

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.

RECORD ON APPEAL
Volume I

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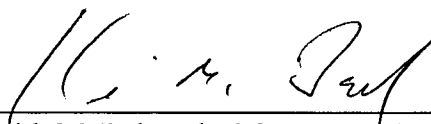
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 Department of Commerce, Division of Public
 Railways

Columbia, South Carolina
 February 4, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-05382

SOUTH CAROLINA DEPARTMENT OF
COMMERCE, DIVISION OF PUBLIC RAILWAYS

GATEWAY PROPERTIES OF GREATER
CHARLESTON, LLC et al

CONDEMNOR

LANDOWNER

Submitted by: Court	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☒ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
GATEWAY PROPERTIES OF GREATER CHARLESTON LLC, et al	SOUTH CAROLINA Dept of Commerce Division of Public Railways	\$ 3,750,000.00
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2763
Judge Code

4-9-19
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

Keith Babcock
David Paavola

G. Trenholm Walker
John Linton, Jr.

ATTORNEY(S) FOR CONDEMNOR

ATTORNEY(S) FOR THE LANDOWNER

CLERK OF COURT

Court Reporter: Joyce Rueger

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,)

Project: Navy Base Intermodal Facility
Tract 23S

vs.)

GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)
Landowner,)

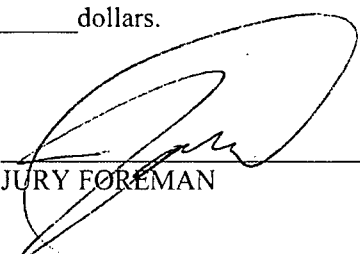
VERDICT FORM

We, the jury, unanimously find just compensation is the amount of

3,750,000

dollars.

3/28/19


JURY FOREMAN

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,)

Project: Navy Base Intermodal Facility
Tract 23S

Condemnor,)

vs.)

GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)

**ORDER ON LANDOWNER'S POST-
TRIAL MOTION FOR INTEREST AND
APPLICATION FOR LITIGATION
EXPENSES**

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.)

FILED
JUN 10 AM 9:20
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court on Gateway Properties of Greater Charleston, LLC's ("Landowner" or "Gateways") Motion for Interest and Application for Litigation Expenses. Condemnor, South Carolina Department of Commerce, Division of Public Railways ("Condemnor" or "Railways") does not dispute that, based upon the jury verdict in this case, Landowner is entitled to order granting it interest, pursuant to S.C. Code 28-2-420(A) and litigations expenses pursuant to S.C. Code §28-2-510(B) and 28-2-30(14). After Landowner filed its motions, the parties conferred and have agreed upon the amounts to which Landowner is entitled to have added to the judgment in this case.

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INTEREST

Section 28-2-420(A) of the South Carolina Code provides as follows:

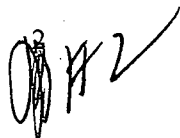
A condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on funds on deposit with the clerk of court must be offset against the interest computed pursuant to this section. Interest shall not accrue during the twenty-day period commencing upon the date of verdict or order of judgment. If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.

In this case, the Notice of Condemnation was filed October 19, 2019. At that time, Condemnor deposited \$1,800,000 with the clerk of court. That amount was later withdrawn by the Landowner via consent motion filed December 7, 2017.

The case proceeded to trial on the matter of just compensation. The jury returned a verdict in favor of the Landowner in the amount of \$3,750,000 on March 28, 2019. Therefore, Landowner is entitled to simple interest of eight percent per year from October 19, 2019 to March 28, 2019 on the amount of \$1,950,000 (the difference in the amount drawn down by the Landowner and the final award of just compensation). The parties agree that, based upon the jury verdict, Landowner is entitled to interest in the amount of \$224,383.56.

LITIGATION EXPENSES

South Carolina Code § 28-2-510 (B)(1) provides that "[a] landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses by serving on the condemnor and filing with the clerk of court an application therefor within fifteen days after the entry of the judgment." To prevail in the context of this statute "means that the compensation awarded [by the jury] . . . is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the



highest valuation of the property that is attested to at trial on behalf of the condemnor." S.C. Code § 28-2-510 (B)(2). Here, there is no dispute that Landowner prevailed at trial. The highest valuation of the property attested to on behalf of Condemnor was \$1,750,000 testified to by Deborah Haskell, MAI and the highest valuation attested to on behalf of the Landowner was \$4,580,000 by Thomas F. Hartnett, GAA. The jury returned a verdict for \$3,750,000, which is closer to the Landowner's highest value than the Condemnor's highest value. Therefore, the Landowner is entitled to an award of litigation expenses as specified in S.C. Code § 28-2-510 (B)(1) and § 28-2-30 (14).

The term litigation expenses include "the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises." S.C. Code § 28-2-30 (14) (defining "litigation expenses").

Landowner filed its application for litigation expenses along with affidavits from G. Trenholm Walker and Robert S. Dodds and provided itemized statements showing the fee charged, the basis for the fee charged, the actual time expended, and all actual expenses for which recovery is sought. See S.C. Code § 28-2-510(B) ("... The application shall ... include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.").

PA #3
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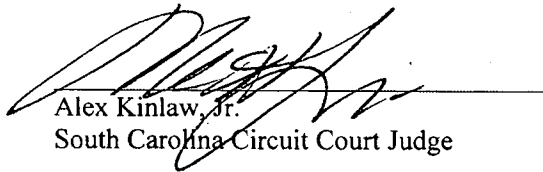
The parties have conferred and agree that Landowner is entitled to litigation expenses in the amount of **\$135,341.71**, calculated as follows:

Walker Gressette Freeman & Linton, LLC	Attorney's Fees	\$99,423.50
Walker Gressette Freeman & Linton, LLC	Expenses	\$3,557.11
ROBERT S. DODDS ATTORNEY AT LAW	Attorney's Fees	\$17,250.00
ROBERT S. DODDS ATTORNEY AT LAW	Expenses	\$25.00
Thomas F. Hartnett	Expert Witness Fees	\$8,875.00
AWR Trial Solutions	Trial Support Expense	\$6,211.10
TOTAL LITIGATION EXPENSES	\$135,341.71	

CONCLUSION

The Court orders that interest in the amount of **\$224,383.56** and litigation expenses in the amount of **\$135,341.71** be added to the judgment in this case.

AND IT IS SO ORDERED!


Alex Kinlaw, Jr.
South Carolina Circuit Court Judge

June ⁴, 2019
Greenville, South Carolina

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,)

Project: Navy Base Intermodal Facility
Tract 23S

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.)

**ORDER ON CONDEMNOR'S POST-
TRIAL MOTIONS**

FILED
2019 JUN 11 PM 3:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY [Signature]

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

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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

A handwritten signature in black ink, appearing to read "Fred Fabian", with a stylized flourish at the end.

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

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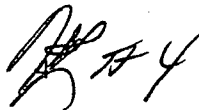
rebuild the building, as modified to meet current building codes. Two written versions of his detailed estimate were admitted as exhibits into evidence.

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

A handwritten signature in black ink, appearing to read 'Tarek Ravenel' with a stylized flourish at the end.

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

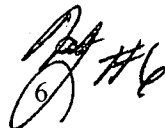
When ruling on a motion for directed verdict or JNOV, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, the Landowner in this case. See Crenshaw v. Erskine College, 424 S.C. 287, 295, 818 S.E.2d 218, 223 (Ct. App. 2018), *reh'g denied* (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

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decision to grant or deny a "new trial motion rests within the discretion of the circuit court . . ."

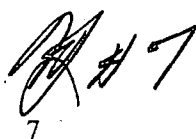
Brinkley v. S.C. Dep't of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

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).


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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.

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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:

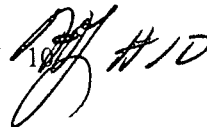
The argument of appellate counsel, in written brief and oral statement before the Court, is largely directed at the quality of the expert testimony rather than its admissibility. John Brock, who testified for the landowner, is a licensed real estate broker with eight years experience in real estate appraisal 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

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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)

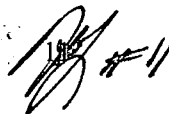
Railways has repeatedly argued that Hartnett should have been excluded because he did not base his opinion on what a willing buyer would pay a willing seller for the property. While that formula is regularly employed in condemnation cases, it is not the sole approach to real estate valuation:

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

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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

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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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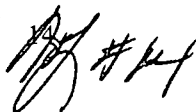
Pursuant to the wording of this statute, the Landowner is entitled to the *value* of the land and improvements taken.¹ This standard is consistent with the above noted definitions of just compensation. Fair market value is often the basis for determining just compensation, but it is not an exclusive 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.

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).

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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.

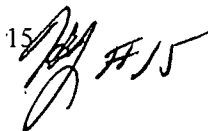
Therefore, for these many reasons and those previously stated, Railways' post-trial motions on the basis of fair market value is the exclusive test for just compensation and Hartnett did not testify to fair market value, are denied.

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.

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

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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:

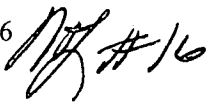
‘It occasionally happens that a parcel of real estate taken by eminent domain is of such a nature, or is held or has been improved in such a manner, that, while it serves a useful purpose to its owner, if he desired to dispose of it he would be unable to sell it at anything like its real value. A church, 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.

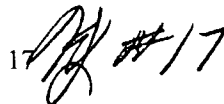
VII.

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

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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.

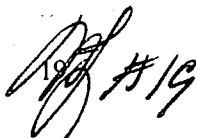
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Railways' objection was that the exhibit was hearsay. The court overruled the objection on the basis that the business records exception to the hearsay rule applied. See SCRE 803(6). Fabian testified that the communications in the exhibit were kept 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.



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

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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.

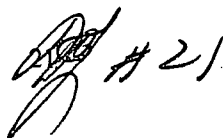
For these reasons, Railways' post-trial motions are denied as to the argument that counsel for Landowner should not have been allowed to cross examine Ravenel on the City's objection to the project based on traffic and that the examination was unduly prejudicial.

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.

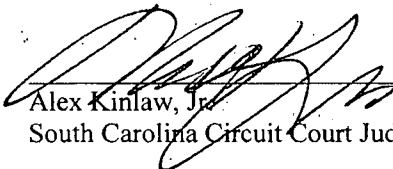
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For all these reasons, the Court believes, finds, and concludes the verdict was fully supported by the proof and the trial was conducted without prejudicial legal error, and denies the motion to set aside the verdict on the basis of the Court's discretion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

Project: Navy Base Intermodal Facility
Tract 23S

Condemnor,)

vs.)

GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)

**AMENDED ORDER
ON LANDOWNER'S POST-
TRIAL MOTION FOR INTEREST AND
APPLICATION FOR LITIGATION
EXPENSES**

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.)

FILED
2019 JUL -2 PM 4:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter is before the Court on Gateway Properties of Greater Charleston, LLC's ("Landowner" or "Gateways") Motion for Interest and Application for Litigation Expenses. Based upon the jury verdict in this case, Landowner is entitled to order granting it interest, pursuant to S.C. Code 28-2-420(A) and litigations expenses pursuant to S.C. Code §28-2-510(B) and 28-2-30(14).

INTEREST

Section 28-2-420(A) of the South Carolina Code provides as follows:

A condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on

1 *Ag #1*

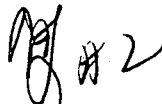
funds on deposit with the clerk of court must be offset against the interest computed pursuant to this section. Interest shall not accrue during the twenty-day period commencing upon the date of verdict or order of judgment. If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.

In this case, the Notice of Condemnation was filed October 19, 2019. At that time, Condemnor deposited \$1,800,000 with the clerk of court. That amount was later withdrawn by the Landowner via consent motion filed December 7, 2017.

The case proceeded to trial on the matter of just compensation. The jury returned a verdict in favor of the Landowner in the amount of \$3,750,000 on March 28, 2019. Therefore, Landowner is entitled to simple interest of eight percent per year from October 19, 2019 to March 28, 2019 on the amount of \$1,950,000 (the difference in the amount drawn down by the Landowner and the final award of just compensation). Based upon the jury verdict, Landowner is entitled to interest in the amount of **\$224,383.56**.

LITIGATION EXPENSES

South Carolina Code § 28-2-510 (B)(1) provides that “[a] landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses by serving on the condemnor and filing with the clerk of court an application therefor within fifteen days after the entry of the judgment.” To prevail in the context of this statute “means that the compensation awarded [by the jury] . . . is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor.” S.C. Code § 28-2-510 (B)(2). Here, there is no dispute that Landowner prevailed at trial. The highest valuation of the property attested to on behalf of Condemnor was \$1,750,000 testified to by Deborah Haskell, MAI and the highest valuation attested to on behalf of the Landowner was

2  2

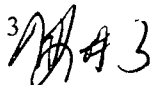
\$4,580,000 by Thomas F. Hartnett, GAA. The jury returned a verdict for \$3,750,000, which is closer to the Landowner's highest value than the Condemnor's highest value. Therefore, the Landowner is entitled to an award of litigation expenses as specified in S.C. Code § 28-2-510 (B)(1) and § 28-2-30 (14).

The term litigation expenses include "the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises." S.C. Code § 28-2-30 (14) (defining "litigation expenses").

Landowner filed its application for litigation expenses along with affidavits from G. Trenholm Walker and Robert S. Dodds and provided itemized statements showing the fee charged, the basis for the fee charged, the actual time expended, and all actual expenses for which recovery is sought. See S.C. Code § 28-2-510(B) ("... The application shall ... include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.").

Landowner is entitled to litigation expenses in the amount of **\$135,341.71**, calculated as follows:

Walker Gressette Freeman & Linton, LLC	Attorney's Fees	\$99,423.50
Walker Gressette Freeman & Linton, LLC	Expenses	\$3,557.11
ROBERT S. DODDS ATTORNEY AT LAW	Attorney's Fees	\$17,250.00
ROBERT S. DODDS ATTORNEY AT LAW	Expenses	\$25.00

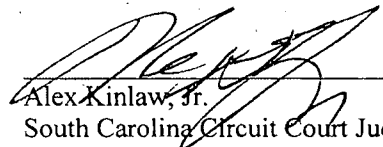
3 

Thomas F. Hartnett	Expert Witness Fees	\$8,875.00
AWR Trial Solutions	Trial Support Expense	\$6,211.10
TOTAL LITIGATION EXPENSES	\$135,341.71	

CONCLUSION

The Court orders that interest in the amount of **\$224,383.56** and litigation expenses in the amount of **\$135,341.71** be added to the judgment in this case.

AND IT IS SO ORDERED!


 Alex Kinlaw, Jr.
 South Carolina Circuit Court Judge

June ²⁵, 2019
 Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Project: Navy Base Intermodal Facility

Tract: 23S

South Carolina Department of Commerce,
Division of Public Railways,

Condemnor,

v.

Gateway Properties of Greater Charleston, LLC,

Landowner,

and

NBSC a division of Synovus Bank, VFC Partners
15 LLC, The Loft Pilates Center, LLC, Scott
Miner, and County of Charleston,

Other Condemnees.

) IN THE COURT OF COMMON PLEAS

) C/A NO. 2017-CP-10-5382

SUMMONS

FILED
2017 OCT 19 PM 12:20
JULIE A. ANDERSON
CLERK OF COURT

TO: THE LANDOWNER AND OTHER CONDEMNED ABOVE NAMED:

YOU ARE HEREBY SUMMONED, advised and notified, that pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-10, *et seq.*, the within Condemnation Notice and Tender of Payment, a copy of which is herewith served upon you, has been filed with the Clerk of Court for Charleston County. The purpose of this lawsuit is to enable the Condemnor, the South Carolina Department of Commerce, Division of Public Railways to acquire certain real property for its public purposes, as is more fully stated in the attached

Condemnation Notice and Tender of Payment. Responsive pleadings to the Condemnation
Notice and Tender of Payment are not necessary.



Keith M. Babcock
Ariail E. King
Badge Humphries
David L. Paavola
LEWIS BABCOCK L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Karen Blair Manning
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 737-1603

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

ATTORNEYS FOR THE CONDEMNOR

Columbia, South Carolina
October 18, 2017

10/11/17
12:31 PM

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C/A NO. 2017-CP-10-5382
Project: Navy Base Intermodal Facility	)	
Tract: 23S	)	
South Carolina Department of Commerce, Division of Public Railways,	)	
Condemnor,	)	LIS PENDENS
v.	)	
Gateway Properties of Greater Charleston, LLC,	)	
Landowner,	)	
and	)	
NBSC a division of Synovus Bank, VFC Partners 15 LLC, The Loft Pilates Center, LLC, Scott Miner, and County of Charleston,	)	
Other Condemnees.	)	

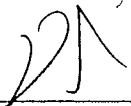
FILED
2017 OCT 19 PM 12:26
JULIE J. HARRIS
CLERK OF COURT

NOTICE IS HEREBY GIVEN that the Condemnor above named pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-10, *et seq.*, of the South Carolina Code of Laws (1976, as amended), has brought an action against the Landowner Gateway Properties of Greater Charleston, LLC, to acquire the real property described herein for public purposes, to-wit:

All that parcel or strip of land, in fee simple, containing 0.55 acre of land (ENTIRE PROPERTY), more or less, and all improvements thereon, if any, owned by Gateway Properties of Greater Charleston, LLC, shown on a plat prepared by CDM Smith dated May 26, 2017, attached hereto and made a part hereof.

Tax Map Number: 464-02-00-017

The property sought herein is to be acquired for public purposes, more particularly in conjunction with the construction and operation of the Navy Base Intermodal Facility.



Keith M. Babcock
Ariail E. King
Badge Humphries
David L. Paavola
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Karen Blair Manning
South Carolina Department of Commerce
Division of Public Railways
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SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

ATTORNEYS FOR THE CONDEMNOR

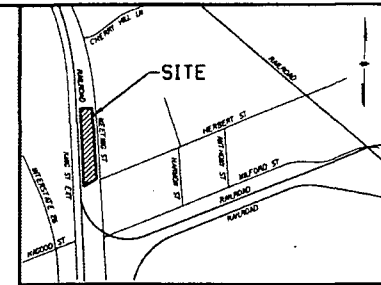
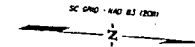
Columbia, South Carolina
October 18, 2017

SURVEYOR'S NOTES:

1. THE PURPOSE OF THIS SURVEY IS TO SHOW THE PROPERTY BOUNDARIES OF TMS PARCEL 464-02-00-017 TO USE AS A PROPERTY DESCRIPTION. THERE MAY BE EASEMENTS OR OTHER MATTERS OF RECORD AFFECTING THE PROPERTY THAT ARE NOT SHOWN HEREON. UTILITIES, BUILDINGS, ASPHALT PARKING AND OTHER PLANIMETRIC FEATURES THAT EXIST ON THIS PARCEL WERE NOT LOCATED BY THIS SURVEY.
2. I HAVE CONSULTED THE FLOOD INSURANCE RATE MAP WITH COMMUNITY PANEL NUMBER 45019C05042 HAVING AN EFFECTIVE DATE OF NOVEMBER 17, 2004 AND FIND THE SUBJECT PROPERTY SHOWN HEREON AS BEING DETERMINED TO BE OUTSIDE 500-YEAR FLOODPLAIN.
3. THE SUBJECT PARCEL IS ZONED GENERAL BUSINESS PER THE CITY OF CHARLESTON INTERACTIVE ZONING MAP.

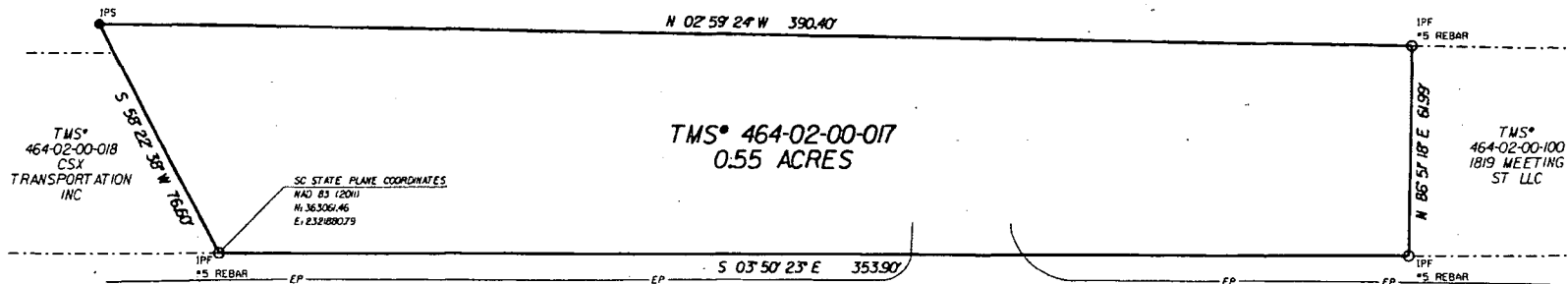
LEGEND

- PROPERTY LINE
- - - - - ADJOINING PROPERTY LINE
- IPF IRON PIN FOUND
- IPS IRON PIN SET (#5 REBAR)
- EP — EDGE OF PAVEMENT



VICINITY MAP
N.T.S.

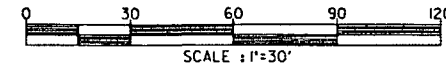
RAILROAD R/W
(PER REFERENCE *1)



MEETING STREET ROAD (US HWY 52) 82' R/W
(PER REFERENCE *3)

REFERENCES:

1. PLAT PREPARED BY A. H. SCHWACKE & ASSOCIATES, INC., DATED APRIL 18, 2006, TITLED "PLAT SHOWING THE SUBDIVISION OF PARCEL 1 (1.17 AC) INTO THREE LOTS #1709, #1819 & #1831 MEETING STREET" RECORDED IN PLAT BOOK D PAGE 598.
2. PLAT PREPARED BY KEMP C. AHRENS, DATED APRIL 20, 2001, TITLED "PLAT SHOWING PARCEL 1, A 1.167 ACRE TRACT OF LAND, OWNED BY GEORGE W. FABIAN, JR AND ABOUT TO BE CONVEYED TO TR-1 SERVICES, INC, LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," RECORDED IN PLAT BOOK EE PAGE 828.
3. SCDOT DOCKET NO. 10 238 SHEET 11 FOR RIGHT OF WAY FOR MEETING STREET (US HWY 52)



I HEREBY STATE THAT TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION, AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN. SEE SURVEYOR'S NOTES HEREON AS TO THE EXTENT AND PURPOSE OF THIS SURVEY.

John L. Hudson
JOHN L. HUDSON S.C.P.L.S. NO. 6957

C. Beebe		J. Hudson		PLAT NO. 1590		PROJECT NO. 105144	
				PLAT OF A BOUNDARY SURVEY OF TMS # 464-02-00-017 0.55 ACRES			
				PREPARED FOR SOUTH CAROLINA DEPARTMENT OF COMMERCE DIVISION OF PUBLIC RAILWAYS CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA			
DATE 5/26/2017				CDM Smith 1411 John Street Suite 1500 Charleston, SC 29403 Tel: 853/784-4002			

) IN THE COURT OF COMMON PLEAS
) C/A NO. 2017-CP-10- 5387

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CONDEMNATION NOTICE AND
TENDER OF PAYMENT
(JURY TRIAL DEMANDED)

FILED
2011 OCT 19 PM 12:20
JULIE A. HARRIS
CLERK OF COURT

TO: GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC AND OTHER
CONDEMNNEES NAMED ABOVE.

Pursuant to the South Carolina Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, *et seq.*, South Carolina Code of Laws (1976, amended), you are hereby notified as follows:

1. The South Carolina Department of Commerce, Division of Public Railways, the Condemnor, is a public body corporate and political subdivision of the State of South Carolina, and seeks to acquire the real property described herein in fee simple for public purposes.

2. Gateway Properties of Greater Charleston, LLC is named as the Landowner in this action by virtue of its claim of title as shown by the following Deed recorded in the RMC Office for Charleston County, South Carolina;

Deed dated May 15, 2006, and recorded May 24, 2006, in Book S584, Page 137.

Grantor – Fabian Properties, L. P.

3. NBSC a division of Synovus Bank is named as an Other Condemnee in this action by virtue of the following Mortgages recorded in the RMC Office for Charleston County, South Carolina:

Mortgage dated May 15, 2013 and recorded May 17, 2013, in Book 0331 page 817.

Mortgage dated July 21, 2017 and recorded July 24, 2017, in Book 0654 page 252.

4. VFC Partners 15 LLC is named as is named as an Other Condemnee in this action by virtue of the following Mortgage recorded in the RMC Office for Charleston County, South Carolina:

Mortgage dated May 15, 2006 and recorded May 24, 2006, in Book S584 page 621, assigned to VFC Partners 15 LLC on November 12, 2011, and recorded February 28, 2012 in Book 0235 page 938.

5. VFC Partners 15 LLC is also named as an Other Condemnee in this action by virtue of the Assignment of Rents dated May 15, 2006, recorded in the RMC Office for Charleston County, South Carolina in Book U584 page 775, assigned to VFC Partners 15 LLC on November 12, 2011, and recorded February 28, 2012 in Book 0235 page 938.

6. The Loft Pilates Center, LLC is named as an Other Condemnee in this action by virtue of the Lease Agreement dated December 23, 2015 and ending December 31, 2016, between Gateway Properties of Greater Charleston, LLC and The Loft Pilates Center, LLC. Upon information and belief, The Loft Pilates Center continues to be a tenant as of the date of this Condemnation.

7. Scott Miner is named as an Other Condemnee in this action by virtue of that Guaranty of Lease dated December 18, 2015, given by Scott Miner to Gateway Properties of Greater Charleston, LLC, identified as Exhibit "B" to the Lease Agreement dated December 23, 2015, between Gateway Properties of Greater Charleston, LLC and The Loft Pilates Center, LLC.

8. County of Charleston is named as an Other Condemnee in this action by virtue of real property taxes due on the Property for 2017.

9. The following is a description of the real property subject to this action and a description of the interest sought to be acquired in and to the property by the Condemnor:

All that parcel or strip of land, in fee simple, containing 0.55 acre of land (ENTIRE PROPERTY), more or less, and all improvements thereon, if any, owned by Gateway Properties of Greater Charleston, LLC, shown on a plat prepared by CDM Smith dated May 26, 2017, attached hereto and made a part hereof.

Tax Map Parcel Number 464-02-00-017

10. The South Carolina Department of Commerce, Division of Public Railways is vested with the power of eminent domain pursuant to Section 13-1-1330(5) and Section 28-2-60, South Carolina Code of Laws (1976, as amended).

11. The real property sought herein is to be acquired for public purposes, more particularly in conjunction with the construction and operation of the Navy Base

Intermodal Facility and associated railway lines, in Charleston County, South Carolina.

12. This action is brought pursuant to S.C. Code Ann. § 28-2-240, South Carolina Code of Laws (1976, as amended).

13. The South Carolina Department of Commerce, Division of Public Railways, has complied with the requirements set forth in S.C. Code Ann. § 28-2-70(A), South Carolina Code of Laws (1976, as amended), by having the subject property interests appraised and making the appraisal available to the Landowner where required by law, and certifies to the Court that a negotiated resolution has been attempted prior to the commencement of this action.

14. Project plans are available for inspection at 2120 Noisette Blvd., Suite 105, North Charleston, South Carolina 29405.

15. THE CONDEMNOR HAS DETERMINED JUST COMPENSATION FOR THE PROPERTY AND RIGHTS TO BE ACQUIRED HEREUNDER TO BE THE SUM OF ONE MILLION EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,800,000.00) AND HEREBY TENDERS PAYMENT THEREOF TO THE LANDOWNER.

16. Payment of this amount will be made to the Landowner if within thirty (30) days of service of this Condemnation Notice, the Landowner in writing requests payment, and agrees to execute any instruments necessary to convey to the Condemnor the property interests and rights described herein above. The Agreement and Request for Payment must be sent first class certified mail with return receipt requested or delivered in person to the Condemnor, care of Keith M. Babcock, Esquire, Post Office Box 11208, Columbia, South

Carolina 29211. If no Agreement and Request for Payment is received by the Condemnor within the thirty (30) day period, the tender is considered rejected.

17. If the tender is rejected, the Condemnor has the right to file this Condemnation Notice with the Clerk of Court of the County where the property is situated and deposit the tender amount with the Clerk. The Condemnor shall give the Landowner notice that it has done so and may proceed to take possession of the property interests and exercise the rights described in this Condemnation Notice.

18. AN ACTION CHALLENGING THE CONDEMNOR'S RIGHT TO ACQUIRE THE PROPERTY AND RIGHTS DESCRIBED HEREIN MUST BE COMMENCED IN A SEPARATE PROCEEDING IN THE COURT OF COMMON PLEAS WITHIN THIRTY (30) DAYS OF THE SERVICE OF THIS CONDEMNATION NOTICE, OR THE LANDOWNER WILL BE CONSIDERED TO HAVE WAIVED THE CHALLENGE.

19. THE CONDEMNOR HAS ELECTED NOT TO UTILIZE THE APPRAISAL PANEL PROCEDURE. Therefore, if the tender herein is rejected, the Condemnor shall notify the Clerk of Court and shall demand a trial to determine the amount of just compensation to be paid. A copy of that notice must be served on the Landowner. That notice shall state whether the Condemnor demands a trial by jury or by the Court without a jury. The Landowner has a right to demand a trial by jury. The case may not be called for trial before sixty (60) days after the service of that notice, but it may thereafter be given priority for trial over other civil cases. The Clerk of Court shall give the Landowner written notice by mail of the call of the case for trial.

20. THEREFORE, IF THE TENDER HEREIN IS REJECTED, THE LANDOWNER IS ADVISED TO OBTAIN LEGAL COUNSEL AT ONCE, IF NOT ALREADY OBTAINED.

21. In the event the Landowner accepts the amount tendered in this Notice, the attached Agreement and Request for Payment form should be signed and returned to the undersigned attorney for the Condemnor within thirty (30) days of your receipt of this Notice.



Keith M. Babcock
Ariail E. King
Badge Humphries
David L. Paavola
LEWIS BABCOCK L.L.P.
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Columbia, South Carolina 29211
(803) 771-8000

Karen Blair Manning
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 737-1603

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

ATTORNEYS FOR THE CONDEMNOR

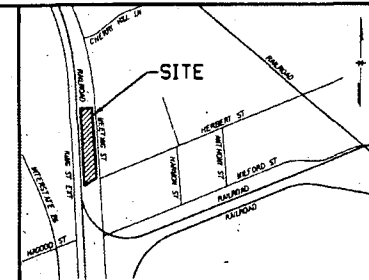
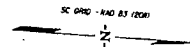
October 18, 2017
Columbia, South Carolina

SURVEYOR'S NOTES:

1. THE PURPOSE OF THIS SURVEY IS TO SHOW THE PROPERTY BOUNDARIES OF TMS PARCEL 464-02-00-017 TO USE AS A PROPERTY DESCRIPTION. THERE MAY BE EASEMENTS OR OTHER MATTERS OF RECORD AFFECTING THE PROPERTY THAT ARE NOT SHOWN HEREON. UTILITIES, BUILDINGS, ASPHALT PARKING AND OTHER PLANIMETRIC FEATURES THAT EXIST ON THIS PARCEL WERE NOT LOCATED BY THIS SURVEY.
2. I HAVE CONSULTED THE FLOOD INSURANCE RATE MAP WITH COMMUNITY PANEL NUMBER 45019C0504J HAVING AN EFFECTIVE DATE OF NOVEMBER 17, 2004 AND FIND THE SUBJECT PROPERTY SHOWN HEREON AS BEING DETERMINED TO BE OUTSIDE 500-YEAR FLOODPLAIN.
3. THE SUBJECT PARCEL IS ZONED GENERAL BUSINESS PER THE CITY OF CHARLESTON INTERACTIVE ZONING MAP.

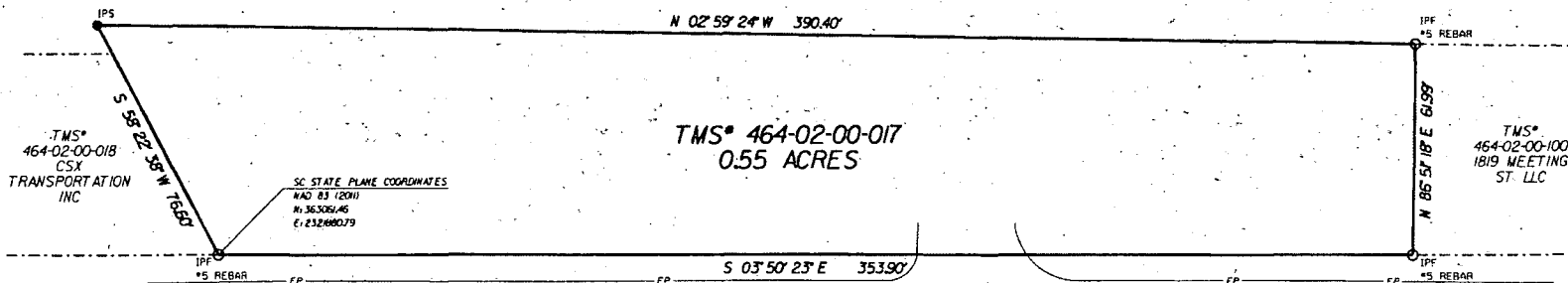
LEGEND

- PROPERTY LINE
- - - ADJOINING PROPERTY LINE
- IPF IRON PIN FOUND
- IPS IRON PIN SET (#5 REBAR)
- EP EDGE OF PAVEMENT



VICINITY MAP
N.T.S.

RAILROAD R/W
(PER REFERENCE *1)



MEETING STREET ROAD (US HWY 52) 82' R/W
(PER REFERENCE *3)

REFERENCES:

1. PLAT PREPARED BY A.H. SCHWACKE & ASSOCIATES, INC., DATED APRIL 18, 2006, TITLED "PLAT SHOWING THE SUBDIVISION OF PARCEL 1 (1.17 AC) INTO THREE LOTS #1799, #1819 & #1831 MEETING STREET" RECORDED IN PLAT BOOK DF PAGE 588.
2. PLAT PREPARED BY KEMP C. AHRENS, DATED APRIL 20, 2001, TITLED "PLAT SHOWING PARCEL 1, A 1.167 ACRE TRACT OF LAND, OWNED BY GEORGE W. FABIAN, JR. AND ABOUT TO BE CONVEYED TO TRI-I SERVICES, INC., LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," RECORDED IN PLAT BOOK EE PAGE 828.
3. SCDOT DOCKET NO. 10.258 SHEET 11 FOR RIGHT OF WAY FOR MEETING STREET (US HWY 52)



I HEREBY STATE THAT TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION, AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN. SEE SURVEYOR'S NOTES HEREON AS TO THE EXTENT AND PURPOSE OF THIS SURVEY.

John L. Hudson
JOHN L. HUDSON

S.C. PLS. NO. 8957

DATE	C. Beebe	DATE	J. Hudson	PLAT NO.	1590	PROJECT NO.	105144
SOUTH CAROLINA SURVEYOR'S SEAL No. C00402 PLAT OF A BOUNDARY SURVEY OF TMS # 464-02-00-017 0.55 ACRES CDM Smith 5/26/2017							
PREPARED FOR SOUTH CAROLINA DEPARTMENT OF COMMERCE DIVISION OF PUBLIC HIGHWAYS							
CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA							

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO. 2017-CP-10- 5382
COUNTY OF CHARLESTON	)	
Project: Navy Base Intermodal Facility	)	
Tract: 23S	)	
South Carolina Department of Commerce,	)	
Division of Public Railways,	)	
	)	
Condemnor,	)	
	)	
v.	)	
Gateway Properties of Greater Charleston, LLC,	)	
	)	
Landowner,	)	
	)	
and	)	
	)	
NBSC a division of Synovus Bank, VFC Partners	)	
15 LLC, The Loft Pilates Center, LLC, Scott	)	
Miner, and County of Charleston,	)	
	)	
Other Condemnees.	)	

AFFIDAVIT

FILED
2017 OCT 19 PM 12:20
CLERK OF COURT

FILED

PERSONALLY APPEARED before me Alec Thompson, who, being first duly sworn,

says and deposes:

1. That the amount tendered by the Condemnor to the Landowner(s) in the
Condemnation Notice has been rejected;
2. That the Condemnor demands a trial not earlier than sixty (60) days after the
date of service of this affidavit upon the Landowner(s);
3. That the Condemnor demands a trial by jury;
4. That, at this time, the Condemnor does not demand that this action be given
priority over other cases;

5. That the Clerk of Court should notify the Landowner(s) and Other
Condemnee(s) designated in the caption above of the call of the case.


Alec Thompson
Project Engineer
South Carolina Department of Commerce,
Division of Public Railways

SWORN to before me this 16th
day of October, 2017


Notary Public for South Carolina
My Commission Expires: 06-13-2021

) IN THE COURT OF COMMON PLEAS

) C/A NO. 2017-CP-10- 5382

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NOTICE OF FILING

FILED
2017 OCT 19 PM 12:21
JULIE J. JACOBI, CLERK OF COURT

TO: GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC AND OTHER
CONDEMNNEES NAMED ABOVE.

Pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-230(b), *et seq.*, Code of Laws of South Carolina (1976, as amended), you are hereby notified that as you have rejected the amount tendered as just compensation as stated in the Condemnation Notice and Tender of Payment, the Condemnor has filed the Condemnation Notice and Tender of Payment with the Clerk of Court for Charleston County, pursuant to Section 28-2-90, Code of Laws of South Carolina (1976, as amended), and may now proceed to take possession of the

property interests and exercise the rights described in the Condemnation Notice.



Keith M. Babcock
Ariail E. King
Badge Humphries
David L. Paavola
LEWIS BABCOCK L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Karen Blair Manning
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 737-1603

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

Columbia, South Carolina

October 18, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Project: Navy Base Intermodal Facility

Tract: 23S

South Carolina Department of Commerce,
Division of Public Railways,

Condemnor,

v.

Gateway Properties of Greater Charleston, LLC,

Landowner,

and

NBSC a division of Synovus Bank, VFC Partners
15 LLC, The Loft Pilates Center, LLC, Scott
Miner, and County of Charleston,

Other Condemnees.

) IN THE COURT OF COMMON PLEAS

) C/A NO. 2017-CP-10- 5382

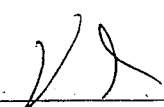
NOTICE OF TAKING POSSESSION

FILED
2017 OCT 19 PM 12:25
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE LANDOWNER AND OTHER CONDEMNEDS:

YOU ARE HEREBY NOTIFIED that, pursuant to the South Carolina Eminent Domain Procedure Act Section 28-2-230, of the South Carolina Code of Laws (1976, as amended), the Condemnation Notice and Tender of Payment was filed with the Charleston County Clerk of Court on 10/19, 2017, and the amount of just compensation stated in the notice as determined pursuant to Section 28-2-70(a) was deposited therewith on that day.

By this Notice of Taking Possession, the Condemnor hereby exercises its right to take possession of the Property and proceed with the public project as authorized by S.C. Code Ann. § 28-2-90.



Keith M. Babcock
Ariail E. King
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ATTORNEYS FOR THE CONDEMNOR

Columbia, South Carolina
October 18, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-5382
SOUTH CAROLINA DEPARTMENT OF	)	Project: Navy Base Intermodal Facility
COMMERCE, DIVISION OF PUBLIC	)	Tract 23S
RAILWAYS,	)	
	)	
Condemnor,	)	NOTICE OF APPEARANCE
	)	AND ANSWER TO
vs.	)	CONDEMNATION NOTICE AND
	)	TENDER OF PAYMENT
GATEWAY PROPERTIES OF	)	(JURY TRIAL DEMAND)
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.	)	
	)	

Please be advised that G. Trenholm Walker, of the firm of Walker Gressette Freeman and Linton, LLC, hereby appears in the above-captioned action as Counsel of Record for the Landowner Gateway Properties of Greater Charleston, LLC ("Landowner"). Service of all documents and notices related to this litigation should be made at the address listed below.

Landowner asserts that the sum offered by Condemnor is not just compensation for the taking and demands a trial by jury to determine the amount of just compensation to be paid.

By: *G. Trenholm Walker*
G. Trenholm Walker (SC Bar #5777)
WALKER GRESSETTE FREEMAN & LINTON, LLC
66 Hasell Street (29401)
P.O. Drawer 22247

Charleston, SC 29413
(843) 727-2208
Walker@WGFLAW.com

October __, 2017

Charleston, South Carolina

This is a condemnation case related to the construction and operation of the Navy Base Intermodal Container Transfer Facility (ICTF) and associated railway lines in Charleston County, South Carolina. The public purpose of this project is to construct a facility that will help meet the growing capacity of the Port of Charleston and facilitate the transfer of cargo from the port to railroad lines for transportation throughout the Southeast. Landowner's property, Tract 23S, commonly known as 1799 Meeting Street, Charleston, SC, is located along what is referred to as the ICTF's southern rail line access route. This condemnation is a total take of the subject property as was filed on October 19, 2017.

Tract 23S is 0.55 acres in size and at or near the time of condemnation contained a two-story building that was occupied by eLifespaces (which is also owned by Frederick Fabian, the managing member of Gateway), The Loft Pilates Center, and Capella Carolinas. Condemnor hired Deborah Haskell, CRE, FRICS, MAI, to appraise the property. Ms. Haskell analyzed the subject property using the sales comparison and income approach methods, ultimately concluding that the value of the property was \$1,750,000 on the date of condemnation. Landowner hired Thomas Hartnett, GAA, CRB, to appraise the property. Mr. Hartnett analyzed the property solely using the cost approach, concluding that the reproduction cost for the subject property was \$4,580,000 on the date of condemnation.

Thomas Hartnett's testimony should be excluded because:

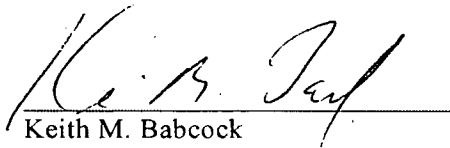
1. Under South Carolina law, just compensation in a condemnation case is limited to the fair market value of the property to be taken, plus any damages to the remainder of the property, if any. S.C. CODE ANN. § 28-2-370; *Housing Authority of City of Charleston v. Olasov*, 320 S.E.2d 478, 481 (S.C. Ct. App. 1984) (citing *South Carolina State Highway Dep't v. Miller*, 117 S.E.2d 561 (S.C. 1960); *United States v. Twin City Power Co.*, 248 F.2 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958)).
2. "Fair market value is the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of

all uses to which the property is adopted and for which it is capable of being used.” *Olasov*, 320 S.E.2d at 481 (citations omitted).

3. Mr. Hartnett testified at his deposition that his property valuation did not represent the property’s fair market value as it did not satisfy the “willing buyer, willing seller” just compensation standard. (Hartnett Dep. 29:10-25; 33:6-35:3, Oct. 10, 2018).
4. Accordingly, Mr. Hartnett’s testimony should be excluded at the trial of this case.

Moreover, and as detailed in Condemnor’s memorandum, the cost approach appraisal method used by Mr. Hartnett is highly disfavored by the courts precisely because of its unreliability and tendency to overstate value. Pursuant to case law and professional standards, the cost approach method should only be used when determining value for a brand-new building or a special use building, like a cathedral or a water treatment plant. Even in those rare and unique circumstances, the valuation must still represent what a willing buyer would pay a willing seller for the property, with neither party under compulsion to buy or sell. Mr. Hartnett has failed to adhere to this standard.

Accordingly, Condemnor respectfully moves for an Order excluding the testimony of Thomas F. Hartnett at the trial of this case.


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1513 Hampton Street
Post Office Box 11208
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(803) 771-8000

Columbia, South Carolina
March 25, 2019

ATTORNEYS FOR THE CONDEMNOR

) IN THE COURT OF COMMON PLEAS
) C/A NO. 2017-CP-10-5382

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**CONDEMNOR'S MEMORANDUM IN
SUPPORT OF ITS MOTION IN LIMINE
TO EXCLUDE THE TESTIMONY OF
LANDOWNER'S APPRAISER**

The South Carolina Department of Commerce, Division of Public Railways (“Public Railways” or “Condemnor”) has moved to exclude the testimony of Gateway Properties of Greater Charleston, LLC’s (“Gateway” or “Landowner”) appraiser Thomas Hartnett because his opinion of value is not based on the legal definition of fair market value. As such, Mr. Hartnett is not competent to testify to the value of 1799 Meeting Street during the trial of this matter.

BACKGROUND

The South Carolina Department of Commerce, Division of Public Railways ("Public Railways" or "Condemnor") is acquiring properties in conjunction with the construction and

R-0058

operation of the Navy Base Intermodal Facility (ICTF) and associated railway lines in Charleston County, South Carolina. As part of this project, Public Railways will be constructing new rail lines for southern access to the ICTF ("Southern Route").

Gateway's property located at 1799 Meeting Street is being acquired by Public Railways as part of the construction of the Southern Route. 1799 Meeting Street is a two-story, 6,708 square foot office building constructed in 2007. At or near the time of condemnation, it housed three tenants: eLifespaces, a security and audio/visual company; Loft Pilates Center, an exercise facility, and Capella Carolinas, which is believed to be a bingo operator.

Public Railways hired Deborah B. Haskell, MAI to appraise the subject property. Ms. Haskell determined that the fair market value of the property at the time of condemnation was one million seven hundred fifty thousand dollars (\$1,750,000.00). Ms. Haskell analyzed the property using the sales comparison and income approach appraisal methods. Landowner hired Thomas Hartnett to appraise the subject property. Mr. Hartnett analyzed the property solely using the cost approach. Based on the cost approach, Mr. Hartnett determined that the value of the property at the time of condemnation was four million five hundred eighty thousand dollars (\$4,580,000.00).

During his deposition, Mr. Hartnett conceded that his determination of just compensation is not the property's fair market value as that term has been defined by South Carolina courts. Moreover, Mr. Hartnett has not adequately substantiated his basis for using cost approach, which is strongly disfavored by courts, and for excluding the sales comparison and income approaches to value, which are the standard and preferred valuation methodologies. The cost approach to value is only appropriate in rare and unique circumstances, which are not present in this case.

FACTS

In 2007, Landowner constructed a two-story commercial office building to house eLifespaces, a security and audio/visual company owned and operated by Gateway's managing member Fred Fabian. Since construction, Gateway has at various times leased significant portions of the property to various local businesses as office or exercise space.

It is Landowner's contention in this condemnation action, through its appraiser Thomas Hartnett, that the subject property is unlike any other office building in the Greater Charleston area such that no true market for its purchase exists and no sale or lease comparables could be located for analysis. (Hartnett Dep. 24:12-25:4, Oct. 10, 2018).

LEGAL STANDARD

The South Carolina Eminent Domain Procedure Act provides that: "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered." S.C. CODE ANN. § 28-2-370.

In condemnation cases, "landowner[s are] entitled to the fair market value of [their] property at the time of the taking, not its speculative value." *Housing Authority of City of Charleston v. Olasov*, 320 S.E.2d 478, 481 (S.C. Ct. App. 1984) (emphasis added) (citing *South Carolina State Highway Dep't v. Miller*, 117 S.E.2d 561 (S.C. 1960); *United States v. Twin City Power Co.*, 248 F.2d 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958)). "Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Id.* (citations omitted).

ARGUMENT

Landowner's appraiser Mr. Hartnett has testified that his cost approach to value does not represent willing-buyer, willing-seller fair market value. Accordingly, pursuant to Rules 702 and 703 of the South Carolina Rules of Evidence, he is not competent to testify as an expert during trial as to the value of just compensation in this matter.

Even if the cost approach to value might have been appropriate in this case, which it is not, Mr. Hartnett has failed to substantiate his exclusion of the standard and preferable approaches to value—the sales comparison and income capitalization approaches. As such, he is not competent to testify as to value of just compensation in this case.

I. Thomas Hartnett's Testimony Should Be Excluded From Trial Because It Does Not Fall Within The Legal Bounds Of Fair Market Value.

Mr. Hartnett's cost approach valuation of the subject property did not provide fair market value, as defined by South Carolina courts, because he did not use the willing-buyer, willing-seller standard.¹ Accordingly, his testimony should be excluded.

South Carolina courts define fair market value as "that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Olasov*, 320 S.E.2d at 481. During his deposition, Mr. Hartnett agreed with this standard, Hartnett Dep. 9:22-

¹ See Standard South Carolina Condemnation Jury Charge:

Market value of property taken or injured for public use means the fair market value of the property as between one who wants to purchase and one who wants to sell, its present value at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale, not what could be obtained for it a forced sale or under peculiar circumstances, nor a value obtained from the necessities of another.

Stated another way, the fair market value of property injured or taken for the public use means that price which a purchaser would give and a seller would take in the ordinary course of trade where neither of them is acting under any compulsion; the criterion is market value, not sentimental value.

Citing *Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188 (S.C. 1972); 20 C.J.S. 821-822.

10:3; 27:5-13, and conceded that his valuation did not represent willing-buyer, willing-seller measure of fair market value:

Q: ... [M]y question to you is, as we're trying to find fair market value, which we defined as willing buyer and willing seller, correct?

A: Correct.

Q: Is it your testimony that a willing buyer and willing seller would have come to the figure of \$4,580,000 for a transaction for the subject property in October 2017? Is that your testimony?

A: No sir.

Q: What is your testimony?

A: My testimony is that in order to make Mr. Fabian whole he needed to receive this much money for what he was having to give up to the state or to whomever the condemnor is, the Railway Commission.

(Hartnett Dep. 29:10-25) (emphasis added).

Mr. Harnett further elaborated on why he chose not to use the willing-buyer, willing-seller standard for fair market value:

Q: Let me make sure I understand. I understand that you have used the cost approach because you, if I understand correctly, you wanted to ensure that Mr. Fabian had the reproduction value for the property that was taken; is that right?

A: Correct.

Q: And you weren't looking at replacement value, correct?

A: Correct.

Q: And in so doing because you were looking at reproduction value, you weren't looking all [sic] willing buyer, willing seller; you were looking at reproduction?

A: In this case Mr. Fabian himself was not a willing seller. I mean, he was a seller who had to sell, but it was not willingly that he sold to the Railway

Commission. So in a truer sense his market value, he was not a willing seller. So it's different when you have a willing seller and a willing buyer.

Q: Sure. And in fairness, Mr. Hartnett, this is a situation you have in every condemnation case, isn't it, where some condemning authority comes to some landowner and says for a public purpose of some sort we need all or part of your property? Isn't that the situation in every condemnation case?

A: Certainly.

(Hartnett Dep. 31:1-32:4).

Ultimately, Mr. Hartnett conceded that **his valuation does not represent the fair market value of the subject property:**

Q: What I want to make sure I'm clear on is that we have a condemnation, correct?

A: Correct.

Q: We have a total take, correct?

A: Correct.

Q: And we have a piece of property that you have analyzed using the reproduction cost, correct?

A: Correct.

Q: And my question is that reproduction cost, does that reflect willing buyer, willing seller under no compulsion?

A: Is that replacement cost?

Q: No. I asked you is your reproduction cost, is that willing buyer, willing seller, no compulsion?

A: I'm not sure what you mean by that, Mr. Babcock.

Q: **Let me rephrase it. We start the process of trying in a condemnation case to come up with fair market value, correct?**

A: **Correct.**

Q: And again, it's easier in a total take because we're looking at the fair market value of an entire piece of property as of a certain date?

A: Correct.

Q: **And fair market value is defined as you've already testified, as willing buyer, willing seller, no compulsion, correct?**

A: **That's the standard definition of fair market value, yes, sir.**

Q: That's the appraiser's definition, correct?

A: Correct.

Q: That's the legal definition in a condemnation case?

A: That's the control of the currency's definition of it. That's what I used in the report.²

Q: I want to make sure. Fair market value, willing buyer, willing seller?

A: Correct.

Q: No compulsion?

A: Correct.

Q: **Does the reproduction cost that you have used with Mr. Fabian, is that willing buyer, willing seller, no compulsion as of October 2017?**

A: **No, sir, I don't think so.**

(Hartnett Dep. 33:6-35:3) (emphasis added).

² When defining "market value" in his Appraisal, Mr. Hartnett cited to the Code of Federal Regulations:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale . . . under conditions whereby: [b]uyer and seller are typically motivated [and a] reasonable time is allowed for exposure on the open market.

Hartnett Report, Bates No. L-00009524, at 13 (citing 12 C.F.R. Part 34.42(g); 55 FR 34696, as amended).

Mr. Hartnett has completely disregarded fair market value and the “willing buyer, willing seller” standard in order to create his \$4,580,000 cost approach valuation. He has done so despite fair market value being the legal standard for determining just compensation in eminent domain cases. Because Mr. Hartnett is preparing to testify to a valuation methodology that does not comport with the legal definition of fair market value, he is not competent to testify as an expert witness pursuant to Rules 702 and 703, SCRE. Accordingly, his testimony should be excluded from trial.

II. Of The Three Standard Approaches To Value, The Cost Approach Is Rarely Used And Is Only Appropriate For Newly Constructed Buildings Or A Special Use Property.

Mr. Hartnett is not competent to testify to the valuation of the subject property because he does not substantiate his basis for excluding the standard and preferred approaches to valuation in favor of only using the cost approach. As such, he should not be qualified as expert under Rules 702 and 703, SCRE.

a. Three Approaches To Property Valuation.

The three standard approaches used to determine fair market value are: (1) the sales comparison approach, (2) the income, or income capitalization approach, and (3) the cost approach. *See, e.g., City of Spartanburg v. Laprinakos*, 230 S.E.2d 443, 444 (S.C. 1976); *Reliance Ins. Co. v. Smith*, 489 S.E.2d 674, 675-77 (S.C. Ct. App. 1997); *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 339 S.E.2d 131, 132 (S.C. Ct. App. 1985) (noting the three approaches are “the usual and customary methodology” used to determine “fair market value”). Of these three, sales comparison and income approach are preferred over the cost approach, and only in the rarest of circumstances it is appropriate to use the cost approach alone and exclude the other two approaches to value.

