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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	C/A NO. 2019-CP-10-4387
	)	
Applied Building Sciences, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER GRANTING DEFENDANT'S</b>
	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
South Carolina Department of Commerce,	)	<b>AND DENYING PLAINTIFF'S MOTION</b>
Division of Public Railways,	)	<b>FOR SUMMARY JUDGMENT</b>
	)	
Defendant.	)	
	)	
	)	

This matter comes before the Court by way of cross motions for summary judgment filed by Plaintiff Applied Building Sciences, Inc. (hereinafter "ABS") and Defendant South Carolina Department of Commerce, Division of Public Railways (hereinafter "Public Railways"). The Court held a virtual hearing on these motions on June 18, 2020. Gene M. Connell, Jr., Esquire appeared for ABS. David L. Paavola, Esquire appeared for Public Railways.

For the reasons set forth below, I DENY Plaintiff Applied Building Sciences' Motion for Summary Judgment and GRANT Defendant Public Railways' Motion for Summary Judgment.

**STANDARD OF REVIEW**

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). In determining

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whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom are viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004).

“The issue of interpretation of a statute is a question of law for the court.” *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

### FINDINGS OF FACT

As reflected by the complaint and the parties’ cross motions for summary judgment and accompanying affidavits, the basic facts underlying this inverse condemnation action are undisputed. They are as follows.

On June 13, 2017, as part of its Navy Base Intermodal Facility project in Charleston County, Public Railways condemned property owned by Hibernian Heights, LLC located at 1890 Milford Street Charleston, South Carolina (the “Milford Property”) in a condemnation action styled as South Carolina Department of Commerce, Division of Public Railways v. Hibernian Heights, LLC (Landowner), and Applied Building Sciences, Inc. (Other Condemnee), case number 2017-CP-10-3029.<sup>1</sup> ABS was named as an Other Condemnee in that action as the sole tenant of the Milford Property. At the time of condemnation, Mr. Alan Campbell was the sole owner of Hibernian Heights, LLC and a part owner of ABS. The condemnation action was settled by the parties and a consent order of dismissal was entered on June 18, 2019.

As part of the condemnation of the Milford Property, ABS, as the sole tenant, was provided with information about eligible relocation assistance for a displaced business, which consists of

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<sup>1</sup> The Court takes judicial notice of the filings in case number 2017-CP-10-3029. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014) (observing that it is appropriate for a court to take judicial notice of orders in a underlying case).

the following four categories: (1) moving costs; (2) losses of tangible personal property; (3) search costs; and (4) reestablishment expenses at the new site. ABS was informed that the statutory limit on reestablishment expenses at its new site was \$50,000. ABS located a replacement site at 2308 Cosgrove Avenue. ABS undertook renovations to this replacement property and sought reimbursement for such reestablishment expenses. Public Railways paid to move ABS's tangible personal property to the replacement site. Moving costs are reimbursed separately from reestablishment expenses and have been paid for ABS's move to its replacement location.

In this lawsuit, ABS claims that it expended more in renovations and reestablishment expenses at its replacement site than the statutory cap of \$50,000. On or about October 2017, ABS, through Mr. Campbell, submitted a claim for \$34,398.94 in reestablishment expenses for framing and demolition at 2308 Cosgrove Avenue. The claim form reflected the statutory cap on reestablishment expenses of \$50,000, and a remaining balance after this initial payment of \$15,601.06. Mr. Campbell signed the claim form and Public Railways paid this first claim. On or about November 2017, ABS submitted a second claim for reestablishment expenses of \$16,543.44, but because it had reached the cap for reestablishment expenses, only \$15,601.06 was approved for payment. Mr. Campbell signed this second claim form and Public Railways paid this second claim. In total, Public Railways paid \$50,000 of reestablishment expenses to ABS.

Public Railways adopted the South Carolina Department of Transportation's regulations and guidelines for Relocation Assistance. These guidelines provide that relocation assistance determinations are first made by the Relocation Manager. An applicant may appeal the Relocation Manager's determination to the Chief Legal Counsel for Public Railways. An applicant may then appeal the decision of the Chief Legal Counsel in the Administrative Law Judge Division within thirty days. Public Railways' Relocation Manager made the determination that ABS was not

entitled to receive reestablishment expenses beyond \$50,000. ABS appealed the Relocation Manager's determination to Public Railways' Chief Legal Counsel. Public Railways' Chief Legal Counsel denied ABS's appeal. ABS did not appeal the Chief Legal Counsel's determination to the Administrative Law Court.

