STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge
Case No. 2017-CP-10-5382
Appellate Case No. 2019-001125

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SC Court of Appeals

South Carolina Department of Commerce,
Division of Public Railways,

Appellant,

v.

Gateway Properties of Greater Charleston, LLC,

Respondent,

and

NBSC a division of Synovus Bank, VFC Partners 15 LLC, Capella Carolinas, LLC, Donivon Glassburn, and the Loft Pilates Center, LLC,

Other Condemnees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondent urges this Court to create a novel "fairness" exception to decades of South Carolina Supreme Court and United States Supreme Court precedent defining just compensation as the fair market value of the condemned property, or that value a willing buyer will pay and a willing seller will accept, neither being under compulsion to do so. There is no precedent for creating such an exception.

The essence of Respondent's position is that a jury should be permitted to deviate from fair market value and create its own formula for just compensation whenever it determines that fair market value is "unfair" to the landowner. Sanctioning such a move away from fair market value would shift the just compensation inquiry away from a principled analysis of market value and into an indefinite fairness inquiry. Factors such as how long the property has been in the family, landowner's plans to keep the property "forever," landowner's efforts in designing and improving the property, whether the landowner will have to rebuild or relocate, and any number of other factors, as distinct as each new case, would engulf the fair market value inquiry. Such an approach has never been approved in state or federal courts and should not be instituted here.

A landowner is free to purchase property below market value and then reap the benefits of its below-market purchase at the time it sells the property. By the same token, a landowner is free to improve its property and build any features it chooses into its office building, but at the time of sale it will only receive the value for those features that the market is willing to pay, which may be more or less than the value placed on those features by the landowner. In condemnation, the government stands in the place of the market participant and must pay the fair market value for the property, regardless of the landowner's investment. The government does not benefit from landowner's below-market purchase, and it is not penalized by landowner's above-market improvements. Fair market value is the measure of just compensation owed to the landowner.

ARGUMENT

I. Mr. Hartnett's Opinion of Value Did Not Reflect the Legal Definition of Just Compensation.

This appeal is not a factual dispute about the construction of Landowner's building, the design of certain rooms, or the quality of lighting, wiring, or steel used in the building's frame. (Br. Resp. 3-10). The legal question raised by Appellant in this appeal is whether Mr. Hartnett's opinion of value should have been admitted into evidence where Mr. Hartnett testified that his valuation *did not* represent: (1) the fair market value of the property, or (2) what a willing buyer or investor would pay for the property at the time of condemnation. Respondent urges this Court to adopt a novel "fairness" exception to the fair market value measure of just compensation, which would allow a jury to deviate from fair market value whenever it so determined that fair market value was unfair to the landowner. Such an unprincipled approach to just compensation has no support in case law and should be rejected.

A. The measure of just compensation is fair market value.

In a condemnation action, where the entire property is acquired and there is no remaining property for which to calculate residual damages, the only question for the jury to determine is the "value of the property taken," which the South Carolina Supreme Court has defined for over seventy years as the property's fair market value. *Howell v. State Highway Dep't*, 167 S.C. 217, 166 S.E. 129, 130 (1932); Br. Appellant 9-13. For at least fifty years, the South Carolina Supreme Court has defined fair market value as the value at which a willing seller will sell, and a willing buyer will buy, where neither is under compulsion to do so. *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 416, 131 S.E.2d 264, 266 (1963). For more than eighty years, the United States Supreme Court has used this same definition of fair market value in condemnation cases. *Olson v. United States*, 292 U.S. 246, 257 (1934).

