STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2017-CP-10-5382
SOUTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC RAILWAYS, Condemnor, vs. GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC, Landowner, and NBSC a division of Synovus Bank, VFC PARTNERS 15 LLC, CAPELLA CAROLINAS, LLC, DONIVON GLASSBURN, and THE LOFT PILATES CENTER, LLC, Other Condemnees.	Project: Navy Base Intermodal Facility Tract 23S **ORDER ON CONDEMNOR'S POST-TRIAL MOTIONS**

This matter is before the Motion of Condemnor, South Carolina Department of Commerce, Division of Public Railways ("Condemnor" or "Railways"), for Judgment Notwithstanding the Verdict, New Trial Nisi Remittitur, New Trial, New Trial Absolute, and New Trial Pursuant to the Thirteenth Juror Doctrine (collectively referred to as Railways' post-trial motions"). For the reasons explained herein, the Court denies Condemnor's motions.

BACKGROUND

Railways initiated this action on October 19, 2017, by filing a Condemnation Notice and Tender of Payment, condemning Gateway's property located at 1799 Meeting Street Road, Charleston (TMS #464-02-00-017) ("the Property"). The Property is located on the "neck" of the

City of Charleston and is owned by Gateway Properties of Greater Charleston, LLC ("Landowner" or "Gateway"). It is bounded on the east by Meeting Street Road and the west by the railroad tracks and right of way the CSX Railroad. The Property is a .55 acre parcel, with a two-story building, parking area, landscaping, and other improvements. Railways condemned the entire parcel, including the improvements on the site. Railways' purpose for condemning the Property is to acquire the Property for the installation of new railroad tracks that will connect to the future Navy Base Intermodal Facility.

At the time of the Condemnation Notice and Tender of Payment, Railways tendered $1,800,000 as just compensation for the taking. Landowner filed an Answer, asserting that the tender was insufficient.

After discovery, the case proceeded to trial on March 25-28, 2019. As explained herein, Landowner presented evidence that the Property is a special use property, while Railways contended the Property was a generic office building, not a special use property. The evidence and valuations presented by each side are briefly summarized below. In ruling on Railways' motions, the Court has considered all the evidence presented at trial including that argued by Railways in its motions, not just those in the overview.

The managing member of the Landowner, Fred Fabian, testified at length regarding the design and construction of the improvements on the Property. The Landowner constructed the building in 2007 for the specific purpose of housing a particular tenant, eLifespaces, a business that is owned primarily by Fabian and his family. The building was designed and constructed with special features throughout that allow eLifespaces to test and showcase the numerous technological and electronic systems that it sells and installs. Landowner presented evidence at trial of numerous unusual elements of the facility, including the special electronic control systems

built into the building, the special theater room with floating shell construction and acoustical isolation, another acoustical room constructed using staggered stud construction method, the specialized foundation and steel framing customized to support the significant extra weight of the theater room, a complex grounding system connecting the building to rebar running through the cement pier foundation for optimal grounding protecting the electronic systems in the building from a lightning strike or power surges, special walls comprised of two layers of sound proof gypsum board with lead centers, and a computerized electronic system throughout the building that filters the "dirty" electricity and provides uniform, perfect power to all the technological and electronic devices and systems in the building. In addition to Fabian's testimony, Landowner admitted into evidence pictures of the floating shell wall framing floor plans showing the special features, detailed drawings of the acoustical room millwork, pictures of the special steel framing, and extra deep foundation and grounding systems, and various other features built into the building.

Fabian further testified that the Landowner intends to construct a similar facility to lease to eLifespaces on other property owned by Landowner on Meeting Street Road in close proximity to the Property.

Landowner also presented the testimony of Steve Morey of Design Build, LLC, a local general contracting firm. Morey worked for the contractor that built the building and personally oversaw its construction on the Property. He testified the building's design, features, and systems were not at all like those of a typical office building. The Court qualified Morey as an expert witness in estimating construction costs. Morey testified to the cost to rebuild the building to the same specifications as original construction, as modified to meet current building codes. Based on actual bids from vendors and subcontractors, Morey estimated that it would cost $4,319,040 to

rebuild the building, as modified to meet current building codes. Two written versions of his detailed estimate were admitted as exhibits into evidence.

