THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity
The Honorable Mikell R. Scarborough

Trial Court Case No. 2011-CP-10-4324
Appellate Case No.: 2013-000168

Town of Mount Pleasant, South Carolina, Condemnor
v.
Bowman MTP Center, LLC, Landowner and NBSC, a Division of Synovus Bank, and K-Mart Corporation, Other Condemnees,

Of whom K-Mart Corporation is the Appellant,
and
Of whom Bowman MTP Center, LLC, is the Respondent.

RESPONDENT'S FINAL BRIEF

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May 17, 2013

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STATEMENT OF THE ISSUE ON APPEAL

This case was before the Master in Equity on cross motions for summary judgment. The circuit court was correct in ordering summary judgment in favor of the Respondent because this is a case dealing with the allocation of an eminent domain award, and the Landowner was entitled to summary judgment as a matter of law. The court did not err, and for the reasons reviewed *infra*, summary judgment should be affirmed by this honorable court.

COUNTER STATEMENT OF THE CASE

The underlying action in this case is a condemnation proceeding brought by the Town of Mount Pleasant, South Carolina, pursuant to the *South Carolina Eminent Domain Procedures Act* (*SCEDPA*), as codified at S.C. Code Ann. § 28-2-10, *et seq.* This parcel is owned by the Respondent, Bowman MTP Center, LLC, (hereinafter referred to as "Landowner"). Also named in the action were "Other Condemnees" identified as NBSC, a Division of Synovus Bank (hereinafter referred to as "NBSC"), and the Appellant K-Mart Corporation, (hereinafter referred to as "K-mart"). K-Mart currently leases retail space for a retail K-Mart store (Store No. 7239) and garden center in this parcel from the Landowner, while NBSC holds a mortgage on the parcel.

K-Mart, as a sophisticated commercial client, originally leased a portion of the condemned property for ten years beginning on March 23, 1978, and has subsequently exercised multiple, five-year, lease extensions with its landlord. The property leased to K-Mart is an 8.6 acre parcel legally described as "Tract A-2," and assigned TMS Parcel Identification Number 559-13-00-041. (See Plaintiff's Exhibit 1, A6: K-Mart's Lease of March 23, 1978 and its Exhibit "A" Parcel A K-Mart Demised Premises, R. 0107-0121;

Plaintiff's Exhibit 1, A, 7, R. 0123: Jody Bishop Appraisal p. 4, R. 0169; Plaintiff's Exhibit 2, R. 0307).

On January 28, 2011, Bowman Center MTP, LLC, purchased the subject property (Deed Book 0168, Page 975), subject to K-Mart's lease. The "Entire Shopping Center" of 14.11 acres is described as "Tract A" in "Exhibit "A," Parcel "B" of the March 23, 1978 lease. Plaintiff's Exhibit 1, A, 7, R. 0124. Tract A is subdivided in "Tract A-1" and "Tract A-2." "Tract A-2" comprised that portion of the 14.11 acres occupied by K-Mart, while "Tract A-1" encompasses other retail businesses. Hereinafter, the entire shopping center is referred to collectively as the Subject Property or Entire Shopping Center. The Subject Property site was developed and constructed by the original landowner/developer, and the K-Mart space was built in accordance with plans and specifications provided by K-Mart in 1977. (See Plaintiff's Exhibit 1, A, 10-11 [Exhibit C to K-Mart's Lease], R. 0130-0136). Subsequently, K-Mart constructed an addition to the original building, pursuant to a 1989 lease amendment with an accompanying, modified Exhibit B. (See Plaintiff's Exhibit 1, A, 2 [Second Amendment to Lease of April 10th 1989 and Exhibit B, 3-31-89 REV.], R. 0094-0097).

On January 28, 2011, K-Mart as a "Tenant," signed a Subordination, Nondisturbance, and Attornment Agreement, otherwise referred to as an "SNDA" in the commercial real estate industry, with NBSC as the "Lender." (See Plaintiff's Exhibit 1, B: Subordination, Nondisturbance, and Attornment Agreement, R. 0138-0145). This agreement was duly recorded by the Charleston County Clerk of Court (Book 0168, Page 978). K-Mart clearly, knowingly, and freely subordinated its rights under the Subject Lease to the lien of the NBSC's mortgage. As the Lender to the "Landowner" and

"Landlord" Bowman Center MTP, LLC, NBSC required that all of the tenants on the Subject Property execute the Subordination, Nondisturbance, and Attornment Agreement (SNDA).

On June 17, 2011, the Town of Mt. Pleasant filed a Notice of Condemnation and *lis pendens* pursuant to S.C. Code Ann. § 5-2-50 in the Court of Common Pleas, Charleston County, to take *in toto* 29,884 square feet (sf) in fee simple from the portion of the Subject Property, which was not part of the demised premises defined in the K-Mart lease. (See Plaintiff's Exhibit 1, C: Condemnation Notice with Attached Plan Sheets, R. 0147-0156; and Plaintiff's Exhibit 2 [area colored in orange], R. 0307). This taking consists of a small "strip-take" for public right-of-way (ROW) improvements and widening of Bowman Road.

On April 10, 2012, a settlement was reached between the Town of Mt. Pleasant and the Landowner in the amount of $435,925.00 and a Consent Order was entered, and executed by all parties, which dismissed the Town of Mt. Pleasant and referred this matter to the Master in Equity for a hearing on the allocation of just compensation pursuant to S.C. Code Ann. § 28 -2-460.

On May 8, 2012, K-Mart filed a motion for summary judgment seeking a ruling that it is entitled to collect the value of its lease-hold interest, comprising almost the entire condemnation award, based solely upon its interpretation of the lease language. On May 18, 2010, the Landowner filed a Motion for summary judgment on the grounds that K-Mart was not entitled to any portion of the condemnation award, and further, that K-Mart had subordinated any such interest to NBSC, the mortgagee. By agreement, the Landowner's motion for summary judgment was amended to include the grounds that the

K-Mart valuation is premised upon misinterpretations of the lease documents amounting to an error of law.

The Honorable Mikell R. Scarborough, Master in Equity, heard these cross motions for summary judgment on September 17, 2012. On October 22, 2012, the Court issued an order in favor of the Landowner which determined that the Tenant K-Mart was not entitled to any portion of the condemnation award. K-Mart then filed a Motion to Reconsider, which the Master in Equity subsequently denied on December 20, 2012. K-Mart served the present appeal on January 7, 2013.

STATEMENT OF FACTS

The small "strip-take" in this matter takes land which is outside of K-Mart's leased premises. Specifically, "Exhibit A, Parcel A" of the original lease dated March 23, 1978 states that the tract leased to K-Mart is 8.6 acres of land as depicted upon the plat as "Tract A-2," with all metes and bounds accurately noted, a sub-portion of the 14.11 acres which constitutes the "Entire Shopping Center." The "Entire Shopping Center" of 14.11 acres is designated as "Tract A" in "Exhibit "A," Parcel "B" of the March 23, 1978 lease, and it encompasses other retail businesses. Exhibit B of the March 23, 1978 lease (See Plaintiff's Exhibit 1, A, 8, R. 0125-0126) also depicts the portion leased by K-Mart. (See in concert "Exhibit A, Parcel A," and "Exhibit A, Parcel B," in Plaintiff's Exhibit 1, A, 7: K-Mart's Lease of March 23, 1978 With Amendments and Exhibits, R. 0123-0124). The depictions of both Tract A-1 and A-2 encompass substantial portions of the overall shopping center parking lot, including parking spaces. (See Plaintiff's Exhibit 2, R. 0307).