Respondent argues that where fair market value is "unfair" to the landowner, the jury is free to develop its own measure of just compensation separate and apart from fair market value. (Br. Resp. 33-34). To support such a deviation from well-established precedent, Respondent rests on a single sentence of dicta from *Carolina Power*, a forty-five-year-old case that has never been cited for the proposition Respondent now propounds. (Br. Resp. 33-34). The court in *Carolina Power* did not sanction a move away from fair market value. Rather, it was concerned that expert testimony on fair market value not be contaminated with speculative profits from future development. *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 188 S.E.2d 188 (1972); Br. Appellant 23 & n.7. *Carolina Power* was recently cited for the proposition that a different highest and best use may be argued but it must still be reasonably probable and reflect a "real market value" of this alternative use. *United States v. 269 Acres, More or Less, Located in Beaufort County S.C.*, 2019 WL 1450578, at *3 (D.S.C. April 2, 2019). *Carolina Power* does not support Respondent's novel theory that the jury may depart from a property's fair market value whenever "fairness" so dictates.

Such a fairness argument opens just compensation to factors that are not compensable in condemnation. Mr. Hartnett testified that he used a non-fair market value cost approach for Respondent's building because he did not think that fair market value would have been "fair" to his client. (Trial Tr. vol. III, 412:10-14; 413:7-11; 415:5-15 (Mr. Hartnett agreeing that he was "looking to try to come up with what [he] thought would be a fair number for Mr. Fabian, regardless of fair market value")). Mr. Fabian testified that the land had been in his family for generations and belonged to his great-grandmother and he and his family never intended to sell the property but had every intention of keeping his business at this location for the foreseeable future. (Trial Tr. vol. II, 163:20-164:3; 289:1-10). Mr. Fabian also testified extensively to his

intimate involvement in the design and construction of the building. (Trial Tr. vol. II, 182:6-15; e.g., 196:12-199:9 (Mr. Fabian testifying about the building's rebar, grounding elements, and steel frame)). While these factors may affect Landowner's own view of value and fairness, for example because of Mr. Fabian's own personal effort in designing the building, they are not part of the legal definition of just compensation.[1] The United States Supreme Court observed decades ago that not every aspect of value that is important to a landowner is compensated in a condemnation, specifically the landowner's resistance to parting with land adapted to its own use:

> [S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness b[e] eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at 'fair' market value.

United States v. Miller, 317 U.S. 369, 375 (1943).

Similarly excluded from just compensation is a speculative price paid for land or an over-improvement suited to the landowner's needs. As the United States Supreme Court has long recognized:

> [Market value] may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes, and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain.

Olson v. United States, 292 U.S. 246, 255 (1934). Moreover, the Supreme Court has rejected efforts to interject subjective measures into what it has called the "relatively objective working

[1] *S.C. State Hwy. Dep't v. Grant*, 265 S.C. 28, 31-32, 216 S.E.2d 758 (1975) (holding lower court's charge to jury not to consider sentimental value sufficient to cure landowner's testimony on sentimental value).

rule" of fair market value. *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania*, 441 U.S. 506, 511, 517 (1979). "[T]he concept of fair market value has been chosen to strike a fair 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose." *Id.* at 512 (quoting *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949)).

Landowner was free to improve its property for its own use however it saw fit. However, if the Landowner improved its property in a manner above what the market would pay, the government does not bear that burden because of "fairness." *United States v. 564.54 Acres of Land,* 441 U.S. at 512 ("In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship." (citation and internal quotation marks omitted)). Moreover, Landowner's testimony was clear that as soon as it could not afford to occupy its entire building, Landowner successfully marketed its building as office space to third parties. Landowner testified that these third parties did not require or need the improved lighting, wiring, and technology that Landowner chose to incorporate into its building. (Trial Tr. vol. II, 246:22-247:17, 248:18-249:4, 249:22-250:4, 296:21-298:3, 306:7-22). Even so, Landowner was able, for years, to lease space to third parties at market rents. (Trial Tr. vol. II, 296:16-20 (lease to bingo operator was fair market rent); 297:6-8 (lease to Pilates studio was fair market rent); 297:19-298:7 (lease to software company was fair market rent)). Both Landowner and its appraiser, Mr. Harnett, testified that the non-leased portion of the building could also have been leased to a third party if needed. (Trial Tr. vol. II, 302:16-21 (Fabian); Trial Tr. vol. III, 411:2-8 (Harnett)).