The sales comparison approach bases market value on what similar properties in the area have sold for recently. *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 676. These sales can be adjusted for time, acreage, size, and amenities. This approach “assumes that an informed purchaser will pay no more for a property than the cost of acquiring an existing, or substitute property with the same utility.” *Id.* (internal quotations omitted). Comparable sales are generally the best evidence of value for a property. 72 AM. JUR. 2d § 649 *Comparison of methods for valuation* (2018); see also *United States v. Whitehurst*, 337 F.2d 765, 775 (4th Cir. 1964) (“It is settled law that comparable sales are the best evidence of value.”).

The income, or income capitalization, approach “looks at property value through the eyes of a typical investor.” *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 675. This approach is generally favored for commercial properties, particularly ones with income-producing leaseholders. See *id.* at 676; *Hull v. Spartanburg County Assessor*, 641 S.E.2d at 911. Income capitalization accounts for the “present worth of future income”—arriving at a property’s present market value by calculating reasonably expected earnings discounted for risks and other variables. *South Carolina Tax Comm’n v. South Carolina Tax Bd. of Review*, 339 S.E.2d at 132; 72 AM. JUR. 2d § 644 *Net income* (2018). Notably here, Landowner’s property was fully leased to third parties at the time of condemnation.

The cost approach uses the value of the land plus the cost to reproduce any improvements at current construction prices, minus depreciation. *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 676. “The cost approach is based on the assumption that an informed purchaser would pay no more for a property than the cost of producing a substitute property with the same utility.” *Id.* (emphasis added) (internal quotations omitted). This approach is appropriate with newly constructed buildings and even more so with specialty or unique use buildings, like a church or school, where

the market for the property is unascertainable under either sales comparison or income capitalization methods. *Id.* at 677; *Cloverport Sand & Gravel Co. Inc. v. United States*, 6 Cl. Ct. 178, 189 (1984) (citations omitted) (“The cost approach is in some circumstances appropriate where the property taken has no ready market and the income capitalization approach cannot be used.”); 72 AM. JUR. 2d § 655 *Reproduction of replacement costs* (2018) (“Thus, reproduction costs should be utilized only in those limited instances in which no other method of valuation will yield a legally and economically realistic value for property.”); 60 AM JUR. TRIALS 447, § 26 *Landowner’s Evidence of Market Value in Eminent Domain Proceeding* (2019) (the cost approach should only be used if neither the sales comparison nor income capitalization approach are applicable). Accordingly, the cost approach method is rarely used. NICHOLS ON EMINENT DOMAIN Ch. 12B § 11.1[1] (Matthew Bender, 3rd ed.) (2018) (“Evidence of reproduction cost is admissible only in exceptional cases.”); *see also* 60 AM. JUR. TRIALS 447 § 28 *Reproduction cost approach* (2018) (“this approach is the exception, not the rule”).

b. Mr. Harnett Failed To Substantiate His Basis For Only Using The Cost Approach.

Mr. Hartnett was required to undertake a more thorough analysis of Landowner’s property as having a special use or special purpose building before deciding to ignore the sales comparison and income approaches and rely solely on the cost approach. In order to testify as an expert witness, Mr. Harnett was required to do more.

According to The Appraisal Institute’s guide, “[t]he usefulness of the cost approach is discounted in many condemnor appraisal guidelines.” REAL PROPERTY VALUATION IN CONDEMNATION 108 (2018). As an example, the guide cites the Uniform Appraisal Standards for Federal Land Acquisitions:

While not inherently flawed, **the cost approach has often been misused**, leading a number of courts to identify the cost approach as ‘one of the least reliable indicia of market value’ for the purpose of measuring just compensation. Indeed, as the Fifth Circuit observed, when improperly applied, ‘reproduction cost evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult.’ As a result, the cost approach is rarely acceptable as a stand-alone indication of value for federal acquisitions

[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 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.’”

Id. (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) (emphasis added) (“To say that the cost approach is generally disliked by the courts is an understatement.”).

Courts agree that the cost approach necessitates a more thorough analysis of its reliability. For example, in a leading case, a property with a dormant cement distribution plant was presented as a specialty building with a cost approach appraisal; however, because the business was no longer in use and “there was no proof to support a finding that [the building] could reasonably be expected to be replaced,” the use of the cost approach was overturned on appeal. *City of Glen Cove v. Switzer Contracting Co., Inc.*, 47 A.D.2d 917 (N.Y.S. 2d 1975). Likewise, another trial court inappropriately allowed a cost approach valuation in a condemnation case involving a laundry and dry cleaning business—despite the building’s many special fixtures and extensive modifications for installing equipment necessary to conduct that business—because “the building was not so unique as to be without value for purposes other than a dry cleaning and laundry business.” *City*

of *Rochester v. S.C. Toth, Inc.*, 59 A.D.2d 1020, 1020-21 (N.Y.S. 2d 1977; see also LOCAL GOVERNMENT LAW Ch. 21 § 34 (John Martinez, 2d ed.) (2018) (“The presence of special features or special equipment in a building does not necessarily indicate the property is unique use property.”); Michael Rikon, *Valuing Property in Condemnations*, 19 PRAC. REAL ESTATE LAW. 17, no. 5 (Sept. 2003) (“The cost approach is rarely used in condemnation cases for real estate. Real property must constitute a ‘specialty’ for the cost approach to be employed.”).³

When examined on the reasons why Landowner’s property classified as special use or special purpose, Mr. Harnett could only identify three factors underlying his conclusion: (1) photos of the foundation and construction; (2) steel used in construction; and (3) the theatre room. (Harnett Dep. 26:1-19; 28:9-21; 35:7-16). “Specialty” steel foundations do not justify abandoning the sales comparison approach, much less abandoning fair market value altogether. NICHOLS ON EMINENT DOMAIN Ch. 12B § 12.11[1] (“As a general rule, the market value of property is the measure of damages. Ordinarily, the cost of construction is not material, and especially the cost of

³ Numerous authorities further highlight the cost approach’s disfavored status. For example, in *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, the United States Supreme Court clarified that it is the property, and not the cost of it, that is protected by the Fifth Amendment. 70 S.Ct. 217, 221-22 (1949) (rejecting the cost approach method because it had no “bear[ing] on what a prospective purchaser would have paid”); see also *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 99 S.Ct. 1854, 1858 (1979) (“The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid . . . would be repeated in a sale of the condemned property.”).

In affirming a bankruptcy court’s rejection of the cost approach method, a Texas federal district court explained that **the cost approach should only be used as a valuation method if would make reasonable business sense to reproduce the asset being valued.** *In re Diamond Beach VP, LP*, 551 B.R. 590 (S.D. Tex. 2016) (discussing prior case law that rejected the cost approach because it did not produce an amount that a willing buyer would pay a willing seller).

some particular improvement, which, however convenient to the owner, may not correspondingly increase the market value.”).⁴

Other than his own conclusory analysis of these items, Mr. Hartnett did not offer any research that he conducted into construction of other buildings in the Charleston area to determine if in fact the foundation and construction were unlike any other; did not explain his expertise in construction that allowed him to testify as such; did not explain why or how the steel used in Landowner’s building was different from all other building in Charleston; and did not explain why the theatre room could not be used or converted by another tenant. Moreover, Mr. Hartnett could not explain why no other tenant in the Charleston area could use the building, especially in light of the fact that Landowner had leased the property to other tenants up until the time of condemnation. Mr. Hartnett was required to do more.

In addition to complications defining what constitutes “specialty” or “unique use,” **the cost approach is disfavored because of difficulties in accounting for depreciation**, which includes

⁴ Moreover, here, the landowner has confirmed that the particular foundation he chose to install is **not related to the business uses of the building**. (Fabian Dep. 33:21-35:1). Thus even if the building is held to be “special use,” the Condemnor should not be forced to pay for higher quality materials or items unrelated to the building’s use.

Regarding the theatre room used by a tenant for audio/visual demonstrations and related commercial sales, Mr. Hartnett stated:

This was a special use building to what Mr. Fabian does in his business. He had one room in there that, you know, almost like a soundproof thing in the White House or something where he could conduct demonstrations and all I guess for clients in this specialty built soundproof, bullet proof, whatever it was, room.

(Hartnett Dep. 35:7-16). Having one soundproof room in a building does not justify departing from the willing buyer, willing seller framework. To the extent that Mr. Fabian’s business was affected by the condemnation, any such lost profits are not compensable in a condemnation case. *Mibbs, Inc. v. South Carolina Dep’t of Revenue*, 524 S.E.2d 626, 628 (S.C. 1999) (“Collateral damages, including lost business profits, are not recoverable on a takings claims.”).

both physical wear and tear and the effects of obsolescence also known as “functional” depreciation. See generally 72 AM. JUR. 2d § 655 *Reproduction of replacement costs* (2018); NICHOLS ON EMINENT DOMAIN Ch. 12B § 11.1[2]. Moreover and most notably, **the cost approach tends to overstate value**. *United States v. Benning Hous. Corp.*, 276 F.2d 248, 250 (5th Cir. 1960) (citations omitted) (“reproduction cost evidence almost invariably tends to inflate valuation”); see also *United States v. Certain Interests in Property in Champaign County*, 271 F.2d 379, 382 (7th Cir. 1959) (citations omitted) (“[The cost approach] method generally is held to be one of the least reliable indicia of market value.”). Here, Mr. Hartnett, simply estimated a flat 7% physical depreciation for “the usual wear and tear of an office building during the 10 years of its existence” without any further substantiation. (Hartnett Report, Bates No. L-00009558).

Other changes over time also affect valuation—like regulatory changes. For example, in the Replacement Cost Estimate contained in Landowner’s appraisal, a ninety three thousand five hundred dollar (\$93,500.00) projected cost is included to install an elevator in the hypothetically rebuilt building. (Hartnett Report, Bates No. L-00009570, at 14.1). The building currently does not have an elevator. But local code would now require one to be built. (Morey Dep. 94:5-97:1). Using the cost approach, Landowner would have Condemnor paying \$93,500 for an elevator which does not exist. It is for reasons like these that the cost approach is generally disfavored.

In sum, the cost approach is universally acknowledged as an outlier appraisal method to be sparingly used because it frequently overstates value, as well as due to complications in both defining specialty uses and in accounting for depreciation. It should only be used when there is truly no ascertainable market value for a property. Mr. Harnett has failed to substantiate that there was in fact no market for the property at the time of condemnation.

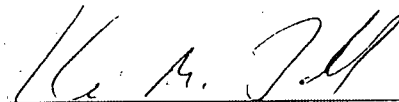
Landowner's property is of the type commonly sold in the marketplace—a ten-year-old office building with some upgraded fixtures and features—for which no legal justification exists to deviate from the willing buyer, willing seller standard for determining just compensation. Accordingly, Mr. Harnett's testimony should be excluded from trial.

CONCLUSION

To determine just compensation in a South Carolina eminent domain case, courts must utilize the fair market value standard, which is the price a willing buyer would pay a willing seller without any compulsion on either party to act. As Mr. Harnett conceded, his cost approach to value does not represent what a willing buyer would pay a willing seller for the subject property. While the cost approach method can in unique cases be employed to determine fair market value, it has not been done so here.

Moreover, even if the cost approach was appropriate, Mr. Harnett has failed to substantiate his basis for concluding that Landowner's property is special use and for excluding the standard sales comparison and income approaches to value.

For these reasons, Mr. Harnett's testimony should be excluded at trial.



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March 25, 2019

ATTORNEYS FOR THE CONDEMNOR

In the Matter Of:

SC Dept of Comm Div of Pub Railways vs.
Gateway Prop of Greater Chas, LLC, et al.

Frederick Fabian

October 09, 2018



A. William Roberts, Jr. & Associates

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1 understand to be particular about Gateway
2 Properties's foundation at 1799 Meeting Street
3 that's different from other buildings?

4 A. Uh-huh. Yes. Well, let's start in
5 the parking lot and work our way into the
6 building. The city made us install a French drain
7 system under the parking lot that was massively
8 expensive, and there's pictures that we've sent to
9 you all that depict all of that. Then the
10 foundation itself has 27 85 foot concrete pilings
11 down to the marl on which a, in some parts a three
12 foot concrete slab sits atop with reinforced
13 rebar.

14 In that we used the rebar for ten
15 twenty foot grounding rods to form the -- a
16 grounding system. Again, worried of lightening
17 and other kind of surges. So that any kind of
18 surge would be dissipated to ground before it
19 sought other paths like computers and electronics
20 and things like that.

21 Q. Does the grounding rods, is that
22 somehow related to the use of the building?

23 A. Yes.

24 Q. How so?

25 A. Well, it would be like you saying,

1 well, I've got a grounding rod for my electrical
2 system. If you don't have it, it doesn't work,
3 right. I'm confused on even that question.

4 Q. I'm trying to ask you how that relates
5 to -- the grounding rods relate to the use of the
6 building for eLifespaces?

7 A. It's a functional use. I mean, it's
8 ground. It's ground. It's an electrical system
9 ground.

10 Q. Does a typical building have a
11 grounding system?

12 A. Not like that, no.

13 Q. Is there something about your business
14 that necessitated that that grounding system?

15 A. No. I would think that any good
16 office building would have something similar, but
17 we watch some pretty low construction standards
18 here in town. So I don't know how to answer that
19 one.

20 Q. Let me see if I can see what you're
21 saying. It's not related necessarily to what kind
22 of business you have in 1799 Meeting Street; it's
23 just related to the quality of the construction
24 you wanted to put in the building?

25 A. That's correct. There you go. Spot

1 on.

2 Q. Back to the foundation you had
3 mentioned. Again, you mentioned 27 85 foot
4 pilings. How do you see that as being unique as
5 compared to what you know about other buildings
6 and how they're constructed?

7 A. I'd say a number of things. Like for
8 example, the building across the parking lot, they
9 use -- what do they call it -- telephone poles for
10 their pilings, which I don't consider to be of
11 quality in nature.

12 Q. This is not a feature that would be a
13 quality of good construction?

14 A. Yes. Yes. Yes.

15 Q. This is related to how eLifespaces
16 functions as a building?

17 A. Correct.

18 Q. And the drainage, French drainage
19 system you talked about, why was that required?

20 A. City of Charleston required it.

21 Q. For drainage purposes?

22 A. Uh-huh.

23 Q. That's not related to the business of
24 eLifespaces?

25 A. Correct.

In the Matter Of:

SC Department of Commerce Division vs.
Gateway Properties of Greater Charleston

Thomas F. Hartnett, GAA

October 10, 2018



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1 if it would change. We can reconvene and hear how
2 it would change, probably by telephone, but if it
3 wouldn't change I need to know that as well. Fair
4 enough?

5 A. Fair enough.

6 MR. BABCOCK: Does that work for you,
7 Trenholm?

8 MR. WALKER: That's fine.

9 BY MR. BABCOCK:

10 Q. What I'd like to do is kind of just
11 walk through your appraisal. I have questions on
12 certain pages. I'm not going to ask you about
13 everything.

14 Your cover letter on page 2 of your
15 appraisal, the cover letter is dated May 15, 2017,
16 and it's directed from you to Mr. Fabian and
17 indicates that the fair market -- well, indicates
18 the value of the property at the date of take --
19 strike that -- as of May 15, 2017 was \$4,580,000;
20 is that correct?

21 A. Correct.

22 Q. You indicate that you were using the
23 cost approach to value, correct?

24 A. Yes, sir. Yes, sir.

25 Q. Using that cost approach to come up

1 with, as you say, market value, but that would be
2 fair market value?

3 A. Yes, sir.

4 Q. As of May 15 is that number?

5 A. Yes.

6 Q. You understand that the condemning
7 authority is Palmetto Railways, correct?

8 A. I do. Yes, sir.

9 Q. I'm looking at page 7 of your
10 appraisal, and it's a certification of appraiser.
11 If we look down to the final bullet point, it
12 says: Assistance was provided to me by Steven J.
13 Morey, a project manager with Design Build
14 Construction, LLC. He provided me with
15 replacement costs for the existing improvements?

16 A. Yes, sir.

17 Q. Did I read that correctly?

18 A. Yes, sir, you did.

19 Q. Is that the individual who provided
20 you with the replacement costs that you used for
21 your appraisal?

22 A. It is, yes, sir.

23 Q. The final certification is that you
24 have not appraised the subject property for, nor
25 have you performed any appraisals for the subject

1 substitution, what are properties like the subject
2 property selling for. Whatever unit of value you
3 use, whether it be square foot, cubic foot,
4 whatever valuation method you use. In this case
5 the buildings that I looked at and was familiar
6 with were not the same types of building in the
7 typical what I just call brick and mortar building
8 without the substantial foundation and other
9 things that went into Mr. Fabian's building
10 according to my reading of the plans and
11 specifications.

12 So I just didn't think that there were
13 in the area -- when I say area, in the Charleston
14 Trident area -- of a building like this that had
15 sold that would give me a fair indication without
16 making substantial adjustments to the comparable
17 sale. Now, some of them might be subjective.
18 Some might be extracted from the market. What
19 type of construction was it, based on its use.

20 So I didn't find any buildings, office
21 buildings that had sold in what I call the greater
22 Charleston area that were comparable to the
23 quality of this building. I could have used
24 others that weren't comparable, but as I just
25 said, I would have to make substantial adjustments

1 to the assessment price, some of which could be
2 market extracted and some of which would probably
3 be the terminology that I used based on my
4 opinion.

5 Q. Subjective?

6 A. That's the word I used, subjective.
7 It would be better to have someone who knew what
8 it would cost to build that building do that for
9 me because I wouldn't have been comfortable making
10 adjustments to typical brick and mortar office
11 buildings.

12 Q. So did you go out and look for sales
13 that you could use in the traditional sense of the
14 sales comparison?

15 A. There should be some. I have reviewed
16 my comparable sales data, which you have. I think
17 you'll find there's some office buildings in there
18 that I used.

19 Q. That you looked at and didn't use?

20 A. Correct.

21 Q. So we'll go through that. I have your
22 file. We'll go through that in a minute to do
23 just that. Now, what were the factors? You
24 talked about the substantial foundation. Tell me
25 the different factors -- strike that.

1 Tell me what factors you used in
2 determining that this property was one that you
3 couldn't find a comparable sale. What was
4 different about this property?

5 A. Well, first of all, I have never
6 really had available to me photographs of
7 ground-up construction project such as this one,
8 which Mr. Fabian certainly has plenty. I think I
9 have them and you have them. But after looking at
10 the type of materials that are apparently going
11 into the foundation, type of equipment necessary
12 to install these materials, it was pretty obvious
13 to me that any cost numbers that I could put
14 together would not be fair to my client because it
15 would be subjective. It would be extracted from
16 the market, if I could find market extracted
17 adjustments. And in fairness to the client, I
18 just felt it was necessary to get somebody who
19 knew.

20 Now what the factors were you asked
21 me, primarily the photographs. And I'm limited in
22 my ability to thoroughly understand plans and
23 specifications and I do it, have done it for
24 years, but that's just not my profession to know
25 every detail in a plan and spec.

1 Q. Let's take a step back, because really
2 I wasn't coming back to the cost approach. I was
3 still staying with the sales comparison approach.
4 Let's kind of walk through what that means. And
5 you know, you've done this for years. When we
6 talk about fair market value we're talking about
7 willing buyer, willing seller with no compulsion;
8 is that fair?

9 A. Correct.

10 Q. What we're trying to establish is what
11 would be the fair market value as to the date of
12 take, correct?

13 A. Correct.

14 Q. In looking at that willing buyer,
15 willing seller under no compulsion, the question
16 is did simply having photos of the building being
17 built and having the material for the foundation
18 equipment to install, is it your opinion that
19 somebody who would be looking to buy the property
20 would be paying additional sums of money for the
21 property? Is that what you're saying?

22 A. Let me put it this way. There are
23 replacement costs and reproduction costs. Any
24 office building that may have been comparable to
25 this could have been a replacement cost. It's an

1 office. It has the same amount of square footage,
2 same amount of offices, got parking spaces. That
3 would be a replacement. But in this instance I
4 was looking at really a reproduction cost because
5 of the quality of that building, and the uses that
6 Mr. Fabian told me he has in it. I'm sure you
7 went to the building, or maybe David or somebody
8 went to the building.

9 So in doing a cost approach normally
10 we will use -- and again, you're on a sales
11 comparison approach now, but it's so interrelated
12 to what we're talking about. The normal office
13 building would have been a replacement cost, but
14 Mr. Fabian had more in it than the normal
15 reproduced office building because of the
16 specialty foundations, the equipment he had in it,
17 the -- excuse me, not the equipment, the steel
18 that was used in the building, at least what was
19 apparent to me from reading the plans and specs
20 and watching the photographs and going through the
21 building.

22 So that's why the sales comparison
23 approach in my opinion was not suitable. It would
24 have given me a replacement cost for Mr. Fabian's
25 building, but I don't know that that would have

1 suited his business and the uses to which he puts
2 the building.

3 Q. There's no question that Mr. Fabian
4 had the right to build whatever building he wanted
5 to on his property when he built it in 2007. No
6 one is challenging that.

7 A. Correct.

8 Q. What I want to do, though, is focus on
9 right now the sales comparison approach, because
10 my question to you is, as we're trying to find
11 fair market value, which we defined as willing
12 buyer and willing seller, correct?

13 A. Correct.

14 Q. Is it your testimony that a willing
15 buyer and willing seller would have come to the
16 figure of \$4,580,000 for a transaction for the
17 subject property in October 2017? Is that your
18 testimony?

19 A. No, sir.

20 Q. What is your testimony?

21 A. My testimony is that in order to make
22 Mr. Fabian whole he needed to receive this much
23 money for what he was having to give up to the
24 state or to whoever the condemnor is, the Railway
25 Commission.

1 Q. Let me make sure I understand. I
2 understand that you have used the cost approach
3 because you, if I understand correctly, you wanted
4 to ensure that Mr. Fabian had the reproduction
5 value for the property that was taken; is that
6 right?

7 A. Correct.

8 Q. And that you weren't looking at
9 replacement value, correct?

10 A. Correct.

11 Q. And in so doing because you were
12 looking at reproduction value, you weren't looking
13 all willing buyer, willing seller; you were
14 looking at reproduction?

15 A. In this case Mr. Fabian himself was
16 not a willing seller. I mean, he was a seller who
17 had to sell, but it was not willingly that he sold
18 to the Railway Commission. So in a truer sense
19 his market value, he was not a willing seller. So
20 it's different when you have a willing seller and
21 a willing buyer.

22 Q. Sure. And in fairness, Mr. Hartnett,
23 this is a situation you have in every condemnation
24 case, isn't it, where some condemning authority
25 comes to some landowner and says for a public

1 purpose of some sort we need all or part of your
2 property? Isn't that the situation in every
3 condemnation case?

4 A. Certainly.

5 Q. That's true of every condemnation
6 case, and there may be some people who get happy
7 when they're condemned, but most times the
8 landowners are not happy when they're condemned;
9 isn't that true?

10 A. Vast majority of time.

11 Q. So this situation is no different than
12 any other total take, is it?

13 A. To the extent that it is a total take
14 that the state is acquiring the entire property
15 it's not, but the details of it are.

16 Q. But you've done total takes before,
17 correct?

18 A. Yes, sir.

19 Q. And they are not unusual in the world
20 of condemnation, are they?

21 A. No. In fact, they're preferred.

22 Q. And in fact, in some ways for an
23 appraiser that's an easier setting because when
24 you get into the after value and diminution of
25 value that sometimes is a little tricky, isn't it?

1 A. That's why I just used the word
2 preferred. The total take is preferred.

3 Q. Because you just have to have one
4 value?

5 A. Correct..

6 Q. What I want to make sure I'm clear on
7 is that we have a condemnation, correct?

8 A. Correct.

9 Q. We have a total take, correct?

10 A. Correct.

11 Q. And we have a piece of property that
12 you have analyzed using the reproduction cost,
13 correct?

14 A. Correct.

15 Q. And my question to you is that
16 reproduction cost, does that reflect willing
17 buyer, willing seller under no compulsion?

18 A. Is that replacement cost?

19 Q. No. I asked you is your reproduction
20 cost, is that willing buyer, willing seller, no
21 compulsion?

22 A. I'm not sure what you mean by that,
23 Mr. Babcock.

24 Q. Let me rephrase it. We start with the
25 process of trying in a condemnation case to come

1 up with fair market value, correct?

2 A. Correct.

3 Q. And again, it's easier in a total take
4 because we're looking at the fair market value of
5 an entire piece of property as of a certain date?

6 A. Correct.

7 Q. And fair market value is defined as
8 you've already testified, as willing buyer,
9 willing seller, no compulsion, correct?

10 A. That's the standard definition of fair
11 market value, yes, sir.

12 Q. That's the appraiser's definition,
13 correct?

14 A. Correct.

15 Q. That's the legal definition in a
16 condemnation case?

17 A. That's the control of the currency's
18 definition of it. That's what I used in the
19 report.

20 Q. I want to make sure. Fair market
21 value, willing buyer, willing seller?

22 A. Correct.

23 Q. No compulsion?

24 A. Correct.

25 Q. Does the reproduction cost that you

1 have used with Mr. Fabian, is that willing buyer,
2 willing seller, no compulsion as of October 2017?

3 A. No, sir, I don't think so.

4 Q. You have told me about why you didn't
5 use the sales comparison approach?

6 A. Correct.

7 Q. Tell me why you didn't use the income
8 approach.

9 A. For the very same reasons. This was a
10 special use building to what Mr. Fabian does in
11 his business. He had one room in there that, you
12 know, almost like a soundproof thing in the White
13 House or something where he could conduct
14 demonstrations and all I guess for clients in this
15 speciality built soundproof, bullet proof,
16 whatever it was, room.

17 But going back, if I might, to your
18 definition of --

19 Q. Are you answering my question? I'm
20 happy to hear what you have to say. I want to
21 make sure we get the question and answers part
22 done. I want to make sure before we leave income
23 approach.

24 A. Sorry. We were on income. For the
25 very same reasons.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON
3 Project: Navy Base Intermodal Facility
4 Track 23S
5 SOUTH CAROLINA DEPARTMENT OF COMMERCE DIVISION
6 OF PUBLIC RAILWAYS,
7 Condemnor,
8 vs. Case No. 2017-CP-10-5382
9 GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC,
10 Landowner.
11 (Full Caption on Page 2)
12 DEPOSITION OF: STEVEN JOHN MOREY, Volume II
13 DATE: November 8, 2018
14 TIME: 10:19 AM
15 LOCATION: Walker Gressette Freeman Linton LLC
16 66 Hasell Street
17 Charleston, SC
18 TAKEN BY: Counsel for the Condemnor
19 REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC
20
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1 Q. Okay. And just -- I know you -- we're
2 doing good, but if you'd let me finish, that would
3 be helpful.

4 A. I apologize.

5 Q. Okay. So you've included the cost for
6 an elevator in here of -- let me see what that is.
7 I see it in the subtotal category of \$85,000; is
8 that correct?

9 A. Yes.

10 Q. Okay. All right. So that's something
11 that the building at 1799 Meeting Street did not
12 have; correct?

13 A. Correct.

14 Q. But you've added that into the
15 rebuilding cost estimate.

16 A. Correct.

17 Q. Okay. And why are you adding that in?

18 A. Because you can't build that same
19 building now that we were able to build then
20 without an elevator.

21 Q. Okay. But there's no confusion. There
22 is not currently or there never was an elevator in
23 that 1799 Meeting Street building; correct?

24 A. That's correct.

25 Q. Okay. So if you were to rebuild it

1 exactly as it stood today or at the time of
2 condemnation, you would not include a line item for
3 elevator; correct?

4 A. No, I --

5 MR. WALKER: Objection. Form of the
6 question. Go ahead and answer.

7 THE WITNESS: I would have to have an
8 elevator in it if I built it at the time of
9 condemnation. Code would require it.

10 BY MR. PAAVOLA:

11 Q. Right. But apart from the code
12 requiring it, if someone were to build a mirror
13 image of the building, it would not include an
14 elevator; correct?

15 A. You couldn't. Code would not allow it.

16 Q. Yeah. So I'm asking you regardless of
17 the code.

18 A. We couldn't build the building then.
19 The code would not allow it.

20 Q. And I hear what you're saying, but I'm
21 just not -- okay.

22 A. You can't build it.

23 Q. All right.

24 A. They won't let you. They'll shut you
25 down.

1 Q. Mr. Morey, that's not my question,
2 okay? I'm not asking about the code regulations.
3 What I'm asking you is if somebody -- that building
4 doesn't include an elevator, does it?

5 A. The existing building does not.

6 Q. There's no confusion about that.

7 A. Then no. That's correct.

8 Q. But your assumption here assumes that
9 you build it today.

10 A. No. Build it at condemnation.

11 Q. Build it at condemnation.

12 A. Or today.

13 Q. Codes change. Now you need an
14 elevator.

15 A. Correct.

16 Q. That's something new the building would
17 not have today; right?

18 A. Do what?

19 Q. That would be something new for the
20 building.

21 A. Say that again.

22 Q. The elevator would be something new to
23 the building if you build a new -- built today, it
24 would be something it didn't have prior to
25 condemnation.

1 A. Correct.

2 Q. Okay. Which is what, and back in
3 Exhibit 19, Mr. Fabian is telling you correctly?

4 A. Yes.

5 (EXHIBIT 22, Email Chain to Mr. Harper,
6 et al., from Mr. Morey dated 4-5-17, premarked for
7 identification.)

8 BY MR. PAAVOLA:

9 Q. Let me hand you Exhibit 22. Exhibit 22
10 is an email that you sent to a number of
11 individuals; correct?

12 A. Yes.

13 Q. Okay. And can you just tell me
14 generally what the purpose of this email was?

15 A. This is to get the estimate to rebuild
16 the building.

17 Q. Okay. So this is -- you're asking --
18 and who are the recipients, just generally? Are
19 these contractors?

20 A. Yes, subcontractors.

21 Q. Subcontractors. Okay. So you're
22 asking subcontractors to give you estimates to
23 rebuild 1799 Meeting Street; correct?

24 A. Yes.

25 Q. Okay. And you say to them in the

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
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.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10-5382

Project: Navy Base Intermodal Facility
Tract 23S

**LANDOWNER'S OPPOSITION
TO MOTION TO EXCLUDE
THOMAS F. HARTNETT, GAA, CRB**

FILED
2019 MAR 25 AM 11:32
JULE J. ARMSTRONG
CLERK OF COURT

Landowner respectfully submits this response in opposition to Condemnor's (sometimes referred to as "Railways") Motion to Exclude Landowner's Expert Witness Thomas F. Hartnett, GAA, CRB ("Hartnett").

In addition to the familiar standard of Rule 702 of the South Carolina Rules of Evidence—that 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—it is worth noting that in the particular context of a condemnation cases, 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. Our Supreme Court has specifically rejected the exclusion of an expert appraiser on this basis:

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 contends Hartnett's opinion should be excluded because he employed the cost approach to valuation instead of the sales comparison and income approaches employed by its expert. Railways cannot cite a single South Carolina case stating that the cost approach should never be employed or that an expert using the cost-approach should be excluded regardless of the factual circumstances. Additionally, Railway's argument that the opinion should be excluded is contrary to South Carolina and the Constitutions of South Carolina and the United States, which require just compensation for a taking of property.

Hartnett is an expert in real estate valuation and Landowner intends to offer him to render an opinion as to just compensation for the taking in this case. Hartnett is a South Carolina Certified General Appraiser (#CG558) and a licensed real estate agent, with more than forty years' experience in the field of real estate and real estate appraisal. Among other designations, he holds GAA - General Accredited Appraiser from the National Association of Realtors, Appraisal

Section. He has been qualified as an expert in real estate valuation countless times in the South Carolina Circuit Court, US District Court, and US Bankruptcy Court.

Hartnett's opinion is that the cost approach to value is the most applicable and reliable approach to determining just compensation because of the specialty nature of the building being condemned. There are three accepted approaches to valuing real property - the sales comparison approach, the income approach, and the cost approach. Hartnett considered all three, and determined that cost approach was the most reliable indicator of the value of the property taken due to the complexities of construction and the special purpose nature of the building. Additionally, there are no readily identifiable sales of similar properties. In employing the cost approach, Hartnett values the land based on comparable sales and then utilizes a cost estimate (reduced for depreciation) to replace the building located at 1799 Meeting Street Road.

According to the South Carolina and United States Constitutions, the question for the jury is 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. 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 e.g., 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)); 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) ("The purpose of payment of just compensation is to

put the condemnee in as good a position pecuniarily as he would have been had his property not been taken.”).

While fair market value is typically the basis for determining just compensation, it is not the only valuation that our courts have approved, contrary to what is argued by Railways in this case. The Supreme Court of South Carolina has specifically recognized that there are circumstances where fair market price does not equate to just compensation and another approach to valuation is warranted:

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). Even the United States Supreme Court recognizes that the sales comparison approach is not only approach to just compensation. United States v. 564.54 Acres, 441 U.S. 506, 513, 99 S.Ct. 1854, 1858 (1979) (citations omitted); U.S. v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402–03, 70 S. Ct. 217, 221 (1949) (noting that in the absence of appropriate comparable sales other approaches to value may be relevant).

South Carolina courts have recognized the cost approach and that there are situations where the cost approach is the most appropriate of the three approaches. See also 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).

Other courts also recognize that the cost approach can be used as an appropriate measure of damages in takings cases.¹ See e.g. Pete v. United States, 209 Ct.Cl. 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”).

The cost approach is particularly appropriate where, as here, the improvements being valued are of a special purpose nature. 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.

¹ Notably, Railways’ appraiser even stated in her appraisal that “[t]here are three traditional approaches to determine value the sales comparison approach the income capitalization approach and the cost approach.” She determined the cost approach was unnecessary in this case on the following basis (1) “[t]he property that is the subject of this analysis consist of an office building that was constructed in 2007. If it were offered for sale on the open market, it is likely that a purchaser would acquire the property” and (2) “[t]he cost approach however is not appropriate because of the age of the building and difficulty in estimating accrued depreciation and functional obsolescence. Thus the cost approach was omitted from the analysis.” Ex. A.

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).

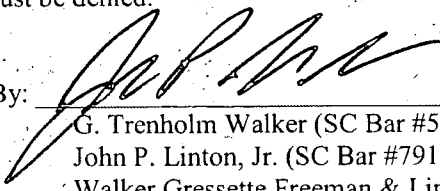
The Court continue and stated, “[t]he cost approach is one of the ‘other means’ for deducing the fair market value of special use property in eminent domain cases.” Id.; see also, Matter of Suffolk County, 47 N.Y.2d 507, 511, 392 N.E.2d 1236, 419 N.Y.S.2d 52 (1979); In re Lido Boulevard, Town of Hempstead, 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).

In this case, Landowner will present testimony and exhibits demonstrating that this building was not a standard office building in any respect. It is a special purpose building. The construction of the building incorporated extensive electronic and technological systems. The entire first floor was designed around these elaborate systems that were constructed into the building itself. There are substantial differences between its special construction and use and those of a run of the mill office building that must factor into determining what is just compensation.

Additionally, Hartnett is expected to testify that there are no similar properties in the market area, much less similar ones that have been sold that could be used as sales comparables.

Railways' Motion to exclude Hartnett is a request to have this court resolve factual issues that our Supreme Court reserves to the jury: (1) whether the comparable sales identified by Railways' appraiser are truly comparable; (2) whether the property is an "office" building as argued by Railways, (3) whether the building is a special use property, (4) whether there are no readily identifiable sales comparisons for this property, and (5) whether the cost approach is only one of the three methods that provides just compensation to the Landowner. Just as in every case, the law specifies the jury must hear the evidence and resolve these factual issues.

For the forgoing reasons the motion must be denied.

By: 

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March 25, 2019
Charleston, South Carolina

VALUATION ANALYSIS AND CONCLUSIONS

VALUATION METHODOLOGY

There are three traditional approaches to determine value; the sales comparison approach, the income capitalization approach, and the cost approach. These valuation methods are described as follows:

Sales Comparison Approach

The sales comparison approach is based on the principle of substitution and the premise that a willing and knowledgeable buyer will pay no more for a property than the cost to obtain an equally desirable substitute. Conversely, a seller will accept no less than recent prices for properties with similar locational and physical attributes. The application of the sales comparison approach involves comparing the property under analysis with similar properties that have recently sold and for which the sale price and terms are known.

The real estate market is characterized by inefficiency. Price variations reflect differences in a property's physical and economic attributes, the proposed use of the land, the legal interest conveyed, the competitive investment environment, and the structure of the transaction. Because comparability is a relative concept, it is necessary to not only identify the highest and best use of the property under analysis but also to understand the significant differences between the subject and the sale properties. The sales comparison approach reflects the actions of market participants.

Income Capitalization Approach

The income capitalization approach is the most meaningful appraisal technique in valuing the fee ownership of properties that generate revenue. This methodology is predicated on an investor's financial objective to realize the economic benefits derived from real property in the form of a positive cash flow. The price that an investor regards as prudent is that price at which the projected income stream is expected to provide an acceptable return on and return of invested capital. As a result, the indicated market value of the property is the present worth of the reasonably anticipated income stream and reversionary value at the termination of the investment.

Cost Approach

The cost approach is based on the premise that an informed, prudent buyer would not pay more for a property than the cost to develop an equally suitable alternative. This assumes that the properties have legal title and offer economically equivalent benefits. The cost approach is an estimate of the replacement value of a property as determined by the cost of the land and improvements. Rather than valuing property as a whole, the cost approach reflects the sum of the land value and improvement or building value.

The inherent strengths of each approach and the nature of the property under analysis must be evaluated to determine which will provide supportable estimates of market value. The property that is the subject of this analysis consists of an office building that was constructed in 2007. If it were offered for sale on the open market, it is likely that a purchaser would acquire the property

VALUATION ANALYSIS AND CONCLUSIONS

for owner occupancy or as an investment. Thus, the sales comparison and income capitalization approaches are meaningful indicators of value. I was able to locate recent sales of office buildings similar to the 1799 Meeting Street Road property with which to determine value. These properties were acquired for both owner occupancy and investment.

I also utilized the income capitalization approach to determine property value. I identified leases in office buildings with similar locational and physical characteristics to the subject as well as expense levels, lease terms and current capitalization rates. The cost approach, however, is not appropriate because of the age of the building and difficulty in estimating accrued depreciation and functional obsolescence. Thus, the cost approach was omitted from the analysis.

SALES COMPARISON APPROACH

I utilized the sales comparison approach to develop a value for the subject property as of the October 19, 2017 date that the Notice of Condemnation was filed with the Court of Common Pleas. This valuation methodology is based on the principle of substitution and the premise that a willing and knowledgeable buyer will pay no more for a property than the cost to obtain an equally desirable substitute. I was able to find recent arms-length transactions that provide indications of value for the subject. As a common denominator, I used the price paid per square foot of building, which is widely used by both sellers and purchasers.

In this case, the most profitable use of the subject property is for continued use as an office building. The major factors that affect the price are location, accessibility, compatibility of surrounding land uses, condition of the building, occupancy history and sufficient land to accommodate parking. These factors are reflected in my analysis.

I analyzed five sales of office properties in the competitive market that occurred between May 2016 and November 2017. These sales are summarized on the chart below and discussed on the following pages.

OFFICE BUILDING SALES METROPOLITAN CHARLESTON													
Identification	Grantor	Land Area Ac-Sq Ft	Building Acres	Age Condition	Classification	Use	Land to Bldg Ratio	Zoning	Date of Sale	Sale Price Acres	Price Per Bldg SF	Cap Rate	
1799 Meeting St. Rd Charleston	Gateway Properties	0.55 23,953	5,708 2 Story	2007 Good	Class S Metal	Office	3.57	GB	10/20/2016				
1 578 East Bay St. Charleston	Perry & Lovers LLC 578 East Bay LLC	0.54 27,707	3,550 1 Story	1997 Good	Class C Masonry	Office Multitenant	3.24	LI	3/23/17	\$2,340,000	\$273.65	8.3%	
2 1049 Morrison Dr Charleston	Newton Holdings LLC APEX 1031 Exchange LLC Pearce Development, LLC	0.16 7,053	5,430 2 Story	1988 Average	Class C Masonry	Office Multitenant	1.30	GB	6/29/17	\$1,950,000	\$359.12	6.4%	
3 1314 Rutledge Ave Charleston	J.R. Development, LLC MER Land, LLC	0.33 14,592	3,390 1 Story	1974 Good	Class D Frame	Office Single tenant	2.60	GB	5/16/15	\$1,395,000	\$218.65	10.1%	
4 1930 Charlie Hall Blvd North Charleston	Pacific Amusements Co 1930 Charlie Hall, LLC	0.37 37,397	3,993 1 Story	2001 Good	Class D Frame	Medical office Single tenant	3.79	BC	7/15/17	\$1,957,500	\$195.85	9.2%	
5 2863 Tricorn St. North Charleston	Sandollar Associates, LLC Thompson Bldg, et al	0.97 42,253	3,325 2 Story	2000 Good	Class D Frame	Medical office Single tenant	4.53	B-1	11/1/17	\$1,560,000	\$167.27		

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WINTHROP

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C-00006611

R-0104

) IN THE COURT OF COMMON PLEAS
) C/A NO. 2017-CP-10-5382

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**CONDEMNOR'S POST TRIAL
MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT;
NEW TRIAL NISI REMITTITUR; NEW
TRIAL; NEW TRIAL ABSOLUTE; NEW
TRIAL PURSUANT TO THE
THIRTEENTH JUROR DOCTRINE**

Base Intermodal Container Transfer Facility (ICTF) and associated railway lines in Charleston County, South Carolina.

In a condemnation action, the only real issue normally involves the question of just compensation at the time of condemnation. S.C. Code Ann. § 28-2-370 provides the formula for just compensation, which is as follows:

In determining just compensation, only the value of the property to be taken, any diminution in the value of the remaining property, and any benefits as provided by Section 28-2-360 may be considered.

This condemnation action was a total take of the subject property; therefore, the only question at issue in the trial of this matter was the value of Landowner's entire property at the time of condemnation on October 19, 2017.

In accordance with the Eminent Domain Procedure Act, when Railways initiated this condemnation action it tendered to Landowner its determination of just compensation of \$1,800,000 in accordance with an appraisal prepared by William Ford. S.C. Code Ann. § 28-2-90.¹ Landowner rejected this offer.

There are three standard approaches to valuation: (1) the sales comparison approach; (2) the income, or income capitalization approach, and (3) the cost approach. Regardless of the approach used, in a condemnation action the value of just compensation must reflect the fair market value of the property at the time of condemnation.

¹ Railways retained an MAI designated appraiser after this matter moved into condemnation—Deborah B. Haskell CRE, FRICS, MAI. Mr. Ford and Landowner's appraiser Thomas Hartnett are not MAI designated. The MAI designation is generally considered the highest designation for real estate appraisers.

During the trial of this matter, during its opening statement counsel for Railways told the jury that it was not seeking a verdict in any amount less than the tender to Landowner of \$1,800,000.

Over Railways' objection, Landowner presented the testimony of Thomas Harnett who opined that the cost approach to valuation was \$4,580,000. Mr. Harnett relied solely on the cost approach to valuation. In Mr. Harnett's deposition and trial testimony, he testified that his cost approach to valuation did not represent fair market value and did not reflect the value a willing buyer or willing investor would pay for the subject property at the time of condemnation.

Railways moved in limine to exclude the testimony of Mr. Harnett because his valuation did not represent fair market value. (See Railways' Motion in Limine & Mem. in Support, attached as **Exhibit A.**) This motion was denied. Railways again moved to exclude the testimony of Thomas Harnett when Landowner presented him as an expert witness at trial, and then renewed this motion at the conclusion of Mr. Harnett's testimony. Railways' motion was denied at each instance.

At the close of Landowner's case-in-chief, Railways moved for a directed verdict on the ground that the only competent evidence in the record of fair market value was from the Landowner's representative and a single document showing that William Ford valued the property at \$1,800,000, which was Landowner's Exhibit 66. This motion was denied.

During its case-in-chief, Railways presented the testimony of its expert appraiser Deborah Haskell who testified based on the sales comparison and income approaches to valuation that the fair market value of the subject property at the time of condemnation was \$1,750,000.

Railways renewed its motion for a directed verdict at the close of evidence, at which time the only additional evidence in the record on fair market value was Deborah Haskell's opinion of fair market value of \$1,750,000.

Railways' motion for directed verdict was denied. The jury returned a verdict of \$3,753,000. These post-trial motions follow.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Rule 50(b), SCRCP, Railways moves for judgment notwithstanding the verdict on the ground that testimony from Landowner's appraiser, Thomas Hartnett, as to the amount of just compensation should have been excluded from evidence and disregarded. Mr. Hartnett's opinion of just compensation *was not* based on the legal definition of just compensation, which is fair market value, defined by our courts as willing buyer, willing seller, under no compulsion. For this reason, a verdict should have been directed based on the only evidence in the record on fair market value, which was Mr. Fred Fabian's testimony during Landowner's case-in-chief that William Ford appraised the property at \$1,800,000, Railways' offer letter reflecting the valuation of Mr. Ford, which was introduced by Landowner as Exhibit 66, and Ms. Deborah Haskell's testimony during Condemnor's case-in-chief that her calculation of just compensation was \$1,750,000.²

Railways requests that the jury's verdict of just compensation of \$3,753,000 be set aside and judgment be entered in the amount of \$1,800,000, which was the only value of just compensation testified to in Landowner's case-in-chief and the amount Condemnor asked the jury to return. In the alternative, Railways requests that a new trial be granted.

A. Legal Standard

² Railways moved for directed verdict on these grounds at the close of Landowner's case-in-chief and renewed its motion at the close of the evidence.

Pursuant to Rule 50(a), SCRCP, a party may move for a directed verdict when a trial presents only a question of law. If a party's motion for directed verdict is denied, it may later move for judgment notwithstanding the verdict to have the judgment set aside.

A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Rule 50(b), SCRCP. The party moving for judgment notwithstanding the verdict must have renewed its motion for a directed verdict at the close of all the evidence. *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 196, 781 S.E.2d 534, 541 (2015).

Railways moved for directed verdict at the close of Landowner's case-in-chief on the ground that Mr. Hartnett's expert opinion testimony should have been disregarded and excluded from evidence because his opinion of just compensation was not based on the legal definition of fair market value. Railways requested that judgment be entered based on the only record evidence of just compensation of \$1,800,000. Railways renewed its motion at the close of evidence, preserving this issue for the Court's review.

On a motion for directed verdict, the evidence and all reasonable inferences are viewed in the light most favorable to the nonmoving party. A denial of a directed verdict may be reversed where there is an error of law. *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011).

B. Just Compensation In A Condemnation Action Is Based On Fair Market Value.

When a governmental entity takes private property for public use through an eminent domain or condemnation action, the landowner is entitled to receive just compensation. U.S. Const. amend. IV ("nor shall private property be taken for public use, without just compensation");

S.C. Const. art. I, § 13 ("private property shall not be taken . . . for public use without just compensation being first made for the property"). In 1987, South Carolina codified its procedure for eminent domain actions in the South Carolina Eminent Domain Procedure Act (hereinafter, the "Eminent Domain Act"). S.C. Code Ann. § 28-2-10, et seq. The Eminent Domain Act provides that "[i]n determining just compensation, only the value of the property 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 Ann. § 28-2-370.

In this case, the entire subject property was acquired through condemnation and the only factual question for the jury was to determine the "value of the property taken." S.C. Code Ann. § 28-2-370. South Carolina courts have defined "value of the property taken" as equating to its "fair market value," or the value a willing buyer would pay a willing seller where neither party is under compulsion to enter the transaction. Market value is measured at the time of the taking and may be more, or less, than the owner's investment. *Olson v. United States*, 292 U.S. 246, 254-55, (1934). As the Supreme Court has explained,

[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.

Id. at 255. Even where there is not an active market for a property taken through condemnation, just compensation is still measured by *market value*. *Olson*, 292 U.S. at 257 (observing where there was no active market for flowage easements the *market value must be estimated* (emphasis added)).

For over seventy years, the South Carolina Supreme Court has repeatedly defined the "value of property taken" in a condemnation action as the property's fair market value. *Howell v.*

State Highway Dep't, 167 S.C. 217, 166 S.E. 129, 130 (1932) (approving jury charge stating that “actual value of the land means the fair market value of the land, upon a fair market, upon fair advertisement, and a fair sale at normal times”); *S.C. State Highway Dep't v. League's Estate*, 251 S.C. 368, 372, 162 S.E.2d 532, 533 (1968) (holding the admissibility of comparable sales “depends upon preliminary proof of sufficient similarity in the transactions to satisfy the trial judge in the exercise of a sound discretion that *the evidence will be of aid in determining the fair market value of the property taken*” (emphasis added)); *S.C. State Highway Dep't v. Bryant*, 253 S.C. 400, 406, 171 S.E.2d 349, 352 (1969) (“That the condemnee had no intention whatever of selling any portion of his property should not deprive him of his *right to be compensated for it at its fair market value based on the highest and best use thereof*.” (emphasis added)); *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 369, 175 S.E.2d 391, 396 (1970) (“The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the *fair market value of the property*, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use.” (emphasis added) (citing *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 131 S.E.2d 264 (1963))); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 407, 175 S.E.2d 805, 820 (1970) (“In a condemnation proceeding the issues are simple. The court is in quest of the reasonable fair market value of the property taken.”); *S.C. State Highway Dep't v. Carodale Assocs.*, 268 S.C. 556, 562, 235 S.E.2d 127, 129 (1977) (“fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking” (quoting with approval *U.S. v. Reynolds*, 397 U.S. 14, 16-17 (1970))); *S.C. Dep't of Highways & Pub. Transp. v. Cheston*, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982) (“In addition, we have held that it is permissible to assess damages upon the basis of the fair value of the land taken plus any special damages to the remainder.” (citing *S.C. State*

Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963)); *City of Folly Beach v. Atl. House Properties, Ltd.*, 318 S.C. 450, 453, 458 S.E.2d 426, 427 (1995) ("The unique nature of the property coupled with expert testimony as to its value allowed the jury to determine the fair market value of the property within the range of evidence presented at trial." (emphasis added)).³

Fair market value has been described by the South Carolina Supreme Court for over forty years as meaning that value at which a willing seller will sell, and a willing buyer will buy, where neither are under compulsion to do so.

And [m]arket value of property taken or injured for public use means the *fair value of the property as between one who wants to purchase and one who wants to sell*, its present value at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale, not what could be obtained for it at a forced sale or under peculiar circumstances, nor a value obtained from the necessities of another.

S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 416, 131 S.E.2d 264, 266 (1963) (emphasis added).

This is the same definition of fair market value that the United States Supreme Court has recognized for over eighty years. *Olson v. United States*, 292 U.S. 246, 257 (1934) ("In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by *fair negotiations between an owner willing to sell and a purchaser desiring to buy*." (emphasis added)); see also *United States v. Miller*, 317 U.S. 369, 374, 63 S. Ct. 276, 280,

³ The South Carolina Court of Appeals has similarly defined "the value of property taken" as its fair market value. *City of N. Charleston v. Claxton*, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) ("Generally, in establishing the *fair market value* of the condemned property, it is permissible to use expert testimony based on "comparable" sales in the area. This includes the price paid for similar property in the vicinity within a reasonable time of the condemnation hearing." (emphasis added) (citing S.C. Code Ann 28-2-340(A)(5)); *Housing Authority of City of Charleston v. Olasov*, 320 S.E.2d 478, 481 (S.C. Ct. App. 1984) ("The landowner was entitled to the fair market value of her property at the time of the taking, not its speculative value." (citing *South Carolina State Highway Dep't v. Miller*, 117 S.E.2d 561 (S.C. 1960); *United States v. Twin City Power Co.*, 248 F.2d 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958)).

87 L. Ed. 336 (1943) (“The owner has been said to be entitled to the ‘value’, the ‘market value’, and the ‘fair market value’ of what is taken. The term ‘fair’ hardly adds anything to the phrase ‘market value’, which denotes what ‘it fairly may be believed that a purchaser in fair market conditions would have given’, or, more concisely, ‘market value fairly determined’. . . . It is usually said that market value is what a willing buyer would pay in cash to a willing seller.”).

South Carolina courts have consistently applied this willing buyer, willing seller definition of fair market value in condemnation cases. *Cty. of Charleston v. McAdory*, No. 2015-UP-370, 2015 WL 4555493, at *1 (S.C. Ct. App. July 29, 2015) (“Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used.” (quoting *Hous. Auth. of City of Charleston v. Olsav*, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984)); *Burroughs & Chapin Co. v. S.C. Dep’t of Transp.*, 352 S.C. 535, 543, 574 S.E.2d 751, 755 (Ct. App. 2002) (“The trial judge’s charge was correct to the extent that it stated the jury must find the fair market value of the property, which is what a willing buyer will pay a willing seller.”); *City of N. Charleston v. Claxton*, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (observing trial court charged jury that “fair market value is the price a willing buyer would pay and a willing seller would accept in the ordinary course of business when neither person is being compelled to act” and finding the record reasonably supported jury’s determination that comparable sales were not made under compulsion); *Olsav*, 282 S.C. at 608, 320 S.E.2d at 481 (“Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used.” (citing cases))).

It is clear that South Carolina law defines just compensation as fair market value, which is the value that reflects the price a willing buyer and willing seller will agree to, neither being under compulsion.

C. A Verdict Should Have Been Directed Based On The Evidence Of Fair Market Value.

A verdict should have been directed at the close of Landowner's case-in-chief or at the close of all evidence in the amount of \$1,800,000 because that was the only evidence of fair market value in the record. Railways moved for a directed verdict at the close of Landowner's case-in-chief in the amount of \$1,800,000 on the ground that Mr. Hartnett's testimony should have been disregarded and excluded from evidence because Mr. Hartnett testified that his valuation did not represent fair market value and willing buyer, willing seller, and the only other evidence of fair market value at the close of Landowner's case was Mr. Ford's appraised value of \$1,800,000. Railways again moved for directed verdict at the close of evidence based on this same ground, and at that point the only competent evidence in the record of fair market value was Mr. Ford's \$1,800,000 appraised value and Ms. Haskell's testimony of fair market value of \$1,750,000.