Landowner also called Thomas F. Hartnett as an expert witness on the appraisal of real estate and real estate valuation. In Hartnett's expert opinion, the value of the Property on the day of the Notice of Condemnation was $4,580,000.

Hartnett explained his opinion and methodology in detail. When he performed his inspection of the Property it was immediately obvious to him the building was not a standard office building, but instead was a special purpose property. He was unable to locate any comparable property in the market area, much less the sale of a comparable facility. In his opinion the cost approach was the best method of determining just compensation for the Property because of the lack of any comparable sales and the extensive special features of the building. He considered the two other valuation methods - the sales comparison approach and income capitalization approach - but in his opinion neither were appropriate. In utilizing the cost approach, Hartnett testified he looked at comparable sales of vacant land in determining the value of the land being taken. Next, he relied upon Morey's estimated replacement cost for the value of the improvements being taken. He then depreciated the cost estimate to account for the age of the building.

Railways presented two witnesses at trial. Tarek Ravenel was called as the first witness in the case, prior to Landowner presenting its case in chief. Ravenel was Railways' project representative. He discussed the taking and the State Ports Authority's intermodal project for which the Property was being acquired by Railways. Ravenel did not testify as to just compensation or any specific valuation issues.

After Landowner rested its case, Railways presented the testimony of Deborah Haskell whom the Court qualified as an expert in appraising and valuing real estate. In her opinion, the

Property was an office building that should be valued under the sales comparison and income approaches, rather than the cost approach. In her opinion the value of the Property on the day of the taking was $1,750,000.

In her testimony, Haskell acknowledged that special use properties are valued differently from other types of property. Haskell testified that over the years she has had several instances where she determined that a building was a special purpose or special use building. She also testified that the cost approach used by Hartnett is one of three professionally recognized "approaches" to valuing property - the other two being the sales comparison and income approaches.

The jury returned a verdict for $3,750,000. Railways then filed the post-trial motions currently before the court.

STANDARDS OF REVIEW

I. Motion for JNOV

When ruling on a motion for directed verdict or JNOV, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, the Landowner in this case. See Crenshaw v. Erskine College, 424 S.C. 287, 295, 818 S.E.2d 218, 223 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004)). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Id. (citation omitted)). "Moreover, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.'" Id. (quoting Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." Id.

(quoting Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)). In fact, when considering a JNOV, the trial court is concerned with the *existence of evidence, not its weight.* See Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh'g denied* (July 13, 2016) (finding that the trial court correctly refused to grant JNOV of an unfair trade practices cause of action because evidence existed that could support the verdict).

II. The Motion for New Trial Absolute

A trial judge also has the power to grant a new trial absolute. However, this power may be exercised only when the verdict "is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." Becker v. Wal–Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 761 (2000). Courts have used varying language to describe the circumstances in which a circuit judge may grant a new trial absolute. See O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) ("If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute."); Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) ("'The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.' ") (quoting Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996)). Regardless of the language used to describe the standard, a jury's determination of damages is entitled to substantial deference. See Todd v. Joyner, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009). The

decision to grant or deny a "new trial motion rests within the discretion of the circuit court . . ." Brinkley v. S.C. Dep't of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

IV. Motion for New Trial based on the thirteenth juror doctrine

Under the thirteenth juror doctrine, a trial court may grant a new trial if the judge determines the jury's verdict is "contrary to the fair preponderance of the evidence." R.C. McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 633, 578 S.E.2d 746, 748 (2003). The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad. Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011). An order denying a new trial on this theory will hardly ever be reversed: "'[T]o reverse the denial of a new trial motion under [the thirteenth juror doctrine,] we must, in essence, conclude that the moving party was entitled to a directed verdict at trial.'" Curtis v. Blake, 392 S.C. 494, 709 S.E.2d 79 (Ct.App.2011) (quoting Parker v. Evening Post Publ'g Co., 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 1994)).

V. Motion for New Trial Nisi Remittitur

"A motion for new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive." James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). Even as to a new trial nisi remittitur, the trial judge's discretion is broad. "The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." Id.; see also Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial nisi additur."); Burke v. AnMed Health, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (same).

