THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity

Mikell R. Scarborough

Case No. 2011-CP-10-4324

Appellate 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN RULING K MART CORPORATION WAS NOT ENTITLED TO ANY PORTION OF THE CONDEMNATION AWARD?

STATEMENT OF THE CASE

On June 17, 2011, the Town of Mt. Pleasant, (the Town), filed a condemnation action against the Bowman MTP Center, LLC and NBSC, a division of Synovus Bank and later amended the pleadings to include the K Mart Corporation as a tenant. The Town and landowner eventually agreed to settle the matter for $435,925.00. The parties then entered a consent order which dismissed the Town and referred the matter to the Master in Equity in order to determine the apportionment issues between the landowner, Bowman MTP Center, LLC and the tenant, K Mart Corporation. Both parties moved for partial summary judgment on the issue of entitlement to the award which the Master heard on September 17, 2012. On October 22, 2012, the Court issued an order in favor of the landowner/respondent which prohibited the tenant/ appellant from sharing in the award. Appellant filed a Motion to Reconsider which the Master denied on December 20, 2012. Appellant served this appeal on January 7, 2013.

FACTS

The subject property is triangular site which borders the US 17 on the South side, Bowman Road to the North side and Old Georgetown Road to the West side. (R. p.307). K Mart Corporation originally entered into a lease for a portion of the landowner's site back on March 23, 1978. The lease consists of two components: the demised 8.6 acres and the remaining parking spaces in the shopping center. (R. p. 108, para. 1). Paragraph 1 of the lease states:

Landlord does demise unto Tenant and Tenant does taking from Landlord

> for the lease term the following property: Tenant's completed building . . . together with site improvements to be constructed as hereinafter specified by landlord at its expense together with land compromising not less that eight plus (-8+ -)- acres . . . (R. p. 108).

The lease addresses these improvements in ¶10 and defines the parking requirement as follows:

> Landlord further covenants that the aggregate area provided for parking of automobiles shall during the lease term be sufficient to accommodate not less than Seven Hundred Thirty ---- (---730---) automobiles on the basis of arrangement depicted on Tenant's working drawings and specifications. (R. p. 112).

Respondent purchased this property on January 28, 2011 subject to K Mart's lease.

On June 17, 2011, the Town filed a Condemnation Notice in order to acquire a *strip-take* of 29,884 square feet along Bowman Road. The *take* eliminated 57 parking spaces on the site. Respondent/landowner settled the matter with the Town for $435,925.00. Appellant/tenant seeks a portion of that award to compensate it for the reduction of its leasehold interest. The Master ruled K Mart was not entitled to any portion of the award based on three grounds: 1) K Mart's did not suffer any damages; 2) the lease prohibited K Mart from sharing in the award; and 3) the mortgagee, NBSC is entitled the funds.

ARGUMENT

I. APPELLANT SUFFERED DAMAGES AS A RESULT OF THIS ACQUISITION.

The Master first determined appellant did not suffer any damages and that its methodology of calculating its damages fails as a matter of law. Here The Master failed to recognize any property interest in the lost 57 parking spaces. "A lessee, as the holder of a constitutional property interest . . . is entitled to just compensation when all or part of the leasehold interest is lost by condemnation." South Carolina State Highway Dept. v. Hammond,

238 S.C. 317, 120 S.E.2d 21 (1961). S.C. Code § 28-2-30(17) of the Eminent Domain Act defines "Property", "real property", or "land":

> as all lands, including improvements and fixtures thereon, lands under water, easements and hereditaments, corporeal or incorporeal, every estate, interest and right, legal or equitable, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise.

Appellant's right to use the parking spaces outside the demised area is included in the lease and defined as a property right by statute. Therefore, appellant is entitled to just compensation resulting from the loss of the 57 parking spaces outside the "demised area".

Paragraphs 1 and 10 of the lease state that landowner demised not less than 730 parking spaces to the appellant. (R. p. 108 & p. 112). Since those parking spaces were demised, appellant possesses a property interest in them. Therefore, any loss of those parking spaces results in damages to the appellant. The methodology of calculating those damages is a question of fact.