Mr. Hartnett freely admitted during his testimony that his opinion of just compensation of \$4,580,000 did not represent fair market value, and did not represent willing buyer, willing seller under no compulsion to buy or sell. Mr. Hartnett was unable to affirm that a willing buyer would pay \$4,580,000 for the subject property at the time of condemnation. Mr. Hartnett's valuation was based solely on a cost approach that did not reflect what a willing buyer would pay to reproduce the subject property at the time of condemnation. As such, Mr. Hartnett was not competent to testify as an expert on just compensation under Rule 702, SCRE.

The essence of Mr. Hartnett's testimony, and Landowner's argument for its admission, was that Landowner was not a willing seller; therefore, calculating just compensation based on willing

buyer, willing seller would be unfair. Mr. Hartnett conceded that this is the same situation in nearly every condemnation case, where the landowner is not a willing seller. This argument does not justify abandonment of the fair market value standard in favor of calculating a reproduction cost that does not represent what a willing buyer would pay for the subject property.

Numerous courts and authorities have criticized use of the cost approach to valuation in condemnation actions. *See, e.g., United States v. Benning Hous. Corp.*, 276 F.2d 248, 250 (5th Cir. 1960) (“reproduction cost evidence almost invariably tends to inflate valuation” (citations omitted)); *United States v. Certain Interests in Property in Champaign County*, 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)). According to the 2018 guide Real Property Valuation in Condemnation, published by the Appraisal Institute, the leading professional association for real estate appraisers, “[t]he usefulness of the cost approach is discounted in many condemnor appraisal guidelines.” *Id.* at 108, excerpt attached as **Exhibit B**. As an example of guidelines disfavoring the cost approach, the Appraisal Institute cites the Uniform Appraisal Standards for Federal Land Acquisitions:

While not inherently flawed, **the cost approach has often been misused**, leading a number of courts to identify the cost approach as ‘one of the least reliable indicia of market value’ for the purpose of measuring just compensation. Indeed, as the Fifth Circuit observed, when improperly applied, ‘reproduction cost evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult.’ As a result, the cost approach is rarely acceptable as a stand-alone indication of value for federal acquisitions

[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 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.’”

Id. (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).

Even where courts observe that reproduction cost may be an appropriate valuation method for measuring just compensation in a condemnation action, they still require competent testimony showing that a willing buyer would pay the cost to build or reproduce the subject property. *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 (“Original cost is well termed the ‘false standard of the past’ where, as here, present market value in no way reflects that cost. So with reproduction cost, *when no one would think of reproducing the property.*” (emphasis added)); *United States v. 55.22 Acres of Land, More or Less, in Yakima Cty., Wash.*, 411 F.2d 432, 435 (9th Cir. 1969) (approving the exclusion of reproduction cost value where party “did not offer to prove that a prudent investor would reproduce the improvements at the reproduction cost figure his expert witness was prepared to state” and “did not offer to show that willing vendees and vendors would deem reproduction cost less depreciation relevant in negotiating a purchase and sale of the property”); *United States v. Certain Interests in Prop. in Cumberland Cty., N.C.*, 296 F.2d 264, 270 (4th Cir. 1961) (“In other words, this court has in the past favored a broad rule of admissibility and consideration of evidence in condemnation cases; the *only condition has been that there be a showing that willing vendees and vendors* would deem such evidence or information relevant in their negotiations. It seems plain that a showing . . . to the effect that a reasonable investor would reproduce the project for the amount given as reproduction or replacement cost would be required before a willing vendee would consider such a figure relevant in his negotiations with a willing vendor.”). Where such a showing cannot be made, expert testimony on reproduction cost value

should be excluded. *E.g. 55.22 Acres of Land, More or Less, in Yakima Cty., Wash.*, 411 F.2d at 435. This is exactly the result that should have happened in this case.

Instead of tying the reproduction cost approach to what a willing investor would pay, Landowner argued from dicta⁴ in *Carolina Power & Light Co. v. Copeland*, that Mr. Harnett could testify to a value that did not represent fair market value and willing buyer because *it was not fair* to force Landowner to move. Landowner cited the following dicta from *Carolina Power* in support of its argument:

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 [t]he 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., 258 S.C. at 217, 188 S.E.2d at 193. The court's comment on church property was dicta because the case was concerned with the admission of expert testimony on the highest and best use that blended fair market value and speculative profits from subdividing undeveloped timberland.

Moreover, *Carolina Power* has never been cited for the proposition that just compensation can be based on anything other than fair market value. In fact, *Carolina Power* supports Railways' position on this point. *Carolina Power* argued that it was error for the landowner's expert witnesses to testify to a value of just compensation that was something other than pure fair market value because their opinion of value blended fair market value with speculative profits that would be

⁴ *Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is “not essential to the decision.” Dicta or, as it is also known, dictum “is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision.” (citations omitted)).

earned after future development. *Id.* at 211-212, 188 S.E.2d at 190 ("The heart of the question is whether the landowner's witnesses blended into their appraisals not only fair market value, but also, profits which might be brought into being by promotion and development of a rural residential subdivision.").

The *Carolina Power* court repeatedly referenced "fair market value" as the measure of just compensation and it did not sanction giving the jury the discretion to decide on its own formula for just compensation, but that is exactly what Landowner argued during trial. *Id.* at 212, 188 S.E.2d at 190 ("A careful reading of the record in this case strongly indicates that the landowner's witnesses' appraisals were not based entirely upon their estimation of the *fair market value* of the condemned property"); *id.* at 214, 188 S.E.2d at 191-92 ("It is not unusual in the trial of condemnation cases for judges to be plagued with the duty of distinguishing reasonable *fair market value* of property taken, on the one hand, from profits which might be earned by skillful development and improvement of the property taken, on the other hand."); *id.* at 214-215, 188 S.E.2d at 192 (potential highest and best use of the property "is one of the factors which determines *market value*"); *id.* at 215, 188 S.E.2d at 192 ("The uses which may be considered must be so reasonably probable as to have an effect on the *present market value* of the land"); *id.* at 216, 188 S.E.2d at 192 ("The *fair market value* of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers; it is the *fair market value* of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance with its best and highest capabilities") (emphasis added to each quoted passage above).

Because Mr. Hartnett testified that his reproduction cost opinion of value did not represent fair market value and did not represent what a willing buyer would pay for the subject property, it

should have been disregarded and excluded from evidence and a verdict should have been directed in accord with the only record evidence of fair market value, which supported Railways' offer of just compensation of \$1,800,000.

III. NEW TRIAL NISI REMITTITUR

Pursuant to Rule 59, SCRCP, Railways moves for a new trial nisi remittitur based on the excessiveness of the jury's verdict in light of the evidence presented on fair market value. *Burke v. AnMed Health*, 393 S.C. 48, 56-57, 710 S.E.2d 84, 88-89 (Ct. App. 2011) ("If the trial court determines that the verdict is 'merely excessive,' the court has the power to reduce the verdict by granting a new trial nisi remittitur."). "A motion for a new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive." *Id.* at 56, 710 S.E.2d at 88 (citing *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006)). "[A]s to a new trial nisi remittitur, the trial judge's discretion is broad." *Id.* at 57, 710 S.E.2d at 89.

Fair market value is the standard for awarding just compensation in condemnation cases in South Carolina. *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 416, 131 S.E.2d 264, 266 (1963). The only evidence introduced during trial on fair market value of the subject property was Mr. Fabian's testimony that William Ford prepared an appraisal valuing the property at \$1,800,000, Railways' offer letter reflecting the valuation of Mr. Ford, which was introduced by Landowner as Exhibit 66, and Deborah Haskell's testimony that the fair market value of the subject property at the time of condemnation was \$1,750,000. Ms. Haskell testified that when determining just compensation, an appraiser looks at the fair market value of the subject property. Ms. Haskell explained that fair market value is the price a willing buyer would pay, and a willing seller would

accept, neither being under compulsion to buy or sell. This definition of fair market value comports with the law in South Carolina on just compensation in condemnation cases.⁵

Mr. Hartnett testified to the cost to rebuild the subject property. He freely admitted that his cost approach was not fair market value and was not what a willing buyer would pay for the subject property. As such, his testimony could not be considered by the jury in arriving at the determination of just compensation.

The jury's verdict of \$3,753,000 is excessive in light of the competent evidence of fair market value. Because the only competent record evidence of fair market value was for \$1,800,000 or \$1,750,000, Railways requests that the Court remit the verdict to \$1,800,000.

IV. NEW TRIAL

In the alternative to a new trial nisi remittitur, Railways moves pursuant to Rule 59, SCRPC, for a new trial based on the following grounds: (1) expert testimony of Thomas Hartnett should have been excluded from evidence; (2) prejudicial hearsay evidence from Landowner's accountant should have been excluded from evidence; (3) irrelevant and prejudicial testimony on project opposition should have been excluded from evidence; (4) jury charge on the formula for calculating just compensation in a condemnation action was erroneous and prejudicial; and (5) evidence bearing on Landowner's ten-year-old grand opening was irrelevant and prejudicial and should have been excluded from evidence.

A. The Expert Testimony Of Thomas Hartnett Should Have Been Excluded From Evidence Because It Was Not Based Not Fair Market Value And Therefore Not Reliable Under Rule 702, SCRE.

Railways moves for a new trial because the Court erred in admitting the testimony of Thomas Hartnett and this error resulted in prejudice because there is a reasonable probability that

⁵ See *supra* Section II.

Mr. Hartnett's testimony influenced the jury's verdict. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Railways moved in limine pursuant to Rules 104, 702, SCRE, to exclude the testimony of Thomas Harnett because his opinion of just compensation was not based on fair market value, willing buyer, willing seller, under no compulsion; and therefore it did not meet the threshold test for reliability of expert testimony. Railways renewed its motion at the time Landowner offered Mr. Hartnett as an expert and at the close of Mr. Hartnett's testimony. Accordingly, this error is preserved for the Court's review.

A trial court serves as a gatekeeper for expert testimony sought to be introduced pursuant to Rule 702, SCRE. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) ("We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific."). "In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact." *Id.*

Mr. Harnett's testimony was not reliable and its admission was error because his testimony of just compensation was not based on the legal definition of just compensation in South Carolina. Just compensation is defined as fair market value, which is willing buyer, willing seller, under no compulsion.⁶

The admission of Mr. Hartnett's testimony was prejudicial because there is a reasonable probability that it influenced the jury. Mr. Harnett testified to just compensation of \$4,580,000,

⁶⁶ Railways incorporates its arguments from Section II, recounting the legal definition of fair market value and how Mr. Hartnett's testimony did not comport.

and the jury returned a verdict of \$3,753,000. The only competent evidence in the record of fair market value of the subject property was \$1,800,000 and \$1,750,000. Therefore, there is a reasonable probability that the jury's verdict was influenced by Mr. Hartnett's inadmissible testimony. Accordingly, a new trial should be granted.

B. The Email From Landowner's Accountant Providing A Cost To Build 1799 Meeting Street Was Hearsay And Should Have Been Excluded From Evidence.

Railways moves for a new trial based on the erroneous and prejudicial admission of Landowner's Exhibit 63—an email between Landowner and its accountant wherein the accountant claims to have taken the historical cost to build the subject property and adjusted it for inflation to the time of condemnation. Landowner sought to introduce Exhibit 63 into evidence through Mr. Fabian. Railways objected to the introduction of Exhibit 63 into evidence on hearsay grounds because it included statements and subjective opinions from someone other than Mr. Fabian. Landowner argued that Exhibit 63 fell under the hearsay exception for business records. The Court agreed and overruled Railways' objection and permitted Landowner to introduce Exhibit 63 into evidence.

The admission of this document over Railways' hearsay objection was error because it was not a business record and because it contained numerous subjective opinions on the cost to rebuild the subject property. The accountant's subjective opinions were highly prejudicial because they provided a second cost estimate prepared by a licensed CPA that was not subject to cross examination, and which only served to bolster Landowner's cost approach valuation. The erroneous introduction of this highly prejudicial document warrants a new trial.

The business records exception to hearsay applies to documents that are kept in the course of regularly conducted business activity and that are prepared as part of the regular practice of that

business activity. Rule 803(6), SCRE. Even where these requirements are met, subjective opinions and judgments found in business records are inadmissible. Rule 803(6), SCRE.

Landowner's representative Mr. Fabian testified that he built the subject property to house his audio/visual business eLifespaces. Mr. Fabian testified at great length that his regular business activity is audio/visual services. Landowner is not in the business of accounting, calculating building costs, inflating ten-year-old costs to present day value, or developing land value estimates, and the information sought to be admitted pursuant to the business records exception was not prepared as part of Landowner's normal business operations. The fact that the document was an e-mail received by Landowner does not by default make it a business record. *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013) ("While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then *ergo* all those e-mails are business records falling within the ambit of Rule 803(6)(B)."). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." *Id.* In fact, Landowner's representative Mr. Fabian testified that he requested his accountant to prepare a cost estimate because of the pending condemnation of the subject property. By Landowner's own admission, this document was not prepared in the normal course of his business, but specially prepared because of this condemnation.

Moreover, Landowner introduced this email solely for the subjective opinion of its accountant Mr. Hoffman, and for that reason the business records hearsay exception also did not apply. Under a plain reading of Rule 803(6), the South Carolina Supreme Court has held that "[t]he business records exception does not allow subjective opinions to be introduced into evidence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (2009).

The email at issue was a correspondence between Landowner and its accountant Brandon Hoffman. In pertinent part, Mr. Hoffman wrote the following to Mr. Fabian:

At your request, we extracted the actual cost associated with 1799 Meeting Street Road from various schedules. From these schedules, you requested that we develop an estimated cost to rebuild your facility by applying current labor rates, land values, and other related financial factors. The results of your analysis listed below are estimates and do not represent audited numbers nor do they reflect actual contractor bid estimates.

Building	\$3,134,000
Land	740,000
Land Improvements	<u>150,000</u>
Total	\$4,024,500

Given the unique nature of the building and the extensive amount of personal property/equipment used for the building systems to function, we included both an estimate of the cost of the structure as well as the related systems equipment in arriving at the building cost estimate.

Email Brandon Hoffman to Fred Fabian, Landowner's Exhibit 63 (Oct 10, 2016), attached as **Exhibit C**.

As is clearly evident, Mr. Hoffman's email contained numerous subjective opinions that should not have been admitted into evidence without his being present, testifying, and subject to cross examination: (1) estimated actual cost to build 1799 Meeting Street extracted from schedules and inflated for labor rates and "other related financial factors"; (2) the building was of "unique nature"; (3) estimated cost of equipment for the building systems to function; (4) land value taken from another party, Daniel Atwell (double hearsay); and (5) an inflation factor of 1.73% per year. See Ex. C.

The admission of Exhibit 63 was prejudicial because it bolstered Landowner's argument that the cost approach was the appropriate measure of just compensation and that the total cost to build the subject property at the time of condemnation was in the four-million-dollar range. This exhibit provided a subjective value by a third-party who was not offered by Landowner as a witness

and whose opinion was not subject to cross examination or review. No documents were introduced by Landowner to substantiate this alleged cost value prepared by its accountant. This document was clearly prejudicial and influential for the jury. It bolstered Mr. Hartnett's testimony of his cost approach to value of \$4,580,000, and Steven Morey's testimony that the cost to rebuild the subject property was \$4.3 million.

Demonstrating the email's great importance to Landowner, it was the only exhibit highlighted by Landowner during its reply in closing argument, where it asked the jury to return a verdict based on the cost to rebuild the property.

For these reasons, it was error to admit Exhibit 63 into evidence and permit its subjective opinions to be repeatedly presented to the jury. In light of jury's verdict of \$3,753,000, there is a reasonable probability that this document influenced the jury's verdict. Accordingly, a new trial should be granted.

C. Landowner Should Not Have Been Permitted to Question Witnesses on Project Opposition.

Railways moves for a new trial based on the trial court's error in permitting witness testimony about public opposition to the condemnation project. This condemnation action was a total take and the fair market value of the subject property as of the date of the condemnation was the sole issue to be determined at trial.

Over Railways' repeated objection, Landowner was permitted to question Railways' project representative about the City of Charleston's opposition to the project and in particular the rail crossing at Meeting Street, which was the very location where Landowner's property was located. Railways objected to this testimony as irrelevant and prejudicial under Rules 401 and 402, SCRE, as it did not have any bearing whatsoever on the market value of the property as of the date of condemnation. Instead, this testimony *only* served to prejudice the jury against

Railways by painting the public project as negatively affecting the local community. Accordingly, permitting such testimony was error and prejudicial, and a new trial should be granted.

D. It Was Error to Charge The Jury That It May Use A Formula For Calculating Just Compensation Other Than Fair Market Value.

Railways moves for a new trial based on the trial court's error in charging the jury that it could use a formula to calculate just compensation that was based on something other than fair market value. A court is required to charge only the current and correct law of South Carolina. *State v. Adkins*, 353 S.C. 312, 317, 577 S.E.2d 460, 463 (Ct. App. 2003) (citing *State v. Burkhardt*, 350 S.C. 252, 565 S.E.2d 298 (2002)). Review of a jury charge is considered in light of the evidence and issues presented at trial. *Id.* at 318, 577 S.E.2d at 463. "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

The method of calculating just compensation was the central issue in this case. Railways repeatedly argued for the exclusion of testimony from Landowner's appraiser Thomas Hartnett who testified that his reproduction cost valuation was not based on fair market value. The law in South Carolina condemnation actions is that just compensation must be based on fair market value.⁷

Landowner's position during trial was that the jury may calculate just compensation based on something other than fair market value. Accordingly, Landowner requested and the court agreed to charge the jury that: "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

⁷ Railways has thoroughly set forth these arguments in Section II and incorporates these arguments herein.

that formula is unfair to either party some other formula may be used.” Landowner’s sole support for this charge was *dicta* from a forty-seven-year-old case, *Carolina Power & Light Co. v. Copeland*. As set forth above, *Carolina Power* has never been cited for this proposition, and, in fact, its holding supported Railways’ position that fair market value and not some other blended valuation method is the appropriate measure of just compensation in condemnation.⁸

This charge either confused the jury or impermissibly gave it permission to deviate from the fair market value standard of just compensation which has been the bedrock of South Carolina condemnation law for over the last seventy years. This substance of this charge did not accurately reflect the current law of South Carolina, but instead introduced a new and amorphous “unfairness” exception into the fair market value standard.

This erroneous charge was confusing to the jury and highly prejudicial to Railways because it gave the jury permission to completely disregard fair market value in determining just compensation. The only competent evidence in the record on fair market value was Mr. Ford’s and Ms. Haskell’s appraised values, which were \$1,800,000 and \$1,750,000, respectively. Mr. Hartnett testified to a non-fair market value reproduction cost valuation of \$4,580,000. The jury delivered a verdict well in excess of the evidence on fair market value and much closer to Mr. Hartnett’s testimony of non-fair market value. Based on the evidence in the record, it is reasonable to conclude that the jury could not have returned a verdict of \$3,753,000 without this erroneous charge confusing the jury and permitting it to ignore the testimony on fair market value in favor of a greatly inflated valuation.

Accordingly, Railways was highly prejudiced by this jury charge which did not state the current and correct law of South Carolina, and a new trial should be granted.

⁸ See *supra* Section II(C).

E. Photos Of Landowner's Grand Opening Were Cumulative, Irrelevant, and Prejudicial.

Railways moves for a new trial based on the trial court's erroneous admission of photos of the grand opening of eLifespaces in 2007. These photos did not depict the subject property at or near the time of condemnation, and as such were not relevant to the jury's consideration of just compensation. Additionally, the introduction of these photos prejudiced the jury by reflecting the condition of the building ten years before condemnation and because they contained photos of public officials attending the grand opening, which served only to suggest that the subject property was more valuable or of certain special importance to local public officials.

Railways objected to Landowner's admission of numerous photos of the grand opening from 2007, including those depicting former Charleston Mayor Joe Riley, on the ground that these documents were irrelevant and more prejudicial than probative. Condemnor did not object to numerous photos of building construction, as this went to Landowner's testimony on the unique nature of its building. However, ten-year-old photos from the grand opening of the subject property were irrelevant to the only issue in this case—the amount of just compensation due to the Landowner for the total taking of his property. Additionally, photos of Mayor Riley only served to prejudice the jury by suggesting that the attendance at the grand opening by local government officials made the business and resulting property more valuable.

The admission of these photos was error and served only to prejudice the jury. Accordingly, a new trial should be granted.

V. NEW TRIAL ABSOLUTE

Railways moves for a new trial absolute on the ground that the jury's verdict was shockingly disproportionate to the fair market value of the Landowner's property, reflecting passion, caprice, prejudice, or some other influence.

“A trial judge also has the power to grant a new trial absolute.” *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011). “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.” *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006).

Here, the only evidence introduced during trial on fair market value of the subject property was Mr. Fabian's testimony that William Ford prepared an appraisal valuing the property at \$1,800,000, Railways' offer letter reflecting the valuation of Mr. Ford of \$1,800,000, which was introduced by Landowner as Exhibit 66, and Deborah Haskell's testimony that the fair market value of the subject property at the time of condemnation was \$1,750,000.

The jury's verdict of \$3,753,000 is shockingly disproportionate to the evidence of fair market value of Landowner's property. This suggests that the erroneous admission of testimony from Thomas Hartnett, the erroneous admission of the accountant's cost calculation, the erroneous testimony on the City of Charleston's objections to the Meeting Street rail crossing, the confusing and incorrect jury charge, and the erroneous admission of photos depicting former Mayor Riley attending the grand opening of Landowner's building, or some other improper motive lead the jury to reach such a disproportionate verdict. Accordingly, a new trial absolute should be granted.

VI. NEW TRIAL BASED ON THIRTEENTH JUROR DOCTRINE

Railways moves for a new trial based on thirteenth juror doctrine because the evidence of the fair market value of Landowner's property was \$1,800,000 and there is no competent evidence justifying the jury's verdict of \$3,753,000.

The thirteenth juror doctrine “entitles the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)

(quoting *Folkens v. Hunt*, 300 S.C.251, 254, 387 S.E.2d 265, 267 (1990)). "As the 'thirteenth juror,' the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Id.* As explained by the Supreme Court:

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

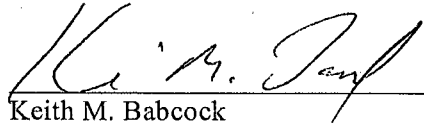
Id.

Fair market value is the measure of damages in a condemnation action. Here, the only evidence introduced during trial on the fair market value of the subject property was Mr. Fabian's testimony that William Ford prepared an appraisal valuing the property at \$1,800,000, Railways' offer letter reflecting the valuation of Mr. Ford, which was introduced by Landowner as Exhibit 66, and Deborah Haskell's testimony that the fair market value of the subject property at the time of condemnation was \$1,750,000. Mr. Hartnett testified that his reproduction cost valuation of \$4,580,000 was not fair market value.

Because the evidence in the record on fair market value did not justify the jury's verdict, a new trial should be granted based on the thirteenth juror doctrine.

VII. CONCLUSION

Railways requests that the Court enter a judgment notwithstanding the verdict in the amount of \$1,800,000 based on the evidence in the record on fair market value, or in the alternative grant a new trial nisi remittitur in the amount of \$1,800,000 based on the record evidence of fair market value, or grant a new trial absolute based on the grounds as described herein.



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April 8, 2019

ATTORNEYS FOR THE CONDEMNOR

IN THE COURT OF COMMON PLEAS
C/A NO. 2017-CP-10-5382

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2019 MAR 25 AM 8:43
JULIE J. ADAMS-STRONG
CLERK OF COURT
BY _____

This is a condemnation case related to the construction and operation of the Navy Base Intermodal Container Transfer Facility (ICTF) and associated railway lines in Charleston County, South Carolina. The public purpose of this project is to construct a facility that will help meet the growing capacity of the Port of Charleston and facilitate the transfer of cargo from the port to railroad lines for transportation throughout the Southeast. Landowner's property, Tract 23S, commonly known as 1799 Meeting Street, Charleston, SC, is located along what is referred to as the ICTF's southern rail line access route. This condemnation is a total take of the subject property as was filed on October 19, 2017.

Tract 23S is 0.55 acres in size and at or near the time of condemnation contained a two-story building that was occupied by eLifespaces (which is also owned by Frederick Fabian, the managing member of Gateway), The Loft Pilates Center, and Capella Carolinas. Condemnor hired Deborah Haskell, CRE, FRICS, MAI, to appraise the property. Ms. Haskell analyzed the subject property using the sales comparison and income approach methods, ultimately concluding that the value of the property was \$1,750,000 on the date of condemnation. Landowner hired Thomas Hartnett, GAA, CRB, to appraise the property. Mr. Hartnett analyzed the property solely using the cost approach, concluding that the reproduction cost for the subject property was \$4,580,000 on the date of condemnation.

Thomas Hartnett's testimony should be excluded because:

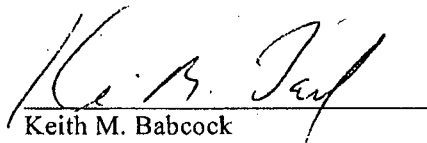
1. Under South Carolina law, just compensation in a condemnation case is limited to the fair market value of the property to be taken, plus any damages to the remainder of the property, if any. S.C. CODE ANN. § 28-2-370; *Housing Authority of City of Charleston v. Olasov*, 320 S.E.2d 478, 481 (S.C. Ct. App. 1984) (citing *South Carolina State Highway Dep't v. Miller*, 117 S.E.2d 561 (S.C. 1960); *United States v. Twin City Power Co.*, 248 F.2 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958)).
2. "Fair market value is the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of

all uses to which the property is adopted and for which it is capable of being used." *Olasov*, 320 S.E.2d at 481 (citations omitted).

3. Mr. Hartnett testified at his deposition that his property valuation did not represent the property's fair market value as it did not satisfy the "willing buyer, willing seller" just compensation standard. (Hartnett Dep. 29:10-25; 33:6-35:3, Oct. 10, 2018).
4. Accordingly, Mr. Hartnett's testimony should be excluded at the trial of this case.

Moreover, and as detailed in Condemnor's memorandum, the cost approach appraisal method used by Mr. Hartnett is highly disfavored by the courts precisely because of its unreliability and tendency to overstate value. Pursuant to case law and professional standards, the cost approach method should only be used when determining value for a brand-new building or a special use building, like a cathedral or a water treatment plant. Even in those rare and unique circumstances, the valuation must still represent what a willing buyer would pay a willing seller for the property, with neither party under compulsion to buy or sell. Mr. Hartnett has failed to adhere to this standard.

Accordingly, Condemnor respectfully moves for an Order excluding the testimony of Thomas F. Hartnett at the trial of this case.



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March 25, 2019

ATTORNEYS FOR THE CONDEMNOR

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Project: Navy Base Intermodal Facility

Tract: 23S

South Carolina Department of Commerce,
Division of Public Railways,

Condemnor,

v.

Gateway Properties of Greater Charleston, LLC,

Landowner,

and

NBSC a division of Synovus Bank, VFC Partners
15 LLC, The Loft Pilates Center, LLC, Scott
Miner, and County of Charleston,

Other Condemnees.

) IN THE COURT OF COMMON PLEAS
) C/A NO. 2017-CP-10-5382
)

**CONDEMNOR'S MEMORANDUM IN
SUPPORT OF ITS MOTION IN LIMINE
TO EXCLUDE THE TESTIMONY OF
LANDOWNER'S APPRAISER**

FILED
2019 MAR 25 AM 8:44
JULIE A. HARRIS
CLERK OF COURT

The South Carolina Department of Commerce, Division of Public Railways ("Public Railways" or "Condemnor") has moved to exclude the testimony of Gateway Properties of Greater Charleston, LLC's ("Gateway" or "Landowner") appraiser Thomas Hartnett because his opinion of value is not based on the legal definition of fair market value. As such, Mr. Hartnett is not competent to testify to the value of 1799 Meeting Street during the trial of this matter.

BACKGROUND

The South Carolina Department of Commerce, Division of Public Railways ("Public Railways" or "Condemnor") is acquiring properties in conjunction with the construction and

operation of the Navy Base Intermodal Facility (ICTF) and associated railway lines in Charleston County, South Carolina. As part of this project, Public Railways will be constructing new rail lines for southern access to the ICTF ("Southern Route").

Gateway's property located at 1799 Meeting Street is being acquired by Public Railways as part of the construction of the Southern Route. 1799 Meeting Street is a two-story, 6,708 square foot office building constructed in 2007. At or near the time of condemnation, it housed three tenants: eLifespaces, a security and audio/visual company; Loft Pilates Center, an exercise facility, and Capella Carolinas, which is believed to be a bingo operator.

Public Railways hired Deborah B. Haskell, MAI to appraise the subject property. Ms. Haskell determined that the fair market value of the property at the time of condemnation was one million seven hundred fifty thousand dollars (\$1,750,000.00). Ms. Haskell analyzed the property using the sales comparison and income approach appraisal methods. Landowner hired Thomas Hartnett to appraise the subject property. Mr. Hartnett analyzed the property solely using the cost approach. Based on the cost approach, Mr. Hartnett determined that the value of the property at the time of condemnation was four million five hundred eighty thousand dollars (\$4,580,000.00).

During his deposition, Mr. Hartnett conceded that his determination of just compensation is not the property's fair market value as that term has been defined by South Carolina courts. Moreover, Mr. Hartnett has not adequately substantiated his basis for using cost approach, which is strongly disfavored by courts, and for excluding the sales comparison and income approaches to value, which are the standard and preferred valuation methodologies. The cost approach to value is only appropriate in rare and unique circumstances, which are not present in this case.

FACTS

In 2007, Landowner constructed a two-story commercial office building to house eLifespaces, a security and audio/visual company owned and operated by Gateway's managing member Fred Fabian. Since construction, Gateway has at various times leased significant portions of the property to various local businesses as office or exercise space.

It is Landowner's contention in this condemnation action, through its appraiser Thomas Hartnett, that the subject property is unlike any other office building in the Greater Charleston area such that no true market for its purchase exists and no sale or lease comparables could be located for analysis. (Hartnett Dep. 24:12-25:4, Oct. 10, 2018).

LEGAL STANDARD

The South Carolina Eminent Domain Procedure Act provides that: "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered." S.C. CODE ANN. § 28-2-370.

In condemnation cases, "[landowner[s are] entitled to the fair market value of [their] property at the time of the taking, not its speculative value." *Housing Authority of City of Charleston v. Olovson*, 320 S.E.2d 478, 481 (S.C. Ct. App. 1984) (emphasis added) (citing *South Carolina State Highway Dep't v. Miller*, 117 S.E.2d 561 (S.C. 1960); *United States v. Twin City Power Co.*, 248 F.2d 108 (4th Cir. 1957), *cert denied*, 356 U.S. 918 (1958)). "Fair market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Id.* (citations omitted).

ARGUMENT

Landowner's appraiser Mr. Hartnett has testified that his cost approach to value does not represent willing-buyer, willing-seller fair market value. Accordingly, pursuant to Rules 702 and 703 of the South Carolina Rules of Evidence, he is not competent to testify as an expert during trial as to the value of just compensation in this matter.

Even if the cost approach to value might have been appropriate in this case, which it is not, Mr. Hartnett has failed to substantiate his exclusion of the standard and preferable approaches to value—the sales comparison and income capitalization approaches. As such, he is not competent to testify as to value of just compensation in this case.

I. Thomas Hartnett's Testimony Should Be Excluded From Trial Because It Does Not Fall Within The Legal Bounds Of Fair Market Value.

Mr. Hartnett's cost approach valuation of the subject property did not provide fair market value, as defined by South Carolina courts, because he did not use the willing-buyer, willing-seller standard.¹ Accordingly, his testimony should be excluded.

South Carolina courts define fair market value as "that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Olasov*, 320 S.E.2d at 481. During his deposition, Mr. Hartnett agreed with this standard, Hartnett Dep. 9:22-

¹ See Standard South Carolina Condemnation Jury Charge:

Market value of property taken or injured for public use means the fair market value of the property as between one who wants to purchase and one who wants to sell, its present value at a sale which a prudent owner would make if at liberty to fix the time and conditions of sale, not what could be obtained for it a forced sale or under peculiar circumstances, nor a value obtained from the necessities of another.

Stated another way, the fair market value of property injured or taken for the public use means that price which a purchaser would give and a seller would take in the ordinary course of trade where neither of them is acting under any compulsion; the criterion is market value, not sentimental value.

Citing *Carolina Power & Light Co. v. Copeland*, 188 S.E.2d 188 (S.C. 1972); 20 C.J.S. 821-822.

10:3; 27:5-13, and conceded that his valuation did not represent willing-buyer, willing-seller measure of fair market value:

Q: ... [M]y question to you is, as we're trying to find fair market value, which we defined as willing buyer and willing seller, correct?

A: Correct.

Q: **Is it your testimony that a willing buyer and willing seller would have come to the figure of \$4,580,000 for a transaction for the subject property in October 2017? Is that your testimony?**

A: **No sir.**

Q: What is your testimony?

A: My testimony is that in order to make Mr. Fabian whole he needed to receive this much money for what he was having to give up to the state or to whomever the condemnor is, the Railway Commission.

(Hartnett Dep. 29:10-25) (emphasis added).

Mr. Harnett further elaborated on why he chose not to use the willing-buyer, willing-seller standard for fair market value:

Q: Let me make sure I understand. I understand that you have used the cost approach because you, if I understand correctly, you wanted to ensure that Mr. Fabian had the reproduction value for the property that was taken; is that right?

A: Correct.

Q: And you weren't looking at replacement value, correct?

A: Correct.

Q: And in so doing because you were looking at reproduction value, you weren't looking all [sic] willing buyer, willing seller; you were looking at reproduction?

A: In this case Mr. Fabian himself was not a willing seller. I mean, he was a seller who had to sell, but it was not willingly that he sold to the Railway

Commission. So in a truer sense his market value, he was not a willing seller. So it's different when you have a willing seller and a willing buyer.

Q: Sure. And in fairness, Mr. Hartnett, this is a situation you have in every condemnation case, isn't it, where some condemning authority comes to some landowner and says for a public purpose of some sort we need all or part of your property? Isn't that the situation in every condemnation case?

A: Certainly.

(Hartnett Dep. 31:1-32:4).

Ultimately, Mr. Hartnett conceded that his valuation does not represent the fair market value of the subject property:

Q: What I want to make sure I'm clear on is that we have a condemnation, correct?

A: Correct.

Q: We have a total take, correct?

A: Correct.

Q: And we have a piece of property that you have analyzed using the reproduction cost, correct?

A: Correct.

Q: And my question is that reproduction cost, does that reflect willing buyer, willing seller under no compulsion?

A: Is that replacement cost?

Q: No. I asked you is your reproduction cost, is that willing buyer, willing seller, no compulsion?

A: I'm not sure what you mean by that, Mr. Babcock.

Q: **Let me rephrase it. We start the process of trying in a condemnation case to come up with fair market value, correct?**

A: **Correct.**

Q: And again, it's easier in a total take because we're looking at the fair market value of an entire piece of property as of a certain date?

A: Correct.

Q: **And fair market value is defined as you've already testified, as willing buyer, willing seller, no compulsion, correct?**

A: **That's the standard definition of fair market value, yes, sir.**

Q: That's the appraiser's definition, correct?

A: Correct.

Q: That's the legal definition in a condemnation case?

A: That's the control of the currency's definition of it. That's what I used in the report.²

Q: I want to make sure. Fair market value, willing buyer, willing seller?

A: Correct.

Q: No compulsion?

A: Correct.

Q: **Does the reproduction cost that you have used with Mr. Fabian, is that willing buyer, willing seller, no compulsion as of October 2017?**

A: **No, sir, I don't think so.**

(Harnett Dep. 33:6-35:3) (emphasis added).

² When defining "market value" in his Appraisal, Mr. Harnett cited to the Code of Federal Regulations:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale . . . under conditions whereby: [b]uyer and seller are typically motivated [and a] reasonable time is allowed for exposure on the open market.

Harnett Report, Bates No. L-00009524, at 13 (citing 12 C.F.R. Part 34.42(g); 55 FR 34696, as amended).

Mr. Hartnett has completely disregarded fair market value and the "willing buyer, willing seller" standard in order to create his \$4,580,000 cost approach valuation. He has done so despite fair market value being the legal standard for determining just compensation in eminent domain cases. Because Mr. Hartnett is preparing to testify to a valuation methodology that does not comport with the legal definition of fair market value, he is not competent to testify as an expert witness pursuant to Rules 702 and 703, SCRE. Accordingly, his testimony should be excluded from trial.

II. Of The Three Standard Approaches To Value, The Cost Approach Is Rarely Used And Is Only Appropriate For Newly Constructed Buildings Or A Special Use Property.

Mr. Hartnett is not competent to testify to the valuation of the subject property because he does not substantiate his basis for excluding the standard and preferred approaches to valuation in favor of only using the cost approach. As such, he should not be qualified as expert under Rules 702 and 703, SCRE.

a. Three Approaches To Property Valuation.

The three standard approaches used to determine fair market value are: (1) the sales comparison approach, (2) the income, or income capitalization approach, and (3) the cost approach. *See, e.g., City of Spartanburg v. Laprinakos*, 230 S.E.2d 443, 444 (S.C. 1976); *Reliance Ins. Co. v. Smith*, 489 S.E.2d 674, 675-77 (S.C. Ct. App. 1997); *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 339 S.E.2d 131, 132 (S.C. Ct. App. 1985) (noting the three approaches are "the usual and customary methodology" used to determine "fair market value"). Of these three, sales comparison and income approach are preferred over the cost approach, and only in the rarest of circumstances it is appropriate to use the cost approach alone and exclude the other two approaches to value.

The sales comparison approach bases market value on what similar properties in the area have sold for recently. *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 676. These sales can be adjusted for time, acreage, size, and amenities. This approach “assumes that an informed purchaser will pay no more for a property than the cost of acquiring an existing, or substitute property with the same utility.” *Id.* (internal quotations omitted). Comparable sales are generally the best evidence of value for a property. 72 AM. JUR. 2d § 649 *Comparison of methods for valuation* (2018); see also *United States v. Whitehurst*, 337 F.2d 765, 775 (4th Cir. 1964) (“It is settled law that comparable sales are the best evidence of value.”).

The income, or income capitalization, approach “looks at property value through the eyes of a typical investor.” *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 675. This approach is generally favored for commercial properties, particularly ones with income-producing leaseholders. See *id.* at 676; *Hull v. Spartanburg County Assessor*, 641 S.E.2d at 911. Income capitalization accounts for the “present worth of future income”—arriving at a property’s present market value by calculating reasonably expected earnings discounted for risks and other variables. *South Carolina Tax Comm’n v. South Carolina Tax Bd. of Review*, 339 S.E.2d at 132; 72 AM. JUR. 2d § 644 *Net income* (2018). Notably here, Landowner’s property was fully leased to third parties at the time of condemnation.

The cost approach uses the value of the land plus the cost to reproduce any improvements at current construction prices, minus depreciation. *Reliance Ins. Co. v. Smith*, 489 S.E.2d at 676. “The cost approach is based on the assumption that an informed purchaser would pay no more for a property than the cost of producing a substitute property with the same utility.” *Id.* (emphasis added) (internal quotations omitted). This approach is appropriate with newly constructed buildings and even more so with specialty or unique use buildings, like a church or school, where

the market for the property is unascertainable under either sales comparison or income capitalization methods. *Id.* at 677; *Cloverport Sand & Gravel Co. Inc. v. United States*, 6 Cl. Ct. 178, 189 (1984) (citations omitted) (“The cost approach is in some circumstances appropriate where the property taken has no ready market and the income capitalization approach cannot be used.”); 72 AM. JUR. 2d § 655 *Reproduction of replacement costs* (2018) (“Thus, reproduction costs should be utilized only in those limited instances in which no other method of valuation will yield a legally and economically realistic value for property.”); 60 AM JUR. TRIALS 447, § 26 *Landowner’s Evidence of Market Value in Eminent Domain Proceeding* (2019) (the cost approach should only be used if neither the sales comparison nor income capitalization approach are applicable). Accordingly, the cost approach method is rarely used. NICHOLS ON EMINENT DOMAIN Ch. 12B § 11.1[1] (Matthew Bender, 3rd ed.) (2018) (“Evidence of reproduction cost is admissible only in exceptional cases.”); *see also* 60 AM. JUR. TRIALS 447 § 28 *Reproduction cost approach* (2018) (“this approach is the exception, not the rule”).

b. Mr. Harnett Failed To Substantiate His Basis For Only Using The Cost Approach.

Mr. Harnett was required to undertake a more thorough analysis of Landowner’s property as having a special use or special purpose building before deciding to ignore the sales comparison and income approaches and rely solely on the cost approach. In order to testify as an expert witness, Mr. Harnett was required to do more.

According to The Appraisal Institute’s guide, “[t]he usefulness of the cost approach is discounted in many condemnor appraisal guidelines.” REAL PROPERTY VALUATION IN CONDEMNATION 108 (2018). As an example, the guide cites the Uniform Appraisal Standards for Federal Land Acquisitions:

While not inherently flawed, the cost approach has often been misused, leading a number of courts to identify the cost approach as ‘one of the least reliable indicia of market value’ for the purpose of measuring just compensation. Indeed, as the Fifth Circuit observed, when improperly applied, ‘reproduction cost evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult.’ As a result, the cost approach is rarely acceptable as a stand-alone indication of value for federal acquisitions

[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 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.”

Id. (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) (emphasis added) (“To say that the cost approach is generally disliked by the courts is an understatement.”).

Courts agree that the cost approach necessitates a more thorough analysis of its reliability. For example, in a leading case, a property with a dormant cement distribution plant was presented as a specialty building with a cost approach appraisal; however, because the business was no longer in use and “there was no proof to support a finding that [the building] could reasonably be expected to be replaced,” the use of the cost approach was overturned on appeal. *City of Glen Cove v. Switzer Contracting Co., Inc.*, 47 A.D.2d 917 (N.Y.S. 2d 1975). Likewise, another trial court inappropriately allowed a cost approach valuation in a condemnation case involving a laundry and dry cleaning business—despite the building’s many special fixtures and extensive modifications for installing equipment necessary to conduct that business—because “the building was not so unique as to be without value for purposes other than a dry cleaning and laundry business.” *City*

of *Rochester v. S.C. Toth, Inc.*, 59 A.D.2d 1020, 1020-21 (N.Y.S. 2d 1977; see also LOCAL GOVERNMENT LAW Ch. 21 § 34 (John Martinez, 2d ed.) (2018) (“The presence of special features or special equipment in a building does not necessarily indicate the property is unique use property.”); Michael Rikon, *Valuing Property in Condemnations*, 19 PRAC. REAL ESTATE LAW. 17, no. 5 (Sept. 2003) (“The cost approach is rarely used in condemnation cases for real estate. Real property must constitute a ‘specialty’ for the cost approach to be employed.”).³

When examined on the reasons why Landowner’s property classified as special use or special purpose, Mr. Harnett could only identify three factors underlying his conclusion: (1) photos of the foundation and construction; (2) steel used in construction; and (3) the theatre room. (Harnett Dep. 26:1-19; 28:9-21; 35:7-16). “Specialty” steel foundations do not justify abandoning the sales comparison approach, much less abandoning fair market value altogether. NICHOLS ON EMINENT DOMAIN Ch. 12B § 12.11[1] (“As a general rule, the market value of property is the measure of damages. Ordinarily, the cost of construction is not material, and especially the cost of

³ Numerous authorities further highlight the cost approach’s disfavored status. For example, in *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, the United States Supreme Court clarified that it is the property, and not the cost of it, that is protected by the Fifth Amendment. 70 S.Ct. 217, 221-22 (1949) (rejecting the cost approach method because it had no “bear[ing] on what a prospective purchaser would have paid”); see also *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 99 S.Ct. 1854, 1858 (1979) (“The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid . . . would be repeated in a sale of the condemned property.”).

In affirming a bankruptcy court’s rejection of the cost approach method, a Texas federal district court explained that **the cost approach should only be used as a valuation method if would make reasonable business sense to reproduce the asset being valued.** *In re Diamond Beach VP, LP*, 551 B.R. 590 (S.D. Tex. 2016) (discussing prior case law that rejected the cost approach because it did not produce an amount that a willing buyer would pay a willing seller).

some particular improvement, which, however convenient to the owner, may not correspondingly increase the market value.”⁴

Other than his own conclusory analysis of these items, Mr. Hartnett did not offer any research that he conducted into construction of other buildings in the Charleston area to determine if in fact the foundation and construction were unlike any other; did not explain his expertise in construction that allowed him to testify as such; did not explain why or how the steel used in Landowner’s building was different from all other building in Charleston; and did not explain why the theatre room could not be used or converted by another tenant. Moreover, Mr. Hartnett could not explain why no other tenant in the Charleston area could use the building, especially in light of the fact that Landowner had leased the property to other tenants up until the time of condemnation. Mr. Hartnett was required to do more.

In addition to complications defining what constitutes “specialty” or “unique use,” **the cost approach is disfavored because of difficulties in accounting for depreciation**, which includes

⁴ Moreover, here, the landowner has confirmed that the particular foundation he chose to install is **not related to the business uses of the building**. (Fabian Dep. 33:21-35:1). Thus even if the building is held to be “special use,” the Condemnor should not be forced to pay for higher quality materials or items unrelated to the building’s use.

Regarding the theatre room used by a tenant for audio/visual demonstrations and related commercial sales, Mr. Hartnett stated:

This was a special use building to what Mr. Fabian does in his business. He had one room in there that, you know, almost like a soundproof thing in the White House or something where he could conduct demonstrations and all I guess for clients in this specialty built soundproof, bullet proof, whatever it was, room.

(Hartnett Dep. 35:7-16). Having one soundproof room in a building does not justify departing from the willing buyer, willing seller framework. To the extent that Mr. Fabian’s business was affected by the condemnation, any such lost profits are not compensable in a condemnation case. *Mibbs, Inc. v. South Carolina Dep’t of Revenue*, 524 S.E.2d 626, 628 (S.C. 1999) (“Collateral damages, including lost business profits, are not recoverable on a takings claims.”).

both physical wear and tear and the effects of obsolescence also known as “functional” depreciation. *See generally* 72 AM. JUR. 2d § 655 *Reproduction of replacement costs* (2018); NICHOLS ON EMINENT DOMAIN Ch. 12B § 11.1[2]. Moreover and most notably, the cost approach tends to overstate value, *United States v. Benning Hous. Corp.*, 276 F.2d 248, 250 (5th Cir. 1960) (citations omitted) (“reproduction cost evidence almost invariably tends to inflate valuation”); *see also United States v. Certain Interests in Property in Champaign County*, 271 F.2d 379, 382 (7th Cir. 1959) (citations omitted) (“[The cost approach] method generally is held to be one of the least reliable indicia of market value.”). Here, Mr. Hartnett, simply estimated a flat 7% physical depreciation for “the usual wear and tear of an office building during the 10 years of its existence” without any further substantiation. (Hartnett Report, Bates No. L-00009558).

Other changes over time also affect valuation—like regulatory changes. For example, in the Replacement Cost Estimate contained in Landowner’s appraisal, a ninety three thousand five hundred dollar (\$93,500.00) projected cost is included to install an elevator in the hypothetically rebuilt building. (Hartnett Report, Bates No. L-00009570, at 14.1). The building currently does not have an elevator. But local code would now require one to be built. (Morey Dep. 94:5-97:1). Using the cost approach, Landowner would have Condemnor paying \$93,500 for an elevator which does not exist. It is for reasons like these that the cost approach is generally disfavored.

In sum, the cost approach is universally acknowledged as an outlier appraisal method to be sparingly used because it frequently overstates value, as well as due to complications in both defining specialty uses and in accounting for depreciation. It should only be used when there is truly no ascertainable market value for a property. Mr. Harnett has failed to substantiate that there was in fact no market for the property at the time of condemnation.

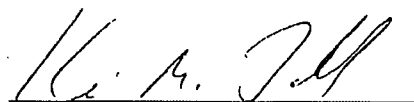
Landowner's property is of the type commonly sold in the marketplace—a ten-year-old office building with some upgraded fixtures and features—for which no legal justification exists to deviate from the willing buyer, willing seller standard for determining just compensation. Accordingly, Mr. Harnett's testimony should be excluded from trial.

CONCLUSION

To determine just compensation in a South Carolina eminent domain case, courts must utilize the fair market value standard, which is the price a willing buyer would pay a willing seller without any compulsion on either party to act. As Mr. Harnett conceded, his cost approach to value **does not** represent what a willing buyer would pay a willing seller for the subject property. While the cost approach method can in unique cases be employed to determine fair market value, it has not been done so here.

Moreover, even if the cost approach was appropriate, Mr. Harnett has failed to substantiate his basis for concluding that Landowner's property is special use and for excluding the standard sales comparison and income approaches to value.

For these reasons, Mr. Harnett's testimony should be excluded at trial.



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March 25, 2019

ATTORNEYS FOR THE CONDEMNOR

In the Matter Of:

SC Dept of Comm Div of Pub Railways vs.
Gateway Prop of Greater Chas, LLC, et al.

Frederick Fabian

October 09, 2018



A. William Roberts, Jr. & Associates

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1 understand to be particular about Gateway
2 Properties's foundation at 1799 Meeting Street
3 that's different from other buildings?

4 A. Uh-huh. Yes. Well, let's start in
5 the parking lot and work our way into the
6 building. The city made us install a French drain
7 system under the parking lot that was massively
8 expensive, and there's pictures that we've sent to
9 you all that depict all of that. Then the
10 foundation itself has 27 85 foot concrete pilings
11 down to the marl on which a, in some parts a three
12 foot concrete slab sits atop with reinforced
13 rebar.

14 In that we used the rebar for ten
15 twenty foot grounding rods to form the -- a
16 grounding system. Again, worried of lightening
17 and other kind of surges. So that any kind of
18 surge would be dissipated to ground before it
19 sought other paths like computers and electronics
20 and things like that.

21 Q. Does the grounding rods, is that
22 somehow related to the use of the building?

23 A. Yes.

24 Q. How so?

25 A. Well, it would be like you saying,

1 well, I've got a grounding rod for my electrical
2 system. If you don't have it, it doesn't work,
3 right. I'm confused on even that question.

4 Q. I'm trying to ask you how that relates
5 to -- the grounding rods relate to the use of the
6 building for eLifespaces?

7 A. It's a functional use. I mean, it's
8 ground. It's ground. It's an electrical system
9 ground.

10 Q. Does a typical building have a
11 grounding system?

12 A. Not like that, no.

13 Q. Is there something about your business
14 that necessitated that that grounding system?

15 A. No. I would think that any good
16 office building would have something similar, but
17 we watch some pretty low construction standards
18 here in town. So I don't know how to answer that
19 one.

20 Q. Let me see if I can see what you're
21 saying. It's not related necessarily to what kind
22 of business you have in 1799 Meeting Street; it's
23 just related to the quality of the construction
24 you wanted to put in the building?

25 A. That's correct. There you go. Spot

1 on.

2 Q. Back to the foundation you had
3 mentioned. Again, you mentioned 27 85 foot
4 pilings. How do you see that as being unique as
5 compared to what you know about other buildings
6 and how they're constructed?

7 A. I'd say a number of things. Like for
8 example, the building across the parking lot, they
9 use -- what do they call it -- telephone poles for
10 their pilings, which I don't consider to be of
11 quality in nature.

12 Q. This is not a feature that would be a
13 quality of good construction?

14 A. Yes. Yes. Yes.

15 Q. This is related to how eLifespaces
16 functions as a building?

17 A. Correct.

18 Q. And the drainage, French drainage
19 system you talked about, why was that required?

20 A. City of Charleston required it.

21 Q. For drainage purposes?

22 A. Uh-huh.

23 Q. That's not related to the business of
24 eLifespaces?

25 A. Correct.

In the Matter Of:

SC Department of Commerce Division vs.
Gateway Properties of Greater Charleston

Thomas F. Hartnett, GAA

October 10, 2018



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1 if it would change. We can reconvene and hear how
2 it would change, probably by telephone, but if it
3 wouldn't change I need to know that as well. Fair
4 enough?

5 A. Fair enough.

6 MR. BABCOCK: Does that work for you,
7 Trenholm?

8 MR. WALKER: That's fine.

9 BY MR. BABCOCK:

10 Q. What I'd like to do is kind of just
11 walk through your appraisal. I have questions on
12 certain pages. I'm not going to ask you about
13 everything.

14 Your cover letter on page 2 of your
15 appraisal, the cover letter is dated May 15, 2017,
16 and it's directed from you to Mr. Fabian and
17 indicates that the fair market -- well, indicates
18 the value of the property at the date of take --
19 strike that -- as of May 15, 2017 was \$4,580,000;
20 is that correct?

21 A. Correct.

22 Q. You indicate that you were using the
23 cost approach to value, correct?

24 A. Yes, sir. Yes, sir.

25 Q. Using that cost approach to come up

1 with, as you say, market value, but that would be
2 fair market value?

3 A. Yes, sir.

4 Q. As of May 15 is that number?

5 A. Yes.

6 Q. You understand that the condemning
7 authority is Palmetto Railways, correct?

8 A. I do. Yes, sir.

9 Q. I'm looking at page 7 of your
10 appraisal, and it's a certification of appraiser.
11 If we look down to the final bullet point, it
12 says: Assistance was provided to me by Steven J.
13 Morey, a project manager with Design Build
14 Construction, LLC. He provided me with
15 replacement costs for the existing improvements?