DISCUSSION

I.

Viewing the evidence and all reasonable inferences in the light most favorable to Landowner, the Court denies the Motion for JNOV. Substantial evidence supported the jury's verdict. Hartnett testified to his opinion that the value of the land taken was $4,580,000. The amount of the verdict was between Hartnett's valuation of $4,580,000 and the valuation offered by Railways' expert, Deborah Haskell of $1,750,000. The question of the amount of just compensation was a factual issue for the jury to decide, not the Court. The jury evaluated the appraisers' respective opinions along with the other proof in reaching their decision on just compensation. The verdict was entirely supported by the evidence. See Duke Power Co. v. Opperman, 266 S.C. 99, 103, 221 S.E.2d 782, 783 (1976) (affirming trial judge's decision to deny motion for judgment notwithstanding the verdict, or for new trial nisi, where jury verdict as to value was well within range of the two extremes established by the expert testimony).

Even if Hartnett's opinion was disregarded as Railways argues, there is still other evidence that supports the amount of the verdict. For example, Fabian testified that the property was a special use property; that there are no similar properties in the area; and that Landowner intends to rebuild a similar facility at a new location just down the street. Fabian testified extensively to the unique construction of this special use building, as previously described. Further, Morey testified, that the cost to reconstruct the building taken was $4,319,040. Two versions of Morey's estimate were admitted into evidence. Railways cross examined Morey at length. Morey's testimony independently supports the jury's verdict.

In sum, the evidence fully supports the jury's verdict and requires the denial of Railways' Motion for JNOV.

II.

Railways argues it is entitled to a JNOV or new trial based on its contention the Court should have excluded Hartnett's opinion of value because it did not represent the fair market value of the Property. Railways previously raised the argument in a Motion to Exclude Hartnett and in its Motions for Directed Verdict at the close of Landowner's case and at the close of evidence. For the same reasons the Court previously rejected this argument, the post-trial motions on this basis are denied. Hartnett was qualified as an expert in appraising property and was, therefore, entitled to render his opinion on the value of the property taken. His testimony on the value of the Property was not inadmissible as a matter of law, as argued by Railways.

Pursuant to Rule 702 of the South Carolina Rules of Evidence, a person qualified as an expert may testify in the form of an opinion when their specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. See SCRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

Railways argues that Hartnett's opinion was inadmissible because he utilized the cost approach. In the particular context of a condemnation case, our Supreme Court has held a qualified appraiser should not be excluded on the basis that the opposing party challenges the sufficiency of the facts relied upon by the appraiser:

> The argument of appellate counsel, in written brief and oral statement before the Court, is largely directed at the quality of the expert testimony rather than its admissibility. John Brock, who testified for the landowner, is a licensed real estate broker with eight years experience in real estate appraisal work. ***He was definitely qualified to testify, and if he could give no rational basis for his testimony, as contended by the appellant, it was a matter for the jury to consider.*** We cannot say that his testimony should have been stricken and, accordingly, the exceptions addressing themselves to this question are without merit.

Duke Power Co. v. Opperman, 266 S.C. 99, 102, 221 S.E.2d 782, 782–83 (1976) (double emphasis added); City of N. Charleston v. Claxton, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (condemnation case noting that "if an expert is qualified, the sufficiency of the foundation for his opinion on value is ordinarily a question of weight for the jury, not a basis for excluding the evidence." (citation omitted)).

Railways has not cited to any South Carolina authority mandating the exclusions of an expert witness who relies on the cost approach to valuation. Railways' own expert testified at trial that the cost approach is one of the three accepted approaches to real estate valuation and appropriate for special purpose properties. Our courts have recognized the cost approach is one of the three generally accepted approaches to real estate valuation and can be utilized in appropriate circumstances. See generally, Reliance Ins. Co. v. Smith, 327 S.C. 528, 533, 489 S.E.2d 674, 676 (Ct. App. 1997) (affirming the ALC in a property tax appeal where "[t]he ALJ concluded that the cost approach yielded the most accurate valuation of the Property."); S.C. Tax Commn. v. S.C. Tax Bd. of Rev., 287 S.C. 415, 417, 339 S.E.2d 131, 132 (Ct. App. 1985) (noting in tax appeal case that the appraisers in that case employed ". . .the usual and customary methodology in arriving at the fair market value of the subject property, i.e.: the income or capitalization approach, the replacement value approach, and the market data or comparable sales approach").