Appellant was required to pay the fair market value for Respondent's property, not a value inflated by Mr. Fabian's reluctance to part with the land and building, not the value the Landowner ascribed to the property because of Mr. Fabian's involvement in design and construction, and not the costs of improvements that Landowner decided to put into its office building that have particular value to the Landowner but not to the market at large and for which no willing buyer would have paid.

Landowner posits an alternative measure of just compensation, but does not, and cannot, present legal authority justifying its argument that the Court should ignore decades of United States Supreme Court and South Carolina Supreme Court jurisprudence and leave it to the jury to determine its own formula of just compensation based on the jury's own view of "fairness."

B. The cost approach to valuation, though not favored, is acceptable where it represents fair market value.

Respondent wrongly argues that Appellant objects to the cost approach to valuation in toto. (Br. Resp. 20, 22). Appellant does not dispute that the cost approach is an accepted valuation methodology and that it is appropriate in certain circumstances.[2] Rather, Appellant contends that when the cost approach is presented to the jury as the value of the property taken, the proponent must be able to affirm that the valuation represents fair market value and that a willing

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[2] Landowner cites *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997), and *S.C. Tax Commn. v. S.C. Tax Bd. of Rev.*, 287 S.C. 415, 339 S.E.2d 131 (Ct. App. 1985), for the proposition that South Carolina appellate courts have recognized the cost approach to valuation. Public Railways does not dispute that the cost approach is a recognized valuation methodology; however, these cases do not advance Landowner's argument that the cost approach was appropriate in this case. In *Reliance*, the cost approach was determined to be most appropriate for a shopping center *less than two years old* and still seeking tenants, which is far different from the situation in this case with a building more than ten years old and fully leased. 327 S.C. at 533, 489 S.E.2d at 676. In *S.C. Tax Commission*, the issue was whether contract rents or current market rents should be used in the income approach to value, 287 S.C. at 417, 339 S.E.2d at 132, and the case had nothing to do with evaluating the appropriateness of the cost approach to value in circumstances analogous to this case.

buyer/investor of the specific property would consider reproduction cost less depreciation relevant in negotiating the purchase of the property.[3] This is the approach approved by the federal government in the Uniform Appraisal Standards for Federal Land Acquisitions, where cost approach must be tied back to fair market value:

> **[T]he cost approach as a means of measuring value "may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid."** Its relevance to market value therefore cannot be merely assumed in federal acquisitions; rather, the appraiser must demonstrate that application of the cost approach to a specific property would be relevant to market participants. . . . Federal courts agree that **reliance on the cost approach is improper "when no one would think of reproducing the property," or when no prudent investor would reproduce it for the figure or amount estimated as replacement or reproduction cost**. Thus courts reject the cost approach without "unequivocal evidence that the [improvements] involved would be reproduced by private investors at the risk of private capital."

Appraisal Institute, Real Property Valuation in Condemnation 108 (2018) (emphasis added) (citing *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed. (Washington, D.C.: U.S. Government Printing Office, 2016), § 4.4.3-4.4.3.1, pp. 131-133) (Condemnor's Post Trial Motion). Such an approach is necessary because the cost approach has been repeatedly criticized as unreliable and as tending to inflate value. *See, e.g., United States v. Benning Hous. Corp.*, 276 F.2d 248, 250 (5th Cir. 1960) ("[R]eproduction cost evidence almost invariably tends to inflate valuation." (citations omitted)); *United States v. Certain Interests in Prop. in Champaign County*,

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[3] The takings cases cited by Landowner as examples of when the cost approach has been approved by courts, (Br. Resp. 24), actually support the proposition that even when using the cost approach, just compensation is measured by fair market value, which is what a purchaser would have paid. *Pete v. United States*, 531 F.2d 1018, 1036 (Cl. Ct. 1976) ("[I]t is well established that just compensation under the Fifth Amendment means that the owner is entitled to the *fair market value* of the property at the time of taking, which in this instance the Court has determined to be the reconstruction or reproduction cost of plaintiffs' three barges . . . ." (emphasis added)); *Yaist v. United States*, 17 Cl. Ct. 246, 261 (1989) (finding while cost approach "may not represent the fair market value with complete exactitude," it reflected a reasonably represented figure of *fair market value*).