16 A. Yes, sir.

17 Q. Did I read that correctly?

18 A. Yes, sir, you did.

19 Q. Is that the individual who provided
20 you with the replacement costs that you used for
21 your appraisal?

22 A. It is, yes, sir.

23 Q. The final certification is that you
24 have not appraised the subject property for, nor
25 have you performed any appraisals for the subject

1 substitution, what are properties like the subject
2 property selling for. Whatever unit of value you
3 use, whether it be square foot, cubic foot,
4 whatever valuation method you use. In this case
5 the buildings that I looked at and was familiar
6 with were not the same types of building in the
7 typical what I just call brick and mortar building
8 without the substantial foundation and other
9 things that went into Mr. Fabian's building
10 according to my reading of the plans and
11 specifications.

12 So I just didn't think that there were
13 in the area -- when I say area, in the Charleston
14 Trident area -- of a building like this that had
15 sold that would give me a fair indication without
16 making substantial adjustments to the comparable
17 sale. Now, some of them might be subjective.
18 Some might be extracted from the market. What
19 type of construction was it, based on its use.

20 So I didn't find any buildings, office
21 buildings that had sold in what I call the greater
22 Charleston area that were comparable to the
23 quality of this building. I could have used
24 others that weren't comparable, but as I just
25 said, I would have to make substantial adjustments

1 to the assessment price, some of which could be
2 market extracted and some of which would probably
3 be the terminology that I used based on my
4 opinion.

5 Q. Subjective?

6 A. That's the word I used, subjective.
7 It would be better to have someone who knew what
8 it would cost to build that building do that for
9 me because I wouldn't have been comfortable making
10 adjustments to typical brick and mortar office
11 buildings.

12 Q. So did you go out and look for sales
13 that you could use in the traditional sense of the
14 sales comparison?

15 A. There should be some. I have reviewed
16 my comparable sales data, which you have. I think
17 you'll find there's some office buildings in there
18 that I used.

19 Q. That you looked at and didn't use?

20 A. Correct.

21 Q. So we'll go through that. I have your
22 file. We'll go through that in a minute to do
23 just that. Now, what were the factors? You
24 talked about the substantial foundation. Tell me
25 the different factors -- strike that.

1 Tell me what factors you used in
2 determining that this property was one that you
3 couldn't find a comparable sale. What was
4 different about this property?

5 A. Well, first of all, I have never
6 really had available to me photographs of
7 ground-up construction project such as this one,
8 which Mr. Fabian certainly has plenty. I think I
9 have them and you have them. But after looking at
10 the type of materials that are apparently going
11 into the foundation, type of equipment necessary
12 to install these materials, it was pretty obvious
13 to me that any cost numbers that I could put
14 together would not be fair to my client because it
15 would be subjective. It would be extracted from
16 the market, if I could find market extracted
17 adjustments. And in fairness to the client, I
18 just felt it was necessary to get somebody who
19 knew.

20 Now what the factors were you asked
21 me, primarily the photographs. And I'm limited in
22 my ability to thoroughly understand plans and
23 specifications and I do it, have done it for
24 years, but that's just not my profession to know
25 every detail in a plan and spec.

1 Q. Let's take a step back, because really
2 I wasn't coming back to the cost approach. I was
3 still staying with the sales comparison approach.
4 Let's kind of walk through what that means. And
5 you know, you've done this for years. When we
6 talk about fair market value we're talking about
7 willing buyer, willing seller with no compulsion;
8 is that fair?

9 A. Correct.

10 Q. What we're trying to establish is what
11 would be the fair market value as to the date of
12 take, correct?

13 A. Correct.

14 Q. In looking at that willing buyer,
15 willing seller under no compulsion, the question
16 is did simply having photos of the building being
17 built and having the material for the foundation
18 equipment to install, is it your opinion that
19 somebody who would be looking to buy the property
20 would be paying additional sums of money for the
21 property? Is that what you're saying?

22 A. Let me put it this way. There are
23 replacement costs and reproduction costs. Any
24 office building that may have been comparable to
25 this could have been a replacement cost. It's an

1 office. It has the same amount of square footage,
2 same amount of offices, got parking spaces. That
3 would be a replacement. But in this instance I
4 was looking at really a reproduction cost because
5 of the quality of that building and the uses that
6 Mr. Fabian told me he has in it. I'm sure you
7 went to the building, or maybe David or somebody
8 went to the building.

9 So in doing a cost approach normally
10 we will use -- and again, you're on a sales
11 comparison approach now, but it's so interrelated
12 to what we're talking about. The normal office
13 building would have been a replacement cost, but
14 Mr. Fabian had more in it than the normal
15 reproduced office building because of the
16 specialty foundations, the equipment he had in it,
17 the -- excuse me, not the equipment, the steel
18 that was used in the building, at least what was
19 apparent to me from reading the plans and specs
20 and watching the photographs and going through the
21 building.

22 So that's why the sales comparison
23 approach in my opinion was not suitable. It would
24 have given me a replacement cost for Mr. Fabian's
25 building, but I don't know that that would have

1 suited his business and the uses to which he puts
2 the building.

3 Q. There's no question that Mr. Fabian
4 had the right to build whatever building he wanted
5 to on his property when he built it in 2007. No
6 one is challenging that.

7 A. Correct.

8 Q. What I want to do, though, is focus on
9 right now the sales comparison approach, because
10 my question to you is, as we're trying to find
11 fair market value, which we defined as willing
12 buyer and willing seller, correct?

13 A. Correct.

14 Q. Is it your testimony that a willing
15 buyer and willing seller would have come to the
16 figure of \$4,580,000 for a transaction for the
17 subject property in October 2017? Is that your
18 testimony?

19 A. No, sir.

20 Q. What is your testimony?

21 A. My testimony is that in order to make
22 Mr. Fabian whole he needed to receive this much
23 money for what he was having to give up to the
24 state or to whoever the condemnor is, the Railway
25 Commission.

1 Q. Let me make sure I understand. I
2 understand that you have used the cost approach
3 because you, if I understand correctly, you wanted
4 to ensure that Mr. Fabian had the reproduction
5 value for the property that was taken; is that
6 right?

7 A. Correct.

8 Q. And that you weren't looking at
9 replacement value, correct?

10 A. Correct.

11 Q. And in so doing because you were
12 looking at reproduction value, you weren't looking
13 all willing buyer, willing seller; you were
14 looking at reproduction?

15 A. In this case Mr. Fabian himself was
16 not a willing seller. I mean, he was a seller who
17 had to sell, but it was not willingly that he sold
18 to the Railway Commission. So in a truer sense
19 his market value, he was not a willing seller. So
20 it's different when you have a willing seller and
21 a willing buyer.

22 Q. Sure. And in fairness, Mr. Hartnett,
23 this is a situation you have in every condemnation
24 case, isn't it, where some condemning authority
25 comes to some landowner and says for a public

1 purpose of some sort we need all or part of your
2 property? Isn't that the situation in every
3 condemnation case?

4 A. Certainly.

5 Q. That's true of every condemnation
6 case, and there may be some people who get happy
7 when they're condemned, but most times the
8 landowners are not happy when they're condemned;
9 isn't that true?

10 A. Vast majority of time.

11 Q. So this situation is no different than
12 any other total take, is it?

13 A. To the extent that it is a total take
14 that the state is acquiring the entire property
15 it's not, but the details of it are.

16 Q. But you've done total takes before,
17 correct?

18 A. Yes, sir.

19 Q. And they are not unusual in the world
20 of condemnation, are they?

21 A. No. In fact, they're preferred.

22 Q. And in fact, in some ways for an
23 appraiser that's an easier setting because when
24 you get into the after value and diminution of
25 value that sometimes is a little tricky, isn't it?

1 A. That's why I just used the word
2 preferred. The total take is preferred.

3 Q. Because you just have to have one
4 value?

5 A. Correct.

6 Q. What I want to make sure I'm clear on
7 is that we have a condemnation, correct?

8 A. Correct.

9 Q. We have a total take, correct?

10 A. Correct.

11 Q. And we have a piece of property that
12 you have analyzed using the reproduction cost,
13 correct?

14 A. Correct.

15 Q. And my question to you is that
16 reproduction cost, does that reflect willing
17 buyer, willing seller under no compulsion?

18 A. Is that replacement cost?

19 Q. No. I asked you is your reproduction
20 cost, is that willing buyer, willing seller, no
21 compulsion?

22 A. I'm not sure what you mean by that,
23 Mr. Babcock.

24 Q. Let me rephrase it. We start with the
25 process of trying in a condemnation case to come

1 up with fair market value, correct?

2 A. Correct.

3 Q. And again, it's easier in a total take
4 because we're looking at the fair market value of
5 an entire piece of property as of a certain date?

6 A. Correct.

7 Q. And fair market value is defined as
8 you've already testified, as willing buyer,
9 willing seller, no compulsion, correct?

10 A. That's the standard definition of fair
11 market value, yes, sir.

12 Q. That's the appraiser's definition,
13 correct?

14 A. Correct.

15 Q. That's the legal definition in a
16 condemnation case?

17 A. That's the control of the currency's
18 definition of it. That's what I used in the
19 report.

20 Q. I want to make sure. Fair market
21 value, willing buyer, willing seller?

22 A. Correct.

23 Q. No compulsion?

24 A. Correct.

25 Q. Does the reproduction cost that you

1 have used with Mr. Fabian, is that willing buyer,
2 willing seller, no compulsion as of October 2017?

3 A. No, sir, I don't think so.

4 Q. You have told me about why you didn't
5 use the sales comparison approach?

6 A. Correct.

7 Q. Tell me why you didn't use the income
8 approach.

9 A. For the very same reasons. This was a
10 special use building to what Mr. Fabian does in
11 his business. He had one room in there that, you
12 know, almost like a soundproof thing in the White
13 House or something where he could conduct
14 demonstrations and all I guess for clients in this
15 speciality built soundproof, bullet proof,
16 whatever it was, room.

17 But going back, if I might, to your
18 definition of --

19 Q. Are you answering my question? I'm
20 happy to hear what you have to say. I want to
21 make sure we get the question and answers part
22 done. I want to make sure before we leave income
23 approach.

24 A. Sorry. We were on income. For the
25 very same reasons.

1 STATE OF SOUTH CAROLINA
2 COUNTY OF CHARLESTON COURT OF COMMON PLEAS
3 Project: Navy Base Intermodal Facility
4 Track 23S
5 SOUTH CAROLINA DEPARTMENT OF COMMERCE DIVISION
6 OF PUBLIC RAILWAYS,
7 Condemnor,
8 vs. Case No. 2017-CP-10-5382
9 GATEWAY PROPERTIES OF GREATER CHARLESTON, LLC,
10 Landowner.
11 (Full Caption on Page 2)
12 DEPOSITION OF: STEVEN JOHN MOREY, Volume II
13 DATE: November 8, 2018
14 TIME: 10:19 AM
15 LOCATION: Walker Gressette Freeman Linton LLC
16 66 Hasell Street
Charleston, SC
17 TAKEN BY: Counsel for the Condemnor
18 REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC
19
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1 Q. Okay. And just -- I know you -- we're
2 doing good, but if you'd let me finish, that would
3 be helpful.

4 A. I apologize.

5 Q. Okay. So you've included the cost for
6 an elevator in here of -- let me see what that is.
7 I see it in the subtotal category of \$85,000; is
8 that correct?

9 A. Yes.

10 Q. Okay. All right. So that's something
11 that the building at 1799 Meeting Street did not
12 have; correct?

13 A. Correct.

14 Q. But you've added that into the
15 rebuilding cost estimate.

16 A. Correct.

17 Q. Okay. And why are you adding that in?

18 A. Because you can't build that same
19 building now that we were able to build then
20 without an elevator.

21 Q. Okay. But there's no confusion. There
22 is not currently or there never was an elevator in
23 that 1799 Meeting Street building; correct?

24 A. That's correct.

25 Q. Okay. So if you were to rebuild it

1 exactly as it stood today or at the time of
2 condemnation, you would not include a line item for
3 elevator; correct?

4 A. No, I --

5 MR. WALKER: Objection. Form of the
6 question. Go ahead and answer.

7 THE WITNESS: I would have to have an
8 elevator in it if I built it at the time of
9 condemnation. Code would require it.

10 BY MR. PAAVOLA:

11 Q. Right. But apart from the code
12 requiring it, if someone were to build a mirror
13 image of the building, it would not include an
14 elevator; correct?

15 A. You couldn't. Code would not allow it.

16 Q. Yeah. So I'm asking you regardless of
17 the code.

18 A. We couldn't build the building then.
19 The code would not allow it.

20 Q. And I hear what you're saying, but I'm
21 just not -- okay.

22 A. You can't build it.

23 Q. All right.

24 A. They won't let you. They'll shut you
25 down.

1 Q. Mr. Morey, that's not my question,
2 okay? I'm not asking about the code regulations.
3 What I'm asking you is if somebody -- that building
4 doesn't include an elevator, does it?

5 A. The existing building does not.

6 Q. There's no confusion about that.

7 A. Then no. That's correct.

8 Q. But your assumption here assumes that
9 you build it today.

10 A. No. Build it at condemnation.

11 Q. Build it at condemnation.

12 A. Or today.

13 Q. Codes change. Now you need an
14 elevator.

15 A. Correct.

16 Q. That's something new the building would
17 not have today; right?

18 A. Do what?

19 Q. That would be something new for the
20 building.

21 A. Say that again.

22 Q. The elevator would be something new to
23 the building if you build a new -- built today, it
24 would be something it didn't have prior to
25 condemnation.

1 A. Correct.

2 Q. Okay. Which is what, and back in
3 Exhibit 19, Mr. Fabian is telling you correctly?

4 A. Yes.

5 (EXHIBIT 22, Email Chain to Mr. Harper,
6 et al., from Mr. Morey dated 4-5-17, premarked for
7 identification.)

8 BY MR. PAAVOLA:

9 Q. Let me hand you Exhibit 22. Exhibit 22
10 is an email that you sent to a number of
11 individuals; correct?

12 A. Yes.

13 Q. Okay. And can you just tell me
14 generally what the purpose of this email was?

15 A. This is to get the estimate to rebuild
16 the building.

17 Q. Okay. So this is -- you're asking --
18 and who are the recipients, just generally? Are
19 these contractors?

20 A. Yes, subcontractors.

21 Q. Subcontractors. Okay. So you're
22 asking subcontractors to give you estimates to
23 rebuild 1799 Meeting Street; correct?

24 A. Yes.

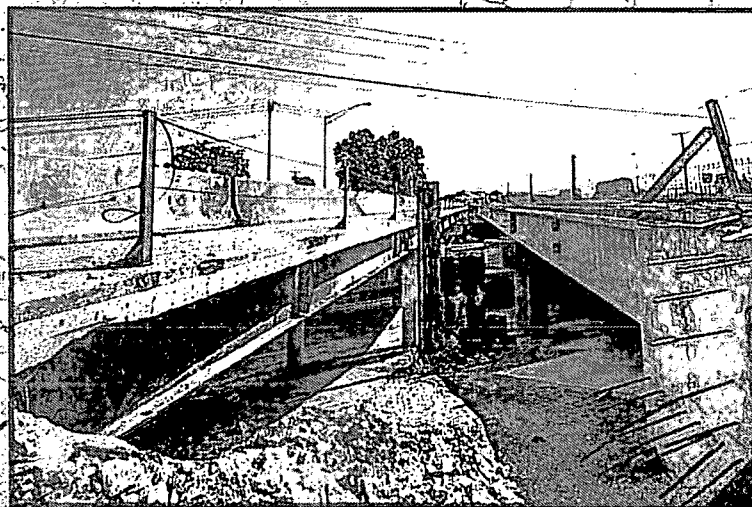
25 Q. Okay. And you say to them in the



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EXHIBIT

B



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Cost Approach to Value

According to *The Dictionary of Real Estate Appraisal*, the cost approach to value is

A set of procedures through which a value indication is derived for the fee simple estate by estimating the current cost to construct a reproduction of (or replacement for) the existing structure, including an entrepreneurial incentive or profit; deducting depreciation from the total cost; and adding the estimated land value. Adjustments may then be made to the indicated value of the fee simple estate in the subject property to reflect the value of the property interest being appraised.¹

According to *The Appraisal of Real Estate*,

This approach is particularly useful in valuing new or nearly new improvements and properties that are not frequently exchanged in the market. Cost approach techniques can also be employed to derive information needed in the sales comparison and income capitalization approaches to value, such as the costs to cure items of deferred maintenance.²

The major steps in applying the cost approach are as follows:

- Estimate the replacement cost or reproduction cost of the improvements as of the date of appraisal, including an appropriate entrepreneurial incentive.
- Estimate the amount of obsolescence present in the improvements.
- Deduct total obsolescence from the estimated cost new to arrive at an indicated value of the improvements as of the date of appraisal.
- Add the estimated value of the land to the indicated improvement value to arrive at an indication of market value.

In testimony before the trier of fact, appraisers should emphasize that the three approaches to value are interrelated and integral parts of the appraisal process. One or more approaches may be used depending on which approaches are necessary to produce credible assignment results, given the intended use of the appraisal, the type of property being appraised, and the property rights involved.³

The indicated values derived by the various approaches are then reconciled into a final opinion of property value after consideration of the relative strengths and weaknesses of each approach in relation to the property being appraised.

Many courts do not seem to understand that each of the three approaches to value is an integral part of the valuation process. Many court rulings appear to be based on the assumption that the three approaches to value are totally independent of one another and that only the most applicable approach is used in the appraisal of a specific property.

In 1972, a Washington court formally recognized the relationship between the three approaches to value, citing *The Appraisal of Real Estate*, fifth edition, as its authority.⁴ Citing the Washington case, however, a Massachusetts court said the following:

Whatever the relative importance or usefulness of the three methods to the real estate profession, however, they have not been viewed as equally applicable or as interchangeable under the law of eminent domain as it has developed in our cases. More specifically, the introduction of evidence concerning value based upon DRC [depreciated reproduction cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods.⁵

To say that the cost approach is generally disliked by the courts is an understatement. Another court stated the following:

A third method of appraisal is somewhat tentatively and timidly put forward by the claimant, namely, the reproduction method. Here an expert is called upon to give his version of the sound value of the building by estimating what it would cost to reproduce it, and then deducting a fair amount for depreciation. This "method" is perhaps the most excellent example conceivable to demonstrate that none of such abstractions ought to have a place in the search for market value, generally speaking. . . . [I]gnoring the fact that on the figures an absurd result is reached, it is apparent that the reproduction method is in itself absurd in the ordinary case, because even in ordinary times it is ridiculous to suppose that anyone would think of reproducing this or any like property, and that same thing would be true in the vast majority of cases, I should think.⁶

Despite pronouncements of that type, most courts allow the cost approach into evidence as long as the improvements enhance the value of the land for its highest and best use and proper deductions are made for depreciation of the improvements. The minority rule, which excludes consideration of cost data, has evolved for a number of reasons. The cost approach has been viewed by some courts as a violation of the unit rule. (See Chapter 4 for a discussion of multiple estates and the undivided fee rule.) Other courts have referred to the cost approach as a *summation* appraisal, which is typically forbidden. The cost approach, as applied, has also been seen as a violation of the consistent use theory. (See Chapter 6.)

The usefulness of the cost approach is discounted in many condemnor appraisal guidelines. For example, according to the Uniform Appraisal Standards for Federal Land Acquisitions:

While not inherently flawed, the cost approach has often been misused, leading a number of courts to identify the cost approach as "one of the least reliable indicia of market value" for the purpose of measuring just compensation. Indeed, as the Fifth Circuit observed, when improperly applied, "reproduction cost

evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult." As a result, the cost approach is rarely acceptable as a stand-alone indication of value for federal acquisitions; instead, it is typically employed either to test the financial feasibility of a potential highest and best use or to "check" or test the reasonableness of estimates of value indicated by other approaches. . . .

[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. The Ninth Circuit suggested possible ways to make the necessary showing in *United States v. 55.22 Acres of Land*, such as with evidence that "a prudent investor would reproduce the improvements at the reproduction cost figure [stated]," or that "willing vendees and vendors would deem reproduction cost less depreciation relevant in negotiating a purchase and sale of the property." The court further suggested that limited use of the cost approach as but "one guide" considered by the appraiser in arriving at a fair market value might have been acceptable. 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."

Cost Estimates

In the appraisal profession, the distinction between reproduction cost and replacement cost is quite clear. *Reproduction cost* is the current cost to reconstruct the improvements physically using the same or very similar materials. *Replacement cost* is the cost of constructing improvements equal in utility to the improvements being appraised using modern materials.

For example, consider a lumber mill constructed in 1920 that is a wood-frame structure of 4-in.-by-4-in. timbers with a sawtooth roof and 3-in.-thick wood decks over 18-in.-by-18-in. floor framing. If reproduction cost is to be estimated, the cost estimate will represent the cost of building these facilities using the same or similar materials. If replacement cost is to be used, however, the appraiser may estimate the cost of a steel-frame structure with steel skin, concrete floors, and a gable roof, which has the same utility as the existing facility. Replacement cost is differentiated from reproduction cost by the removal of many, if not all, items of construction excess, and therefore use of a replacement cost estimate may eliminate the need to make certain deductions for functional obsolescence.

Although there is a clear distinction between replacement cost and reproduction cost in appraisal, these terms are not clearly distinguished by the courts in most jurisdictions. Because many courts fail to distinguish between reproduction cost and replacement cost, appraisers must be careful in using these terms on the witness stand. When the terms are used, appraisers must explain their precise meanings in an appraisal context. It is generally permissible for an appraiser to estimate either reproduction cost or replacement cost as long as all forms of depreciation are accounted for in a manner consistent with the cost estimate used.

There are three standard methods for estimating reproduction or replacement cost: (1) the quantity survey method, (2) the unit-in-place method, and (3) the comparative-unit method.⁸ The quantity survey method is generally considered the most accurate, while the comparative-unit method is generally considered the least reliable. Whichever method is used by an appraiser, it is important that all indirect costs be included in the cost estimate and that entrepreneurial incentive be considered as an element of cost.

Appraisers must, of course, make an accurate, detailed property inspection and review building plans, if available, before a cost estimate can be developed. Many of the computations can be made after a field inspection, especially if a detailed field inspection checklist is used in the physical inspection of the property. This practice is recommended because it obviates multiple trips to the property to obtain data overlooked during the first inspection and, more importantly, prevents embarrassing situations on the witness stand. An appraiser will not have to answer inquiries about construction details by saying "I don't know," "I didn't notice," or, worse, "No, that item of cost is not included in my replacement cost estimate."

When an appraiser cannot testify to the size of the hot water tank in a single-family dwelling being appraised, typical jurors often forget that they do not know the size of the hot water tank in their own homes. Instead, jurors may wonder how the appraiser was able to estimate the replacement cost of the hot water tank without knowing its size. Jurors may also speculate that, if the appraiser missed this item of replacement cost, the appraiser may have missed others and made significant errors in the appraisal.

Appraisers must avoid representing themselves to the trier of fact as both *expert appraisers* and *expert cost estimators*. In a Rhode Island case, an appraiser was precluded from testifying to the cost of replacing a portion of a fence taken in an eminent domain action when the court ruled that being an expert appraiser does not necessarily qualify the appraiser as an expert fence builder.

If the cost approach is important to an appraiser's value conclusion, the appraiser is well advised to obtain an estimate of reproduction cost or replacement cost from at least one qualified contractor. To supplement the contractor's cost estimate, the appraiser should consider developing at least one other cost estimate or use one developed by a cost service. If the appraiser adopts the contractor's estimate with no other evidence, the estimate is not the opinion of the appraiser but of the contractor. In such a circumstance, the appraiser could be excluded from testifying in regard to the cost of the improvements because the estimate is not the appraiser's opinion and, therefore, is hearsay evidence. A simple solution to this problem is for the appraiser to obtain two independent cost estimates, using two different qualified contractors or two different methods. Then the appraiser can consider both cost estimates and arrive at a final opinion of the reproduction cost or replacement cost of the improvements.

The problem of hearsay can also arise if an appraiser uses a published cost service as the sole source of data. Aside from the hearsay rule, using a cost service as the sole source of data in estimating reproduction cost has been viewed with skepticism by some courts. For example, a Washington, D.C., Circuit Court said the following:



They [the appraisers] relied largely upon reproduction costs calculated on a rule of thumb cubic footage basis, less depreciation. . . . [T]he rule of thumb basis for estimating cost of reproduction, used by the Agency appraisers, has been described as being "not even approximately accurate, except for a few highly standardized types of structures." There is no showing that this was such a standardized structure. Accordingly, if such testimony is repeated on a new trial the jury should be cautioned . . . that the cubic foot cost method of computing reproduction cost is not entitled to great weight in such a case as this even in arriving at reproduction cost.⁹

Depreciation

Depreciation analysis is a valuable appraisal tool, but presenting it to a judge or jury may lead to confusion. Phrases such as *curable physical deterioration* or *incurable functional obsolescence caused by a superadequacy* have precise meanings in the real property appraisal profession, but they are meaningless to most jurors. If an appraiser uses technical terms on the witness stand, the jury may be confused or, even worse, they may feel patronized or manipulated. Any appraiser who uses a detailed breakdown method to estimate the depreciation present in a property being appraised is advised to find a way to explain the methodology in simple terms before taking the witness stand. Alternately, simplifying the analysis presented in the appraisal report may lay the foundation for a more convincing presentation at trial.

For condemnation appraisals, "[t]he depreciation from all causes—including physical deterioration, functional obsolescence, and economic or external obsolescence—must be properly identified and analyzed," according to the Uniform Appraisal Standards for Federal Land Acquisitions. "The estimated dollar amounts associated with each form of depreciation must be supported by market data using the breakdown method or the market extraction method. Depreciation should not be estimated by the use of published tables or age-life computations."¹⁰

Land Value

Six techniques of land valuation are recognized in the appraisal profession:

- sales comparison
- ground rent capitalization
- subdivision development analysis
- allocation
- extraction
- land residual

Subdivision development and land residual techniques have been harshly criticized in most jurisdictions. Many courts will exclude an appraisal using either technique.

If an appraiser does not employ the cost approach to value, analyzing the value of the land separately is not technically required in a typical appraisal assignment. However, in eminent domain valuation, a separate land value opinion is often required, even if the cost approach is not applied. There are two reasons for this requirement. First, a partial taking requires a separate land value opinion because without it the value of the part taken cannot be accurately analyzed. If

the before and after rule is applied, it is possible that the before and after values of the property cannot be properly analyzed without a separate land value estimate. Second, many condemnors require a separate opinion of land value.

The sales comparison technique is the preferred method of land valuation. It is the only technique of land valuation recognized by some condemnors when the land value opinion is being used in the cost approach to value. According to the Uniform Appraisal Standards for Federal Land Acquisitions, "The value of the land, vacant and subject to improvement, is generally developed by the sales comparison approach for land."¹¹

The technique applied to value land using comparable sales is the same as the technique used to value whole properties in the sales comparison approach to value. The technique is described in Chapter 10. Similarly, to value land with the ground rent capitalization technique, appraisers apply the same procedures employed to value improved properties by the income capitalization approach, which are covered in Chapter 9. The subdivision development analysis technique is described in Chapter 11.

Attempts to value vacant land using improved property sales, as prescribed in the allocation and extraction techniques, have generally been rejected by the courts. The single exception to this rule may be the use of the extraction technique when the improvements constitute a comparatively small percentage of the total sale price of the comparable property. The procedure used to analyze land value by extraction is similar to the procedure applied to estimate the amount of depreciation in the improvements, which was outlined previously. In this case, however, the residual value is the land value rather than the depreciated value of the improvement. In other words, the depreciated (or contributory) value of all of the improvements on a sale property are deducted from the sale price of the property and the remaining portion of the sale price represents the land value.

The land residual technique for analyzing land value is, to say the least, looked upon with disfavor by the courts. As a New York court put it:

Such a method of evaluation of vacant, unimproved land is completely unprecedented. There is no authority cited by claimants in support of it and none is to be found, for how can income be capitalized to produce a residual land value when the appropriated land is neither producing income nor equipped to produce such income.¹²

All six techniques of land valuation are discussed in detail in *The Appraisal of Real Estate*.¹³ In general, valuation of land using the extraction, allocation, or land residual method is not well received by the courts and may be inadmissible in some jurisdictions. The land residual technique of land valuation, which involves projecting income from a hypothetical improvement, would appear to have no place in the courtroom or in eminent domain valuation.¹⁴

Appraisers who are forced to develop an opinion of land value with a method other than the sales comparison technique should expect to receive strong criticism from the courts and their clients.



Notes

1. *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), s.v. "cost approach."
2. *The Appraisal of Real Estate*, 14th ed. (Chicago: Appraisal Institute, 2013), 47.
3. *The Appraisal of Real Estate*, 14th ed., 36.
4. *State v. Wilson*, 493 P.2d 1252, 1256 (Wash. 1972).
5. *Correia v. New Bedford Redevelopment Authority*, 377 N.E.2d 909, 911 (Mass. 1978).
6. *United States v. 49,375 Square Feet of Land in Borough of Manhattan*, 92 F. Supp. 384, 387-388 (S.D. N.Y. 1950), *affirmed per curiam sub. Nom. United States v. Tishman Realty & Constr. Co.*, 193 F.2d 180 (2d Cir. 1952), *cert. denied*, 343 U.S. 928 (1952) (Footnote omitted).
7. *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.
8. For examples illustrating how estimates of reproduction cost or replacement cost are developed by these methods, see *The Appraisal of Real Estate*, 14th ed., 584-595.
9. *Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d 641, 644 (D.C. Cir. 1957) (citations omitted).
10. *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed., §1.5.3.1.2, p. 34.
11. *Uniform Appraisal Standards for Federal Land Acquisitions*, 2016 ed., §1.5.3, p. 33.
12. *Levitin v. New York*, 207 N.Y.S.2d 798, 799 (N.Y. 1960).
13. *The Appraisal of Real Estate*, 14th ed., 359-376.
14. *United States v. 75.13 Acres of Land, etc.*, 693 F.2d 813, 816 (8th Cir. 1982).

Fred Fabian

Friday, December 8, 2017 at 1:21:21 PM Eastern Standard Time

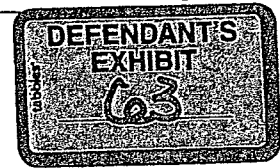
Subject: RE: 1799 Meeting St

Date: Monday, October 10, 2016 at 1:23:59 PM Eastern Daylight Time

From: Bill Ford

To: 'Fred Fabian', 'Rowe Jr, Albert J'

CC: 'Rucker, Oscar K', 'Robert S. Dodds', 'Thomas Hartnett', 'Brandon Hoffman'



Thank you for your help, the total cost numbers are much appreciated. Any detail showing different systems, HVAC, Security, Structure, electrical, plumbing, etc., would help even further. It is not a problem if this is not available, it would simply speed the process on my end.

I am currently working on the land value, and will contact you once I've moved into the improvement phase of the assignment. I anticipate this contact in approximately two weeks based on current work flow.

Bill

843 875-1487 o

843 819-6990 c

From: Fred Fabian [mailto:ffabian@elifespaces.com]

Sent: Monday, October 10, 2016 11:52 AM

To: Bill Ford; Rowe Jr, Albert J

Cc: Rucker, Oscar K; Robert S. Dodds; Thomas Hartnett; Brandon Hoffman

Subject: FW: 1799 Meeting St

Importance: High

Bill,

You had asked that I put together some cost information regarding 1799 Meeting Street Rd. Taking that one step further, I contacted my accountant, Brandon Hoffman, to extract precisely those costs; then asked that he bring those values forward into "today's dollars". His findings are below.

John,

Having not heard back from you regarding your "taking an inventory" request, I thought to touch base. Also, have you followed through with my tenants in that similar request?

I am presently in a holding pattern awaiting your next steps. ~ fred

ffabian

: (843) 577-5644 ext. 115

(843) 514-3040

From: Brandon Hoffman <bhoffman@hoffmancpa.com>

Date: Monday, October 10, 2016 at 11:35 AM

To: Fred Fabian <ffabian@elifespaces.com>

Subject: RE: 1799 Meeting St

Yes. That is fine.

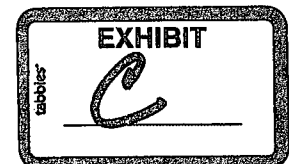
Brandon Hoffman, CPA

Hoffman & Hoffman, CPA, PA

Office: 843-766-3465

Fax: 843-766-0098

From: Fred Fabian [mailto:ffabian@elifespaces.com]



Sent: Monday, October 10, 2016 11:33 AM
To: Brandon Hoffman
Subject: Re: 1799 Meeting St

Brandon, can I share this with others involved in the valuation of 1799? ~ fred

From: Brandon Hoffman <bhoffman@hoffmancpa.com>
Date: Monday, October 10, 2016 at 11:17 AM
To: Fred Fabian <ffabian@elifespaces.com>, "Fred Fabian (ffabian@me.com)" <ffabian@me.com>
Subject: 1799 Meeting St

Fred,

Hope y'all weathered the storms this weekend ok and have gotten power back.

At your request, we extracted the actual cost associated with 1799 Meeting Street Road from various schedules. From these schedules, you requested that we develop an estimated cost to rebuild your facility by applying current labor rates, land values, and other related financial factors. The results of our analysis listed below are estimates and do not represent audited numbers nor do they reflect actual contractor bid estimates.

Building	\$ 3,134,000
Land	740,000
Land Improvements	<u>150,500</u>
Total	\$ 4,024,500

Given the unique nature of the building and the extensive amount of personal property/equipment used for the building systems to function, we included both an estimate of the cost of the structure as well as the related systems equipment in arriving at the building cost estimate. These values do not reflect vehicles, furniture and fixtures, information technology and computer systems, inventory, or other similar assets not integral to the function of the building and its systems.

Two factors worth notation utilized in the development of these values were (a) replacement land costs, and (b) the annual inflation rate applied to the original scheduled cost values.

We recommend you contact your real estate appraiser for a more accurate representation of land values. For our purposes, we used a land value provided by Daniel Atwill with Roadstead Real Estate Advisors, LLC of \$740,000. In his valuation, he cited several real estate transactions and listings around your area with comparable frontage on Meeting Street Road.

Lastly, we applied a factor of inflation to the actual costs incurred in construction of the existing facility. The inflation factor applied to the construction costs was 1.73%, per year.

Let me know if you need anything further.

Brandon Hoffman, CPA
Hoffman & Hoffman, CPA, PA
Office: 843-766-3465
Fax: 843-766-0098

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

You will please take notice that the undersigned, as attorneys for the Landowner will, ten (10) days after the service of this Notice of Motion and Motion, or as soon thereafter as counsel may be heard, move before the presiding judge for the Court of Common Pleas, Charleston County at the Charleston County Courthouse, for an order pursuant to South Carolina Code § 28-2-420 awarding interest as follows:

Section 28-2-420(A) of the South Carolina Code provides as follows:

A condemnor **shall** pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on funds on deposit with the clerk of court must be offset against the interest computed pursuant to this section. Interest shall not accrue during the twenty-day period

commencing upon the date of verdict or order of judgment. If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.

In this case, the Notice of Condemnation is dated October 17, 2019. At that time, Condemnor deposited \$1,800,000 with the clerk of court. That amount was later withdrawn by the Landowner via consent motion filed December 7, 2017.

The case proceeded to trial on the matter of just compensation. The jury returned a verdict in favor of the Landowner in the amount of \$3,750,000 on March 28, 2019. Therefore, Landowner is entitled to simple interest of eight percent per year from October 17, 2019 to March 28, 2019 (527 days) on the amount of \$1,950,000 (the difference in the amount drawn down by the Landowner and the final award of just compensation).

Therefore, the interest due Landowner under the statute is \$225,238.36 and Landowner hereby requests this amount be added to the judgement.

By: *G. Trenholm Walker*
G. Trenholm Walker (SC Bar #5777)
John P. Linton, Jr. (SC Bar # 79130)
WALKER GRESSETTE FREEMAN & LINTON, LLC
66 Hasell Street (29401)
P.O. Drawer 22167
Charleston, SC 29413
(843) 727-2200
Walker@WGFLAW.com
Linton@WGFLAW.com

April 8, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 8th day of April, 2019, in Charleston, South Carolina.

Wendy Jane Davis

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

NOW COMES Landowner, by and through its undersigned counsel, and requests this Court award Landowner its litigation expenses as provided by controlling law. South Carolina Code § 28-2-510 (B)(1) provides that “[a] landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses by serving on the condemnor and filing with the clerk of court an application therefor within fifteen days after the entry of the judgment.” The term litigation expenses includes “the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney’s fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or

participation in condemnation actions and the actual cost of transporting the court and jury to view the premises.” S.C. Code § 28-2-30 (14) (defining “litigation expenses”).

As stated by the statute, a landowner must prevail at trial to qualify for an award of litigation expenses. To prevail in this context “means that the compensation awarded [by the jury] . . . is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor.” Here, the Landowner prevailed at trial. The highest valuation of the property attested to on behalf of the condemnor was \$1,750,000 testified to by Debra Haskell, MAI and the highest valuation attested to on behalf of the Landowner was \$4,580,000 by Thomas F. Hartnett, GAA. The jury returned a verdict for \$3,750,000, which is closer to the Landowner’s highest value than the condemnor’s highest value. Therefore, the Landowner is entitled to an award of litigation expenses as specified in S.C. Code § 28-2-510 (B)(1) and § 28-2-30 (14).

The application must contain an “itemized statement” from the landowner’s attorney, which includes: (1) the fee charged; (2) the basis for the fee charged; (3) the actual time expended; and (4) all actual expenses for which recovery is sought. S.C. Dept. of Transp. v. Revels, 411 S.C. 1, 11, 766 S.E.2d 700, 705 (2014); see also, S.C. Code § 28-2-510(B) (“ . . . The application shall show that the landowner has prevailed, state the amount sought, and include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.”)

Landowner, the prevailing party at trial, seeks an award of the following litigation expenses totaling \$136,591.71, which are further supported by the affidavits of G. Trenholm Walker, Esq. and Robert S Dodds, Esq. attached hereto as exhibits A and B.

Walker Gressette Freeman & Linton, LLC	Attorney's Fees	\$99,423.50
Walker Gressette Freeman & Linton, LLC	Expenses	\$3,557.11
ROBERT S. DODDS ATTORNEY AT LAW	Attorney's Fees	\$18,500
ROBERT S. DODDS ATTORNEY AT LAW	Expenses	\$25.00
Thomas F. Hartnett	Expert Witness Fees	\$8,875
AWR Trial Solutions	Trial Support Expense	\$6,211.10
TOTAL LITIGATION EXPENSES		\$136,591.71

By: *G. Trenholm Walker*
 G. Trenholm Walker (SC Bar #5777)
 John P. Linton, Jr. (SC Bar # 79130)
 WALKER GRESSETTE FREEMAN & LINTON, LLC
 66 Hasell Street (29401)
 P.O. Drawer 22167
 Charleston, SC 29413
 (843) 727-2200
Walker@WGFLAW.com
Linton@WGFLAW.com

April 8, 2019
 Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

SOUTH CAROLINA DEPARTMENT OF)
COMMERCE, DIVISION OF PUBLIC)
RAILWAYS,)

Condemnor,)

vs.)

GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)

Landowner,)

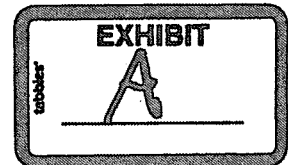
and)

NBSC a division of Synovus Bank, VFC)
PARTNERS 15 LLC, CAPELLA)
CAROLINAS, LLC, DONIVON)
GLASSBURN, and THE LOFT PILATES)
CENTER, LLC,)

Other Condemnees.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10-5382

Project: Navy Base Intermodal Facility
Tract 23S



**AFFIDAVIT OF G. TRENHOLM
WALKER IN SUPPORT OF
LANDOWNER'S APPLICATION
FOR AWARD OF ATTORNEYS'
FEES AND COSTS**

Personally appeared before me G. Trenholm Walker. who being duly sworn, testifies as follows:

1. I offer this Affidavit as testimony, under oath and under penalty of perjury, stating and affirming that I have personal knowledge of the facts set forth herein, that I am competent to testify to the matters set forth herein, and that all statements included herein are truthful and accurate.
2. I am over the age of eighteen. I am the senior member of Walker Gressette Freeman & Linton, LLC ("the firm"), in Charleston, SC.
3. The firm represents the Landowner in this action, commenced via filing of the condemnation notice on October 19, 2017.

4. The firm is handling this matter on an hourly basis. My hourly rate is \$390. John P. Linton, Jr.'s is \$325. The paralegal's is \$110. The rates are reasonable and consistent with those customarily charged in this locality for similar legal services. The rates have not changed since the filing of the notice of condemnation. The rates are consistent with those charged by the firm to other clients for similar services and in fact are slightly lower than those now charged.
5. The work undertaken in this condemnation action consists of tasks and actions required for litigation of moderate difficulty and complexity like this case. The tasks devoted to this matter have included, but are not limited to, communications and conferences with the client and witnesses, written discovery, document review and document production, multiple depositions, mediation, motion practice, legal research, drafting legal memoranda, and preparing for trial as well as trying the case.
6. I have substantial experience handling business litigation, including condemnation cases, at the trial and appellate levels. I graduated from the University of Virginia, Phi Beta Kappa, in 1974 and from the University of South Carolina School of Law, *cum laude*, in 1978. I was admitted to the South Carolina Bar in 1978. I served as a law clerk from 1978 to 1979 to the Honorable Robert F. Chapman, U.S. District Court Judge. I am AV-rated, the highest rating offered by Martindale-Hubbell®. Additionally, I am a fellow of the American College of Trial Lawyers, which is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. I am a fellow in the American Board of Trial Advocates, called ABOTA, as well as being a fellow in Litigation Counsel of America, both of these being other honorary organizations of trial lawyers where one must be selected by one's litigation peers who are fellows in the

2
#2

organizations. Among other recognitions, I was selected by other lawyers in South Carolina as one of the top 25 lawyers in South Carolina in 2017 and 2018 in the polling conducted by Super Lawyers®.

7. John P. Linton, Jr., graduated from Wofford College, *cum laude*, in 2007 and the University of South Carolina School of Law, *cum laude*, 2010. Following law school, he clerked for Senior United States District Court Judge P. Michael Duffy. Mr. Linton has substantial trial and appellate experience handling civil cases, including condemnation cases. Mr. Linton and I have been working together since 2012 on a variety of business litigation at the trial and appellate levels.
8. As of April 5, 2019, the firm's fees for handling this matter, from the date of the notice of condemnation, total \$99,423.50 as reflected in the chart below.¹

	Title	Hourly Rate	Number of hours	total
G. Trenholm Walker	Member	\$390	157	\$61,230.00
John P. Linton, Jr.	Member	\$325	96.5	\$31,362.50
Nancy Jane Dennis	Paralegal	\$110	62.1	\$6,831.00

9. The undersigned believes the fees are reasonable and consistent with factors typically considered by courts in awarding fees including 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of

¹ Walker Gressette Freeman & Linton, LLC will make the detailed bills available for *in camera* review to the extent the Court would like to review the detailed bills in addition to the itemized statement of fees included in this affidavit.

counsel; 4) contingency of compensation; 5) fees customarily charged in the locality for similar services; and 6) beneficial results obtained.²

10. Additionally, the firm has advanced costs in the amount of \$3,557.11 as reflected by the below chart:

Vender	Date	Description	Amount
Palmetto Railways	10/10/2019	FOIA	\$67.50
A. William Roberts Jr. & Associates	10/23/2019	Morey and Hartnett Depositions	\$320.23
A. William Roberts Jr. & Associates	10/23/19	Dopson and Fabian Depositions	\$382.95
Palmetto Railways	10/30/2018	FOIA	\$202.50
A. William Roberts, Jr. & Associates	11/19/2018	Morey Deposition	\$280.10
Clawson & Staubes, LLC	1/3/2019	mediation	\$786.13
G. Trenholm Walker	2/18/2019	Mileage reimbursement for Haskell Deposition	\$134.56
Creel Court Reporting	3/8/2019	Deposition of Haskell	\$709.30
ProLegal	3/26/2019	Trial Notebooks	\$673.84
TOTAL			\$3,557.11

11. Landowner incurred expert witness fees to Thomas F. Hartnett, GAA, a real estate appraiser who testified at trial in the amount of \$8,875, as shown by the attached invoices.

See Ex. A.

12. Landowner incurred litigation support fees to A. William Roberts Jr. & Associates for audio visual support services preparing for trial and at trial in the amount of \$6,211.10 as shown by the attached invoice. See Ex. B.

13. All attorney's fees and litigation expenses discussed in the preceding paragraphs were reasonably and necessarily incurred by the Landowner in this case after the filing of the notice of condemnation.

² An evaluation of these factors is neither required, nor forbidden, in condemnation cases. S.C. Dept. of Transp. v. Revels, 411 S.C. 1, 13, 766 S.E.2d 700, 706 (2014) ("... we emphasize that a Jackson evaluation is neither required nor forbidden under section 28-2-510").

FURTHER AFFIANT SAYETH NOT.

G. Trenholm Walker
G. Trenholm Walker

Sworn this 8 day
of April, 2019

Sherry Roper
Notary Public for South Carolina

My Commission Expires: Aug. 11, 2026



THE HARTNETT COMPANY, LLC.

Appraisers-Brokers-Consultants
Litigation & Trial Preparation
Expert Witness Testimony

P. O. Box 247
Isle of Palms, SC 29451

843-729-7222
tfhartnett@gmail.com

Gateway Properties of Greater Charleston
C/O G. Trenholm Walker, Esquire
Walker, Gressette, Freeman & Linton, PA
66 Hasell Street
Charleston, SC 29401

Date: April 1, 2019

In re: TFH2017-03-FABIAN

Date	Subject	Fee	Paid	Balance Due
04/01/19	SC Dept of Commerce v.			
	Gateway Properties of Greater Charleston			
	Meetings with attorneys, trial preparation			
	And review of all documents, 3 days in			
	Courtroom an testimony	\$ 8,275.00	-0	\$ 8,275.00
		TOTAL		\$ 8,275.00

Please make check payable to:

The Hartnett Company, LLC
P. O. Box 247
Isle of Palms, SC 29451
SSN: 248-66-8079



Thomas F. Hartnett, GAA

Certified General Real Estate Appraiser
Appraiser- Broker - Consultant

P. O. Box 247
Isle of Palms, SC 29451

Phone 843-729-7222

Mr. Frederick T. Fabian
C/O Walker, Gressette, Freeman & Linton, PA
66 Hasell Street
Charleston, SC 29401

Date: October 10, 2018

In re: TFH2017-03-FABIAN

Date	Subject	Fee	Paid	Balance Due
10/10/18	Deposition of Thomas F. Hartnett			
	SCDC v. Fabian			
	2 Hours @ \$ 300.00	\$ 600.00	-0-	\$ 600.00
		TOTAL		\$ 600.00

Please make check payable to:

The Hartnett Company, LLC
P. O. Box 247
Isle of Palms, SC 29451
SSN: 248-66-8079



AWR Trial Solutions
234 Seven Farms Drive, Suite 210
Charleston, SC 29492
(800) 743-3376
droberts@awrtrialsolutions.com
www.awrtrialsolutions.com



Invoice

BILL TO
G. Trenholm Walker Esq
WGFL Law
66 Hasell Street
Charleston, SC 29401

INVOICE # 1320
DATE 04/01/2019
DUE DATE 05/01/2019
TERMS Net 30

DATE	ACTIVITY	QTY	RATE	AMOUNT
03/22/2019	Case Information Action: Palmetto RR vs. Gateway; Charleston County	1	0.00	0.00
03/23/2019	Travel Travel fee charges: Georgia to Charleston	9.50	89.00	845.50
03/24/2019	Case Database Work Creation and gathering of database of video depositions for trial, arbitration or mediation. Download dropbox data, rotate, deskew, rename. Load to TrialDirector. Code EX and DESC fields	3.75	135.00	506.25
03/25/2019	Case Database Work Creation and gathering of	0.50	135.00	67.50

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TRIAL | MEDIATION | ARBITRATION

R-0197

DATE	ACTIVITY	QTY	RATE	AMOUNT
	database of video depositions for trial, arbitration or mediation. Download Cross folder from Dropbox. Load to TrialDirector, cross-ref to depo exhibits			
03/25/2019	Trial Presentation in courtroom Trial presentation technician in courtroom helping counsel present case; 10:00 to 4:20	6.50	175.00	1,137.50
03/26/2019	Trial Presentation in courtroom Trial presentation technician in courtroom helping counsel present case; 9:30 to 5	7.50	175.00	1,312.50
03/27/2019	Trial Presentation in courtroom Trial presentation technician in courtroom helping counsel present case; 9:00 to 3:45	6.75	175.00	1,181.25
03/28/2019	Travel Travel fee charges: Charleston to Georgia	10	89.00	890.00
03/29/2019	Miscellaneous Miscellaneous fee for: Parking, meals	1	270.60	270.60

Thank you for your business, and I look forward to working with you in the future.

BALANCE DUE

\$6,211.10

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Our Tax ID: 26-4800150

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TRIAL | MEDIATION | ARBITRATION

R-0198

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,)

Project: Navy Base Intermodal Facility
Tract 23S

Condemnor,)

vs.)

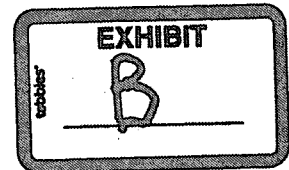
GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)

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.)



AFFIDAVIT OF ROBERT S. DODDS

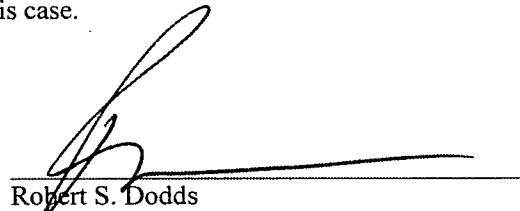
Personally, appeared before me Robert S. Dodds. who being duly sworn, testifies as follows:

1. I offer this Affidavit as testimony, under oath and under penalty of perjury, stating and affirming that I have personal knowledge of the facts set forth herein, that I am competent to testify to the matters set forth herein, and that all statements included herein are truthful and accurate.
2. My name is Robert S. Dodds. I am over the age of eighteen. I am an attorney operating as Robert S. Dodds, Attorney at Law, a law firm located in Mt. Pleasant, SC.

3. Along with Walker Gressette Freeman & Linton, LLC, I represented the Landowner in this action as counsel of record, which was commenced via condemnation notice on October 18, 2017.
4. I am handling this matter on an hourly basis. My rate is \$250 an hour for this matter. This rate is reasonable and consistent with those customarily charged in this locality for similar legal services. This rate is also consistent with those I charge other clients for similar services.
5. The tasks which have been undertaken in this condemnation action are normal tasks required for litigation of this nature and they are of moderate difficulty and complexity. The tasks necessarily devoted to this matter have included: evaluation of validity of condemnation, coordination with expert witness and co-counsel, assisting client with compilation and evaluation of factors related to valuation of subject property, review and assist client related to discovery requests and responses, application for and disbursement of funds on deposit with clerk of court, including coordination with attorneys for other Condemnees; and monitoring of litigation.
6. I have experience handling civil cases. I have been licensed to practice law in South Carolina since 1988. I have an undergraduate degree in Accounting and an LLM in taxation. I have significant experience in commercial real estate transactions, as well as real property and commercial real estate and entity appraisals.
7. As of April 5, 2019, my fees for handling this matter, from the date of the notice of condemnation, totaled Eighteen Thousand Five Hundred and No/100ths (\$18,500.00) Dollars, which represents seventy-four (74) hours.

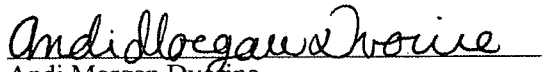
8. The undersigned believes the fees are reasonable and consistent with factors typically considered by courts in awarding fees including 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.¹
9. Additionally, the firm has advanced costs in the amount of \$25, which was a filing fee with Charleston County Clerk of Court.
10. All attorney's fees and litigation expenses discussed in the preceding paragraphs were all necessarily incurred by the Landowner in this case.

FURTHER AFFIANT SAYETH NOT.



Robert S. Dodds

Sworn this 8th day of April, 2019.


Andi Morgan Dvorne
Notary Public for South Carolina
My Commission Expires: 03/22/2029

¹ An evaluation of these factors is neither required, not forbidden in condemnation cases. S.C. Dept. of Transp. v. Revels, 411 S.C. 1, 13, 766 S.E.2d 700, 706 (2014) (“... we emphasize that a Jackson evaluation is neither required nor forbidden under section 28-2-510”).

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

SOUTH CAROLINA DEPARTMENT OF)
COMMERCE, DIVISION OF PUBLIC)
RAILWAYS,)
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Condemnor,)
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vs.)
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GATEWAY PROPERTIES OF)
GREATER CHARLESTON, LLC,)
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Landowner,)
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and)
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NBSC a division of Synovus Bank, VFC)
PARTNERS 15 LLC, CAPELLA)
CAROLINAS, LLC, DONIVON)
GLASSBURN, and THE LOFT PILATES)
CENTER, LLC,)
)
Other Condemnees.)
)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10-5382

Project: Navy Base Intermodal Facility
Tract 23S

FILED
2019 APR 25 PM 2:15
JULIE J. ARMSTRONG
CLERK OF COURT

**LANDOWNER'S MEMORANDUM
IN OPPOSITION TO
CONDEMNOR'S POST-TRIAL
MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT;
NEW TRIAL NISI REMITTITUR; NEW
TRIAL; NEW TRIAL ABSOLUTE; NEW
TRIAL PURSUANT TO THE
THIRTEENTH JUROR DOCTRINE**

Landowner Gateway Properties of Greater Charleston, LLC ("Landowner") respectfully submits this Memorandum in Opposition to the Post-Trial Motions of Condemnor, South Carolina Department of Commerce, Division of Public Railways, ("Condemnor" or "Railways" or "Palmetto Railways"). For the reasons explained herein, the Condemnor's Motions should be denied.¹ In its Post-Trial Motions, Condemnor rehashes arguments made during trial that have already been rejected by this Court and are not supported by the law or the evidence at trial.