In this case, appellant hired an expert to determine the damages it suffered as a result of this acquisition. Jody Bishop analyzed the present value appellant's leasehold interest in the property both before and after the acquisition and determined it diminished appellant's leasehold interest by $430,000.00. (R. p. 222). In doing so, Mr. Bishop first determined the site contained 739 parking spaces. The Town's zoning ordinance requires 4 parking spaces for every 1,000 square feet of retail space. (R. p.191, 3rd para.). When applying this ordinance to the subject, the site must have a minimum of 509 parking spaces. (R. p.191, 3rd para.). This leaves a surplus of 230 spaces which appellant can use to construct additional buildings within the demised 8.6 acres. (R. p.191, 4th para.). Mr. Bishop then determined landowner could construct a 37,500

square foot building and still comply with the zoning requirements prior to the acquisition. (R. p. 192).

The acquisition eliminated 57 spaces which in turn reduced appellant's development rights in the property. (R. p. 212). Applying the same methodology as he did in the *before*, Bishop determined appellant could only construct a 30,000 square foot building and still comply with zoning requirements. (R. p. 215). In short, the acquisition reduced appellant's development rights by 7,500 square feet. Bishop then calculated this reduction diminished appellant's leasehold interest by $430,000.00. (R. p. 215 - 222).

Accordingly, the Court should reverse the Master's finding that appellant did not possess a property interest in the lost spaces and that the loss of those spaces did not damage appellant's leasehold interest.

A. Appellant maintains the right to construct additional buildings.

The Court erred in ruling appellant did not maintain the right to construct additional buildings within the "demised area". In doing so, the Master relied on the Second Amendment to Lease. (R. p. 94). Paragraph 16 requires the landowner's consent to construct additions which affect the buildings structural integrity. (R. p. 115). Therefore the Second Amendment was required to demonstrate landowner's written permission to alter the building.

The original lease allows tenant to construct additions or additional buildings within the demised area and does not limit nor restrict appellant in any way from constructing structurally sound additions. (R. p. 115). Paragraph 16 of the lease recognizes this right and refers back to paragraph 10 of the lease wherein appellant was guaranteed 730 spaces. (R. p. 112). The Second Amendment does not limit this right nor alter any of the language of ¶ 16 of the original lease. It

simply substituted Exhibit B of the lease to accurately reflect the site as-built and address any implications triggered by ¶¶ 4 and 5 of the lease. This amendment is necessary pursuant to ¶ 16 which requires appellant to obtain landowner's written consent to make any alterations, additions or changes to the building. In addition, landowner cannot withhold its consent if the alterations do not affect the structural integrity. (R. p. 115).

The Master acknowledges the original lease allowed appellant to construct additional buildings on the "demised area" but fails to point to any language which eliminates that right. (R. p. 4). The Master's ruling that appellant only had a single opportunity to develop the site creates an illogical interpretation of the lease. First, no language exists which limits the number of times appellant could develop the site. Second, the amended Exhibit B contains the same language as the original Exhibit B with the exception of an added date and a sketch of potential additions to the building. Therefore, if the amended Exhibit B prohibits any additional development, then likewise, the original Exhibit B would also prohibit further development thus creating a direct conflict with ¶ 16 of the lease. The more logical interpretation would be the both Exhibit B's represent the site as built. If the parties intended to limit development to what was contained in the amendment Exhibit B, it would have been stated.

Finally, even if we follow the rationale of the Order, the Master does not differentiate between the construction of new buildings and the additions to the existing buildings. He ignores the second portion of ¶ 16 of the lease which allows appellant to construct new buildings. (R. p. 115). This is important because the lease does not require appellant to obtain respondent's permission to construct a new building within the demised area. Appellant only needs permission to alter the structure of the existing buildings. Assuming that respondent could stop

appellant from constructing an addition the current structure, it cannot stop appellant from constructing a separate stand alone building.

Accordingly, the Court should find the Master erred in ruling appellant could not further develop the property.

B. The larger parcel theory does not apply in this matter.

The Master erred in applying the larger parcel theory in this case. The larger parcel theory requires multiple tracts of land be appraised as a single tract if there is unity of use, ownership and contiguous. S.C. St. Hwy Dept. v. Terrain, 267 S.C. 186, 227 S.E.2d 184 (1976); Arnold v. S.C. Public Serv. Auth., 292 S.C. 396, 356 S.E.2d 837 (1987). The authority relied on by the Master does not apply to the instant case. First, the unity rule or larger parcel theory only applies to acquisition of land. Appellant cannot find any case law which applies the larger parcel theory to leasehold interests. That makes sense since a leasehold interest can overlap separate tracts.

