

**Jeffrey S. Tibbals**  
Member  
Admitted in MD, VA, DC, SC

October 23, 2013

The Honorable Jenny A. Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

*Re: South Carolina Department of Transportation v. RI CS5, LLC, et al.*  
**Appellate Case No.: 2013-000394**  
*Civil Action No.: 2009-CP-08-3890*

Dear Ms. Kitchings:

I recently discovered an error in the Record on Appeal in the above-referenced case. Respondent RI CS5, LLC designated a certain "Proposed Order of Condemnor dated March 25, 2012" as item number two (2) in its Designation of Matter to be Included in Record on Appeal (a copy is attached hereto). As indicated in Respondent's Brief, this was the proposed order submitted by Appellant regarding the condemnation award. It appears that, when assembling the Record, Appellant included a different proposed order, relating to the award of litigation expenses. Neither party designated the latter proposed order as part of the record.

The fact that neither of the proposed orders was specifically dated may have caused some confusion. In any event, counsel for both parties, evidenced below by their original written consent, have consented to correct the record by substituting the proposed order that Respondent intended to include in the record.

Please advise as to the Court's requirements of the parties to correct the Record. The parties have consented to take the appropriate action to make this correction.

Very truly yours,



Jeffrey S. Tibbals

JST/ksh  
Enclosures

cc: John S. West, Esquire  
Beacham O. Brooker, Jr., Esquire

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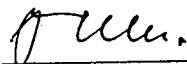
WE CONSENT:

A handwritten signature in black ink, appearing to read "Paul A. Dominick", written over a horizontal line.

Paul A. Dominick  
Jeffrey S. Tibbals  
Nexsen Pruet, LLC  
205 King Street, Suite 400  
Charleston, SC 29401

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WE CONSENT:



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**SC Court of Appeals**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BERKELEY )  
 )  
Road / Route U.S. 17A )  
File 8.165B )  
Item )  
Project STP-UR08(007) )  
PIN 32502 )  
 )  
South Carolina Department of Transportation, )  
 )  
Condemnor, )  
 )  
Vs. )  
 )  
RI CS5, LLC, )  
 )  
Landowner(s), )  
 )  
and )  
 )  
Worsley Operating Corporation, a North )  
Carolina Corporation, Lessee, and Berkeley )  
County Treasurer's Office, Lien Holder, )  
 )  
Other Condemnee(s). )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-08-3890

CONDEMNATION ORDER

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**SC Court of Appeals**

BACKGROUND

This condemnation case came before me for hearing on the merits at the Berkeley County Courthouse on December 14, 2011 pursuant to Consent Order of Reference With Finality.

Present at hearing were John S. West and J. Camden West, attorneys for the South Carolina Department of Transportation (Condemnor) and Paul A. Dominick and Jeffrey S. Tibbals, attorneys for RI CS5, LLC (Landowner), along with various witnesses.

## FINDINGS OF SALIENT FACTS

From the record and proceedings herein, from stipulations of counsel, from the testimony of witnesses in open court and from the various exhibits admitted in evidence, I find from a clear preponderance of the evidence the following salient facts:

1. Condemnor is an agency of the State of South Carolina.
2. Condemnor is responsible for planning, construction, maintenance and operation of the state highway system. It coordinates all state and federal programs relating to highways in this state.
3. The U.S. Highway 17-A widening project in Berkeley County is being administered by Condemnor.
4. Tract No. 244 is a site designated in the U.S. Highway 17-A widening project. It is the subject matter of this case. It is a 0.391 acre lot located at the intersection of U.S. Highway 17-A and Old Whitesville Road, south of Moncks Corner. It was the site of an operating Scotchman convenience store. (Condemnor's Ex. 6). The acquisition by Condemnor was a total taking.
5. Landowner owned Tract No. 244 on December 1, 2009.
6. Condemnor initiated this case by the filing of a Condemnation Notice and Tender of Payment and related documents on December 1, 2009. Landowner did not challenge Condemnor's condemnation action or its right to condemn.
7. The tendered amount was \$201,000.00.