The 5.15 acre portion of the Subject Property, Tract A-1, is assigned TMS Number 559-13-00-038. The Charleston County GIS website (http://ccgisweb.charlestoncounty.org) clearly distinguishes these two portions of the Subject Property, and designates Tract A-2 as "K-Mart #7239," and Tract A-1 as "Rite-Aid, Etc.," a former tenant. In summary, it is clear that K-Mart has leased only a portion of the Subject Property, and the Town's taking *does not include any portion of the K-Mart's demised premises.*

Furthermore, the taking did not have any material impact to the direct access to K-Mart by its customers or any valuation issue. As noted above, Tract A-2, the parcel leased by K-Mart, is not contiguous to Bowman Road. The overall Subject Property currently has three entrances along Bowman Road, and these entrances to the overall shopping center will not be materially affected by the proposed improvements. (See Plaintiff's Exhibit 1, E: Jodie Bishop Deposition, pp. 8-9, R. 0236-0237).

STANDARD OF REVIEW

The construction of a clear and unambiguous contract and its clauses presents a question of law for the court. Pruitt v. S. C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct. App. 1992). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). Where the agreement is not ambiguous, therefore, 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. Ebert v.

Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). The "court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). It is also a question of law whether the language of a contract is ambiguous. So. Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C 617, 623, 550 S.E.2d 299, 302-03 (2001). This Court therefore reviews all questions of law de novo. Fields v J. Haynes Waters Builders, Inc., 376 S.C, 545, 564. 658 S.E.2d 80 (2003).

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct.App.2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets this initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). Rule 56(c), *SCRCP*, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." Rule 56(c), *SCRCP*. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct.App.2001). In this case, the standard of review is for the correction of errors of law since by filing cross motions for summary judgment both parties agree that there are no material issues of fact in dispute and that the documents are not ambiguous.

LEGAL ARGUMENTS

A. The lease does not allow K-Mart to share in the condemnation award.

1. The law upholds comprehensive lease articles which specifically delineate a tenant's and landlord's rights in the event of a taking.

Under South Carolina law, where the lease includes a provision specifying the rights of the parties in the event of a condemnation of the leased premise, that provision is valid and controlling. Texaco, Inc. v. Warrington, 264 S.C. 18, 212 S.E.2d 59 (1975). The allocation of condemnation awards is also firmly controlled by written lease terms and provisions, which are subject to general rules of contract construction and interpretation. So. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7, 14 (Ct. App. 2008) ("As such, it is generally held that parties may agree in the lease to a method or formula of valuation or compensation in the event of condemnation"). *Further, as cited with approval in* M & T Enterprises of Mt. Pleasant, *see also,* City and County of Honolulu v. Mkt. Place, Ltd., 55 Haw. 226, 517

P.2d 7, 15 (1973) ("Where a landlord and tenant have contractually agreed as to the disposition of compensation in the event of condemnation, such an agreement is generally held binding."); City of Manhattan v. Galbraith, 24 Kan.App.2d 327, 945 P.2d 10, 12–13 (1997) ("[I]f the lease itself includes a provision in respect of the rights of the parties in the event of the condemnation of the leased premises, such provision is controlling, if applicable to the particular case.") (*citations omitted*); City of Kansas City v. Manfield, 926 S.W.2d 51, 53–54 (Mo.Ct.App.1996) ("[s]pecific provisions in a lease spelling out the respective rights of the parties to that lease are valid and controlling in the event the property is condemned. Such lease provisions have uniformly been upheld.") (*citations omitted*).

Furthermore, the condemnation clause (Article 21) in the K-Mart lease is hardly unique, as is summarized *infra* in 96 Am. Jur. Trials 211 § 26. Lease Provisions Governing Lessee's Compensation Upon Condemnation (2005). Plaintiff's Exhibit 1, A6, R. 0107-0121, specifically R. 0116-0117. A lessee's entitlement to compensation for the value of a lease-hold interest taken by eminent domain may be limited or extinguished by the terms of the lease agreement. 22 A.L.R.5th 327: Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property. Often, the owner/lessor and the lessee will include lease provisions governing the lessee's right to compensation in the event the leased property is condemned during the term of the lease, *thereby effectively altering the common-law rule requiring payment of compensation for the taking of a lease-hold interest.* [Emphasis Added]. Am. Jur. 2d, Eminent Domain § 236: Condemnation provisions in leases or statutes. Commonly known as "condemnation

clauses," such lease provisions typically provide that the lease will automatically terminate, *see* 96 Am. Jur. Trials 211 § 27: Automatic termination of lease upon condemnation, or may be canceled at the option of one or either of the parties upon condemnation, *see* 96 Am. Jur. Trials 211 § 28. Option to terminate upon condemnation, or assign some or all of the lessee's share of compensation for the lease-hold interest to the owner/lessor, *see* 96 Am. Jur. Trials 211 § 29: Assignment of lessee's right to compensation to lessor. It should be noted that such lease provisions will have no effect on the total amount of compensation that the condemning authority is obligated to pay for the condemned property because, in most jurisdictions, both the fee and lease-hold interests are first valued together as a single unit when determining the amount of just compensation owed for the property ("undivided fee rule"), and only afterward is the condemnation award apportioned according to the respective interests of the owner and lessee. South Carolina State Highway Department v. Hammond, 238 SC 317, 120 S.E.2d 21 (1961); Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. Ct. App. 1991) (apportionment of this amount among persons claiming a share is of no concern to the condemnor). Thus, condemnation clauses only affect the apportionment stage of the condemnation proceedings, and merely dictate what share, if any, the lessee is entitled to receive from the total amount awarded to the owner/lessor of the condemned property. 96 Am. Jur. Trials 211 § 16: Apportionment between lessor and lessee in absence of agreement.

The construction of a clear and unambiguous contract and its clauses presents a question of law for the court. Pruitt v. S. C. Med. Malpractice Liab. Joint Underwriting Ass'n, supra; United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., supra at 868-

69 (Ct. App. 1992) (applying the rules of contract construction to interpret the lease of a shopping center). To determine the intention of the parties, the court "must first look at the language of the contract." C.A.N. Enters., Inc. v. So. Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). In this determination, the court must give effect to the intention of the parties, and "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." Century Indem. Co. v. Golden Hills Builders, Inc., supra. It is also a question of law whether the language of a contract is ambiguous. So. Carolina Dep't of Natural Res. v. Town of McClellanville, supra at 302-03 (2001).

Where the agreement is not ambiguous 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. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). The "court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).

2. The lease in this case is specific, unambiguous, and conspicuously not silent in regard to condemnation awards.

In this case, the fourteen page-long lease is a standardized lease form dating from 1972, and it is clear and unambiguous in regard to the lessee's rights in case of expropriation through eminent domain. Article 21 of the K-Mart lease systematically and comprehensively addresses the rights of the parties with no less than six full paragraphs, and based upon a review of these paragraphs, K-Mart clearly and cogently waived its claim to share in any portion of the condemnation award in this particular instance of

expropriation. The specific paragraphs of the eminent domain article (Article 21) of the K-Mart lease are analyzed below.

Paragraph one of Article 21 in the K-Mart lease addresses a full taking of the tenant's buildings. This is an automatic termination ("shall terminate") of lease article in case of 100% expropriation of all buildings built by the Landlord for the Tenant, or 100% expropriation of the points of ingress/egress. Based on the undisputed facts described above, this paragraph is patently inapplicable as no buildings, or any portions thereof, will be 100% expropriated by the taking, nor will points of ingress or egress be materially impaired. (See Plaintiff's Exhibit 1, C: Condemnation Notice With Attached Maps, R. 0147-0156; Plaintiff's Exhibit 1, E: Jody Bishop Deposition, pp. 8-9, R. 0236-0237).

Paragraph two of the eminent domain article in the K-Mart lease addresses the partial taking of buildings. It allows an optional termination of the lease with 90 days' notice to the Landlord if more than 10%, but less than 100%, of the buildings built by the Landlord for the tenant are expropriated (a partial taking). Based on the undisputed facts described above, this paragraph is patently inapplicable since no buildings, or any portions thereof, are to be impacted by the taking. (See Plaintiff's Exhibit 1, C: Condemnation Notice with Attached Maps, R. 0147-0156; Plaintiff's Exhibit, 1, E: Jody Bishop Deposition, pp. 8-9, R. 0236-0237).