¹As explained in Landowner's Post-Trial Motions, statutory interest and Landowner's reasonable litigation expenses should be added to the amount of the judgment.

As this Court ruled in denying Railways' motion to exclude Hartnett's testimony at the beginning of the trial, again at the time of presentation of his testimony, and again when denying Railways' motion for a directed verdict, the question of the "just compensation" is inherently a factual issue. Subsidiary factual issues that were pertinent to the ultimate factual determination of "just compensation" included, but were not limited to, whether there was a ready market for the building on the property, whether the building was a special purpose facility or a commercial office building, and what was the best approach to determining the value of the improvements on the property taken. This Court correctly decided that all of these factual issues were for the jury.

BACKGROUND

The Court is fully familiar with the facts, having tried the case for four days. The factual question of the amount of "just compensation" turned largely on whether the condemned property at 1799 Meeting Street Road, Charleston (TMS #464-02-00-017) ("the Property") was a special use property based on the specific characteristics of the building and related improvements that were completed in 2007. The Landowner and the Landowner's appraiser considered it to be a special use property. Railways and its appraiser contended the Property was a generic office building not a special use property. There was abundant evidence at trial that the Property was not a standard office building but was instead a state-of-the-art technology facility.

The managing member of the Landowner, Fred Fabian, testified at length regarding the design and construction of the facility. The Landowner constructed it in 2007 for the special purpose of housing eLifespaces, the tenant, to test and showcase the numerous technological and electronic systems that it sells and installs that were built into the infrastructure of the facility.

The proof at trial highlighted the features of the facility that are unique and without comparable in the local market. These unusual elements of the facility are too numerous to

exhaustively list, but include 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 complicated computer 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.

The evidence at trial also included numerous pictures of the facility illustrating many of the special features, 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 of the construction of the Property. See generally, Landowner Exs. 11, 13-28, 30-34, 36, 38-39, 43, 48.

Witness Steve Morey of Design Build, LLC, a local general contracting firm, personally oversaw the original construction of the facility. He testified the building’s design, features, and systems were not those of an office building. Morey, who the Court qualified as an expert witness in estimating construction costs, testified, without objection, as to the costs to rebuild the building to the same specifications as original construction, as modified to meet current building codes.²

² Mr. Morey did testify that there were slight changes and the addition of an elevator to the design, because code changes since the original construction required those changes and it would be illegal to build the building without complying with today’s code.

Morey's estimate of over \$4,300,000, based on actual bids from vendors and subcontractors, further demonstrated that the building was not just an office building.

Thomas F. Hartnett was Landowner's expert witness on real estate valuation. He testified that when he performed his inspection of the Property it was obvious to him the Property was not a standard office building, but instead was a special purpose property. He testified that he was unable to locate any comparable property in the market area, much less the sale of a comparable facility. Hartnett testified that in his opinion the cost approach was the best and fairest method of determining just compensation for the Property taken. He relied on Morey's estimated replacement cost, as depreciated, for the value of the improvements being taken. He relied on the sales comparison approach for determining the value of the land being taken.

Finally, even Railways' expert, Deborah Haskell, acknowledged that special use properties are valued differently and the cost approach is an accepted method of valuation. 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, giving as one of her examples a bio-tech 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 upshot of her testimony was that in her opinion the facility on the Property was nothing more than an office building that should be valued under the sales comparison and income approaches and should not be valued under the cost approach. Landowner introduced extensive proof to contradict Haskell's opinion.

DISCUSSION

I. The Court must deny the Motion for JNOV because there was ample evidence to support the jury's verdict.

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. (double emphasis added) (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) (double emphasis added). 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*. 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). These principles concerning directed verdict and JNOV motions apply with equal force in the context of condemnation cases where the sole question for the jury is the amount of just compensation to be awarded.

Here, substantial evidence supports the jury's verdict. Hartnett, an expert witness qualified in real estate valuation and the appraisal of real estate, testified as to his opinion that the value of the land taken was \$4,580,000. As explained in detail below, this opinion was based upon one of

Morey's estimate of over \$4,300,000, based on actual bids from vendors and subcontractors, further demonstrated that the building was not just an office building.

Thomas F. Hartnett was Landowner's expert witness on real estate valuation. He testified that when he performed his inspection of the Property it was obvious to him the Property was not a standard office building, but instead was a special purpose property. He testified that he was unable to locate any comparable property in the market area, much less the sale of a comparable facility. Hartnett testified that in his opinion the cost approach was the best and fairest method of determining just compensation for the Property taken. He relied on Morey's estimated replacement cost, as depreciated, for the value of the improvements being taken. He relied on the sales comparison approach for determining the value of the land being taken.

Finally, even Railways' expert, Deborah Haskell, acknowledged that special use properties are valued differently and the cost approach is an accepted method of valuation. 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, giving as one of her examples a bio-tech 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 upshot of her testimony was that in her opinion the facility on the Property was nothing more than an office building that should be valued under the sales comparison and income approaches and should not be valued under the cost approach. Landowner introduced extensive proof to contradict Haskell's opinion.

the three standard approaches to real estate valuation, the cost approach. Even Railway's expert recognized that this cost approach is one of the standard approaches to value and that it is appropriate for a special use property and/or when comparable sales are unavailable. Hartnett determined that the property was a special use property and that there were no comparable sales that could be used for the sales comparison approach to valuation. He also determined that the income approach to valuation was not appropriate in this case.

Hartnett was cross examined on his approach, particularly the depreciation he applied to the costs included in his opinion. The evidence supports that the jury believed Hartnett, but may have felt his valuation was slightly high or that he should have depreciated the improvements more. Either way, the jury's verdict is fully supported by Hartnett's testimony. Therefore, Railways' motion must be denied.

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 jury evaluated their respective opinions along with the other proof in reaching their decision on just compensation. Here, where the jury settled on a figure falling between the opinions of the two experts, there is no basis to overturn the jury's verdict. If the verdict in a condemnation case is between the competing values offered into evidence, the Supreme Court has ruled that post-trial motions based on the amount of the verdict are properly denied. 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). Here, just as in the Opperman case, the verdict was well within the range of the values offered at trial and must be sustained.

Even if Hartnett's opinion was disregarded, there is still other evidence that supports the amount of the verdict.

Fred 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, Steve Morey testified, without objection, that the cost today to reconstruct the building taken was \$4,319,040. See Landowner Exs. 71 & 72. Railways cross examined Morey at length about his estimate, including questioning certain costs attributable to complying with the current version of the building code, such as adding an elevator. Morey testified the additional costs attributable to changes in the building code were 10-15%. The jury could have believed Morey's testimony but decided to only award the land value and the cost of rebuilding identical improvements. Morey's testimony independently supports the jury's verdict.

The evidence fully supports the jury's verdict and requires the denial of Railways' Motion.

II. The Court correctly denied Condemnor's Motion to Exclude Thomas F. Hartnett and Condemnor's Motions for Directed Verdict on that same basis and should deny the Post-Trial Motions making the identical arguments. Further, substantial legal precedent supports use of the cost approach including valuing special purpose properties.

The admission of expert testimony is left to the sound discretion of the trial court. Hartnett was qualified as an expert in appraising property and was, therefore, entitled to render his opinion on the value of the property taken, even though Railways might have disagreed with his conclusions. 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.”) The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kears, 329 S.C. 51, 60–61, 495 S.E.2d 205, 211 (1998). Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989).

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. Our Supreme Court has specifically rejected the grounds for excluding an expert appraiser that were argued by Railways at trial and again in its Post-Trial Motions:

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 exhaustively cross-examined Hartnett, attacking the foundation of his opinion. It was for the jury to decide what weight to give to Hartnett’s testimony - whether to believe all, some, or none, as the Court instructed they were entitled to do when considering the testimony of an expert.

The Court correctly determined that the sufficiency of the basis for Hartnett’s opinion was for the jury to decide. Railways has not come forward with any reported legal precedent in South Carolina to the contrary. Railways has not produced a single reported case holding that a qualified real estate appraiser’s opinion *must be excluded as a matter of law* based on the opposing party’s contention that the appraiser ignored supposed standards for establishing value in a condemnation case or that his opinion was not based on fair market value.

- a. The cost approach is a recognized approach to real estate valuation and is appropriate when there are no comparable sales and/or the property to be appraised is a special use property.

Railways continues to argue Hartnett’s opinion should have been excluded because he employed the cost approach to valuation instead of the sales comparison and income approaches employed by its expert, Haskell. Railways cannot, and does not, cite a single South Carolina case stating that the cost approach can never be employed or that an expert using the cost approach must be excluded from testifying. Railway’s argument that the opinion must be excluded as a matter of law is contrary to the Constitutions of South Carolina and the United States that both mandate just compensation for the taking of property by the state.

As stated earlier, Haskell, Railways’ 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.³ The Appraisal of Real Estate, a leading treatise on real estate appraisal that Railways cites in its Post-Trial Motions, explains “[t]he cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised . . . are not amenable to valuation by income capitalization approach.” pp. 353-54 (Copy attached as Exhibit A). South Carolina appellate courts have recognized that the cost approach is one of the three generally accepted approaches to real estate valuation. 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).

Here, Hartnett testified that he looked for comparable sales, but was unable to locate any. Because this was a special use property with unique design features and there was no market for sales or rental of this type of facility in the local area, Hartnett employed the cost approach to valuation.

Railways continues to assert the cost approach employed by Hartnett is inadmissible as a matter of law. This position ignores that its own appraiser and courts recognize that the cost approach can be used to value property in a condemnation action, particularly if the condemned property is a special use property.

³ Railway’s expert did not employ the cost approach because she determined that the Property was nothing more than an office building. Having made that determination, she utilized “comparable sales” of office buildings and the income capitalization approach to determine just compensation.

Numerous 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”).⁴ Even the United States Supreme Court recognizes that the sales comparison approach is not the only approach to just compensation. United States v. 564.54 Acres, 441 U.S. 506, 513, 99 S.Ct. 1854, 1858 (1979) (citations omitted); U.S. v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402–03, 70 S. Ct. 217, 221 (1949) (noting that in the absence of appropriate comparable sales other approaches to value may be relevant).

Other courts around the country have approved the cost approach for valuing special purpose properties like the Property in this 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

⁴ It is worth noting that this case includes not only the Landowner’s right to just compensation under the South Carolina Constitution, but also, the right to just compensation under the United States Constitution.

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, 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).

The New York court in In re Lido Boulevard, supra, established four criteria that a property owner in a condemnation case must satisfy to recover reproduction or replacement cost that were fully met by the proof of the Landowner in this case:

...Before a property can qualify as a specialty entitled to the summation approach, the following criteria must be established.

- (a) The improvement must be Unique and must be specially built for the specific purpose for which it is designed;
- (b) There must be a Special use for which the improvement is designed and the improvement must be so specially used;
- (c) There must be No market for the type of property (here, a beach and cabana club) and no sales of property for such use; and
- (d) The improvement must be an appropriate improvement at the time of the taking and its use must be Economically feasible and reasonably expected to be replaced.

349 N.Y.S.2d 427 (capitals in original).

The decision of the Supreme Court of Rhode Island in Warwick Musical Theater, Inc. v. State of Rhode Island, 525 A.2d 905 (2005) is particularly instructive. In that condemnation proceeding the property taken was a theatre, one of the principal special purpose uses of the Property in this case. The 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:

Although the comparable-sales method of determining fair-market value is the preferred method of valuation in condemnation proceedings, it is within the discretion of the trial justice to depart from this method when he finds that the subject property is unique or special purpose. ... In light of the testimony regarding the unique character and use of the theater building, it appears that the trial justice was not clearly wrong in his determination that the facility was used for a special purpose that precluded the use of comparable-sales valuation.

The trial justice then accepted the method of valuation employed by the theater's expert. When evidence of comparable sales is not available or is inappropriate, the reproduction cost of the building less depreciation is admissible as proof of market value.

....In his testimony regarding the replacement cost of the theater, the theater's expert used the actual-cost-of-construction figures as provided by the theater's accountant. He consulted the E.H. Boeckh system of cost analysis to obtain a time-modifying factor in order to bring the actual costs up to date. Testimony regarding the actual expenditures made to improve the land is relevant to a determination of damages sustained because of a condemnation and is admissible as a consideration in such assessment.

525 A.2d 910-911 (internal citations omitted; double emphasis added).

As this Court is aware, the Supreme Court of South Carolina has acknowledged the guiding principles of these cases from other jurisdictions. In Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 217, 188 S.E.2d 188, 193 (1972) our Supreme Court commented that in some instances such as a specialty purpose property, the jury is not limited to fair market value and may value the property taken by another method:

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.*

188 S.E.2d 193 (double emphasis added).

In this case, it was clearly up to the jury to weigh the evidence and decide if there were no comparable sales for the Landowner's Property. If not, the jury was entitled to use another formula supported by the evidence, namely the cost approach. Railway's expert, who categorized this special use property as an "office," identified several sales of offices that she opined were comparable to the building in this case. The jury, by its verdict, rejected her opinion that these sales involved other properties comparable to this Property, as it was fully entitled to do. See City of N. Charleston v. Claxton, 315 S.C. 56, 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (recognizing that jury must evaluate whether the comparable sales used by an appraiser are appropriate).

III. Landowner's entitlement to just compensation is the standard under both the South Carolina and United States Constitutions.

In arguing that Hartnett's use of the cost approach should have been excluded by this Court, Railways continues to assert that the only measure of value of the property taken in a condemnation case is "fair market value," rather than "just compensation" as required by the South Carolina and

United States Constitutions, or that the two terms are one in the same. As explained herein, there is no legal authority to support Railways untenable position that the Constitutions' "just compensation" has been watered down or modified by statute or caselaw.

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 in this case, 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 e.g., 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)⁵; Blue Ridge Elec. Co-op. v. Combined Util. System of City of Easley, 279 S.C.

⁵ The quoted excerpt from the United States Supreme Court in Seaboard Air Line Ry. Co. v. U.S. is particularly pertinent to this case where Railways objected to the jury charge from Carolina Power ("... If that formula [fair market value] is unfair to either party some other formula may be used.") on the basis that equitable considerations have no place in takings jurisprudence.

135, 139, 303 S.E.2d 91, 93 (1983) (“The purpose of payment of just compensation is to put the condemnee in as good a position pecuniarily as he would have been had his property not been taken.”); 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) (“Generally speaking, in condemnation cases valuation is not a matter of mere mathematical calculation, but involves the exercise of judgment. ‘Just compensation’ is the amount of money necessary to put a landowner in as good a pecuniary position, but no better, as if his property had not been taken.” (internal quotations and citations omitted)); see also, generally, Howell v. State Hwy. Dept., 167 S.C. 217, 166 S.E. 129, 132 (1932) (“The Constitution of the state provides that, when private property is taken for public use, just compensation shall be made to the owner. The method for the final fixing of the amount of such just compensation is by the verdict of a jury, which arrives at its verdict by finding the right conclusion from a consideration of the facts, and then applying its findings of fact to the law as the court has given it.”).

Consistent with the above cited authorities, the Court charged the jury at trial regarding just compensation, without objection from either party, as follows:

The amount a condemnor should pay a landowner in order to adequately compensate the landowner for a taking of his property is called ‘just compensation.’ It 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.

In order to be compensated fully, the landowner must be put in as good position pecuniarily as if the use of his property had not been taken. He is entitled to have the full equivalent of the value of such use at the time of the taking. The owner is to be given as compensation for his land its fair price for any use for which it has commercial value of its own in the immediate present or in reasonable anticipation in the near future.

The Court's charge on just compensation was an accurate statement of the law that Railways did not object to. The Court should reject Railways' invitation in its Post-Trial Motions to reverse course and overturn the constitutional standard for just compensation.

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. At trial, and in its Post-Trial Motions, Railways repeatedly contended that the Eminent Domain Procedures Act's definition of just compensation provides that just compensation is "fair market value" as defined as what a willing buyer would pay a willing seller. However, the statute does NOT say that:

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. The definition does NOT mention "fair market value" or that just compensation must be determined by what a willing buyer would pay to a willing seller. 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 means that the legislature did not intend to equate value to fair market value. 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).

Pursuant to the wording of this statute, the Landowner is entitled to the *value* of the land and improvements taken.^{6 7} This standard is consistent with the above noted definitions of just compensation, requiring the landowner to be placed in as good a position as he would have been had the taking not occurred. Fair market value is often the basis for determining just compensation, but it is not the only valuation that courts have approved, contrary to what is argued by Railways in this case. Carolina Power & Light Co., supra.

Railways argues that the Court should disregard Carolina Power & Light⁸ 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. In fact, the legislature could not have changed or impaired the constitutional right to “just compensation” by statute. See Blue Ridge Elec. Co-op. v. Combined Util. System of City of Easley, 279 S.C. 135, 303 S.E.2d 91 (1983) (affirming the trial court’s ruling in case concerning a

⁶ S.C. Code § 28-2-30 (17) (“‘Property’, ‘real property’, or ‘land’ means all lands, including improvements and fixtures thereon, lands under water, easements and hereditaments, corporeal or incorporeal, every estate, interest and right, legal or equitable, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise.”).

⁷ 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. However, it is worth noting that our state Supreme Court recently rejected what it called a “restrictive” approach to just compensation for damages to the remainder in favor of realizing the constitutional imperative of just compensation. S.C. Dept. of Transportation v. Powell, 424 S.C. 206, 211, 818 S.E.2d 433, 435 (2018), *reh’g denied* (Sept. 28, 2018) (rejecting a “restrictive interpretation of the just compensation statute whereby only damages resulting from the actual taking . . . are recoverable”).

⁸ 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).

specific statute regarding the condemnation of certain utility facilities stating that “. . . the statutory formula was constitutional so long as it was construed as a minimum, not a limitation, on what factors the arbiter could use to determine just compensation” and explaining that “[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)); S.C. State Hwy. Dept. v. S. Ry. Co., 239 S.C. 1, 9, 121 S.E.2d 236, 240 (1961) (“While 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.” (Oxner, J., dissenting));

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. See Railways Motion, 6-10. Railways includes an extensive string of citations where the words “fair market value” appeared in a court opinion. However, Railways does not cite a single case where our courts have held that fair market value defined by what a willing buyer would pay a willing seller for a property is the *exclusive* definition of just compensation.

Stated differently, none of the cases cited by Railways holds that fair market value is the exclusive test for just compensation. See Howell v. State Hwy. Dept., 167 S.C. 217, 166 S.E. 129, 130 (1932) (the issue considered by the Court has nothing to do with the definition of just compensation and was limited to the appropriate time for the valuation of the property: “[t]he particular assignment of error is that by this charge the jury were left to fix the value as of a time they thought to be normal, whereas they should have been instructed that the value must be fixed as of the time of taking.”); S.C. State Hwy. Dept. v. League’s Est., 251 S.C. 368, 371, 162 S.E.2d 532, 533 (1968) (“Our decisions recognize that the value of real property *may* be shown by

evidence of the price realized from voluntary sales of similar property in the vicinity when not too remote in point of time.) (double emphasis added)); S.C. State Hwy. Dept. v. Bryant, 253 S.C. 400, 406–07, 171 S.E.2d 349, 352 (1969) (affirming the decision of the lower court not to charge the jury that the landowner had to show a probability that the land would be developed as residential because the Landowner was entitled to the highest and best use of the property stating that “the condemnee had no intention whatever of selling any portion of his property should not deprive him of his right to be compensated for it at its fair market value based on the highest and best use thereof. *Under the circumstances of the case, the requested charge would, in effect, have told the jury that the condemnee could not recover the value of the condemned acreage for rural residential purposes, even though such was the highest and best use thereof*, since it was obvious that he had no intention of putting the property to such use within the immediate future or within a reasonable time had such not been condemned.”) (emphasis added)); S.C. State Hwy. Dept. v. Wilson, 254 S.C. 360, 367, 175 S.E.2d 391, 395 (1970) (case only concerned severance damages/diminution in value of the remaining parcel and the value of the land taken was not an issue in the case); South Carolina State Highway Department v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963) (same); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 407, 175 S.E.2d 805, 820 (1970) (Overruling an objection that the court did not give new counsel for one of the parties sufficient time to prepare for trial: “In a condemnation proceeding the issues are simple. The court is in quest of the reasonable fair market value of the property taken. There is nothing in the transcript before us to convince us that ample opportunity to explore that issue was not afforded the landowner.”); S.C. State Hwy. Dept. v. Carodale Associates, 268 S.C. 556, 562, 235 S.E.2d 127, 129 (1977) (finding the “scope-of-the-project test” was inapplicable to that case); S.C. Dept. of Highways & Pub. Transp. v. Cheston, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982) (stating

that “while the ‘before and after’ method of evaluating damages is sound, it is not exclusive” and “it is permissible to assess damages upon the basis of the fair value of the land taken plus any special damages to the remainder.”); City of Folly Beach v. A. H. Properties, Ltd., 318 S.C. 450, 452–53, 458 S.E.2d 426, 427 (1995) (in a case concerning the amount of compensation due to an owner of “the only known beach front parcel exempt from the Beach Front Management Act,” the court affirmed a jury verdict even though the appraisers in the case had a difficult time valuing the unique property, noting that “the unique nature of the property coupled with expert testimony as to its value allowed the jury to determine the fair market value of the property within the range of evidence presented at trial.”); City of N. Charleston v. Claxton, 315 S.C. 56; 59, 431 S.E.2d 610, 612 (Ct. App. 1993) (“the City contend[ed] that the trial court erred in denying a new trial because the jury verdict was based on testimony regarding the sale of comparable properties which the City claims were bought under compulsion.”); Hous. Auth. of City of Charleston v. Olasov, 282 S.C. 603, 608–09, 320 S.E.2d 478, 481–82 (Ct. App. 1984) (noting that a landowner is not entitled to speculative value and affirming a jury award because “the valuation of \$18,000 falls well within the range of values testified to by the witnesses. We think the award is supported by both the ‘any’ evidence standard and the ‘substantial’ evidence standard.”); U.S. v. Twin City Power Co., 248 F.2d 108, 115 (4th Cir. 1957) (“The Supreme Court has held that compensation need not be made for the element of value represented by availability for water power development. It has not held that other elements of value may be ignored or that the government may take for nothing an interest in land merely because the land lies along a navigable stream.”); Olson v. U.S., 292 U.S. 246, 248, 54 S. Ct. 704, 705 (1934) (“The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that inter alia will be available for the

generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled.”); U.S. v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943) (noting that while courts have looked to value, market value and fair market value as measures of just compensation, “[i]t is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.”).

To be sure, some of the cases cited by Railways discuss defining fair market value as what a willing buyer will pay and willing seller will accept. However, none holds that to be the only measure of just compensation. See e.g., County of Charleston v. McAdory, 2015-UP-370, 2015 WL 4555493, at *1 (Ct. App. July 29, 2015) (unpublished opinion noting the definition of fair market value in ruling that the admission of evidence is within the trial court’s discretion); Burroughs & Chapin Co., Inc. v. S.C. Dept. of Transp., 352 S.C. 535, 541, 574 S.E.2d 751, 754, 2002 WL 31748921 (Ct. App. 2002) (noting the definition of fair market value when holding that evidence regarding timber prices was admissible but that the “unit rule” precludes the jury from valuing the property as separate units).

Just compensation is a constitutional imperative dating back at least to the beginning of the United States. There is substantial case law (cited above) explaining that 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. That is the constitutional mandate, and the Court should reject, as it did several times at trial, Railway’s request to change the law to dictate an exclusive means of determining just compensation that is not mentioned in the Constitution, the Act, or the case law. Even the authority relied upon by Railways recognizes that just compensation cannot be

reduced to a single formula. See Railways Motion at 8 (citing U.S. v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943) which recognizes that “no general formula should be used”...).

IV. Railways waived its argument that fair market value is the exclusive method for determining value by consenting to the jury charges and verdict form that directed the jury to make a determination of “just compensation.”

Rule 51 of the South Carolina Rules of Civil Procedure provides that “[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.” See also, e.g., Belue v. City of Greenville, 226 S.C. 192, 84 S.E.2d 631 (1954) (refusing to consider on appeal a contention regarding the trial court's jury instruction that was not raised at trial); Sierra v. Skelton, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992).

Railways agreed to the Court charging the jury on the definition of just compensation, as quoted above. Now, Railways asserts that the definition of just compensation is something different, namely that just compensation is exclusively defined as what a willing buyer would pay for a taking and what a willing seller would accept. Railways waived any argument by agreeing to the jury charge on just compensation.⁹

Additionally, the determination of “just compensation” was the question asked of the jury on the verdict form that Railways agreed upon. Railways could have insisted that the verdict form ask the jury to determine fair market value; what a willing buyer would have paid for the taking; or what a willing seller would have accepted. Recognizing the constitutional imperative that the Landowner receive just compensation, Railways did not object to the verdict form. The failure of a party to object to the verdict form before it is submitted to the jury constitutes a waiver and

⁹ The “just compensation” charge to the jury that Railways agreed to was a standard charge, fully supported by South Carolina law.

cannot be the basis for setting aside the jury's verdict based on that form. Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 420, 453 S.E.2d 908, 912 (Ct. App. 1995); Gause v. Smithers, 403 S.C. 140, 150, 742 S.E.2d 644, 650 (2013) (Party fails to preserve any issue related to the verdict form by not objecting to jury verdict form until after verdict read).

Here Railways is essentially arguing that the jury was required to deliver a verdict that represented fair market value rather than "just compensation." Railways is precluded from making these arguments because of its consent to the form of the verdict. This failure to object to the verdict form is of the same force and effect as failing to object to a jury charge. Johnson, 453 S.E.2d 912.

V. Railway's Motions for New Trial Nisi Remittitur, New Trial Absolute, and New Trial under the Thirteenth Juror Doctrine should all be denied.

Railway's motion for new trial restates the grounds for its motion to exclude Hartnett, its motion for a direct verdict, and its motion for JNOV, and should be denied for all the reasons addressed above. In recycling those arguments, Railways asserts the Court's single charge to the jury with the excerpt from Carolina Power was flawed.

In addition, to those arguments, Railways raises three evidentiary rulings as a basis for these motions. Each of those issues is addressed below. However, it is worth noting at the outset that evidentiary rulings are within the sound discretion of the trial court.

a. 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). Here the verdict was well within the range of expert opinions and the cost of reconstruction of the facility and cannot be considered excessive.

b. The Motion for New Trial Absolute should be denied

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.” 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, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the

conclusions reached are controlled by error of law.” Brinkley v. S.C. Dep't of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

Here the verdict was well within the range of expert opinions and the cost of reconstruction of the facility and cannot be considered shockingly disproportionate to the injuries suffered.

c. The Motion for New Trial based on the thirteenth juror doctrine should be denied.

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)).

Here the verdict was well within the range of expert opinions and the cost of reconstruction of the facility and cannot be considered contrary to the fair preponderance of the evidence.

d. The Court’s charge to the jury was a correct statement of the law.

Railways asserts the Court should grant a new trial because the jury charge included a direct quote from a South Carolina Supreme Court opinion that Railways claims is a misstatement of law, even though that case 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, which is a quote from Carolina Power & Light Co. v. Copeland 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.

This charge is consistent with the authorities cited above for the meaning of “just compensation.” Railway’s purported criticism of this charge is that it did not specifically instruct the jury that the *exclusive test* for just compensation must be what a willing buyer will pay and a willing seller will accept. Overlooking that Railways has not found a single case stating, even in dicta, that the formula it proposes is exclusive (see discussion above), the jury charge as whole included no fewer than three references to fair market value, defined as what a willing buyer will pay and willing seller will accept. The Court’s instructions also included other jury charges based upon the Eminent Domain Procedures Act that Railways did not object to.

“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). “When an appellate court reviews an alleged error in a jury charge, it ‘must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.’” Id. (quoting Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). “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). “This holistic approach to jury instructions is linked to the principle of appellate procedure that ‘[a]n error not shown to be prejudicial does not constitute grounds for reversal.’” Id. (quoting Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009)).

The two sentences from the jury charge that Railways complains of are a correct statement of the law. The charge is taken directly from a South Carolina Supreme Court case and Railways has come forward with no legal authority calling the accuracy of the charge into question. Additionally, even if the two sentences were not accurate, the charge contained multiple references to the formula for fair market value that Railways claims is exclusive. Additionally, the charge included agreed upon charges on “just compensation” and that the Landowner is entitled to the “value” of the property taken. Simply put, the charge did not contain legal error, was not an abuse of discretion and was a correct statement of the law.

- e. The e-mail from Landowner’s Accountant was properly admitted into evidence over a hearsay objection.

One of the most hotly contested issues at trial was whether it was appropriate for an appraiser to utilize depreciated construction costs in reaching an opinion of just compensation for the taking. Before he was dumped by Railways, an appraiser named Bill Ford was retained to do an appraisal. Fabian testified that Ford asked him for information relating to the costs of the original construction. The e-mail that was admitted into evidence (Landowner’s Ex. 63) is a string of e-mails. The first e-mail is an e-mail from Ford to Landowner 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). The next e-mail was from Landowner to Ford forwarding e-mails between Landowner and Landowner’s accountant concerning the original costs of construction of the improvements, adjusted for inflation.

The only 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. Railways overlooks that Fabian is a member and contact person for the Landowner, Gateway Properties. It is clear from the exhibit that he received and sent these communications within the scope of that real estate business. Gateway is in the business of owning and renting property and the taking of that property is certainly within the scope of activities conducted in a 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. Additionally, because the cost calculation is significantly lower than the cost estimate performed by Steve Morey, any subjectivity was an error in Railway's favor and Railways can show no prejudice.

Additionally, the exhibit is not inadmissible hearsay for two other reasons. First, it was admissible for reasons unrelated to the truth of the matter asserted, i.e. the cost estimate. SCORE 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Landowner's Ex. 63 was admissible to show that Railways' former appraiser requested and received the cost information but chose not to use it. The inference from Landowner's Exhibit 63 is that Railways did not want the cost approach utilized even if its own appraiser thought it was the appropriate approach—Railways just wanted an appraisal with the lowest number possible.

Second, as mentioned, Landowner's Exhibit 63 shows Railway's first appraiser asked for and received costs information. This entire e-mail string is an admission of a party opponent by Railway's appraiser Bill Ford that was made in the scope of his agency for Railways with its substance relating to his task of appraising the Property. SCORE 801(d)(2) (admission of a party

opponent). Therefore, Landowner's Exhibit 63 was not hearsay and was properly admitted into evidence.

Even if Railways were correct, there was no prejudice. Any alleged error was harmless. Steve Morey and Tommy Hartnett both testified concerning the costs of construction in today's dollars, which was substantially higher than the \$3.1m cost estimate included in the contested exhibit. Steve 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).

Finally, Railways highlights in its motion that counsel for Landowner mentioned Ex. 63 in his reply argument to the jury. Railways suggests that it was a significant evidentiary point because counsel for Landowner mentioned it in reply. Railways omits that counsel for Landowner only mentioned the exhibit in response to the statement to the jury by counsel for Railways in his closing argument that Landowner never provided any information about the cost of the original construction.

As explained above, Ex. 63 was properly admitted, there are additional reasons the exhibit should have been admitted over a hearsay objection, and even it were hearsay, Railways cannot show any prejudice.

f. Questions regarding project opposition

Railways argues the court erred in allowing questioning of its witness concerning opposition to the project. Railways, the party that did not have the burden of proof in the case, put

up the first witness in the case. Instead of merely introducing the taking and project, Railway's witness testified extensively about the benefits of the project for the community, even discussing that traffic could improve because the new railway would have the effect of taking trucks off the road. See generally, Railways' Exs. 1-5.

Railways, not Landowner, opened the door on this subject by making the decision to try to influence the jury by offering testimony about the benefits of the project and its relief of truck congestion. After Railways suggested to the jury that the project was a great project and Railways was the "rebranded" "enterprise agency" that had come to the area to solve economic and other issues, Landowner was justified in cross examining the witness on his statements. See generally, SCRE 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility"); 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.").

Additionally, the scope of the questioning was minimal, the Court immediately sustained Railway's objection to a specific letter impeaching Railway's first witness, and Railways cannot show prejudice. After this first witness, the benefits *vel non* of the project were hardly mentioned. Neither of Landowner's experts touched on the subject. Landowner's counsel did not mention it in closing argument. The verdict was well within the proof at trial concerning just compensation and Railways has not demonstrated that the jury was swayed by passion or caprice. In fact, the opposite is true; the verdict is a compromise verdict between the numbers suggested to the jury by the parties.

- g. Photos of the opening were cumulative and relevant to the condition of the building and illustrated facets of its custom infrastructure and special use.

In a Hail Mary, Railways asks this Court to grant a new trial on the basis 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. These arguments are without merit.

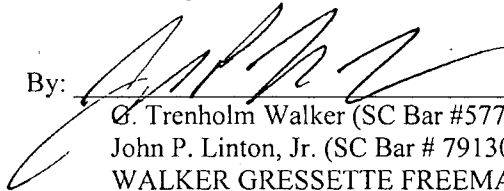
Under Rule 401 and 402, “[e]vidence meets the test of relevance for admissibility if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears.” Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) (citation omitted). “[R]elevant 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 are clearly relevant. The photos taken at the grand 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, or just like any other office building as suggested by Railways. Railways has not articulated any unfair prejudice. The Court properly admitted this evidence.

Finally, even if Railways were correct, any error was harmless.

CONCLUSION

For the reasons stated above, Railways' Post-Trial Motions should be denied.

By: 

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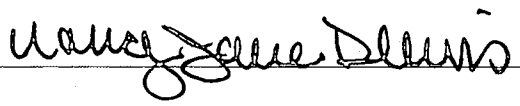
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April 27, 2019

Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 27th day of April, 2019, in Charleston, South Carolina.





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product is located a great distance from a recently completed highway, the property may suffer from external obsolescence. External conditions can also cause a newly constructed building to be worth more or less than its cost. If properties of a certain type are scarce or it is difficult to construct new competitive properties, the value of a newly constructed building may be higher than its cost. On the other hand, an economic recession might create an oversupply of a particular type of property, which would cause the value of a new property to be less than its cost. Externalities may have an especially strong effect on older properties. Externalities can be temporary and may work in positive and negative directions over the life of a building improvement.

Highest and Best Use

In the first series of tests of highest and best use, land is first valued as though vacant and available to be developed to its highest and best use; the ultimate conclusions of highest and best use analysis are based on the highest and best use of the property as improved. Thus, a parcel of land may have one highest and best use as though vacant, and the existing combination of the site and improvements may have a different highest and best use as improved. Existing improvements have a value equal to the amount they contribute to the site, or they may penalize value, often by an amount equal to the cost to remove them from the site.

If the existing improvements do not develop the site to its highest and best use, the improvements are worth less than their cost. A new building that is poorly designed is worth less than its cost because of the functional obsolescence in its design, which is discussed in more detail later in this chapter. Thus, the improvements that constitute the highest and best use add the greatest value to the site.

Stabilization

The value of a property indicated by the cost approach assumes stabilized occupancy and income, a concept similar to, but distinct from, the balance of the agents of production and property components within the subject property. An appraiser considers the holding costs accrued during the leasing phase of the development of a property among the other indirect costs applicable to that property. The tenant finish costs are also a necessary cost to achieve stabilized occupancy and they must be added as either a direct cost or an indirect cost. Also, a property in a market that is out of balance may be fully occupied and yet may not have reached stabilized income if the effective rental rates for the subject are higher or lower than market rents, which would require an adjustment to the indication of value by the cost approach.

Applicability and Limitations

In any market, the value of a building can be related to its cost. The cost approach is particularly important when a lack of market activity limits the

usefulness of the sales comparison approach and when the properties to be appraised—e.g., single-family residences—are not amenable to valuation by the income capitalization approach. Because cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction. The approach is especially persuasive when land value is well supported and the improvements are new or suffer only minor depreciation and, therefore, approximate the highest and best use of the land as though vacant. The cost approach can also be applied to older properties given adequate data to measure depreciation.

The cost approach is also used to develop an opinion of market value (or use value, if the appraisal assignment allows for the development of a value other than market value) of proposed construction, special-purpose or specialty properties, and other properties that are not frequently exchanged in the market. Buyers of these properties often measure the price they will pay for an existing building against the cost to build minus depreciation or the cost to purchase an existing structure and make any necessary modifications. If comparable sales are not available, they cannot be analyzed to develop an opinion of the market value of such properties. Therefore, current market indications of depreciated cost or the costs to acquire and refurbish an existing building are the best reflections of market thinking and, thus, of market value (or use value).

When the physical characteristics of comparable properties differ significantly, the relative values of these characteristics can sometimes be identified more precisely with the cost approach than with sales comparison. Because the cost approach starts with the cost to construct a replica or a substitute property with optimal physical and functional utility, it can help an appraiser determine accurate adjustments for physical differences in comparable sale properties. If, for example, an appraiser must make an adjustment for inadequate elevators in a comparable property, the cost to cure the deficiency can be used as a basis for this adjustment. The cost approach provides the appraiser with data to use both in estimating depreciation and in deriving an adjustment to apply in the sales comparison approach.

The cost approach is especially useful when building additions or renovations are being considered. The approach can be used to estimate whether the cost of an improvement, including profit, will be recovered through an increased income stream or in the anticipated sale price; its use can help identify and prevent the construction of overimprovements.

Because the cost approach requires that land and improvements be valued separately, it is also useful in appraisals for

insurance purposes; insurable items. In applied to estimate tends to make up; agricultural proper approach can take requiring a separa

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The cost approach is **most applicable** in valuing new or proposed construction when the improvements represent the highest and best use of the land and land value is well supported.

Depending on the **purpose of the appraisal assignment**, the cost approach can be used to develop an opinion of the market value or use value of special-purpose properties and properties that are not frequently exchanged in the market.

) IN THE COURT OF COMMON PLEAS
) C/A NO. 2017-CP-10-5382

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based on the only evidence of fair market value presented in Landowner's case-in-chief, the testimony and document offered by Landowner concerning the \$1,800,000 valuation of Mr. Ford.¹

Landowner repeatedly attempts to reshape Railways's *legal* argument into a *factual* dispute, suggesting, incorrectly, that Railways's actual dispute is whether the property was in fact a special use property that warranted the use of the cost approach and whether Mr. Hartnett's testimony was based on a sufficient factual basis. (Landowner's Opp'n Post Trial Mot. 5-9). Railways does not dispute that the cost approach is an accepted valuation methodology and that it is appropriate in certain circumstances.² Rather, Railways 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

¹ Landowner contends that even absent Mr. Hartnett's testimony, the jury could have believed the cost estimate provided by Mr. Morey. However, absent testimony from someone with knowledge, skill, and training who could perform the technical aspects of the cost approach, i.e., obtaining land values, adjusting for depreciation, Mr. Morey would not have been permitted to testify as a standalone expert and neither would Mr. Fabian. *See, e.g., Manhattan Ice & Cold Storage, Inc. v. City of Manhattan*, 274 P.3d 609 (Kan. 2012) (holding landowner's president was "not qualified, as a lay landowner, to assemble the components of and calculate replacement costs, i.e., the cost to replace existing improvements on the land minus depreciation plus the value of the land evidenced through comparable sales"); *In re Eminent Domain*, 320 P.3d 955 (Kan. 2014) (holding owner not competent to testify to cost approach and observing that "[g]iven [landowner's] admission that he did not have appraisal expertise, reasonable people would agree with the trial judge that [landowner] was not qualified to perform a cost appraisal"). Railways renewed its motion for a directed verdict at the close of evidence, at which time the only additional evidence in the record on fair market value on the date of taking was Deborah Haskell's opinion of fair market value of \$1,750,000.

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. 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.

the valuation represents fair market value and that a willing buyer/investor of the specific property would consider reproduction cost less depreciation relevant in negotiating the purchase of the property.³ Mr. Harnett testified that his valuation did not represent the fair market value of the property or what a willing buyer/investor would pay for the property. Landowner concedes that Mr. Hartnett did not testify to fair market value and the willing buyer/investor standard. For this reason, Mr. Hartnett's testimony was inadmissible.⁴

As explained in more detail in Railways's post trial motions, 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). For at least fifty years, the South Carolina Supreme Court has defined fair market value as the value at

³ The takings cases cited by Landowner as examples of when the cost approach has been approved by courts, (Landowner's Opp'n 11), 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. U.S.*, 531 F.2d 1018, 1036 (Cl. Ct. 1976) ("it 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. U.S.*, 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*); *U.S. 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").

⁴ Additionally, Mr. Hartnett's opinion incorporated Mr. Morey's replacement cost estimate, not a reproduction cost estimate. (Landowner's Opp'n 4). This is an incorrect cost approach methodology for condemnation cases. Replacement cost estimates the cost to rebuild a building at today's costs with modern materials and meeting modern building codes. This is what Mr. Morey did, for example by adding the non-existent elevator into his estimate and bringing the building up to modern codes. Reproduction cost calculates the cost to build the exact building with the same materials and features as existed at the time of condemnation. Mr. Morey did not prepare this calculation, meaning his figure was inflated.

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). 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."

As Mr. Hartnett testified, Landowner relied on a non-fair market value cost approach to value because it did not think it was fair for Railways to take property and force it to move locations. Even if it were the case that the fair market value of Landowner's property at the time of condemnation would not permit it to rebuild the building at today's building costs, it does not fall on the condemning authority to make up this difference. 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). Railways is required to pay the fair market value of Landowner's property, not an inflated reproduction cost that no willing buyer would have paid. The only evidence of fair market value presented in Landowner's case-in-chief was the testimony and document concerning the \$1,800,000 valuation of Mr. Ford. As such, a verdict should be directed in this amount.

Landowner asserts that just compensation should place the owner in as good a position monetarily as it was prior to the taking. (Landowner's Opp'n 15). Landowner is correct in this assertion; however, it fails to recognize that the very courts and cases it cites for this proposition have defined "as good a position pecuniarily" as *market value*, which is the very point that Railways has been making. *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)); *U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C.*, No. 9:16-2550-RMG, 2019 WL 1450578, at *3, 4 (D.S.C. Apr. 4, 2019) ("When a landowner posits that a different use is highest and best, he must show that this use is reasonably probable and that the probability has a real *market value*."; and making credibility findings on "fair market value"). At every turn, just compensation comes back to fair market value. Notwithstanding, Landowner asks the Court to ignore more than seventy years of precedent and rule that just compensation does not mean fair market value. (Landowner's Opp'n 17).

Landowner rests on a single sentence of dicta from a forty-five-year-old case that has never been cited for the proposition Landowner now propounds. (See Railways's Post Trial Mot. 13). Landowner is correct that the holding in *Carolina Power* continues to be good law and has been cited by courts even as recently as after the trial in this case, but conveniently ignores that it was most recently cited for a proposition completely different from the novel argument it now makes. *U.S. v. 269 Acres, More or Less, Located in Beaufort County S.C.*, 2019 WL 1450578, at *3 (citing

Carolina Power 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).

Landowner 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 Cty.*, 349 N.Y.S.2d 422 (N.Y. App. Div. 1973) (beach cabana club); *Warwick Musical Theatre, Inc.*, 525 A.2d 905 (R.I. 1987) (musical theatre). These facilities are a far cry from Landowner’s office building.

Landowner 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. A property cannot fairly be classified as special use where nearly half of its finished space is used for typical office space for third parties.

In addition, these 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). Landowner also cites cases from New York applying a multi-part test for application of the cost approach. Surprisingly, Landowner failed to include the fifth element required by New York courts, which is a showing that the structure is “uniquely 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). 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 for years to third parties.

Landowner argues that Railways waived its argument that just compensation is defined as fair market value because it failed to object to the jury charge on just compensation. This is incorrect. The jury charges defined just compensation, in part, as fair market value so there was no reason for Railways 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," Railways certainly did object. Railways did not waive its argument. Additionally, there is no basis for Landowner's secondary argument that Railways'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. There is no basis for such an argument.

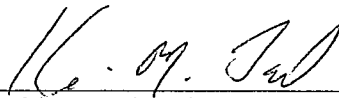
The email from Landowner's accountant was hearsay and erroneously admitted under the business records exception to hearsay. First, it was prepared because of the condemnation, not as part of Landowner's regularly conducted activity. Second, Rule 803(6), SCRE, explicitly states that subjective opinions and judgments found in business records are not admissible. There is no doubt that this email prejudiced Railways because it offered a second opinion of value of Landowner's property in the four-million-dollar range without subjecting its proponent to testing and cross examination. Landowner 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 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 in post trial motions. *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) ("It is well settled that an issue may not be raised for the first time in a post-trial motion"). The admission of this email from Landowner's accountant containing numerous subjective opinions was prejudicial error. (See Railways Post Trial Mot. 19-20 (listing at least five subjective opinions of accountant included in this document)).

Railways did not open the door to contentious questioning by Landowner of the at-grade rail crossing at Meeting Street. Railways's project representative testified about the public purpose of the project, as is statutorily set forth by the Eminent Domain Act. This testimony did not open the door to prejudicial questioning about the City of Charleston's letters objecting to the rail crossing at Meeting Street. Such questioning was inappropriate and prejudicial.

Finally, concerning the excessive photos of Landowner's 2008 grand opening, it is not only the fact that these photos were not contemporaneous with the taking, but also that they impermissibly reflected public officers at the grand opening, suggesting that the public was in favor of Landowner and against Railways. These photos were irrelevant and prejudicial.

For all of these reasons, and as more fully explained in Railways's post trial motions expressly incorporated herein, Railways respectfully requests that the Court enter a judgment notwithstanding the verdict in the amount of \$1,800,000 based on the evidence in the record on fair market value, or in the alternative grant a new trial nisi remittitur in the amount of \$1,800,000 based on the record evidence of fair market value, or grant a new trial absolute based on the grounds as described in Railways's post trial motions.



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April 30, 2019

ATTORNEYS FOR THE CONDEMNOR

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

RECEIVED

JUL 10 2019

SC Court of Appeals

Project: Navy Base Intermodal Facility

Tract: 23S

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, The Loft Pilates Center, LLC, Scott Miner, and County of Charleston,¹

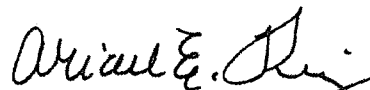
Other Condemnees.

NOTICE OF APPEAL

South Carolina Department of Commerce, Division of Public Railways appeals the order of the Honorable Alex Kinlaw, Jr., dated June 4, 2019 and filed on June 11, 2019 (attached

¹ The parties listed as other condemnees have made no appearance in this action either through counsel or *pro se*.

hereto). Appellant received notice of entry of the order on June 17, 2019.



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July 10, 2019

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

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.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2017-CP-10-5382

Project: Navy Base Intermodal Facility
Tract 23S

**ORDER ON CONDEMNOR'S POST-
TRIAL MOTIONS**

RECEIVED

JUL 10 2019

SC Court of Appeals

FILED
2019 JUN 11 PM 3:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY 2

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

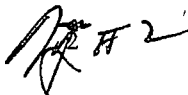
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City of Charleston and is owned by Gateway Properties of Greater Charleston, LLC ("Landowner" or "Gateway"). It is bounded on the east by Meeting Street Road and the west by the railroad tracks and right of way the CSX Railroad. The Property is a .55 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

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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

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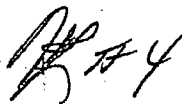
rebuild the building, as modified to meet current building codes. Two written versions of his detailed estimate were admitted as exhibits into evidence.

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

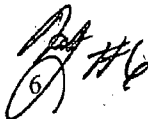
When ruling on a motion for directed verdict or JNOV, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, the Landowner in this case. See Crenshaw v. Erskine College, 424 S.C. 287, 295, 818 S.E.2d 218, 223 (Ct. App. 2018), *reh'g denied* (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


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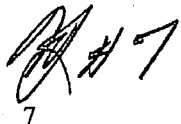
decision to grant or deny a “new trial motion rests within the discretion of the circuit court . . .” Brinkley v. S.C. Dep’t of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

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).


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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.

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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

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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

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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

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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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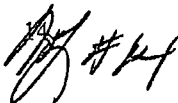
Pursuant to the wording of this statute, the Landowner is entitled to the *value* of the land and improvements taken.¹ This standard is consistent with the above noted definitions of just compensation. Fair market value is often the basis for determining just compensation, but it is not an exclusive 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.

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).

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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.

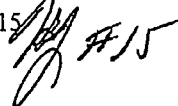
Therefore, for these many reasons and those previously stated, Railways' post-trial motions on the basis of fair market value is the exclusive test for just compensation and Hartnett did not testify to fair market value, are denied.

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.

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

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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:

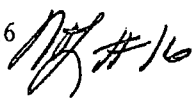
'It occasionally happens that a parcel of real estate taken by eminent domain is of such a nature, or is held or has been improved in such a manner, that, while it serves a useful purpose to its owner, if he desired to dispose of it he would be unable to sell it at anything like its real value. A church, 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.

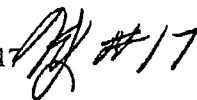
VII.

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

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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.

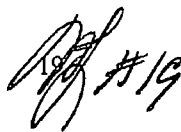


Railways' objection was that the exhibit was hearsay. The court overruled the objection on the basis that the business records exception to the hearsay rule applied. See SCRE 803(6). Fabian testified that the communications in the exhibit were kept as part of his regularly conducted business. Railways 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 contained 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.



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

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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

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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.

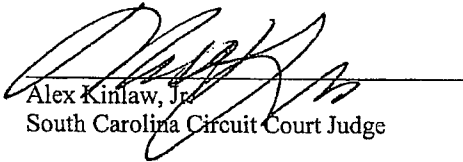
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For all these reasons, the Court believes, finds, and concludes the verdict was fully supported by the proof and the trial was conducted without prejudicial legal error, and denies the motion to set aside the verdict on the basis of the Court's discretion 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 COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2017-CP-10-5382
	)	
	)	
S.C. DEPARTMENT OF COMMERCE;	)	
DIVISION OF PUBLIC RAILWAYS	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
GATEWAY PROPERTIES OF GREATER	)	
CHARLESTON, LLC	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

March 25, 2019
Charleston, South Carolina

VOLUME 1 (of 4)

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE

A P P E A R A N C E S:

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JOHN LINTON, ESQ.
Attorneys for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Proceedings
March 25, 2019

1 THE COURT: Alright. I've got the Condemnor's
2 motion in limine. I'll be glad to hear from you.

3 MR. BABCOCK: Yes, Your Honor. Before we get to
4 that, we also, during the pretrial conference, had
5 discussed the request of the jury view of the property.

6 THE COURT: Yes, sir.

7 MR. BABCOCK: Pursuant to Section 28-2-340(e) of the
8 code I understood that Mr. Walker was going to consult
9 with his client. As we said, Your Honor, we are not
10 asking them to go inside the building, for various
11 reasons, just to be taken to the outside of the building
12 for them to see the outside work.

13 THE COURT: Alright. And I think the parties agreed
14 that that would take place somewhere near the end?

15 MR. WALKER: Your Honor, Trenholm Walker for the
16 Landowner. That's correct. And Mr. Babcock is correct.
17 Our objection was to going in the inside, which was
18 substantially altered from the date of condemnation,
19 which is the moment in time for the valuation. And as
20 long as the jury is just going to take a look at the
21 outside of the property and the general surroundings,
22 that is fine. We're also fine with doing it ---

23 THE COURT: --- at the ---

24 MR. WALKER: --- close of the evidence, I guess;
25 right?

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Proceedings
March 25, 2019

1 MR. BABCOCK: Yes.

2 THE COURT: Close of evidence from both sides?

3 MR. BABCOCK: Yes, Your Honor. I think that'll be
4 the most appropriate time to send them.

5 I know sometimes there's difficulty lining up vans
6 and whatnot for the view, so we may have to work around
7 that. But typically it's done, and it can be done, at
8 the close of all the evidence.

9 THE COURT: Alright. That's fine. And I'll give
10 the jury some specific instructions that they can't talk
11 to each other while they're on the van about -- they
12 can't -- even when they're viewing it, they can't talk to
13 each other, they can -- they can look at it and form
14 their own opinion in their minds, but they can't talk to
15 each other during the period of time. I think that's the
16 appropriate thing. Yes, sir?

17 CCSO DEPUTY: We didn't know anything about that.
18 We've got to provide security so, I mean, is it one van?
19 How many vans?

20 MR. WALKER: Well, I've never done a jury view, so I
21 don't know whether the lawyers go or not. And if Mr.
22 Babcock has done one, maybe he can tell us who's the
23 guide ---

24 THE COURT: --- right. And I'm from Greenville and
25 I was just sent here to try the case. I wasn't sent here

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1 to arrange vans and to take people back and forth. I'm
2 just here to try the case. So whatever y'all work out is
3 fine. Y'all can carpool or however you want to do it.

4 MR. BABCOCK: Your Honor, typically in the jury
5 views that I've had in my cases, the lawyers don't go.
6 They get together with the bailiffs and talk about where
7 they're going. So they go, but we don't go. We stay
8 here.

9 MR. WALKER: That's fine with us. I think that's a
10 good protocol. We're good with that.

11 THE COURT: So will that give you enough heads up?

12 MR. WALKER: It'll just be the jurors.

13 CCSO DEPUTY: When is it? Are you talking
14 Wednesday or tomorrow?

15 MR. WALKER: It would either be late tomorrow or
16 Wednesday morning.

17 CCSO DEPUTY: Because I would have to go with them,
18 and we have to send two deputies with them.

19 MR. WALKER: She's going to see about the vehicle
20 transport because we don't want the jurors going --
21 driving their cars, in case something happens.

22 THE COURT: No, no. So --

23 THE DEPUTY: Well, have you guys arranged
24 transportation for them yet, or not?

25 MR. WALKER: I coordinated the limousine for our

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1 service. We have not arranged it, but we would work with
2 you, whatever you want to do, whatever works with you.

