THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church, Appellant-Respondent,

v.

York County, South Carolina Respondent-Appellant.

RESPONDENT/APPELLANT'S FINAL APPELLANT'S BRIEF

July 1, 2016

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4839-2126-2640, v. 1

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

I. Did the Circuit Court err by refusing to grant summary judgment in favor of York County, as sufficiency of the notice given to Morningstar is a question of law, not of fact.

II. Did the Circuit Court err by failing to grant summary judgment in favor of York County, where Morningstar had actual notice of approval of the subject site plan.

Statement of Facts 2

Standard of Review 4

Argument

I. **The Circuit Court erred by refusing to grant summary judgment in favor of York County, as sufficiency of the notice given to Morningstar is a question of law, not of fact** 5

II **The Circuit Court erred by failing to grant summary judgment in favor of York County, where Morningstar had actual notice of approval of the subject site plan.** 8

Conclusion 13

Certificate of Service 14

TABLE OF AUTHORITIES

CASES

American Freehold Land Mortgage Co. v. Felder, 44 S.C. 478, 22 S.E. 598 (1895)........11

Benton v. Mut. of Omaha Ins. Co., 500 N.W.2d 158, 160 (Minn. Ct. App. 1993).............8

Bower v. National Gen'l. Ins. Co., 342 S.C. 315, 318, 536 S.E.2d 693, 695 (Ct. App. 2000)........8

C.A.N. Enterprise, Inc. v. South Carolina Health and Human Svcs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)........13

Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990)........12

Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)........4

Crystal Ice Co. of Cola. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979)........9, 11

Dorman v. Campbell, 331 S.C. 179, 500 S.E.2d 786 (Ct. App. 1998)........11

Hill v. Carolina Power & Light Co., 204 S. C. 83, 28 S. E. 2d 545 (1944)........10, 11

Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct.App.1997)........13

Morris v. Anderson Co., 349 S.C. 607, 564 S.E.2d 649 (Ct. App. 2002)........4

Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 339, 574 S.E.2d 502, 512 (Ct. App. 2002)........5

Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994)........5

S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008)........12, 13

Thompson v. Bank of SC, 21 S.C.L. 77, 83 (Ct. App. L. 1838)........8

United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)........12

Wimberly v. Sovereign Camp, W.O.W., 190 S. C. 158, 2 S. E. 2d 532 (1939)........10

STATUTES AND RULES

Rule 56 S.C.R. Civ. P.........1, 6

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err by refusing to grant summary judgment in favor of York County, as sufficiency of the notice given to Morningstar is a question of law, not of fact.

II. Did the Circuit Court err by failing to grant summary judgment in favor of York County, where Morningstar had actual notice of approval of the subject site plan.

STATEMENT OF THE CASE

Morningstar Fellowship Church (Morningstar) commenced this action on January 24, 2013, alleging claims for breach of contract, declaratory judgment and breach of the implied duty of good faith and fair dealing regarding a development agreement entered into between it and York County, South Carolina pursuant to the South Carolina Local Government Development Agreement Act, S.C. Code Ann. §6-31-10, *et seq*. (R. p. 496). York County timely answered, denying the allegations of the Complaint, and asserting counterclaims for breach of contract, declaratory judgment, and nuisance (R. p. 504). Discovery commenced thereafter.

York County moved for summary judgment or partial summary judgment pursuant to Rule 56 S.C.R. Civ. P. based in part on Morningstar's notice of site plan approval (R. p. 59). The County's motion was heard by the Honorable S. Jackson Kimball on June 19, 2014. On July 16, 2014, the Circuit Court granted York County summary judgment as to Morningstar's cause of action for breach of the covenant of good faith and fair dealing, but denied the County's motion as to the breach of contract claim (R. p. 4). York County moved for reconsideration of that order on July 29, 2014 (R. p. 268). By order dated September 29, 2014, Judge Kimball denied that motion (R. p. 13).

On November 10, 2015, Judge Hall granted York County's motion and entered judgment against Morningstar on its breach of contract and declaratory judgment claims (R. p.31). This appeal and York County's cross appeal followed.

STATEMENT OF FACTS

This case arises from a development agreement between Morningstar and York County for the completion and rehabilitation of a long-standing fixture in northeastern York County, the Heritage Tower, a 21-story condominium planned as part of the former PTL Ministries development (the "Tower"). A detailed account of the history of the Tower project is set forth in York County's Respondent's Brief filed contemporaneously herewith, and is incorporated by referenced herein.