Paragraph three addresses expropriation of less than 10% of the tenant's buildings. Simply put, if the partial taking is below 10%, then the Landlord mitigates the effect upon the Tenant. However, once again, based on the undisputed facts described above, this paragraph is inapplicable because no buildings, or any portions thereof, will be impacted by the taking.

Paragraph four of Article 21 provides that if the taking removes more than 15% of the total land within the overall 14.11-acre "Entire Shopping Center" (Parcel B), and if the Landlord fails to substitute equivalent, improved, contiguous lands, then the tenant may terminate their lease at any time within twelve months of the effective deprivation by giving notice to the Landlord. In this scenario, the Tenant once again gets to walk free and clear of any lease obligations, if the Landlord cannot mitigate the loss caused by the expropriation of land either *outside* of, or *within*, the parcel demised unto K-Mart. But, based upon the undisputed facts described above, the option to terminate and the right to share in any award is waived because 15% of 14.11 acres would be 2.11 acres, and the "strip-take" in this matter (0.686 acres) is only impacting a very small fraction of the total acreage of the Subject Property, *none* of which is leased by K-Mart. Furthermore, K-Mart has not provided notice of termination. (See Plaintiff's Exhibit 1, F: Affidavit of Ed Navarro, R. 0269-0270).

Paragraph five of Article 21 states that if the lease is terminated pursuant to the eminent domain provision of the lease, all advanced rent and charges will be refunded to the Tenant, who also gets 60 days rent-free to relocate free and clear of any Subject Property lease obligations. Paragraph five of Article 21 in the K-Mart lease also states that if the Tenant's buildings are expropriated and the Tenant has not fully amortized its expenditures made on these buildings, then "the Landlord shall assign to the Tenant that portion of any award" that equals the unamortized expenses of the Tenant; a formula for the Landlord to use is then provided for the calculation of the portion of the award to be assigned to the Tenant. However, paragraph five is also inapplicable in this case because no buildings, much less un-amortized improvements, alteration or changes to any

portions thereof, will be impacted by the taking and there has been no termination by K-Mart.

Specifically, paragraph six of Article 21 states, *in toto*:

> "Tenant shall not be entitled to share in any award made by reason of expropriation of Landlord buildings on the demised premises, or any part thereof, by public or quasi-public authority, except as set forth in the preceding paragraph relative to unamortized expenditures by tenant, and then only if the award for such unamortized expenditures shall be made by the expropriating authority in addition to the award for the land, buildings, and other improvements (or portions thereof) comprising the demised premises; however, the Tenant's right to receive compensation for damages or to share in any award shall not be effected in any manner hereby if said compensation damages or award is made by reason of expropriation of the land or buildings or improvements constructed or made by the Tenant." (Underlining added)

Paragraph six of Article 21 in the K-Mart lease states that if a condemnation award is made to the Landlord for the expropriation of the Landlord's buildings, then the Tenant only has claim for unamortized expenditures from the condemnation award under the formula of paragraph five, *unless* an additional award has been separately designated by the condemning authority to go toward the unamortized expenses of the Tenant.

However, under the second clause of paragraph six of Article 21, *supra*, which notes that "the Tenant's right to receive compensation for damages or to share in any award shall not be effected in any manner hereby if said compensation damages or award is made by reason of expropriation of the land or buildings or improvements constructed or made by the Tenant," the Tenant still retains the right to receive compensation for an award based upon the taking of "land or buildings or improvements constructed or made by the Tenant." Paragraph six is once again inapplicable to K-Mart in this matter, as no land, buildings or improvements of the Tenant are being expropriated.

3. The case law cited by K-Mart in support of its interpretation of the lease is not applicable.

In support of its interpretation of the lease, K-Mart cites to City of Puyallup v. Carl. R. Hogan, 168 Wash. App. 406, 277 P.3rd 49, Wash.App. Div. 2 1012) and K-Mart Corporation v. State of Florida Dept. of Transportation, 636 S.2d131 (Fla. 2d DCA 1994) first as "not controlling" and then as "at least two controlling higher courts." (K-mart's Final Brief on Appeal p. 11, 17). Respondent agrees with the first statement that these cases are "not controlling" and clearly distinguishable on the facts, equitable factors not present here, and the lease terms.

a. K-Mart's cites Hogan as a controlling case, when is not analogous in terms of facts.

In 2007, the City of Puyallup, Washington, condemned a portion of Carl Hogan's shopping center for a road construction project that would materially impact access to his shopping center. Borders, the anchor tenant, testified on behalf of Hogan during the jury trial between the condemnor and condemnees regarding just compensation regarding the severity of the loss from the proposed condemnation, and later alleged that Hogan had amicably promised to share the total condemnation award. However, once the jury came back with an award for $5.15 million, (out of $11.9 million sought), Hogan did an about-face in the apportionment phase of the trial and argued that under the condemnation terms of the lease, Borders had waived its common law rights to the award and was actually not entitled to any of it.

Borders testified during the apportionment phase that they were in fact were going to suffer $3.4 million in damages and this amount of the total award should be apportioned to them, a fact that Borders had failed to mention during the jury trial.

Borders was initially apportioned $355,801 by the court. The court took a rather dim view of this change in tactics by both parties during the apportionment phase, stating "You have Hogan in Phase one stressing the catastrophic results to be worked on Borders by the taking. Hogan now disavows their phase one argument by claiming that damages to Borders may be as little as $48,000." Likewise, the court found that Borders "played coy at trial in phase one" when they failed to mention $3.4 million in damages. Partially as a result of these tactics, the court used substantial equitable discretion to double the award of $355,801 to $711,602 for Borders, noting as one equitable factor that "Hogan and Borders have employed different litigation tactics in 2009 and 2010."

Hogan appealed, arguing that the trial court erred in (1) denying summary judgment because Borders waived its right to apportionment, (2) calculating Borders' award, (3) exercising its equitable discretion to increase Borders' apportioned award, and (4) awarding Borders prejudgment interest. Borders cross appealed, arguing that the trial court erred in suspending post-judgment interest. The appellate decision in Hogan was issued on May 16, 2012, by the Washington Court of Appeals. City of Puyallup, a municipal corporation, v. Carl R. Hogan, et al., supra. The 27-page appellate opinion ruled against Hogan, and for Borders, on all points.

In summary, while Hogan is certainly an interesting case about once-cooperative co-condemnees falling upon each other's throats and propounding inconsistent theories during the jury trial and the subsequent allocation phase of a condemnation proceeding within Washington state, and the court's equitable response to these activities, its facts are simply not applicable to the current case.

b. The lease in Hogan is not analogous to the present lease.

At common law, a lessee is ordinarily entitled to share in a condemnation award paid to the lessor when a portion of its leasehold interest is taken in an eminent domain proceeding. This rule is subject to the exception that where the lessee/tenant specifically agrees in the lease to waive its right compensation. S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (2008). The interpretation of a lease is question of law that the court will review *de novo*.

Hogan argued that Borders had waived its right to share in the condemnation award unless: (1) Borders terminated the lease under Paragraph 22 of the lease, or (2) the City specifically awarded compensation for any of Borders' unamortized expenditures for improvements, alterations, or changes to buildings Borders owned or built. The appellate court in Hogan court held that:

> "Borders correctly argues that these conditions apply only *if* Borders terminates its lease under Article 22. Despite Article 22's length, it is neither clear nor comprehensive. Article 22 does not clearly waive Borders' right to share in the condemnation award under the facts here." Hogan, at 19.