Additionally, other courts have found that the cost approach is an acceptable approach to valuation in takings cases under certain circumstances. See Pete v. United States, 209 Cl. Ct. 270, 291, 531 F.2d 1018, 1031 (1976) ("The reproduction cost less depreciation approach, used by both parties and all the valuation witnesses, is a valid method of determining fair market value and one particularly well adapted to use under the circumstances of the case."); Yaist v. U.S., 17 Cl. Ct. 246, 260 (Cl. Ct. 1989) (endorsing the cost approach in a takings case and stating that "lack of data

on market sales does not preclude compensation"); City of Bend v. Juniper Util. Co., 242 Or. App. 9, 24–25, 252 P.3d 341, 349–50, 2011 WL 1262265 (Or. App. 2011) (quoting 4 Nichols, Eminent Domain 133, § 12.32) (additional citation omitted); see also, Matter of Suffolk County, 47 N.Y.2d 507, 511, 392 N.E.2d 1236, 419 N.Y.S.2d 52 (1979); In re Lido Boulevard, Town of Hempstead, Lido Beach, 43 A.D.2d 45, 49, 349 N.Y.S.2d 422, 427 (1973); see also, City of Glen Cove v Switzer Constr. Co., 47 A.D.2d 917, 918, 367 N.Y.S.2d 43 (1975); Warwick Musical Theater, Inc. v. State of Rhode Island, 525 A.2d 905 (2005)

Railways has repeatedly argued that Hartnett should have been excluded because he did not base his opinion on what a willing buyer would pay a willing seller for the property. While that formula is regularly employed in condemnation cases, it is not the sole approach to real estate valuation:

> The approved formula for determining damages in condemnation cases in this state provides for payment to the landowner of fair market price of property taken, plus payment for diminution in value caused to the remainder of the landowner's property. ***If that formula is unfair to either party some other formula may be used. For example, if church property is involved, another formula would be required because there is no fair market value for church property.***

Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 217, 188 S.E.2d 188, 193 (1972) (double emphasis added).

Additionally, as Hartnett explained, the Landowner was not a willing seller and, more important, there are no comparable properties in the market area, much less those that had recently sold, for him to determine what a willing buyer would pay a willing seller with full knowledge of the facts not acting under compulsion.

Railways' arguments that the Property was not a special use property, that there was sufficient evidence of comparable sales, and that the cost approach was inappropriate are all challenges to the factual foundation of Hartnett's opinion and present factual issues properly

decided by the jury. See Duke Power Co. v. Opperman, 266 S.C. 99, 102, 221 S.E.2d 782, 782–83 (1976); City of N. Charleston v. Claxton, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993). Therefore, Railways' post-trial motions are denied as to its argument that Hartnett should have been excluded as a matter of law.

III.

Railways also asserts that the exclusive measure of just compensation in a condemnation case is "fair market value," that Hartnett did not testify to fair market value, and that it was entitled to a verdict in the amount of $1,800,000 as a matter of law. Although Haskell testified that in her opinion the fair market value of the Property was $1,750,000, Railways told the Court it would accept a verdict for $1,800,000, the fair market value opinion of its first appraiser and the amount of its tender.

Contrary to Railways' argument, our courts have not so narrowly defined just compensation. Pursuant to the South Carolina and United States Constitutions, the question for the jury was the amount of ***just compensation*** to be paid to the owner for the taking of the land, building, and improvements on the Property. See U.S. Const. amend. V; S.C. Const. art. I, § 13(A) ("Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property."). The Constitution does not define "just compensation," or prescribe how it shall be made. See S.C. State Hwy. Dept. v. S. Ry. Co., 239 S.C. 1, 5, 121 S.E.2d 236, 238 (1961); Wilson v. Greenville County, 110 S.C. 321, 96 S.E. 301, 303 (1918) ("the Constitution does not define just compensation, or prescribe how it shall be made. . . ").