Second, the Master continues to ignore ¶¶ 1 and 10 of the lease in which the landowner demised not less than 730 parking spaces. (R. p. 112). Since those parking spaces were demised, appellant possesses a property interest in them and any reduction of those spaces results in damages to appellant.

Finally, The Master mentions the potential rights of other tenants who occupy the buildings. However, no evidence exists they possessed any property right in the parking spaces nor does evidence exist they suffered any loss of leasehold interest as a result of the acquisition. In fact, no other tenant was even included in the condemnation action.

Appellant merely seeks compensation for the reduction of its development rights caused

by the loss of 57 parking spaces. The Master focuses on the "demised premises" and ignores respondent's contractual obligation to provide at least 730 parking spaces for K Mart use.

II. THE LEASE ALLOWS APPELLANT TO SHARE IN THE AWARD.

Paragraph 21 of the lease addresses the parties' rights in the event a public or quasi-public agency acquires a potion of the property through eminent domain. The condemnation clause is complicated and provides remedies based on a number of situations. However, the last paragraph is the only relevant portion for purposes of this matter. The last sentence in the Eminent Domain section clearly allows the tenant to share in an award in this instance. It states:

> . . . however, the Tenant's 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 land or buildings or improvements constructed or made by Tenant. (R. p. 117).

Since the condemnation does not include the expropriation of any buildings or improvements made the tenant, that portion is irrelevant and can be removed all together for purposes of this case. In short, the lease reads, "Tenant's right to . . . share in the award shall not be affected . . . if . . . award is made by . . . expropriation of land." This clearly allows appellant to share in the condemnation award as the lease does not differentiate between land within the demised area or land within the demised parking spaces.

A. The law does not favor forfeiture clauses in eminent domain matters.

First, the law does not look favorably on clauses causing the forfeiture of the lessee's interest in a condemnation. 2 *Nichols on Eminent Domain*, § 5.02[6][f]. Furthermore, eminent domain clauses must be construed to avoid waiver and will only be found to extinguish a lessee's right to share in compensation only where the parties' intent is clearly and expressly stated.

Burkhart v. U.S. 227 F.2d 659. 662-63 (9th Cir. 1955). Simply put, a lessees' compensable interest in the property remains intact unless the lessors and lessees clearly contract otherwise. Gawzner v. Lebenbaum, 180 F.2d 610 (App. Ct. 9th Cir. 1950); United States v. 1010.8 Acres of Land, D.C., 62 F.Supp. 277. *fn 3 in* Burkhart, 227 F.2d 659. *See also* Reilly Trust v. Anthony Wayne Oil Corp., 574 N.E.2d 318 (Ind App. 1981); Winn-Dixie Stores, Inc. v. Dept of Transportation, 839 So. 2d 727 (Fla App. 2003); Maxey v. Redevelopment Authority of the City of Racine, 288 N.W. 2d 794 (Wisc. 1980).

In the instant case, the Master took the opposite approach, finding appellant clearly contracted away its right to apportionment of the award. As stated above, the relevant portion of the condemnation clause states:

> . . . however, the Tenant's 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 land or buildings or improvements constructed or made by Tenant. (R. p. 117).

Since the *take* did not include any buildings or improvements constructed or made by Tenant, that language can be removed. The abbreviated clause reads "Tenant's right to . . . share in the award shall not be affected . . . if . . . award is made by . . . expropriation of land." The Master appears to interpret the last sentence that the tenant can share in the award if the *take* involves land it constructed. (R. p. 8). This cannot be since the tenant can't construct land. The proper interpretation would be to break down the last part of the sentence into three categories: 1) the expropriation of land; 2) the expropriation of buildings constructed by Tenant; and 3) the expropriation of improvements constructed by Tenant.

This Court should also note, this clause does not differentiate between the land

expropriated within the "demised premises" or not. It simply refers to expropriated land on the site. Had the parties intended to limit K Mart's right to share in the award for the land inside the "demised premises", the lease would say so as it did in other portions. This is consistent with ¶ 10 of lease which guarantees at least 730 spaces. (R. p. 112). Otherwise, K Mart lacks any remedy for loss of parking spaces which diminishes its development rights and thus reduces its leasehold interest.

When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Appellant argues the lease clearly allows it to share in the award. Had appellant intended to contract away its right to share in the award, it could have simply said so. At the very least, the fact we are arguing about the issue demonstrates that appellant did not clearly contract away its right to share in an award.