In determining that Borders had a right to apportion of the condemnation award, the Hogan appellate court found clarity and specificity to be lacking in Hogan's lease provision regarding condemnation. The appellate court held that:

> "At most, Borders waived its right to share in a condemnation award if: (1) Borders terminated the lease under Article 22(a); or, (2) Borders had unamortized tenant improvement expenses at the time of condemnation for which the expropriating authority made a specific condemnation award, and if the expropriating authority made that specific condemnation award for Borders' unamortized expenditures for buildings Borders owned.
>
> Thus, because those narrow contingencies did not occur, Borders did not waive its right to share in this condemnation award. The language of

> Article 22(d) plainly states that it only applies "[*if* Borders] terminate[s this lease . . . under] Article 22." CP at 130 (emphasis added). Because Borders did not terminate its lease under Article 22, Hogan's argument that Borders waived its right to apportionment fails. Therefore, the trial court correctly found that Borders did not waive its right to apportionment. Accordingly, we affirm the trial court's denial of Hogan's motions for summary judgment." Hogan, at 22.

While the K-Mart lease in the current case and the lease in Hogan are slightly similar, the K-Mart lease is an older, more thorough, commercial lease template which has a much greater emphasis on specificity in terms of the various types of takings, and the number of remedies afforded the tenant based upon differing condemnation scenarios. In addition, K-Mart's lease has a waiver clause, and the lease in Hogan does not. Specifically, the first sentence of the last paragraph of Article 21 waives K-Marts' rights to any award under the facts of the present case.

The K-Mart lease actually has numerous provisions, remedies, and clauses which are wholly lacking in the Hogan lease, and also provides specific remedies for each possible taking scenario. Overall, the Hogan lease is substantially shorter and appears to be have been written and shortened to favor Borders, rather than Hogan. [1]For purposes of

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[1] Paragraph four of Article 21 in the K-mart lease is the parking lot provision. While it is somewhat analogous to the "Parking Area" clause found in in Provision C of the Hogan lease, it uses a completely different formula, allows for optional termination of the lease within six months of the effective deprivation, and has a ten day notice requirement. In contrast, paragraph four of Article 21 of the K-mart lease provides that if any portion of the parking area within the overall shopping center is taken by eminent domain, the landlord shall make every attempt to substitute equivalent, improved, contiguous lands. If the landlord cannot substitute land from the overall parcel, and if the taking removes more than 15% of the land (parking) within the 14.11-acre shopping center, then the tenant may terminate their lease at any time with 12 months of the effective deprivation by giving notice to the landlord.

In regard to paragraph four of Article 21 in the present lease, it bears further mention that the "strip-take" along Bowman Road in this case does not even come close to physically approaching the parking spaces in front of K-mart. In Norman's, Inc. v. Wise, 747 S.W.2d 475, Tex.App.1988, the court was faced with a very similar situation. In Norman's, the city condemned an 18.9 feet wide right-of-way over a small portion of a parking lot which was leased to a retail store, and the store filed a DJ action to have its lease with landlord Wise declared terminated. The trial court held that the lease was not terminated because the lease agreement referred to and covered two separate tracts of land, one of which was the store and the other of which was the parking lot, and "no portion of the clothing store or the land upon which it was situated was affected by the condemnation." Norman's, at 476. The store appealed. The Court of Appeals affirmed, holding that two separate tracts were leased and it was "glaringly clear that this

comparison, Article 21 of the K-Mart lease, the relevant eminent domain paragraphs, are compared in detail with eminent domain article in Hogan, *infra*.

Paragraph six of Article 21 within the K-Mart lease addresses condemnation awards. It specifically states:

> Tenant shall not be entitled to share in any award made by reason of expropriation of Landlord buildings on the demised premises, or any part thereof, by public or quasi-public authority, except as set forth in the preceding paragraph relative to unamortized expenditures by tenant, and then only if the award for such unamortized expenditures shall be made by the expropriating authority in addition to the award for the land, buildings, and other improvements (or portions thereof) comprising the demised premises; however, the tenants right to receive compensation for damages or to share in any award shall not be effected in any manner hereby if said compensation damages or award is made by reason of expropriation of the land or buildings or improvements constructed or made by the Tenant." [Emphasis added].

The K-Mart condemnation award clause is far more specific than the criticized clause in the Hogan case, and has some significant differences. In fact all of the underlined sentences in the K-Mart condemnation award clause listed *supra,* do not even occur in the condemnation award clause in the Hogan lease, which is listed below. The Hogan condemnation clause is listed below for comparison.

> If at the time of any such termination [Borders] has any unamortized expenditures that [Borders] may have made at [Borders'] cost on account of any improvements, alterations, or changes to the demised premises,

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condemnation was a partial taking and, indeed, a modest or small partial taking," and that the only way the automatic termination provision of the lease agreement condemnation clause could have been triggered would be if it had specified expropriation of "the demised premises, or any part thereof." Norman's, at 477.

The specific expropriation of shopping center parking in relation to lessees is also addressed in Winn-Dixie Stores, Inc. v. Dept. of Transp., 839 So. 2d 727 (Fla. Dist. Ct. App. 2d Dist. 2003). In Winn Dixie, the lessee of space in a shopping center had a leasehold interest in the center's parking area, and was found to be entitled to share in proceeds of Department of Transportation's condemnation of a portion of parking area, where the lease referred to the leased premises as the "store building and related improvements," the "related improvements" included specifications for minimum ratio of parking spaces to building area, and notably the lessee paid separate consideration to the lessor for the use, maintenance and repair of the parking area. In the current case, even assuming, *arguendo,* that the small "strip-take" not within the 8.6 acre parcel demised unto K-mart will somehow project across the Subject Property to impact the parking spots in front of K-mart, it is clear from the lease that K-mart *does not pay* separate consideration for their nonexclusive use of parking spaces outside of its demised premises.

> then [Hogan] shall assign to [Borders] that portion of any award payable as a result of such expropriation as shall equal the unamortized portion of [Borders'] expenditures. Such unamortized portion of [Borders'] expenditures shall be determined by multiplying such expenditures by a fraction, the numerator of which shall be the number of remaining years of the Lease term at the time of such expropriation, and the denominator of which shall be the number of remaining years of the Lease term at the time such expenditures shall have been made, plus the number of years for which the Lease term has been subsequently extended; provided, however, [Borders] shall have such right to share in a condemnation award only if the award for such unamortized expenditures is made by the expropriating authority in addition to the award for the land, building and other improvements (or portions thereof) comprising the demised premises, although [Borders'] right to receive compensation for damages or to share in any award shall not be affected in any manner hereby if said compensation, damages or award is made by reason of the expropriation of any land or buildings constructed, made or owned by [Borders].

The K-Mart lease is clearly not the same lease in Hogan, and provides specific remedies within very precise, unambiguous clauses that are directly tied to condemnation impacts upon real property. K-Mart can receive part of the condemnation award under conditions such as: 1) if the award is made to the landlord for the appropriation of the landlord's buildings and the tenant has a claim based upon unamortized expenses on these buildings; 2) if a portion of the condemnation award is wholly designated to the tenant by the condemning authority; and 3) if the condemnation award is made for the actual taking of the tenant's land or buildings.

Finally, while it was argued in Hogan the lessee could only receive an award under two narrow circumstances based on the lease, in the current case, K-Mart can be awarded condemnation proceeds under a variety of different expropriation scenarios. This limitation was the very fact upon which the appellate court's decision turned in Hogan, and it is simply not present in the current case. In summary, Hogan is not

controlling law in regard to interpretation of the K-Mart lease. The leases are not similar, and the fact patterns are not analogous.

c. The Florida K-Mart case cited by the appellant case involves material impairment of direct access to the demised parcel, direct impacts to the demised parcel, business damages, different lease language, and is not analogous to the present case.

In K-Mart Corporation v. State of Florida Dept. of Transportation, supra, the Florida DOT initiated a partial taking of property leased by K-Mart during the construction of an overpass along U.S. 19. This taking "resulted in K-Mart's loss of direct access to U.S. 19 and the loss of driveways and parking areas." Id. at 132.