8. At the request of the Landowner, Condemnor agreed to a 100% draw down of the tendered amount which was paid over to the Landowner.
9. All documents produced by the parties in the course of discovery were deemed authentic. All relevant documents of record were deemed authentic and admissible.
10. Landowner's corporate witness was Michael Robert Pfeiffer. He is Executive Vice President and General Counsel for Realty Income Corporation, which is the sole managing member of RI CS5, LLC.
11. Mr. Pfeiffer is familiar with all relevant corporate transactions before and after December 1, 2009. He was authorized to speak to the corporate positions of the Landowner.
12. Realty Income Corporation purchased a portfolio of 75 Worsley convenience store sites located in North and South Carolina in March of 2008 for \$65,535,000.00. The portfolio purchase included 65 fee sites and 10 ground leased sites. (Landowner's Ex. 10 and 13/ Condemnor's Exhibit 10).
13. Included in the Worsley portfolio was Store #82 which is Tract No. 244. (Landowner's Ex. 13).
14. The allocated purchase price for Store #82 was \$1,150,000.00. The applicable cap rate for the transaction was 8.89%. (Landowner's Ex. 1).
15. Contemporaneously with the portfolio closing was the assignment of membership interest of WF Intermediate Real Estate, LLC by VP C-Store Real Estate Holding Corporation to RI CS5, LLC. (Landowner's Ex. 4).
16. WF Intermediate Real Estate, LLC was the predecessor in title to Tract No. 244.

17. Landowner entered into a Land and Building Lease Agreement dated March 27, 2008 with Worsley Operating Corporation. The premises covered by the lease was Worsley Store #82, 1445 Live Oak Drive, Moncks Corner, South Carolina. (Landowner's Ex. 7).
18. The initial term of the lease was twenty (20) years with two ten (10) year renewal options.
19. Base monthly rent at the inception of the lease was \$8,517.16.
20. Upon the filing of the Condemnation Notice and Tender of Payment the lease was terminated by the parties to the lease. (Condemnor's Ex. 10).
21. Mr. Pfeiffer's opinion of the value of the property acquired by condemnation is \$1,150,000.00.
22. Prior to the portfolio purchase of the Worsley stores by Realty Income Corporation, extensive due diligence was conducted by Janet Windman on Store #82 on behalf of Realty Income Corporation. She rendered her report dated November 28, 2007. Her report is silent as to any inquiry regarding the U.S. Highway 17-A widening project. (Condemnor's Ex. 10).
23. The U.S. Highway 17-A project was publicized by SCDOT. Public information meetings were held including a well attended public meeting on March 20, 2007. (Condemnor's Ex. 3).
24. A RI CS5, LLC transaction report generated on March 27, 2008 and updated January 25, 2010 characterizes the portfolio purchase of the Worsley stores as a "sale-leaseback". (Condemnor's Ex. 10).

25. A letter from Realty Income Corporation dated November 20, 2007 to Sun Capital Partners Group IV, Inc. describes “sale-leaseback financing”. (Condemnor’s Ex. 1).
26. Thomas F. Hartnett was qualified and testified for the Landowner as its real estate valuation expert. He performed an appraisal and issued his report to Landowner’s counsel under his cover letter dated June 25, 2009. (Landowner’s Ex. 6).
27. Mr. Hartnett testified he arrived at his opinion of value base after he “coalesced” various approaches. He used the sales comparison approach. He did a direct capitalization approach which he characterized as the income approach. He then valued the going concern. The valuations he derived from three approaches were then blended. Mr. Hartnett did not recall having ever appraised a sale-leaseback property. He did not do any analysis of market rent for convenience stores.
28. Mr. Hartnett’s testimony was that the coalesced value of the subject property is \$900,000.00.
29. Charles Crider was qualified and testified as the first real estate valuation expert for the Condemnor.
30. He performed an initial appraisal of Tract No. 244 and issued what he described as an “offer” report to Condemnor. (Condemnor’s Ex. 11). He later performed an updated “through the date of take” appraisal and issued a second report to Condemnor. (Condemnor’s Ex. 12).
31. Mr. Crider testified regarding the methodologies he utilized in arriving at his opinion of value for the subject. He testified about the significance in his opinion of the “sale-leaseback” arrangement between Landowner and the Worsley Operating Corporation. He quoted from the Dictionary of Real Estate Appraisal, Third Edition, page 318 which defines sale-leaseback as...“a *financing arrangement in which real property is*

*sold by its owner/user who simultaneously leases the property from the buyer for continued use. Under this arrangement, the seller receives cash from the transaction and the buyer is assured a tenant and thus a fixed return on investment.”*

32. Mr. Crider is of the opinion that the rent provided in the lease is not market rent because it is a component of a financing instrument which was intended to produce a fixed return on investment of 8.89%.

33. He valued the subject property based on gross profit multiplier between 2.8 and 3, producing a value of the property as a going concern of \$1,150,000.00.

34. He testified that the going concern value includes real property, personal property and the intangibles of business. He then utilized the cost approach, less depreciation to separate out the real estate and personal property. He testified that whatever is left is the value of the business.

35. Mr. Crider testified that in his opinion the value of the real property on the date of acquisition was \$201,000.00; the value of personal property was \$198,750.00 and the value of the business was \$750,000.00.