Allowing appellant to share in the award not only falls in line with common sense but such a ruling is consistent when reading the document as a whole. K Mart pays an annual rent of $227,838.00, (R p. 108), and is guaranteed 730 parking spaces. (R. p. 108). Applying the Master's reasoning, appellant could lose 1.28 acres, (up to 15% of the land under the Eminent Domain Section) which would include a number or parking spaces and still be obligated to pay the same annual rents without any remedy.

B. Other courts agree with the appellant's position.

When presented with the identical situation the Appellate Court in Florida found the same language entitled tenant to share in the award. K-Mart Corporation v. State of Florida Dept of

Transportation, 636 So.2d 131 (Fla App 1994). In the Florida K Mart case, the DOT acquired a portion of property leased by K Mart. The lower court misinterpreted identical language finding that the K-Mart contracted away its right to share in the award. The Appellate Court reversed the ruling, stating:

> 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 premise." The trial court apparently relied on this provision in determining that K Mart had no right to compensation. It is the second provision, however, that 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 effected in any manner hereby if said compensation damages or award is made by reason of expropriation of the land" Id. 132.

The Appellate Court in the Florida K Mart interpreted the same language present in the instant matter and correctly determined that the tenant can share in the award unless it involves the taking of landlord's building. Although not controlling, it does provide guidance for the interpretation of this complex clause.

In addition, the Appellate Court in the State of Washington faced identical apportionment issues and very similar lease language. City of Puyallup v. Carl R. Hogan, 277 P.3rd 49 (App Ct. 2012). There, the city condemned a small portion of a commercial shopping owned by Carl Hogan. Border's Inc. was the anchor tenant in the center and sought apportionment of the award after the jury rendered a verdict on the value of the acquisition. Id. Paragraph 22 of the Hogan lease uses very similar language to the last two paragraphs of the K Mart lease. Like the K Mart lease, the Eminent Domain section's last sentence of the Hogan lease stated:

> although [Border's] 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 [Border's].

The trial judge ruled Border's Inc. was entitled to share in the award based on lack of clear evidence indicating the tenant intended to waive its common law right to apportionment. Id. at 6-7. The ruling was upheld by Washington's Appellate Court. City of Puyallup, 277 P.3rd 49.

Again, although not controlling this case provides additional guidance on the lease interpretation. The Court should also note that appellant cannot find any cases which found similar language construed to prohibit the tenant from sharing in the award. Therefore, this Court should reverse The Master's ruling on this ground.

III. THE MASTER MISINTERPRETED THE SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT CLAUSE.

The Master misapplied the SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT (SNDA) finding the mortgage holder's interest in the property trumps that of appellant and prohibits appellant from sharing in the award. (R. p. 9-11). In doing so, the Master discusses the note and mortgage and states the two shall be read in concert with the SDNA. (R. p. 10). The problem with this ruling is that 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 Master then cites paragraph 28 of the lease that requires appellant to sign a SDNA which it misapplies.

The subordination portion of the agreement subordinates the lease to any present or future mortgages on the property as to title only. Therefore, in the event of foreclosure, the lender can evict the tenant if is paying below market rents. The subordination portion in ¶ 2 of the agreement clearly states, "Lender hereby consents to the Lease terms and provisions." (R. p. 10).

This paragraph goes on to state, "Any options or rights or first refusal contained in the Lease to acquire title to the Premises are hereby made subject and subordinate to the rights of Lender under Section 14 of the lease." (R. p. 10). Clearly, the subordination agreement applies only to title issues and the First Refusal to Purchase Option, (R. P. 114). It does not apply to appellant's rights to share in the award under ¶ 21 of the lease.

The nondisturbance portion of the agreement restores the tenant to the same position it had been in had the lease continued to have priority over the mortgage and places the lender in the same position as a lender enforcing a security on the property with a prior ranking unsubordinated lease. Paragraph 3 of the agreement titled "Tenant Not to Be Disturbed" provides that subject to subordination in ¶ 14 of the lease and as long as K Mart is not in default, any lender, purchaser or subsequent owner "(a) shall not diminish or interfere with Tenant's possession of the Demised Premised and its rights and privileges under the Lease . . ." (R. p. 139). Clearly K Mart enjoys and will continue to enjoy its rights under Eminent Domain portion of the lease.