271 F.2d 379, 382 (7th Cir. 1959) ("[The cost approach] method generally is held to be one of the least reliable indicia of market value." (citations omitted)); Br. Appellant 14-15.

Quite contrary to the federal standard, Mr. Harnett testified that his cost approach valuation did not have any relevance to what a prospective purchaser would have paid. (Trial Tr. vol. III, 414:10-415:15). The fact that Mr. Hartnett was qualified as an expert appraiser does not ipso facto make his cost approach opinion of value admissible as Respondent suggests, (Br. Resp. 21), if his opinion of value did not comport with the legal definition of just compensation. The lower court was charged with exercising its gatekeeper function to prevent the jury from hearing and considering inadmissible evidence and it should have excluded Mr. Harnett's testimony. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).

Mr. Harnett testified that he took into account the concept that just compensation should place the owner in as good a position monetarily as it was prior to the taking. (Trial Tr. vol. III, 412:10-19). While this is a general principle of condemnation law, Mr. Hartnett failed to recognize that "as good a position pecuniarily" has been defined by courts as *market value* and does not exceed market value, which is the very point that Public Railways has argued throughout. *Olson*, 292 U.S. at 255 ("He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions. Just compensation includes all elements of value that inhere in the property, *but it does not exceed market value* fairly determined." (emphasis added) (internal citations omitted)). Fair market value makes a landowner whole.

Respondent cites various cases from outside of South Carolina as examples of courts approving the cost approach in condemnation actions. These cases are examples of true "specialty

use" facilities that have a single or very limited scope of use—sewer and water treatment facility, beach cabana club, and a musical theater. *City of Bend v. Juniper Utility Co.*, 252 P.3d 341 (Or. Ct. App. 2011) (sewer and water treatment facility); *In re Lido Boulevard, Town of Hempstead, Lido Beach, Nassau County*, 349 N.Y.S.2d 422 (N.Y. App. Div. 1973) (beach cabana club); *Warwick Musical Theatre, Inc. v. State of Rhode Island*, 525 A.2d 905 (R.I. 1987) (musical theatre). These facilities are a far cry from Landowner's office building. Respondent admitted that more than forty percent of its "specialty" building was leased to third-party businesses that leased the facility for typical office uses—Pilates studio, technology company, bingo operator's corporate office—none of which had a need for the "extra" technology incorporated into the facility. (See supra § I.A; Br. Appellant 3 (indicating space occupied by third parties)). A property cannot fairly be classified as special use unsuitable for any other tenant when nearly half of its finished space at the time of condemnation, and for years prior, was leased to third parties for typical office space.

In addition, these special-use cases still discuss the cost approach in terms of fair market value. *City of Bend*, 252 P.3d at 352 (holding cost approach appropriate in determining fair market value of water and sewer facility); *Warwick Musical Theatre, Inc.*, 525 A.2d at 910 (discussing cost approach in terms of fair market value). Respondent also cites cases from New York applying a multi-part test for application of the cost approach. Conveniently, Respondent failed to include the fifth element required by New York courts, which is a showing that the structure is "[u]niquely adapted to the business conducted upon it or use made of it and cannot be converted to other uses without the expenditure of substantial sums of money." *Matter of Suffolk County*, 392 N.E.2d

1236, 1238 (Ct. App. N.Y. 1979) (recognizing this fifth element).[4] It is plain from the evidence presented at trial that Landowner's building could be converted to other uses because more than forty percent of it had already been leased to third parties for years.