> "In its answer to DOT's petition, K-Mart asserted claims for severance and business damages. DOT filed no response in opposition or avoidance of K-Mart's claims. On the morning of trial, DOT filed and served a motion to dismiss K-Mart as a party to the action based on the bare assertion that K-Mart "has no right to compensation." The court continued the trial and set a hearing on the motion. DOT argued and the court agreed that the terms of K-Mart's lease restricted its recovery to a claim against the lessor. The court entered the order now under review which states, "[T]he Court grants Petitioner's Motion to Dismiss K-Mart and K-Mart is hereby dismissed with prejudice as a Party Defendant from this cause." DOT now concedes that the dismissal of K-Mart's claim for business damages was error. We determine that the dismissal in its entirety was error.
>
> ..... The lease in this case contains two pertinent provisions. The first states that the lessee is precluded from sharing in any award made for a taking if the taking involves the "expropriation of landlord buildings on the demised premises." The trial court apparently relied on this provision in determining that K-Mart had no right to compensation. It is the second provision, however, which is controlling. That provision, in pertinent part, states that "the tenant's right to receive compensation or damages or to share in any award shall not be affected in any manner hereby if said compensation damages or award is made by reason of expropriation of the land." There is no factual dispute that the taking here involves only land and, therefore, K-Mart is entitled to be compensated." Id. at 132-133. [Emphasis added].

In the current case, K-Mart did not lose any direct access, suffer a direct impact to its demised parcel, or seek to recover business damages. In addition, the lease language does not correspond; the lease language in the present matter contemplates, and addresses, a panoply of possible eminent domains scenarios. K-Mart's reliance upon this case hinges on a superficial review of roughly similar clauses, and once again, the lease in the present case has a clear waiver clause in the event of a land take from the demised premises, a right to terminate if the land taken outside of the demised premises exceeds 15%, and the tenant is only entitled to compensation or to share in an award if "said compensation, damages, or award is made by reason of the expropriation of the land or buildings or improvements constructed by the or made by Tenant." The land and improvements taken in this case were not within K-Mart's demised premises or constructed or made by it. (See Plaintiff's Exhibit 1, A, 10-11: K-Mart Lease Article 10 and Exhibit C to the Lease, R. 0129-0136; Exhibit C contains two letters of from K-Mart concerning its typical plans and specifications for the site development, which clearly was constructed by the original developers).

B. K-Mart Suffered No Damages Due to this Acquisition.

1. K-Mart does not have some "statutory property right" to parking spaces in the shopping center which are completely outside of the tract actually demised unto K-Mart.

The strip-take in this case patently lies well outside the K-Mart's leased parcel. Kmart admits that the parcel demised unto K-Mart in paragraph one is Tract A-2 of "8 +/- acres." (K-Mart's Final Brief On Appeal p. 2) K-Mart argues that Article 10 of the lease which provides that the "aggregate area provide for parking of automobiles shall be sufficient to accommodate not less than seven hundred thirty --- (730---) automobiles on

the basis of arrangement depicted on Tenant's drawing and specifications," which includes all of the parking of the Entire Shopping Center, and thereby concludes that "the landowner *demised* not less than 730 parking spaces to K-Mart, and further, bridging to the definition of "property" in the *South Carolina Eminent Domain Act*, that K-Mart had a "statutory property right" to these spaces. (K-Mart's Final Brief on Appeal p. 3). Here, K-Mart conflates parking spaces, leaseholds, and property, while overlooking the basis of their own appraisal. K-Mart's appraisal is not premised upon a loss of parking, but upon the loss of a supposed expansion right.

K-Mart thereby loftily elevates a right to use aggregate parking under the lease, into a statutory property right under the law. If the shopping center landowner did not intend, to demise any parking at all unto the other tenants in Tract A-1, then the function of the line dividing the parking lot between Tracts A-2 and A-1 on Exhibit B is difficult to explain. (See Plaintiff's Exhibit 1, A: K-Mart's Lease of March 23, 1978 With Amendments and Exhibits, *passim* R. 0089-0136, but specifically R. 0097 and 0126; Plaintiff's Exhibit 1, D: Jody Bishop Appraisal p. 4, R. 0169; Plaintiff's Exhibit 2, R. 0307). Moreover, the whole purpose of using different tract legal descriptions in the lease was to distinguish between the defined premises leased and the concomitant parking. Continuing K-Mart's line of reasoning, all of the parking spaces combined with the building foot-print of K-Mart would certainly constitute more than "8+/- acres" listed in the description of their demised parcel. Clearly, K-Mart was entitled to use any of the spaces in "aggregate," and could have used any of them on any occasion, but this obviously does <u>not</u> translate into a right of exclusivity held by K-Mart. To wit, there is simply no lease provision or scenario wherein K-Mart could exclude others from any of

the parking spaces or share in any condemnation award unless the land taken exceeded 15% pursuant to paragraph 4.

The word "demised" has a specific meaning within any lease, and this lease is no different in regard to parking spaces; it clearly states that K-Mart was allowed the use of all of the parking spaces, but that they were not part of the demised premises. Further, as reviewed *infra*, paragraph four of the K-Mart lease provides that if a taking removes more than 15% of the total land within the overall 14.11-acre "Entire Shopping Center" (Parcel B), and if the Landlord fails to substitute equivalent, improved, contiguous lands, then the tenant may terminate their lease at any time within twelve months of the effective deprivation by giving notice to the Landlord. In this scenario, the Tenant once again gets to walk free and clear of any lease obligations, if the Landlord cannot mitigate the loss caused by the expropriation of land either *outside* of, or *within*, the parcel demised unto K-Mart. K-Mart has not provided notice of termination to the landlord, and the strip take in this case does not constitute 15% of any either Tract A-1 or A-2, or the entire shopping center.

2. K-Mart does not have unexercised "expansion rights," *ad infinitum*, allowing it to construct additional buildings without the Landowner's consent.

The appraisal utilized by K-Mart was conducted by Jody Bishop of Atlantic Appraisals, LLC, and is dated December 12, 2011. (See Plaintiff's Exhibit 1, D: Atlantic Appraisals, LLC, Report on 1545-1551 Bowman Road, R. 0158-0232). The appraisal has fatal flaws. The central premise of the Tenant's appraisal is that the Tenant had the right under the original lease to construct an additional building on the demised premises and that the loss of land and parking spaces outside the demised premises would limit the

size of the building that could be constructed. (See Plaintiff's Exhibit 1, E: Jody Bishop Deposition, pp. 44-51, R. 0245-0247 and Deposition Exhibit 9, R. 0264-0267; Plaintiff's Exhibit 1, D: Atlantic Appraisals, LLC, Report on 1545-1551 Bowman Road, R. 0158-0232). Notably, the valuation of damages in Bishop's appraisal was not premised upon the loss of 57 parking spaces out of the aggregated total parking spaces, which would, of course, have produced a much lower estimate of damages than the loss of some supposed, unfettered, development right on the part of K-Mart.

While the original lease allowed for the construction of additional buildings, the Second Amendment to the Lease modified the original lease to change the right to build "anywhere on the demised premises" to the right to build in a specific location (the "K-Mart Expansion Area"). K-Mart actually built this expansion *before* the current taking. Exhibit B of the original lease was graphically modified by Exhibit B of the Second Amendment to the Lease in order to specify the location of this expansion right. (See Plaintiff's Exhibit 1, A: K-Mart's Lease of March 23, 1978 with Amendments and Exhibits, R. 0089-0136, specifically R. 0094-0097). It is self-evident that the expansion option in the Second Amendment to the K-Mart Lease *has already been exercised* and K-Mart's structural expansion is *built-out*. The appraisal theory of the tenant is therefore barred as a matter of law because K-Mart has no right to construct any additional buildings after the date of taking. While it is unclear when and how K-Mart's appraiser saw the Second Amendment to the lease, counsel for K-Mart determined that the second amendment to the lease should be construed as a right to expand. (See Plaintiff's Exhibit 1, E: Jody Bishop Deposition Jody, p. 44-46; p. 47, lines 11-12, R. 0245-0246).

