
23 around this time.

24 Q. Okay. Do you recall any conversation with Pat,
25 prior to December of 2009, about the fact that

1 Power Engineering was contending the site plan had
2 been approved?

3 A. Possibly.

4 Q. Okay. Tell me about that.

5 A. I remember Pat saying that they were contending the
6 site plan was approved. I can't recall the time.

7 Q. Do you recall Pat saying that, "Even though the
8 County says we have site plan approval, we don't
9 have a stamped set of plans"?

10 A. I can't recall that specific phrase, but I recall
11 us -- could you rephrase that or repeat that? I'm
12 sorry.

13 Q. Well, let me ask it this way. First of all, it is
14 your testimony that prior to December of 2009 you
15 had a conversation with at Pat Selvey to the effect
16 that the County -- or Power Engineering was
17 contending the site plan had been approved?

18 MR. FENNELL:

19 Objection.

20 EXAMINATION CONTINUES BY MR. BALLOU:

21 Q. Is that your testimony?

22 A. I can't recall the time, but I remember having a
23 conversation with Pat concerning that.

24 Q. Do you recall if that conversation was prior to
25 December of 2009?

1 A. I can't recall.

2 Q. Okay. What do you recall about the conversation
3 with Pat?

4 A. I would have been concerned about releasing payment
5 on any contract if I didn't feel it was fulfilled.

6 Q. Okay. Did you believe that Power Engineering's
7 work was not complete when you had this
8 conversation with Pat?

9 A. Possibly. I did for a long time, yeah.

10 Q. What did you believe was not complete?

11 A. That we didn't have site plan approval, I believe.

12 Q. Do you recall Pat ever taking the position that a
13 stamped set of plans was what you were waiting for?

14 A. Not specifically.

15 Q. Okay. Do you recall any conversation with Pat
16 Selvey about how you would know when the site plan
17 had been approved?

18 A. I believe we were waiting on numerous items. I
19 can't recall.

20 Q. Did you authorize the release of payment to Power
21 Engineering in January 2010?

22 A. I can't recall, possibly.

23 Q. If you had authorized the release of payment, would
24 that indicate to you that Power Engineering's work
25 was completed?

1 A. No.

2 Q. Would you have authorized payment to Power
3 Engineering when their work was not complete?

4 A. Possibly.

5 Q. Why?

6 A. I recall at the time that there was a lot of
7 shakeup in their offices, and they were moving
8 around, or something; and I recall it being an
9 inconsequential amount, and them complaining about
10 it, or something.

11 Q. At the bottom of page one of Exhibit 26, Patricia
12 Smith is writing to a Jenny Cooper with a cc to
13 Derrick Boyte. It says, "The contract that was
14 signed says that MorningStar will receive
15 notification from Power that our site plan has been
16 approved by York County." Did you have any
17 discussion with Patricia Smith about what the
18 contract with Power Engineering said?

19 A. No.

20 Q. Do you know if Pat --

21 A. Not -- not that I can recall. I may have.

22 Q. Do you recall ever having a conversation with
23 Patricia Smith that the contract required
24 notification from Power that the site plan had been
25 approved?

1 A. I can't recall that conversation.

2 Q. Did you ever have that conversation with Pat
3 Selvey?

4 A. Could you -- what was the -- what was the question?

5 Q. That the contract with Power Engineering says that
6 MorningStar will receive notification from Power
7 that the site plan had been approved?

8 A. I don't recall that.

9 Q. Having that conversation with Pat Selvey, Patricia
10 Smith, or anybody else?

11 A. That -- no.

12 Q. Okay. Did Patricia Smith talk to you in January of
13 2010 about this exchange?

14 A. I can't recall.

15 Q. Did Pat Selvey talk to you on or before January
16 21st of 2010 about the issues described in Exhibit
17 26?

18 A. Yes.

19 Q. When did he talk to you about that?

20 A. I can't recall the time.

21 Q. What did he tell you?

22 A. I recall the conversation that Pat informed me that
23 Power Engineering was looking to get paid, but we
24 hadn't received site plan approval.

25 Q. What did you say?

1 A. I think initially I said not to pay them.

2 Q. Was this in 2010 or 2009?

3 A. I can't recall.

4 Q. Did you have any discussion with Pat Selvey, or
5 anyone else, to the effect that once Power
6 Engineering provided evidence of site plan
7 approval, the time under the development agreement,
8 under Section 4.C.2, would begin?

9 A. I can't recall that.

10 Q. In fact, Section 4.C.2 was not part of any of these
11 conversations with Power Engineering or concerning
12 Power Engineering's invoice, was it?

13 A. Not that I can recall. You don't mind if I eat
14 while we're talking?

15 Q. I don't mind.

16 A. 'Cause I don't -- I don't mean to be rude about it,
17 but it just -- if I keep my little bits of food
18 going, then I won't eat bad food at lunch.

19 MR. BALLOU:

20 Exhibit 27.

21 (Court Reporter marks Exhibit Number 27, Emails,
22 attached hereto.)

23 EXAMINATION CONTINUES BY MR. BALLOU:

24 Q. I'm going to hand you what's been marked Exhibit
25 27, an email from David Pettine to Pat Selvey, copy

1 to Susan Britt, dated January 13th, 2010, and a
2 chain of emails, that actually predate that going
3 back to January 12th, initiated on last page by Pat
4 Selvey; do you see that?

5 A. Let me take just a quick second. (Reviews
6 document.) Okay.

7 Q. All right, so the first email, starting on the next
8 to the last page of this document, from Pat Selvey,
9 is addressed to Rick Joyner, Dave Yarnes, Buddy
10 Motz, and a whole line of other individuals,
11 correct?

12 A. Is it at the bottom of what's the second to the
13 last page?

14 Q. That's correct.

15 A. Yeah.

16 Q. Dated January 12th, --

17 A. Yes.

18 Q. -- 2010, at 16:54:54.

19 A. Correct.

20 Q. All right. "Heritage Tower Update, Happy New Year
21 to our friends at York County." Did you discuss
22 this email with Pat Selvey before he sent it?

23 A. I don't believe so.

24 Q. Do you recall receiving this email?

25 A. No, I -- I don't recall.

1 Q. Do you know why Pat Selvey would be sending an
2 email of this nature to the addressed recipients?

3 A. We felt it was important to communicate with York
4 County.

5 Q. He says, "It's been a while since our last update.
6 Our waiting list is now over 20 deep, which is a
7 significant milestone for us. We are now ready to
8 build our model unit. Plans will be submitted to
9 York County very soon." He's basically providing
10 an update status report to the County, correct?

11 A. I believe it's a truncated update, yes.

12 Q. Okay. At the time of this email, had you had the
13 discussion with Pat Selvey about the invoices
14 claimed due by Power Engineering?

15 A. I can't recall the timing.

16 Q. Do you know if at the time of this email you
17 understood that Power Engineering had informed Pat
18 Selvey that site plan had been approved?

19 A. No.

20 Q. Do you recall receiving this chain of emails
21 proceeding from the one we just referenced, the
22 response from Dave Pettine on January 10th at 5:13,
23 and then Pat's response later that night?

24 A. (Reviews document.) No, I don't recall.

25 Q. Did you have any discussion with Pat Selvey about

1 the fact that on January 12th Dave Pettine had
2 referenced the 180 Day Provision and Development
3 Agreement?

4 A. I think at some point Pat would have brought my
5 attention to it.

6 Q. But you don't specifically as you sit here today
7 recall having that discussion with him at or around
8 the time of this email?

9 A. No.

10 Q. On the first page of this exhibit is an email on
11 January 13th, 2010, at 7:30 a.m. from David Pettine
12 to Pat Selvey?

13 A. (Reviews document.) Uh-huh.

14 Q. "Pat, after looking at our plan review software,
15 the commercial site plan for the Tower was approved
16 by staff on August 24th, 2009." Do you recall Pat
17 Selvey telling you that this information had come
18 in from David Pettine on or about January 13th of
19 2010?

20 A. I believe around this time, Pat told me that the
21 County was contending that site plan approval had
22 taken place.

23 Q. All right, and so when he told you that, what did
24 you do?

25 A. I would have done -- I -- I know -- can you be more

1 specific?

2 Q. What did you do when Pat Selvey told you the County
3 was contending that the site plan had been approved
4 in August of 2009?

5 A. I can't recall exactly.

6 Q. Isn't it true that prior to January 13th of 2010,
7 the date of this email, Exhibit 27, that you had
8 not specifically looked at the provisions of
9 Section 4.C.2 of the Development Agreement?

10 MR. FENNELL:

11 Objection.

12 WITNESS CONTINUES:

13 A. I think I've stated on a number of occasions I
14 would have gone through the site plan prior to
15 this; but I -- does that answer your question?

16 Q. Were you surprised when Pat Selvey told you that
17 the County was contending the site plan had been
18 approved in August of 2009?

19 A. Yes.

20 Q. Hadn't you had that conversation with him
21 previously in the context of Power Engineering's
22 invoices?

23 A. I don't believe so, no.

24 Q. Hadn't Patricia Smith told you that Power
25 Engineering had indicated that the site plan had

1 been approved prior to the date of this email?

2 A. She may have indicated that was their contention.

3 Q. And you didn't take any action in response to that
4 information?

5 A. I don't, you know, that's a hard question to
6 answer. I don't know.

7 Q. You were waiting on site plan approval in the
8 summer of 2009?

9 A. I believe we were looking forward to -- we were
10 looking to site plan approval.

11 Q. You had described it to Community One Bank in May
12 of 2009 as being in it.

13 A. I believe that is the case.

14 Q. So when you learned that the site plan had in fact
15 been approved, were you pleased?

16 A. I can't recall.

17 Q. Did it have any significance to you at all?

18 A. I'm sure it did.

19 Q. What significance did it have for you?

20 A. I -- I can't recall. We were looking forward to
21 the site plan being approved. We felt it was
22 important to the project. We were waiting on it.

23 Q. With the site plan being imminent in the summer of
24 2009, were you aware that upon receipt of site plan
25 approval, you then had 180 days to produce the

1 information described in Section 4.C.2 of the
2 Development Agreement?

3 MR. FENNELL:

4 Objection.

5 WITNESS CONTINUES:

6 A. I think you've asked it several times. I think I
7 would have read the section.

8 Q. But you weren't really focused on it?

9 A. I don't know that I was really focused on it, no.

10 Q. Okay.

11 MR. BALLOU:

12 28.

13 (Court Reporter marks Exhibit Number 28, Email, attached
14 hereto.)

15 EXAMINATION CONTINUES BY MR. BALLOU:

16 Q. Exhibit 28 is an email with attachments. An email
17 from David Pettine, February 4, 2010, to Pat Selvey
18 and yourself, with ccs to Susan Britt, Jim Baker;
19 is that correct?

20 A. (Reviews document.) It appears to be, yeah.

21 Q. "Pat, good afternoon. I've attached the documents
22 that were sent to Gerald Lee of Power Engineering
23 on August 24th, 2009, along with the Zoning
24 Compliance that is created the following commercial
25 site plan approval." Do you recall receiving this

1 information?

2 A. No.

3 Q. You don't recall receiving this email?

4 A. I don't recall receiving this email.

5 Q. You don't recall receiving an email that had the
6 documents supposedly evidencing site plan approval
7 as an attachment in February of 2010?

8 A. No, I don't recall that.

9 Q. Okay. Do you recall any conversations with Pat
10 Selvey about the County sending him copies of the
11 documents indicating the site plan had been
12 approved?

13 A. I recall having conversations with Pat concerning
14 the County's contention that site plan was
15 approved.

16 Q. Do you recall him saying that they had sent
17 documents evidencing that site plan had been
18 approved?

19 A. No.

20 Q. So is it your testimony you don't recall talking to
21 Pat Selvey about this email at all?

22 A. I can't recall.

23 Q. Did you believe that a stamped set of plans was
24 required to be delivered to MorningStar as evidence
25 of site plan approval under the Development

1 Agreement?

2 A. I believed that -- I believed that the stamp set of
3 plans were an important part of site plan approval.

4 Q. But did you believe that the Development Agreement
5 required the County to deliver a stamped set of
6 plans on the Development Agreement for the 180 days
7 to begin?

8 A. I -- I don't believe I -- did I recall that the
9 develop -- can you just say that one more time?

10 MR. BALLOU:

11 Could you read it back, please?

12 Court Reporter reads back the question as follows:

13 Q. But did you believe that the Development Agreement
14 required the County to deliver a stamped set of
15 plans on the Development Agreement for the 180 days
16 to begin?

17 WITNESS CONTINUES:

18 A. I'm not sure. Did I believe that the Development
19 Agreement required the County to deliver a set of
20 plans? I just believe that the set of plans were
21 an important part.

22 Q. Okay. Did you have any conversations with Pat
23 Selvey where he contended that a stamped set of
24 plans was what was required for the 180 days to
25 begin?

1 A. I can't recall that.

2 Q. You don't recall that conversation at all?

3 A. No.

4 Q. You've read the Development Agreement?

5 A. I believe so, yes.

6 Q. Do you believe it requires a stamped set of plans
7 for the 180 days, under Section 4.C.2, to begin?

8 A. I don't know that it specifically calls it out.

9 Q. Okay. But do you believe that the Development
10 Agreement requires the delivery of a stamped set of
11 plans to MorningStar in order for the obligations
12 under Section 4.C.2 to begin?

13 A. I think that the -- I think that the stamped set of
14 plans are important to the approval of the site
15 plan.

16 Q. That's not my question, sir.

17 A. I -- I answered your question the first time. I'm
18 not sure how the second question is different. I'm
19 trying --

20 Q. Do you believe that the Development Agreement
21 requires a stamped set of plans to be delivered to
22 MorningStar for the 180 days under Section 4.C.2 to
23 begin?

24 A. I don't believe -- I -- I don't recall seeing that
25 in the Development Agreement.

1 Q. It's not in there -- that's not a requirement of
2 the Development Agreement, is it?

3 MR. FENNELL:

4 Objection.

5 WITNESS CONTINUES:

6 A. I don't recall seeing it in there.

7 Q. All right.

8 (Court Reporter marks Exhibit Number 29, Zoning Permit,
9 attached hereto.)

10 EXAMINATION CONTINUES BY MR. BALLOU:

11 Q. Is that Pat Selvey's signature on that document?

12 A. (Reviews document.) It appears to be.

13 Q. Can you read who the signature below his is?

14 A. No, I -- I really can't.

15 Q. That says Power Engineering Company in the
16 certificate of authorization stamp, doesn't it?

17 A. (Reviews document.) Yes.

18 Q. The next stamp next to that says Gerald Allen Lee,
19 doesn't it?

20 A. (Reviews document.) It appears to be.

21 Q. The box in the corner says, "For York County Use
22 Only Approved," right?

23 A. Yes.

24 Q. It says, "Zoning 8/19/09, Engineering 7/28/09,
25 Environmental 8/19/09;" do you see that?

1 A. (Reviews document.) Yeah, it appears to.

2 Q. That's a stamped set of plans, isn't it? That's a
3 stamp for a site plan, isn't it?

4 A. I don't understand. What is -- what is your
5 question? There are stamps. This appears to be
6 part of a site plan.

7 Q. Is this what you were waiting for? What Pat Selvey
8 may have been waiting for to commence the 180 days?

9 A. I believe that we were waiting for a set of plans
10 that -- can you -- can you restate that? 'Cause
11 you've got like two or three questions in there.

12 Q. Is this a stamped set of plans? Is this a copy of
13 a portion of a stamped set of plans?

14 A. It appears to have -- it appears to be a copy of
15 the portion of the plans, and it appears to have
16 stamps on it.

17 Q. Showing that it has been approved?

18 A. It has certain approvals on it.

19 Q. Okay. Did you ever ask anyone at York County to
20 provide a stamped set of plans prior to February of
21 2010?

22 A. I believe I did.

23 Q. Who did you ask?

24 A. I remember being in someone's office, possibly Dave
25 Pettine, and asking him when we could receive the

1 finalized plans.

2 Q. This was after this issue had arisen, correct?

3 A. You have to be more clear.

4 Q. After the issue described in the emails we just
5 looked at in January of 2010 where the County
6 indicated that the site plan had already been
7 approved back in August, the meeting in Dave
8 Pettine's office was after that issue came up?

9 A. No -- no, it was before.

10 Q. Was it before August of 2009?

11 A. I believe so.

12 Q. Okay. Before August of 2009 --

13 A. I believe it was, yeah.

14 Q. -- your testimony is, you believe you had a meeting
15 in Dave Pettine's office where you asked when you
16 can get a stamped set of plans?

17 A. Yes.

18 Q. What did he say?

19 A. He indicated there was some further approvals
20 needed, and that, you know, something to that
21 effect.

22 Q. So this is prior, it hadn't been approved yet,
23 right? There were still approvals that needed to
24 be obtained?

25 A. I believe that's true.

1 A. I believe after site plan approval.

2 Q. So the dispute really wasn't whether or not this
3 information was required, it was whether or not the
4 site plan got approved, right?

5 A. I think it had to do with the timeline. I think it
6 had to do with how we were -- our contention that
7 we weren't in -- informed. I can't recall all the
8 subjects.

9 Q. Okay. What else was said?

10 A. I can't recall anything else.

11 Q. How did the meeting end?

12 A. We left.

13 Q. Was there any final discussion about what the next
14 steps would be from either side?

15 A. I believe Jim Baker indicated that he would --
16 something about -- I believe he indicated
17 something, concerning mediation process, or -- I --
18 I can't recall at that point if there was anything
19 decided.

20 Q. Did you have any more meetings with Jim Baker prior
21 to March of 2010?

22 A. Possibly.

23 Q. Do you recall Jim Baker ever suggesting to you if
24 it would help to get more time to provide the
25 information required under the Section 4.C.2 of the

1 Development Agreement?

2 A. No, not specifically.

3 Q. Do you recall ever saying to Jim Baker or to anyone
4 else at the County that you needed more time to
5 obtain that information?

6 A. I believe so.

7 Q. How much time did you tell York County that you
8 needed?

9 A. I can't recall.

10 Q. You didn't give them a timeframe, did you?

11 A. I can't recall.

12 Q. In fact, you weren't prepared at that point in time
13 to give them a timeframe, were you?

14 A. Possibly not, no.

15 Q. So in February of 2010 when this meeting occurred,
16 if you had started 180 days under Section 4.C.2 to
17 the Development Agreement, you couldn't agree to
18 provide the information in that period of time,
19 could you?

20 MR. FENNEL:

21 Objection.

22 WITNESS CONTINUES:

23 A. Yeah, there's a lot of questions there. There's a
24 lot --

25 Q. That was just one question. At the time of this

1 A. They were calling concerning the County's
2 accusations about the Tower.

3 Q. Okay.

4 (Court Reporter marks Exhibit Number 33, Minutes of
5 County Council Meeting of 3/1/2010, attached hereto.)

6 EXAMINATION CONTINUES BY MR. BALLOU:

7 Q. Let's go ahead and look at Exhibit 33. I'll
8 represent to you that these are the minutes of the
9 Monday, March 1st, 2010, County Council meeting.
10 If you'd look at the very last page, the last item?