As the Court charged the jury, without objection, just compensation is that amount of money which would put the Landowner in as good a position monetarily as he was in prior to the

taking of the property. See generally, Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299, 304, 43 S. Ct. 354, 356 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking." (internal citations omitted)(double emphasis added); Blue Ridge Elec. Co-op. v. Combined Util. System of City of Easley, 279 S.C. 135, 139, 303 S.E.2d 91, 93 (1983); U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C., CV 9:16-2550-RMG, 2019 WL 1450578, at *3 (D.S.C. Apr. 2, 2019).

Railways contends the legal definition of just compensation is fair market value, meaning what a willing buyer would pay a willing seller for a property acting under no compulsion. Railways argues the Eminent Domain Procedures Act's (the "Act") definition of just compensation provides that just compensation is "fair market value" defined as what a willing buyer would pay a willing seller. However, contrary to what Railways argues, the Act does not mention fair market value, only "value":

> ***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 Section 28-2-360 may be considered.

S.C. Code § 28-2-370 (double emphasis added). Had the legislature intended to limit just compensation for the property taken to its "fair market value," the legislature could have inserted those words. Its failure to do so indicates the legislature did not intend to equate value to fair market value in all instances. State v. Sweat, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct. App. 2008), *aff'd as modified*, 688 S.E.2d 569 (2010).

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Pursuant to the wording of this statute, the Landowner is entitled to the ***value*** of the land and improvements taken.[1] This standard is consistent with the above noted definitions of just compensation. Fair market value is often the basis for determining just compensation, but it is not an exclusive formula for valuation, contrary to what is argued by Railways in this case.

Railways argues that the Court should disregard the Carolina Power & Light case because it precedes the Eminent Domain Procedures Act. However, nothing in the Eminent Domain Procedures Act changed the Constitutional requirement that the landowner be paid just compensation nor discarded the legal precedent interpreting just compensation before its adoption.[2] In fact, the legislature could not have changed or impaired the constitutional right to "just compensation" by statute. See e.g., Blue Ridge Elec. Co-op. v. Combined Util. System of City of Easley, 279 S.C. 135, 303 S.E.2d 91 (1983) (. . . "[w]hile the Legislature may fix the procedure to be followed in asserting a claim for compensation, it may not impair or deny an essential element thereof.") (citations omitted)).

Railways argues that the Supreme Court has for over 70 years considered "just compensation" to be solely defined as "fair market value" and that for at least 40 years that has been defined as what a willing buyer would pay a willing seller for a property. However, none of the cases cited by Railways holds that fair market value is the exclusive test for just compensation. While some of the cases cited by Railways discuss fair market value as what a willing buyer will pay and willing seller will accept, none holds that to be the only measure of just compensation.

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[1] It is undisputed the second half of this definition discussing damages to the remainder and benefits is inapplicable to this case where the taking is total take of the Landowner's property.

[2] Additionally, this case has been cited since the adoption of the Act, including by a South Carolina Federal District Court the week after the trial of this case. See U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C., CV 9:16-2550-RMG, 2019 WL 1450578, at *3 (D.S.C. Apr. 2, 2019).

Just compensation is a constitutional imperative under both the South Carolina and United States Constitutions. There is no exclusive means of determining just compensation and the jury was entitled to weigh the evidence and render a verdict consistent with the evidence in the case.

Finally, the jury was entitled to consider all of Hartnett's testimony, not just the select excerpts relied upon by Railways, and apply the law based on its view of the facts. In applying the Court's charges on fair market value,[3] the jury could have made the finding that Hartnett's opinion did represent fair market value. The jury could have determined that a willing buyer who needed and wanted to purchase a special use facility like this from a willing seller, who was selling this special purpose facility, would have paid $3,750,000.

Therefore, for these many reasons and those previously stated, Railways' post-trial motions on the basis of fair market value is the exclusive test for just compensation and Hartnett did not testify to fair market value, are denied.

VI.

In its post-trial motions, Railways also contends that the cost approach used by Hartnett is suspect and disfavored. In support of its argument, Railways refers to outside sources that were not admitted into evidence, case law discussing the sales comparison and income approaches, and the testimony of Haskell.