In the parties' cross motions for summary judgment, the only dispute is whether South Carolina's \$50,000 statutory cap on reestablishment expenses under S.C. Code Ann. § 28-11-30(4) limits the amount of reestablishment expenses that ABS can recover as a person displaced by eminent domain. ABS contends that it incurred additional reestablishment expenses beyond the statutory limit of \$50,000, and that Public Railways was constitutionally required to pay for these additional expenses.

Because I find that ABS has a statutory, but not a constitutional, right to recover reestablishment expenses, and that ABS has been paid the statutory maximum for reestablishment expenses, I need not, and do not, reach any conclusion as to the validity or reasonableness of the additional claimed expenses by ABS.

## CONCLUSIONS OF LAW

### **I. South Carolina's Statutory Limit for Reestablishment Expenses is \$50,000.**

Condemnation actions in South Carolina are governed by The South Carolina Eminent Domain Procedure Act. S.C. Code Ann. § 28-2-10, *et seq.* Condemnation actions may proceed under either an appraisal panel, with appeal or affirmation of the award in the circuit court, or by filing directly in circuit court. S.C. Code Ann. §§ 28-2-220, -250-270.

Persons displaced by condemnation are eligible for certain relocation assistance benefits under a separate statutory and administrative framework. Relocation assistance is set forth in S.C. Code Ann. § 28-11-10, *et seq.* Relocation assistance is an administrative proceeding governed by

rules and regulations of each state or local government body. S.C. Code Ann. § 28-11-50. Public Railways adopted the South Carolina Department of Transportation's regulations and guidelines for Relocation Assistance.

South Carolina's statutory framework for Relocation Assistance contains certain limitations. Of import to this action, South Carolina's statutory limit on the payment of reestablishment expenses is \$50,000, as set forth below:

Reestablishment expenses related to the moving of a small business, farm, or nonprofit organization payable for transportation projects pursuant to federal guidelines and regulations may be paid in an amount *up to fifty thousand dollars*, notwithstanding a lower limitation imposed by federal regulations.

S.C. Code Ann. § 28-11-30(4) (emphasis added). As a matter of law, payment of reestablishment expenses in South Carolina is statutorily capped at \$50,000.

There is no dispute of fact that Public Railways paid \$50,000 to ABS for reestablishment expenses related to renovating ABS's replacement site at 2308 Cosgrove Avenue. There is also no dispute of fact that ABS appealed the Relocation Manager's decision to Public Railways' Chief Legal Counsel but did not appeal the Chief Legal Counsel's determination to the Administrative Law Court. As a matter of law, ABS has received the maximum amount of reestablishment expenses provided for by statute and summary judgment is appropriate on this basis.

**II. Reestablishment Expenses and Relocation Costs Incurred by Persons Displaced As a Result of Eminent Domain Are Not Constitutionally Compensable.**

In South Carolina, just compensation is the measure of constitutional damages that must be paid for property taken by eminent domain. Reestablishment expenses are not constitutional damages but are a separate and additional statutory benefit for eligible persons displaced as a result of condemnation.

The Fifth Amendment to the United States Constitution states that private property shall

not “be taken for public use, without just compensation.” U.S. Const. amend. V. Likewise, the South Carolina Constitution states that “private property shall not be taken . . . for public use without just compensation being first made for the property.” S.C. Const. art. I, § 13. When Public Railways acquired the Milford Property through eminent domain it was constitutionally required to pay just compensation for the property.

**A. Constitutional Just Compensation For a Total Take Includes the Leasehold Interest.**

When an entire property is taken by eminent domain, a leasehold interest, if one exists as it did here with the Milford Property, is one of the property rights that is acquired by the condemning authority and compensated for by the payment of just compensation. S.C. Code Ann. § 28-2-280(C)(2) (“Condemnation Notice must . . . designate as . . . ‘other condemnees’ all persons who . . . have or claim any record interest in the property to be taken”). ABS correctly asserts that its leasehold interest was taken as part of Public Railways’ condemnation of the Milford Property; however, it wrongly contends that this property right is separately compensable outside of the condemnation proceedings for determining just compensation.

When Public Railways acquired the entire Milford Property through condemnation and paid just compensation for the Milford Property in South Carolina Department of Commerce, Division of Public Railways v. Hibernian Heights, LLC, and Applied Building Sciences, Inc., No. 2017-CP-10-3029, Public Railways paid the full constitutional amount necessary to acquire the full scope of property rights in the Milford Property. Counsel for the landowner Hibernian Heights and the tenant ABS agreed that the amount of just compensation had been settled. The parties agreed that Hibernian Heights and/or ABS was free to pursue matters involving relocation assistance outside of the condemnation. There are no property rights in the Milford Property that Public Railways did not acquire through condemnation.