11 A. (Reviews document.)

12 Q. "Council took the following action after
13 reconvening from Executive Session. Authorized
14 default notification of agreement with MorningStar
15 Fellowship Church." Do you recall that happening?

16 A. I believe I did.

17 Q. Okay. Were there any accusations made against you
18 at that time at that meeting?

19 A. Against myself? I -- I can't -- can you just
20 clarify that?

21 Q. Were there any accusations made at that meeting
22 against MorningStar on March 1st of 2010?

23 MR. FENNEL:

24 Objection.

25 EXAMINATION CONTINUES BY MR. BALLOU:

1 Q. Did you have a press conference in connection with
2 your press release?

3 A. Yes.

4 Q. Did you call the media to attend?

5 A. We made the -- a -- our facility available to
6 media.

7 Q. Did media attend?

8 A. Yes.

9 Q. And they reported it?

10 A. I believe so, yes.

11 Q. So the following day this letter was sent from York
12 County to Rick Joyner, Dave Yarnes, and James W.
13 Sheedy?

14 A. Apparently.

15 Q. Do you recall receiving this letter?

16 A. I think so, yeah.

17 Q. Okay. Was Jim Sheedy the attorney for MorningStar
18 you consulted with at the time of the Notice of
19 Dispute?

20 A. No, I don't believe so.

21 Q. In fact, he was the attorney who helped MorningStar
22 in the drafting of the Development Agreement, isn't
23 he?

24 A. I think that's true.

25 Q. What did you understand this letter to be?

1 Q. Okay. No one else at MorningStar has, at this
2 point?

3 A. Not to my knowledge.

4 Q. Okay. The last component of damages is lost income
5 from reservation holders at the Tower over the next
6 five years; do you recall that?

7 A. Yes.

8 Q. You provided that number to your attorney of
9 \$7,187,421?

10 A. I believe I worked with them to develop that
11 number, correct.

12 Q. Anyone besides you and your attorneys work to
13 develop that number?

14 A. Possibly Pat Selvey, possibly our accounting team.

15 Q. Okay. I'm going to show you what has been
16 identified by your attorney as the document that
17 you used to determine that number; and it is a
18 Heritage Tower's Project Executive Summary,
19 beginning MorningStar Number 000214.

20 MR. BALLOU:

21 Let's mark that as 56.

22 (Court Reporter marks Exhibit Number 56, Heritage Towers
23 Project Executive Summary, attached hereto.)

24 EXAMINATION CONTINUES BY MR. BALLOU:

25 Q. Can you show me in that document how you determined

1 that the lost income from reservation holders at
2 the Tower over the next five years was 7,187,421?

3 A. (Reviews document.) I can't recall off the top of
4 my head, no.

5 Q. All right. Well, not off the top of your head,
6 referring to that document, can you explain to me
7 how you reached that number?

8 A. I believe it would have been a compilation of the
9 lost income from the aggregated years of the Tower.

10 Q. So walk me through that process. How did you go
11 about determining the lost income over the
12 aggregated years of the Tower?

13 A. I believe we looked at the, as I recall, the net
14 operating income, and we determined it for the
15 first three years, and then I believe we
16 extrapolated years after that.

17 Q. I think your testimony earlier in your deposition
18 was that you picked five years because it just
19 seemed reasonable; is that fair?

20 A. I think we picked five years, correct. I'm not
21 sure if I said just because it seemed reasonable.

22 Q. Well, why did you pick five years, and not four
23 years, or eight years?

24 A. I seemed to feel that the five years was the best
25 reflection of the damages.

1 Q. Why was that?

2 A. It seemed it represented -- it seemed
3 representative.

4 Q. Of what?

5 A. Of damages.

6 Q. In what way?

7 A. Can you start -- can you rephrase it?

8 Q. No, sir. Why did you pick five years?

9 A. It seemed representative.

10 Q. Of what?

11 A. We were trying to assess damages.

12 Q. So how did you determine that five years was
13 representative?

14 A. I believe we had conversations with our attorney
15 regarding it, and we felt that five years -- I
16 don't know how I can say it any other way.

17 Q. Okay. All right, so show me, like you showed your
18 attorneys, how you reached 7,187,000. Walk through
19 the document with me.

20 A. I believe, and I'd have to consult with my
21 attorney, specifically, we took the net operating
22 income as stated in the final pages of this
23 document.

24 Q. Which page are you referring to?

25 A. (Reviews document.) Page ten, page 12, and page

1 24.

2 Q. Okay. So referring to page ten of this Exhibit 56,
3 get my magnifying glass, there's a line that says,
4 "Net operating income," and it's a continuation of
5 page nine, that shows year one January through
6 December; is that accurate?

7 A. I believe that it's a continuation of page nine,
8 and it shows net operating income.

9 Q. So page ten shows net operating income for year one
10 of the operation of the tower; and this number says
11 that is -- I guess that's the total of the last
12 column, exhibit total. So that document says that
13 total for year one was 467,007?

14 A. Let me see. (Reviews document.) It appears to,
15 it's a little small --

16 Q. Sure.

17 A. -- for my eyes.

18 Q. So this portion of this document is called
19 preliminary operating statements, right?

20 A. Can I just see it again?

21 Q. That's it.

22 A. (Reviews document.) Yes.

23 Q. Okay. These are produced in-house with
24 MorningStar, weren't they?

25 A. I believe they were in conjunction with outside

1 accounting sources and help.

2 Q. Moore, Stephens and Lovelace?

3 A. Possibly, yeah.

4 Q. Were there any other accountants or outside sources
5 you were relying upon?

6 A. Possibly Jack Ottinger.

7 Q. Did you put together these numbers primarily on
8 page ten?

9 A. (Reviews document.) I don't know that that is my
10 spreadsheet; is that what you're asking?

11 Q. No, who compiled this information?

12 A. I'm not sure who would have done it originally.

13 Q. So you don't know where they got the information
14 from?

15 A. Yes, I do know where they got the information from.

16 Q. Where did they get the information?

17 A. They got the information from the -- the
18 projections that are stated in the rest of the
19 document.

20 Q. Of this document?

21 A. That's correct.

22 Q. Is it your testimony that an outside person, or
23 entity, or professional provided this information
24 to you; or did you, or somebody within MorningStar
25 compile the information included in this

1 spreadsheet?

2 A. I believe we worked in conjunction with outside
3 companies to pro -- produce that material.

4 Q. You worked in conjunction?

5 A. I believe we -- we worked in conjunction as a team.

6 Q. Who is we?

7 A. Myself, our accounting team.

8 Q. Mr. Wideman?

9 A. Wideman, Pat Selvey, others.

10 Q. Who else?

11 A. I can't recall any others.

12 Q. So the first year you estimate net operating income
13 of 467,007?

14 A. That's correct. I believe that's correct.

15 Q. Okay. This net operating income assumes zero cost
16 for food service; does it not?

17 A. (Reviews document.) Yes.

18 Q. Zero cost for housekeeping?

19 A. Yes.

20 Q. In fact, the only expenses assigned to this
21 calculation are general and administration and
22 marketing, right?

23 A. Let me just take a minute and review. (Reviews
24 document.) Can you just ask your question again?

25 Q. The only expenses assigned to calculate the net

1 operating income, were general and administration
2 and marketing; were they not?

3 A. No.

4 Q. What other expenses were factored into your
5 calculation of operating income?

6 A. It appears utilities, repairs, and maintenance.

7 Q. All right, let's see, where are those in the first
8 year?

9 A. On the second page.

10 Q. Okay. So you've got utilities, repairs and
11 maintenance, and insurance, okay.

12 A. I can't see what else was on there, but --

13 Q. Well, you can look.

14 A. (Reviews document.) Okay, I'm not -- I think that
15 the operating expenses are a summary of those
16 expenses.

17 Q. A summary of the above expenses?

18 A. I believe that's true.

19 Q. Page 12, in relation of page 11, which is year two,
20 same analysis; and you've calculated net operating
21 income 1,673,451?

22 A. Can I just take a look? (Reviews document.) I
23 believe that's correct.

24 Q. Okay. Then the third year it showed net operating
25 income of 1,682,321.

1 A. Let me double check. (Reviews document.) Yeah.

2 Q. All right, and so that's the first three years.

3 what did you do for years four and five?

4 A. We used year three.

5 Q. So you just repeated year three --

6 A. I --

7 Q. -- for four, and for five?

8 A. I believe that's correct.

9 Q. Okay. This Executive Summary does not have a date
10 on it, does it?

11 A. May I take a look?

12 Q. Yes, sir.

13 A. (Reviews document.) It doesn't appear to. It
14 doesn't appear to.

15 Q. In fact, the attachment is a preliminary summary?

16 A. I don't understand the question.

17 Q. The attachment to this Executive Summary is called
18 a preliminary operating statement.

19 A. That's correct.

20 Q. These preliminary operating statements, this
21 version, does not reflect that it's been verified
22 by an accountant or anybody else. No one else has
23 signed their name to this, have they?

24 A. Could you be just more specific about that?

25 Q. Sure. Moore, Stephens and Lovelace is not

1 verifying this preliminary operating --

2 A. That's correct. I don't believe they are.

3 Q. All right. Let me show you --

4 (OFF RECORD)

5 EXAMINATION CONTINUES BY MR. BALLOU:

6 Q. I'm looking at a document Bates stamped MorningStar
7 013259. This document has a date of 7/29/2009; do
8 you see that, sir?

9 A. (Reviews document.) Yes.

10 Q. Okay. When did you prepare Exhibit 56?

11 A. I can't recall exactly. It would have been with
12 our attorneys, so --

13 Q. With your current attorneys?

14 A. Correct.

15 Q. So it's your testimony that you prepared a Heritage
16 Tower Project Executive Summary with your current -
17 -

18 A. Oh, no.

19 Q. -- counsel?

20 A. No, I'm sorry, I misunderstood.

21 Q. Okay. My question is when did you prepare this
22 document?

23 A. I can't recall the specific time.

24 Q. In fact, this document was prepared before the July
25 23rd, 2009, version of the Executive Summary,

1 wasn't it?

2 MR. FENNELL:

3 Objection.

4 WITNESS CONTINUES:

5 A. Can I take a look it here?

6 Q. Sure. Actually, let me make some copies of this.

7 (OFF RECORD)

8 (Court Reporter marks Exhibit Number 57, Heritage Towers
9 Project Executive Summary dated 7/23/2009, attached
10 hereto.)

11 EXAMINATION CONTINUES BY MR. BALLOU:

12 Q. Mr. Yarnes, I've put in front of you what's been
13 marked as Exhibit 57, and this one is dated July
14 23rd, 2009. My question is isn't it true that 56
15 predates 57? 56 was done first, and then 57?

16 A. Can I see 56 again?

17 Q. I'm sorry.

18 A. (Reviews documents.)

19 (OFF RECORD)

20 WITNESS CONTINUES:

21 A. Now, your question was is this --

22 Q. Is it fair to say --

23 A. Just so I'm clear on --

24 Q. -- that Exhibit 56 came before Exhibit 57?

25 A. I honestly can't tell.

1 Q. All right.

2 A. They appear to be about the same time.

3 Q. All right, on page five of Exhibit 56, you state,
4 "Currently, 135 priority reservations of \$1,000 are
5 in place," okay?

6 A. Uh-huh.

7 Q. On page six of Exhibit 57, you state, "HTP has 158
8 priority reservations of \$1,000 each." Do you see
9 that?

10 A. On page six?

11 Q. Let me see it a minute.

12 A. Uh-huh.

13 Q. So that would indicate that the 57 was the later
14 document?

15 A. That the one referencing the lower number was the -
16 -

17 Q. Was the earlier document. But as you're marketing
18 efforts continued, you got more reservations.

19 A. It -- it seems to be. I just -- I hadn't looked at
20 the comparison in these --

21 Q. Okay.

22 A. -- documents before.

23 Q. All right. So you don't recall preparing a version
24 of this, that the number of priority reservations
25 actually went down from the prior version, do you?

1 A. They would have fluctuated, sure.

2 Q. How many versions of this Executive Summary do you
3 recall preparing?

4 MR. FENNELL:

5 Objection. You can answer.

6 WITNESS CONTINUES:

7 A. There are numerous versions of the Business Plan.

8 Q. Well, this isn't the Business Plan, this is an
9 Executive Summary.

10 A. Numerous versions of the Executive Summary.

11 Q. But this is the one, Exhibit 56, that you chose to
12 use for purposes of determining the net operating
13 income to reach the 7,187,421 number?

14 A. I believe that's true.

15 Q. Of all the other versions, this is the one you
16 chose?

17 A. I believe that's true.

18 Q. Okay. Exhibit 57 has a different financial
19 projection attached to it, doesn't it, starting on
20 page eight?

21 A. (Reviews document.) There are differences in the
22 financial declarations, it -- it appears.

23 Q. That's correct. In fact, there isn't a line, is
24 there, in Exhibit 57 that specifically is labeled
25 net operating income?

1 A. (Reviews document.) Not that I can see.

2 Q. Okay. On page nine of Exhibit 57, however, there
3 is a chart, that shows what is labeled projected
4 statements of operations, and changes in net
5 assets;" do you see that?

6 A. (Reviews document.) Yes.

7 Q. That projects out over the period of time from 2010
8 to 2018, expected revenue, and expected expenses,
9 and what is labeled a change in net assets; do you
10 see that?

11 A. Yes.

12 Q. On this chart, attached to your Executive Summary,
13 a change in net assets remains a negative number
14 through 2018, doesn't it? Your revenue, minus
15 expenses, is a negative number through 2018; is it
16 not?

17 A. (Reviews document.) Change in net assets remains a
18 negative number --

19 Q. Do you see where I'm at?

20 A. Yeah, I'm just familiarizing myself with it. It
21 appears to be negative number through 2018.

22 Q. So on this chart that you prepared on or about 7/23
23 of 2009, in 2010, you show a change in net assets.
24 Are these in whole numbers? Are these thousands,
25 or do you know what the units we're talking about

1 here?

2 A. In --

3 Q. On page nine of Exhibit 57.

4 A. I'm assuming they're thousands.

5 Q. So a decrease in net assets of 168,000 in 2010?

6 A. Change in net assets.

7 Q. Of negative 168,000 for 2010.

8 A. That's correct.

9 Q. For 2011 a net change in assets, excuse me, a
10 change in net assets of negative 4,390,000?

11 A. If that's -- if these are based on thousands, that
12 appears to be so.

13 Q. So on, in 2012, 2,262,000?

14 A. That's correct.

15 Q. 676,000 in 2013, and so on; and throughout this
16 entire chart it's all negative, right?

17 A. In that line item throughout 2018 it's negative.

18 Q. Do you recall why you would have changed the
19 attachment of the financials on the Executive
20 Summary from Exhibit 56 to Exhibit 57?

21 MR. FENNELL:

22 Objection.

23 WITNESS CONTINUES:

24 A. I don't think they're the same.

25 Q. They're different, right. Do you know why they're

1 different?

2 A. They're different financial documents.

3 Q. They paint a very different financial picture,
4 don't they?

5 MR. FENNELL:

6 Objection.

7 WITNESS CONTINUES:

8 A. They're viewing different components of the
9 project.

10 Q. The revenues minus the expenses are negative
11 through 2018 in Exhibit 57?

12 MR. FENNELL:

13 Objection.

14 EXAMINATION CONTINUES BY MR. BALLOU:

15 Q. Correct.

16 A. Can you be specific about it?

17 Q. I just was.

18 A. You didn't say which document.

19 Q. I said Exhibit 57, the revenues minus the expenses
20 were negative from 2010 until 2018, by your own
21 document?

22 MR. FENNELL:

23 Objection.

24 WITNESS CONTINUES:

25 A. I'm not sure what the change in net assets is

1 reflecting in there.

2 Q. Fair enough, okay. So you chose not to rely on
3 Exhibit 57 in determining what the lost income for
4 the reservation holders of the Tower would be,
5 correct?

6 A. I believe that's true.

7 Q. Okay.

8 (Court Reporter marks Exhibit Number 58, Confidential
9 Business Plan, attached hereto.)

10 EXAMINATION CONTINUES BY MR. BALLOU:

11 Q. I want to show you what's being marked Exhibit 58.
12 Beginning with MorningStar Number 011035, it's
13 entitled, "Confidential Business Plan for Heritage
14 Tower Project," dated March, 2008; do you see that,
15 sir?

16 A. (Reviews document.) I don't see the date you
17 mentioned.

18 Q. On page two of that document.

19 A. Oh, okay, yeah.

20 Q. If you flip with me, sir, to page 11066, dated
21 March 8th, no, excuse me, March 5th, 2008, a
22 compiled projection by Moore, Stephens, Lovelace,
23 P.A.; do you see that?

24 A. (Reviews document.) Yes.

25 Q. This is the document prepared by the accountants

1 for MorningStar to provide the compiled financial
2 projections for this project; is it not?

3 A. I think this is prepared for this particular
4 business plan.

5 Q. Are you aware of any other compiled projections
6 prepared by Moore, Stephens, Lovelace, or any other
7 accountant that was attached to any business plan?

8 A. I believe so.

9 Q. You believe that there are other financial
10 documents other than the March 5th, 2008,
11 projections, prepared by Moore, Stephens, and
12 Lovelace?

13 A. Yes.

14 Q. Prepared by Moore, Stephens, and Lovelace?

15 A. Yes.

16 Q. We're going to have to find them. If you would,
17 sir, flip with me to page five of the Moore,
18 Stephens, and Lovelace report, Bates Number 11072.

19 A. Uh-huh.

20 Q. Okay? This is a projection as of March 21st of
21 2008. In the second paragraph it reads, "This
22 projection was prepared to reflect the results of
23 operations of the corporation following the
24 expected financing of Heritage Tower project via
25 the issuance of bonds in the amount of \$55,000,000;

1 do you see that?

2 A. (Reviews document.) Yes.

3 Q. There was no issuance of bonds in the amount of
4 \$55,000,000, was there?

5 A. No.

6 Q. So that assumption is incorrect?

7 A. I believe it's based on the -- I believe what he's
8 pointing out is the issuance of bonds as compared
9 to other types of financing.

10 Q. But that's an assumption that did not occur, right?

11 A. I don't mean to be wrangling at words, but he's --
12 he's -- he's -- he's making an assumption that this
13 project would be financed by bonds in this
14 statement.

15 Q. Okay.

16 A. I believe that's what he's pointing out.

17 Q. It's your testimony that you believe that there are
18 other reports attached to business plans prepared
19 by the accountants other than this report?

20 A. I believe so.

21 Q. Turn with me, if you would, sir, to MorningStar
22 011081. This is Moore, Stephens and Lovelace's
23 detailed Statement of Operations Year 1; do you see
24 that?

25 A. (Reviews document.) Yeah.

1 Q. Here they have month 1 through month 12, and a
2 total revenues, expenses, net operating income.

3 A. It appears to be.

4 Q. Moore, Stephens, and Lovelace said, at this point
5 in time, in March of 2008, that at the end of the
6 first year of operations, the total net operating
7 income was negative \$516,759, correct?