Once more, whether the cost approach should be the basis for determining just compensation was for the jury to decide. Railways' expert, Haskell, acknowledged the validity of the cost approach and its application for special use properties. As previously stated, whether the facility on the Property constituted a special purpose property was a jury issue.

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[3]The Court instructed the jury in multiple charges proposed by Railways that referred to fair market value.

Although the Supreme Court has not explored valuation of a special use property in detail, although referring to a special use property in Carolina Power & Light, infra, courts from other jurisdictions have approved the cost approach as a proper method of valuing a special use property in a condemnation case. For example, the Oregon Court of Appeals, quoting Nichols on Eminent Domain, ruled the cost approach is an appropriate valuation methodology in condemnation cases involving special use property for which comparable sales data is unavailable:

> 'It occasionally happens that a parcel of real estate taken by eminent domain is of such a nature, or is held or has been improved in such a manner, that, while it serves a useful purpose to its owner, if he desired to dispose of it he would be unable to sell it at anything like its real value. A church, or a college building, or a club-house located in a town in which there was but one religious society, or college, or club, might be worth all it cost to its owners, but it would be absolutely unmarketable. * * *. Even such a piece of property as a mill site or a reservoir site, or a factory or store of abnormal size may, to a somewhat lesser degree, be difficult to dispose of, though of great value to its owner.
>
> In such a case as similar property is not commonly bought and sold it is impossible to ascertain market value by the usual tests. In fact, as market value presupposes a willing buyer, the conditions upon which such value is based are not present, and it is sometimes said that in cases of this character market value is not the measure of compensation. As it is conceded that the owner cannot on that account be deprived of his property without any compensation whatever, some other measure is sought. It must, however, be remembered that market value is always based upon hypothetical conditions, and that it is never necessary to show that there was in fact a person able and willing to buy. The measure is still what another religious society, or college, or club, or public service corporation, or abutting owner, would pay if there were one at hand; in other words, the measure is still market value. However, since the usual means of ascertaining market value are lacking, other means must from the necessity of the case be resorted to. It is, therefore, proper in such cases to deduce market value from the intrinsic value of the property, and its value to its owners for their special purposes. * * *.' "

City of Bend v. Juniper Util. Co., 242 Or. App. 9, 24–25, 252 P.3d 341, 349–50, 2011 WL 1262265 (Or. App. 2011) (quoting 4 Nichols, Eminent Domain 133, § 12.32) (additional citation omitted). The Oregon Court of Appeals continued and stated, "[t]he cost approach is one of the 'other means' for deducing the fair market value of special use property in eminent domain cases." Id.; see also,

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Matter of Suffolk County, 47 N.Y.2d 507, 511, 392 N.E.2d 1236, 419 N.Y.S.2d 52 (1979); In re Lido Boulevard, Town of Hempstead, Lido Beach, 43 A.D.2d 45, 49, 349 N.Y.S.2d 422, 427 (1973); see also, City of Glen Cove v Switzer Constr. Co., 47 A.D.2d 917, 918, 367 N.Y.S.2d 43 (1975); Warwick Musical Theater, Inc. v. State of Rhode Island, 525 A.2d 905 (2005) (Supreme Court of Rhode Island upheld the trial judge's determination that the theater was a special use property that should be valued under the cost approach rather than the sales comparison approach).

The Court rejects Railways' contention that the cost approach is suspect, unreliable, and improper in a condemnation case and denies its post-trial motions on this basis.

VII.

Railways asserts the Court should grant a new trial because the jury charge included a quote from a South Carolina Supreme Court opinion that Railways claims is a misstatement of law. That case, Carolina Power & Light, has not been overturned and even been cited by the federal court since the trial. See U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C., CV 9:16-2550-RMG, 2019 WL 1450578, at *3 (D.S.C. Apr. 2, 2019) (citing Carolina Power & Light Co. v. Copeland).

The challenged charge (charged portion underlined below), which is a direct quote from the Carolina Power & Light case, is as follows:

> The approved formula for determining damages in condemnation cases in this state provides for payment to the landowner of fair market price of property taken. . . If that formula is unfair to either party some other formula may be used. For example, if church property is involved, another formula would be required because there is no fair market value for church property.