The Development Agreement in this case required specific benchmarks Morningstar was required to meet as conditions to its re-development of the Tower site. Specifically, in order to establish the financial viability of the project, the County required that Morningstar produce tangible evidence of appropriate financing within 180 days of site plan approval. Paragraph IV.C.2., a negotiated term of the Development Agreement, provides:

> 2. Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer (R. p. 1085).

Morningstar engaged Power Engineering, Inc. ("Power") to serve as its project engineer in handling dealings with York County, and designated Power as the entity with which the County would correspond. Gerald Lee ("Lee"), then the manager of Power's Charlotte office, was assigned by Power as project manager in early 2009, and he communicated directly with

Morningstar's construction manager, Pat Selvey, concerning the site plan approval process. There were rounds of comments and changes through the spring and summer of 2009 concerning the site plan. (R. pp. 940-642; R. pp. 718-721; R. app. pp. 1292-1296; 1297-1299; 1301-1302).

On August 18, 2009, Lee met with Billy Payne ("Payne"), the County's Stormwater Plans Examiner, and made some final additions and corrections to the plans. Following that meeting, Lee considered that the site plan had met all requirements for final approval and Power's work was complete (R. pp. 865-866; R. pp. 874-875; R. pp. 882-885; R. p. 886). Moreover, Pat Selvey testified that he knew that the site plan had been approved but did not think it was official since he had not been sent a stamped set of plans (R. pp. 945-948; 965; 968-969). It is undisputed that no formal "notice" of approval was independently sent to Morningstar. Despite the fact that both Lee and Selvey knew that the site plan was complete and had been approved, Morningstar contends that the County was required to communicate such approval directly to Morningstar president Rick Joyner by certified or registered mail. Appellant/Respondent's Brief at 9.

Morningstar's development efforts coincided with the economic downturn and aftermath of the Great Recession, and attempts to secure financing were plagued by numerous difficulties (R. p. 960; R. pp. 975-996; R. p. 1020; R. App. pp. 1256-1257; R. pp. 732-733; R. pp. 739-740). Even after approval of the site plan, Morningstar was unable to secure any commitment to long term permanent financing of the project, which was critical to its ability to meet the requirements of Paragraph IV.C.2 of the Agreement. Morningstar project manager Dave Yarnes testified that they continued to seek financing throughout 2009, and at various points changed the scope and nature of the project in order to try to appeal to a difficult market (R. pp. 732-733; R. pp. 739-741). Predictably, despite having its site plan approved, Morningstar was unable to provide any

bid, performance or payment bond, any letter of credit or any other acceptable evidence of the financial viability of the project as required by the Development Agreement with 180 days, or any time thereafter. In fact, in February of 2010, prior to the declaration of default, Morningstar admitted that it could not obtain the required financing even if York County started the 180-day clock over (R. pp. 1030-1034).

Ultimately, in early 2010, York County was told by Morningstar that it did not have long term permanent financing in place, and that there were no reasonable prospects for such financing in the near future (R. pp. 802-803). On March 5, 2010, the County notified Morningstar in writing that its failure to comply with Section IV.C.2 constituted a default under the Agreement (R. pp. 804-805).

In this lawsuit, Morningstar seeks money damages for breach of contract and a declaration that it was not in default under the Development Agreement, despite the fact that it did not, and to this day has never, provided any of the required evidence of financial viability contemplated and required by Section IV.C.2 of the Agreement.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under S.C. R. Civ. P. 56. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)(citations omitted). Considering all the facts and inferences in the light most favorable to the appellant, summary judgment is proper where there are no genuine issues of material fact such that the movant is entitled to judgment as a matter of law. Id. While an order denying summary judgment is not ordinarily appealable, this Court may, as a matter of discretion, review such an order along with an appealable issue where such a ruling will avoid unnecessary litigation, Morris v. Anderson Co., 349 S.C. 607, 564 S.E.2d 649 (Ct.

App. 2002); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994); see also, Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 339, 574 S.E.2d 502, 512 (Ct. App. 2002)(noting that because an order denying summary judgment was "so closely connected to" other appealable issues and otherwise "constitutes a basis for the grant of summary judgment," the order was properly reviewable).

ARGUMENT

I. The Circuit Court erred by refusing to grant summary judgment in favor of York County, as sufficiency of the notice given to Morningstar is a question of law, not of fact.