8 MR. FENNELL:

9 Objection.

10 EXAMINATION CONTINUES BY MR. BALLOU:

11 Q. Is that what that report says?

12 A. Can you -- can you say that one more time?

13 Q. Yes, sir. Page 11081 --

14 A. Uh-huh.

15 Q. -- Heritage Towers, LLC, detailed statement of
16 operation, year one, net operating income total
17 negative 516,759?

18 MR. FENNELL:

19 Objection.

20 WITNESS CONTINUES:

21 A. That's what it says.

22 MR. FENNELL:

23 Go ahead.

24 EXAMINATION CONTINUES BY MR. BALLOU:

25 Q. Is that what it says?

1 A. That's what it says here.

2 Q. All right. If you flip with me to page 11086,
3 we've got Heritage Towers, LLC, Detailed Statement
4 of Operation, Year 1, for months 1 through 12, with
5 a total at the end, net operating income; do you
6 see where I am?

7 A. (Reviews document.) Yes.

8 Q. Net operating income after year two, negative
9 218,184.

10 MR. FENNELL:

11 Objection. Go ahead.

12 EXAMINATION CONTINUES BY MR. BALLOU:

13 Q. Is that what it says?

14 A. That's what it says.

15 Q. Okay. Now, you had access to this report at the
16 time you prepared Exhibit 56, didn't you?

17 A. I believe so, yes.

18 Q. Yet you chose to ignore the opinion of your
19 accountants in determining the net operating income
20 of this project?

21 MR. FENNELL:

22 Objection.

23 WITNESS CONTINUES:

24 A. I used their -- I don't think I would have ignored
25 it. I think I used some of their projections, in -

1 - in compiling the other -- or I believe that some
2 of those projections are -- are used as the basis
3 for the other.

4 Q. So what documents did you rely upon to come from
5 the financial projections you said you relied upon
6 that were prepared in March of 2008 in order to
7 prepare the numbers contained in Exhibit 56?

8 A. Possibly things like the absorption rate. I
9 honestly can't recall right now. This was a very
10 early model, very different.

11 Q. In fact, you never really referred to this for
12 purposes of determining what lost income from
13 reservation holders would be until this lawsuit was
14 filed?

15 A. This -- all -- this document is part of an ongoing
16 effort to correctly identify income of the Tower.
17 It's at an early stage, and I used it to prepare
18 other documents.

19 Q. So in order to turn in a claim for damages that you
20 contend are lost income from reservation holders,
21 you selectively chose a document that you contend
22 shows a positive net income, ignoring the
23 MorningStar accountants' reports, that show a
24 negative net income?

25 MR. FENNELL:

1 Objection.

2 WITNESS CONTINUES:

3 A. I used a version that I thought was the best
4 representation.

5 Q. As we sit here today, do you believe it is still
6 the best representation?

7 A. Yeah.

8 Q. Why?

9 A. I think it's one of the latest that we did, and I
10 think it's reflects a lot of the -- our latest
11 understanding of the project.

12 Q. Okay. You say our understanding, besides you, who
13 is that?

14 A. Myself, the others that were involved in the
15 project.

16 Q. Who would that be, Rick Joyner and Pat Selvey?

17 A. Rick Joyner, Pat Selvey. I believe Jack Ottinger
18 would have been involved at this time.

19 Q. When it came time to pick a number to determine
20 what damages for lost income were concerned, who
21 made that decision?

22 A. Myself and our attorneys.

23 Q. Okay.

24 MR. BALLOU:

25 We'll step outside for a second.

Debbie Helms

From: Patricia Smith <PSmith@morningstarmlnstries.org>
Sent: Wednesday, August 19, 2009 10:48 AM
To: Gerald A. Lee
Subject: RE: Tower Project Approval

Gerald,

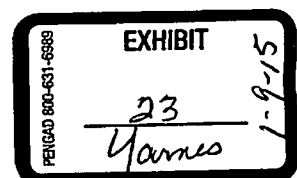
Thank you so much for your email. I will get this to Dave as soon as possible and let you know. We will look at what we have on our side concerning Invoices with Power Engineering and talk about this with you as well. We are looking forward to moving forward with you and Power!

Thanks,
Patricia

From: Gerald A. Lee [mailto:gerald@powereng.net]
Sent: Wednesday, August 19, 2009 10:38 AM
To: Patricia Smith
Subject: Tower Project Approval

I do not have an e-mail for Dave so I will send this through you. I had a meeting with York County yesterday to go over the last of some minor changes they wanted on the plans and they actually allowed me to just write the changes on the previously submitted drawings. That is the last of the comments and it is my understanding that they will be issuing their approval letter next. We probably need to talk again and discuss where we need to go from this point. Please call me at your earliest convenience. There is also an issue of past due billings. Since we did not have the approval on the work we did I did not push the issue but now that we do I need to bring it up. The last payment we received from Morningstar I believe was back in January and it was a partial payment. We need to get current with billings. Thanks

Gerald A. Lee, PE
Power Engineering Company, Inc.
138 Westpark Blvd
Columbia, SC 29210
Tel: 803-216-8777
Fax: 803-216-8070



Debbie Helms

From: Patricia Smith <PSmith@morningstarministries.org>
Sent: Thursday, August 20, 2009 9:36 AM
To: Gerald A. Lee
Subject: RE: Tower Project Approval

Gerald,

Thanks for your flexibility. I will set it up with Dave to give you a call at 10:30 am this Monday, the 24th of August. Will you let me know the best number that he can reach you at?

Thank you,
Patricia

From: Gerald A. Lee [mailto:gerald@powereng.net]
Sent: Wednesday, August 19, 2009 1:53 PM
To: Patricia Smith
Subject: RE: Tower Project Approval

Currently I have nothing on my schedule. Let me know what time he would prefer and I will keep that time open.

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Wednesday, August 19, 2009 1:52 PM
To: Gerald A. Lee
Subject: RE: Tower Project Approval

Dear Gerald,

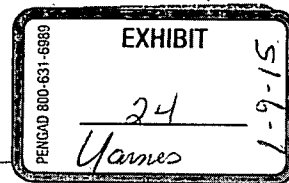
I was able to speak with Dave and we found that next week would work better for his schedule to talk on the phone. There is a conference going on Thursday - Saturday this week which will keep him pretty occupied just about every moment. Will you have Monday, the 24th of August available for a conference call with Dave? He has 10 am or 10:30 am available.

I look forward to hearing from you.

Thanks,
Patricia

From: Gerald A. Lee [mailto:gerald@powereng.net]
Sent: Wednesday, August 19, 2009 10:38 AM
To: Patricia Smith
Subject: Tower Project Approval

I do not have an e-mail for Dave so I will send this through you. I had a meeting with York County yesterday to go over the last of some minor changes they wanted on the plans and they actually allowed me to just write the changes on the previously submitted drawings. That is the last of the comments and it is my understanding that they will be issuing their approval letter next. We probably need to talk again and discuss where we need to go from this point. Please call me at your earliest convenience. There is also an issue of past due billings. Since we did not have the approval on the work we did I did not push the issue but now that we do I need to bring it up. The last payment we received from Morningstar I believe was back in January and it was a partial payment. We need to get current with billings. Thanks



Gerald A. Lee, PE

Power Engineering Company, Inc.

138 Westpark Blvd

Columbia, SC 29210

Tel: 803-216-8777

Fax: 803-216-8070

Debbie Helms

From: Patricia Smith <PSmith@morningstarministries.org>
Sent: Wednesday, September 09, 2009 2:03 PM
To: Derrick E. Boyte
Subject: RE: Rescheduling with Dave Yarnes

Thanks Derrick. I am going to shoot for the mornings of either of those days, just so you know.
Have a good day,
Patricia

From: Derrick E. Boyte [mailto:dboyte@powereng.net]
Sent: Wednesday, September 09, 2009 2:02 PM
To: Patricia Smith
Subject: RE: Rescheduling with Dave Yarnes

I should be available either day as it stands now. I will try to keep those days free until I hear back from you.

I do need one favor from you, Can you check on the status of our outstanding invoices associated with this project. It was my understanding that it was being held until approval which we have according to the county. It would help if we could collect the outstanding balance this month.

Thanks,
Derrick

From: Patricia Smith [mailto:PSmith@morningstarministries.org]
Sent: Wednesday, September 09, 2009 1:46 PM
To: Derrick E. Boyte
Subject: Rescheduling with Dave Yarnes

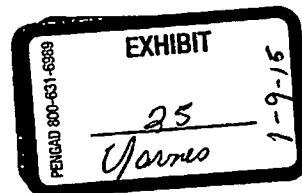
Hello Derrick,

I hope you are having a good week. I am writing because Dave has asked me to reschedule the conference call we have planned for this Friday to another time next week. I am looking at putting a few other things on his calendar, so if you don't mind I will get back with you soon on Dave's availability. I will look at rescheduling the conference call for either Thursday the 17th of Sept. or Friday the 18th of Sept.

If either of these dates will not work for you, please let me know. I will get in touch with you soon.

Thanks for your flexibility,
Patricia

Patricia Smith
Assistant to David Yarnes
psmith@morningstarministries.org
(803) 802-5544 x378
(803) 547-9615



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 [mailto: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.

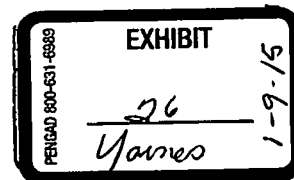
Please let me know if you have any other questions.

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 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

Kendree, Michael

From: Pettine, David
Sent: Wednesday, January 13, 2010 7:30 AM
To: 'Pat Selvey'
Cc: Britt, Susan
Subject: RE: Heritage Tower Update

Pat,

After looking in our plan review software, the commercial site plan for the tower was approved by staff on August 24th 2009. The approval notice was sent to the engineer by our DCC staff. I also recall staff having the engineer come to the offices in York to add a few notes to the plan that were needed to get approval and save the re-review cost of an additional submittal.

The engineer for the project should have the letter generated by staff following approval of the plans. The note from the DA is below and is in section C "Bonds or Letter of Credit".

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.

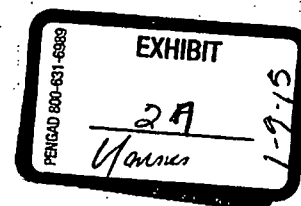
Please let me know if there is anything else we can provide at this time. I'll be in a workshop all day, but will check email periodically. We should have some time Thursday or Friday to discuss further as needed. Just let me know. Thanks Pat.

Dave Pettine
Assistant Director, Planning and Development Services

York County Government
Planning & Development
1070 Heckle Blvd. A-5
Rock Hill, SC 29732-2863
Direct: (803) 909-7173
Toll Free: (800) 922-7271
Phone: (803) 909-7240
Fax: (803) 909-7478
Email: david.pettine@yorkcountygov.com
Website: www.yorkcountygov.com

From: Pat Selvey (mailto:patselvey@gmail.com)
Sent: Tuesday, January 12, 2010 7:15 PM
To: Pettine, David
Cc: Britt, Susan
Subject: Re: Heritage Tower Update

David,



I am aware of the language you are referring to, however, it is my understanding that the Site Plan has not been approved. Last time we talked with your offices, it was still in review and we were happy to have more time as we are doing our level best to perform as promised.

Pat

On Tue, Jan 12, 2010 at 5:13 PM, Pettine, David <David.Pettine@yorkcountygov.com> wrote:

Pat,

Thanks for the update. Sounds like things have been progressing on the project. However, you may want to review the DA as our understanding was there was a six month period following site plan approval to provide proof of financing for the project. If that did not occur, the DA became void.

Under that provision, financing would need to be secured by late February in order for the project to proceed as plans were approved in August.

I am out of the office at the moment, but I will provide you with the section of the DA that references the 180 day provision tomorrow morning.

Again, this is our understanding of that language and should be reviewed by both legal counsels prior to making a final determination. I have a council retreat all day tomorrow but as stated will get you the language I am referencing in this email in the morning so you can conduct review on your end. Let's plan on talking on Thursday or Friday so we can all make sure we are on the same page.

Thanks Pat. Have a good night.

Dave

From: Pat Selvey <patselvey@gmail.com>
To: Rick Joyner <rickjoy@aol.com>; dave yarnes <dyarnes@gmail.com>; Buddy Motz <b.motz@rellanceadm.com>; Motz, Buddy; Lindemann, Paul; Britt, Susan; Allen, Steve; Pettine, David; Gary Sanderson <gws717@gmail.com>; Dave Priester <DPriester@choateco.com>; JEFFERSON WOODALL <jwoodall@conceptarc.com>; Rich Whipple <Rich.Whipple@yorkcountygov.com>; Bowyer, Rebecca; Caloe, Shannon; David Yarnes <pselvey@morningstarmindustries.org>
Sent: Tue Jan 12 16:54:54 2010
Subject: Heritage Tower Update
Happy New Year to our friends at York County.

It has been a while since our last update. We have been working diligently throughout 2009, primarily on one thing: Sales. We have good news to report.

Our waiting list for reservations is now over 20 deep which triggers a significant milestone for us. We are now ready to build our "model unit". Plans will be submitted to YC very soon for the model unit which will be constructed very quickly now that we have enough reservations to proceed with the next stage of our Master Plan.

Once the model is built, we will be able to come under contracts which will in turn trigger construction financing. Our project is proceeding as planned in every way, except for timing. It took longer in this economy than we initially thought to get to this milestone, but given the time constraints of our Development Agreement, we should have plenty of time to complete everything within the 5 years allotted for our PD Plan.

Please feel free to contact us with any questions about our project.

Pat Selvey
Heritage Tower Project

Kendree, Michael

From: Pat Selvey <patselvey@gmail.com>
Sent: Tuesday, January 12, 2010 7:15 PM
To: Pettine, David
Cc: Britt, Susan
Subject: Re: Heritage Tower Update

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Thanks Pat. Have a good night.

Dave

From: Pat Selvey <patselvey@gmail.com>
To: Rick Joyner <rickjoy@aol.com>; Dave Yarnes <dyarnes@gmail.com>; Buddy Motz <b.motz@rellanceadm.com>; Motz, Buddy; Lindemann, Paul; Britt, Susan; Allen, Steve; Pettine, David; Gary Sanderson <gws717@gmail.com>; Dave Priester <DPriester@choateco.com>; JEFFERSON WOODALL <jcwoodall@conceptarc.com>; Rich Whipple <Rich.Whipple@yorkcountygov.com>; Bowyer, Rebecca; Catoe, Shannon; David Yarnes <pselvey@morningstarministries.org>
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Please feel free to contact us with any questions about our project.

Pat Selvey
Heritage Tower Project

Britt, Susan

From: Pettine, David
Sent: Thursday, February 04, 2010 4:39 PM
To: Pat Selvey; dave yarnes
Cc: Britt, Susan; Baker, Jim
Subject: Commercial Site Plan Approval Documents
Attachments: Plan_Tracking_Report.pdf; Zoning_Compliance_8_28_2009.pdf

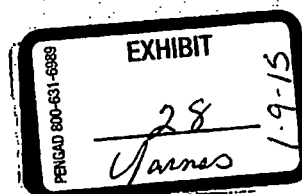
Pat,
Good afternoon. I have attached the documents that were sent to Gerald Lee of Power Engineering on August 24th, 2009, along with the Zoning Compliance that is created following commercial site plan approval.

In regards to the info on the Plan Tracking Report attachment, plans received conditional approval on August 4th, 2009. The conditions for final approval were the addition of a few notes on the plans. York County staff worked with Gerald to have him add and initial the notes on the plans to staff's satisfaction rather than request a full re-submittal. The addition of the notes resulted in the conditions being met for final approval with the attached correspondence outlining staff's acknowledgement of the notes being added and sent to Gerald Lee. Following that, the plans were stamped approved and the Zoning Compliance was created which is formal acknowledgement of the plans meeting the requirements of the applicable ordinances. Copies of the approved, stamped plans are in our offices and we can provide copies to you upon request.

Please let me know if there is anything else we can provide or if you have any additional questions on the attached documents. Thanks Pat.

Dave Pettine
Assistant Director, Planning and Development Services

York County Government
Planning & Development
1070 Heckle Blvd. A-5
Rock Hill, SC 29732-2863
Direct: (803) 909-7173
Toll Free: (800) 922-7271
Phone: (803) 909-7240
Fax: (803) 909-7478
Email: david.pettine@yorkcountygov.com
Website: www.yorkcountygov.com





LETTER OF NOTIFICATION

York County Site Plan Revision Letter

YORK COUNTY DEVELOPMENT COORDINATING CENTER
1070 Heckle Blvd, Rock Hill, South Carolina 29732-2863

Phone: 803 909 7238 or 803 909 7232 FAX 803 909 7227

website: www.yorkcountygov.com

To: POWER ENGINEERING, INC
138 WESTPARK BLVD
COLUMBIA, SC 29210

Project Number: 20080392
Project Name: HERITAGE TOWER PROJECT
Project Address: 225 STAR LIGHT DR
Plan Number: 4
Date Submitted: 7/16/2009
Types of Plans: Commercial Site Plan

Attention: GERALD LEE

FAX: (803)216-8070

We have completed our review of your site plans for the project referenced above. The comments listed on the attached plan review report must be addressed and revised plans resubmitted.

Once the above comments have been addressed, please submit a cover sheet with the revisions that thoroughly detail the changes/responses and the associative locations on the plans. When revised plans are received, we will resubmit the plans to staff for review. We require 7 complete sets for re-review. Please note that we require separate checks for zoning and storm water re-review fees (both payable to York County). See attached comments to verify if fees are applicable.

We remind owners, designers and contractors, or their representatives, that while this review is an integral part of this project, it does not relieve them from the individual or collective responsibility to comply with applicable provisions of the adopted codes and standards. Nor should this examination be construed as a check of every item in the submitted documents and does not prevent this agency, nor other state or local authorities, from hereafter requiring corrections of errors in plans or construction. Please call if you have questions or if we can help you.

Sincerely,

Ann Dodgen

Development Coordinating Center



Initial: Tuesday, August 4, 2009
Printed: Monday, August 24, 2009

NS: 1 1



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-162.41.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



Thursday, February 4, 2010

Page 1 of 2

C:\Program Files\BCS\Plan Tracking\reports\Review_Comments.rpt

STAKING PLAN
EROSION CONTROL PLAN
EROSION CONTROL NOTES AND DETAILS
GRADING PLAN
STORM DRAINAGE PLAN
STORM DRAINAGE PROFILES
UTILITY PLAN
UTILITY DETAILS
STORM STRUCTURE DETAILS
BAYSAYER DETAILS
STORM STRUCTURE DETAILS

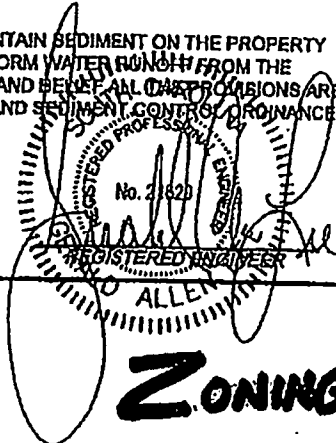
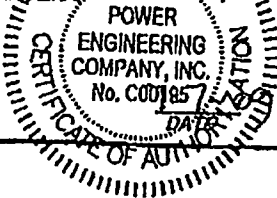
IN ALTY OF LAW THAT THIS DOCUMENT AND ALL ATTACHMENTS WERE PREPARED UNDER MY DIRECTION OR ORDANCE WITH A SYSTEM DESIGNED TO ASSURE THAT QUALIFIED PERSONNEL PROPERLY GATHERED AND RMATION SUBMITTED. BASED ON MY INQUIRY OF THE PERSON OR PERSONS WHO MANAGE THE SYSTEM, OR ECTLY RESPONSIBLE FOR GATHERING THE INFORMATION, THE INFORMATION SUBMITTED IS, TO THE BEST OF BELIEF, TRUE, ACCURATE, AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR INFORMATION, INCLUDING THE POSSIBILITY OF FINE AND IMPRISONMENT FOR KNOWING VIOLATIONS."