3 CCSO DEPUTY: I'll have to get back with you
4 because I -- the deputies will have to go with them so.

5 MR. WALKER: I think the first thing, if we could
6 start early on Wednesday and then go first thing
7 Wednesday, I think that's really safe. I think we can
8 finish our proof by Tuesday.

9 MR. BABCOCK: Yeah. Judge, even if we blend over a
10 little bit until Wednesday, it might make sense to do
11 that first thing Wednesday morning because just ---

12 MR. WALKER: --- that's good with us ---

13 MR. BABCOCK: --- for coordination.

14 THE COURT: Well, like I say, I was sent here to try
15 the case.

16 CCSO DEPUTY: I'll work --- I'll talk to ---

17 THE COURT: --- y'all work it out.

18 CCSO DEPUTY: I'll work it out.

19 THE COURT: Work it out. Any way I can help, let me
20 know. Alright. So we've got that resolved. Either late
21 tomorrow or Wednesday morning; somewhere in that regard.

22 Okay. Yes, sir?
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1 MR. BABCOCK: May it please the Court?

2 THE COURT: Yes, sir.

3 MR. BABCOCK: Your Honor, we have filed and given to
4 you a written motion and memorandum with regards to...

5 THE COURT: Right.

6 MR. BABCOCK: Sorry, Your Honor. Court's
7 indulgence.

8 [Whereupon, Mr. Babcock reviews documents]

9 THE COURT: And I've -- and I've read both, on both
10 sides and I must say on the outset, I thought both sides
11 did a great job expressing their respective positions.
12 But I had the opportunity to read your memorandum, as
13 well as you from the other side. Go ahead.

14 MR. BABCOCK: Thank you, Your Honor. So we did have
15 a motion and a memorandum.

16 THE COURT: Uh-huh.

17 MR. BABCOCK: And that is to exclude the testimony
18 of Thomas Hartnett, who is the Landowner's appraiser.
19 And we make this motion pursuant to Rules 702 and 703 of
20 the South Carolina Rules of Evidence, along with the
21 gatekeeper function that the Court has with regards to
22 any expert testimony.

23 THE COURT: Alright.

24 MR. BABCOCK: Now, the basis for the motion is that
25 Mr. Hartnett's testimony at his deposition made it clear

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1 that he did not comply with the appropriate legal
2 standard for determining just compensation in a
3 condemnation case. As I advised the Court, because of
4 the significance of this issue, I brought the matter to
5 Mr. Walker's attention at the mediation we had in
6 December and even gave him some of the same legal
7 positions that are contained in the memorandum.

8 As Your Honor knows, this case is about a
9 construction of an intermodal facility and the
10 acquisition for that facility from Southern Tracks, of
11 the property in this case, which is the 1799 Meeting
12 Street property. It's also referred to as tract 23(s)
13 and it's a two-story building with a total take.

14 Now, at various times, Your Honor, in addition to
15 the testimony that you will hear about Fabian's business,
16 eLifespace case, there have been other tenants in the
17 building, a Pilates Group and a bingo operation and even
18 a software IT company. So this is a building that has --
19 it is an office building that can be used for many
20 purposes.

21 Now, the appraiser for the Condemnor, or Railways,
22 is Ms. Deborah Haskell, MAI, and she used both the sales
23 comparison approach and the income method and as a result
24 of those two approaches determined that just
25 compensation, fair market value in this case, would be

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1 1,750,000 dollars. Now, the Landowner's appraiser is Mr.
2 Thomas Hartnett.. While he's been an appraiser for a
3 number of years, he is not an MAI. He did not use either
4 the sales comparison approach or the income method.
5 Instead, he used the cost approach. And his figure for
6 just compensation is 4,580,000 dollars.

7 Now, Your Honor, the starting point here for the
8 analysis is section 28-2-370 of the Code. And I think
9 it's important to see exactly what that says in terms of
10 what evidence and what the standard should be for
11 testimony for just compensation. 28-2-370 says: in
12 determining just compensation, only the value of the
13 property to be taken, any diminution in value of the
14 Landowner's remaining property, and any benefits as
15 provided in section 28-2-360 may be considered.

16 I think what's very important about that statute,
17 because we don't have any damages and we don't have any
18 benefits because it's a total take. What that statute
19 says is only the value of the property to be taken is the
20 issue for just compensation purposes..

21 Now, the standard for value is fair market value.
22 And in a condemnation case, it's fair market value, which
23 means willing buyer, willing seller, no compulsion. That
24 is a standard and is a standard that Mr. Hartnett
25 recognized in his deposition. Mr. Hartnett testified

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1 several times in his deposition, however, that his
2 valuation did not represent willing buyer, willing
3 seller. Did not represent. He said that in this case
4 Gateway was not a willing seller. But he had to admit
5 right after that that in any condemnation case, or
6 virtually any condemnation case, the Landowner is not a
7 willing seller.

8 The State or any other governmental entity has come
9 to the Landowner and has said, we have a -- we have a
10 project, a public project, and we need your project --
11 property and if we can't negotiate a settlement, then
12 we're going to acquire a condemnation. That happens all
13 the time.

14 Now, Your Honor, the cost approach, I want to talk
15 briefly about that, is the least favorite of the methods
16 for appraisal. Basically, you look at cost of a new
17 building and then you depreciate it. And the problem
18 with it, among other things, is that depreciation is a
19 very subjective matter.

20 In this case Mr. Hartnett only used seven percent
21 for his depreciation. So as a result, and as the
22 material said in the memorandum we provided, what happens
23 is an appraisal based on cost will frequently overstate
24 value. So where does it work? Alright. One place it
25 works is when you have brand new construction, you've

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1 just constructed something, the State or some
2 governmental entity comes in and you take it. And you
3 can say, okay, this is what it cost to construct this
4 property right now. In our case the property was ten
5 years old, so there had been a significant amount of time
6 since it had been constructed. This -- the approach also
7 is used when you have true special use properties, things
8 like cathedrals, water-treatment plants, things that
9 there simply wouldn't normally be a market for.

10 Now, Your Honor, I would like to take a minute and
11 read some sections of Mr. Hartnett's deposition that we
12 reproduced in the memorandum. And I think they're
13 important. And this is from his deposition, page 29,
14 lines 10 through 25.

15 Question: my question to you is as we're trying to
16 find fair market value, which we defined as willing
17 buyer, willing seller; correct? Answer: correct.

18 Question: is it your testimony that a willing buyer and
19 a willing seller would have come to the figure of
20 4,580,000 dollars for a transaction for the subject
21 property in October of 2017? Is that your testimony?

22 Answer: no, sir.

23 Question: what is your testimony? My testimony is
24 that in order to make Mr. Fabian whole, he needed to
25 receive this much money for what he's having to give up

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1 to the State or to whomever the Condemnor is; the Railway
2 Commission.

3 And, again, and this time from his deposition, page
4 31, line 1 to page 32, line 4. Question: let me make
5 sure I understand. I understand that you have used the
6 cost approach because you, if I understand correctly, you
7 wanted to insure that Mr. Fabian had the reproduction
8 value for the property that was taken; is that right?
9 Answer: correct.

10 Question: and you weren't looking at replacement
11 value; correct? Answer: correct. And in so doing,
12 because you were looking at reproduction value, you
13 weren't looking at willing buyer, willing seller, you
14 were looking at reproduction? Answer: in this case Mr.
15 Fabian himself was not a willing seller. I mean, he was
16 a seller who had to sell, but it was not willingly that
17 he sold to Railway Commission. So in a truer sense, his
18 market value, he was not a willing seller. So it's
19 different when you have a willing seller and a willing
20 buyer.

21 Question: sure. And in fairness, Mr. Hartnett,
22 this is a situation you have in every condemnation case,
23 isn't it, where some condemning authority comes to some
24 Landowner and says for a public purpose of some sort, we
25 need all or part of your property. Isn't that the

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1 situation in every condemnation case? The answer:
2 certainly.

3 And finally, Your Honor, looking at Mr. Hartnett's
4 deposition, page 33, line 6 through page 53, line 3.

5 Question: what I want to make sure I'm clear on is that
6 we have a condemnation; correct? Answer: correct.

7 Question: we have a total take; correct? Answer:
8 correct.

9 Question: and we have a piece of property that you
10 have analyzed using the reproduction cost; correct?

11 Answer: correct. Question: and my question is that
12 reproduction cost, does that reflect willing buyer,
13 willing seller under no compulsion? Answer: is that
14 replacement cost? Question: no. I asked you is your
15 reproduction cost, is that willing buyer, willing seller,
16 no compulsion? Answer: I'm not sure what you mean by
17 that, Mr. Babcock.

18 Question: let me rephrase it. We start the process
19 of trying a condemnation case to come up with fair market
20 value; correct? Answer: correct. Question: and,
21 again, it's easier in a total take because we're looking
22 at the fair market value of an entire piece of property
23 as of a certain date? Answer: correct.

24 Question: and fair market value is decide -- is
25 defined, as you have already testified, as willing buyer,

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1 willing seller, no compulsion; correct? Answer: that's
2 the standard definition of fair market value, yes sir.
3 Question: that's the appraiser's definition; correct?
4 Answer: correct. Question: that's the legal definition
5 of a condemnation case? Answer: that's the control-the-
6 currencies definition of it. That's what I used in the
7 report.

8 Question: I want to make sure. Fair market value,
9 willing seller -- willing buyer, willing seller? Answer:
10 Correct. Question: no compulsion? Answer: Correct.
11 Question: does the reproduction cost that you have used
12 with Mr. Fabian; is that willing buyer, willing seller,
13 no compulsion, as of October 2017? Answer: no, sir. I
14 don't think so.

15 Now, Your Honor, I did something that I would have
16 told a young lawyer in my office never to do. Once you
17 get something good in a deposition, don't go back at it
18 again. But it was so important to me that there be
19 absolutely no question that Mr. Hartnett had not used
20 fair market value, had not used willing buyer, willing
21 seller, no compulsion, for his appraisal, that I went and
22 I made sure twice.

23 And I did that so there would be no question, when
24 we came before the Court today, that that is what Mr.
25 Hartnett had done and that there was no question on that

1 fact. Now, Your Honor, what's important here is that
2 while you can use the cost method with a lot of provisos
3 that we don't think it's appropriate here. If you're
4 using it, it's still got to come back to fair market
5 value. And we cited in our memorandum, at pages 10 and
6 11, to the Uniform Appraisal Standards for Federal Land
7 Acquisition.

8 And the quote -- and it's a two-paragraph quote
9 there. Let me just talk about two parts of it. The
10 first part says: while not inherently flawed, the cost
11 approach has often been misused leading a number of
12 courts to identify the cost approach as, quote, one of
13 the least reliable indicia of market value for the
14 purpose of being just compensation.

15 And then the start of that next paragraph, and this
16 is very important for the legal issue here today: the
17 cost approach has a means of measuring value may --
18 quote, may have relevance but only, of course, as bearing
19 on what a perspective purchaser would have paid. And
20 jumping down, Federal Court's -- read why cost approach
21 is improper quote when no one would think of reproducing
22 property, or when no prudent investor would reproduce it
23 for the figure or amount estimated as a replacement for
24 reproduction cost.

25 And that's exactly what we have here, because as Mr.

1 Hartnett testified, this is not a figure that a willing
2 buyer would pay for this property. So we have a
3 deviation from the required standard for an appraiser in
4 a condemnation case.

5 Now, Your Honor, I also have cited this in the brief
6 on pages 12 and 13, cited Nichols on eminent domain as a
7 general rule, the market value of property is measure
8 damages, ordinarily the cost of construction is not
9 material and specialty costs on particular improvements
10 which, however convenient to the owner, may not
11 correspondently increase the market value.

12 And, Your Honor, this is similar to a lot of other
13 things in life. Somebody may have a house, decide they
14 want to put a pool in that house, and the cost of that
15 pool does not necessarily raise the value of the property
16 by the amount of the cost of the pool. It doesn't mean a
17 person can't do it. It just does -- it means that
18 sometimes you can do things in your property that are not
19 going to reflect an increase in the market value of your
20 property. And that's what we have here.

21 This building can be used as a building. It's had
22 other tenants in it. There's a market for that type
23 building, and Ms. Haskell found that market. The only
24 way in this case the Landowner could get to a four-
25 million-dollar figure was using this flawed approach that

1 was not linked to fair market value. Now, again, there
2 are a lot of things that are not compensable in
3 condemnation cases. Business losses are not compensable
4 and yet they may occur. There could be sentimental value
5 for a piece of property, and yet that is not compensable
6 in a condemnation case.

7 Somebody might have had property in their family for
8 200 years and it may be something that is so meaningful
9 to them that they would never sell it, but the question
10 would be if it was condemned, what is the market value
11 for the property.

12 So here, Your Honor, we have a situation where Mr.
13 Hartnett has deviated from the required approach in a
14 condemnation case. And we think there are substantial
15 problems with the cost approach that he used, in general.
16 But our motion to exclude him is not just based on that.
17 It is based upon the fact that if he were to use the cost
18 approach, he needed to link it up to fair market value,
19 because under the statute that's what's compensable in a
20 condemnation case. And we are limited in condemnation
21 cases to what the legislature has told us and what the
22 case law has told us.

23 So, Your Honor, again, I realize the significance of
24 what I'm asking this Court to do, and I realized it back
25 in December, and that is why I told Mr. Walker at the

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1 mediation, and gave him some case law, because I knew we
2 would be here one day and I did not want -- I thought
3 fairness, as the State. And I've always believed that
4 the State has a responsibility in condemnation cases to
5 be fair. And I thought in fairness to the Landowner and
6 in fairness to Mr. Walker, I would give him some research
7 right then and there so he would know where we were
8 coming from. And we did that.

9 And so we are here today, Your Honor, because Mr.
10 Hartnett has not based his testimony, has not based his
11 opinion, on the requirement for condemnation damages and
12 value, which is fair market value, willing buyer, willing
13 selling, no compulsion. And as a result, we respectfully
14 request that he be excluded as a witness in this case.
15 Thank you, Your Honor.

16 THE COURT: Thank you, counsel. Yes, sir?
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1 MR. LINTON: Your Honor, John Linton, on behalf of
2 the Landowner.

3 Mr. Hartnett has been an appraiser for more than
4 forty years. He's been admitted to testify in either
5 thirty-two or thirty-four circuit courts in South
6 Carolina, district court, bankruptcy court. There is no
7 question about his qualifications.

8 And I only bring that up because we have multiple
9 cases in South Carolina, condemnation cases, recognizing
10 that when an appraiser is qualified to testify as to
11 value, that criticisms of the process they used were the
12 sufficiency of the facts they relied on are for cross-
13 examination. And we've cited over in our memo the Duke
14 Power case and the Claxton case. And that's essentially
15 what you just heard from Mr. Babcock is what he wants to
16 cross-examine Mr. Hartnett on.

17 This idea that Mr. Hartnett shouldn't have used the
18 cost approach has its genesis in Railways as appraiser,
19 who said this is an office building. And an office
20 building, there are comparable sales for that. There are
21 other office buildings in North Charleston and she went
22 out and found some of those.

23 Mr. Hartnett, in his appraisal, considered the sales
24 comparison approach, the normal willing buyer, willing
25 seller to wind up with comparable sales, and he said

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1 there is an insufficient data to perform that appraisal
2 so I have to rely on the cost approach. And that is well
3 within the standard for appraisers. In fact, Ms.
4 Haskell's own appraisal talks about the cost approach and
5 how it may be utilized in cases where there's a lack of
6 data.

7 Here the reason there's a lack of data, Your Honor,
8 is basically what this whole trial is about. They say
9 it's an office building. What you're going to hear over
10 the next couple of days is that this office building was
11 built for a specific purpose and it was not an office
12 building.

13 The wiring systems in this office building are
14 substantial. There's more wires in these pictures that
15 you're going to see, than I've ever seen in a building.
16 The steel structure of this building was way more
17 substantial than any office building because it was
18 holding up a theater, a half-million-dollar theater,
19 built inside of a building on Meeting Street Road. This
20 theater is not an office building.

21 Mr. Hartnett went and inspected the property, in his
22 opinion, and what he's here to testify about is this is
23 no office building, this is a special use facility. And
24 we've cited, Your Honor, several cases from the Court of
25 Claims, I think the U.S. Supreme Court, New York, several

1 other courts, as well as South Carolina tax cases, where
2 they recognize that the cost approach is a valid approach
3 to value. And the only criticism that Railways has, of
4 the use of the cost approach here, is basically they say
5 that Mr. Hartnett shouldn't have used it because the
6 reasons he shouldn't have used it aren't sufficient.
7 They even say that.

8 I think it's on the second page of their memo. They
9 say he should be excluded because there's an insufficient
10 basis for his opinion, which is exactly what the Duke
11 Power and Claxton cases ruled. Our Supreme Court said
12 when you're got an appraiser and you don't like the basis
13 of his opinion, you can cross-examine him.

14 And, Your Honor, to this issue of it has to be fair
15 market value because that's what the statute says. The
16 Constitution does not mention fair market value. It says
17 just compensation. We even have in South Carolina our
18 Supreme Court has said, in the Carolina Power case, which
19 is 188 S.E.2d 188, that if that fair market formula is
20 not fair in a particular case, other approaches may be
21 utilized.

22 And we have tax cases that recognize sales
23 comparison, income, and cost approach. There -- and
24 we've cited all of this in our brief, Your Honor. There
25 are -- there is substantial authority that while the cost

1 approach is not the most common, it is a legitimate
2 approach to valuing just compensation. And the decision
3 to use the cost approach or to use the sales comparison
4 approach is really just -- depends upon the facts you're
5 relying on as an expert. And that's not a legal matter
6 for the Court.

7 And so -- and, Your Honor, their appraiser has said
8 that this building that has a giant theater in it, that
9 Mr. Fabian paid huge amounts of money to create this
10 building, that he should be valued as an office building.
11 We could have moved to exclude her and said this is not
12 just compensation, which the Constitution requires, but
13 we didn't go down that road.

14 But it would be the same exact motion. They say
15 it's an office building. We say it's a special purpose
16 building, and that's an issue for the jury to decide.
17 Thank you.

18 THE COURT: Summary reply and then I'm going to
19 chime in a little bit.

20 MR. BABCOCK: Yes, sir. Briefly.

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1 MR. BABCOCK: Your Honor, what we don't have here is
2 a tax case, and what we don't have here is New York or
3 some other state's law. What we have here is the code
4 section that I read, 28-2-370, talking about the value of
5 the property to be taken, fair market value.

6 Your Honor, the one case they cited in their brief,
7 that is the Carolina Power and Light case, which has
8 dicta about a church or some other type of property,
9 another formula being required as to the quote that they
10 used there. A) that is dicta in nearly a fifty-year-old
11 case.

12 More importantly, however, Your Honor, is that that
13 case came fifteen or sixteen years before the adoption of
14 the Eminent Domain Procedures Act. And that's the
15 statute that we are relying on here. That's the statute
16 before the Court. And unless they're trying to have a
17 statute to be declared unconstitutional, which I don't
18 think is what's at issue here, that's the statute that
19 controls this case and any condemnation case in South
20 Carolina.

21 Your Honor, we have argued about the problems with
22 the cost approach because it is important to understand
23 the background to how we got here. However, this is not
24 just an argument about cost approach versus income
25 approach versus sales comparison approach. Ms. Haskell

1 did what was appropriate. She linked her analysis, using
2 the sales comparison approach and the cost approach, to
3 fair market value; willing buyer, willing seller, no
4 compulsion. Mr. Hartnett did not do that, because he
5 couldn't do that because he had gotten up to a number
6 that he recognized was beyond what a willing purchaser
7 would pay.

8 And so, Your Honor, that's the flaw. It's not just
9 to use the cost approach; it's that when he used it he
10 didn't have it being controlled by the definition of fair
11 market value. And when he deviated from that standard,
12 that's the basis for denying his testimony in this case
13 because if he has done something in his appraisal that is
14 not in compliance with what the South Carolina Courts and
15 General Assembly told us is the rule, then that's why his
16 testimony should be excluded.

17 So that's it, Your Honor. He didn't use willing
18 buyer, he didn't use willing seller, no compulsion, which
19 is the definition of fair market value. He admitted that
20 on several occasions, and he admitted that he didn't do
21 it. And his only explanation for why he didn't do it was
22 because Mr. Fabian and Gateways was not a willing seller.
23 But he admitted to me right after that that in any
24 condemnation case, almost all the time, the seller is not
25 a willing seller. The State Board entity has come to it

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1 and has acquired his property. But the standard for
2 determining how much just compensation a Landowner
3 receives is willing buyer, willing seller, no compulsion.

4 We respectfully request that this Court exclude the
5 testimony of Mr. Hartnett.

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1 MR. WALKER: May I be heard for a minute, Your
2 Honor?

3 THE COURT: Yes, sir.

4 MR. WALKER: I feel compulsion; willing lawyer
5 under compulsion.

6 THE COURT: Alright.

7 MR. WALKER: My code reads a little different from
8 Mr. Babcock's. My version of 2-2-370 says: in
9 determining just compensation, only the value of the
10 property to be taken, any diminution in the value of the
11 Landowner's remaining property and any benefits as
12 provided in 28-2-360 may be considered. It doesn't say
13 only the fair market value.

14 And what this section is going at, Your Honor, is
15 that, as Mr. Babcock said, sometimes owners like to
16 recover business loss or other damages from the taking.
17 And this is saying you can only recover the value of the
18 property taken. And it's a factual issue as to what is
19 the value of the property taken.

20 You're going to hear about the business that was the
21 tenant. And we can't recover that business loss. But,
22 it's the value of the property taken. And as Mr. Linton
23 said, we have an expert opinion that the value is based
24 on the cost approach, it's the fairest -- there is
25 nothing in the Constitution that says fair market value.

1 There's nothing in the statute. It's a question of the
2 value to the owner of it. The Constitution says just
3 compensation. The case we cited to the Court recognized,
4 and they recognize, that if it's a specialty use
5 property, then the cost approach would be appropriate.
6 We intend to demonstrate this is a special use property.

7 And what's a special use property? It's a property
8 that's not like a typical property, that has features
9 that are not generally in a building or a property, and
10 there would be no ready market for it as is. And we're
11 going to show that, because this was a very
12 sophisticated, technological facility.

13 The Landowner did lease, during the recession, two
14 small spaces. But the primary technological part of the
15 building remained as it was. So that's a factual issue.
16 Everything's a factual issue.

17 And besides, that's his deposition. Who knows what
18 he'll say in trial. But I think it'll be fairly close,
19 but we don't know. It's premature. And they can argue
20 all that on cross-examination, but we're entitled to
21 prove what we think is proof of just compensation.
22 Nobody -- they haven't shown any cases that says in
23 absolutely, all circumstances, it has to be fair market
24 value. It just says the value. And we're going to show
25 that just compensation is the cost approach. Thank you.

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1 THE COURT: Okay. Alright. Let me -- let me do
2 this. I'm going to talk about three things, and we'll
3 sort of wrap this up.

4 You know, we charge both -- judges charge all the
5 time, you know, at the end of cases in which expert
6 witnesses are presented. And there's a charge that -- we
7 charge the jury that, basically, you could -- you can
8 treat an expert's testimony the same way that you would
9 treat any other witness' testimony, you don't give an
10 expert any different treatment, you can believe some of
11 what an expert says or you can believe none of what an
12 expert says.

13 So I think the rule -- when you look at Rule 702, it
14 talks about, you know, being a person qualified as an
15 expert. I think -- you know, I view that -- I view -- as
16 long as the person is deemed to be qualified as an expert
17 in the field he or she is stated to be an expert in, I
18 think it's up to these twelve people over here how much
19 weight to give to that expert's testimony.

20 Counsel, and, I mean, you -- who knows, if you're
21 putting -- you've got an expert, Ms. Hart -- what's her
22 name? Ms. Hart ---

23 MR. BABCOCK: Haskell, Your Honor.

24 THE COURT: Ms. Haskell. She -- are you going to
25 move that she be qualified as an expert? I mean, the

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1 jury is going to look at her testimony, can either
2 believe it or not believe it. Or the jury -- and then
3 counsel will move that Mr. Hartnett be qualified as an
4 expert and if the Court deems him to be so, then you've
5 got these two experts. And then it's in the prevue of
6 these twelve people over here to decide, well, you know,
7 I'm going -- they may not believe -- you know, and there
8 are sometimes --

9 And I've sat here for a little bit, and I've sat in
10 situations where the jury didn't believe either expert.
11 You know, juries are just like that. They don't -- you
12 can put up these expert witnesses and have them talk all
13 this technical stuff, and then you put up another one,
14 and then the jury has their own way of coming up with
15 what they think is fair and just.

16 So as far as Mr. Hartnett being excluded as an
17 expert, that basis of Rule 703, I certainly disagree with
18 that.

19 Now, here's my -- here's my question. You know, I
20 think our Constitution, as well as the -- all appellate
21 courts, I don't care which jurisdiction you go, you know,
22 judges have to be real careful about taking factual
23 issues out of the hands of the jurors, because that's why
24 they're sitting there. Now, here's the deal. Let's
25 talk about, you know, the cost approach. During the --

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1 during the break, I have tried my best to find a South
2 Carolina case so I could look at somebody -- a South
3 Carolina case. And I know these other cases you cited,
4 counsel but I was looking for a South Carolina case that
5 dealt directly with uses of the cost approach and that
6 kind of thing. I didn't find one and I -- I didn't see
7 one during the break.

8 But when you talk about -- and you know what this
9 case really hinges upon, I think one of the things, is
10 visibility. You know, it's interesting when you talked
11 about -- counsel, when you mentioned if you build a house
12 and put a swimming pool in it, you know, it necessarily
13 increases the value. But if you put a swimming pool in
14 it and you've got a watchtower and you've got all these
15 other kinds of things in it, then it makes it a little
16 different.

17 So -- but this -- the jury -- the jury -- it's a
18 factual question as to whether or not they're going to
19 prove that this is a specialty building. I mean, they're
20 going to -- they -- you know, they have to do that. You
21 know, a jury may look at this and say, well, you know
22 what, I know that this is -- this is attached to the
23 building and they've done this to the building, whatever.
24 And, you know, and that -- the jury may say, well, I
25 don't think that's a specialty building. But that's a

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1 factual determination for these twelve people over here
2 to make. And I think it goes to the weight and
3 sufficiency of the evidence. So I don't -- that's where
4 I'm having a little issue.

5 Now, the other thing is -- and I don't think I heard
6 you correct, counsel, when you said that when -- I wrote
7 that down -- you said that when Ms. Hartsell -- am I
8 saying her name right? Hartsell?

9 MR. BABCOCK: Haskell, Your Honor.

10 THE COURT: Haskell. Okay. When Ms. Haskell did
11 her analysis that she found -- and I'm -- she found other
12 cases -- other places that were similar. I don't -- I
13 don't know if you -- when you said that or not. But I
14 didn't think that Mr. Hartnett, at least in the
15 deposition I read, he couldn't identify any building that
16 was similar.

17 And so I don't know -- I'm not -- I don't know what
18 the Landowner's -- the basis -- the real flux of the case
19 is. But I can -- willing to bet you it hinges on that
20 whole specialty building. And, I mean, they -- you know,
21 if I had a betting a man, I'd put they're hanging their
22 case on that, because then that gives Mr. Hartnett the
23 right to deviate from the other approach and utilize the
24 cost approach. So -- but here again, I think the -- let
25 me -- I made some notes here. I think the -- let me go

1 to it.

2 [Whereupon, the Court reviews documents]

3 THE COURT: I think whether the -- this building is
4 considered your run-of-the-mill office building, or a
5 specialty building, I think that's for them to determine.

6 I also think, with regard -- the testimony of the
7 expert, Mr. Hartnett, and Ms. Haskell, whether that's
8 factual, is that for those twelve people over there to
9 make that determination.

10 And, you know, and as far as the approach is
11 concerned, you're going to argue -- your witness is going
12 to talk about the approach she used, their witness is
13 going to talk about the approach they used, and then
14 these twelve people over here have to make a
15 determination which approach is appropriate.

16 So I think all of these issues, counsel -- and I
17 think y'all made good arguments on both sides. But I
18 just think that as a trial judge, I think that what's in
19 dispute needs to go here, and I don't -- I don't think
20 that at this juncture I need to do anything other than
21 first of all, I do make a finding on the record that I
22 think the -- Mr. Hartnett, if he's proven to be an expert
23 once it's proffered, that he'd be allowed to testify.

24 And your Ms. Haskell, the same thing, that she be
25 allowed to testify as an expert in the area of expertise

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1 that he or she thinks she is. And I think all the other
2 issues regarding what approach was used, and whether or
3 not this building is considered a specialty building, I
4 think that's clearly, clearly, in the laps of these
5 twelve people over here. And I think that's where it
6 should be.

7 And that's -- so that would be my ruling in that
8 regard. So counsel's motion to exclude the testimony of
9 Mr. Hartnett is hereby denied based on the rationales I
10 just gave. Anything else from either side?

11 MR. BABCOCK: If Your Honor please? And I
12 understand Your Honor's ruling. I just don't mean to
13 belabor the point, but I want to make sure for the record
14 ---

15 THE COURT: --- yes, sir ---

16 MR. BABCOCK: --- that the record is complete here.

17 THE COURT: Right.

18 MR. BABCOCK: Our motion, in large part, was based
19 upon the gate keeping function of the Court before an
20 expert testifies. State Court has its standard, Federal
21 Court, we saw there, has its standards.

22 In this case it is not the disagreement between the
23 appraisers in terms of what methodology they used,
24 although we think the cost approach is very flawed. The
25 significance is the use of fair market value as to

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1 definition: willing buyer, willing seller, no
2 compulsion.

3 Ms. Hartnett used -- Ms. Haskell used that for her
4 appraisal. Mr. Hartnett didn't, and it's his failure to
5 use that required standard that caused me to file a
6 motion that I have never filed in forty-plus years with
7 condemnation cases. I realize the significance, and I
8 realize that in virtually every case, as Your Honor has
9 held, is something for the jury.

10 I made the motion because in this case Mr. Hartnett
11 did not follow the rule of following fair market value
12 willing buyer, willing seller, no compulsion, and that's
13 why I filed the motion. So I just want to make that
14 clear for the record. Thank you, Your Honor.

15 THE COURT: Okay. The record is clear.
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1 THE COURT: Alright. Anything else before we bring
2 the jury out?

3 Let me just -- hold on one second. Just one second.
4 Let me get something.

5 [Off the record momentarily]

6 THE COURT: We're back on the record. Let's get the
7 logistics of the trip straight so he can get some idea.

8 Are we going to have the twelve jurors plus one and
9 a driver; is that right?

10 MR. BABCOCK: Yes, sir.

11 THE COURT: Alright. And I -- and before they
12 leave, I'll just give the jury some specific instructions
13 that the driver is going to take them over there to the
14 property, they're not going to go inside, and they're not
15 to talk to each other about anything involving the
16 property. That's going to be my specific instruction
17 unless the lawyers tell me something else I need to tell
18 them. But that's basically it.

19 And then once they finish with them -- let me ask
20 you this. Once they finish with the jurors, since it's
21 going to be at the end of the day, what do -- do they
22 bring them back here or they let them go home or what's
23 the -- what's the process? Or do I determine that?

24 MR. BABCOCK: I think you determine that, Your
25 Honor.

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1 THE COURT: Alright. It depends upon...

2 CCSO DEPUTY: I thought we said they're going to do
3 it in the morning. Do you want to do it after?

4 THE COURT: Can we do it -- what's easier -- what's
5 easier for you guys? In the mornings?

6 CCSO DEPUTY: It would probably be easier in the
7 morning to do it.

8 THE COURT: Well, you're going to -- you're going to
9 do opening statements today. You might get in a little
10 testimony. It might be -- it might be a good idea to do
11 it in the morning before they come in here. What do you
12 think? And then ---

13 MR. WALKER: --- the Landowner has no objection to
14 that. If it's easier for the staff, we ---

15 THE COURT: --- Yeah ---

16 MR. WALKER: --- that's fine with us.

17 THE COURT: Say in the morning if they...

18 MR. BABCOCK: Your Honor, yes, I have no problem
19 with that. I think if we can get Mr. Ravenel's testimony
20 in this afternoon so he can give kind of an overview of
21 the project and where the property is in relation to the
22 project, that that would give them enough of a basis for
23 understanding things so they can go out and take a look
24 at it. I think it would be kind of hard, just in a
25 vacuum, to go out and look at the building.

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1 THE COURT: Okay. So at 9:30? Is that a good time?
2 They would just -- they would just meet here in the jury
3 room and then you guys would pick them up from here? Is
4 that a good thing?

5 CCSO DEPUTY: Yes ---

6 THE COURT: --- and then take them. How long -- how
7 far -- how long -- it's about ten minutes from here?

8 THE COURT: Alright. So ---

9 CCSO DEPUTY: Depending on how long they're out
10 there.

11 THE COURT: Yeah. You can pick them up at 9:30.
12 They should be through by eleven o'clock, shouldn't they?

13 MR. WALKER: Oh yeah.

14 MR. BABCOCK: Yes, sir.

15 MR. WALKER: It's only three miles up the road.

16 THE COURT: Okay. So take them at 9:30 and then
17 have them back over here by maybe like 10:30? Is that
18 reasonable?

19 CCSO DEPUTY: 10:30, eleven o'clock, probably, if
20 traffic's not ---

21 THE COURT: If traffic's not too bad? And then
22 you'll communicate with somebody ---

23 CCSO DEPUTY: --- right ---

24 THE COURT: Alright. So we'll do that in the
25 morning. Okay?

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1 THE BAILIFF: Your Honor, if I may?

2 THE COURT: Yes, sir.

3 THE BAILIFF: You might want to consider a bailiff
4 to go with those jurors, also.

5 THE COURT: Hear that bailiffs? You're going with
6 them, aren't you?

7 CCSO DEPUTY: I'm a deputy, sir.

8 THE COURT: Sir, you want to go?

9 THE BAILIFF: Yes, sir.

10 THE COURT: Okay. Those two are going. Mr. Hall,
11 you want to go?

12 MR. HALL: Yes, sir.

13 THE COURT: Okay. Those two are going.

14 [Off the record momentarily]

15 THE COURT: Alright. Everybody is in place? Okay.

16 [Whereupon, the jury enters the courtroom at 2:28
17 p.m.]

18 THE BAILIFF: Jurors are all present, Your Honor.

19 THE COURT: Alright. Ladies and gentlemen of the
20 jury, I hope you had a wonderful lunch. I did, so I hope
21 you -- I hope you did, as well.

22 We're going to at least attempt to start this trial
23 but I want to discuss a couple of things with you. This
24 trial probably is a little different in the sense that if
25 you've ever participated in a jury before, jury service

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1 before, you probably heard the words plaintiff and
2 defendant. And that's typically what you hear in trials.

3 But this trial is going to be a little different.

4 You're going to hear the word Condemnor and you're going
5 to hear the word Landowner. So you're going to hear
6 those words interchangeably and typically not hear the
7 name -- the word plaintiff or defendant.

8 And as I may have said to you earlier, this is a
9 condemnation action and certainly the burden is on the
10 Landowner to prove the value of what was taken, as well
11 as any damages to the remainder -- or the improvements to
12 the remainder applicable.

13 Now, we're going to have some opening statements in
14 just a minute. I'm going to talk to you a little bit
15 about something before we do that. But the Condemnor
16 will give you -- will come up and give you an opening
17 statement, and then the Landowner will give his opening
18 statement. In these statements, they're just going to
19 recite to you their respective positions in the case.

20 After that, the Condemnor will present a witness who
21 will discuss what the project is with you and their
22 position. Then after that, the Landowner will present
23 his case in chief.

24 Now, you're going to receive evidence in this case.
25 And evidence is -- may take the form of testimony, as

1 well as documents, photographs, or the like. And I'm
2 assuming in this case you're going to be looking at
3 certain documents, and documents can be either plats, any
4 kind of exhibits of that nature. We may be utilizing one
5 of these TV screens, and the lawyers may also have
6 certain other documents that you're going to take a look
7 at.

8 And so two forms of evidence; we're talking about
9 evidence that comes from the witness box and also
10 evidence that comes in the form of exhibits that may
11 present -- be presented to you.

12 Credibility or believability; you have the right as
13 jurors to believe everything a witness says, to believe
14 portions of what a witness says, or don't believe
15 anything a witness says, that -- and you give that same
16 weight to not only the testimony that comes out of the
17 witness box, but you give that same evaluation to any
18 exhibits that are presented to you for your evaluation,
19 that same level of credibility.

20 Now, after the arguments are finished and the case
21 is finished, then I will give you what's the law that's
22 applicable to this case. And, however, I'll tell you
23 that the -- while you're serving as jurors, until the
24 trial is completed and you're given the law that's
25 applicable to this case, you're not to discuss the case

1 with each other and not to discuss the case with anyone
2 else.

3 Now, I do -- I do allow this -- I'm probably one of
4 the few judges, but I do allow note taking in this case.
5 And I'm sure the bailiff may provide you with a little
6 pad, if you want to take notes, and pencil. If you --
7 bailiff, if they want to do that.

8 The only stipulation is you're not to take your
9 notepad out of the jury room. Don't take it home with
10 you. Make sure that you keep it there. But, please,
11 ma'am, please, sir, do not take notes so much that you're
12 not focused on what the -- either what the witnesses are
13 testifying to or what the lawyers are testifying to. So
14 you've got a task that you want to take notes but you
15 still want to be focused on the evidence and testimony
16 that's being presented to you. So if you would do that,
17 I would appreciate it.

18 Now, I am -- you know, I always tell juries
19 everywhere I go that there are two judges in the case,
20 that there's me, I'm the judge of the law, and you're the
21 judge of the facts. So there are two judges. You're the
22 judge of the facts, so I will not say anything or do
23 anything or give the appearance of anything that would
24 give you any inkling that I know anything about the facts
25 of the case or making any comments about the facts,

1 because I'm prohibited from doing that. You're the judge
2 of the facts, you're the -- you weigh the evidence and
3 the testimony presented, and you evaluate what's been
4 presented. I am the judge of the law and I will exercise
5 my duty, as the judge of the law, during the course of
6 the trial.

7 Now, during the course of the trial -- we've got a
8 bunch of lawyers in here, you know, and -- I shouldn't
9 say a bunch of lawyers because that didn't sound right.
10 I shouldn't have said we've got a bunch of lawyers. But
11 we've got a few lawyers in here.

12 And from time to time, the lawyers may jump up and
13 object to the introduction of a piece -- some evidence,
14 object to a witness' testimony, and that may be a
15 question of law that I may need to deal with. And so if
16 there's a question of law, then I may from time to time
17 have to send you out so I can deal with that particular
18 issue. So that's one of the roles that I have. You
19 know, I always compare my role as the judge sort of as
20 the umpire. I call balls and strikes, and that's
21 basically what I do.

22 Alright. So the last thing I'm going to say to you
23 before we start the trial is both sides in this matter,
24 the Landowner and the Condemnor, and everybody involved
25 on both sides, they just -- they just want you to pay

1 attention, listen very carefully, be fair and impartial,
2 which you took an oath to do and which I'm sure you will
3 do.

4 And I'll say this and then I'm going to shut up for
5 a second. I told a jury the other day that I thought
6 that jury duty was right up there with your wedding
7 anniversary, with Christmas and all that, and they didn't
8 -- they didn't like that too much.

9 But, anyway, so it's an important service that you
10 provide for your community and it's just a -- it's our
11 system. And that's our -- that's what our system
12 dictates. So please, ma'am, and please, sir, exercise
13 that duty accordingly.

14 So if nothing further, I am going to turn to you,
15 counsel.

16 MR. WALKER: Your Honor, we agreed that the
17 Landowner would ---

18 THE COURT: --- alright ---

19 MR. BABCOCK: --- address the jury first.

20 THE COURT: Alright. Very good. Very well.

21 MR. WALKER: Thank you. May it please the Court?

22 THE COURT: Yes, sir.
23
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25

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1	OPENING STATEMENT

2 BY MR. WALKER:

3 Good afternoon. I am a member of a bunch of
4 lawyers. My name is Trenholm Walker. I'm here today on
5 behalf of the Landowner and I'm going to introduce you to
6 some people that you're going to see over on our side of
7 the table over the course of the next couple of days.

8 Right next to me is my partner, John Linton. And
9 next to him is Fred Fabian for the property owner. And
10 over in the corner is Ty Bagley and he is going to
11 occasionally note an exhibit on the screen for us so that
12 everybody can see it. Behind him is Nancy Jane Dennis,
13 who works for me, my paralegal, and really makes sure
14 that everything gets done. And there's Thomas Hartnett,
15 who is an appraiser, and you will hear from Thomas'
16 Hartnett during the course of the case.

17 You know, in our government system we give the
18 government an awful lot of power. And that power can be
19 exercised in different ways. And one of the powers that
20 we've given our government is the power to take property.
21 When I say take property, they have the ability to
22 possess property after notice, to use it for a public
23 purpose. If there is a public project, basically, that
24 needs a person's property, then the government can do
25 what you've heard the Court refer to as bring an action

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1 for condemnation or eminent domain. And that's what
2 we're here about today. Nobody is here saying the
3 government cannot take the property. And that's the word
4 we use, we use take, take the property.

5 But the condition on that, and what our State
6 Constitution says is that if the government takes the
7 property, then the property owner has to receive just
8 compensation. And those are the words you're going to
9 hear throughout this case: just compensation. That's
10 what you're here to determine. And that just
11 compensation means how much should the owner receive for
12 his property. What was the value of your property that
13 was taken. And we wouldn't be here were there not a
14 sharp disagreement about that.

15 And the first thing I want to do is introduce you to
16 the property. You know, where's this property? This
17 property is in the neck of Charleston. I think most of
18 you from here know where the neck is. And this is a
19 piece of property between King Street Extension and
20 Meeting Street Road.

21 There's a portion of the neck where if you're
22 driving up King Street or Meeting Street, you can see the
23 other and there are some train tracks in the middle. And
24 this piece of property is a rectangular piece of property
25 just off of Meeting Street, in the neck, and it's between

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1 the railroad tracks and Meeting Street Road. And this
2 piece of property has been in Mr. Fabian's family for
3 generations.

4 And there are really going to be two entities. When
5 I say entities, companies you're going to hear about
6 because individuals didn't own the property or lease the
7 property. The ownership entity is a family company of
8 Mr. Fabian's called Gateway Properties of Greater
9 Charleston, or Gateway, might call them Gateway
10 Properties.

11 The tenant and you'll hear about the tenant, because
12 this building was built for a family company that's a
13 business and the business is called eLifespaces. And
14 that's Mr. Fabian's business. He's had it for about
15 twenty years. And the business of eLifespaces is to put
16 technology everywhere. If you -- they sell all kinds of
17 technology. And it can be something as grand as a home
18 theater that's totally engineered for the sound and the
19 view and everything else. And if somebody has the means
20 and they care about it, or you want to tune your
21 something perfectly, they've got that.

22 Or they've got a lot of pragmatic things: security
23 systems, advanced camera systems, access, security, all
24 of that. And that's important because Mr. Fabian's
25 business was in Mount Pleasant. The whole reason this

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1 building got built by the family was that the family
2 ownership entity wanted to build a building for the
3 family business, which is eLifespaces, and they did that
4 back in 2007.

5 And this is not any ordinary building, as you will
6 hear. There's going to be a dispute about the nature of
7 that building. This building was designed specifically
8 to include all the technological features and incorporate
9 all the electronic systems that were marketed by
10 eLifespaces.

11 The building itself was designed, since it was next
12 to the train tracks, and you'll see pictures, to look
13 like a train station. And you will have a chance, maybe
14 as early as tomorrow, to go take a look at it. And you
15 may have gone by it otherwise, but you're going to have a
16 chance tomorrow to see it.

17 It looks like a train station, but inside it's very
18 different. The design was specifically engineered to
19 have all the infrastructure that Mr. Fabian's business
20 uses so that he could test systems, he could show people
21 who came in the difference systems. Somebody might come
22 in and say I want this and he could say, well, there's
23 this or that. All that was built into the building. He
24 built a theater that is -- and you'll see pictures of it
25 and hear about it -- that's actually a suspended room

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1 inside another suspended room, right next to the railroad
2 tracks and if a train went by and blew its whistle, you
3 cannot hear a thing. Everything was done specialty for
4 the purpose of featuring their services.

5 And that's going to be a key issue in this case
6 because on the other side of the room the Condemnor, and
7 that's the Palmetto Railways -- they're the ones who are
8 taking this property -- they don't think much about it.
9 They say it's an office building. And you're going to
10 have to decide all that.

11 But I'm getting slightly ahead of myself. Mr.
12 Fabian's family built that building in 2007 up there in
13 the neck, and it was the first technological building up
14 there. It was really a move that the City endorsed
15 because a lot of companies had followed suit. Back then,
16 there wasn't much up there. It was a neglected area of
17 town. And now things are starting to happen up there.

18 Depending on who you talk to, it's either good or
19 bad, but a lot of things are happening up there. And
20 this gentleman's family was the first to go up there and
21 they invested a huge amount, millions, in this building.

22 He went through the recession and as a result of
23 that, he ended up having to lease a little bit of the
24 building but by and large the entire building, with all
25 its special features, remained intact. And in 2016, he

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1 had word, he received a notice that Palmetto Railways was
2 thinking about putting a new train track very close to
3 his building. And that train track, known as the
4 southern connection, was going to serve that brand-new
5 shipping terminal that the State Ports Authority is doing
6 there over there on the Cooper River where the navy base
7 used to be.

8 And Mr. Fabian, at the time, didn't know whether it
9 was going to hit his property or not. He had a lot of
10 issues with the location because -- and you'll hear about
11 this -- he thought there were better locations. But
12 there's no stopping decisions like that. He received a
13 notice that we're going to take your property, that we're
14 going to put some train tracks right over your property,
15 we're going to take that building you built in 2007 and
16 we're going to knock it down and we'll pay you just
17 compensation. They're going to take the land; they're
18 going to get rid of the building.

19 They contacted him, the right-of-way acquisition
20 people because they hire people to come out, talk to the
21 property owner. Mr. Fabian showed these people, who
22 represent the railways, that this is an unusual building.
23 They had an appraiser come out. He walked into the
24 building. He showed the special features. He was
25 encouraged to do things like show us the plans, get us

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1 the original cost, and he did all of that, thinking at
2 the end of the day they would recognize this building for
3 what it was, because it was just an unusual building
4 because for his business -- and it's critical for his
5 business. He and his family are going, the ownership
6 entity are going to have to go out and build another
7 building.

8 But in the end the railway said, no, it's basically
9 an office building, that theater with a little work, you
10 can make it an office; that acoustical room that's
11 specially built, we -- you can make that an office; that
12 weird layout of the floor, you can make that an office.
13 And, basically, the information that he gave them just
14 got thrown in the trash.

15 And they came forward with an offer, and you're
16 going to hear what it is, based on an appraisal, of
17 1,800,000 dollars which is a lot of money. It is a lot
18 of money. But for what he has to do, his family has to
19 do, to replace that building -- you will hear that to
20 replace the land, land value plus the building, is around
21 four-and-a-half-million dollars to do everything that he
22 had in that building.

23 And that's really for you to decide whether it was
24 an office building or a specialty building. And the
25 judge is going to say you decide that. As Judge Kinlaw

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1 said, they're two judges in here. He's the judge who's
2 going to tell the lawyers and you what the law is, Judge
3 Kinlaw, and then you're going to go back in your jury
4 room and decide whether it's a common office building or
5 it's something else.

6 And we submit that if you're fair and you listen to
7 the evidence, and you listen to the law, that you will
8 conclude the value of what's taken, what has been taken,
9 is that four-and-a-half-million dollars that his family
10 is going to have to go out and rebuild right down the
11 street, which is what they're going to have to do.

12 I've already talked at you too much. I'm going to
13 sit down. I'm looking forward to spending a couple of
14 days with you. We're delighted that you're willing to
15 serve, and look forward to addressing you in argument at
16 the end of the case. Thank you.

17 THE COURT: Alright. Yes, sir.

18 MR. BABCOCK: May it please the Court?

19 THE COURT: Yes, sir.

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1 couple of things. Number one, in this case it's like any
2 other condemnation case where a public entity like
3 Railways, for a public project, needed to acquire some
4 private property.

5 In many cases, the property is acquired for roads,
6 schools or things of that nature. In this case it's
7 being acquired for an intermodal container transfer
8 facility. And what that's doing, with the new terminal
9 at the Port the ships are going to come in, the
10 containers are going to be taken off of the ships, moved
11 to this facility, and they'll be put on Railway trains,
12 then they'll go out to various parts of the state.

13 Similarly, trains will bring the containers in and
14 this facility will transfer those containers over to the
15 ships. And by doing this, it's going to involve a lot
16 more of the railway, which will avoid a lot of trucks in
17 the area. So there's going to be a reduction for the
18 truck traffic because of the way the trains will operate.
19 So it's something that is going to be very important for
20 the Port and for Charleston.

21 I want to make one thing very clear. Railways did
22 not seek out the Gateway property. Unfortunately,
23 because of the design for the southern route, it needed
24 to acquire that property. And in so doing, it -- when it
25 acquires property with anybody, it tries to listen to the

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1 Landowner and resolve for the Landowner where they can.
2 Unfortunately in this case, as is the case with most
3 cases that come to trial, the two sides have not been
4 able to resolve their differences and that's why we come
5 to the twelve of you for you to resolve the differences.

6 So as we go forward into this case, Mr. Ravenel is
7 going to tell you about how the intermodal facility will
8 work, how the southern tracks will work, and where the
9 Gateway property is located. And be clear on this. At
10 no point have Railways ignored or thought little of
11 Gateway or Mr. Fabian.

12 We've respected all private property owners.
13 Unfortunately, we have a disagreement as to the fair
14 market value or the land value for the land and the
15 building that we're talking about. And that's what
16 brings us before you.

17 Now, the testimony that you're going to hear, you're
18 going to hear -- it's not going to be a long case. It's
19 a three-day case. But you're going to hear testimony
20 from Ms. Haskell about her experience in appraising
21 property, her review of this property, different records
22 she looked at.

23 You're going to hear from her about the different
24 methodologies that appraisers use when they are
25 appraising property. And she going to give you -- she's

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1 going to give you her opinion about it for the Railway
2 property. And that's going to be 1,750,000 dollars.

3 Now, you heard reference a few minutes ago, of Mr.
4 Walker, to 1.8-million dollars. And that's because the
5 initial appraisal that was done to the property, by
6 someone who is not an MAI, not as experienced as Ms.
7 Haskell, came out from 1.8-million dollars.

8 And I'm going to tell you right now, you should not
9 return a verdict, and we will not ask you to return a
10 verdict, for any less than 1.8-million dollars. We
11 offered that to Mr. Fabian and Gateway. They rejected
12 it. But that was an offer and you should not even though
13 Ms. Haskell goes a little bit under that, \$50,000 under
14 that, we're not going to ask you to do anything other
15 than what we had with our first appraisal. So let's be
16 clear on that.

17 Now, as Your Honor mentioned, the jury system is an
18 interesting system. With all due respect to His Honor,
19 he is calling balls and strikes. He's going to analyze
20 the law. But you will analyze the facts. You're going
21 to listen to all the evidence.

22 And the beauty of the jury system is it takes twelve
23 people from different walks of life and brings y'all
24 together to apply your common sense and logic to the
25 testimony you hear in this courtroom. And the collective

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1 wisdom and life experiences that you have will, in the
2 end, produce a verdict. And verdict is from the Latin
3 word ut vere dicam; to tell the truth. And it will tell
4 the truth. It will say what the twelve of you have
5 determined that the fair market value, the value of this
6 property, is.

7 And you'll hear about willing buyer and willing
8 seller coming together for what that price would be.
9 Because in a condemnation case, it's important to look at
10 what the value of the property is, not the value that
11 some person might have, because we all have things that
12 we think are more valuable than what the market might
13 really show.

14 So we're here to come up with a verdict, at the end
15 of the day that represents the fair market value of this
16 property when Railways acquired it in October of 2017.
17 And it's going to be important that that number that you
18 return be not a dollar more nor a dollar less than what
19 that fair market value is.

20 Because the constitutions of South Carolina and the
21 United States require that when a government entity
22 acquires private property, they pay just compensation.
23 And that's an important protection for both Railways and
24 Gateway, because it's supposed to protect both entities
25 in terms of what that fair market value is. So we're

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1 going to ask you to listen to all of the evidence but, in
2 particular, the appraisal testimony, because that
3 valuation testimony is going to be focused on what that
4 number is for fair market value, what that number is for
5 just compensation. And that's what you ultimately have
6 to determine: what just compensation and fair market
7 value was on the Gateway property in October of 2017,
8 when Railways acquired it.

9 I know y'all will listen carefully to everything.
10 You're going to have an opportunity to see the property
11 in some pictures and some videos. You'll have an
12 opportunity to go out and visit, I think probably
13 tomorrow or perhaps tomorrow morning, so you can see the
14 property and you'll know exactly what we're talking
15 about.

16 At the end of the day, this is the only opportunity
17 that Gateway or Railways have to be in Court to have a
18 determination made as to just compensation. And the
19 twelve of you, with your collective experience, logic and
20 wisdom, will be able to determine what that figure is for
21 just compensation for the Gateway building in October of
22 2017. Thank you.

23 THE COURT: Alright. Thank you, Mr. Babcock. Are
24 you ready to call your first witness?

25 MR. PAAVOLA: Yes, sir.

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1 THE COURT: Alright.

2 MR. PAAVOLA: Condemnor calls Terrick Ravenel.

3 THE COURT: Alright, sir. Come around and be sworn.

4 [Whereupon, Mr. Ravenel comes forward]

5 THE CLERK OF COURT: If you will place your left

6 hand on the Bible and raise your right.

7 [Whereupon, Mr. Ravenel is duly sworn by the Clerk

8 of Court]

9 THE CLERK OF COURT: You may be seated.

10 [Whereupon, the witness takes the witness stand]

11 THE CLERK OF COURT: And for the record, please

12 state your full name, spelling your last.