In its Final Brief on Appeal, K-Mart now relies upon a new reading of paragraph 16 of the lease, as well as a unique impression of the Second Amendment to the lease, which was not argued before the Master. Weaving vignettes of these two documents together, K-Mart now finds a new distinction between building alterations and stand-alone buildings constructed on the demised premises. Article 16 reads:

> "16. Tenant may, at its own expense, from time to time make such alterations, additions, or changes, structural or otherwise, in and to its buildings as it may deem necessary or suitable; provided, however, Tenant shall obtain *Landlord's prior written consent to drawings and specifications for structural alterations, additions or changes*; provided, further, Landlord shall not withhold its consent thereto if the structural integrity of the buildings will not be impaired by such work.....Landlord, at Tenant's cost, shall cooperate with Tenant in securing building or other permits or authorizations required from time to time for any work *permitted* hereunder or installations by Tenant....." [Emphasis added].

The final sentence of Article 16 of the K-Mart lease states that "in the event Tenant constructs *any such additions or new construction*, Landlord shall not be obligated to furnish additional parking areas in substitution of the areas thereby built over, and the number of parking spaces required under Article 10 shall be reduced by the number of spaces covered by such *additional buildings or structures*." [Emphasis added]. Clearly, even if the right to add buildings was not specifically defined by the Second Amendment to the Lease and revised Exhibit B, the loss of parking caused by the expansion was the Tenant's risk. Loss of parking outside of the demised area does not entitle the Tenant to share in the award where the Landlord had no obligation to replace the loss of parking in the event of the construction of additional buildings.

K-Mart now asserts that Article 16 of the lease means that K-Mart does not need to obtain "respondent's permission to construct a new building within the demised area. K-Mart only needs permission to alter the structure of the existing buildings" and further,

that the Landowner "cannot stop appellant from constructing a separate stand lone building." (K-Mart's Final Brief On Appeal p. 6). However, a reading of Article 16 *in pari materia* strips the very logic from K-Mart's reading of Article 16.

First, clearly, the words "such alterations, additions, or changes, structural or otherwise; structural alterations, additions or changes; such additions, new construction, such additional buildings or structures," as included throughout Article 16, are words of the same kind and nature, *eiusdem generis.* K-Mart's assertion that since the phrase "such alterations, additions, or changes, structural or otherwise, in and to its buildings" in the first section of Article 16 does not include the phrase "additional buildings or structures" which is found in the second section of Article 16, this means the landlord can only control additions and alterations to existing buildings, runs counter to the very basic principles of contract interpretation. A word is known by the company it keeps, *noscitur a sociis.* Finally, the paragraphs of Article 16 are clearly intended to be read a whole, because the first sentence of the second paragraph indicates how rent shall be collected base upon gross sales from the either new buildings, *or* building alterations.

Second, the requirement in Article 16 that the Tenant receive "prior written consent" is clearly connected to the words "such alterations, additions, or changes, structural or otherwise" and "structural alterations, additions or changes" by semi-colons, and not separated by periods. Further, the Second Amendment to the lease, with its text and exhibit, clearly demonstrates the exercise of this written consent requirement, *ipso facto.*

Furthermore, the entire concept that according to its lease, a commercial tenant could build as many new buildings as it desired on its rented parcel, without permission

from its landlord, is an argument made *ab absurdo*. The Landowner craves reference to any clause within the four corners of the current commercial property lease which demonstrates how such a tortured interpretation would, in fact, operate.

In addition, the interpretation of the Second Amendment, which shows the "Expansion Area" of K-Mart, as functioning "as required to show the landowner's written permission to alter the building" *and* "to represent the site as-built" is illogical from a before and after standpoint. K-Mart cannot conveniently assert that the Exhibit first functions as the Landlord's permission granted before the new construction was executed, *and* then following the completion of construction, as some form of "as-built," documentation of the completed construction.

While Exhibit B of the Second Amendment clearly replaced Exhibit B of the original lease, the landowner never asserts that the Exhibits control for "only a single opportunity" to build additional buildings. New construction on the demised parcel was obviously a contractual point which the Landowner and K-Mart would negotiate "from time to time," as Article 16 states, and then laboriously memorialize with written records. The contractual record before this Court aptly reflects that the Landlord and Tenant bargained for, negotiated, and then documented the rights, duties and obligations each desired in the lease. Finally, K-Mart's insistence on the fact that since the lease did not contain language that explicitly limited the number of times K-Mart could expand, there was literally in fact, no limit, is rather discordant given its otherwise non-literal interpretation of selected lease clauses.

K-Mart also complains in its Final Brief on Appeal (p. 5) that the Master ignored the "second portion of Article 16 of the lease which allows the appellant to construct new

buildings." The Master's Order specifically discusses the Tenant's right to expand *vis-à-vis* parking, and Article 16, on page 13 of its order.

Even if there were a right to expand under the lease, South Carolina case law holds that plans and hopes of an owner of land for its future use are not admissible evidence as a bearing on market value except upon proof that it is reasonably probable that it will be put to the other use within the immediate future. South Carolina State Highway Department v Westboro Weaving Company, 244 S.C. 516, 137 S.E.2d 776 (1964). There is no such evidence in this case. Since such damages cannot be recoverable by the owner in the condemnation action against the government they likewise are not recoverable in an award allocation proceeding.

In summary, this lease provided for K-Mart's expansion with the written consent of the Landowner. There was room to expand laterally without impacting parking on their demised parcel, K-Mart completed its build-out into this "Expansion Area," and the K-Mart lease was modified to specify this expansion right. There is simply no other lease article governing expansion, and the Tenant cannot unilaterally expand as it asserts, without a right under the lease. In an attempt to reach such a right, once again, K-Mart ignores substantive South Carolina case law and alternatively and selectively seizes upon both highly literal and highly selective readings of the lease in order to reach its highly improbable assertions, and to which the Landowner respectfully responds once again, *interpretatio cessat in claris.*

3. The larger parcel theory was correctly applied by the Master in Equity.

The bed-rock premise of the Bishop's appraisal of K-Mart's leasehold (not fee-simple) interest is that the Tenant had the right under the original lease to construct an

additional building on the demised premises, and that the loss of land and parking spaces outside the demised premises would limit the size of the building that could be constructed. (See Plaintiff's Exhibit 1, E: Jody Bishop Deposition, pp. 45-51, R. 0246-0247, and Deposition Exhibit 9, R. 0264-0267; Plaintiff's Exhibit 1, D: Atlantic Appraisals, LLC, Report on 1545-1551 Bowman Road, R. 0158-0232). This result is achieved by the appraiser determining that the leasehold encompasses both Tracts A-1 and A-2 through a "larger parcel" analysis. However, K-Mart's use of the larger parcel premise fails soundly in this case.

Briefly, under the larger parcel theory in a fee simple taking, the land owner is entitled to severance damages, as well as the value of the parcel taken from a larger parcel, with the larger parcel being defined on the basis of the three unities of contiguity, ownership, and highest and best use. More specifically, the "larger parcel is defined as that tract or tracts of land which are under the beneficial control of a single individual or entity and have the same or an integrated highest and best use." The Dictionary of Real Estate Appraisal, Third Edition, edited by Stephanie Shea-Joyce, 1993.