Y THAT TO THE BEST OF MY KNOWLEDGE, THESE PLANS CONTAIN ALL INFORMATION REQUIRED BY THE OF YORK COUNTY 8C AND AS REFERENCED BY THIS APPLICATION. "I (WE) HERBY CERTIFY THAT ALL LAND ES INCLUDING CLEARING, GRADING, CONSTRUCTION AND/OR DEVELOPMENT WILL BE DONE PURSUANT TO E TO INDEMNIFY ANY PERSON DAMAGED BY FAILURE TO COMPLY WITH THE APPROVED PLAN. COUNTY AND WILL BE ALLOWED TO ENTER UPON THE PROJECT SITE PROVIDED THEY PRESENT APPROPRIATE

7-8-09
DATE

Pat Henry
PERMIT APPLICANT

AT THIS PLAN IS DESIGNED TO CONTAIN SEDIMENT ON THE PROPERTY PROVIDE FOR THE CONTROL OF STORM WATER RUNOFF FROM THE TO THE BEST OF MY KNOWLEDGE AND BELIEF ALL OTHER PROVISIONS ARE IN HE STORMWATER-MANAGEMENT AND SEDIMENT CONTROL ORDINANCE OF I CAROLINA



ZONING PERMIT #
ZC-091595

FOR YORK COUNTY USE ONLY		
APPROVED		
Subject to York County Code of Ordinances by initials and date below.		
Reviewer	Date	
Zoning: <i>cat</i>	8-19-09	
Engineering: <i>HL</i>	7-29-08	
Env Comp: <i>BL</i>	8-17-09	
Changes/Alterations to this plan may void permit # <i>201595</i>		

ZONING
Copy

PERC40 800-631-6889	EXHIBIT
	29
	Younes

1-9-15



York County Zoning Department
1070 Heckle Blvd Ste 107
Rock Hill S.C. 29732
803-909-7232
803-909-7218
Fax:803-909-7227

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 District:

PD (Custom)

Community

Fort Mill, SC 29716

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

see site plan

Parking Size

see site plan

HC Spaces

see site plan

HC Size

see site plan

Special Conditions:

See conditions under site plan and site must comply with the Development Agreement. See site plan for additional requirements along with all requirements of the Development Agreement.

Applicant
Power Engineering

Zoning Official
Shannon Catoe

Date Issued
Aug 28 2009

Fee \$100.00

(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 initialed 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.



Thursday, February 4, 2010

Page 2 of 2

C:\Program Files\BCS\Plan Tracking\reports\Review_Comments.rpt



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 1

Type of Work
Heritage Tower Project

Project Name:
Heritage Tower Project

Zoning District:
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

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see site plan

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See conditions under site plan and site must comply with the Development Agreement. See site plan for additional requirements along with all requirements of the Development Agreement.

Applicant
Power Engineering

Zoning Official
Shannon Catoe

Date Issued
Aug 28 2009

Fee \$100.00

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

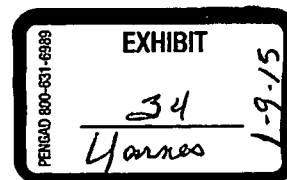
Dear Mr. Joyner, Mr. Yarnes, and Mr. Sheedy:

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



MORNINGSTAR_17522

Notice of Default regarding MorningStar Fellowship Church
Page 2 of 2
March 5, 2010

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.

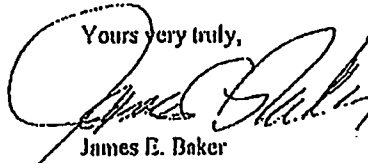
This letter constitutes a notice of default by MorningStar for breach of its obligations to provide bid, performance and payment bonds, a letter of credit or a demolition bond or its financial equivalent under Section IV. C of the Development Agreement. As provided in Section X. B of the Development 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

MORNINGSTAR_17523

Deposition of Gerald Lee

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

MORNINGSTAR FELLOWSHIP)
CHURCH,)

)
PLAINTIFF,)

-VS-) CA No. 2013-CP-46-00246

)
YORK COUNTY, SOUTH)
CAROLINA,)

)
DEFENDANTS.)
_____)

DEPOSITION OF GERALD A. LEE
COLUMBIA, SOUTH CAROLINA
MARCH 20, 2014

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
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1 Rains was let go?

2 A Johnny came up to assess the situation, but I was
3 basically in charge of the office from that point
4 on.

5 Q And that would be John Stephenson?

6 A No, Johnny Johnson, --

7 Q Johnny Johnson.

8 A -- the president of the company.

9 Q Okay. And so, from 2008 until you were let go, you
10 were basically in charge of the Charlotte office?

11 A 2008 until March of 2009, when they shut it down.

12 Q Were you Derrick Boyte's supervisor?

13 A Yes.

14 Q Did you start working on the Morningstar Fellowship
15 project before you went up to Charlotte?

16 A No.

17 Q You said when you went to Charlotte, that was one
18 of the projects they wanted you to work on.

19 A Right.

20 Q And we talked about the parking lot a little bit
21 and these bunk houses. When Keith Rains was your
22 supervisor up to 2008, would you communicate
23 directly with the people at Morningstar or would
24 Keith Rains communicate with the people at
25 Morningstar?

1 A Until I got there, Keith did; but I then took over
2 the management responsibilities, and I had the
3 direct contact with the parties.

4 Q And who, at Morningstar, did you directly
5 communicate with?

6 A Pat Selvey.

7 Q And who is he?

8 A He was just my contact with them.

9 Q Do you know anything about his background?

10 A I don't remember his capacity or whatever. I just
11 remember his name.

12 Q In your --

13 A And then he signed the permit applications, he gave
14 me the checks for the review fees, so --

15 Q In your experience in dealing with Pat Selvey, did
16 it appear to you that he was an engineer or a
17 developer or have any particular expertise in the
18 development field?

19 A In my few meetings, he just acted as a developer.

20 Q Okay. So how would you communicate with Pat
21 Selvey?

22 A I'd bring whatever we were working on, at the time,
23 that needed his review and we -- We had a
24 development meeting, a coordination meeting at
25 Heritage USA one time, where the architect was

1 there. It was a coordination meeting.

2 Q And was that coordination meeting while Keith Rains
3 was still with Power?

4 A Yes, Keith was still there at the time.

5 Q So you and Keith attended this meeting --

6 A No, just me.

7 Q Just you?

8 A (Indicating yes)

9 Q Even though Keith was the direct contact -- or the
10 direct contact between Power and Morningstar, he
11 sent you to that meeting.

12 A Right.

13 Q Okay. And tell me what happened at that meeting.

14 A The architect was there, I was there, the
15 mechanical and plumbing guys were there, and we
16 just sat around and discussed coordination issues.

17 Q And was this before the parking lot and bunk house
18 projects were really underway?

19 A We were in the process of working on those, at the
20 time; that's hence, the coordination -- the need
21 for coordination meetings.

22 Q Had your work begun on the Tower project, at that
23 time?

24 A The only thing we were doing for the Tower was
25 supplying a fire sprinkler, a new fire sprinkler

1 A If I was overseeing it, I would've had them send it
2 to me.

3 Q To you?

4 A Yes.

5 Q Under any circumstances, would you have recommended
6 or instructed them to put the developer's name
7 there?

8 A It depends on the relationship with the developer.

9 Q Have you ever instructed a county to deal directly
10 with the developer in the site plan approval
11 process?

12 A Typically not.

13 Q Typically not or never?

14 A I've had some developers that want to be included
15 in all the correspondence. Most developers want
16 the engineer to handle it.

17 Q Okay. Now, it's different being included on
18 correspondence, as opposed to being -- to
19 instructing the county as to who that contact
20 person should be; isn't it?

21 A Right.

22 Q So have you ever had a situation where the
23 developer has instructed you that they would be the
24 contact for the county for comments?

25 A Not directly, no.

1 Q In fact, that would make this whole process a lot
2 more complicated; wouldn't it?

3 A Right.

4 Q And were you ever asked by Morningstar to instruct
5 the County to direct comments directly to
6 Morningstar?

7 A Not that I can recall.

8 Q Okay. So in December of 2008 was the initial
9 submittal, correct?

10 A Yes.

11 Q These are just some more letters of transmittal.
12 Let me show you the first one --

13 MR. BALLOU: Let me mark that as Exhibit 3.

14 Whereupon - Document marked as Deposition
15 Exhibit 3.

16 BY MR. BALLOU:

17 Q Can you identify this document?

18 A It's a transmittal letter from Joe Hammond to Pat
19 Selvey.

20 Q Okay. And this is the same date as Exhibit 2?

21 A Right.

22 Q And who is this being transmitted to?

23 A To Pat Selvey.

24 Q At Morningstar Church.

25 A Right.

1 Q It would be normal, would it not, to submit to the
2 developer, your client, a copy of what you'd
3 submitted to the County, correct?

4 A That is correct.

5 Q And that's what this reflects.

6 A Yes.

7 Whereupon - Document marked as Deposition
8 Exhibit 4.

9 Q Okay. I show you what is marked Exhibit 4. Can
10 you identify that document?

11 A It's a transmittal letter from Joe Hammond to -- it
12 doesn't specify. It says just to Morningstar, a
13 copy of the plans in PDF.

14 Q And what's the date of this transmittal?

15 A January 21, 2009.

16 Q So this is about six weeks after the first
17 transmittal, correct?

18 A That is correct.

19 Q Do you have any knowledge as to what happened
20 between the first transmittal and this document?

21 A No, sir.

22 Q What would typically happen, in the development
23 process, between the initial transmittal and a
24 transmittal six weeks later, preliminary plans in
25 digital format?

1 MR. FENNELL: Objection.

2 BY THE WITNESS:

3 A The owner may've requested a set of PDF plans to
4 give to the other -- the architect, the MEP's, you
5 know, for coordination issues. That's typically
6 why we would supply them with PDF's.

7 Q Okay. Under the Remarks section, what does it
8 say?

9 A Final digital copies will be issued once approval
10 has been received from York County.

11 Q What does that mean to you?

12 A They were expecting to get approval from York
13 County on what was submitted.

14 Q And that Power would do what?

15 A They would issue a final set of documents upon that
16 approval.

17 Whereupon - Document marked as Deposition
18 Exhibit 5.

19 Q I show you what's marked Exhibit 5. What does this
20 appear to be?

21 A This is a transmittal letter from Joe Hammond to
22 Shannon Catoe at York County Zoning.

23 Q And what is reflected that would have been enclosed
24 with this transmittal?

25 A Revised plans, the developer's agreement with six

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

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

5 A January 29, 2009.

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

8 A (Indicating yes)

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

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

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

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

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

25 A Right.

1 Q What does the County want to see on your plan?

2 A Right.

3 Q You do your best to comply with the checklist.

4 A Right.

5 Q Make the submittal, and that's what happened in
6 December.

7 A Yes.

8 Q The County looks at it and sometimes they like it,
9 sometimes they don't, they make comments, --

10 A Right.

11 Q -- right? Okay. And then they send you back those
12 comments and say, well, you missed this or you
13 missed that or we need more information on --

14 A Right.

15 Q -- such and such. And then you go back and you try
16 to address those comments and resubmit.

17 A Yes, sir.

18 Q And it's a back-and-forth process between you, as
19 the engineer for the developer, and the County, as
20 the approving authority --

21 A Yes.

22 Q -- to get to that point of site plan approval.

23 A That is correct.

24 Q Okay. And so, on January 29 of 2009, a set of
25 revised plans is submitted.

1 A Yes.

2 Q Also, is submitted DA agreement with 6 copies of
3 enlarged PD plan. What does that mean?

4 A I want to say that's a developer's agreement.

5 Q But you don't know what developer's agreement that
6 might have been.

7 A No.

8 Q And then comment response, what is that?

9 A We take their response letters and we do written
10 responses to each one telling them how we
11 addressed them.

12 Q Okay. Letter from David Hughes. Who's David
13 Hughes?

14 A I don't recall who Davis Hughes is.

15 Q Any idea why you would include a letter from David
16 Hughes in this submittal?

17 A It would've been something that they would've
18 requested in the comments.

19 Q Okay. In January of 2009, was Keith Rains still
20 with Power Engineering?

21 A Yes, he was.

22 Q Do you know what day, approximately, when he left?

23 A It was sometime over the summer.

24 Q So, at least at this point in time, Keith was still
25 supervising --

1 comments.

2 Q Is it fair to say that, at this point in the
3 process, stormwater was really the last big issue?

4 A Right.

5 Q Everything else has pretty much been --

6 A Right.

7 Q -- resolved? And then you have attached a
8 Stormwater Management Plan Heritage Tower Project
9 to this document?

10 A That was also revised per the comments.

11 MR. BALLOU: That will be 11.

12 Whereupon - Document marked as Deposition
13 Exhibit 11.

14 BY MR. BALLOU:

15 Q I'm going to show you what's been marked as
16 Exhibit 11. Do you recognize this document?

17 A Review comments.

18 MR. BALLOU: This will be 12 and this will be
19 13.

20 Whereupon - Documents marked as Deposition
21 Exhibits 12 and 13.

22 BY MR. BALLOU:

23 Q And so these are comments you received from York
24 County.

25 A (Indicating yes)

1 Q Do you recall if these were received before or
2 after the resubmittal in July?

3 A These were after.

4 Q Okay. It says Plan Number 4, so this would be
5 the next round?

6 A Right.

7 Q Okay. So, on this document, this -- this pertains
8 to stormwater, correct?

9 A Right.

10 Q Specific Division Comments, the first one says
11 flumes are not an acceptable means of runoff
12 conveyance.

13 A Right.

14 Q That's one issue.

15 A (Indicating yes)

16 Q Number 2, please include the wall at the proposed
17 flume location. The wall must be partially
18 demolished due to the proposed inlet. So that's
19 another issue, right?

20 A Right.

21 Q Okay. And 3, we will require a check for NPDES
22 permitting.

23 A Yep.

24 Q And then 4, even though -- Well, go ahead and read
25 number four.

1 A Even though this project has been issued a
2 rejection status, all of these items can probably
3 be completed in the offices of York County with the
4 assistance of the engineer of record. If all of
5 the plans can be obtained and either sheets
6 replaced or hand revised, then approval can be
7 issued. FYI: Due to the fact that I had to place
8 comments in Plan Tracking, an approval could not be
9 issued... although....Gerald Lee.....call me to
10 setup this time to fix these couple of items and if
11 all other departments have approved your
12 project..... then after revisions are made...then
13 I can approve.... Billy Payne.

14 Q And Billy Payne was over Stormwater.

15 A Right.

16 Q Okay. Engineer of record, do you know who that is?

17 A That would've been me.

18 Q Okay. What did you understand that comment to be
19 telling you?

20 A That I can come by his office and either bring him
21 revised sheets or hand-write on the plans, and he
22 will approve the plans.

23 Q Is it fair to say that this project was coming down
24 to the wire --

25 A Right.

1 Q -- towards getting final approval?

2 A Yes.

3 Q And this was Billy's effort to try to speed things
4 along.

5 A Right.

6 Q Okay. Well, then what does he say?

7 A I went there and --

8 Q Tell me what happened.

9 A What I can remember of the meeting, I just went by
10 there and put the notes on the plan they wanted.

11 Q And that's what it says in this note --

12 A That is correct.

13 Q -- August 18, 2009, Mr. Gerald Lee (Engineering
14 Manager for Power Engineering) came by my office
15 today. Tell me about that meeting.

16 A I just went in there, he showed me the plans, I
17 wrote the notes on there he wanted, and I was out
18 of there.

19 Q And then what happened?

20 A To my knowledge, our plans were approved.

21 Q Okay.

22 A But, until we get an official approval letter --

23 Q All right. Let me show you what's been marked as
24 Exhibit 12.

25 A All right.

1 Q All right. What does this say?

2 A It says Zoning has approved the project.

3 Q Okay. And then Exhibit 13.

4 A All right. This says that Planning is giving it
5 Conditional approval.

6 Q Okay. And then what happened on August 24th of
7 2009?

8 A I don't recall going and putting notes on drawing.

9 Q You don't recall that.

10 A I don't. But we may've issued another drawing. I
11 don't recall how that one got addressed, but
12 apparently, it did.

13 Q But your recollection is it did get addressed.

14 A Right.

15 MR. FENNELL: Objection.

16 BY MR. BALLOU:

17 Q And so, as of August 24th, 2009, everything had
18 been approved.

19 MR. FENNELL: Objection.

20 BY MR. BALLOU:

21 Q Had it?

22 A To my recollection, yes.

23 Whereupon - Document marked as Deposition
24 Exhibit 14.

25 Q Okay. I show you Exhibit 14. Can you identify

1 this document?

2 A It's a letter from Billy Payne to me.

3 Q Saying what?

4 A And it's saying -- basically, saying it's been
5 approved by Stormwater.

6 Q And that's all you were waiting for, at that point.

7 MR. FENNEL: Objection.

8 BY THE WITNESS:

9 A No, this is just Stormwater approval.

10 Q What else needed to be approved by York County as
11 of this date?

12 A I would imagine York County Planning would issue an
13 approval, if everything -- if everybody -- if all
14 the departments had signed off it.

15 Q And so the documents that we saw previously telling
16 Power Engineering that everything they've asked for
17 has been accomplished --

18 A Right.

19 Q -- would be enough --

20 MR. FENNEL: Objection.

21 BY MR. BALLOU:

22 Q -- in your opinion; is that right?

23 MR. FENNEL: Objection.

24 BY THE WITNESS:

25 A Typically, you would get something from the County,

1 not the department, when the project is finally
2 approved.

3 Q Was this project finally approved?

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

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

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

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

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

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

14 MR. FENNEL: Objection.

15 BY THE WITNESS:

16 A Phone call, e-mail.

17 Q Do you recall sending an e-mail?

18 A I don't recall.

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

20 A I -- Been a long time ago.

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

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

1 Q Okay. When did you stop working -- When were you
2 let go from Power Engineering?

3 A August of 2009.

4 Q Before or after August 24th of 2009?

5 A I think it was August 18th, 2009, was the actual
6 date.

7 Q Did you continue to do any work on this project
8 after August 18th of 2009? -

9 A No.

10 Q And so the day that you went to meet with Billy was
11 the day you were let go, August 18th of 2009, --

12 A No.

13 Q Okay. Go back and look at Exhibit 11, please.

14 A Do I have my dates messed up? I must've got let go
15 in 2010. Must've been 2010 I got let go. I just
16 had the date screwed up.