Accordingly, to the extent that ABS had a constitutional claim for just compensation in recognition of its leasehold interest in the Milford Property at the time of condemnation, ABS's claim fell within the amount of just compensation paid by Public Railways to acquire the Milford Property. In other words, ABS may have had a claim for an apportionment of just compensation as between itself, as tenant, and Hibernian Heights, LLC, as landlord, as envisioned by the South Carolina Eminent Domain Procedure Act, which provides as follows:

Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment must be made jointly to all the parties and may be paid to the clerk of court. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties.

S.C. Code Ann. § 28-2-460. However, ABS has never had a freestanding property claim against Public Railways for its leasehold interest outside of the amount due as just compensation for the total taking of the Milford Property.

ABS could have challenged the apportionment of just compensation as between itself and its landlord Hibernian Heights, LLC, but it chose not to. *South Carolina Dept. Transp. v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 653, 667 S.E.2d 7, 12 (Ct. App. 2008) ("A proceeding to allocate any condemnation funds is by statute a proceeding in equity" (citing S.C. Code Ann. § 28-2-460)). Had ABS done so, South Carolina courts have recognized that "leasehold value in a total condemnation is the difference between the market value rent and the rent paid by the tenant over the full course of the lease including renewal options." *M&T Enterprises*, 379 S.C. at 662, 667 S.E.2d at 16; *Gray v. South Carolina Dept. Highways and Public Transp.*, 311 S.C. 144, 153, 427 S.E.2d 899, 904 (Ct. App. 1992) (same) (citing *Hamilton v. Martin*, 270 S.C. 223, 241 S.E.2d 569 (1978)), *overruled on other grounds by Hardin v. South Carolina Dept. Transp.*

371 S.C. 598, 641 S.E.2d 437 (2007). If ABS had been found to be entitled to value for its leasehold interest, this amount would have been apportioned from the amount of just compensation on deposit with the court, not separately paid by Public Railways. S.C. Code Ann. § 28-2-460.

Accordingly, ABS does not have a separate constitutional claim against Public Railways for its leasehold interest in the Milford Property.<sup>2</sup> Therefore, to the extent ABS claims a continuing property interest flowing from its lease of the Milford Property, its claims fails and Public Railways' motion for summary judgment is granted.

**B. Relocation Assistance and Reestablishment Costs Are Not Constitutionally Compensable.**

ABS contends that it is constitutionally entitled to recover reestablishment expenses separate and apart from just compensation. However, neither the United States Constitution nor the South Carolina Constitution require the government to pay for reestablishment expenses of tenants displaced as a result of condemnation; the federal and state constitutions only require the government to pay just compensation for the property being taken. U.S. Const. amend. V.; S.C. Const. art. I, § 13.

The United States Supreme Court has long held that businesses displaced as a result of condemnation do not have a constitutional right to receive moving and related expenses:

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, *evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation*

<sup>2</sup> ABS's reliance on *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), is misplaced because in this case the full extent of ABS's interest in the Milford Property was condemned and compensated for in the condemnation action.

*proceedings.*

*United States v. Petty Motor Co.*, 327 U.S. 372, 377–78 (1946) (emphasis added); *United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945) (“Even where state constitutions command that compensation be made for property ‘taken or damaged’ for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership *does not include losses to his business or other consequential-damage.*” (emphasis added)); *U.S. v. 7,215.50 Acres of Land*, 507 F. Supp. 228 (D.S.C. 1980) (“the expenses of relocation and other consequential losses *are not allowed* in federal condemnation proceedings” (citing *Mitchell v. United States*, 267 U.S. 341, 344 (1925))).

South Carolina law follows federal takings jurisprudence and does not recognize moving and relocation of personal property as elements of constitutional damage. See *Hardin v. South Carolina Dept. Transp.*, 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007) (“South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone’s property interests amounts to a constitutional taking.”). “The Fifth Amendment Takings Clause concerns itself solely with the owner’s relation to the physical thing and not with consequential damages.” *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 305, 534 S.E.2d 270, 274 (2000); see also *S.C. State Highway Dep’t v. Bolt*, 242 S.C. 411, 417-18 (1963) (“[I]t is the general rule that injury to or loss of business resulting from the taking is not considered as an element of damage in eminent domain proceedings in the absence of a statute expressly allowing such damages.”).<sup>3</sup>

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<sup>3</sup> ABS cites case law and state constitutional provisions in other jurisdictions in support of its argument that reestablishment expenses are constitutionally required in South Carolina. The cases

Costs of moving personal property as a result of condemnation are not elements of constitutional damage in South Carolina:

‘A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee’s estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property.’