In condemnation, the cost approach to valuation is acceptable where it represents a valuation that would be relevant to market participants. Mr. Harnett testified that his valuation did not reflect what market participants would consider relevant in establishing market value. Further, Mr. Harnett ignored the fact that Landowner's existing tenants established a fair market value use of the building as office space. Because Mr. Hartnett ignored fair market value and did not connect his cost approach valuation to a willing market participant, his opinion of value did not meet the legal definition of just compensation and should have been excluded from evidence.

II. The Lower Court Erred in Not Directing a Verdict in the Amount of $1,800,000.

Respondent wrongly argues that if Mr. Harnett's testimony had been excluded there was other evidence supporting the jury's verdict. Separate from Mr. Hartnett, Respondent only offered testimony from Mr. Fabian and Mr. Morey. Mr. Fabian testified to the construction of the building but did not give his own opinion of the property's value even though as the Landowner's representative he could have.

Respondent's only other witness was Mr. Morey. Mr. Morey was a predicate witness to Mr. Harnett's cost approach opinion of value. Mr. Hartnett testified that in order to formulate his cost approach to value he could have used the Marshall and Swift Valuation Service to determine

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[4] Other cases cited by Respondent also rest on market value. *United States v. 564.54 Acres of Land*, 441 U.S. at 514-515 (denying landowner's request to part from the fair market value standard in favor or reproduction cost where the cost to reproduce the condemned camp facilities in another location would be significantly higher than their fair market value); *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949) (observing that "other means of measuring value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid").

the reproduction cost of Landowner's building or alternatively obtain the reproduction cost estimate from a third party. (Trial Tr. vol. III, 392:23-393:15, 395:2-25). In this instance, Mr. Hartnett relied on Mr. Morey to provide the construction cost estimate. (Trial Tr. vol. III, 395:8-25). Mr. Morey's testimony does not have independent significance apart from Mr. Hartnett's opinion of value. If Mr. Hartnett's opinion of value is struck because it did not represent fair market value, then Mr. Morey's predicate testimony to a cost estimate that did not reflect the building's fair market value would have no relevance to the jury's fair market value inquiry. Further, Mr. Morey was not a licensed real estate appraiser and therefore he was precluded from offering an opinion of value during trial.[5]

Once Mr. Hartnett's testimony is properly excluded, the remaining evidence presented at trial of just compensation was for $1,800,000 or $1,750,000. (Trial Tr. vol. II, 264:7-265:12 (Mr. Fabian testifying to Mr. Ford's opinion of value); vol. III, 494:8-495:10 (Ms. Haskell's opinion of value of $1,750,000)). Because Public Railways requested that the jury return a verdict for $1,800,000, the amount it tendered at the beginning of this case, (Trial Tr. vol. I, 92:8-16), a verdict should have been directed in the amount of $1,800,000. The lower court erred in not directing a verdict for $1,800,000.

[5] The South Carolina Real Estate Appraiser License and Certification Act provides that it is unlawful for a person "to engage in real estate appraisal activity" without a valid license issued by the South Carolina Department of Labor, Licensing and Regulation. S.C. Code Ann. § 40-60-30. The Code broadly defines the scope of real estate appraiser activity to include: "the act or process of developing an opinion of value" and "[t]he testimony of an individual dealing with the analyses, conclusions, or opinions concerning identified real estate or real property may be considered to be an oral appraisal report." S.C. Code Ann. § 40-60-20(2), (5) (defining "appraisal" and "appraisal report"). The Code further provides for civil and criminal penalties for any such statutory violations. S.C. Code Ann. §§ 40-60-200 to -210.

III. Appellant Preserved Its Objection to the Jury Charge on Fairness.

Respondent wrongly contends that Appellant did not preserve its objection to the lower court's jury charge on fairness. The lower court charged the jury as follows:

> Let's look at the damages formula. The approved formula for determining damages in a condemnation case provides for payment to the Landowner a fair market price of the property taken. If that formula is unfair to either party, some other formula may be used.