Under the larger parcel theory in South Carolina, "for parcels to be combined parcels must have unity of use, ownership and proximity. S.C. St. Hwy. Dep't v. Terrain, 267 S.C. 186, 227 S.E.2d 184 (Sup. Ct. 1976). For unity of title to exist, there must be a unity of ownership for the purpose of addressing damages to any remaining portion of the tract. Arnold v. S.C. Public Serv. Auth., 292 S.C. 396, 356 S.E.2d 837 (1987). However, in this case, K-Mart has a lease-hold on the 8.6 acres of Tract A-2, hence its property name of "K-Mart # 7239," but *K-Mart has no lease-hold on the 5.15 acres of Tract A-1.* Other commercial entities clearly occupy the buildings located in Tract A-1, as admitted

by the appraiser Jody Bishop in his deposition. (See Landowners Exhibit E: Jody Bishop Deposition, pp. 67-68, R. 0251). In this case, there is, in fact, *no unity of ownership* of leasehold interests, and this presents a fatal, substantive flaw in the larger parcel premise as applied by K-Mart's appraiser. Clearly defined premises and tracts cannot be ignored through the misapplication of the larger parcel theory.

Therefore, even if the expansion defined under the Second Amendment had not already occurred, there is no lease-hold "unity of title" in this case, and the appraisal thus fails under the larger parcel premise. Finally, the larger parcel interpretation wholly flies in the face of K-Mart's lease and lease amendments, with their various exhibits; the tax maps, property names, property addresses, and parcel identification numbers; the current as-built status of K-Mart; and, the differing lease-holds held by other shopping center tenants.

The appraisal relied upon by K-Mart specifically lists the property identification number(s) as TMS No. 559-13-00-041 *and* TMS No. 559-13-00-038. The appraisal therefore covers the parcel leased by K-Mart (TMS No. 559-13-00-041, Tract A-2, at 1551 Bowman Road), *and* the parcel leased by others (TMS No. 559-13-00-038, Tract A-1, at 1545 Bowman Road). K-Mart's appraisal notes on page 2 that "both parcels are owned by the same entity and have similar use," there is currently a surplus of 230 parking spaces, and no parking is specifically assigned to K-Mart. Based upon these reasons, the appraiser chose to combine both K-Mart's leased parcel and Rite-Aid's leased parcel, and they were "appraised as a single property under the principle of larger parcel."

First, K-Mart's Final Brief on Appeal (p. 6) states that the "larger parcel theory does not apply in this matter." If the court accepts this bold statement, then K-Mart's appraisal, which relies upon a flawed conceptualization of the larger parcel theory, may be set aside, and K-Mart's position falls with it.

Second, K-Mart's Final Brief on Appeal (p. 6) further proffers that the "larger parcel theory only applies to the acquisition of land. Appellant cannot find any case law which applies the larger parcel theory to leasehold interests." Despite the K-Mart's assertions, it is axiomatic that while "the leasehold interest is less than fee simple ownership, it is an ownership interest." John Schmick and Robert Strachota, "Larger Parcel Theory," *Real Estate Review*, Fall 1987:pp. 96-100. In this case, the Landowner has leased portions of the shopping center to numerous tenants, giving them a measure of ownership, so it is difficult for K-Mart to assert unity of title, over the entire shopping center, all its tenants, and all the parking, yet it must do so for its appraisal theory to fly.

C. The SNDA clearly applies in this case, and K-Mart's claim to the condemnation award is further barred by the subordination clause of the properly executed SNDA.

In regard to the specific SNDA signed by K-Mart and its effect on the disposition of the condemnation award, existing case law, the function of SNDA's, and commentary clearly indicates that K-Mart has no claim to share in the condemnation award because its leasehold interest is inferior to the bank's interest. SNDA's, and their function, are hardly unique in the commercial real estate realm.

Simply put, the "subordination provision within an SNDA makes the tenant's rights under the lease subordinate and inferior to the rights of the lender's mortgage." https://www.dallasbar.org/.../2007_november_subordination_nondist. Subordination,

Nondisturbance and Attornment Agreements. Keenen Kolondo, Dallas Bar Association, Real Property Sec. Publication, Nov. 12, 2007. The mortgage's condemnation clause specifies that the lender is to receive the entire condemnation award. This is consistent with the Tenant being given a right to terminate under certain conditions and only a right to share in a compensation award if property it built was acquired.

1. K-Mart's claim to the condemnation award is barred by the SNDA.

The note and mortgage gives the lender NBSC the right to the condemnation award proceeds. (See Plaintiff's Exhibit 1, F: Affidavit of Ed Navarro, R. 0269-0270; Plaintiff's Exhibit 1. Exhibit G: Promissory Note and Mortgage, R. 0272-0306). Specifically, Recital "B" of the SNDA requested by NBSC states that "As part of the Loan, Lender has required that all tenants on the Premises execute and deliver a Subordination, Nondisturbance and Attornment Agreement," and Recital "C" of this SNDA directly ties into "Paragraph [Article] 28 of that certain lease dated March 23, 1978 by and between Tenant and Landlord's predecessor-in-interest, Baker & Baker, a partnership, as amended (the "Lease") requires Tenant to deliver this Agreement."

> Mortgage Subordination: 28. Upon written request by Landlord, Tenant shall execute and deliver an agreement subordinating this lease to any first mortgage upon the demised premises; provided, however, such subordination shall be on the express condition that the validity of this lease shall be recognized by the mortgage, and that, notwithstanding any defaults by the mortgagor with respect to said mortgage or any foreclosures thereof, Tenants' possession and right of use under this lease in and to demised premises shall not be disturbed by such mortgage unless and until Tenant shall breach any of the provisions hereof and this lease or Tenant's right to possession hereunder shall have been terminated in accordance with the provision of this lease."

Article 28 of the original lease unambiguously subordinates the Tenant's lease "to any first mortgage." Moreover, Section 2.07 of the executed NBSC mortgage for the

Subject Property specifically contemplates condemnation awards, leaving no doubt that the subordination of condemnation awards was addressed by NBSC's SNDA. To wit, Section 2.07 states:

> "2.07 Condemnation. In the event that by, or pursuant to, proper authority there is taken or *condemned the entire Mortgaged Property or any part thereof, under power of eminent domain exercised by any actual or quasigovernmental authority or public utility, the Mortgagor hereby assigns to the Mortgagee any and all awards that may be given,* made or due the Mortgagor in any proceedings in connection therewith, and the amounts of such awards shall be applied by the Mortgagee to the reduction of the indebtedness secured hereby, and the Mortgagor agrees to execute any and all such further instruments of assignment of any and all such condemnation awards as may be required by the Mortgagee to carry out the purposes of this Section." [Emphasis added].

Section 2.07 also provides a formula which allows the mortgagor to restore the property with disbursements of the condemnation award paid to the mortgagor in the case of partial taking where the cost of restoration is under $50,000. K-Mart's assertion in its Final Brief on Appeal (p. 18) that "the SDNA applies only to title issues" runs inapposite to the plain meaning and logical function of these documents.

To wit, the SNDA in this matter is conventional, common commercial lending practice, unambiguous, correctly tied to the original Subject Property lease and mortgage, properly executed, and properly filed. The interpretation that the SNDA does not subordinate K-Mart's right to the condemnation award flies in the face of the basic contract interpretation principle that a mortgage, promissory note, SNDA, and lease have to be read *in pari materia.* Further, if K-Mart's interpretation of the SNDA is to be believed, it would be necessary to suppose that commercial mortgagee's who secure their indebtedness with parcels adjacent to public right-of-ways have elected to forego their

secured status in regard to those portions of land which might one day expropriated, a clearly illogical syllogism in commercial business terms.