17 Q Okay. Would it have been about August of 2010, or
18 was it sometime --

19 A Yeah, August 18th was the actual date.

20 Q So you were employed by Power Engineering for
21 about another year after you received this Notice
22 of Approval, Exhibit 14.

23 A Something's not jiving with me on these dates.

24 Q Okay. You were with Power Engineering for some
25 period of time after you received Exhibit 14.

1 A I'm trying to remember the actual date that I was
2 let go from Power Engineering.

3 Q Okay.

4 A But, yeah, it had to have been 2010, then, because
5 I remember this meeting with Billy on August 18th,
6 --

7 Q Okay.

8 A -- 2009. So I must've just had the dates messed
9 up.

10 MR. FENNELL: You said, at the beginning
11 of the deposition, that you think you worked
12 from November, 2007 through March, 2009.
13 Could it have been November of 2008 through
14 March 2010? Because that would make more
15 sense with the timeline that you've been
16 giving us.

17 THE WITNESS: Probably. I know I -- They
18 sent me up there late November or December of
19 one year. I worked the whole next year and
20 into March of the following year in Charlotte.

21 MR. FENNELL: So --

22 THE WITNESS: But something --

23 MR. FENNELL: Because, unless I wrote my
24 notes bad, everything that you've been telling
25 us about -- and there were some more things I

1 was going to ask you about, so I'm sorry
2 about interrupting you --

3 MR. BALLOU: No, no, no, not at all.

4 MR. FENNELL: -- was, after you testified
5 earlier that you had already been let go from
6 Power, which is making me think, now, that
7 you're just off by a year.

8 THE WITNESS: I think I'm off by a year,
9 because it just --

10 MR. FENNELL: Why don't we take a minute
11 and you can maybe stretch your legs and get
12 your --

13 THE WITNESS: Sure.

14 (Brief break; resuming as follows:)

15 BY MR. BALLOU:

16 Q Have you had a chance to think more about the
17 timeline here?

18 A It's just messed up in my head. Because, I turned
19 50 in 2010 and we're -- my wife and I both did, and
20 we had a big party. And I was working for Chao in
21 2010, and that party was in May of 2010. And I
22 started in November, so, you know, of the previous
23 year; so that would've been, you know, --

24 Q 2009.

25 A -- 2009. So that's why these dates aren't making

1 sense to me.

2 Q Well, let me ask you this question: It would not
3 be accurate, would it, to say that, at the time
4 that this Notice of Approval was issued, you had --
5 either had just been let go or were just about to
6 be let go; and there was a period of time after
7 this approval that you continued to work for Power
8 Engineering.

9 MR. FENNELL: Objection.

10 BY THE WITNESS:

11 A If that date is correct, and I'm thinking the date
12 that I got let go, then, no, I wasn't working; but
13 this doesn't -- this doesn't make sense. Because,
14 it says here I was in Billy's office on August 18th
15 of 2009.

16 Q And you would agree with me, would you not, that
17 Exhibit 14 was issued to you at Power Engineering.

18 A Yeah.

19 Q Do you recall getting it?

20 A Not -- No.

21 Q Okay.

22 A And right there is a telltale sign. This letter
23 was written to me, and their procedure here is to
24 write the initials of who's to get the copies of
25 this letter, and it's got a question mark where my

1 name should be.

2 Q And so who were the other initials?

3 A John T. Stephenson, who was my direct supervisor,
4 and Derrick Boyte.

5 Q Okay. Do you have any reason to know why it would
6 have been stamped November 23, 2009, Received?

7 A No.

8 Q Okay.

9 A They usually stamp them when they get in there.
10 Jenni was always really good at that.

11 Q Was the Charlotte office open in August of 2009?

12 A No.

13 Q And this is directed to you at the location we're
14 at today --

15 A Right.

16 Q -- in Columbia. Okay. You were aware, though,
17 that Billy Payne had approved the -- at least, his
18 portion of it.

19 A Right.

20 Q And you were aware that there were no other
21 approvals that were necessary.

22 MR. FENNEL: Objection.

23 BY THE WITNESS:

24 A The stormwater approval is what I was -- and the
25 other ones that said were approved, were the ones

1 that I would know.

2 Q So, based on the documents we've looked at today,
3 as of August 24th, 2009, what else was required to
4 be issued by York County in the site plan approval
5 process?

6 MR. FENNELL: Objection.

7 BY THE WITNESS:

8 A I don't recall. But these are the last few items,
9 so --

10 Q Did you ever tell Morningstar, Pat Selvey or
11 anybody else at Morningstar, that site plan had
12 been approved?

13 A I don't recall.

14 Q Would it have been your practice not to tell the
15 developer if site plan approval had --

16 A No, the --

17 Q -- been received?

18 A -- developer should be the first one to know.

19 Q And so it would've been you practice, once you
20 received Notice of Approval on October -- on
21 August 24th, 2009, to tell the developer.

22 MR. FENNELL: Objection.

23 BY THE WITNESS:

24 A That is correct. But, apparently, I -- You know,
25 the timing is still confusing to me. It doesn't

1 look like I was working for Power Engineering when
2 this letter came in.

3 Q Did you tell York County when you stopped working
4 for Power Engineering?

5 A No.

6 Q Do you know of any reason why York County
7 would've known that you had stopped working for
8 Power Engineering?

9 A No.

10 Q When mail would come in to Power Engineering, did
11 you know who was going to get it when you were
12 gone?

13 A No.

14 Q That was an internal issue that Power Engineering
15 had to deal with.

16 A Right.

17 Q Okay.

18 A All Charlotte jobs went to Derrick Boyte.

19 Q And did you know what Derrick Boyte's position was
20 going to be after your departure?

21 A No.

22 Q What was his position before your departure?

23 A He was just another staff engineer.

24 Q Okay. Were you aware that he was taking over the
25 projects that you had been involved with after your

1 Columbia office.

2 A Right.

3 Q And to your understanding, took over the projects
4 you had been working on.

5 A Right.

6 Q Okay. Just so I'm clear, your testimony is you
7 don't recall ever personally notifying Morningstar
8 by e-mail, letter or phone call -- or do you recall
9 notifying them that the County had approved the
10 site plan?

11 A No.

12 MR. FENNEL: Objection.

13 BY THE WITNESS:

14 A I don't recall.

15 Q But would it have been your practice to notify your
16 developer when site plan approval was received?

17 A Of course.

18 Q When you left Power Engineering, did you believe
19 site plan approval had been received?

20 A I remember the meeting with Billy Payne and
21 signing -- putting the notes on the drawings he
22 wanted, and that was my understanding that our
23 plans were then approved.

24 Q Okay. Have you reviewed the development agreement
25 between York County and Morningstar?

1 A No, not in detail.

2 Q Did you ever have any discussions with Morningstar
3 or anyone about any of the dates contained in the
4 development agreement?

5 A No.

6 Q Did anybody tell you that site plan approval
7 started a time limit on the development agreement?

8 A There was a discussion in one meeting with York
9 County where the planning and zoning administrator
10 mentioned that there was a timeline in the
11 developer's agreement. But, I believe, at that
12 time, they were still drafting the developer's
13 agreement, that the timeline had not started yet.
14 And that's the only discussion I recall.

15 Q So you recall a discussion, even before the
16 development agreement was finalized, about the
17 timeline?

18 A Yes. And this was mentioned, that they were
19 working on this developer's agreement.

20 Q This would've been way before the process we just
21 --

22 A This probably would've been in March.

23 Q But, if the development agreement was signed prior
24 to March, it would've been sometime prior to the
25 date of the development agreement.

1 Q What is that?

2 A This is a DHEC approval of the land disturbance.

3 Q Okay. In the process of developing a property like
4 this, does the DHEC approval letter -- is the
5 timing of that dependant at all upon the site plan
6 approval by the County?

7 A Yes.

8 Q In what way?

9 A The County has to approve the plan first, then it
10 gets submitted to the state to issue the state
11 permit. This is a state permit.

12 Q And so this permit doesn't get issued until site
13 plan approval --

14 A Right.

15 Q -- is issued.

16 A Right.

17 Q And this letter was issued to Pat Selvey; wasn't
18 it?

19 A Yes, it was.

20 Q Did you ever have any conversations with Pat Selvey
21 about obtaining the DHEC permit?

22 A This is after my time here. But, no, I have not
23 seen this letter.

24 Q This says it was received by Power Engineering
25 December 3rd of 2009. And, looking at the

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

4 A John Stephenson and Derrick Boyte.

5 Whereupon - Document marked as Deposition
6 Exhibit 16.

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

9 A This is the NOI for the land disturbance permit.

10 Q And what is an NOI?

11 A The application for a land disturbance permit.

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

14 A Yes, it does.

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

17 A Yes, I do.

18 Q Tell me about the process of submitting this
19 document.

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

22 Q Okay.

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

1 would sign it, and it would go with a check for
2 \$125 in with the County submittal. After the
3 County approved it, then that would be forwarded to
4 the state.

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

7 MR. FENNELL: Objection.

8 BY THE WITNESS:

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

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

13 A It's usually within three or four weeks.

14 Q Okay. And is there a date --

15 A But it's after they receive it.

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

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

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

22 A No. I no longer worked here.

23 Q How about before you left?

24 A I had to get him to sign this.

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

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

3 MR. FENNELL: Objection.

4 BY MR. BALLOU:

5 Q Did they?

6 A Yes.

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

10 A No.

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

16 MR. FENNELL: Objection.

17 BY THE WITNESS:

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

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

23 A I don't recall receiving any.

24 Q You're not aware of any?

25 A I'm not aware of any.

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

3 MR. FENNELL: Objection.

4 BY THE WITNESS:

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

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

11 MR. FENNELL: Objection.

12 BY THE WITNESS:

13 A Yes.

14 Q Yes?

15 A Yes.

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

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

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

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

1 Q For Power Engineering and a lot of other people,
2 right?

3 A Yes.

4 Q So having to perform 57 hours of work without
5 getting paid was a bit of an irritant; was --

6 A Right.

7 Q -- it not?

8 A Right.

9 Q And are you certain that you were done as of July
10 7, 2009, when you say that all your time was
11 recorded?

12 A Yes.

13 Q So any document that you've seen that indicates
14 that you did work after July 7, 2009, that would be
15 a mistake?

16 A Right.

17 MR. BALLOU: Object to the form.

18 BY MR. FENNELL:

19 Q Can you look through these time sheets and see if
20 you can find anybody performing work after July 7,
21 2009, on behalf of Power Engineering?

22 A Possibly could've.

23 Q Well, just look through the documents and see if
24 you can find something.

25 A Derrick Boyte had time.

1 A Right.

2 Q Can you remember of another instance in your
3 dealings with the County in which a document that
4 was sent to you came three months after it was
5 dated?

6 A No.

7 MR. BALLOU: Object to the form.

8 BY MR. FENNELL:

9 Q And you never saw this document before this
10 deposition; did you?

11 A No.

12 Q So, when you testified earlier that, you know,
13 based on the documents that you've seen that showed
14 notice of approval, you didn't know those documents
15 existed until you walked in this room; did you?

16 MR. BALLOU: Objection.

17 BY THE WITNESS:

18 A Right.

19 Q So, when you said that you -- You know, your
20 testimony is that there was a notice of approval or
21 site plan approval, that's based on something that
22 you understand as of now, right?

23 MR. BALLOU: Object to the form.

24 BY THE WITNESS:

25 A As of when I went and signed those drawings for

1 Billy Payne.

2 Q Sir?

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

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

8 A No. No, I --

9 Q -- until today.

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

12 Q Okay.

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

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

19 A Not that I can recall.

20 Q And, in your testimony, you were talking about --
21 when these documents were being shown to you --
22 Well, until we get the official approval letter.

23 Do you remember that?

24 A Right.

25 Q What were you talking about when you testified

1 about until we get the official approval letter?

2 A Normally, when we go through this process locally
3 here with Richland County, we'll get individual
4 department approvals. But it's not officially
5 approved until we get a letter from Richland County
6 Planning and Development --

7 Q Okay. And --

8 A -- that says the project has met all the
9 requirements and is approved.

10 Q All right. And until today, you were expecting to
11 see some form of official approval letter --

12 MR. BALLOU: Object to the form.

13 BY MR. FENNELL:

14 Q -- from the County, that you never saw, right?

15 A I -- This letter right here says we got stormwater
16 approval.

17 Q Yes, sir.

18 A It does not say we have official approval.

19 Q Yes, sir. But, if you can take yourself back into
20 real time, you were expecting to get an official
21 approval letter from York County --

22 A Yes.

23 MR. BALLOU: Object to the form.

24 BY MR. FENNELL:

25 Q -- similar to your experience with Richland County.

1 A Yes. Yes.

2 Q And was this the first project that you had worked
3 on with the York County officials?

4 A Yes.

5 Q I know you've tried really hard to be honest with
6 us, and we both appreciate that. But, is it fair
7 to say that much of your testimony today has been
8 best guess?

9 MR. BALLOU: Object to the form.

10 BY THE WITNESS:

11 A The dates are sketchy. It has been a long time.

12 Q In particular, the first six exhibits that you saw,
13 when you were asked to interpret those exhibits --
14 or rather, 2 through 6 -- if you'd get those in
15 front of you, and then tell me whether you'd ever
16 seen those documents before you --

17 A Yes.

18 Q -- came in this room?

19 A Well, 2, no.

20 Q But you testified and you interpreted that document
21 based on your best guesses, right?

22 A Right.

23 Q And how about 3?

24 A These were -- When I got up there, they were
25 preparing these documents to go out until, you

1 EXAMINATION - (By Mr. Ballou)

2 Q On Exhibit 14, this Notice of Approval, at the time
3 that was issued August 24th, 2009, at least, if we
4 look at the documents -- the notes from the -- the
5 comment notes, this was the only thing that was
6 outstanding, correct?

7 A Yes. To my knowledge, yes.

8 Q And so, even though this is specific to the
9 stormwater, you weren't expecting anything else.

10 A Right.

11 Q Because you've been approved.

12 A Right.

13 Q And you're not aware of any requirement that there
14 be anything -- a Notice of Approval, a written
15 Notice of Approval like this; are you?

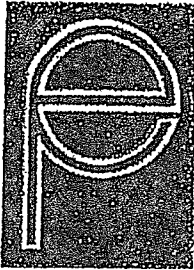
16 A No.

17 Q That was just based on your experience with
18 Richland County.

19 A Right.

20 Q Okay. Your involvement, reflected by the billing
21 records, shows that on December 1st, two-and-a-half
22 hours review; the 3rd, three hours review; the 4th,
23 three hours review; the 8th, two-and-a-half hours
24 review and sign construction drawings.

25 A Yeah.



POWER ENGINEERING COMPANY, INC.

CIVIL ENGINEERS PLANNERS SURVEYORS
13310 South Ridge Drive, Suite A, Charlotte, North Carolina 28273
Phone (704) 525-7275 Fax (704) 525-2515

LETTER OF TRANSMITTAL

TO: York County Planning & Development 1070 Heckle Blvd. Rock Hill, SC 29732	Job Number 6218	Date 12/3/2008
	Attention: York County Planning	
	RE: Heritage Tower	
Deliver		

We are sending you: ☒ Attached ☐ Under separate cover via _____
☐ Shop Drawings ☐ Prints ☒ Plans ☐ Specifications ☐ Samples
☐ Copy of Letter ☐ Change Order ☐ Other: _____

COPIES	DATE	NUMBER	DESCRIPTION
1		1	Commercial Review Fee for \$500.00
1		2	Land disturbance fee check for \$356.25, \$125.00 NPDES fee
8		3	Site Plan
1		4	Site plan checklist, York County Code of ordinances
1		5	Notice of Intent For Stormwater Discharges - NPDES General Permit SCR 100000, stormwater checklist
1		6	Financial Responsibility / Ownership Form
1		7	Revised stormwater calcs for items 6 & 12 of comments
1		8	Digital copy of plans

☒ For Approval ☐ Approved as Submitted ☐ Resubmit ☐ Copies for Approval
☐ For your use ☐ Approved as Noted ☐ Submit ☐ Copies for Distribution
☐ As Requested ☐ Returned for Correction ☐ Return ☐ Corrected Prints
☐ For Review & Comment ☐ Other: _____

☐ PRINTS RETURNED AFTER LOAN ☐ FOR BIDS DUE/DATE
(If enclosures are not as noted, please notify us at once.)

REMARKS:

Copy To: _____

Signed

Joe Hammond

DEPOSITION
EXHIBIT

2 3-20-14
Lee

STORMWATER PROJECT INFORMATION RECORD

(ALL ITEMS MUST BE COMPLETED ACCURATELY BEFORE THIS PROJECT WILL BE
REVIEWED BY THE STORMWATER DEPARTMENT.)

Development Name Heritage Tower Project
Tax Map Number 729-00-00-457
Road Location 225 Star Light Drive
Existing Land Cover Mix of commercial buildings, some woods & grass.
Proposed Use Commercial
Number of Lots (If Residential Development) 212 Units
Financially Responsible Person: (Name) Morningstar Church
(Mailing Address) 375 Star Light Drive, Fort Mill SC 29715
Developer Morningstar Church
Acres Disturbed 4.75 Total Acres 52.26
Drainage Creeks Sugar Creek
Soils ENON, Cecil
FEMA Map _____
Firm/Person Preparing Power Engineering / Joe Hammond

ADDITIONAL INFORMATION REQUIRED FOR PROJECTS DISTURBING 2 OR MORE ACRES

SCDHBC WS# 03050103020 Watershed Name Sugar Creek
SCNAD 1983 State Plane Coordinates: X 2312583.38 Y 368642.08
USGS Quad Fort Mill

FOR OFFICE USE ONLY

Date Received _____ Fee Due _____ Date Paid _____
Permit Type: I _____ (Over 5 Acres Disturbed) Project Classification: Commercial _____
II _____ (2-5 Acres Disturbed) Industrial _____
III _____ (Under 2 Acres Disturbed) Residential _____
Other _____
Comments _____
Permit # _____ Date Approved _____



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

FINANCIAL RESPONSIBILITY / OWNERSHIP FORM

No person may initiate any land-disturbing activity, as defined in the Stormwater Management and Sediment Control Ordinance of York County, before this form, along with all other applicable forms and plans, have been submitted and a grading permit has been issued.

(Please Type. If the question is not applicable place N/A in the blank)

Part A.

1. Location of land-disturbing activity? 225 Star Light Drive Fort Mill SC

2. Approximate date land-disturbing activity will begin. Jan. 2008

3. Purpose of development (residential, commercial, industrial, ect.) Commercial

4. Approximate area of land to be disturbed. 4.75 acres

5. Land owner(s) of record (Use blank page to list additional owners.):

Morningstar Church

Name

Name

375 Star Light Drive

Current Mailing Address

Current Mailing Address

Fort Mill, SC 29715

City State Zip

City State Zip

704-756-3053

Telephone Number

Telephone Number

6. Indicate County, Book and Page where deed or instrument is filed (Use blank page to list additional deeds or instruments):

County York Book 6582 Page 28

County _____ Book _____ Page _____

Part B.