13 THE WITNESS: Terrick Ravenel R-A-V-E-N-E-L.

14 THE COURT: Yes, sir.

15 - - - - -

16 TERRICK RAVENEL,

17 Having Been First Duly Sworn,

18 was Examined and Testified as Follows:

19 DIRECT EXAMINATION

20 BY MR PAAVOLA:

21 Q. Good afternoon, Mr. Ravenel. Are you currently

22 employed?

23 A. Yes.

24 Q. And who do you work for?

25 A. Palmetto Railways or South Carolina Public Railways.

1 South Carolina Department of Commerce, Division of Public
2 Railways.

3 Q. And what are you here to talk about today?

4 A. The condemnation proceedings for the Gateway
5 property and as a result of the Navy Base Intermodal
6 Facility.

7 Q. And I'm going to come back to the intermodal
8 facility and the Gateway property. Can you first tell me
9 about Palmetto Railways? What is Palmetto Railways?

10 A. Palmetto Railways is a enterprise agency of the
11 State of South Carolina, an enterprise agency similar to
12 the Ports Authority where we do not take state
13 appropriations. The revenues that are generated from the
14 business that we operate is how we pay our bills and do
15 projects.

16 We are an operating class-three short-line railroad,
17 which is -- a short-line railroad is known from doing the
18 first mile, last mile operations. You hear mostly of
19 class-one CSX and Norfolk Southern. They do what's
20 referred to as long haul.

21 But we're doing the industrial work in some of the
22 plants off of Virginia Avenue or on the Port facilities
23 and we do railroad switching, our own maintenance,
24 locomotive repair, railcar repair; so basically a full
25 service operation.

1 Q. It's called Railways. Does Railways own trains or
2 locomotives or track?

3 A. So we own twelve locomotives, about eighty-five
4 miles of track in -- mostly in Berkeley, Charleston, and
5 Colleton Counties.

6 Q. And can you give me an example of a Railways
7 operation, a project you may recall?

8 A. The -- probably the most -- the operation we're most
9 known for is on the Columbus Street terminal right off of
10 East Bay Street. You see where Norfolk Southern brings
11 in the unit train every day of the finished BMW
12 Automotives.

13 So they bring in the train and we put it in the
14 position for it -- those rail, those cars to be off-
15 loaded from the railcar, and then build the train for the
16 outbound back to Greer.

17 Q. Does Railways currently operate in the Port of
18 Charleston?

19 A. Yes. We operate at North Charleston, Union Pier,
20 and Columbus Street.

21 Q. And can you explain how the operations -- how
22 Railways operates at the Port?

23 A. As I mentioned, at Columbia Street we have a
24 plastics operation, unloading operation at Union Pier, as
25 well as at North Charleston terminal.

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1 Q. And Palmetto Railways is also called Public
2 Railways; correct?

3 A. Yeah. We -- our legal name is Division of -- the
4 Division of Commerce of Public Railways. We rebranded in
5 2013.

6 Q. In addition to the -- some of the operations you've
7 already described, does Railways also undertake projects
8 to construct track or develop new infrastructure?

9 A. We do. As part of the Department of Commerce, we're
10 utilized in a number of industrial development or just
11 commerce projects for working with Volvo and also the
12 Navy Base Intermodal Facility, which is part of the
13 State's infrastructure package supporting the Port.

14 Q. Before I ask you about the intermodal facility, I
15 want to ask of your background. Where are you from?

16 A. West Ashley.

17 Q. And did you go to high school in the Charleston
18 area?

19 A. I did.

20 Q. Where did you go to high school?

21 A. First Baptist Church School.

22 Q. And when did you graduate?

23 A. 1999.

24 Q. Did you attend college afterwards?

25 A. College of Charleston.

1 Q. And when did you graduate the College of Charleston?

2 A. 2005.

3 Q. And when did you begin working at Railways?

4 A. 2013.

5 Q. And what position were you hired for in 2013?

6 A. Project manager.

7 Q. Was that specific to any particular projects?

8 A. It was to the Navy Base Intermodal Facility.

9 Q. And just generally between the time you graduated
10 college in 2004, to when you started at Railways in 2013,
11 generally what types of jobs did you have?

12 A. Various jobs. I worked sport fishing for a few
13 years, and then came back. I worked for a heavy-highway
14 construction contractor, a commercial construction group,
15 and then, as well, I worked for Construction Aggregates,
16 which is raw materials brought into the Port of
17 Charleston and Port of Savannah.

18 Q. You've mentioned the intermodal facility several
19 times. Can you describe for us what an intermodal
20 facility actually is?

21 A. So intermodal facility is the transfer of
22 containerized freight from rail to truck or truck to
23 rail.

24 Our facility is strictly for the Port of Charleston.
25 Really, the majority of the market coming in and out of

1 Charleston is all international, so either import or
2 export. So it's the twenty, forty, or forty-five-foot
3 containers that you see on -- typically on trucks today.

4 Q. And how long has Railways intermodal facility
5 project been ongoing?

6 A. It was initially conceived in the 2008 State Rail
7 Plan, which identified a lack of capacity in the existing
8 intermodal facilities.

9 So the state, as part of constructing the new
10 Leatherman Terminal, which was permitted in 2016,
11 identified that they needed additional rail capacity to
12 be able to maintain, you know, all those containers, not
13 moving by trucks and congesting up the interstates.

14 Q. When did you first become involved in the project?

15 A. 2013.

16 Q. Generally, what is your role and responsibility in
17 regards to the intermodal facility?

18 A. I manage all the day-to-day activities of
19 everything.

20 Q. What's an example of day-to-day activities?

21 A. Everything from design, permitting, property
22 acquisition, moving towards construction. So everything
23 from this that's involved in the project development.

24 Q. Can you tell us why Palmetto Railways is building an
25 intermodal facility?

1 A. The main is support of the State Ports Authority and
2 the increase in capacity. With the Leatherman Terminal,
3 they basically doubled their capacity for containerized
4 freight in the city. With that, the existing intermodal
5 facilities which CSX and Norfolk Southern operate do not
6 have room for expansion.

7 So with that, the State identified that additional
8 property was going to be needed and an additional
9 facility was going to be needed to be able to handle that
10 freight to continue moving those containers.

11 Q. And I believe you mentioned the project may have an
12 impact on the local roadways. Can you describe what that
13 impact may be?

14 A. Well, if there wasn't the project, there would be a
15 much larger impact on the local roads. We're -- our
16 volumes, when we began, is going to be about 300,000
17 containers a year would move through our facility than
18 rather be on the local roads.

19 Q. And what is the current status of the project?

20 A. We received our permit from U.S. Army Corps of
21 Engineers last October and are finishing the record of
22 decision through the Federal Railroad Administration to
23 get the infrastructure funding through their program.

24 Q. Mr. Ravenel, as part of the intermodal facility
25 project, did Railways prepare certain maps depicting the

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1 project?

2 A. We did.

3 Q. And are you familiar with these maps?

4 A. Yes.

5 MR. PAAVOLA: May I approach the witness, Your
6 Honor?

7 THE COURT: Yes, sir.

8 Q. [Mr. Paavola] I hand you for identification what's
9 been marked as Condemnor's Exhibit 1.

10 [Whereupon, Mr. Paavola proffers documents to the
11 witness]

12 Q. Mr. Ravenel, can you tell us what Condemnor's
13 Exhibit 1 is?

14 A. We refer to this as Exhibit A from my project side.
15 This is a north to south look at the project limits.

16 Q. And how do you recognize that map?

17 A. Because we -- I had it created.

18 Q. It was created in conjunction with the project?

19 A. Yes, from our design files.

20 Q. And is that a fair representation of the intermodal
21 facility project?

22 A. It is.

23 MR. PAAVOLA: Your Honor, we would move Condemnor's
24 Exhibit 1 into evidence.

25 THE COURT: Alright.

1 MR. WALKER: I have no objection.

2 THE COURT: Alright. Without objection, so
3 admitted.

4 [Whereupon, Condemnor's Exhibit Number 1 is admitted
5 into evidence by the Court]

6 Q. [Mr. Paavola] Alright Mr. Ravenel, if I can direct
7 your attention to what has been introduced as Condemnor's
8 Exhibit 1.

9 Q. [Mr. Paavola] Mr. Ravenel, if you can --

10 MR. PAAVOLA: I've got to move that out of the way
11 because I think I'll be in the way.

12 THE COURT: Let me ask you this, counsel. Since the
13 jury is that far back, and this screen is here and we've
14 got all these lights, do you think they -- it would be
15 helpful if the lights were dimmed so they could see it a
16 little better?

17 MR. PAAVOLA: That may be helpful --

18 THE COURT: Yes. Since we can't -- you can't put it
19 on this screen, because it's not working, but if you cut
20 that -- those two lights off right there [indicates],
21 they might be able to see it a little better. Who is in
22 charge of lights?

23 [Whereupon, the lights are adjusted]

24 Q. [Mr. Paavola] Mr. Ravenel, are you -- if you're
25 able to use the monitor, it also has a function where you

1 can draw on the exhibit and then later clear it. But if
2 you can generally point out to the jury some major
3 landmarks on Condemnor's Exhibit 1 so they can actually
4 make sense of where the project is in North Charleston.

5 [Whereupon, the photograph is shown]

6 A. So the project is located on the former navy base.
7 If -- this area here [indicates] is Cosgrove Avenue on
8 its way to 26.

9 This [indicates] is Spruill Avenue, which runs
10 adjacent to the old navy base.

11 This [indicates] would be Viaduct Road, which was
12 the south entrance to the old navy base. You've got I-26
13 here [indicates].

14 This [indicates] -- so Spruill continues down where
15 it turns into Meeting Street Road, and then you have King
16 Street on this side.

17 MR. PAAVOLA: Your Honor, pardon the interruption.
18 But I think we're -- because it's so far away, I think it
19 might be a little bit more helpful if you can hold this
20 in front of the jury and then have the witness ---

21 THE COURT: --- yeah ---

22 MR. PAAVOLA: --- point out with the pointer on the
23 ---

24 THE COURT: --- yes and cut the lights on and ---

25 MR. PAAVOLA: --- yeah. Would that be okay?

1 THE COURT: What about an easel? Do you have an
2 easel?

3 [Off the record momentarily]

4 MR. PAAVOLA: We can just hold it, Your Honor.
5 We'll do it the old fashioned way.

6 THE COURT: Okay.

7 [Off the record momentarily]

8 MR. PAAVOLA: Your Honor, may the witness come down
9 and ---

10 THE COURT: --- yes.

11 [Whereupon, the witness exits the witness stand]

12 A. So Spruill Avenue is adjacent here [indicates].
13 You've got I-26.

14 This [indicates] is Rivers Avenue, 52, where it
15 comes down into King Street.

16 This [indicates] is down on the south end where it's
17 Meeting and then King Street.

18 This [indicates] was Cosgrove Avenue coming onto the
19 base, Viaduct Road.

20 This [indicates] is where the new port facility is
21 being constructed.

22 This [indicates] is the reference area that we refer
23 to as the southern connection, which is coming down from
24 the existing CSX and Norfolk Southern right-of-way up
25 around to CSX right-of-way.

1 Q. [Mr. Paavola] -- circle the facility --

2 A. This [indicates] is the main body of the intermodal
3 facility. This is what we refer to as the northern-B
4 track, which connects to the existing interchange just
5 north of Noisette Creek.

6 Q. Is there also an eventual connection between
7 Interstate 26 and the facility?

8 A. There is. So the under construction for an access
9 road is here [indicates] which leads to the port
10 facility.

11 As part of that, there's a local portion of the
12 project that connects with Bainbridge and Hopson Avenue,
13 which will bring trucks to and from the facility directly
14 from I-26 rather than using the local roads.

15 [Whereupon, the witness retakes the witness stand]

16 Q. Mr. Ravenel, you had indicated that the project
17 would both northern and southern rail track leads;
18 correct?

19 A. Yes.

20 Q. And was the project always designed to have a
21 northern and a southern entrance?

22 A. The initial permit application in 2013 was both
23 railroads would enter from the north. In 2015, CSX
24 advised us that they were going to require to enter from
25 the south to connect to their existing infrastructure.

1 Q. Is that why Railways added a southern connection to
2 these project plans?

3 A. It is.

4 Q. And where does the Gateway property fall in relation
5 to the facility map that we just looked at?

6 A. On the southern end, right where the connection into
7 the existing CSX infrastructure would be in between
8 Meeting and King Street.

9 Q. Mr. Ravenel, as a part of the intermodal facility
10 project, did Railways prepare an animated video depicting
11 the operation of the intermodal facility and associated
12 rail lines that we've been discussing?

13 A. We did.

14 MR. PAAVOLA: Your Honor, we've marked for
15 identification Condemnor's Exhibit 2.

16 Q. [Mr. Paavola] Mr. Ravenel, have you seen this
17 animated video before?

18 A. I have.

19 Q. Okay. And did you have a role in the production of
20 this video?

21 A. I did.

22 Q. And when did Railways produce -- prepare the video?

23 A. 2016.

24 Q. Does it fairly and accurately represent how the
25 intermodal facility is designed to eventually operate on

1 the project?

2 A. Yes. It was built off of our CAD files or design
3 files.

4 MR. PAAVOLA: Your Honor, we would offer Condemnor's
5 Exhibit 2 into evidence.

6 THE COURT: Any objection?

7 MR. WALKER: Objection, Your Honor.

8 THE COURT: Objection?

9 MR. WALKER: We have an objection it's not relevant.
10 We also have an objection because the video includes a
11 voiceover and commentary, which is hearsay, and it's in
12 our estimation principally a propaganda piece.

13 THE COURT: Alright.

14 MR. WALKER: There's no ---

15 THE COURT: --- hold on a second. Can you take the
16 jury out for a second?

17 [Whereupon, the jury exits the courtroom at 3:14
18 p.m.]

19 THE COURT: Alright. Counsel, if you would restate
20 your objection.

21 MR. WALKER: The objection is that here we've
22 determined just compensation of the property. This video
23 doesn't relate to the property. The project has been
24 explained. The witness, Mr. Ravenel, has already said
25 what the project does, the intermodal facility. He's

1 already explained about the southern connection and how
2 they load containers on and off the trains, and all the
3 other little things that are shown as animation have no
4 relevance to the case.

5 Additionally, the whole thing is hearsay. And the
6 commentary -- it has a commentary from somebody talking
7 about this is going to work so smoothly, we'll come in
8 like clockwork, and we'll bring a train here and it will
9 be removed this way, and then we'll go back out. And it
10 looks like it's just a Disney World thing, and it's not
11 relevant. So we object, on the bases of relevance and
12 hearsay.

13 THE COURT: Alright. How do you connect the dots on
14 relevancy based on what we've got -- what I've got before
15 me?

16 MR. PAAVOLA: Mr. Ravenel is our statutorily first
17 witness to describe the project and what the purpose of
18 the project. This helps the jury to understand the
19 project. And a map, a flat map, and just in talking,
20 this is to give them a visual of how it will actually
21 work and its purpose. So that's why it's -- that's why
22 it's relevant.

23 THE COURT: He could just tell them everything
24 that's on the video.

25 MR. PAAVOLA: Well, he certainly can narrate the

1 video. If their objection is to the narration, we can
2 turn the narration off and he can narrate the video. But
3 it's hard to conceptualize a construction project that no
4 one's ever seen. Most folks ---

5 THE COURT: --- are you saying these jurors have
6 never seen a construction project?

7 MR. PAAVOLA: I understand the people have probably
8 never seen this type of project. The intermodal facility
9 is an obtuse word and we've tried to describe it. But
10 this video has not only been publicly available on the
11 website for years, so it's been out there. It's not like
12 a new video produced for this trial.

13 THE COURT: Y'all -- you've seen it. Obviously,
14 y'all saw it in the discovery process; right?

15 MR. WALKER: We did. And the case is not about how
16 the intermodal facility works. They're putting a piece
17 of track across my client's property. They aren't
18 putting the facility itself. And we've heard what
19 happens, how the trains come in, they take the containers
20 off or they come in and they're loaded on.

21 I mean we've had an explanation of the project. We
22 don't have to go into a lot of other pat myself on the
23 back, what a good thing I'm doing for South Carolina.
24 And that's what this video is all about. It's a promo
25 piece. It's a commercial piece.

1 THE COURT: How do you respond to the hearsay
2 objection?

3 MR. PAAVOLA: We are certainly able to turn the
4 volume off, then he can describe it. If that's what he's
5 able to do, that's fine. That's not a problem. But all
6 of the -- the project is built on the plans of Exhibit 1
7 ---

8 THE COURT: --- alright. I'll tell you what I'll
9 do. I'll -- you turn the volume off, let him just say
10 what's going on. I think that'll -- that's the -- I
11 think that -- I think I'll allow that.

12 MR. PAAVOLA: Thank you, Your Honor.

13 THE COURT: Alright. Anything else? No? Alright,
14 bring the jury back.

15 [Whereupon, the jury enters the courtroom at 3:19
16 p.m.]

17 THE BAILIFF: Jurors are all present, Your Honor.

18 THE COURT: Alright. Yes, sir?

19 MR. PAAVOLA: Your Honor, we'd offer Condemnor's
20 Exhibit 2 into evidence.

21 THE COURT: Any objection? Subject to your
22 objection?

23 MR. WALKER: Yes. We would restate our objection.
24 We understand the Court's ruling. I want to preserve
25 that objection. Thank you.

1 THE COURT: Alright. Objection so observed.

2 [Whereupon, Condemnor's Exhibit Number 2 is admitted
3 into evidence by the Court]

4 THE COURT: Go ahead.

5 Q. [Mr. Paavola] Mr. Ravenel, I'll direct your
6 attention to what's been admitted as Condemnor's Exhibit
7 2. If you could explain the movement of trains and
8 trucks and how this will operate as the video is played.

9 [Whereupon, Condemnor's Exhibit Number 2, video, is
10 played for the jury with comments from the witness]

11 A. So this is identifying the location, map,
12 identifying its proximity to the State Ports Authority
13 facility. Also, the roadway improvements that are
14 included in our project and/or the Port's Authority
15 project or the DOT project that's ongoing.

16 This shows the northern connection and the southern
17 connection by the two class-one carriers.

18 This is an accurate representation of what the
19 facility would look like once constructed, with utilizing
20 electric wide span gantry cranes.

21 Processing track area, container stacks, trying to
22 utilize some of the newer technologies. This is some of
23 the buildings that are associated with the project.

24 Some of those electronic -- or some of the
25 technology that we're working on is automated gates so

1 that the trucks and trains can come in without having
2 people -- or people there or having to have wait times
3 for diesel admissions, as well as the electric wide span
4 gantry cranes.

5 Creating a sound -- an earthen berm that's a sound
6 and light barrier for the adjacent community. It's also
7 got sound attenuation walls in those areas that are
8 through wetlands.

9 The northern lead of the facility will go through --
10 go adjacent to the old navy hospital.

11 And then under a grade separation, that is part of
12 the project, we've designed the facility so that there
13 are no at-grade crossings within the area that's
14 processing.

15 Also, in the north lead, this is depicting a cut
16 section where the track is about fifteen feet below
17 grade, the existing grade, so which will also reduce the
18 noise impacts to the adjacent properties.

19 This shows the Cosgrove overpass, which I just
20 mentioned. It also has a multiuse path going to North
21 Charleston's riverfront park.

22 This depicts the southern connection just above
23 Milford Avenue. On the left side, you can see Spruill --
24 or Meeting Street Road, King Street. On the right side,
25 you can see the North Charleston Sewer District facility.

1 This is the Port access road and the drayage road.
2 The Port access road is how the trucks access the Port
3 terminal in our facility.

4 And then the private drayage road is a private road
5 in between the Port terminal and the intermodal facility
6 so that those truck transfers never have to hit public
7 roads.

8 And this just continues to show the reasons that we
9 are doing the project, as well as how the project would
10 operate. And that's it.

11 [Whereupon, Condemnor's Exhibit Number 2, video,
12 concludes]

13 Q. [Mr. Paavola] Mr. Ravenel, let's discuss the
14 specific property that we're here about today. The
15 property we're here about today is located at 1799
16 Meeting Street; correct?

17 A. Yes.

18 Q. You mentioned that it's in the -- located at
19 southern rail route?

20 A. Correct.

21 Q. This action to acquire the property was filed
22 October 19th, 2017; correct?

23 A. Yes.

24 Q. Alright. Did Railways prepare a map specific to
25 depicting the southern route?

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2017-CP-10-5382
	)	
	)	
S.C. DEPARTMENT OF COMMERCE,	)	
DIVISION OF PUBLIC RAILWAYS	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
GATEWAY PROPERTIES OF GREATER	)	
CHARLESTON, LLC	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

March 26, 2019
Charleston, South Carolina

VOLUME 2 (of 4)

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE

A P P E A R A N C E S:

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Circuit Court Reporter

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Proceedings
March 26, 2019

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PROCEEDINGS

[Whereupon, the jury goes on a site visit to the property from 9:30 a.m. until 10:20 a.m.]

THE COURT: Okay. Anything before we bring the jury?

MR. BABCOCK: Not from Railways, Your Honor.

MR. WALKER: Nothing from the -- nothing from the property owner, Your Honor.

THE COURT: Alright. Is the jury back?

THE BAILIFF: They said they're coming in.

THE COURT: Alright.

THE BAILIFF: Do you want them in?

THE COURT: Yes, sir.

THE BAILIFF: Judge, can you give them about two minutes?

THE COURT: Yes, I will.

[Off the record momentarily]

[Whereupon, the jury enters the courtroom at 10:26 a.m.]

THE BAILIFF: Good morning, Judge. All jurors are here and are seated.

THE COURT: Alright.

MR. WALKER: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. WALKER: The Landowner calls Fred Fabian.

1 [Whereupon, Mr. Fabian comes forward]
2 [Whereupon, Mr. Fabian is duly sworn by the Clerk of
3 Court]
4 THE CLERK OF COURT: You may be seated.
5 [Whereupon, the witness takes the witness stand]
6 THE CLERK OF COURT: And for the record, please
7 state your full name, spelling your last.
8 THE WITNESS: Frederick Thorpe Fabian, F-A-B-I-A-N.
9 - - - - -
10 FREDERICK T. FABIAN,
11 Having Been First Duly Sworn,
12 was Examined and Testified as Follows:
13 DIRECT EXAMINATION
14 BY MR. WALKER:
15 Q. Mr. Fabian, who's the owner of 1799 Meeting Street,
16 the subject property?
17 A. My family, under Gateway Properties.
18 Q. And what is the name of the Limited Liability
19 Company that owns it?
20 A. Gateway Properties of Greater Charleston LLC.
21 Q. How long has this property at 1799 Meeting Street
22 been in your family?
23 A. Since my great-grandmother.
24 Q. And is that decades? Or how...
25 A. Generation.

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Fred Fabian-Direct Examination by Mr. Walker
March 26, 2019

- 1 Q. Alright. Does it -- or was it the intent of you and
2 your family ever to sell this property in your lifetime?
- 3 A. No, sir.
- 4 Q. Alright. Let's provide the jury a bit of background
5 about yourself. Where did you grow up?
- 6 A. Here, Charleston; West Ashley.
- 7 Q. Okay. And did you go to college?
- 8 A. I did. College ---
- 9 Q. Where did ---
- 10 A. --- College of Charleston.
- 11 Q. How about did you do any graduate school at all?
- 12 A. I did. At night time, I went to the Carolina MBA
13 nighttime school program.
- 14 Q. Did you get a Master of ---
- 15 A. --- I did ---
- 16 Q. --- Business Administration?
- 17 A. Yes, sir.
- 18 Q. What do you do for a living?
- 19 A. I am -- I have a technology contracting company.
- 20 Q. What's the name of that?
- 21 A. It's Life Spaces, Inc., but it does business as
22 eLifespaces.
- 23 Q. Who started that?
- 24 A. I did.
- 25 Q. When did you start it?

1 A. At -- right at the 2000 mark.

2 Q. And what prompted you to go into this business of
3 technology contracting as eLifespaces?

4 A. I had been in -- you know, I'm trying to keep it
5 short. I had worked for an audio-visual staging company.
6 You know, when big concerts come to town, they need
7 audio-visual support. And we got bought up by one of
8 these Fortune 500 companies.

9 And then went out on the road and got involved in
10 their construction arm, which built boardrooms and
11 courtrooms and stuff like this. I did this throughout
12 the '90s, until my wife kind of reminded me that I had
13 missed by son's adolescent years by life on the road.

14 And I just wanted to come home and thought what
15 better way to do it than to apply whatever we had learned
16 commercially to the residential market.

17 Q. And do you have a lifetime interest in electronics
18 and technology?

19 A. Well, I'm a gadget guy, yeah.

20 Q. Alright. And who are the owners of eLifespaces?

21 A. It's family members and some others.

22 Q. Where is the business located today, March 26th?

23 A. 1808 Meeting Street Road, across -- sort of across
24 the street from our original -- well, old facility.

25 Q. And where was it located before you moved across ---

1 A. --- in a -- in a shopping center on Long Point Road.

2 That's where we started.

3 Q. That's where you started before you went to 1799?

4 A. Correct.

5 Q. Okay. And what prompted you to move your business
6 from the shopping center, on Long Point Road in Mount
7 Pleasant, to 1799 Meeting Street?

8 A. In part, rent. The cost of rent at the shopping
9 center was drawing higher and higher. And we wanted to
10 put more investments in like, for example, the -- we'll
11 talk about it in a minute --- but the theater and some
12 acoustical rooms and other elements that we market.

13 And I didn't want to do all these improvements for
14 someone else, the benefit of somebody else, meaning the
15 landlord -- I talk with my hands; I apologize.

16 Anyhow, so in that regard, we started looking around
17 town and decided that we would construct our own facility
18 in Meeting Street.

19 Q. Okay. And I'm going to ask you to turn to what's
20 been marked as Landowner or Defendant's Exhibit 1. And
21 can you identify that?

22 A. I can. That's a ---

23 MR. WALKER: Don't put it up yet.

24 A. Overview of our building with the blue -- it's
25 really green -- but a blue roof.

1 MR. WALKER: Alright. Your Honor, we would move
2 Defendant's Exhibit 1, aerial photograph, into evidence.
3 MR. BABCOCK: No objection, Your Honor.
4 THE COURT: Alright. Without objection.
5 [Whereupon, Defendant's Exhibit Number 1 is admitted
6 into evidence by the Court]
7 Q. [Mr. Walker] Alright. Now, would you show us your
8 building?
9 [Whereupon, the photograph is shown]
10 A. Assuming that -- I did that wrong?
11 Q. No.
12 A. Okay.
13 Q. So that's your building?
14 A. Yes, sir.
15 Q. And where is Meeting Street?
16 A. Right here, this way [indicates].
17 Q. Alright. And where is King Street?
18 MR. WALKER: It might be easier if you use your
19 pointer.
20 THE WITNESS: I'm going to do that.
21 MR. WALKER: Yeah.
22 THE WITNESS: Where is it? There. Will it show up
23 on that?
24 [Off the record momentarily]
25 Q. [Mr. Walker] --- King Street on this first exhibit,

1 so ---
2 A. --- let's see. King Street is that [indicates].
3 Q. [Mr. Walker] Okay. And Meeting Street?
4 A. Right here [indicates].
5 Q. And are there railroad tracks nearby?
6 A. There are. Right here [indicates] and right --
7 there are a series of them there [indicates].
8 Q. Okay. And why would you move your business right
9 next to these railroad tracks up in this area, at the
10 neck, between Meeting and King Street?
11 A. Well, for a couple of reasons. One is we, our
12 family, owned it so we already had the land. But more
13 importantly, what better way to show what we do than next
14 to a noisy railroad track?
15 Q. Alright. Did you have any encouragement from local
16 government at all to ---
17 A. --- yes.
18 Q. Tell us about that.
19 A. We were -- when we were considering relocating from
20 Mount Pleasant the -- we were approached by the City of
21 Charleston to consider the neck area because at the time,
22 it had been neglected for so long.
23 It was shabby and whatever. So we did a fair amount
24 of analysis on the location and they -- I can't remember
25 the gentleman's name. But there were some tax

1 incentives, which I could not explain to you how that
2 worked, involved with I, but to attract us to investing
3 and developing that part or that tract of land.
4 Q. Were there any successful businesses that you know
5 of, nearby or in the neighborhood right there in the
6 immediate vicinity?
7 A. Gibson Tire was across the street.
8 Q. Alright. Could you show us where Gibson Tire was?
9 A. Gibson Tire is right here [indicates].
10 Q. Okay. Anything else that was, to your knowledge,
11 going on up there?
12 A. The hoochie-coochie clubs.
13 Q. Okay. Sorry. But anything from a business
14 standpoint that you can think of?
15 A. No.
16 Q. Alright. And what was your vision, your and your
17 family's vision, for what you wanted to build there on
18 the property at 1799 Meeting Street?
19 A. It -- gosh. We're a technology contractor, so we're
20 very concerned with grounding and issues like this. So
21 in order to construct a technology center, which we had
22 pitched to the City, we had to create the infrastructure
23 needed, very elaborate elements that included -- for
24 example, even the pilings are eighty-five feet, and there
25 are twenty-seven of them drilled in which we bonded to

1 because it's a metal and concrete building. Which if you
2 think about lightening, and we're up in the neck area
3 where there's not much stuff there, we were a lightening
4 rod. So we wanted to make sure that those elements were
5 covered so we wouldn't have a hit, direct hit, and
6 sustain any damage.

7 Beyond that, then it went into foundation. Some of
8 these acoustical rooms weigh, gosh, in excess of twenty-
9 five tons. I mean, we're -- very heavy.

10 So we needed to make sure the steel was designed in
11 such a way to support that kind of weight where we were
12 hanging four-by-eight pieces of specialized sheetrock
13 that weigh 180 pounds. I'm -- getting ---

14 Q. --- before we get into ---

15 A. --- I'm sorry.

16 Q. --- all those details, I want to start from the ---

17 A. --- yeah ---

18 Q. --- bigger picture ---

19 A. --- I apologize ---

20 Q. --- we're going to have some pictures of all that to
21 help the jury ---

22 A. --- got you ---

23 Q. --- see what we're talking about.

24 A. Yes, sir.

25 Q. And I'm just going to start with the shell, the

1 appearance of the building. What was the concept for the
2 appearance of the building?

3 A. Big into that. We -- it -- we wanted the building
4 to look like it had belonged there since the earth
5 cooled, so we thought about what better way to construct
6 something that looked like the railroad.

7 So we went around the state and looked at various
8 train stations and things like this, and picked a design,
9 believing that that's where you would have an engine pull
10 up into.

11 We even looked at one time; we couldn't afford it,
12 but the tracks to create a fake drive-up to the building.
13 You know, that never happened.

14 Q. Alright. And what I'd like you to do so that the
15 jury can actually see exactly what you're talking about
16 -- they were out there today and may have noticed ---

17 A. --- uh-huh ---

18 Q. --- it. But I want you to take a look at Exhibits
19 7, 8, 9 and 10 and tell me if you can identify those.

20 [Whereupon, the witness views exhibits]

21 A. That would -- yes. 7 is a picture of our facility
22 from King Street on the west side of the building.

23 Q. Does it fairly and accurately represent the exterior
24 appearance of your building after it was constructed?

25 A. Yes.

1 MR. WALKER: We'd move 7 into evidence, Your Honor.

2 THE COURT: Alright. Any objection?

3 MR. BABCOCK: Without objection.

4 THE COURT: Without objection, 7 is so admitted.

5 [Whereupon, Defendant's Exhibit Number 7 is admitted
6 into evidence by the Court]

7 MR. WALKER: Can we go on and show that? And how do
8 we erase the marks on the screen?

9 [Off the record momentarily]

10 Q. [Mr. Walker] The top-right corner.

11 A. Top-right corner. Okay.

12 Q. There you go.

13 A. Clear.

14 Q. Alright. Does that show what you're talking about?

15 A. Yes.

16 Q. And is there a train in that one?

17 A. Yes.

18 Q. Okay. And then I'm going to ask you if we could go
19 to -- if you take a look at Exhibit 8, while 7 is on the
20 screen, and ask if you can identify 8.

21 A. Yes. That would be the southern side of the
22 building, the balcony and second-floor view.

23 MR. WALKER: Okay. We would move 8, the photograph
24 that's 8, into evidence.

25 THE COURT: Alright. Any objection?

1 MR. BABCOCK: Without objection.

2 THE COURT: Without objection, 8 is so admitted.

3 [Whereupon, Defendant's Exhibit Number 8 is admitted
4 into evidence]

5 Q. [Mr. Walker] Alright. Is that 8 that we were just
6 talking about?

7 A. Yes, sir.

8 Q. Okay. And the jury went out there today.

9 A. Huh-huh.

10 Q. And they looked at the building. Is there anything
11 different from the building today, as it was at the time
12 you moved out, as far as ---

13 A. --- yeah ---

14 Q. --- the exterior appearance?

15 A. Our signs are not on the building anymore. The --
16 we took those two fixtures and the speakers that we --
17 can I draw on this thing?

18 Q. Yeah.

19 A. There's a speaker there [indicates], and a speaker
20 -- oh, I'm doing something -- anyhow.

21 Q. Okay. And if you would please take a look at
22 Defendant's Exhibit 9.

23 A. Yes. That would be the southeast position on
24 Meeting Street.

25 Q. Alright. Does it fairly and accurately represent

1 the building after construction?

2 A. Yes.

3 Q. Before the Palmetto trees had blossomed?

4 A. Yeah, before. Yeah.

5 MR. WALKER: We would move 9 into evidence.

6 THE COURT: Alright. Any ---

7 MR. BABCOCK: Without objection.

8 THE COURT: Alright. Without objection, 9 is so
9 admitted.

10 [Whereupon, Defendant's Exhibit Number 9 is admitted
11 into evidence by the Court]

12 Q. [Mr. Walker] Can you see the facade that we were
13 just talking about, there on the south facade?

14 A. Yes.

15 Q. Does this show the whole south facade?

16 A. Yes.

17 Q. And does it show the facade along Meeting Street?

18 A. Yes.

19 Q. Did you have a name for it that was consistent with
20 your designs or your intent to reflect or evoke a train
21 station?

22 A. We used to call the facility the E-Life Station.

23 Q. And the last photograph I'm going to ask you to look
24 at right now is Defendant's Exhibit 10. Can you identify
25 Defendant's Exhibit 10?

1 A. Yes, sir.

2 Q. And what is that?

3 A. Same southern view of the building, except this is a
4 little wider angle, where on the left side we have a ---

5 Q. --- alright. And I'm going to ask you to pause for
6 a second.

7 A. Okay.

8 MR. WALKER: We would move --

9 Q. [Mr. Walker] Does it fairly and accurately
10 represent the southeast façade?

11 A. Yes.

12 MR. WALKER: We would move 10 into evidence.

13 MR. BABCOCK: Without objection.

14 THE COURT: Alright. 10 is so admitted without
15 objection.

16 [Whereupon, Defendant's Exhibit Number 10 is
17 admitted into evidence by the Court]

18 Q. [Mr. Walker] Alright. Tell us about this one,
19 which is a little bit more distant view of E-Life
20 Station.

21 A. Yes. A couple of elements visible, if you will. I
22 don't know how -- first, over here [indicates], these
23 were storm shutters. We'll talk about that. And if you
24 looked at some of the earlier ones, it's closed up.
25 They're cameras out there. And then, more importantly,

1 this [indicates].

2 Q. What is that thing over on the left that looks like
3 a fork is stuck in the ground?

4 A. Okay. It -- there are -- you may have heard cable
5 cutters. And all that is is you're able to get broadcast
6 quality, high-definition signals, over your TV without
7 service providers like -- and they're all fine service
8 providers, the Internet and Direct Way.

9 But what we tried to explain is the signal quality
10 is better. The bit rate is higher so when you get off a
11 terrestrial broadcast off the ---

12 Q. --- so would that be like my Comcast cable?

13 A. Yeah. And -- but in this we're taking an antenna
14 like the old rabbit-ears, but it's a little different,
15 that you used to see on television and just getting an
16 off-air broadcast.

17 Q. And did you say the quality was higher or lesser
18 than...

19 A. Higher ---

20 Q. --- what you'd get on your cable?

21 A. Higher.

22 Q. Alright. Now, when you started this, did you meet
23 with your other family members before embarking on this
24 construction project?

25 A. Oh, yes.

1 Q. Was there an arrangement made between Life Spaces,
2 your company, and Gateway Properties of Charleston to
3 memorialize the arrangement between the two entities?

4 A. [No response]

5 Q. How did you set it up between the two entities?

6 A. The -- well, the -- I was -- my father had just
7 passed, right, and so I was given kind of the role of
8 kind of the point person of the family.

9 And I didn't want to take advantages of that kind of
10 role, particularly when asking my brother, my sisters, my
11 mother, about using family land for an adventure I had
12 started personally. And in doing so, you know, the -- to
13 be aboveboard, I pitched them on, look, we're going to
14 up-fit the building with things you've never seen.

15 So part of that agreement, and it's covered in a
16 written document because everybody says you've got to do
17 that, is that these improvements that we were making
18 belonged to the family, to the real estate, if you will.

19 Q. The ownership entity?

20 A. Correct.

21 Q. Was the -- after informing other -- why don't we
22 talk about who these other family members are that you
23 talked about. You mentioned your sisters.

24 A. Yeah. And ---

25 Q. --- could you just tell the jury who the family

1 members that are involved in the entity?

2 A. Yes. My mother. And I have -- I had three sisters
3 and the one close to me had passed away so it passed on
4 to her two kids. So it's a niece and a nephew.

5 Q. Was your son part of this ---

6 A. --- oh, yes. Sorry. So, yes, son was a part of it.
7 And he came on later because he went to Clemson and
8 studied electrical engineering and became very interested
9 in the technology field.

10 Q. Was there a written lease to document the
11 relationship, the tenancy, of Life Spaces to Greater --
12 excuse me -- Gateway Properties of Greater Charleston?

13 A. Yes.

14 Q. Would you take a look at Exhibit 7?

15 A. Wait a minute. That's a picture.

16 Q. Alright. Let's change the number on that. Let's go
17 to 6.

18 [Whereupon, the witness reviews documents]

19 A. Okay.

20 Q. Have you looked at 6?

21 A. Yes, sir.

22 Q. Is that a true and accurate copy of the lease that
23 was entered between Gateway Properties and Life Spaces?

24 A. Yes, sir.

25 MR. WALKER: Landowner moves Exhibit 6 into

1 evidence.

2 THE COURT: Alright. Any objection?

3 MR. BABCOCK: Without objection.

4 THE COURT: So entered, without objection.

5 [Whereupon, Defendant's Exhibit Number 6 is entered
6 into evidence by the Court]

7 Q. [Mr. Walker] A minute ago you were talking about
8 Life Spaces commitment to put certain features in this
9 building to construct them in the building itself.

10 A. Yes, sir.

11 Q. And that there was a written commitment. Let me
12 direct your attention to the second page of the lease.

13 MR. WALKER: If we could go to that, about the
14 middle of the page, please, right above the highlighted
15 phrase.

16 A. Okay.

17 MR. WALKER: If you would go down to the next
18 paragraph. Go to -- there you go.

19 A. Right.

20 Q. [Mr. Walker] That's it. Now, we're looking at two
21 paragraphs but I would like you to focus on the bottom
22 paragraph of page 2, which is part of section 4 of the
23 lease. Is that the provision that you were talking
24 about?

25 A. Yes, sir.

1 Q. Would you read that for us and explain what that's
2 all about?

3 A. As additional consideration for the rental of the
4 premises, tenant agrees that it will make additional
5 improvements to the building, including but not limited
6 to flooring, home theater, some acoustic isolations and
7 treatment. Such improvements will be made in good
8 workman-like manner and in compliance with all building
9 codes.

10 Q. Were those listed ones there -- you know, the ones
11 that were in that included but not limited to, were those
12 the only improvements, or did Life Spaces do a number of
13 other improvements and incorporate other systems into the
14 building?

15 A. Correct; meaning other systems, yes.

16 Q. You also mentioned that these were to become the
17 property of the owner, which was Gateway Properties ---

18 A. --- correct ---

19 Q. --- and I'd like to direct your attention now to
20 page 4 of the lease. At the bottom you see a section
21 called improvements?

22 A. Yes, sir.

23 Q. The very bottom, it's the last paragraph. Alright.
24 And if you would go to the next page, which is a
25 continuation of paragraph 10 -- if we could have that,

1 which is page 5.

2 MR. WALKER: There you go. And go down, Ty, to the
3 sentence that's seven lines down starting all
4 improvements and additions. If you could go down about
5 six lines there.

6 [Whereupon, the document is shown]

7 Q. [Mr. Walker] Are you familiar with this provision
8 of the lease?

9 A. Yes, sir.

10 Q. And would you read this one so that we can have that
11 one before the jury?

12 A. Right. All improvements and additions made to the
13 tenant and permanently attached to the premises
14 including, without limitations, all partitions, carpet,
15 lighting fixtures, doors, hardware, shelves, cabinets --
16 ceiling, shall remain in the premises and shall be
17 surrendered to the landlord at the expiration or earlier
18 termination -- earlier termination of this lease unless
19 landlord requests their removal. Do you want me to keep
20 going?

21 Q. Alright. Is the upshot of this lease that when the
22 condemnation occurred, that all the things that
23 eLifespaces had put in the building reverted to the
24 landlord?

25 A. That's correct.

1 Q. Thank you. Now, when you moved into the facility,
2 about how many employees did you have?

3 A. Twenty.

4 Q. Alright. And who designed this eLifespaces?

5 A. I did.

6 Q. When you say you designed it, did you actually do
7 the technical work or were you the one who came up with
8 the concept and the different features you wanted?

9 A. The concept was mine. In order to get permitting, I
10 needed an architect. In -- and for building permits, you
11 need engineering, structural, electrical, mechanical.

12 And then beyond that, we were involved -- I was
13 involved, and my -- everybody that I worked with, in the
14 designs of the electronic systems and infrastructure
15 which it needed. Does that answer your question?

16 Q. It does. And now I want to get to one example of
17 it. You mentioned that we saw the lease required a home
18 theater.

19 A. Uh-huh.

20 Q. Was there anything that you did, you, Fred, did, to
21 prepare you to work on the design of that home theater to
22 build it?

23 A. Yes.

24 Q. What did you do?

25 A. The theater, if you will, was designed before the

1 building was even constructed. And the reason being is
2 if I know what the footprint of a room is going to be, we
3 can build around it.

4 We can build whatever it needs to support that
5 structure. So it started with a series of layouts and
6 acousticals [phonetic] and how they're...

7 Q. Did you get any special training in order to do
8 that?

9 A. Yeah. I went to -- y'all may not know -- George
10 Lucas, who has a place, Skywalker Ranch. But at the
11 time, THX was a big standard for theaters, right?

12 And so I went out to California for several weeks to
13 study how to get -- and we got certified on constructing
14 these rooms. So, yes.

15 Q. And was that associated -- where did you do that
16 study, specifically, in California?

17 A. Its north of San Francisco at the Skywalker Ranch.

18 Q. Did you take what you learned there and incorporate
19 that into the design of your new building, E-Life
20 Station?

21 A. Yes.

22 Q. And I'm going to ask you to turn to Defendant's
23 Exhibit 13 and ask if you can identify what Exhibit 13
24 is.

25 [Whereupon, the witness is shown exhibit]

1 A. This is the electrical plans for the building.
2 Q. And I'm going to ask ---
3 A. --- well, it's a number of different plans, but it's
4 electrical and security.
5 Q. Is it ---
6 A. --- and there's some theater drawings in there.
7 Q. Is Exhibit 13 a section of, or a part of, the many
8 drawings that were associated with the construction of
9 this building?
10 A. Yes.
11 MR. WALKER: Your Honor, Landowner moves Defendant's
12 Exhibit 13 into evidence.
13 MR. BABCOCK: Without objection.
14 THE COURT: Alright. Without objection, Exhibit 13
15 is so admitted.
16 [Whereupon, Defendant's Exhibit Number 13 is
17 admitted into evidence by the Court]
18 Q. [Mr. Walker] This particular design shows that some
19 of the walls are colored in red. Would you explain what
20 that is?
21 A. Those are additions after the original construction.
22 Q. And when were those additional walls put in? And
23 we'll get to this part ---
24 A. --- uh-huh ---
25 Q. --- of the exhibit later but when were they put in?

1 A. 2013 -- twenty -- somewhere -- thirteen. The early
2 2010's.

3 Q. Alright. And what I'd like you to do -- and let's
4 go back to the larger picture is -- and we aren't going
5 to spend a whole lot of time of these because they're ---

6 A. --- uh-huh ---

7 Q. --- very technical but when we're looking at this,
8 what would this be for this particular building? What
9 ---

10 A. --- lighting-control systems.

11 Q. Okay. And if you go to the next page, what are you
12 talking about on that?

13 A. Lighting-control systems for the second floor.

14 Q. Okay. And the third page; it says first floor on
15 it.

16 A. Power. The receptacles throughout the building.
17 And ---

18 Q. --- and what are we looking at on the fourth page?

19 A. These are the electrical panels and then the
20 lighting-control system.

21 Q. Were those incorporated into the building?

22 A. Oh, yes.

23 Q. And there are many others, but I would like you to
24 go to one that is probably eight or nine back that's a
25 bunch of lines.

1 A. Uh-huh.

2 Q. And I'll show this to Ty so he can bring it up.

3 [Whereupon, the exhibit is shown]

4 A. There you go. No, went too far. Back.

5 Q. Go back one. There you go. What is this a design

6 of?

7 A. This was the preliminary design for the theater. In

8 other words, when you do a real THX theater, not only do

9 you hear my voice but you're going to hear it reflected

10 off of a wall.

11 And the goal in a theater is to replicate the true

12 sound, not total absorption but a reflection so that

13 there's not so much reflection where -- like in this

14 room, terrible -- echoes. I can hear echoes everywhere.

15 In this kind of room, you would not hear an echo.

16 Q. Let's talk about the walls for a second.

17 A. Yes, sir.

18 Q. And I'd like you to tell us about the building

19 construction on the wall on the left.

20 A. Okay. This would be an exterior wall, so it doesn't

21 address the outside elements associated with that wall.

22 But the inside element starts with another stud or

23 whatever in which we attach a shock absorber, is the best

24 way to explain it, and then we put a ---

25 Q. --- kind of known as what -- what do you call that,

1 a hat channel?

2 A. Well, a hat channel goes through it, correct, but
3 ---

4 THE COURT REPORTER: Are you saying hat channel?

5 THE WITNESS: Hat. Uh-huh. Looks like a top-hat.

6 A. And then you affix the sheetrock to it, the purpose
7 of which is it doesn't vibrate. You know, I always
8 explain, when we do acoustical stuff, that a normal wall
9 is attached to a stud, which is attached to another piece
10 of sheetrock.

11 If you think of the old tin can and a string that's
12 what you've created. Particularly commercially when you
13 do stuff with metal studs, you know, it made it worse.
14 And it's a microphone on one side and a speaker on the
15 other. And the worst thing you can have in one of these
16 kinds of rooms is to hear outside, so you isolate it.
17 Q. And what is -- what is on the outside of that wall
18 on the left? What is out there?

19 A. Well, that's the southern side. On the northern
20 side is the train track.

21 Q. Okay.

22 A. Which we were particularly interested in.

23 Q. Do you have one wall or two walls?

24 A. There are two walls, alright. So this is what's
25 called floating-wall construction. So we've floated

1 these exterior walls, and then we do it again interiorly
2 so that there is no possible way sound can penetrate
3 through both of these walls.

4 Now, keep in mind that the sheetrock, when we start
5 talking about that is remember I told you the difference
6 between a standard piece of sheetrock that weighs 55
7 pounds and a -- one of these things that weighs 180
8 pounds.

9 So we've got tons of load issues, and we have
10 structural steel elements that -- because not only on the
11 sides, we're floating this above. I don't want that
12 stuff falling down on anybody's head.

13 So you have to create reinforced steel above you, to
14 support this kind of weight, so that these kinds of
15 ceilings aren't falling down.

16 Q. Alright. We talked about the shell within a shell.

17 A. Uh-huh.

18 Q. We talked about the sound.

19 MR. WALKER: Could we have the next page, please.

20 And if we could fit that, please, to the screen.

21 [Whereupon, the exhibit is shown]

22 Q. [Mr. Walker] Again, we have some little blue lines
23 and we can see the wall structure ---

24 A. --- uh-huh ---

25 Q. --- and the floating walls. But what is this to

1 depict in that room?

2 A. Field of view. Whenever you go to a movie theater,
3 do you sit in the front, do you sit way in the back, do
4 you sit in the middle, where does every -- and
5 everybody's different.

6 But it's to -- most people enjoy the somewhere in
7 the middle range and it's because I don't want to sit up
8 front and have my head doing this [indicates] the whole
9 time, yet I don't want to be way at the back to where
10 you're totally not moving your fit.

11 So what we try to address is what's known as viewer
12 fatigue. So there's a bunch of calculations that go into
13 all of this in the dimensions and ---

14 Q. --- would you show us where the projector would be
15 on this?

16 A. Yes.

17 Q. If you would circle that.

18 A. Okay. Over here [indicates]. Outside the room.

19 Q. And where are the seats that you're talking about?

20 A. The cash seat is here [indicates]. Secondary seats
21 are here [indicates].

22 Q. And where's the screen?

23 A. It curves right there [indicates].

24 MR. WALKER: Could we have the next slide, please?

25 Fred, if you would clear the markings.

1 [Whereupon, the witness complies]

2 Q. [Mr. Walker] Is this another rendering of what we
3 were talking about in terms of the engineering of this
4 room?

5 A. Yes. This where -- is where you get to see the
6 hanging ceiling and stuff like that. But ---

7 Q. --- alright. Let's talk about that for a second.

8 A. Uh-huh.

9 Q. Is this a normal ceiling in the theater room?

10 A. No.

11 Q. Was it -- was it hanging? Suspended?

12 A. Yeah, suspended.

13 Q. How was it suspended?

14 A. Mason and -- through these -- it looks like a car
15 shock absorber, if you will, I mean, when you actually
16 look at the springs. They're from Mason Industries. And
17 they actually suspend that sheetrock above you.

18 Q. Alright. And then if we could go -- I think that's
19 it for that. I'd like to go to Exhibit 14 now, please.

20 A. Okay.

21 MR. WALKER: And hold off on projecting it.

22 Q. [Mr. Walker] Can you identify Exhibit 14?

23 [Whereupon, the witness is shown exhibit]

24 A. Yeah. These were the acoustic treatments and -- for
25 the interior of the theater.

1 Q. Do they fairly and accurately represent the
2 renderings?

3 A. They do.

4 Q. And what was constructed?

5 A. They do.

6 MR. WALKER: Landowner moves Defendant's 14 into
7 evidence.

8 THE COURT: Any objection?

9 MR. BABCOCK: Without objection.

10 THE COURT: Without objection, so admitted.

11 [Whereupon, Defendant's Exhibit Number 14 is
12 admitted into evidence by the Court]

13 Q. [Mr. Walker] Alright. Let's put these up and we'll
14 go through them fairly briskly.

15 A. Yes, sir.

16 [Whereupon, the exhibit is shown]

17 Q. So what are we looking at right now?

18 A. Front and rear views of the room.

19 Q. So on the upper left, we're looking at the screen
20 area?

21 A. No. That's the rear.

22 Q. Okay. Sorry.

23 A. Alright. And -- okay.

24 Q. And what's the bottom?

25 A. And that's the screen at the front of the window.

1 Q. What are the little boxes below the screen itself on
2 the bottom?
3 A. What you see are the millwork.
4 Q. Alright.
5 A. No. On the front wall, we eliminated the millwork
6 because we had to get lower.
7 Q. Let's go to the next page.
8 A. Yes.
9 Q. Are these renderings of the side walls?
10 A. Yes. Yes.
11 Q. And there are a bunch of little boxes in there.
12 What are those little boxes?
13 A. Okay. These are speakers. These are types of --
14 that's a barrel diffuser. There are absorption and
15 reflection panels, acoustical panels that go into a room
16 to make it respond correctly. Not too vibrantly, like
17 this room, but...
18 Q. And let's go through that. And we'll go to the last
19 page of the theater renderings. And what is that?
20 A. This is where we were talking about the placement of
21 the columns, the lights.
22 Q. Are those standard columns?
23 A. No. They were custom-milled, acoustically. They're
24 -- if you would, up above, looking down, they're barreled
25 like this and then a bunch of barrels so that when sound

1 hits it, it's reflected differently than a flat surface.

2 Q. And now I'd like you to move to Exhibit 15 quickly.

3 Can you identify Exhibit 15?

4 [Whereupon, the witness is shown exhibit]

5 A. Yes. These are the actual acoustic calculations
6 that go into a room before we try to calculate them,
7 before we place treatment.

8 Q. Are these the calculations that were actually used
9 in the construction of your theater room?

10 A. They were. They are.

11 MR. WALKER: The defendant -- Landowner moves
12 Defendant's Exhibit 15 into evidence.

13 THE COURT: Without objection, Your Honor.

14 THE COURT: Alright. Without objection, so
15 admitted.

16 [Whereupon, Defendant's Exhibit Number 15 is
17 admitted into evidence by the Court]

18 Q. [Mr. Walker] Can you look at those?

19 A. Yes. That's like Greek, mostly. Its purpose is to
20 identify the field of view, which is here [indicates].
21 And then harmonic issues are here [indicates]. And these
22 are things that we'll address at the very end when we
23 start to equalize the room.