Morningstar's entire case arises from its claim that the County failed to provide sufficient notice of site plan approval. As Judge Kimball noted, all of its claims flow from this pivotal assertion (R. p. 8). In an email exchange in January of 2010, the County raised the issue of the 180-day time limit following site plan approval with Morningstar construction manager Pat Selvey (R. p. 949-952). Even though Power had previously told Selvey that the site plan had been approved, he responded that time was not an issue because the 180 days under the Agreement did not begin to run until he had received from the County a stamped set of site plans (R. pp. 1190-1191; R. pp. 958-959). Morningstar then argued that the time had not commenced because York County failed to provide notice that the site plan had been approved by certified or registered mail "as provided in the Agreement." (R. pp. 501-502 ¶27(a); R. pp. 646-648).

Morningstar has abandoned Selvey's argument that its clock started with delivery of a stamped set of plans, but contends that the County was obligated "as provided in the Agreement" to provide notice of site plan approval by certified or registered mail. Appellant/Respondent''s Initial Brief at 11. Morningstar cannot prevail in this case unless it can establish that York

County was contractually required to convey notice of site plan approval in that particular manner (R. pp. 8-9).

York County moved for summary judgment based upon the fact that the Agreement contains no mention of notice to Morningstar of the approval of its site plan in any particular form or manner, and that approval was communicated directly to Morningstar's agent, Power. While the trial court declined to grant York County's motion, its order significantly narrowed the issues in dispute. See R. pp. 8-9; see also Rule 56(d) S.C. R. Civ. P.[1] Specifically, the trial court found that the Agreement does not require formal notice of site plan approval by certified or registered mail as specified in Article XI, §H of the Agreement. The trial court further found that even though Section IV.C.2 does not specify that notice is required, a requirement of reasonable notice should be implied into the Agreement. Finally, the court found that notice was in fact given by the County to Power, but it nonetheless reserved granting judgment as to Morningstar until a "full presentation of the facts pertaining to the reasonableness of the notice." (R. p. 9).

Following York County's motion for reconsideration of the Court's denial of summary judgment, Judge Kimball clarified his factual findings that: (1) no genuine issue of fact exists concerning the approval of Morningstar's site plan, (2) Morningstar's agent, Power, understood the approved status of the site plan, (3) Pat Selvey was aware of site plan approval, and that Morningstar's reliance on receiving a stamped set of plans as notice of site plan approval was "misplaced." (R. p. 268; R. p. 13). The court reiterated that "I do not intend to suggest that the

[1] **Case Not Fully Adjudicated on Motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just. **Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.**

notice given and relied upon by the County was not sufficient, only that the applicable standard of review precludes summary judgment on that issue under the facts of this case." (R. p. 14). Declining to cross the threshold of entering summary judgment, Judge Kimball concluded that the sole issue for trial was "whether reasonable notice of approval was communicated, and knowledge of such approval was received by Morningstar, either directly, or its agent." Id.

The fundamental issues in this appeal are whether the Development Agreement requires notice of the County's approval of the Tower site plan, and if so, whether Morningstar is charged with such notice and bound by the consequences under the Agreement of having received it. Paragraph IV.C.2 of the Agreement provides a time frame within which Morningstar committed to obtain evidence of the Tower project's financial viability to the County, which time began upon approval of the Tower site plan. Per the terms of the Agreement, if such information was not provided within 180 days of site plan approval, Morningstar would be deemed to be in default, and the Agreement would be null and void (R. p. 1085).

The terms of Section IV.C.2. are unambiguous and contemplate that the onus is upon Morningstar as the developer to produce sufficient information in an agreed-upon time frame to justify the County's agreement to allow the redevelopment of a controversial property. The Agreement also recognizes that site plan approval is an interactive process involving the repeated exchange of information, objections, and modifications relating to the site plan. Morningstar retained an engineering firm, Power Engineering, to represent its interests in this process.

Under these circumstances, there would be no need to specify that any part of the approval process required notice beyond that which ordinarily occurs in obtaining site plan approval. In fact, York County assumed no obligation to provide any additional notice that was not already contemplated by the approval process. The special circuit court judge recognized the

context of the Agreement and correctly found that no formal notice of site plan approval was required (R. pp. 8-9). However, Judge Kimball also found that Power in fact had notice that the Tower site plan had been approved, but denied summary judgment on the basis that the "sufficiency" of such notice was a question of fact. Id.