Restatement Second of Property thoroughly addresses subordination in relation to tenants and mortgages. Specifically, Restatement 2d Property: Landlord & Tenant § 8.2 Amount Of The Condemnation Award Tenant Entitled To Receive (2012), Comment J and Reporters Note 14 state:

> "Comment J: Mortgage or other lien on leased property. The tenant may have subjected his leasehold interest to a mortgage or other lien. In that case, any condemnation award that would otherwise go to the tenant will go to the mortgagee or lienholder to the extent his security has been impaired by the condemnation and only the surplus, if any, will go to the tenant."
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> RN 14. Rights of mortgagee or lienor superior to lease—No cases have been found on the question of the apportionment of an award among a landlord, tenant and mortgagee, *but it is certainly settled that if a lien on property taken by eminent domain exists before the condemnation, the lienor's claim on the award is superior to the owner's and other creditors' rights. His lien on the property becomes an equitable lien on the award.* 2 Nichols on Eminent Domain § 5.74; Annot., 45 A.L.R.2d 522 (1956); e.g., Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). *Similarly in all states a mortgagee may have his debt satisfied out of the award in advance of other creditors*, 2 Nichols on Eminent Domain § 5.741; e.g., City of Chicago v. Salinger, 384 Ill. 515, 52 N.E.2d 184, 154 A.L.R. 1104 (1943), whether or not the mortgage debt has matured. *See*, e.g., Knoxville Housing Authority, Inc. v. Bush, 56 Tenn.App. 464, 408 S.W.2d 407 (1966). In title-theory states his remedy can be directly against the condemnor, his interest being constitutionally protected property. Collector of Taxes v. Revere Building, Inc., 276 Mass. 576, 177 N.E. 577, 79 A.L.R. 112 (1931). If the tenant's interest is subordinate to the lien, the lien should undoubtedly be satisfied first.
>
> The position taken in Comment J that the mortgagee is entitled to the amount necessary to protect his security interest follows the majority rule. Annot., 58 A.L.R. 1534 (1929), supp. by 110 A.L.R. 542 (1937), supp. by 154 A.L.R. 1110 (1945); Seaboard All-Florida Ry. v. Leavitt, 105 Fla. 600, 141 So. 886 (1932); State v. Hemmingson, 57 Wash.2d 635, 359 P.2d 154 (1961). 2 Nichols on Eminent Domain § 5.741(1) takes the position that the mortgagee or lienor in partial condemnation cases is entitled to have the entire lien satisfied if possible, and this seems to be the rule in New York. In re Houghton and Olmstead Avenues, 266 N.Y. 26, 193 N.E. 539 (1934).

Comment (J) of Restatement 2d Property: Landlord & Tenant § 8.2 Amount Of The Condemnation Award Tenant Entitled To Receive (2012) was cited in Raiford v. Department of Transp., 206 Ga.App. 114, 424 S.E.2d 789, 791 for the proposition that in regard to subordination clauses and condemnation awards, "secondary authorities support the view that such a clause also gives a lienholder priority to condemnation proceeds to the extent that the security has been impaired by the condemnation, although we find no cases specifically addressing the question."

In Raiford, a lessee who operated a self-service laundromat on condemned property sought just compensation for business losses. The lessee argued that he was entitled to priority in disbursement of funds, even though two banks held mortgages and a clause in his lease provided that the lessee's leasehold interest was subordinate to security deed holders' claims. The trial court entered judgment on a jury verdict awarding the lessee no damages for business losses because the property was not unique, and finding that under the subordination clause, the security deeds had priority to the condemnation award proceeds.

On appeal, the Raiford court found that "the subordination agreed to is general and would operate to establish priorities between the lender and the lessee regardless of what event caused lessee's ouster. The subordination was not limited to an event of foreclosure." Raiford, at 792. However, the appellate court in Raiford reversed and remanded upon this point because the lessee's subordinate interest was specifically conditioned upon the security deed holders' explicit inclusion of a covenant of quiet possession in their deeds, and since the security deed holders did not fulfill this "condition precedent," they did not have a contractual right to priority under the lease's

subordination clause. However, notably in the current case, NBSC *did* include a "Tenant Not to Be Disturbed" clause within the SNDA.

2. Kmart signed the SNDA and was party to its provisions.

K-Mart's Final Brief on Appeal (p.11-12) states that the SDNA does not apply to K-Mart because the "appellant is not a party to the note or mortgage and to hold appellant liable for a contract to which it is not a party violates the basic premise of contract law." The Landowner responds to this assertion by noting that K-Mart signed the document, which is clearly labeled Subordination, Nondisturbance, and Attornment Agreement, and signed the lease, which contains paragraph 28. (See Plaintiff's Exhibit 1, B, R. 0138-0145).

In its discussion of the SNDA, K-Mart also cites an appraisal done by Stuart Saunders in its Final Brief on Appeal (p. 14). K-Mart mentions this appraisal to support the notion that there is more than enough equity in the property to satisfy the underlying mortgage. However, this is irrelevant because the language of the document provides priority to the mortgagor for all eminent domain awards notwithstanding the amount of equity in the property.

SUMMARY

In summary, the K-Mart lease in this case addresses condemnation and sets out the exclusive rights of two sophisticated parties within a long-term commercial lease. It has both automatic and optional termination clauses, and addresses both full takings, partial takings, and the taking of Landlord and Tenant property; the lease in question has also been repeatedly renewed. Finally, it bears mention that the K-Mart lease is not inequitable, unconscionable or one-sided, for it does allow the Tenant the right to

terminate upon conditions the parties have agreed to, based upon impacts by a variety of different expropriation scenarios.

In this particular matter, based upon abundant case law, commercial real estate practices, and a thorough review of the lease in question, it is clear that K-Mart knowingly bargained for the right to terminate the lease and waived its common law right to share in the condemnation award. A lease may make a provision for the contingency of condemnation, and such a provision will be given effect in accordance with its language and purpose. CJS Eminent Dom § 233: Lease provisions governing or affecting condemnation. Francis C. Amendola et. al. (May, 2012). Furthermore, there can be no equitable claim to the condemnation award because none of the land taken was from the parcel demised unto K-mart. The K-Mart contract documents have a very comprehensive eminent domain clause which: 1) provides for the condemnation award to be paid to mortgage company and the Tenant remedies if buildings, improvements, sufficient land, or points of ingress or egress are expropriated and the expropriation materially impacts the Tenant; 2) allows the Tenant to walk away from the lease free and clear in most of these scenarios, and even 3) requires the Landlord to mitigate the Tenant's unamortized expenditures, refund rent, mitigate for the material loss of parking spaces, and replace impacted buildings. While the Landlord suffers the risk of losing land, points of ingress and egress, buildings, and rental income from such an expropriation, the Tenant can simply break the lease with minimal to no notice, without penalty, after receiving a refund of rent or mitigation for any unamortized improvements it made, and walk away free and clear.

Furthermore, from an equitable and legal viewpoint, K-Mart *can show no loss of value in its lease-hold* due to this expropriation in law or in equity. In fact, the road improvements will ultimately improve traffic flow and access to the shopping center once completed, thereby benefitting all shopping center tenants. While K-Mart will lose nothing due to this expropriation, it *must* show damages in order to make any claim to share in the condemnation award on the basis of their leasehold.

Ultimately, since there are no damages to K-Mart, their claim to share in the condemnation award must fail as a matter of law. So. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, *supra*.

A. This Court should affirm the decision of the lower court based upon any ground appearing in the Record on Appeal pursuant to Rule 220(c), *South Carolina Appellate Court Rules (SCACR).*

This Court should affirm the decision of the lower court based upon any and all legal conclusions it may draw, and any and all factual conclusions to which it is bound, under the proper standard of review from any and all evidence appearing in the Record on Appeal. (See Rule 220(c), *SCACR*; Rule 208(b)(2), *SCACR*).

CONCLUSION

For the aforementioned reasons the Appeal should be dismissed.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity
The Honorable Mikell R. Scarborough

Trial Court Case No. 2011-CP-10-4324
Appellate Case No.: 2013-000168

Town of Mount Pleasant, South Carolina, Condemnor
v.
Bowman MTP Center, LLC, Landowner and NBSC, a Division of Synovus Bank, and K-Mart Corporation, Other Condemnees,

Of whom K-Mart Corporation is the Appellant,
and
Of whom Bowman MTP Center, LLC, is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Appellant by depositing a copy of it in the United States Mail, Postage prepaid on May 17th, 2013, addressed to: Christopher L. Murphy, Esquire, Stuckey Law Offices, 123 Meeting Street, Charleston, SC 29401.

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