(Trial Tr. vol. IV, 587:15-19). Appellant previously indicated its objection this charge during the charge conference. (Trial Tr. vol. III, 501:18-505:10, 508:21-509:11 (noting Appellant's exception to this charge)). Following its charges to the jury, the court asked the parties if there was any exception to the charges. (Trial Tr. vol. IV, 593:5-6). Appellant then objected to the final sentence of the above charge and the court overruled its objection. (Trial Tr. vol. IV, 593:5-17). The transcript is clear. This issue is preserved for the Court's review.

Appellant was not required to object to the remaining charges on just compensation to preserve its objection to one portion of the overall charge. Where the jury charges defined just compensation as fair market value there was no reason for Appellant to object. Where the jury charges strayed from fair market value, such as the instruction to the jury that it could disregard fair market value and consider another formula if it determined fair market value was unfair, Appellant certainly did object. Appellant did not waive its argument.

Additionally, there is no basis for Respondent's argument that Appellant's consent to the use of "just compensation" on the jury verdict form somehow waived its right to argue about the appropriate definition of just compensation. If this were the case, the jury verdict form would have had to been encumbered by the entire set of jury charges given on just compensation, charges which the jury in fact asked for but the Court did not provide. (Trial Tr. vol. IV, 596:9-597:1). Respondent wrongly cites *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.

App. 1995), for the proposition that "failure to object to the verdict form is of the same force and effect as failing to object to a jury charge." (Br. Resp. 39). This is not what *Johnson* says. *Johnson* states that where there was no objection to a verdict form and no objection to the court's instructions on the verdict form, any purported error in the verdict form is not properly preserved for review. *Johnson*, 317 S.C. at 421, 453 S.E.2d at 912. This is not the case here, where Appellant timely objected to the problematic jury charge. There is no alleged error in the verdict form, so there was nothing for Appellant to preserve. *Johnson* is inapplicable here.

Respondent continues to rely exclusively on *Carolina Power* to argue in favor of the jury charge on fairness, but this case does not provide the support Respondent seeks. In more than forty-five years since the South Carolina Supreme Court's decision in *Carolina Power*, the case has never been cited for the proposition that just compensation can be based on anything other than fair market value, and certainly never for the proposition that just compensation is arrived at by the jury first making a determination of whether the evidence of fair market value is fair to the landowner, and then if not, the jury then employs such an amorphous concept as "some other formula" it determines is most fair to the parties. A jury does not have the discretion to ignore the legal definition of just compensation equating to fair market value, and the court erred in instructing the jury that it had such discretion.

It was error to grant the jury unfettered discretion to ignore testimony on fair market value and formulate its own determination of just compensation. Appellant was prejudiced by this jury charge because the jury did in fact return a verdict well in excess of the testimony of fair market value. For this reason, a new trial should be granted.

IV. The Lower Court Erred in Admitting the Subjective Opinion of Respondent's Accountant Under the Business Records Exception to Hearsay.

The email from Respondent's accountant was hearsay and erroneously admitted under the business records exception. First, it was prepared because of the condemnation, not as part of Respondent's regularly conducted activity. (Trial Tr. vol. II, 270:2-271:19). Second, Rule 803(6), SCRE, explicitly states that subjective opinions and judgments found in business records are not admissible. There is no doubt that this email prejudiced Appellant because it offered a second purported cost estimate for Respondent's property in the four-million-dollar range without subjecting its proponent to testing and cross examination.

Respondent now offers several belated alternative arguments for why this document was admissible, such as it was not offered for the truth of the matter asserted, it was offered to show Public Railways's appraiser requested cost information and received it, and it was an admission by a party opponent. However, such arguments were not contemporaneously raised and ruled upon by the Court at the time of Railways's objection and are not properly raised for the first time on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (observing that it is "axiomatic that an issue cannot be raised for the first time on appeal").