1. Person(s) or firm(s) who is financially responsible for this project.

<u>Morningstar Church</u>	_____
Name of Person or Firm	Name of Person or Firm
<u>375 Star Light Drive</u>	_____
Mailing Address	Mailing Address
<u>Fort Mill, SC 29715</u>	_____
City State Zip	City State Zip
<u>704-756-3053</u>	_____
Telephone Number	Telephone Number

2. Registered agent, if any, for the person or firm who is financially responsible:

_____	_____
Name	City State Zip
_____	_____
Mailing Address	Telephone Number

3. The above information is true and correct to the best of my knowledge and belief and was provided by me while under an oath. (This form must be signed by the financially responsible person if an individual and by an officer, director, partner, attorney-in-fact, or other person with the authority to execute instruments for the financially responsible person if not an individual.)

<u>Pat Selvey</u>	<u></u>
Type or Print Name	Signature
<u>Construction Manager</u>	<u>12/02/08</u>
Title of Authority	Date

I, Carl H. Klump, a Notary Public of the County of York, State of South Carolina, hereby certify that Pat Solway personally before me this day and under oath acknowledged that the above form was executed by him,

Witness my hand and notarial seal, this 2nd day of December, 2008.

Notary Carl H. Klump My Commission expires 8/3/2016



Notice of Intent (NOI) for Stormwater Discharges from
Large and Small Construction Activities,
NPDES General Permit SCR100000

For official use only

File number: _____

Permit number: SCR10 _____

Submission package complete: _____

Public Notice Start Date (OCRM only): _____

For official use only

Submission of an NOI constitutes notice that the entity identified in Section I intends to be authorized under SCR100000. Instructions on page 5.

Date: 12-02-2008

Project/ Site Name: Heritage Tower Project

County: York

Do you want this project to be considered for the Expedited Review Program (ERP)? ☐ Yes ☒ No (See Instructions.)

If yes, is the design of this project above regulatory requirements or Low Impact Development? ☐ Yes ☒ No

I. Project Information

Project Owner/ Operator (Company or person): Morningstar Church

Company EIN: 20-8104091

Phone: 704-756-3053

Fax: 803-547-9667

Mailing Address: 375 Starlight Drive

City: Fort Mill

State: SC

Zip: 29715

Permit Contact (if owner is company): Pat Selvey

Phone: 704-756-3053

Mailing Address: 375 Starlight Drive

City: Fort Mill

State: SC

Zip: 29715

Email address (optional): _____

II. Property Information

A. Site Location (street address, nearest intersection, etc.): located at 375 Starlight Drive.

City/ Town (if in limits): Fort Mill

Latitude: 35° 3' 40" N

Longitude: -80° 54' 47" W

Tax map # (list all): 729-00-00-457, 729-00-00-014

B. Property Owner: Morningstar Church

Phone: 704-756-3053

Mailing Address: 375 Starlight Drive

City: Fort Mill

State: SC

Zip: 29715

III. Site Information

A. Disturbed area (to the nearest tenth of an acre): 4.8 acres Total area: 52.2 acres

B. Is this project part of a Larger Common Plan for Development or Sale (LCP)? ☒ Yes ☐ No

LCP/ Overall Development Name: Heritage Tower Project

Check here if this is the first phase. ☒

Previous state permit/ file number: _____

Previous NPDES coverage number: SCR10

C. Start Date (MM/DD/YYYY): 01/14/2008

Completion Date: 01/14/2013

D. Is this site located on Indian Lands? ☐ Yes ☒ No

If yes, name of reservation: NA

E. Type of Activity (check one):

☐ Institutional

☐ Residential: Single-family

☐ Commercial

☐ Industrial

☐ Linear

☐ Residential: Multi-family

☒ Multi-use (Commercial & Residential)

☐ Other: _____

☐ Site Preparation (No new impervious)

F. Are there any flooding problems downstream of or adjacent to this site? ☐ Yes ☒ No

G. Has S.C. DHEC issued a Notice to Comply or Notice of Violation for this site or LCP? ☐ Yes ☒ No

H. Is any part of the property located inside an MS4 or urbanized area? ☒ Yes ☐ No

If yes, list the MS4 operator or urbanized area name: YORK COUNTY

I. List all state and federal environmental permits or approvals applied for or obtained for this site (e.g., RCRA).

IV. Waterbody Information

A. Nearest receiving waterbody(s) (RWB): Sugar Creek

Distance to nearest RWB (feet): 1,663

Classification of nearest RWB: FW

Next/Nearest named RWB: Sugar Creek

B. 1. Waters of the U.S./ State	On the site?	Delineated/ Identified?	Impacts?	Amount of impacts
a. Jurisdictional wetlands	☐ Yes ☒ No	☐ Yes ☐ No	☐ Yes ☐ No	Ac
b. Non-jurisdictional wetlands	☐ Yes ☒ No	☐ Yes ☐ No	☐ Yes ☐ No	Ac
c. Other Water(s) List:	☐ Yes ☒ No	☐ Yes ☐ No	☐ Yes ☐ No	Ac _____ Feet

2. If yes for impacts in B.1, describe each impact and activity, and list all permits (e.g., USACOE Nationwide permit, DHEC General Permit) and certifications that have been applied for or obtained for each impact.

NA

C. Impaired Waterbodies (See Instructions.)

List the nearest DHEC water quality monitoring station(s) [WQMS(s)] to which construction stormwater (SW) discharges will drain and the corresponding waterbody(s). CW-248 Waterbody(s): Sugar Creek

1. Is this WQMS(s) listed on the most current 303(d) List for Impaired Waters? ☒ Yes ☐ No
- a. If yes for 1, list the impairment(s). BIO
- b. If yes for 1, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)? ☐ Yes ☒ No
- c. If yes for b, list the impairment(s) affected by the pollutant(s) referenced in b. NA
- d. If yes for b, will use of the proposed BMPs ensure that the site's discharges will not contribute to or cause further water quality standard violations for the impairment(s) listed in c? ☒ Yes ☐ No
2. Has a TMDL(s) been developed for this WQMS(s)? ☐ Yes ☒ No
- a. If yes for 2, list the impairment(s). NA
- b. If yes for 2, has the standard been attained for all impairment(s)? ☐ Yes ☒ No
- c. If no for b, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)? ☐ Yes ☒ No
- d. If yes for c, are your discharges consistent with the assumptions and requirements of the TMDL(s)? ☒ Yes ☐ No

D. 1. Are S.C. Navigable Waters (SCNW) on the site? ☐ Yes ☒ No

- a. If yes for 1, list the name of the SCNW: NA
- b. If yes for 1, will any construction activities cross over or occur in, under, or through the SCNW? ☐ Yes ☒ No
- c. If yes for b, then describe activities. NA
- d. If yes for b, are the activities in SCNW covered under a DHEC General Permit or other DHEC permit? ☐ Yes ☒ No
- e. If no for d, has an SCNW permit been applied for or issued for the site? ☐ Yes, for all activities ☐ Yes, for some activities ☒ No
- f. If yes for d or e, list permit number(s) and corresponding activities. NA

V. Operator Information

- A. SWPPP Preparer: Gerald Lee S.C. Registration #: 21628
Company/ Firm: Power Engineering S.C. COA #: 001185
Mailing Address: 13310 South Ridge Dr. Suite A City: Charlotte State: NC Zip: 28273
Phone: (Day) 704-525-7275 (Mobile) 803-360-0110 (Fax) 704-525-2515
Email address (optional):
- B. Operator of Day-to-Day Site Activities [ODSA] (Company or person): Morningstar Church
Mailing Address: 375 Starlight Drive City: Fort Mill State: SC Zip: 29715
Phone: 704-756-3053 Fax: 803-547-9667
Site Contact (if ODSA is company): Pat Selvey Phone: 704-756-3053

VI. Signatures and Certifications: DO NOT SIGN IN BLACK INK!

- A. One copy of the SWPPP, all specifications and supporting calculations, forms, and reports are herewith submitted and made a part of this application. I have placed my signature and seal on the design documents submitted signifying that I accept responsibility for the design of the system. Further, I certify to the best of my knowledge and belief that the design is consistent with the requirements of Title 48, Chapter 14 of the Code of Laws of SC, 1976 as amended, pursuant to Regulation 72-300 et seq., and in accordance with the terms and conditions of SCR100000. (This should be person identified in Section V.A.)
Check one. ☒ Engineer ☐ Tier B Surveyor ☐ Landscape Architect

Gerald Lee 21628
Printed name of SWPPP Preparer Signature of SWPPP Preparer S.C. Registration #

- B. 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 hereby certify that all land-disturbing construction and associated activity pertaining to this site shall be accomplished pursuant to and in keeping with the terms and conditions of the approved plans and SCR100000. I also certify that a responsible person will be assigned to the project for day-to-day control. I hereby grant authorization to the to S.C. Department of Health and Environmental Control (DHEC) and/or the local implementing agency the right of access to the site at all times for the purpose of on site inspections during the course of construction and to perform maintenance inspections following the completion of the land-disturbing activity. (See Section 122.22 of S.C. Reg. 61-9 for signatory authority information.)

Pat Selvey 12/2/08
Printed name of Project Owner/Operator Signature of Project Owner/ Operator Date

NPDES CGP Fee Schedule A

(All Counties **EXCEPT** Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper)

This schedule should not be used for projects reviewed by a delegated entity or MS4 operator.

If you are completing the fillable version of this form and if the **County** and **Disturbed Area** fields are correctly filled out on page 1 of this form, the fees in the right-hand column will be automatically entered based on your answers to the questions below. The schedule should be attached to DHEC Form 2617. Do not send payment in window envelope. **DO NOT MAIL CASH.** DHEC will notify the Project Owner/ Operator if the submitted check or credit card payment cannot be processed. The review clock will start when acceptable payment is received.

1. Will this project or LCP (Item III.B) ultimately disturb 1 acre or more? ☒ Yes ☐ No \$ 125.00
If yes, enter \$125 in right-hand column and proceed to Item 2. If no, coverage under SCR100000 is not required; see BOW-SPWS for "Small Project Requirements in Non-Coastal Counties".
2. a. Will this project or LCP ultimately disturb more than 2 acres? ☒ Yes ☐ No
If no, review fees are not initially required*; proceed to item 3.
b. If yes for 2a, is this project exempt from S.C. Reg. 72-300 et seq.? ☒ Yes ☐ No
If yes for 2b, review fees are not initially required*; proceed to item 3.
If yes for 2a and no for 2b, enter review fees of \$100/ disturbed acre (from Item III.A on page 1) in right-hand column. The review fees cannot exceed \$2000. Proceed to Item 3. \$ _____ .00

3. Total Required Fees

Add the values in the right-hand column. Maximum required fees are **\$2125**. DHEC will not review this project until all required fees are received. Total Required Fees: \$ 125.00

* If DHEC will review the project, then DHEC will notify the Project Owner/ Operator in writing within 20 business days of receipt of the complete NOI and request review fees.

Payment by Check:

Make sure check is signed and has a current date on it. If check is more than 30 days old, it may be returned. The check must be for the entire amount of required fees.

STAPLE CHECK HERE

Make check payable to S.C. DHEC.

Payment by Credit Card:

Fill out the information below. Make sure that the authorized signature is complete.

Name as it appears on Card: _____ Phone: _____
Mailing Address: _____ City: _____ State: _____ Zip: _____
Type of Card: ☐ Visa ☐ MasterCard ☐ Discover Credit Card Number: _____
Expiration Date (MM/YYYY): _____ Credit Validation Value (3-digit # on back of card): _____
Authorized Signature: _____

For official use only: Invoice Number QB _____ - _____

YORK COUNTY
CODE OF ORDINANCES

PERFORMANCE STANDARDS AGREEMENT

LOCAL LEGISLATION CURRENT THROUGH ORDINANCE 903, PASSED 2/3/03.
NOT TO BE CONSTRUED AS THE OFFICIAL ORDINANCE IN ITS ENTIRETY & IS
SUBJECT TO CHANGE.

CONTACT THE YORK COUNTY ZONING DEPARTMENT AT 909-7230 FOR
ADDITIONAL INFORMATION

APPENDIX D - EXHIBIT 1:

**CODE OF YORK COUNTY
PERFORMANCE STANDARDS AGREEMENT**

All permitted uses in the ID, LI and UD Districts and special exceptions approved by the Zoning Board of Appeals shall, in addition to all applicable state and federal regulations, meet the following minimum standards regulating the emission or existence of dangerous, detrimental and objectionable elements, where applicable:

(A) *Fire and explosive hazards.* All activities and all storage of flammable and explosive materials at any point shall be provided with adequate safety devices against the hazards of fire and explosion including adequate fire fighting and fire suppression equipment.

(B) *Radioactive emissions.* There shall be no radiation emitted from radioactive emission measured at the property line.

(C) *Smoke, dust and dirt.* The emission of visible smoke, dust, dirt, fly ash particulate matter from any pipes, vents, or other openings, or from any other source, into the air, shall comply with the regulations of the South Carolina Pollution Control Authority.

(D) *Fumes, vapors and gases.* There shall be no emission of any fumes, vapors or gases of a noxious, toxic, or corrosive nature which can cause any damage or irritation to health, animals, vegetation, or to any form of property.

(E) *Vibration.* There shall be no perceptible earth vibrations measured at the property line.

(F) *Heat, cold, dampness or movement of air.* Activities which could produce any adverse effect on the temperature, motion, or humidity of the atmosphere beyond the lot line shall not be permitted.

(G) *Noise.* The permitted level of noise or sound emission at the property line of the lot on which the principal use is located shall not exceed the values given in the following tables, except that the following uses and activities shall be exempt from the noise requirements:

- (1) Noises not directly under the control of the property user.
- (2) Noises emanating from construction and maintenance activities between 7:00 a.m. and 9:00 p.m.
- (3) The noises of safety signals, warning devices, and emergency pressure relief valves.
- (4) Transient noises of moving sources such as automobiles, trucks, airplanes, railroad cars and locomotives.

The instruments used for these measurements shall conform to all current United States of America Standards Institute specifications. Impact noises shall be measured by means of an impact noise analyzer. Impact noises are those whose peak values are more than five decibels higher than the values indicated by the sound level tables. Between the hours of 7:00 p.m. and 7:00 a.m., the permissible sound levels at residential district boundaries shall be reduced by five decibels in each octave band, or in the overall band for impact noises.

Table 1. Maximum Permitted Sound Levels Using Pre-1960 Octave Bands

<i>Octave Bands, in Cycles Per Second</i>	<i>Sound Levels</i>
20 - 75.....	77 db
75 - 150.....	65
150 - 300.....	58
300 - 600.....	54
600 - 1200.....	50
1200 - 2400.....	47
2400 - 4800.....	44
4800 - 10KC.....	42

Table 2. Maximum Permitted Sound Levels, Using Preferred Frequency Octave Bands

<i>Preferred Center Frequency, in Cycles Per Second</i>	<i>Sound Levels</i>
315.....	86 db
63.....	75
125.....	64
250.....	57
500.....	53
1000.....	49
2000.....	46
4000.....	44
8000.....	41

(H) *Odor.* There shall be no emission of odorous gases or other odorous matter in such quantities as to be offensive at the property line. Any process which may involve the creation or emission of any such odor shall be provided with both a primary and a secondary

(1) *Glare.* There shall be no direct or sky reflected glare, whether from floodlights, high temperature processing, combustion, welding or otherwise, so as to be visible in any residential district.

Pat Selby 12/02/08
Owner/Contractor Date

(‘77 Code, Appendix D, Exhibit 1) (Ord. passed 1-3-00)

375 STAR LIGHT DRIVE

OUR REF. NO.	YOUR INVOICE NO.	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
			Disturbance Fee	091036	356.25	356.25

MORNINGSTAR FELLOWSHIP CHURCH

375 STAR LIGHT DRIVE
FORT MILL, SC 29716
TEL 1-803-802-5544
TEL 1-800-542-0278

ECCU
955 WEST IMPERIAL HIGHWAY, BREA, CA 92821
9240 EXPLORER DRIVE, COLORADO SPRINGS, CO 80920
90-7337-3222

77304

CHECK DATE	CONTROL NUMBER	AMOUNT
12/2/2008	077304	*****356.25

PAY

Three Hundred Fifty-Six and 25/100----- Dollar

TO THE
ORDER
OF

York County

Steve Long

⑈077304⑈ ⑆322273379⑆ 0001032501⑈

375 STAR LIGHT DRIVE

OUR REF. NO.	YOUR INVOICE NO.	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
			Comm Review Fee	091037	500.00	500.00

MORNINGSTAR FELLOWSHIP CHURCH

375 STAR LIGHT DRIVE
FORT MILL, SC 29716
TEL 1-803-802-5544
TEL 1-800-542-0278

ECCU
855 WEST IMPERIAL HIGHWAY, BREA, CA 92821
9240 EXPLORER DRIVE, COLORADO SPRINGS, CO 80920
80-7337-3222

77305

CHECK DATE	CONTROL NUMBER	AMOUNT
12/2/2008	077305	*****500.00

PAY Five Hundred and 00/100----- Dollar
TO THE ORDER OF York County

Steve Long

⑈077305⑈ ⑆322273379⑆ 0001032501⑈

-900-

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) 525-7275 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, (212 units for Penate/Tace-)

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.

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) C.1.1 Tax map reference number; Section 155.594 of the York County Commercial Development Standards
- (3) C.1.1 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) C.1.1 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) (C.1.1) Street frontage; Section 155.594 of the York County Commercial Development Standards
- (11) C.1.1 Size of lot. (Acreage or square footage of land); Section 155.594 of the York County Commercial Development Standards
- (12) C.1.1 Size of site to be developed. (Acreage or square footage of developed land); Section 155.594 of the York County Commercial Development Standards
- (13) C.1.1, C.3.1 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) C.1.1 Adjacent property owner's names; Section 155.594 of the York County Commercial Development Standards
- (15) C.1.1 Adjacent property uses (Example: vacant, residential, commercial, and the like ;) Section 155.594 of the York County Commercial Development Standards
- (16) C.1.1 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) C.1.1 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) (C.1.1) Location of all existing structures; Section 155.594 of the York County Commercial Development Standards

- (19) C.1.1 Use of all existing structures; Section 155.594 of the York County Commercial Development Standards
- (20) C.1.1 Dimensions of all existing structures and elevations; Section 155.594 of the York County Commercial Development Standards
- (21) C.1.1, C.2.1 Location of all proposed structures; Section 155.594 of the York County Commercial Development Standards
- (22) C.2.1 Dimensions of all proposed structures; Section 155.594 of the York County Commercial Development Standards
- (23) C.2.1 Use of all proposed structures; Section 155.594 of the York County Commercial Development Standards
- (24) C.1.1, C.2.1 Heights of building (generally cannot exceed 50 feet); Section 155.594 of the York County Commercial Development Standards
- (25) C.2.1 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) C.2.1 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) C.2.1 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) C.2.1 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) C.2.1 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) C.2.1 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) C.1.1, C.2.1 Traffic circulation plan (arrows to indicate traffic flow); Section 155.594 of the York County Commercial Development Standards
- (32) C.1.1 Exact ratio (percentage) of impervious surfaces (areas that do not absorb rain) to lot area. Formula = $\frac{\text{total impervious surface area}}{\text{total site area}} = \%$; Section 155.594 of the York County Commercial Development Standards
- (33) C.1.1 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) C.1.1 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) C.2.1 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 ^{For 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
- (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
- (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 ~~Section 155.534~~ (C.4.1) & (C.2.1) Show additional landscaped areas are required, in an amount not less than 10% of impervious parking area 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 C 1-2

- (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 155.539 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
- ✓ (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. * Pg. 1-6 of Stormwater report
- ✓ (3) + Note on C-1 Area Street
* See Prop Plan For Future Roadway Improvements
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 Stormwater 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) C-11, (3) 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) C-3-3 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) C-3-3 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 Hammett SIGNATURE [Signature]

DATE 12-3-08

Stormwater Management and Sediment and Erosion Control Plan Review Checklist For Design Professionals

Please indicate the location and page number(s) where each item below can be found in your SWPPP or supporting calculations. If an item is not applicable, put N/A. The Department reserves the right to modify this checklist at any time. The Coastal Zone consists of the following counties: Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper.