The attornment portion of the agreement prohibits the tenant from vacating the property in the event of foreclosure if the tenant is paying above market rent. This protects the lender by prohibiting the tenant from getting out of an unfavorable lease. Paragraph 4, titled "Tenant to Attorn to Lender" states, that if Lender obtains possession of the property, "Lender shall be bound to Tenant under all terms, covenants and conditions of the Lease, . . ." (R. p. 140). Again, there is no mention of K Mart waiving any rights under the Eminent Domain section of the lease.

Paragraph 5 of the agreement, titled "Successor Landlord" states, "If the Lender should succeed the interest of the Landlord under the Lease, Lender shall be bound to Tenant under all

terms, covenants and conditions of the Lease, . . ." (R. p. 140). Again, there is no mention of K Mart waiving any rights under the Eminent Domain section of the lease.

In short, the agreement does not alter appellant's rights under the lease in any way with the exception of its right of first refusal to purchase the property. No where in the agreement does it clearly state or even suggest that appellant waived its right to share in the condemnation award or collect its diminished leasehold interest and no case law exists to the contrary. In fact, the agreement goes out of its way to state several times that appellant enjoys all rights and privileges under the lease.

The Master cited Raiford v. Department of Transportation, 114 S.E.2d 789, 791 (GA App Ct 1992) to support its ruling which states, "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." The Master also cites comment J of Restatement 2d Property: Landlord and Tenant § 8.2 Amount of the Condemnation Award Tenant Entitled to Receive (2012) and Reporters Note 14 which states,

> 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 interest has been impaired by the condemnation and only the surplus, if any, would go to the tenant.

Although this comment does not apply since appellant did not subordinate its interest in the condemnation clause, it does state the majority rule that the mortgage or lien holder is entitled to the amount necessary to protect his security interest. Reporter's Note 14.

Here, the property is encumbered by a $3,000,000.00 mortgage to NBSC Bank. (R. p.

329). As part of the condemnation, Stuart Saunders appraised the property for the Town at $18.50 per square foot or an after value of $10,189,475. (R. p. 364). Landowners did not dispute this value. Jody Bishop opined the property equaled $19.00 per square foot which translates to an after value of $10,464,866. (R. p. 204). In either case, the respondent has over $7,000,000.00 equity in the property leaving the security interest completely protected. Therefore, appellant asks the Court to follow the majority rule and compensate it for its diminished leasehold interest.

IV. THE MASTER DID NOT RECOGNIZE APPELLANT'S EXPANSION RIGHTS.

The first part of the final portion of the Master's order addresses an amendment to 15A which states landlord shall reimburse appellant it is pro rata share of cleaning, striping, snow and ice removal and illumination of the parking areas. (R. p. 128). The amendment provides the formula to determine the pro rata apportionment, stating, "Said pro rata shall be based upon the ratio that the floor area of landlord's building bears to total gross floor area of all other buildings (exclusive of additional buildings or structures erected by the tenant under the provisions of Article 16 hereof)." (R. p. 128).

This rider is an agreement between the landlord and tenant provides the anchor tenant an incentive to provide a consistent and uniform landscape and traffic control plan. It allows appellant construct an aesthetic landscape plan which benefits the other tenants and thus the landlord without bearing all the costs. Without that rider, appellant has little incentive to improve the property. No evidence exists that would require other tenants to share in any of those costs. Such an assumption would leave a small business at the mercy of whether the anchor tenant wants to spend a fortune redesigning the common areas. The amendment simply

allows appellant to recoup a portion of its costs, it if improves the whole property. Finally, the amendment clearly states appellant can expand or construct additional buildings.

The Master's order recognizes appellant's right to use but seems to limit definition of the term "use". It appears the Master limits the term "use" to mean that appellant's customers may park in the spaces and prohibits appellant from using the spaces for any other purpose. The Master goes on to state that using the spaces for expansion "belies the obvious fact that other shopping center tenants and neighbors of K-mart would be entitled to use some of the 730 (or 739) parking spaces." (R. p. 12-13).

First, the lease does not define nor limit the term "use" in any way. Here, the Master created its own definition to limit the term as to only the right of appellant's customers to park in those spaces. This creates a direct conflict to paragraph 16 because the zoning ordinance establish a direct correlation between the size of retail space and the number of spaces available. If appellant could not use the spaces for development purposes, than appellant cannot develop the site at all.