This charge is consistent with the authorities discussed in detail above for the meaning of "just compensation." Railways' criticism of this charge is that the Court did not specifically charge the jury that the *exclusive test* for just compensation must be what a willing buyer will pay and a

willing seller will accept. As discussed above, fair market value is not an exclusive test for just compensation. Additionally, the Court notes that at Railways' request, the jury charge included multiple references to fair market value, defined as what a willing buyer will pay and willing seller will accept.

"A trial court must charge the current and correct law." Stephens v. CSX Transp., Inc., 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015) (citations omitted). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id. at 198, 781 S.E.2d at 542 (quoting Keaton, 334 S.C. at 497, 514 S.E.2d at 575).

The Court does not believe the charge included any error of law and denies Railways' post-trial motions to the extent it argues the charge was not a correct statement of the law.

VIII.

Railways asserts it is entitled to a new trial because Landowner's Exhibit 63 should have been excluded from evidence. The exhibit is an e-mail chain between an appraiser hired by Railways, Bill Ford, and Landowner representative Fred Fabian. The exhibit was admitted into evidence during Fabian's testimony.

Fabian testified that Ford asked him for information relating to the costs of the original construction. Landowner's Ex. 63 includes an e-mail from Ford to Fabian stating that costs numbers are appreciated, that he is working on the land value and about to start valuing the improvements (which is only the process when the cost approach is utilized) and an e-mail from Fabian to Ford forwarding e-mails between Fabian and Landowner's accountant concerning the original costs of construction of the improvements, adjusted for inflation.

Railways' objection was that the exhibit was hearsay. The court overruled the objection on the basis that the business records exception to the hearsay rule applied. See SCRE 803(6). Fabian testified that the communications in the exhibit were kept as part of his regularly conducted business. Railways argues that the email was inadmissible because it was not generated in the scope of Fabian's business at eLifespaces, the tenant in the building. However, Fabian is a member and contact person for the Landowner, which is an entity that developed and owns the Property for the purpose of renting it. It is clear from the exhibit that he received and sent these communications within the scope of that real estate business.

Railways suggests even if properly admitted as a business record, the e-mail should have been excluded on the basis that it contains subjective opinions of an accountant. Railways projects subjectivity onto the calculation continued in the exhibit. The accountant states that he used actual schedules and simply performed a calculation to provide costs in today's dollars.

Even if Railways were correct, there was no prejudice. Any alleged error was harmless. Morey and Hartnett both testified concerning the costs of construction in today's dollars, which was higher than the cost estimate included in the contested exhibit. Morey's testimony and exhibits concerning cost were all admitted into evidence without objection. "Where the hearsay is merely cumulative to other evidence, its admission is harmless." Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)); see also, Collins Ent. Corp. v. Coats and Coats Rental Amuse., 355 S.C. 125, 135, 584 S.E.2d 120, 126, n.9 (Ct. App. 2003), *aff'd*, 368 S.C. 410, 629 S.E.2d 635 (2006) (citing the same rule).

Therefore, Railways' post-trial motions are denied as to the argument that Landowner's Exhibit 63 should have been excluded from evidence.

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IX.

Railways argues the court erred in allowing limited questioning of its witness concerning opposition to the project. As stated earlier, Ravenel, Railways' project representative, discussed the taking and project. In describing the project, Ravenel testified to the benefits of the truck and rail traffic flow it would facilitate and the public good of the project. In particular, he noted the new railway would have a beneficial effect on vehicular traffic in the area.

Landowner cross examined Ravenel by pointing out that all persons, including the City of Charleston, did not agree that the project would be beneficial to traffic in the area. Counsel asked Ravenel if the City objected to the project because of its adverse effect on traffic on Meeting Street. Ravenel responded that he did not believe the letter of objection from the City mentioned traffic as an issue. When the Landowner sought to refresh Ravenel's recollection with the letter and examine him further, Railways objected that the examination was improper and the letter and a subsequent letter to the same effect should not be admitted. The Court sustained the objection and disallowed further examination of Ravenel on the subject.

As is evident, the testimony as to the City's objection to the project was minimal. There is no showing that this limited proof was materially prejudicial to Railways.