Checklist Completed by:

Printed name: Joe Hammond

Signature: [Signature]

Date: 12-3-08

1. CURRENT COMPLETED APPLICATION FORM

- Original signatures ✓
- Signatory authority ✓
- All items completed and answered ✓
- Fee Schedule ✓
- Note: State and local government projects are not exempt from the plan review fee of \$100 per disturbed acre. ✓

* (PL, PG) ⇒ Plans Page Number
* (SWR, PG) ⇒ Stormwater pg page number

2. COPIES OF PLANS AND CALCULATIONS

- Plans stapled together ✓
- For projects that disturb more than 2 acres, less than or equal to 2 acres but are part of a larger common plan of development or sale (LCP), or more than 0.5 acre and within ½ mile of a receiving waterbody (RWB) in the Coastal Zone, ONE set of plans and supporting documentation (report, calculations, maps, etc.) N/A
- For projects that disturb less than or equal to 2 acres (not part of LCP and not within ½ mile of RWB in the Coastal Zone), THREE sets of plans and one set of supporting documentation [Note: You may submit up to 2 additional sets of plans to be stamped for approval.] N/A
- Supporting documentation tabbed (e.g., Maps, Pre-Development calculations) and pages numbered [no loose pages] (SWR) ✓

3. LOCATION MAP

- North arrow and scale All sheets on plans
- Outlined project location Vase on cover sheet of plans
- Labeled road names All sheets of plans

4. PROJECT NARRATIVE

- Scope of project outlined, including a brief description of pre- and post-development conditions (SWR pg. 1-1.1-2)
- Summary table of pre- and post-development flows (at least 2- and 10-year, 24-hour storm events) (SWR pg 1-2)
- Existing flooding problems in the surrounding area described N/A
- Disturbed area calculations included for subdivision projects or LCP disturbing 1 or more acres
 - For subdivisions if the site is not to be mass-graded, the following formula should be used to determine the amount of disturbance: * Note 4.5.2.2 of Disturbance shown in (PL 13-1) for Commercial Dev.
- Amount of Disturbance = 2[Max Restricted Building Size][Number of Lots] + Right of Way (ROW) areas (ROW areas include clearing for roads, utilities, easements etc.)
- If this equation is used, include a note on the plans stating: "The site is not to be mass-graded. Only 2 times the footprint is to be cleared as the lots are developed. The assumed disturbance on each lot is ____ sq. ft."

5. USGS TOPOGRAPHIC MAP (SWR, 1-4)

- Project boundary outlined ✓
- Route of runoff from site to nearest waterbody shown ✓
- Road names adjacent to site labeled ✓

6. SOILS INFORMATION (SWR, 2-1-2-3)

- Project boundary outlined ✓
- Predominate soil types found at the site identified on the plans or on a separate map ✓
- Note: Soils information is available from the Natural Resource Conservation Service through their website: <http://websoilsurvey.nrcs.usda.gov/app/> ✓

7. FLOODWAY MAPS/FEMA FLOOD INSURANCE MAP (SWR, 1-6)

- Project boundary outlined, if in close proximity to floodplain/ floodway ✓
- Note: The Department does not regulate the placement of fill in floodplains. Please see your local city or county official. ✓

Updated 10/3/06

8. WATERS OF THE STATE, INCLUDING WETLANDS ^{*Section 4 of (SWR)}

- Delineation of all waters of the State (WoS), including wetlands, shown and labeled on plans (delineation not required if a 100-ft undisturbed buffer can be maintained between the WoS and all land-disturbing activities)
- Additional, separate plan sheet that shows all WoS on the site and the impacted areas with a description of the activity(s), whether it is permanent or temporary, and any other relevant information.
- If impacts to WoS, outlined areas of impacts and labeled that no work can begin in this area until all necessary USACOE permits and SCDHEC 401 certifications have been obtained.
- Double row of silt fence provided in all areas where a 50' undisturbed buffer cannot be maintained between the disturbed area and the WoS
- Minimum 10' maintenance buffer provided between last row of silt fence and WoS; or, if buffer not provided, then statement from P.E. on plans indicating how silt fence will be installed and maintained without impacts to WoS
- Note: If there are proposed impacts to WoS, then it is advised that you contact USACOE (888-329-8187) and/ or S.C. DHEC Water Quality Certification, Standards & Wetlands Programs Section (803-698-4300) to determine additional requirements before submitting the Notice of Intent (NOI).
- Note: If WoS are to be impacted, work cannot be performed in these designated areas until all necessary permits have been acquired
- Note: If a USACOE permit is required for construction of or access to a temporary or permanent stormwater management structure, NPDES permit coverage cannot be granted until the USACOE permits and S.C. DHEC 401 Section certifications are obtained.
- Note: The Department recommends a minimum 20-foot buffer between a sediment trap/basin and WoS.

9. HYDROLOGIC ANALYSIS (SWR, 3-1-3-34)

- ✓ Pre- and post-developed hydrologic analysis calculations for the 2- and 10-year, 24-hour storm events at each outfall point (SWR, 3-1-3-34)
- ✓ Drainage area maps that clearly correspond to the calculations (pre- and post-development) (SWR, 3-1-3-2)
- ✓ Analysis points for comparing runoff rates and the total drainage area analyzed do not change from pre- to post-development, although the immediate drainage areas contributing to each analysis point might shift. (SWR, 3-1-3-3)
- ✓ Post-development discharges less than pre-development discharges for each outfall point (if not, then see "Detention Waiver" section below) N/A
- ✓ Analysis performed using SCS 24-hour storm (Rational method is not acceptable)
- ✓ Rainfall data from South Carolina DHEC Storm Water Management BMP Handbook (BMP Handbook) used
- ✓ In all calculations
- Note: The curve number for open water, marshes, etc. should be 98 to 100.

10. DETENTION ANALYSIS/DESIGN

- Analysis (SWR 3-1-3-34)
 - ✓ Pond routing using a volume-based hydrograph for the 2- and 10-year, SCS 24-hour storm event (Drain:Edge, ICPR, HEC-1, SedCAD, HYDRAFLOW, etc. perform full pond routings; TR55 does not perform a full pond routing; rational method cannot be used)
 - ✓ Hydrologic and hydraulic calculations necessary to determine the impact of hydrograph timing modifications of the proposed land-disturbing activity, with and without the detention structure (results of analysis will determine the need to modify the detention design or eliminate the detention requirement—see note 2 below) (SWR 3-1-3-34)
 - ✓ Inputs and outputs from analysis program (SWR 3-1-3-34)
 - ✓ Summary table of the peak inflows, peak outflows, discharge velocities, and maximum water surface elevations (WSE) for the 2- and 10-year, 24-hour storm events for each detention structure (SWR 3-1-3-34)
 - ✓ Stage-storage-discharge relationship for the outlet structure of each detention structure (SWR 3-1-3-34)
 - ✓ If a rating curve for the outlet structure must be generated externally from the analysis program (Drain:Edge, HEC-1, etc.), data and equations used to rate the outlet structure N/A
 - ✓ As-built of existing detention pond if the site drains to an existing detention pond (see below) See plans
 - ✓ Note: SedCAD users please refer to the memo regarding the input of outlet structures.
 - Note: The Department recommends using the 10% rule in performing analysis. The hydrologic analysis should be conducted for the larger drainage area, where the site in question encompasses 10% of the total drainage area. For example, if your site is 10 acres, then the hydrologic analysis should be performed at the point downstream where the contributing drainage area, including your 10-acre site, is approximately 100 acres.
- Design
 - ✓ Detail of outlet structure and cross-section of the dam/ berm or pond bank, including elevations and dimensions that correspond to the calculations See detail sheet C6-1 of Plans
 - ✓ (A) Orifice constructability considered (do not specify orifice diameters with increments of less than 1/4")

Updated 10/3/06

* Existing Spillway elevation = 568.50'

* 10 year storm event peak elevation = 567.73

* Top of Dam = 570.00

* 100 yr peak elevation = 568.38'

- ✓> Maximum WSE for the 10-year storm event below the emergency spillway with 0.5-ft of freeboard between maximum WSE for the 10-year storm and the emergency spillway ~~See Note above~~
- ✓> Maximum WSE for the 100-year storm event below the embankment with 0.5-ft of freeboard between maximum WSE for the 100-year storm and the embankment
- ✓> Dewatering time calculations for the 10-year storm event (dry ponds must drain completely within 72 hours) *N/A*
- ✓> Bottom of all detention and retention ponds graded to have a slope of not less than 0.5% *N/A*
- ✓> If the pond is to be used for sediment control during construction, temporary horseshoe-shaped riprap berm in front of any low level outlets provided during construction and shown on the pond detail *N/A*
- ✓> Permanent maintenance access to all permanent detention structures (easements may be needed for structures surrounded by lots) *25' Easement Around perimeter of Pond*
- ✓> Infiltration systems designed in accordance with S.C. Reg. 72-307.C(11) [specify how items a-f have been addressed]
- ✓> Note: Emergency spillways should not be built on fill slopes. *N/A Existing Pond*
- ✓> Note: The Department recommends installation of a trash rack or other debris-screening device on all pond risers.
- ✓> Note: The Department recommends a maximum slope of 3:1 on pond embankments to allow for ease of maintenance.
- ✓> Note: The Department recommends installation of sediment forebays at each outfall into the detention/ sediment basin.

11. AS-BUILTS *See Construction Plans*

- ✓> Provided for all previously approved detention ponds that will receive flows from new drainage areas
- ✓> Prepared by a South Carolina Licensed Land Surveyor
- ✓> Grades/ contours/ depths for pond
- ✓> Elevations and dimensions of all outlet structures, including:
 - ✓> Pipe and orifice inverts and diameters
 - ✓> Weir elevations and dimensions
 - ✓> Riser dimensions and elevations
 - ✓> Emergency spillway dimensions and elevations
 - ✓> Locations and inverts for all pipes discharging into the pond
- ✓> If the elevations or dimensions of the structures listed above do not match those used in the approved plans, certification statement signed by the project's Registered Engineer indicating that the pond, as built, will function within all applicable standards provided [new analysis of the pond (routing) may be necessary]
- ✓> For projects located in the eight coastal counties: For any construction project permitted after September 1, 2006, as-built/record drawings will be required by DHEC-OCRM prior to stormwater permit closeout. Prior to the contractor requesting a final site inspection, one as-built drawing hard copy and 1 digital (scanned plan sheets as .tif or .pdf document) copy must be provided to OCRM staff.
- ✓> Note: As-built survey and/or analysis must be submitted and accepted by the Department before Notice of Termination (NOT) is submitted.

12. PERMANENT STORMWATER MANAGEMENT STRUCTURE MAINTENANCE

- ✓> Signed agreement from the responsible party accepting ownership and maintenance of the structure
- ✓> Description of maintenance plan to be used
- ✓> Schedule of maintenance procedures (e.g., every 6 months)
- ✓> Detailed or manufacturer-specific maintenance items for proprietary control devices (oil-water separators, etc.), underground detention structures, exfiltration systems and non-traditional stormwater controls (constructed wetlands, bioretention, etc.) *N/A*
- ✓> Typical maintenance items to be addressed
 - ✓> Grass to be mowed
 - ✓> Trees to be removed from within the pond and on the embankment
 - ✓> Trash and sediment to be removed from inside of and around the pond outlet structure
 - ✓> Orifices to be cleaned and unclogged
 - ✓> Outlet pipe to be cleaned, inspected, and repaired
 - ✓> Sediment accumulation to be removed from pond
 - ✓> Pond bottom to be regraded to provide proper drainage towards the outlet discharge point
 - ✓> Energy dissipator to be cleaned and repaired
 - ✓> Emergency spillway, if applicable, to be inspected and repaired
 - ✓> Erosion on side slopes, if present, to be addressed
 - ✓> The Department must be notified in writing of any changes in maintenance responsibility for the stormwater devices at the site (include this statement in agreement).

Updated 10/3/06

- *Note: The Department recommends that the county, city, or other governing utility, which has the authority to accept the ownership and maintenance of a storm drainage system also accept the permanent stormwater management structure.*
- *Note: If the entity or person with maintenance responsibility changes, then a new maintenance agreement, signed by the new person responsible for maintenance, must be provided to the Department. If a new, signed maintenance agreement is not provided to the Department, then the entity/person who signed the most recent maintenance agreement on file with the Department will be considered the responsible entity.*

13. DISCHARGE POINTS

- Storm drainage or pond outfalls carried to an existing drainage outfall such as a pipe, ditch, etc.
- No new point discharges onto adjacent property where there was not a point discharge previously, unless written permission from the adjacent property owner is provided
- Level spreaders, plunge pools, etc. provided when the proposed outlet is near the property line and not directed to an existing outfall, such as a creek or ditch
- Twenty (20)-foot minimum buffer is provided between the property line and the discharge point
- Outlets shall not discharge on fill slopes

14. DETENTION WAIVER *N/A*

- *Note: If the 2- and 10-year, 24-hour post-developed flow rates exceed the pre-developed rates, walvers from detention may be granted in accordance with regulation 72-302(B) on a case-by-case basis*
- Justification and a written request, including the following statement: "the increased flows will not have a significant adverse impact on the downstream/adjacent properties"
- A project may be eligible for a waiver or variance of stormwater management for water quantity control if the applicant can demonstrate that:
 - The proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties; or
 - The imposition of peak control requirements for rates of stormwater runoff would aggravate downstream flooding
- Waiver signed by the project's Professional Engineer
- *Note: See note in checklist item 10 regarding the 10% rule.*

15. PERMANENT WATER QUALITY REQUIREMENTS *N/A*

- Permanent water quality addressed (all projects or LCP that disturb 5 or more acres)
 - Wet ponds designed to catch the first 1/2" of runoff from the entire area draining to the pond and release it over at least a 24-hour period
 - Dry ponds designed to catch the first 1" of runoff from the entire area draining to the pond and release it over at least a 24-hour period
 - For areas not draining to a pond, show how permanent water quality requirements were addressed
- Projects disturbing less than five (5) acres but within one-half (1/2) mile of a receiving water body in the Coastal Zone must meet Section III.C.3.XIII.A of the Coastal Zone Management Program Refinements. Designs must show that the first 1/2 inch of runoff from the entire site or the first one (1) inch of runoff from the built upon area, whichever is greater, can be stored onsite.
- Waters of the U.S./State are not used for permanent water quality control (alternative means of treatment must be used if an existing pond is to be used for water quantity control).
- *Note: Other non-traditional stormwater controls such as Bioretention areas, constructed wetlands, etc. may be used. Consult the BMP Handbook for information on the design of these devices.*
- *Note: Pre-fabricated or proprietary treatment devices are approved on a case-by-case basis if adequate removal efficiency can be demonstrated. Provide pollutant removal efficiency data, preferably from a third-party testing company. Type of system selected should be based on the ability to remove the pollutants of concern in that area/situation (bacteria, hydrocarbons, etc.).*

16. SEDIMENTOLOGY *N/A*

- Trapping efficiency calculations showing that all sediment basins/ traps are capable of achieving a sediment trapping efficiency of at least 80% for the 10-year, 24-hour storm event, if more than 10 disturbed acres drain to a common point (stream, lake, etc.)
- Sediment basins provide storage for the 10-year, 24-hour storm event for disturbed conditions or 3600 ft³/acre draining to the basin, if more than 10 disturbed acres drain to a common point (stream, lake, property line, etc.)
- Sediment traps only used for drainage areas of less than 5 acres
- Sediment trap storage calculations, showing that 1800 ft³/total acre draining to each trap is provided below the spillway
- If trapping efficiency calculations are required for sediment traps, then provide peak outflow, Q_{po} , calculations; the 10-year, 24-hour storm event for construction conditions cannot overtop the trap's spillway

Updated 10/3/06

- ✓ Sediment basins and traps designed for total area draining to them
- ✓ Drainage area map outlining the area draining to each basin/ trap
- ✓ Copies of figures used to determine V_{15} (SV-1) and trapping efficiency (ST-1, SB-1, SB-2), if Design Aids from BMP manual are used to determine trapping efficiencies
- ✓ Silt fence only used in areas with drainage areas of less than $\frac{1}{4}$ acre per 100 LF of fence and not used in areas with concentrated flows
- ✓ Clean-out stake, marked at $\frac{1}{2}$ the designed sediment storage depth, provided in all sediment basins/ sediment traps
- ✓ Note: Consult the BMP Handbook for information on the design of these and other devices.
- ✓ Note: The Design Aids in the BMP Handbook cannot be used to determine trapping efficiencies for structures in series. If the flow for the 10-year, 24-hour storm for construction conditions overtops the structure or the structure's splitway, then the Design Aids cannot be used. If multiple soil types are in the area draining to the structure, then the soil type with the smallest D_{15} for the appropriate depth should be used to determine the settling velocity, V_{15} ; an average D_{15} should not be used.
- ✓ Note: SedCAD users please refer to the memo regarding the input of outlet structures.

✓ 17. STABLE CHANNEL CALCULATIONS *N/A*

- ✓ All channels and diversion ditches able to handle the 10-year storm event with non-erosive velocities of less than 5 feet per second during construction (use appropriate CN for disturbed areas) and post-construction (if velocity exceeds 5 ft/s, then permanent measures to reduce the velocity to a non-erosive rate must be provided)
- ✓ Rock check dams provided in temporary diversions
- ✓ Installation detail for erosion control blanket (ECB) or turf reinforcement matting (TRM) if ECBs or TRMs to be used

✓ 18. INLET PROTECTION (PL, C3.1 - C3.2)

- ✓ Provided at all inlets
- ✓ Hay bales not used
- ✓ Steel posts and buried fabric shown for filter fabric inlet protection
- ✓ Inlet protection details provided for pre-paving and after roadways have been paved
- ✓ Note: The Department recommends that an inlet not have more than one (1) acre draining to it.