On reconsideration, Judge Kimball reiterated that he found "no genuine issue of fact concerning approval of the Morningstar site plan." (R. p. 13). While the court refrained from granting judgment under "the very stringent 'scintilla' standard," not even a scintilla of evidence was offered as a justification for applying the rule. Essentially, the court found that sufficiency of notice was a question of fact, without finding any material facts in dispute. All that remains is the question of the legal sufficiency of the notice that "was given and relied upon by the County." (R. p. 14). Since the court found that the facts relevant to the question of notice were not in dispute, its refusal to grant summary judgment was in error. Bower v. National Gen'l. Ins. Co., 342 S.C. 315, 318, 536 S.E.2d 693, 695 (Ct. App. 2000)(sufficiency of offer of UIM coverage is question of law to be decided by court); Thompson v. Bank of SC, 21 S.C.L. 77, 83 (Ct. App. L. 1838)(sufficiency of notice of dishonor is question of law); see also Benton v. Mut. of Omaha Ins. Co., 500 N.W.2d 158, 160 (Minn. Ct. App. 1993) ("courts consistently have held that the factfinder determines whether notice was given, but the courts determine as a question of law whether a written notice was adequate").

II. The Circuit Court erred by failing to grant summary judgment in favor of York County, where Morningstar had actual notice of approval of the subject site plan.

The time to provide the information required by Section IV.C.2. began to run upon site plan approval by York County. Once Morningstar or its agent had notice of the approval, its 180-day clock began to run. Morningstar's agent Power and construction manager had notice of

site plan approval on August 24, 2009, and when Morningstar could not provide the required evidence of financial viability within 180 days thereafter, the County properly declared default.

Notice to an agent is notice to the principal. See, Crystal Ice Co. of Cola. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979) (holding that notice of a prior lien by an attorney was imputable to his real estate purchaser client, even where the attorney acted fraudulently). In this case, Morningstar hired Power as its agent with actual authority to obtain approval by York County of the Tower project site plan required under the Development Agreement. Matters relating to the site plan approval were specifically within the scope of Power's duties. As noted by Morningstar's construction manager, Pat Selvey, Power prepared and submitted a preliminary site plan consisting of detailed engineering and architectural drawings, which generated a series of noted deficiencies and responses from County planning staff to Power (R. pp. 1190-1191at para. 6). Power communicated directly with Pat Selvey throughout this process (R. p. 1077 at para. 12). Power's primary point of contact with Morningstar was Selvey, and Selvey reported directly to Morningstar vice president Dave Yarnes. (R. p. 1077 at para. 12). Moreover, Morningstar never limited the scope of Power's agency or authority in dealing with the County on site plan matters (R. p. 557, lines 1-11). Consequently, Power acted with Morningstar's actual authority in matters involving the approval of the commercial site plan, and was Morningstar's agent for such purposes.

The primary contact at Power Engineering throughout the site plan approval process was Gerald Lee. Lee shepherded the site plan through the approval process on Morningstar's behalf (R. pp. 857-859; R. pp. 879-880). Lee was Power's project manager for most of the Tower project, and testified that he regularly communicated with Selvey and Yarnes at Morningstar throughout the site plan approval process, beginning in January of 2009, and provided

Morningstar with regular status reports (R. pp. 850-852; R. pp. 774-781; R. p. 828; R. pp. 829-830). Mr. Lee testified about his final day on the project, August 24, 2009, which was also his final day with Power. With only a few details on the site plan left to be addressed, he personally travelled from Columbia to Rock Hill to meet with Billy Payne, in the York County Planning Department. Mr. Lee testified that he remembered meeting with Mr. Payne, "signing – putting the notes on the drawings he wanted, and that was my understanding that our plans were then approved." (R. p. 874). Lee received actual notice that the site plan had ultimately been approved as of August 24, 2009, and in fact understood and believed that the plans had been approved (R. pp. 863-866; R. pp. 874-875; R. pp. 882-885; R. p. 886). He was then let go by Power in connection with a downsizing of Power's offices (R. p. 867; R. p. 874).

After Gerald Lee's departure, Derrick Boyte took over on the Morningstar project for Power. Since Lee had obtained approval of the site plan, Boyte's primary responsibility on the project was collecting payment for the work Power had done in obtaining approval (R. pp. 931-933; R. App. p. 1311).

As a matter of law, notice to Power as Morningstar's agent while acting within the scope of its actual authority is binding as notice to Morningstar. Hill v. Carolina Power & Light Co., 204 S. C. 83, 28 S. E. 2d 545 (1944); Wimberly v. Sovereign Camp, W.O.W., 190 S. C. 158, 2 S. E. 2d 532 (1939); 23 S.C. Jur. Agency § 95. As noted above, Pat Selvey testified that he had communicated with Boyte about approval of the site plan, but since he had not received a stamped set of plans, he (erroneously) felt the 180-day clock had not started. Selvey Dep. Tr. at 64. The sum of this evidence is the inescapable conclusion that both Power and Selvey were aware that the site plan had been approved.