Even if such alternative arguments can be asserted after the lower court's ruling, they are belied by the evidence. The only questions asked about this document related to the background for numbers prepared by the accountant. Counsel for Respondent made a point to confirm that the numbers requested to be provided by the accountant were actual construction figures, Mr. Fabian did not tamper with the numbers in any manner, and that the accountant's numbers comported with Mr. Fabian's recollection of actual costs and any confirmation that the made of the actual

costs. (Trial Tr. vol. II, 270:4-23). Mr. Fabian read directly from his accountant's email stating as follows:

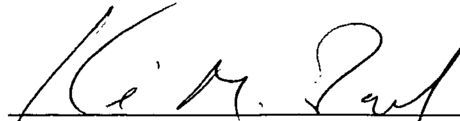
> You request we develop an estimated cost to rebuild your facility by applying current labor rates, land values, and other related financial factors. The result of our analyses listed below are estimates and do not represent audited numbers, nor do they reflect the actual contractor bids' bid estimates.

(Trial Tr. vol. II, 271:9-15). Mr. Fabian also testified that his accountant <u>adjusted</u> his estimate to account for inflation, (Trial Tr. vol. II, 271:17-19), which is certainly a subjective exercise. Then, in Respondent's closing argument, this exhibit was again highlighted as being accountant prepared "actual costs as adjusted for inflation." (Trial Tr. vol. III, 560:10-14). Exhibit 63 was clearly entered into evidence for the truth of the matter asserted, that is, a historical construction cost estimate prepared by a Certified Public Accountant and adjusted to present day values. That was the import of Exhibit 63, and not the fact that Public Railways's appraiser received a copy of the email. Further, nowhere in this exhibit does Public Railways admit that these figures represent just compensation. It was not an admission by a party opponent.

The admission of this email from Respondent's accountant containing numerous subjective opinions was prejudicial error. (*See* Br. Appellant 28-29 (listing at least five subjective opinions of accountant included in this document)).

CONCLUSION

For these reasons, Appellant requests that a verdict be directed in the amount of $1,800,000, reflecting the testimony on fair market value and the minimum amount Public Railways asked the jury to return for Landowner. Alternatively, Public Railways is entitled to a new trial.



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Columbia, South Carolina
January 6, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr.
Case No. 2017-CP-10-5382
Appellate Case No. 2019-001125

RECEIVED
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SC Court of Appeals

South Carolina Department of Commerce,
Division of Public Railways,

Appellant,

v.

Gateway Properties of Greater Charleston, LLC,

Respondent,

and

NBSC a division of Synovus Bank, VFC Partners 15 LLC, Capella Carolinas, LLC,
Donivan Glassburn, and the Loft Pilates Center, LLC,

Other Condemnees.

PROOF OF SERVICE

I, Connie W. Grugan, legal assistant to the law firm of Lewis Babcock L.L.P., hereby certify that I have served the Reply Brief of Appellant upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to said counsel addressed as follows:

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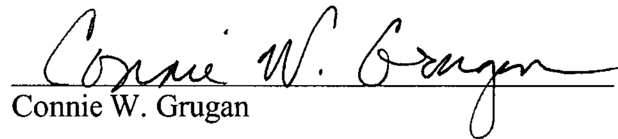
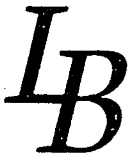


Connie W. Grugan

This 6th day of January, 2020.



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January 6, 2020

RECEIVED
JAN 06 2020
SC Court of Appeals

HAND DELIVERED
Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: South Carolina Department of Commerce, Division of Public Railways v. Gateway Properties of Greater Charleston, LLC, et al.
Case No. 2019-001125

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Reply Brief of Appellant in regard to the above-referenced matter for filing with your office. Please return a clocked copy via our courier.

By copy of this letter, we are hereby serving a copy of same upon opposing counsel.

Very truly yours,

Keith M. Babcock

KMB:cg
Enclosure
cc: G. Trenholm Walter, Esquire
John Phillips Linton, Jr., Esquire
Robert S. Dodds, Esquire