✓ 19. ENERGY DISSIPATORS/ OUTLET PROTECTION *N/A*

- ✓ All outlets stabilized
- ✓ Riprap aprons sized appropriately
- ✓ Riprap detail shows apron dimensions and stone sizes for each pad or each pipe diameter
- ✓ Filter fabric installed beneath all riprap

✓ 20. FILL SLOPES AND/ OR EMBANKMENTS *N/A*

- ✓ All slopes stabilized
- ✓ Slope drains designed in accordance with the BMP Handbook
- ✓ Slope drains provided where concentrated flows discharge onto a fill slope
- ✓ For all slopes steeper than 1.5:1, identification of stabilization practice (e.g., ECB, TRM)
- ✓ Note: Measures, in addition to grassing or hydroseeding, include synthetic or vegetative matting, diversion berms, temporary slope drains, etc.
- ✓ Note: If retaining walls or fill slopes are to be constructed at the downstream property line, the Department recommends a 10' buffer to allow for construction and maintenance. If a 10' buffer is not provided, then provide permission from the adjacent property owner for possible land-disturbing activities on his property.

✓ 21. UTILITY LINES (PL, 3-1 - 3-2, 5-1)

- Limits of disturbance include areas disturbed for water and sewer line installation
- Inlet protection provided at all existing inlets that receive flows from the disturbed areas; also add this as a note on the plans
- For all utility lines crossing WoS, narrative and detail showing sediment and erosion control measures provided on plans
- Note for construction entrances to be provided at all locations where construction traffic accesses a paved roadway

22. TMDL/ 303d IMPAIRED WATERBODIES

- List the nearest S.C.DHEC Water Quality Monitoring Station (WQMS) that the site's stormwater discharges drain to and the waterbody on which it is located: C18-246 Sugar Creek

Updated 10/3/06

- ✓ Qualitative and quantitative assessment (described in Section 3.4C of SCR100000), if nearest WQMS listed on the 2004 303(d) List of Impaired Waters and if site's stormwater construction discharges contain the pollutant of impairment and if site disturbs 25 or more acres
- ✓ Evaluation of selected BMPs if nearest WQMS listed on the 2004 303(d) List of Impaired Waters and if site's stormwater construction discharges contain the pollutant of impairment and if site disturbs less than 25 acres
- ✓ If Approved TMDL developed for nearest WQMS and if site's stormwater construction discharges contain the pollutant of impairment, showed that measures and controls on SWPPP met assumptions and requirements of TMDL (may need to contact Watershed Manager for assistance)
- ✓ Note: Contact Department staff for guidance on selection of BMPs based on pollutant of impairment.

23. NAVIGABLE WATERS *N/A*

- ✓ Extra plan sheet showing impacts to navigable water and description of activity included if S.C. Navigable Waters (SCNW) crossing and separate SCNW permit has not been obtained for all activities
- ✓ Note: For NOIs initially submitted to delegated entities, if project has SCNW crossing and if separate SCNW permit has not been obtained for this crossing, then this item will be reviewed by S.C. DHEC before NPDES coverage will be granted.

24. OCRM REQUIREMENTS *N/A*

- ✓ Note: The following items only apply to those projects in the eight coastal counties.
- ✓ If a project is within a half-mile of a receiving water body (RWB) or is one (1) or more acre in size, a digital project boundary must be submitted and approved by the OCRM GIS department. If OCRM's review of the project location indicates potential impacts to Coastal Resources on projects disturbing less than or equal to 0.5 acre but within ½ mile of a RWB, then OCRM staff will notify the applicant to submit an NOI. For projects which will disturb more than 0.5 acre and are located within ½ mile of a RWB, the NOI and other pertinent information must be submitted with the digital boundary. Please include the completed digital submittal form along with the electronic boundary. Go to <http://www.scdhec.gov/environment/ocrm/permit/stormwater.htm> for instructions.
- ✓ Any freshwater wetlands on the site must be identified and verified by the US Army Corps of Engineers (USACOE). A Corps wetland verification letter and corresponding signed, sealed and dated wetland plat must accompany the application package. The dates on the plat and verification letter must correspond. The Corp verification letter must reference the plat as an "accurate depiction" and not preliminary or approximation. The plat needs to identify whether or not the wetlands are jurisdictional or non-jurisdictional. Include USACOE permit number on the permit application if applicable.

If non-jurisdictional wetlands are being impacted, a wetland impact statement as shown below must be completed along with an 8.5 x 11 inch map indicating the wetland acreages, amount and type of impacts. A USGS topographic map should also be submitted indicating the location of the project.

"This project is proposed to impact ____ acres of Federally non-jurisdictional freshwater wetlands. These proposed impacts require approval under the SCCZM program. This plan will (fill, excavate, otherwise impact) (give individual wetland size by acres) for a total impact of (total acreage). Mitigation will be provided for these proposed impacts by (describe mitigation, giving acreages of preserved wetlands and/or buffers/credits)." If no mitigation is proposed, the notice needs to state as such.

- ✓ If saltwater/critical areas are located on the site, an OCRM approved delineation and plat must be included with the submittal package.
- ✓ If the proposed project is adjacent to saltwater/critical areas then a dock master plan will need to be submitted (if applicable) with the permit application package.
- ✓ Water and Sewer Certification requests if applicable.
- ✓ See item #15, 4th bullet of this checklist for additional water quality requirements in the Coastal Zone.

25. SITE PLANS CHECKLIST:

- ✓ Note: The Department may require phased sediment and erosion control plans for large or complicated projects.
- ✓ Location map with site outlined on first plan sheet (map should have enough detail to identify Surface Waters of the State within 1 mile of the site)
- ✓ North arrow and scale All plan sheets
- ✓ Property lines and adjacent landowners' names (p. 1, C. 1.1)
- ✓ Legend All sheets on plans
- ✓ Registered engineer's signed and dated seal All sheets on plans

Updated 10/3/06

- ✓ Engineering Firm's Certificate of Authorization seal (All plan sheets)
 - ✓ Existing and proposed contours for entire disturbed area (Pl. C3.2)
 - ✓ Limits of disturbed area (Pl. C1.1, C3.2)
 - ✓ Locations of off-site material, waste, borrow, or construction equipment storage areas, excluding roll-off containers (*Note: Some off-site disturbed areas may require a separate application for NPDES coverage*)
 - ✓ Location and identification of any stormwater discharges associated with industrial activity (not construction)
 - Delineation of WoS, including wetlands (see checklist item 8) N/A
 - ✓ Easements C4.1
 - ✓ Road profiles with existing and proposed ground elevations (if no contours are shown on the plans) N/A
 - ✓ Grassing and stabilization specifications (temporary and permanent) C3.2
 - ✓ Construction sequence (implementation of all stormwater and sediment controls in the first phase of construction; ensure that basins, traps, ponds, etc. can be installed before the area draining to them is cleared and grubbed) C3.2
 - ✓ Standard notes (see following page)
 - ✓ Temporary and permanent control measures (provide details of all sediment and erosion control measures used; make sure the label or legend on the plans matches the name on the detail)
- Note: Maintenance requirements for each BMP should be listed on the detail.*
- Note: If details from the BMP Handbook are used, then the inspection frequency must be changed to be in accordance with the new CGP (see Standard note 3).*

Updated 10/3/06

Standard Notes (see SWPP manual)

4. If necessary, slopes, which exceed eight (8) vertical feet should be stabilized with synthetic or vegetative mats, in addition to hydroseeding. It may be necessary to install temporary slope drains during construction. Temporary berms may be needed until the slope is brought to grade.
2. Stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than fourteen (14) days after work has ceased, except as stated below.
 - > Where stabilization by the 14th day is precluded by snow cover or frozen ground conditions stabilization measures must be initiated as soon as practicable.
 - > Where construction activity on a portion of the Site is temporarily ceased, and earth-disturbing activities will be resumed within 14 days, temporary stabilization measures do not have to be initiated on that portion of the Site.

3. All sediment and erosion control devices shall be inspected every seven (7) days. If site inspections identify BMPs that are damaged or are not operating effectively, maintenance must be performed as soon as practical or as reasonably possible and before the next storm event whenever practicable.

OR

All sediment and erosion control devices shall be inspected at least once every fourteen (14) calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater. If site inspections identify BMPs that are damaged or are not operating effectively, maintenance must be performed as soon as practical or as reasonably possible and before the next storm event whenever practicable.

4. Provide silt fence and/or other control devices, as may be required, to control soil erosion during utility construction. All disturbed areas shall be cleaned, graded, and stabilized with grassing immediately after the utility installation. Fill, cover, and temporary seeding at the end of each day are recommended. If water is encountered while trenching, the water should be filtered to remove any sediments before being pumped back into any waters of the State.
5. All erosion control devices shall be properly maintained during all phases of construction until the completion of all construction activities and all disturbed areas have been stabilized. Additional control devices may be required during construction in order to control erosion and/or offsite sedimentation. All temporary control devices shall be removed once construction is complete and the site is stabilized.
6. The contractor must take necessary action to minimize the tracking of mud onto paved roadway(s) from construction areas and the generation of dust. The contractor shall daily remove mud/soil from pavement, as may be required.
7. Residential subdivisions require erosion control features for infrastructure as well as for individual lot construction. Individual property owners shall follow these plans during construction or obtain approval of an individual plan in accordance with S.C. Reg. 72-300 et seq. and SCR100000.
8. Temporary diversion berms and/or ditches will be provided as needed during construction to protect work areas from upslope runoff and/or to divert sediment-laden water to appropriate traps or stable outlets.
9. All waters of the State (WoS), including wetlands, are to be flagged or otherwise clearly marked in the field. A double row of silt fence is to be installed in all areas where a 50-foot buffer can't be maintained between the disturbed area and all WoS. A 10-foot buffer should be maintained between the last row of silt fence and all WoS.
10. Litter, construction debris, oils, fuels, and building products with significant potential for impact (such as stockpiles of freshly treated lumber) and construction chemicals that could be exposed to storm water must be prevented from becoming a pollutant source in storm water discharges.

Updated 10/3/06



COMMENT LISTING OF ALL REVIEWS
YORK COUNTY DEVELOPMENT COORDINATING CENTER

20080392

PROJECT NAME: HERITAGE TOWER PROJECT

PLAN NUMBER: 2
PLAN TYPE(S): SITE

Phase Section 1st Lot 2nd Lot

Addressing

STATUS
Approved

SPECIFIC DIVISION COMMENTS

The International Building Code section 1106.1: 400 to 500 parking spaces required 9 handicap parking spaces. The development agreement states that the tower is to have 420 parking spaces.

Building & Code

STATUS
Rejected

SPECIFIC DIVISION COMMENTS

The International Building Code section 1106.1: 400 to 500 parking spaces required 9 handicap parking spaces. The development agreement states that the tower is to have 420 parking spaces.

Eng-water-sewer

STATUS
Rejected

SPECIFIC DIVISION COMMENTS

1. On sheet C7.2, all of the details must be the most current YC details. They are available on our website at www.yorkcountygov.com.

2. All sewer lines and fire hydrants must be shown in a 20' easement.

3. Per page 7 section VII of the DA, submit anticipated flow rates for the County's review and evaluation of the effects on the utility system.

4. All water meters that are 1" or greater in size will require a separate back-flow preventer. Show the back flow preventer located at the back of the meter outside of the easement.

5. York County will require the 6" meter to be a hersey MVR with remote read capability. A detail will need to be shown on the plans. Contact Rick Carter to discuss this further.

6. Label the 20ft sewer easement on the utility plan.

7. Impact fees will have to be paid for water and sewer.

8. Show the material and length of the fire hydrant extension pipe.

9. The note on the fire line should read "SCDHEC approved double detector check valve assembly (DDCVA) to be installed inside building" not Back flow Preventer....

To expedite the review of the re-submitted documents, in addition to the revised drawings, 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 call Amanda Cain in the Engineering Department at 803-818-5754.

Engineer-roads

STATUS SPECIFIC DIVISION COMMENTS



Wednesday, February 25, 2009

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**DEPOSITION
EXHIBIT**

7 3-20-14
Lee

Page 1 of 4

Power 162

Rejected Note: All of the information shown on the overall site plan is too small to see. Include the information for this site on sheet C1.2 in addition to the overall site plan.

1. The site distance shown on Starlight Drive is for a speed limit of 35. Per note 10 on sheet C1.0, the speed limit is 25 on Starlight Drive. Also, show the site distance on sheet C1.2. Please note that the speed limit per the PD is 25 for Zenith Drive and should be noted the overall site plan (sheet C1.0).

2. Per previous comment #4, "Intersection radii must be labeled on plans." Show the radius of the intersection at Starlight Drive. Label the radius on the overall site plan as well as sheet C1.2.

3. Per previous comment #6, "Show the locations of existing and proposed rights-of-ways." Please show the right-of-way limits of Starlight Drive on the overall site plan as well as sheet C1.2.

4. Per the PD, "Existing Starlight Drive to be relocated prior to or during the construction of the future addition." The site plan that is submitted is for the "future addition" so the Starlight Drive relocation must be included as a part of this site plan and will have to be completed before or during the construction of the future addition. Please note that per the DA, any roadway related improvements or new road construction shall meet all County and SCDOT transportation standards. Any roadway construction will have to be inspected by a York County inspector.

5. Place a note on the plans that states that the 52 acre development is currently accessed via private roads in the Regent Park development. Any private road proposed for dedication to York County must meet the York County road standards at the time of dedication. (This is stated on page 6 of the DA).

To expedite the review of the re-submitted documents, in addition to the revised drawings, 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 call Amanda Cain in the Engineering Department at 803-818-5754.

Fire Prev.

STATUS **SPECIFIC DIVISION COMMENTS**
Approved

Floodplain

STATUS **SPECIFIC DIVISION COMMENTS**
Approved

Planning

STATUS **SPECIFIC DIVISION COMMENTS**
Rejected

1. Please address the reconfiguration of Starlight Drive, as expressed on the PD Plans and in the DA (Exhibit A (to the Morning star PD Standards)). This drive is to be relocated prior to or during the construction of the future addition.
2. Additionally, all road improvements must meet minimum York County and SCDOT standards, as expressed in the DA (page 6).
3. Please show Zenith Drive in its entirety along the parcel, it 'appears' to have disappeared for a stretch.
4. Please note that the speed limit for Starlight Drive is labeled in the notes on Sheet C 1.0 as 25mph, thank you. Additionally, please add a note to the plans, preferably on Sheet C1.0 that the speed limit for Zenith Drive is also 25mph, per the PD plan.
5. Please include the driveway width at Starlight Drive to the new parking.



Wednesday, February 25, 2009

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Power 163

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
Rejected

SPECIFIC DIVISION COMMENTS

1. Please correct the NOI.

Signatures - Date of Signature

A new check is required as the one on file is older than sixty days.

2. Please provide Water Quality calculations for all areas not draining to the existing pond as demonstrated inside the DA under Standards for Development Section 5-J. Excerpt: 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 or Environmental Compliance Division. Also, please add this to the narrative and remove the statement that currently exists concerning water quality.

3. Please provide more detail for modification to existing structure like the width, how the skimmer will be installed and also the outlet invert.

4. Please provide double row silt fence along edge of existing pond with a statement from the engineer of record on the plans stating that the silt fence maintenance be completed only by hand.

5. Please provide propose size and depth of pit shown in Concrete Washout detail. Detail must meet the criteria for design as stated under SCDHEC standards for concrete washout area. These requirements may be found under Land and Waste management. (Copy of requirements e-mailed). Please place same detail as found in the SWPPP on the plans on sheet C3.1. Thanks.

6. Please revise the water quality calculations on 3-40 to state a 3.5-ft weir opening instead of 435-ft. Thanks.

7. On sheet C1.2, there is a disconnection shown behind the existing building between the two sections of storm drainage piping. Please clarify.

8. Please show on the plans where the piping continues to outfall within the parking area to the right of the existing building.

9. On page 15 of the SWPPP, please state a minimum 80% stabilization and on page 14, please revise the dimensions for the stabilized construction entrance. Thanks.

10. Once the above comments have been addressed, please submit a cover sheet with the revisions that thoroughly details the above changes/responses and the associative locations on the plans and the \$50.00 re-review fee for Stormwater re-review (checks should be made payable to York County). Please note that the Applicant's and Professional's Certification must be signed on all revisions to the plans submitted for review. If there are any questions or concerns, please contact Billy Payne or Jeff Smith at 803-684-8571 or jeff.smith@yorkcountygov.com; billy.payne@yorkcountygov.com

Zoningcom

STATUS
Rejected

SPECIFIC DIVISION COMMENTS

1. Please be aware that all improvements to the site, such as roadway, amenities, utilities, stormwater, erosion control, zoning requirements and etc. must comply with the approved Development Agreement and must be included on the site plan submittal for the entire 52 acres not just for the tower location. All improvements must be installed and completed according to the York County Code and the Development Agreement.

2. Revise the proposed site plan to include the approximate location and size of existing and proposed storm sewers, sanitary sewers, water lines, culverts, septic systems, and wells for the 52 acres in accordance with Section 155.594 of the York County Commercial Development Standards.

3. Revise the proposed site plan to include the location of all existing/proposed fire hydrants within 500 feet of the proposed development in accordance with Section 155.594 of the York County Commercial Development Standards.



Wednesday, February 25, 2009

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Power 164

4. Revise the proposed site plan to include the existing and proposed easements and existing and proposed rights-of-way for the 52 acres (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 in accordance with Section 155.594 of the York County Commercial Development Standards.

5. Revise the proposed site plan to include the approximate location of telephone, gas, and power lines for the entire 52 acres in accordance with Section 155.594 of the York County Commercial Development Standards.

6. Revise the proposed site plan to include the calculation of total caliper inches required for the entire 52 acres in accordance with Section 155.534 of the York County Commercial Development Standards.

7. Revise the proposed site plan to designate the type of open space that will be provided for the entire 52 acres in accordance with Section 155.429 of the York County Zoning Code. What type of recreational use is being proposed for the areas labeled as recreational?

8. The proposed site plan indicates existing vegetation to be used for the bufferyard requirement. However a tree survey needs to be submitted indicating the type and location of the existing trees.

9. The proposed site plan indicates 1375 existing parking spaces however the development agreement indicates the existing parking as 1377.

Please contact our Development Services Department at 909-7236 to schedule a meeting with the reviewers before any site plans are resubmitted.





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

Stormwater

STATUS
Conditional

SPECIFIC DIVISION COMMENTS

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 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.



Thursday, September 3, 2009

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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

Zoningcom

STATUS
Conditional

SPECIFIC DIVISION COMMENTS

Approved per conditions outlined and indicated on site plan on the improvements to the roads and Development Agreement.

DEPOSITION
EXHIBIT

12y 3-20-14
Lee



Thursday, September 3, 2009

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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

Planning

STATUS
Conditional

SPECIFIC DIVISION COMMENTS

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



13 3-20-14
Lee



Thursday, September 3, 2009

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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

DEPOSITION
EXHIBIT

14 2-20-14

Lee

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