Further, Landowner was justified in cross examining the witness on his statements. See generally, Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 407, 426 S.E.2d 823, 827 (Ct. App. 1993) ("As to the testimony of Mr. Rhodes, we find no error, as the record indicates the appellant opened the door to this evidence."); SCRE 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility"). Railways opened the door by having its witness testify the project would benefit truck and rail traffic in the vicinity. Ravenel could have simply testified that the intermodal facility was a public project associated with the

new Leatherman Shipping Terminal. The Condemnor went further, by delving into its view the project would benefit traffic flow. The limited cross examination was directly responsive.

For these reasons, Railways' post-trial motions are denied as to the argument that counsel for Landowner should not have been allowed to cross examine Ravenel on the City's objection to the project based on traffic and that the examination was unduly prejudicial.

X.

Railways also argues that photos of the grand opening of the facility in 2008 were inadmissible. According to Railways, these were either irrelevant or the probative value was substantially outweighed by unfair prejudice. The court rejects these arguments.

Under Rule 401 and 402, "[e]vidence meets the test of relevance for admissibility if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) (citation omitted). "[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id. (citing Rule 403, SCRE). "Determinations of relevance are largely within the trial court's discretion, and its decision to either admit or exclude evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the appellant's rights." Id. (citing Merrill v. Barton, 250 S.C. 193, 195, 156 S.E.2d 862, 863 (1967)).

Here, the photographs objected to by Railways were relevant. The photos taken at the opening showed many of the construction features that made the building a special use facility. Additionally, Fabian testified that the City of Charleston encouraged the Landowner to construct this special use building in the neck area as part of the City's efforts to construct a technology corridor. All of these details are relevant, directly or indirectly, to the issue of whether the building

was a special use building. There was no unfair prejudice in the addition of these photos. Therefore, the court denies Railways' post-trial motions as to the argument that photos of the opening of the facility should have been excluded.

XI.

Railways also asks this Court to order New Trial Nisi Remittitur and reduce the verdict. Railways asserts that the jury's verdict of $3,750,000 is excessive in light of the evidence at trial of fair market value and asks the court to reduce the verdict to $1,800,000. For all the reasons discussed in the proceeding sections of the order, the court rejects Railways' argument and denies the Motion for New Trial Nisi Remittitur. There is no proof the verdict was the result of passion or caprice, or any of the other legal grounds for granting a new trial. The verdict was squarely within the parties' experts' divergent opinions of the value of the Property and also supported by Morey's estimates. As detailed above, Landowner is entitled to just compensation and the evidence at trial supports the jury's verdict in this case.

XII.

The Court also denies the motion to set aside the verdict under the thirteenth juror doctrine. The Court believes, finds, and concludes that the jury's verdict is supported by the evidence. As the Court stated several times when considering the motions of Railways during the trial, the matters that Railways raised were factual ones for the twelve jurors to decide. The jury deliberated for three to four hours and returned with a verdict that was higher than the valuation proposed by Railways and lower than that sought by the Landowner. The Court charged most of the charges requested by Railways and overruled its objection to the charge from Carolina Power & Light, for the reasons previously discussed.

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For all these reasons, the Court believes, finds, and concludes the verdict was fully supported by the proof and the trial was conducted without prejudicial legal error, and denies the motion to set aside the verdict on the basis of the Court's discretion under the thirteenth juror doctrine.

CONCLUSION

For the reasons stated above, Railways' post-trial motions are **DENIED**. To the extent there are arguments in Railways' post-trial motions filed April 10, 2019, that are not fully addressed herein, the Court has considered those grounds and rejects those arguments.

AND IT IS SO ORDERED!

Alex Kinlaw, Jr.
South Carolina Circuit Court Judge

June 4, 2019
Greenville, South Carolina

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Alex Kinlaw, Jr.
Judge

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June 4, 2019

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Re: South Carolina Department of Commerce, Division of Public Railways vs. Gateway Properties of Greater Charleston, LLC and NBSC a division of Synovus Bank
2017-CP-10-5382

Dear Madam Clerk:

Please find enclosed the original of the order in the above styled matter. Please facilitate a copy to counsel on both sides.

Thanking you I am,

Shannon Thurman
Administrative Assistance to Judge Kinlaw, Jr.