As for the other shopping tenants, the Master does not address the fact that zoning requires those tenants to possess 159 spaces. (R. p. 191). The site has 739 spaces and zoning requires the K Mart to possess 350 spaces and when combined with the additional 159 spaces, zoning requires 509 spaces. This leaves an excess of 230 spaces for K Mart to use. Again, no evidence exists that any other tenant possessed any development rights and the Master cannot assume this fact without any basis. Even if another tenant's lease used the same language, appellant's lease would predate any of them. In short, respondent can't give away what is doesn't have. It makes more sense that the anchor tenant would possess the strongest lease

which includes the right to construct additional buildings. The final portion of the Master's order states, "neighbors of K-mart would be entitled to use some of the 730 (or 739) spaces." (R. p. 12-13). Appellant is not sure what neighbors possess a right to park in the spaces as the lease is the only instrument in evidence granting anyone any rights in this property.

The Master also refers to paragraph 16 of the lease which addresses possible expansion and releases landowner from its obligation to provide 730 spaces. (R. p. 13). Clearly, the lease allows appellant to expand and contemplates that such expansion would eliminate some spaces. In that event, the lease simply says that if appellant builds over any parking spaces, it eliminates landowner's obligation to provide at least 730 spaces. This supports appellant's position that it possessed the right to develop the property and use the parking spaces to support such development.

The Master also seems to narrowly interpret the Winn-Dixie Stores, Inc. v. Department of Transportation, 839 So. 2d 727 (FL App Ct 2003) and K-Mart Corporation v. State of Florida Dept of Transportation, 636 So.2d 131 (Fla App 1994) to allow apply to cases dealing with loss of access. (R. p. 13). Such is not the case. In Winn-Dixie, "A substantial amount of the condemned property was used for parking." Winn-Dixie 839 So 2d at 728. The *take* in K-Mart included "loss of direct access to U.S. 19, loss of driveways and parking areas." K-Mart, 636 So.2d at 132. The court did not differentiate between the three types of losses when ruling tenant could share in the award. In all three of these cases, the tenants possessed a property interest in the parking spaces and the loss of any spaces diminishes their leasehold interest.

The bottom line in this case is that appellant possessed the right to at least 730 spaces and therefore possessed a property interest in those spaces. The taking of the 57 spaces results in a

taking of appellant's property interest which it is entitled to compensation. To hold otherwise would effectively leave appellant without any recourse for the loss of parking spaces it possessed a right to use.

CONCLUSION

The lease clearly demises a minimum of 730 spaces to appellant to use as part of the lease. Therefore, if appellant enjoys the right to use those spaces, then it possesses a property interest in them. Naturally, the loss of any of those spaces causes damages to the appellant.

The lease does not define the word "use" and to limit it only to customer use rather than appellant's development rights defies logic. Because the number of parking spaces determines the potential size of the buildings on the site, it makes little sense to find appellant can't use the spaces in order to further develop the property. Such a ruling conflicts with the plain ordinary reading of the lease. Accordingly, the acquisition diminished appellant's leasehold interest.

Since appellant suffered damages, the Court looks to the lease to determine if it contains clear language eliminating appellant's right to share in the award. In this matter, at least two higher courts considered language similar or identical to the instant lease and ruled the tenants possessed the right to share in the award. Therefore, appellant should also share in this award since the lease does not clearly and unequivocally eliminate that right.

The lease also allows appellant to construct new buildings as no language exists to the contrary. The substitution of Exhibit B does not eliminate appellants rights to further develop the property in any way. Such a reading would void ¶ 16 of the lease. Following the Master's logic, appellant would be prohibited from further expanding the existing building, but not prohibited from constructing a new building altogether.

Finally, the SDNA applies only to title issues. The agreement includes a Non Disturbance Agreement which only alters ¶ 14 of the lease. It does not alter the lease in any other way. Without the SDNA, appellant could have never purchased the property.

Accordingly, the Court should reverse the Master's ruling and remand that matter for a damages hearing to determine the value of the diminished leasehold interest.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the Final Brief complies with SC Appellate Rule 211(b).

CHRISTOPHER L. MURPHY

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PROOF OF SERVICE

I CERTIFY that I have served the Final Brief on counsel of record for Respondent by delivering a copy via U.S. Mail First-Class postage prepaid on the 13th day of May, 2013, addressed as follows:

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