A principal is deemed to have knowledge of all material facts its agent obtains while acting within the scope of its agency. Crystal Ice Co. of Cola., 257 S.E.2d 496; see also American Freehold Land Mortgage Co. v. Felder, 44 S.C. 478, 22 S.E. 598 (1895); Hill, *supra*). This rule is based on the agent's duty to communicate all material information to the principal and the presumption that the agent has done so. 23 S.C. Jur. Agency § 94. So too, a third party is not required to look behind the relationship between a principal and its disclosed agent to determine if communications to the agent are passed on to the principal. Because Morningstar's agent had actual knowledge of site plan approval by August 24, 2009, such knowledge is imputed to Morningstar. *See* Dorman v. Campbell, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998)(home purchasers charged with notice of information contained in letter sent to their attorney; fact that home purchasers did not actually receive letter was "irrelevant, for knowledge of the information in [the] letter was imputed [to purchasers] through their agent").

As Judge Kimball noted, all of Morningstar's claims flow from the assertion that the County failed to provide sufficient notice of site plan approval (R. p. 8). Even though Power had previously told Selvey that the site plan had been approved, Selvey erroneously believed that the 180 days did not begin to run until he had received a stamped set of plans from the County (R. pp. 1190-1191 at para. 6, 7, 9, 10). Morningstar has understandably not embraced Selvey's interpretation, but instead argues that the time had not commenced because York County failed to provide notice that the site plan had been approved by certified or registered mail "as provided in the Agreement." (R. P. 501 at ¶27(a) (emphasis added)) (R. p. 1078-1079 at para. 22-23, 25 and R. p. 1106).

The only way that Morningstar can argue lack of notice is by throwing its own engineers under the proverbial bus, and claim that the County was required to give notice of approval to

Morningstar's president Rick Joyner by certified or registered mail. Even then, Morningstar must disavow Pat Selvey's testimony that he knew that the engineer's work was done and the site plan was approved (R. pp. 945, 965, 970). Judge Kimball expressly rejected this argument, and noted that "progress on the project was monitored and communicated by other means, such as emails and direct interaction between Power and the County and Power and Morningstar, throughout the approval process." Finally, the court found that, even if a term of reasonable notice were implied into the Agreement, notice of approval was in fact given by the County to Power. Inexplicably, however, the court reserved granting judgment until a "full presentation of the facts pertaining to the reasonableness of the notice."(R. p. 9; R. p. 14).

The Development Agreement is silent as to any requirement that the County provide notice of site plan approval, and certainly nothing in the Agreement prescribed any mandatory procedure by which the County was required to give Morningstar formal notice of site plan approval, much less notice by certified or registered mail as described in Section XI, §H of the Agreement. Whether Selvey, Yarnes or Joyner drew the correct conclusions as to Morningstar's rights and obligations under the Agreement from the information provided to them is irrelevant, and any communication problems they may have had with their engineers does not modify the terms of Section IV.C.2. Under the circumstances, notice of site plan approval on August 24, 2009, was actual, imputable to the principal, and inherently reasonable.

The cardinal rule of contract construction is to ascertain and give effect to the intention of the parties. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992)(citing Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990)). Courts must enforce a contract according to its terms regardless of the parties' failure to guard their rights carefully. S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant,

LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)(quoting Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct.App.1997)). Where a contract's language is clear and capable of legal construction, "the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." M & T Enters., 379 S.C. at 655, 667 S.E.2d at 13. Courts have no "authority to alter an unambiguous contract by construction or to make new contracts for the parties." Id. (citing C.A.N. Enterprise, Inc. v. South Carolina Health and Human Svcs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)). The language of the Agreement unambiguously required timely action by Morningstar once its site plan was approved, and such approval was obtained by its hired engineers. Under these circumstances, the circuit court should have granted summary judgment, and the record provides ample basis for affirming on these additional sustaining grounds.

CONCLUSION

The trial court found that no genuine issue of material fact exists concerning the approval of Morningstar's site plan, notice to Morningstar's agent of site plan approval, Morningstar's own knowledge of site plan approval, and Morningstar's failure to produce the required information within 180 days of such approval. The trial court therefore erred in declining to grant summary judgment in favor of York County.

July 1, 2016

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PROOF OF SERVICE

The undersigned certifies that she has served this Respondent/Appellant's Final Appellant Brief by depositing a copy of it in the United States Mail, postage prepaid, on July 5th 2016, addressed to its attorney of record, Richard B. Fennell, James, McElroy & Diehl, PA, 600 South College Street, Charlotte, North Carolina 28202.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent/Appellant's Final Appellant's Brief complies with Rule 211(b).

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