36. David Graydon was qualified and testified as Condemnor's second real estate evaluation expert.

37. Mr. Graydon performed an appraisal of the subject and issued his report to Condemnor under his cover letter dated November 2, 2010. (Condemnor's Ex. 14).

38. Mr. Graydon testified about the methodologies he utilized in arriving at his opinion of value on the subject property. He broke down his opinion of value into several component parts. He attributed a going concern value of \$1,100,000.00. He attributed \$351,000.00 to real property and \$190,000.00 to personal property. The business value in his opinion is \$559,000.00.

39. Mr. Graydon used three approaches to arrive at his opinion of value. He used a sales comparison approach using a gross revenue multiplier. He used an income capitalization approach to value the subject as a going concern. He then used the cost approach to value the real and personal property.

40. Mr. Graydon testified that the lease equates to a rental rate of \$55 per square foot. In his opinion, that figure is considerably higher than prevailing market rent for convenience stores. He believes that rental rate may be inflated because it contains going concern or business value.

41. All witnesses were credible, experienced and highly qualified professionals. Each brought in to the courtroom his own background, perspective and well reasoned opinions.

42. After careful consideration of the testimony of each witness and their work product and opinions, I attribute and assign equal weight to the testimony of each witness on the ultimate issue of value.

#### CONCLUSIONS OF LAW

I conclude as a matter of law as follows:

1. The parties and the subject matter are properly before this Court for adjudication.
2. The pleadings and proceedings are adequate, complete and proper.
3. Venue is proper.
4. This action was commenced by the Condemnor pursuant to the *South Carolina Eminent Domain Procedures Act*, S.C. Code Ann. § 28-2-30 et seq.

5. Landowner did not commence proceedings to challenge Condemnor's right to condemn within thirty days of service of the Condemnation Notice.
6. Just compensation is the issue before the Court.
7. In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered. S.C. Code Ann. § 28-2-370.
8. Because this matter involves a total taking and because there are no benefits to the Landowner, the value of the property is just compensation.
9. Private property shall not be taken for public use without just compensation. S.C. Constitution. Article I, § 13.
10. Landowner has the burden of proving damages. *Rice v. South Carolina Department of Highways and Public Transportation*. 277 S.C. 495, 289 S. E. 2d 645 (1982).
11. The actual value of the land taken means the market value of the land. *South Carolina State Highway Department v. Bolt*. 242 S.C. 411, 131 S. E. 2d 264 (1963).
12. Business, loss of profits, loss of rent or inconvenience in carrying on business which results from the taking of realty by the State under its power of eminent domain is not to be considered as an independent element of damage. *Bolt, infra*. 18 Am. Jur. *Eminent Domain*, Section 259 at 899-901.
13. As the trier of fact it is my responsibility to set a price on the land taken.

14. A guide for setting the price is fair market value. Fair market value is the price for which a willing buyer would pay and a willing seller would accept in the ordinary course of business when neither is compelled to act. In determining fair market value I must not consider speculative or imaginary damages to property. I must confine compensation only to those elements that actually have some bearing upon the market value as of the date of taking. *South Carolina Highway Department v. Hines*, 234 S.C. 254, 107 S. E. 2d 643 (1953).

15. Each expert witness conducted some measure of blending of appraisal approaches to arrive at their respective opinions of value. This is reasonable. Likewise, I consider a blending of their opinions of value to be a fair and reasonable approach to my determination of just compensation. This is particularly reasonable and proper when I consider the wide gap between the lowest figure testified and the highest figure testified to.

16. I also considered the opinion of value of the subject by the Landowner. It should also be blended into my calculation of just compensation.

17. In so doing I have accounted for the existence and the totality of circumstances surrounding the lease on a determination of value. I consider the lease to have some bearing on the value of the subject property. However, it is only one of a variety of factors bearing on my determination of value.

18. The aggregate total of all four values testified at trial was \$2,602,000.00. When blended, giving equal weight to each testified value and divided by four, the figure derived, which I deem to be the actual value of the property as of December 1, 2009 is \$650,500.00.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Landowner RI CS5, LLC be and it hereby is awarded and granted judgment from the South Carolina Department of Transportation in the sum of Six Hundred Fifty Thousand Five Hundred (\$650,500.00) Dollars as just compensation for the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment amount shall be offset and credit given to the Condemnor in the sum of Two Hundred One Thousand (\$201,000.00) Dollars on account of the draw down;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that interest shall accrue on the judgment amount from December 1, 2009 as provided by statute, consideration being given for the draw down credit.

AND IT IS SO ORDERED.

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ROBERT E. WATSON  
Master-in-Equity, Berkeley County

\_\_\_\_\_, 2012  
Moncks Corner, SC