*Creative Displays, Inc. v. S.C. Highway Dep’t*, 272 S.C. 68, 72–73, 248 S.E.2d 916, 918 (1978) (quoting *South Carolina State Highway Dept. v. Smith*, 253 S.C. 639, 642, 172 S.E.2d 827, 828 (1970)).

Recognizing that certain damages to displaced owners or tenants could go uncompensated, the federal government enacted The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“Relocation Act”). 42 U.S.C. § 4601, *et seq.* The Relocation Act generally provides that displaced persons are entitled to the following benefits:

- (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
- (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;
- (3) actual reasonable expenses in searching for a replacement business or farm; and
- (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, *but not to exceed \$25,000*, as adjusted by regulation, in accordance with section 4633(d) of this title.

42 U.S.C.A. § 4622 (emphasis added). The federal Relocation Act caps reestablishment expenses at \$25,000. 42 U.S.C.A. § 4622(4).

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relied on by ABS are based on state-law specific constitutional interpretation, not federal. There is no analogous state constitutional provision or case law in South Carolina.

South Carolina has codified the relocation requirements of the Relocation Act in S.C. Code Ann. § 28-11-10, *et seq.*, mandating relocation payments to displaced persons and businesses regardless of whether a project uses any federal dollars. S.C. Code Ann. § 28-11-10. ABS's actual moving expenses were paid as part of its relocation. South Carolina's statutory scheme increases the cap on reestablishment expenses above the Relocation Act's \$25,000 to \$50,000. S.C. Code Ann. § 28-11-30(4). South Carolina's Relocation Assistance statute expressly provides that: "Nothing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding." S.C. Code Ann. § 28-11-70.

South Carolina courts recognize that condemning authorities are statutorily obligated to pay relocation assistance to displaced tenants regardless of whether a state project involves federal funds. In *Brown v. City of North Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994), displaced tenants brought an action for relocation costs after being denied financial assistance to move by the City because the project did not have any federal funding. *Id.* at 299, 442 S.E.2d at 634. The court held that S.C. Code Ann. § 28-11-10 requires relocation assistance to displaced tenants regardless of whether a project has federal funding. *Id.* at 300, 442 S.E.2d at 635. The court looked to statutory, not constitutional, law to reach this result.

Public Railways is under no constitutional obligation to pay any amounts beyond the determined amount of just compensation for condemning the Milford Property. South Carolina's relocation assistance statute places a statutory requirement on Public Railways to pay certain benefits to displaced persons. Public Railways has paid ABS the statutory limit on reestablishment expenses of \$50,000.

ABS was free to make all of the leasehold improvements it chose to its new location, and have the exclusive use of these improvements throughout the duration of its lease. However, it

does not constitutionally fall on Public Railways to reimburse ABS for such expenses. The South Carolina General Assembly determined that \$50,000 would be the maximum amount of reestablishment expenses that a condemning authority could pay a displaced business. The General Assembly could have determined that a cap was not necessary, but instead it placed a cap on reestablishment expenses that was twice the size of the federal government's \$25,000 cap. ABS has not provided any support for asking this Court to ignore the General Assembly's legislative prerogative in enacting a statutorily mandated maximum on reestablishment expenses.

As of a matter of law, ABS is not constitutionally entitled to recover reestablishment expenses. Rather, ABS is statutorily eligible to receive up to \$50,000 in reestablishment expenses. There is no dispute of fact that ABS has already been paid the statutory limit of \$50,000 for reestablishment expenses. For these reasons, summary judgment is appropriate.

## I. CONCLUSION

### ACCORDINGLY, THIS COURT FINDS:

1. A person displaced because of eminent domain does not have a constitutional right under the United States Constitution or the South Carolina Constitution to receive payment for relocation or reestablishment expenses.
2. South Carolina provides a statutory scheme for persons displaced because of eminent domain to be eligible for certain reimbursements related to relocation. S.C. Code Ann. 28-11-10, *et. seq.* One such category of reimbursement is reestablishment expenses. South Carolina caps reestablishment expenses at \$50,000.
3. ABS has received \$50,000 in reestablishment expenses.
4. ABS has no constitutional or statutory right to recover reestablishment expenses in excess of \$50,000.

**THEREFORE,**

Plaintiff's motion for summary judgment is **DENIED**.

Defendant's motion for summary judgment is **GRANTED**.

**AND IT IS SO ORDERED.**

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Judge Bentley D. Price  
Ninth Judicial Circuit

November \_\_, 2020  
Charleston, South Carolina



Charleston Common Pleas

**Case Caption:** Applied Building Sciences Inc VS South Carolina Department Of  
Commerce  
**Case Number:** 2019CP1004387  
**Type:** Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766