24 Q. Well, now that we've talked about the theater room

25 ---

1 A. --- uh-huh ---

2 Q. --- I want to turn to the actual construction
3 itself. We were talking about plans.

4 A. Uh-huh.

5 Q. Did you bring any plans with you today?

6 A. Yes, sir.

7 Q. Are these some of the plans that went into the
8 building?

9 A. Yes, sir.

10 MR. WALKER: We're not going to put those into
11 evidence, Your Honor.

12 THE COURT: Okay.

13 MR. WALKER: Nor are we going to go over them.

14 Q. [Mr. Walker] Let's go to Defendant's Exhibit 16,
15 please. Do you recognize that?

16 [Whereupon, the photograph is shown]

17 A. The foundation.

18 Q. Is that a -- well, first of all, let me ask you
19 about your site before we get to the foundation. Did you
20 inspect the site before you started construction?

21 A. Oh. Yeah.

22 Q. And what did you visually observe?

23 A. Well, we -- just like any other piece of land we
24 thought, great. We started to -- after we had had the
25 soil tested and did all the pilings and things like this.

1 It was one of those days where we had one of those
2 monsoon rains and, oh, my gosh it turned into a lake back
3 there. So we were on a construction trailer up the
4 street so I walked down the sidewalk there and walked
5 down the tracks and realized, to the railroad's benefit,
6 that the tracks weren't in -- under water. So I said,
7 well, hello.

8 So I went to the contractor and I said, okay, it's
9 probably another eighteen inches up, go up, alright, and
10 at least get it out of the flood plane for that. So the
11 ponds had already -- so what they did was increase the
12 slab.

13 Q. Is -- and I think you called ---

14 A. --- and that's a representation of it ---

15 Q. --- called this a -- Number 16, is that -- does that
16 show the wooden ---

17 [Whereupon, the witness is shown photograph]

18 A. That ---

19 Q. --- forms for the ---

20 A. Yes.

21 Q. --- for the slab?

22 A. Yes.

23 MR. WALKER: Landowner moves Defendant's Exhibit 16
24 in.

25 MR. BABCOCK: Without objection.

1 THE COURT: Without objection, so admitted.

2 [Whereupon, Defendant's Exhibit Number 16 is
3 admitted into evidence by the Court]

4 MR. WALKER: Alright. Can we see that for a second?

5 [Whereupon, the photograph is shown]

6 Q. [Mr. Walker] Is that the elevated slab? Does 16
7 show the...

8 A. Yes.

9 Q. The form that was used for the concrete work for the
10 slab?

11 A. Yes, sir.

12 Q. Alright. Let's go to 17, please, sir. Do you
13 recognize 17 in your book?

14 [Whereupon, the witness is shown photograph]

15 A. I do. This was before that slab was poured. The
16 rebar and grounding elements associated with ---

17 Q. --- before you get into that, does it fairly and
18 accurately ---

19 A. --- yes ---

20 Q. --- show the condition before the concrete slab was
21 fully poured?

22 A. Yes, sir.

23 MR. WALKER: Landowner moves Defendant's 17 into
24 evidence.

25 MR. BABCOCK: Without objection.

1 THE COURT: Alright. So entered, without objection.
2 [Whereupon, Defendant's Exhibit Number 17 is
3 admitted into evidence by the Court]
4 [Whereupon, the photograph is shown]
5 Q. [Mr. Walker] And what are we looking at?
6 A. The -- you know, before they pour they put this
7 plastic down, and all this kind of stuff, and they form
8 it a certain way.
9 And so the rebar that you see was later put into
10 place, and elements of it welded together create a
11 grounding mesh within the concrete slab that then was
12 bonded to the rebar and the pilings that went down and
13 then -- we'll talk about it later -- then bonded to the
14 steel that was a part of the building.
15 Q. And on that, take a look at 18, please.
16 [Whereupon, the witness is shown photograph]
17 A. Uh-huh. There you go. This is the slab ---
18 Q. --- does 18 fairly and accurately ---
19 A. --- oh ---
20 Q. --- represent the slab after it was poured?
21 A. It does.
22 MR. WALKER: Landowner moves Defendant's 18 into
23 evidence.
24 THE COURT: Any objection?
25 MR. BABCOCK: Without objection.

1 THE COURT: Without objection, so entered.
2 [Whereupon, Defendant's Exhibit Number 18 is
3 admitted into evidence by the Court]
4 Q. [Mr. Walker] Continue the ---
5 A. --- okay ---
6 Q. --- grounding story.
7 A. So all this is grounded as a mesh. And then right
8 there [indicates], you see this wire -- sorry. I'll
9 clear that off -- that's looping around. That's what's
10 going to get bonded to the steel that's going to go up
11 around the building.
12 Q. Why are you so concerned about grounding?
13 A. When lightning strikes, it finds every path to
14 ground. I want it to find the superhighway to ground and
15 avoid our equipment.
16 Q. Would you please take a look at Defendant's 19,
17 which is another photo?
18 [Whereupon, the witness is shown photograph]
19 A. Yep. That would be ---
20 Q. --- does that fairly and accurately represent the
21 job site as the steel was going up?
22 A. Yes, sir.
23 MR. WALKER: Landowner moves Defendant's 19 into
24 evidence.
25 THE COURT: Any objection?

1 MR. BABCOCK: Without objection.

2 THE COURT: Without objection, so entered.

3 [Whereupon, Defendant's Exhibit Number 19 is
4 admitted into evidence by the Court]

5 [Whereupon, the photograph is shown]

6 A. This is Mr. Morey and I observing the steel as it
7 was going up. And this is -- this is not stick-built.
8 This is steel-and-concrete built, two different types of
9 construction.

10 Q. [Mr. Walker] Was the steel typical steel? Was
11 there anything unusual about the steel?

12 A. Oh, yeah. Remember I was talking about the tonnage
13 associated with all that sheetrock. So various sections
14 of the building had to be treated with different type
15 steel.

16 Q. And let's take a look at that, if you would. We've
17 got a picture, I think, that may show that.

18 A. Oh.

19 Q. Would you go to Defendant's 20?

20 A. Yes, sir.

21 [Whereupon, the witness is shown photograph]

22 Q. Does that also fairly and accurately represent the
23 steel superstructure as it was coming together?

24 A. Yes, sir.

25 MR. WALKER: Landowner moves Defendant's 20 into

1 evidence.

2 THE COURT: Any ---

3 MR. BABCOCK: --- without objection.

4 THE COURT: Without objection, so entered.

5 [Whereupon, Defendant's Exhibit Number 20 is entered
6 into evidence by the Court]

7 A. Okay. There -- I'm going to draw, and you'll have
8 to really look. There -- this type steel in there,
9 that's the mesh [indicates], and this type steel, are two
10 different types, right? The one to the left side is more
11 closely placed together to support the weight.

12 Remember all the weight of those acoustical rooms
13 are on the west side of the building, so -- and then,
14 again, there are still other elements on the left. So
15 not as much weight, but still the structure required on
16 the right side of the building. So, yes.

17 Q. [Mr. Walker] All right. We've done the
18 superstructure. Now I want to start to go through some
19 photographs of the construction itself, just to show some
20 of the things you're talking about as they came together.

21 A. Yes, sir.

22 [Whereupon, the witness is shown photograph]

23 Q. Can you identify Defendant's 21?

24 A. Yes, sir. This is the theater flooring.

25 Q. Is that the floor of the theater?

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1 A. Yes, sir.

2 Q. Does it fairly and accurately represent it as it was
3 being constructed?

4 A. Yes, sir.

5 MR. WALKER: Landowner moves Defendant's 21 in.

6 THE COURT: Any objection?

7 MR. BABCOCK: Without objection.

8 THE COURT: Without objection, so entered.

9 [Whereupon, Defendant's Exhibit Number 21 is
10 admitted into evidence by the Court]

11 Q. [Mr. Walker] Is that floor floating, as well?

12 A. Yes. If those ---

13 Q. --- we remember when you told us about steel and
14 concrete, but this is wood. How is that connected to the
15 slab underneath?

16 A. Well, there's a slab. Then we have, just like a car
17 shock absorber, below the -- I think the subfloor -- like
18 things of -- layers of sheetrock. Then another layer
19 atop is another shock absorber. Underneath these framing
20 members [indicates].

21 Q. Underneath those floor joists?

22 A. Correct.

23 Q. Okay. I'm going to ask you to look at 22 which
24 seems to be a picture of another floor and can you
25 identify that?

1 [Whereupon, the witness is shown photograph]

2 A. Yes. This is the acoustical room. Unrelated. Not
3 the theater.

4 Q. Does it fairly and accurately represent the
5 acoustical room floor as it was being constructed?

6 A. Yes, sir.

7 MR. WALKER: Landowner moves 22 into evidence.

8 MR. BABCOCK: Without objection.

9 THE COURT: Without objection, 22 is so entered.

10 [Whereupon, Defendant's Exhibit Number 22 is
11 admitted into evidence by the Court]

12 Q. [Mr. Walker] We haven't spent much time on the
13 acoustical room. Tell us about the acoustical room. Is
14 it on the west side of the building like the theater?

15 A. It is. It's almost adjacent, except separated by
16 the projection room.

17 Q. Are there any windows in the acoustical room?

18 A. None.

19 Q. Any windows in the theater room?

20 A. None.

21 Q. What was the purpose of the acoustical room?

22 A. The -- there are types of construction that
23 homeowners and business owners want to know to keep a
24 room isolated, isolated so to eliminate the tin-can-and-
25 string issue. And there are levels; like the theater was

1 on steroids where it was floating, and all this kind of
2 stuff. However, we -- everybody's not going to do that.
3 That's only for really the commercial side of life. But,
4 okay. Let's say I don't have the gazillion dollars it
5 takes to do one of those kinds of rooms, I want to do
6 something more practically.

7 And that's where these rooms started to take place,
8 where we would kind of inform people about staggered stud
9 construction in lesser ways so that the -- this flooring,
10 so all -- you don't have to hear the footsteps above you
11 or those type noise-bothering issues that we encounter a
12 lot. So this was the next level down in acoustical
13 treatments.

14 Q. And 23 as we go through here?

15 [Whereupon, the witness is shown photograph]

16 Q. Can you identify that?

17 A. Yes, sir. This is the interior of the theater
18 framing before the sheetrock was applied.

19 Q. Does it fairly and accurately depict the
20 construction of that wall?

21 A. It does.

22 MR. WALKER: Landowner moves 23 into evidence.

23 THE COURT: Any objection?

24 MR. BABCOCK: No objection.

25 THE COURT: Without objection, 23 is so entered.

1 [Whereupon, Defendant's Exhibit Number 23 is entered
2 into evidence by the Court]

3 [Whereupon, the photograph is shown]

4 Q. [Mr. Walker] Which wall are we looking at? Is that
5 an interior or exterior wall?

6 A. Interior wall to the -- the doorway is to your left.
7 So this would be west looking east inside the room,
8 inside the theater.

9 Q. Is this also a double-stud construction?

10 A. It is.

11 Q. Can you show us where ---

12 A. --- yeah. Here [indicates] would be the first stud.
13 There [indicates] is the outer stud. Oops. Well, that
14 didn't work, did it?

15 Q. And if you could go back to the larger picture,
16 please.

17 Q. What are the horizontal pieces that we see?

18 A. Alright. How do -- like I was explaining earlier,
19 how do you not create the tin-can-on-a-string? And you
20 have to use hat channel, which is -- if you could zoom in
21 to one cross-section, I'll show you. Alright.

22 [Whereupon, Mr. Walker adjusts the photograph]

23 A. Alright. And I brought one if y'all want to get an
24 up-close and personal. But right there [indicates] is
25 where we take an acoustical bracket, if you will, and

1 then slide through -- this [indicates] gets mounted to
2 the stud. And if you look at it, this is rubber, so when
3 I slide this through and then mount the sheetrock to it,
4 technically I've created a barrier between the sheetrock
5 and the stud.

6 So this rubber material, this acoustical absorption
7 material, will -- that vibration that occurs from sound
8 hitting the sheetrock gets absorbed into that material.

9 Q. [Mr. Walker] We have a photograph of that, and it's
10 Defendant's Exhibit 24. Would you take a look at that,
11 please.

12 [Whereupon, the witness is shown photograph]

13 Q. Can you identify that as...

14 A. Yes ---

15 Q. --- an example of the construction that you're
16 talking about?

17 A. That is a true representation of that picture.

18 MR. WALKER: Landowner moves 24 into evidence.

19 MR. BABCOCK: Without objection.

20 THE COURT: Alright. 24 is so entered, without
21 objection.

22 [Whereupon, Defendant's Exhibit Number 24 is
23 admitted into evidence by the Court]

24 Q. [Mr. Walker] Which way do you want this turned?

25 Ninety ---

1 A. --- ninety degrees ---

2 Q. --- degrees?

3 [Whereupon, the photograph is shown]

4 A. There you go. Alright. So we see it attached to
5 the stud and the QuietRock. Attach it. And you don't
6 easily attach QuietRock to that. Remember, this has
7 steel in the middle of this sheetrock, so it requires
8 even special types of screws to get through it to attach
9 it to the hat channel.

10 Q. And how many layers of this QuietRock did you have
11 in your theater room? Did you just put up one layer of
12 the QuietRock?

13 A. No. There's two layers.

14 Q. The next picture also deals with the theater room,
15 and that's 25.

16 [Whereupon, the witness is shown photograph]

17 A. Okay.

18 Q. And are you familiar with the image here in 25?

19 A. This is the construction of some of the interior
20 acoustical treatments of the room during construction.

21 MR. WALKER: Landowner moves Defendant's 25 into
22 evidence.

23 THE COURT: Any objection?

24 MR. BABCOCK: Without objection.

25 THE COURT: So entered, without objection.

1 [Whereupon, Defendant's Exhibit Number 25 is entered
2 into evidence by the Court]

3 [Whereupon, the photograph is shown]

4 Q. [Mr. Walker] They're just standing in front of a
5 bunch of -- a bunch of blocks.

6 A. Blocks. Yeah.

7 Q. And why do you have a bunch of blocks there?

8 A. Well, they are -- in long-term, they will be turned
9 into -- well, cut on that certain angle and then create a
10 -- almost like a skyline-looking image that will run
11 across the back wall.

12 And its intent is when you're in a -- you know,
13 everybody talks about surround sound and, oh, I've got to
14 hear the sound behind me. No. The real way to do it is
15 you want to hear reflections of sound behind you, not
16 direct sounds.

17 So as -- in order to do that, remember you've got a
18 speaker and it's -- your ear is trying to hear directly
19 where that speaker is. So our goal is to break the sound
20 up of that speaker, so that you can't locate it. In
21 order to do that, I've got to break the sound up. And
22 that's, in part, what that does.

23 Q. I think we have an example of that in the next
24 photograph, Defendant's Exhibit 26.

25 [Whereupon, the witness is shown photograph]

1 A. Correct. That is...

2 Q. Is that ---

3 A. --- it's a true representation as constructed.

4 MR. WALKER: Landowner moves 26 into evidence.

5 MR. BABCOCK: Without objection.

6 THE COURT: So entered, 26.

7 [Whereupon, Defendant's Exhibit Number 26 is

8 admitted into evidence by the Court]

9 [Whereupon, the photograph is shown]

10 A. Notice the angles of the ends of the wood. They're

11 different heights. They're intended to grab sound, suck

12 it out, and spit it out differently; just in a different

13 direction.

14 Q. [Mr. Walker] Is that -- are those wood blocks

15 covered, or is that the finished back wall?

16 A. Covered.

17 Q. Alright. Does -- can one see those wooden blocks?

18 A. They're visible, yes.

19 Q. Exposed?

20 A. Uh-huh. We thought they were a great architectural

21 element to the room so, yeah, we left them exposed.

22 Q. If you would turn to the next photograph,

23 Defendant's 27.

24 [Whereupon, the witness is shown photograph]

25 A. Yes, sir. That is a true representation of our

1 custom millwork of the columns.

2 MR. WALKER: Landowner moves 27 into evidence.

3 MR. BABCOCK: Without objection.

4 THE COURT: So entered, without objection.

5 [Whereupon, Defendant's Exhibit Number 27 is
6 admitted into evidence by the Court]

7 Q. [Mr. Walker] What are we looking at? Is the column
8 solid or is it hollow?

9 A. It's hollow.

10 Q. Okay.

11 A. Alright. But it's designed in such a way as to
12 create a curve similar to barrel diffusers. But in
13 addition to that, each of the grooves are milled in to
14 create even further dispersion, barrel dispersion, of
15 sound.

16 Q. Were all the columns in the theater room hand
17 manufactured like this?

18 A. Yes.

19 Q. Please take a look at Defendant's Exhibit 28.

20 [Whereupon, the witness is shown photograph]

21 A. Okay. This is a representation of our installing
22 the absorption material in the ceiling.

23 Q. In the floating ceiling?

24 A. Yes.

25 Q. Does it fairly and accurately show it?

1 A. It does.

2 MR. WALKER: Alright. Landowner moves 28 into
3 evidence.

4 MR. BABCOCK: Without objection.

5 THE COURT: 28 is so entered, without objection.

6 [Whereupon, Defendant's Exhibit Number 28 is entered
7 into evidence by the Court]

8 Q. [Mr. Walker] Alright. What is this gentleman
9 doing?

10 A. He is attaching the absorption material onto the
11 ceiling.

12 Q. And after all this work, was it complete?

13 A. Oh. No. No.

14 Q. Alright. Well, I want to get to the complete. We
15 spent so much time going through the ---

16 A. --- boring stuff ---

17 Q. --- mechanics of it. Would turn to 30.

18 [Whereupon, the witness is shown photograph]

19 A. Got it. This is a representation of the final
20 constructed product prior to our dialing it in.

21 MR. WALKER: Landowner moves Defendant's 30 into
22 evidence.

23 MR. BABCOCK: Without objection.

24 THE COURT: So entered, without objection.

25 [Whereupon, Defendant's Exhibit Number 30 is entered

1 into evidence by the Court]

2 Q. [Mr. Walker] Voila.

3 A. Okay.

4 Q. Alright. Does that show the theater room?

5 A. It does.

6 Q. As fully constructed?

7 A. It does.

8 Q. There seems to be something that look like curtains

9 over there on the far wall. Are those drapes?

10 A. No. That's acoustical material that covers either

11 absorption material or speakers.

12 Q. Would you please turn to 31?

13 [Whereupon, the witness is shown photograph]

14 A. Okay.

15 Q. Can you identify that?

16 A. Yeah. That represents the entrance to the theater.

17 Q. Does it fairly and accurately show it?

18 A. It does.

19 MR. WALKER: Landowner moves 31 into evidence.

20 MR. BABCOCK: Without objection.

21 THE COURT: 31 is entered, without objection.

22 [Whereupon, Defendant's Exhibit Number 31 is

23 admitted into evidence by the Court]

24 [Whereupon, the photograph is shown]

25 Q. [Mr. Walker] There seems to be a break in the floor

1 a step up. Why is that?

2 A. Well, remember that floor is floating on another
3 floating level, so you've got to climb up to get into it.
4 And if you look at the doorway, there appears to be a
5 threshold, but that threshold really is a -- it's the
6 meeting of two rooms. Remember I can't have them
7 connect, so there's kind of a rubber ---

8 Q. --- is there a cap ---

9 A. --- it's a rubber gasket that goes around that
10 doorway that separates the outer layer from the inner
11 layer. Alright? Right there [indicates]. And its two
12 doors. Obviously, a door is a vibrator, so let's clear
13 that. And it's a special material to address acoustics.

14 THE WITNESS: Back out for a moment.

15 [Whereupon, the photograph is adjusted]

16 A. The equipment to the right is so that none of that
17 hum and stuff of the equipment gets into the room. We
18 don't want those kinds of distractions in the room. And
19 if -- I'm sorry.

20 Going back, zooming back in, you'll see the three --
21 the dispersion next to that light, right here [indicates]
22 that material with the three-dimensional acoustical
23 dispersion.

24 Q. [Mr. Walker] After all this work going in this
25 room, did you test it with trains going by right outside?

1 A. We did. Yes, sir.
2 Q. Could you hear the trains?
3 A. No, sir.
4 Q. Let's go to 32.
5 [Whereupon, the witness is shown photograph]
6 A. Okay.
7 Q. Is that another photograph of the construction?
8 A. It is a photograph of the construction.
9 Q. Does it ---
10 A. --- truly represent it ---
11 Q. --- accurately depict it?
12 A. Yes.
13 MR. WALKER: Landowner moves Defendant's 32 in.
14 MR. BABCOCK: Without objection.
15 THE COURT: Alright. So entered, without objection.
16 [Whereupon, Defendant's Exhibit Number 32 is
17 admitted into evidence by the Court]
18 Q. [Mr. Walker] What is this?
19 A. We had a custom stairway fabricated.
20 Q. Spiral staircase?
21 A. Uh-huh.
22 Q. And where in the building is this?
23 A. This is in the rear south end, to get from the first
24 floor to the second floor.
25 Q. Was it ever your intent to have any other tenants in

1 the building, other than Life Spaces?

2 A. No. Not when I built it, no.

3 Q. Now please turn to 33.

4 [Whereupon, the witness is shown photograph]

5 MR. WALKER: Or did I move 33 in? I think I did.

6 32?

7 THE COURT: 32, yes.

8 Q. [Mr. Walker] 32 is in. 33. Can you identify that
9 as something we're looking at from the outside?

10 A. Yeah. This is that storm shutter we were talking
11 about in the boardroom.

12 Q. Does it accurately ---

13 A. --- truly represent ---

14 Q. --- show that being constructed; the room in the
15 back.

16 A. Yes, sir.

17 MR. WALKER: Landowner moves 33 in.

18 MR. BABCOCK: Without objection.

19 THE COURT: 33 is so admitted, without objection.

20 [Whereupon, Defendant's Exhibit Number 33 is
21 admitted into evidence by the Court]

22 Q. [Mr. Walker] What -- why would -- what's so special
23 about this?

24 [Whereupon, the photograph is shown]

25 A. At the time glass hadn't -- glass manufacturing, so

1 that it could handle hurricane-force objects being thrown
2 at it, wasn't perfected so we would partner up with Storm
3 Shutter for the -- to the control of it so that as winds
4 approached a certain speed, it would automatically shut
5 down. It would lock up the house -- or facility.

6 Q. Would -- is the storm shutter, when it's not in use,
7 visible on the outside the building?

8 A. Not visible.

9 Q. Would you show us how that's done?

10 A. We...

11 Q. Was there a -- go ahead.

12 A. Up here [indicates] is the box, the cavity that this
13 thing rolls up into. But instead of on the outside,
14 where it's so unattractive, we put it on the inside.

15 And there's a gap in construction between masonry
16 and the interior walls and so we capitalized on that
17 space to do the pocket, the shutter movement going down,
18 like a lift going down.

19 Q. And what are the electronics in that? Could the
20 owner do it remotely?

21 A. Oh, yes. This is -- remember, this is ten years ago
22 before the big craze with remote access and stuff like
23 this. We were pioneering these efforts back then.

24 Q. Which raises an important point.

25 A. Uh-huh.

1 Q. When you designed this building, what technology
2 were you designing for? Were you doing it for the then-
3 existing technology?

4 A. Oh, no. We had to think way out. And you hear a
5 lot of stuff about future proofing. And we had to get
6 even beyond that concept and how it was built so that we
7 could keep adapting to these changes.

8 Like there's -- throughout the building, there was
9 open railway on cable trays so that if I needed something
10 different I could easily go lay it in a cable tray and
11 route it to a specific area of the building.

12 Q. Tell me about circuitry. Take a look at 34.

13 [Whereupon, the witness is shown photograph]

14 A. Yes, sir.

15 Q. Can you ---

16 A. --- so this ---

17 Q. --- tell me about that ---

18 A. --- truly represents the power conditioning and
19 lighting-control system in the building.

20 MR. WALKER: Landowner moves 34 in.

21 MR. BABCOCK: Without objection.

22 THE COURT: 34 is so entered, without objection.

23 [Whereupon, Defendant's Exhibit Number 34 is
24 admitted into evidence by the Court]

25 Q. [Mr. Walker] You said power conditioning. What are

1 you talking about?

2 A. Everybody's heard of surge protectors and these
3 little devices you have. The object to the left, this
4 thing [indicates], is designed for commercial facilities,
5 just like a sub paneling.

6 It creates a perfect -- perfectly balanced power
7 sixty cycle; because power is thirty. And like when
8 you're vacuuming and you look at your TV and it's got
9 snow everywhere, or any of those kinds of issues, it
10 prevents that. It's designed to make power --

11 THE COURT REPORTER: Make power?

12 THE WITNESS: Power, like electrical power.

13 THE COURT REPORTER: I just didn't hear the last
14 word you said.

15 THE WITNESS: Yes, ma'am.

16 Q. [Mr. Walker] Is that built into the building?

17 A. It is.

18 Q. Is it still -- is it still in the building?

19 A. It's still in the building.

20 Q. How about those little packets over there on the
21 other side, on the right side of that photograph? What
22 are those?

23 A. This is -- there's a lot of stuff today about
24 lighting control. This is in the beginning. Alright?

25 And the -- lighting control takes on all kinds of

1 different thoughts as you start to think about it,
2 including we used the security system. If a motion
3 sensor doesn't detect anybody in the room, it cuts the
4 lights off.

5 Even to the extent that we had the active usage of
6 power in the building, we could send commands to lights
7 to change colors. So if it was blue, good. If it was
8 red, bad.

9 Q. Were you doing all this for your benefit?

10 A. No, sir.

11 Q. Why were you doing all this?

12 A. Well, because in order for me to sell it -- you
13 know, these things are so far out there that people don't
14 really get it until they actually see it.

15 And so one of the big key to our success throughout
16 the years has been that I can bring somebody in and show
17 them what we're talking about instead of having to
18 conceptualize it. It's such a difference when, oh, my
19 God, I see it.

20 Q. Could you do this in your rental space over in the
21 Mount Pleasant shopping center?

22 A. No.

23 MR. BABCOCK: --- objection, Your Honor. May we
24 approach?

25 THE COURT: Alright.

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Fred Fabian-Direct Examination by Mr. Walker
March 26, 2019

1 [Whereupon, an off-the-record bench conference is
2 held]

3 THE COURT: Alright. Ladies and gentlemen of the
4 jury, we're going to take about a fifteen-minute break.
5 Please, ma'am, please, sir, do not discuss the case with
6 each other during that period of time. You can take your
7 notepads with you. You can bring them back when you come
8 back. We'll be down for about fifteen minutes. Alright.

9 [Whereupon, the jury exits the courtroom at 11:33
10 a.m.]

11 [Whereupon, a recess is taken from 11:34 a.m. to
12 11:58 a.m.]

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S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
Proceedings
March 26, 2019

1 THE COURT: Can I see the lawyers for a second.

2 [Whereupon, an off-the-record bench conference is
3 held]

4 THE COURT: Let's go on the record, Madam Court
5 Reporter. I've received a note from the -- a juror.
6 And I'm assuming this was facilitated by the Foreman and
7 given to the Bailiff. And I'll have you mark it in just
8 a minute.

9 But the note says, and both lawyers have seen it,
10 the note that this particular juror says: if at all
11 possible, can I please leave early to be with my sister
12 for her twelve-week doctor's appointment to hear the
13 heartbeat of her baby. I would need to leave around 2:00
14 p.m. Thank you.

15 It's been a bit since I knew about heartbeats and
16 babies, but I guess they can do that. What I intend to
17 do, after consultation with both sides, I am going to
18 probably, in all likelihood, replace Juror Number 57 with
19 the alternate. We've just got one alternate.

20 So Bailiff, if you could go in there and get Juror
21 Number 57 for me?

22 THE BAILIFF: Yes, sir.

23 THE COURT: While he's doing that, could you please
24 mark that as a Court's Exhibit.

25 [Whereupon, Court's Exhibit Number 1 is marked for

1 identification by the court reporter]

2 [Whereupon, Juror Number 57 enters the courtroom]

3 THE COURT: Alright. Ma'am, you are Juror Number
4 57. What's your name?

5 JUROR NUMBER 57: Caroline Clark

6 THE COURT: Ms. Clark, I've got your note and what
7 we're going to do is we're going to -- I appreciate your
8 service, appreciate your willingness to serve, but we're
9 going to let you go. We're going to replace you with the
10 alternate. Okay?

11 JUROR NUMBER 57: Okay.

12 THE COURT: Alright. And good luck.

13 JUROR NUMBER 57: Thank you.

14 THE COURT: Alright. Turn in your badge to the
15 Bailiff, okay.

16 JUROR NUMBER 57: Okay. Thank you.

17 [Whereupon, Juror Number 57 is excused and exits the
18 courtroom]

19 THE COURT: When you see a Bailiff, tell them to
20 come back in a second.

21 [Off the record momentarily]

22 THE COURT: Alright. Anything else before I bring
23 the jury out -- bring the jury back?

24 MR. BABCOCK: Nothing from the Condemnor.

25 MR. WALKER: Nothing from the Landowner, Your Honor.

S.C. Department of Commerce v Gateway Properties of Greater Charleston, LLC
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1 THE COURT: Alright. Let's bring the jury back.
2 [Whereupon, the jury enters the courtroom at 12:08
3 p.m.]

4 MR. WALKER: Thank you, Your Honor.

5 THE COURT: Alright.
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1 CONTINUED DIRECT EXAMINATION

2 BY MR. WALKER:

3 Q. Mr. Fabian, we're just about done with pictures of

4 the facility. I have a couple more I want you to go

5 over.

6 Q. If you would turn to the photograph that's 36.

7 [Whereupon, the witness is shown photograph]

8 A. Yes, sir.

9 Q. Can you identify that?

10 A. That represents the electronic-bench area of our

11 facility.

12 Q. Does it accurately reflect it as constructed?

13 A. Yes, sir.

14 MR. WALKER: Landowner moves 36 into evidence.

15 MR. BABCOCK: Without objection.

16 THE COURT: 36 is entered, without objection.

17 [Whereupon, Defendant's Exhibit Number 36 is

18 admitted into evidence by the Court]

19 [Whereupon, the photograph is shown]

20 Q. [Mr. Walker] Are there any outside windows in this

21 room?

22 A. No sir, no outside windows.

23 Q. And what are we looking at here?

24 A. This is -- this is our electronic-bench area. We --

25 wow. There's tons of things we're looking at. First is

1 on the left side, you're looking at an invisible speaker.
2 And when I say invisible speaker, we had to construct
3 this backside view of it because people didn't believe
4 that it was a speaker. It looks like a sheetrock wall.
5 It's nothing like ---

6 Q. --- are you talking about on the opposite side of
7 that speaker?

8 A. Correct. There's no grills, there's ---

9 Q. --- could you circle that?

10 A. Pardon?

11 Q. Could you circle that on the screen?

12 A. Oh, I'm sorry. It would be this [indicates].

13 Q. So that was to demonstrate that there was actually a
14 speaker in the wall?

15 A. Yes, sir. That -- some of the roots -- as long as
16 it can be hidden esthetically, it typically is a game-
17 winner in a household. So, yes.

18 And it just looked like -- the only problem we've
19 ever had is people forget they're there and they nail a
20 picture up on -- on the outside of it. So...

21 Q. How about the next window down?

22 A. This was a -- in essence, you could -- right here
23 [indicates] you could see into the other parts of the
24 showroom. But we, in later days, installed what's known
25 as blue ocean screens that attach there and are outdoor

1 theater screens that -- if you can get an idea of...

2 Q. How about at the very end where we see the curling
3 wire that's wired back there?

4 A. This [indicates] is the theater equipment, what ran
5 the theater. Uh-huh. The ---

6 Q. --- what do we have over on the right?

7 A. This is area -- this area [indicates] you remember
8 that perfectly balanced electrical stuff fed all of this
9 and other areas of the building. But it allowed us to
10 test gear.

11 So part of our role, before it ever goes out into
12 any commercial or residential, is to try to break it.
13 The worse thing I can have is for it to malfunction in
14 somebody's house or somebody's office and then I get a
15 phone call, oh, my God, the thing's not working like
16 yesterday. So we try to break it over and over again so
17 that -- and we bring it into a controlled environment to
18 do that. So that's what you're seeing.

19 Q. Now if you would please turn to photograph 38.

20 [Whereupon, the witness is shown photograph]

21 A. Yeah.

22 Q. Do you recognize that?

23 A. That would be our acoustical room.

24 Q. Is that a fair and accurate representation?

25 A. That is a fair and accurate representation.

1 MR. WALKER: Landowner moves 38 into evidence.

2 MR. BABCOCK: Without objection.

3 THE COURT: 38 is so entered, without objection.

4 [Whereupon, Defendant's Exhibit Number 38 is
5 admitted into evidence by the Court]

6 Q. [Mr. Walker] We saw this earlier. We had the floor
7 just before it was finished.

8 A. Uh-huh.

9 Q. Is this the finished room?

10 A. Yes, sir.

11 Q. And what goes on in the acoustical room?

12 A. Remember it's the lesser version than the theater.
13 And we bring speakers in here to test their quality,
14 right, test performance.

15 We also -- it's -- it is black because we use the
16 room for video calibration, ISF calibration, and before
17 we take it on site we want to take it in a controlled
18 room, calibrate it, and then roll it out.

19 Meaning like when you go buy a TV at the -- any
20 wonderful electronics store, their settings are set to
21 fluorescent. When you get home, it's not the best it can
22 be unless we get -- you go in there and fix it. Right?
23 So what we try to do is take care of that in advance
24 before it ever rolls out.

25 Q. Is that just one example of what that room is used

1 for? You use the same for sound?

2 A. Yes.

3 Q. One last picture of the completed facility, and
4 that's Defendant's Exhibit 39.

5 [Whereupon, the witness is shown photograph]

6 A. Yes, sir.

7 Q. Do you recognize that?

8 A. Yes, sir.

9 Q. What is that?

10 A. This is the Apple area, as it was constructed.

11 Q. Is it a fair and accurate representation?

12 A. Yes, sir.

13 MR. WALKER: Landowner moves 39 into evidence.

14 MR. BABCOCK: Without objection.

15 THE COURT: 39 so entered, without objection.

16 [Whereupon, Defendant's Exhibit Number 39 is
17 admitted into evidence by the Court]

18 Q. [Mr. Walker] What is going on here? You said the
19 Apple area. Did you sell Apple products?

20 A. We did. But before there was an Apple store,
21 Quicksell, one of our programmers had an issue with some
22 Apple products and he wrote an email to Steve Jobs and he
23 responded.

24 And before I knew it, they -- he sent the national
25 sales manager down and they set us up as a retailer and

1 we got involved in the Beta testing of the Apple TV.

2 Q. Is this room still in existence at the facility?

3 A. No. Probably a year after this, Apple became very
4 interested in the Charleston market and opened up a
5 retail shop and our role in that regard was abandoned.

6 They could support their own product much better
7 than we could, and we still remained involved in the
8 development of some products.

9 Q. I want to ask you a few questions now about this
10 building in comparison to what your competitors have. Do
11 you keep up with technology contractors that you could
12 compete against in your space, so to speak?

13 MR. BABCOCK: Objection, Your Honor. We're getting
14 into the business side of things and that goes to the
15 same objection we raised earlier about anything having to
16 do with business not being part of the condemnation.

17 MR. WALKER: Well, we're not offering this because
18 of the business itself, but to talk about this facility
19 being a special use facility. And this is an
20 introductory question. And I have to agree that we can't
21 -- this is not about a business loss.

22 THE COURT: Alright. I will sustain his objection,
23 but you can rephrase your question and see if you can go
24 outside that realm.

25 Q. [Mr. Walker] Do you look at the physical facilities

1 of other businesses who are doing the same thing that
2 you're doing?

3 A. Yes.

4 Q. Are there any people, any competitors, in the
5 Charleston area who have a facility that has features
6 that are similar to the features that you incorporated
7 into this building?

8 I mean the electronics, the technology, the method
9 of construction; all of the things that we've spent the
10 last hour going over?

11 MR. BABCOCK: Objection, Your Honor. The same
12 issue. We're back to the business but going at it a
13 different way.

14 MR. WALKER: We're talking about the construction of
15 a building.

16 THE COURT: I will sustain his objection. I gave
17 you, counsel, an opportunity to rephrase your question
18 but I think you're going just the same street, different
19 path.

20 MR. WALKER: Your Honor, if I could be heard for a
21 second on that?

22 THE COURT: Take the jury out?

23 MR. WALKER: No. I don't want to impose on the
24 jury. May I try the question again?

25 THE COURT: Yeah. Yeah. I'll give you another

1 opportunity to try the question again.

2 Q. [Mr. Walker] Do you know of any comparable
3 property, physical property, in the Charleston region
4 that has similar physical features to those that are in
5 your building?

6 A. No.

7 Q. Do you know of any in the southeast region?

8 A. No.

9 Q. Did your theater obtain a certification?

10 A. Yeah ---

11 MR. BABCOCK: --- objection, Your Honor. Now we're
12 back to business. The other was real estate. Now we're
13 back to business.

14 MR. WALKER: This has to do with the construction
15 itself, Your Honor, and I...

16 THE COURT: Alright.

17 MR. WALKER: It was constructed to a certain
18 standard. They say it's an office building and we're
19 showing it was not, and we want to have this proven.

20 THE COURT: Alright.

21 MR. BABCOCK: Your Honor, in addition, if somebody
22 is certifying, that's going to be hearsay whatever that
23 certification is. So it's business and it's hearsay.

24 MR. WALKER: I would say the action of a
25 certification is an action, not a statement. It's an

1 action that occurred, not a statement.

2 THE COURT: Alright. Ladies and gentlemen of the
3 jury, let me tell you what we're going to do. Let me
4 tell you what we're going to do. I'm going to talk to
5 the lawyers in just a minute, but let me tell you what
6 I'm going to do with you guys.

7 It is 12:15 and I'm going to let you leave and take
8 an early lunch, about fifteen minutes. I was going to
9 let you go about 12:30 anyway, but I'm going to let you
10 go now. And I need you to report back to your jury
11 assembly room at about no later than two o'clock. Try to
12 be on time.

13 Please, ma'am, please, sir, do not discuss the case
14 with each other. Leave your notepads in the jury
15 assembly room. Don't -- do not take it with you. And
16 even though you had that nice ride to the site this
17 morning, do not get back in your car and go back to that
18 site because you may have the bad luck of seeing me drive
19 by and you don't want that to happen. So alright, have a
20 good lunch and I'll see you back at two o'clock.

21 [Whereupon, the jury exits the courtroom at 12:20
22 p.m.]

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1 THE COURT: Alright.

2 MR. BABCOCK: Yes, Your Honor. Any certification
3 I've ever seen has been in writing. And so writing where
4 somebody is certifying from a business standpoint for
5 what you have in your business, (a), is to business, (b),
6 it's hearsay.

7 MR. WALKER: The certification was as to the
8 theater, the construction of the theater, and that is the
9 building itself, the components of the theater. That's
10 what was certified. It would just be like showing a
11 building was up to code if I said did you get it -- did
12 the inspector approve the final construction.

13 That's not hearsay. That's the act of approval. We
14 aren't saying what the inspector said. If I ask Mr.
15 Fabian did the -- did the room itself obtain a
16 certification and he says it did obtain a certification,
17 that is not hearsay and it deals with the building.

18 We aren't contending that there -- that that -- I
19 didn't even mention the business loss. I'm talking about
20 the building itself. They say that there are comparables
21 out there, and we're entitled -- that's the core of this
22 case, are there comparable buildings, and we're entitled
23 to put up proof of the unique nature of this building,
24 whether it's a special building.

25 THE COURT: I mean, he was allowed to answer that

1 question and he said no. So let me ask you this. Who
2 actually would do the certification? Who actually does
3 that? Who would do that?

4 MR. WALKER: It's a special theater. He mentioned
5 that I think it's called THX. They certify the theater
6 as meeting all these criteria, design criteria. And this
7 is the only one in the southeast that's ever been
8 certified; the construction of it has ever been
9 certified. And that is this building we're ---

10 THE COURT: --- so the certifying entity is this --
11 is this place you're talking about? That's who does it?

12 MR. WALKER: THX, he mentioned this. When he went
13 out to the Skywalker Ranch to learn how to build a
14 theater ---

15 THE COURT: --- yeah ---

16 MR. WALKER: --- that was put on by THX, Fred?

17 THE WITNESS: Lucas Limited.

18 MR. WALKER: Yeah. But what is the certification,
19 Fred?

20 THE WITNESS: THX certification.

21 MR. WALKER: Right.

22 THE COURT: And they're out of where? Where ---

23 THE WITNESS: --- out of California. San Francisco.

24 THE COURT: Well, I'm sure counsel would not object
25 if somebody from California was coming in ---

1 MR. BABCOCK: --- I was going to say, Your Honor, if
2 we had someone from THX here say that this is the only
3 one certified ---

4 THE COURT: --- then you'd be ---

5 MR. BABCOCK: --- in the southeast, then I'd cross
6 him on it. But this -- it's the third person saying it's
7 certified. The only way he would know that he was the
8 only one certified in any geographic area is what he was
9 told by this third person.

10 THE COURT: Yeah. I think he -- he as -- you know,
11 I think counsel has a right to cross-examine whoever did
12 the certifying. I mean, he just -- he's just saying it
13 was certified.

14 MR. WALKER: I could ask him did he receive a
15 certificate of certification, did he receive a
16 certificate of certification. That is a physical fact.
17 It is not -- if he received a certificate of
18 certification, that is not hearsay. It's ---

19 THE COURT: Have you got a copy -- have you got a
20 copy of that certificate?

21 THE WITNESS: Not with me, no.

22 MR. WALKER: We didn't -- we didn't bring it because
23 we didn't -- he can cross-examine him and say why didn't
24 you bring it. But that is not hearsay.

25 MR. BABCOCK: Your Honor, also, it's a written

1 statement from somebody else saying that this is
2 certified.

3 THE COURT: Let me ask you this -- he doesn't get a
4 chance to go in and ask the question what goes in a --
5 what -- what all do you take into account when you
6 certify. He can't ask this guy that.

7 MR. WALKER: He can -- this man can tell you.

8 THE COURT: Well ---

9 MR. WALKER: He knows what the criteria are.

10 THE COURT: But he wasn't ---

11 MR. WALKER: --- he can tell you.

12 THE COURT: But he wasn't the guy that did the
13 certification.

14 MR. WALKER: It's just like a building. If you have
15 a contractor and you're asking him what's in the code, he
16 doesn't do the approval of the building that is
17 consistent with the code but he can tell you what the
18 code says in order to pass the code., And they do it all
19 the time.

20 THE COURT: You've got to -- you've got to think
21 that the guy who's actually the person he's who's
22 actually doing the certification. He's going to say
23 well, in these type buildings, this is what we look for,
24 we look for this, a, b, c, d and e, we take into account
25 this, this and this, and then after we do all that, then

1 we issue certification. And so he doesn't get a chance
2 to cross-examine on those points.

3 MR. WALKER: When ---

4 THE COURT: Am I making sense?

5 MR. WALKER: You are. But let me, just to the
6 analogy of the building. If there's a construction
7 defect case ---

8 THE COURT: --- yeah ---

9 MR. WALKER: --- and the building has been approved
10 by the building inspector, that can be brought out and
11 the owner can say it was approved. Now -- that they are
12 paying their certificate of occupancy. Did you obtain
13 the certificate of occupancy? Yes. That's not hearsay.

14 And the building inspector doesn't have to be
15 present in court to tell everybody what went into his
16 determination of this certificate of occupancy. It's a
17 fact. It's an action that occurred.

18 THE COURT: That's a little different ---

19 MR. WALKER: --- and that's what we're saying here.

20 THE COURT: That's like apples and oranges, though.
21 Certificate of occupancy versus a certification? In this
22 instance, that's like -- of course, you know that, too,
23 though don't you?

24 MR. WALKER: I'm going to have to respectfully...

25 THE COURT: He knew it. He ---

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1 MR. WALKER: I don't -- I don't ---

2 THE COURT: That's difference.

3 MR. WALKER: --- see a difference. You see a
4 difference ---

5 THE COURT: That's a good ---

6 MR. WALKER: --- but I'm not going to ---

7 THE COURT: That's good lawyering. I understand.

8 But that's just -- I just think that, counsel --
9 seriously, I just think that he should have the right to
10 particularly with a case like this where the crux of the
11 case is the stuff, these -- all the exhibits that we've
12 seen. I think he should have the right to cross-examine
13 who actually did the certification.

14 You know, like I said, he wouldn't be standing up if
15 you had somebody from California here outside that door
16 getting ready to come in and do that. But you don't.
17 And you're just asking, you know, this witness -- you
18 know, I think Mr. Fabian is a good man but I don't know
19 if he can answer the questions that's going to be posed
20 to him by opposing counsel. So ---

21 MR. WALKER: --- Your Honor, I respectfully accept
22 your ruling. Just noting my objection.

23 THE COURT: Alright. Your objection is so noted.
24 Now, anything else before we take a break for lunch?

25 MR. BABCOCK: Not from Railways.

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1 THE COURT: Okay. We said -- he said -- we're going
2 to take a break and I'll try to get back. We've got the
3 jury coming back at 2:00. I'll try to get back here by
4 at least five or seven or eight minutes beforehand in
5 case we've got something we've got to deal with. Okay?

6 MR. WALKER: Thank you.

7 MR. BABCOCK: Thank you, Your Honor.

8 THE COURT: Alright. Have a good one.

9 [Whereupon, a recess is taken from 12:30 p.m. to
10 2:07 p.m.]

11 THE COURT: Counsel, I apologize I didn't get back
12 five minutes before 2 like I indicated I would but I'm
13 pretty sure everybody is good. Anything that we need to
14 address before we bring the jury back? Anything at all?

15 MR. BABCOCK: Not from Railways.

16 THE COURT: Alright.

17 MR. WALKER: Nothing from the Landlord.

18 THE COURT: Alright. Mr. Fabian, do you want to ---

19 THE WITNESS: Yes, sir.

20 THE COURT: You're still under oath.

21 THE WITNESS: Yes, sir.

22 [Whereupon, the witness retakes the witness stand]

23 THE COURT: Alright. Bring the jury back.

24 [Whereupon, the jury enters the courtroom at 2:09
25 p.m.]

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1 THE BAILIFF: All jurors present, Your Honor.

2 THE COURT: Alright. Yes, sir.

3 MR. WALKER: Thank you.

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1 CONTINUED DIRECT EXAMINATION

2 BY MR. WALKER:

3 Q. Good afternoon. Mr. Fabian, would it have been
4 feasible to convert a typical office space to incorporate
5 all those features that you showed us before lunch?

6 A. No, sir.

7 Q. When was the official opening of your business at
8 1799 Meeting Street, approximately?

9 A. 2007.

10 Q. Did you do anything to commemorate the opening?

11 A. Yes, sir.

12 Q. What did you do?

13 A. We ---

14 MR. BABCOCK: --- Your Honor, I'm going to object to
15 anything to do with the opening of the business. He's
16 going to get into a series of questions and potential
17 exhibits that we might need to talk about. I don't think
18 it's relevant.

19 THE COURT: I'm going to overrule your objection at
20 this time. Go ahead, counsel. Let me see -- let me see
21 where it's going.

22 Q. [Mr. Walker] Did you celebrate the building itself,
23 the completion of this building?

24 A. We did.

25 Q. Did you have a ribbon-cutting?

1 A. We did.

2 MR. BABCOCK: Your Honor, I have a continuing
3 objection here?

4 THE COURT: So noted.

5 Q. [Mr. Walker] Did people in the community, business
6 community and the civic community, show up for this?

7 A. They did.

8 Q. I'm going to ask you to turn to Exhibit 41.

9 [Whereupon, the witness is shown exhibit]

10 A. Yes, sir.

11 Q. Do you recognize that picture?

12 A. I do.

13 Q. Is it a fair and accurate copy of a person cutting a
14 ribbon?

15 A. It is.

16 MR. WALKER: Defendant's -- Landowner would move
17 into evidence 41.

18 MR. BABCOCK: I object to 41, Your Honor.

19 THE COURT: Alright. So noted. I'm going to
20 overrule your objection.

21 [Whereupon, Defendant's Exhibit Number 41 is
22 admitted into evidence by the Court]

23 Q. [Mr. Walker] And who is that ---

24 THE COURT: --- I'm assuming your objection was
25 relevance?

1 MR. BABCOCK: Relevance. And I also think that it's
2 potentially prejudicial, depending on people's political
3 persuasions. It's one of a series of pictures I think
4 counsel is going to be offering. It's not just one
5 picture. And it has nothing to do with the actual value
6 of the property in October of 2017.

7 THE COURT: So are political persuasions a legal
8 objection, counsel?

9 MR. BABCOCK: Definitely, You're Honor. It could be
10 prejudicial.

11 THE COURT: Political persuasions?

12 MR. BABCOCK: I think the prejudicial outweighs the
13 probative value. I think the bottom line is it's not
14 relevant. Whatever happened in October of 2007, for an
15 opening ceremony, has nothing to do with the value of the
16 property on October of 2017.

17 THE COURT: Alright. Your objection is so noted. I
18 think your objection was on relevancy and then you made
19 an objection regarding some political persuasion. But
20 I'm not -- I'm not impressed by that, so I'm going to
21 overrule your objection with regard to relevancy. And
22 I'll go ahead and let you ask the question.

23 MR. WALKER: Thank you.

24 MR. BABCOCK: Can I have a continuing objection,
25 Your Honor?

1 THE COURT: A continuing objection, counsel.
2 Q. [Mr. Walker] And who is this cutting the ribbon for
3 your building?
4 [Whereupon, the photograph is shown]
5 A. Mayor Riley at the time.
6 Q. Did you showcase some of the features of the
7 building to the guests, including Mayor Riley?
8 A. Yes, sir.
9 Q. Would you go to 43, please?
10 [Whereupon, the witness views photograph]
11 Q. Do you recognize 43?
12 A. I do.
13 Q. Is that a fair and accurate representation or does
14 that photo accurately represent you displaying one of the
15 features of the building?
16 A. It does.
17 MR. WALKER: Landowner moves 43 into evidence.
18 THE COURT: Subject to your objection?
19 MR. BABCOCK: Same objection, Your Honor.
20 THE COURT: Alright. 43 is admitted, subject to
21 counsels -- the plaintiff's objection.
22 MR. BABCOCK: My continuing ---
23 THE COURT: --- So noted ---
24 MR. BABCOCK: --- and my continuing objection again,
25 Your Honor?

1 THE COURT: And his continuing objection, as well.
2 So noted for the record.
3 [Whereupon, Defendant's Exhibit Number 43 is
4 admitted into evidence by the Court]
5 [Whereupon, the photograph is shown]
6 Q. [Mr. Walker] Which room are you in here?
7 A. The theater.
8 Q. Alright. And what are you showing?
9 A. We're demonstrating the acoustics and visual impacts
10 of that room.
11 Q. Does that picture show the room in its completed
12 state?
13 A. It does.
14 Q. I'm going to skip several of the pictures and direct
15 your attention to 48, please.
16 [Whereupon, the witness is shown photograph]
17 A. Okay.
18 Q. Does 48 include a photograph of a feature of the
19 building that we've not discussed yet?
20 A. [No response]
21 Q. Alright. Let me say ---
22 A. --- yeah, ask it differently.
23 Q. Alright. Let me say this. Let's first get the
24 picture described. Is this a fair and accurate
25 representation of the building when it was completed?

1 A. Yes.

2 Q. On the inside?

3 A. Yes.

4 MR. WALKER: Your Honor, we'd move 48 into evidence.

5 THE COURT: Subject to your objection?

6 MR. BABCOCK: Yes, Your Honor.

7 THE COURT: Alright.

8 MR. BABCOCK: And, again, a continuing objection,

9 Your Honor.

10 THE COURT: Alright. A continuing objection. 48 so

11 admitted, subject to objection of plaintiffs' counsel.

12 [Whereupon, Defendant's Exhibit Number 48 is

13 admitted into evidence by the Court]

14 [Whereupon, the photograph is shown]

15 Q. [Mr. Walker] Alright. Was this during the ribbon

16 cutting when you had guests at your building?

17 A. Yes.

18 Q. And what I was getting at, Mr. Fabian, is there is a

19 square that's framed behind the gentleman, the

20 technician.

21 A. Correct.

22 Q. And what is that?

23 A. That's our X --

24 Q. Would you -- would you first mark it and tell us

25 what it is?

1 [Whereupon, the witness complies]

2 A. Alright. And it is an example of staggered stud
3 construction, so to depict how you would construct an
4 acoustically isolated room.

5 Q. Was your acoustically isolated room constructed with
6 wood studs like this wall, or was it ---

7 A. --- no, sir. It was metal. But for the purposes of
8 the display, we made that thirty-two inch display; we
9 replaced the metal studs with wood studs.

10 Q. Fred, can all these systems that we were -- have
11 looked at this morning, and a little bit this afternoon,
12 can they simply be unplugged and moved to another
13 building?

14 A. No, sir. No, sir.

15 Q. Why not?

16 A. They're built into the building.

17 Q. Does Gateway Properties intend to construct another
18 building for eLifespaces?

19 A. For these purposes. Yes.

20 Q. Will it have similar features?

21 A. All of the features, yes.

22 Q. At this time, I want to turn to your leasing of the
23 building. Did the economic recession have an effect on
24 your business that resulted in your doing something you
25 hadn't planned to do?

1 A. Yes.

2 Q. Would you tell the jury what that was?

3 A. Sure. So y'all remember, in the late 2000s we had a
4 recession and as with our business and others, it slowed
5 down and when it did, we no longer needed seventy-five,
6 seventy-whatever, square-foot facility.

7 And so we took a step back and thought, alright, the
8 second floor were used as our offices and that could be
9 easily subletted [phonetic] -- if that's such a word --
10 out, and with some minor building modifications.

11 Like remember that spiral staircase we sealed up
12 because we didn't think they'd want access to ours and we
13 didn't want them in ours and us in theirs.

14 Anyhow, and then remember that -- the Apple area,
15 which Apple had just opened their facility here in town,
16 we decided to add a wall and to lease that space out
17 because we no longer needed that area.

18 Q. What I'd like to do now is turn your attention back
19 to Exhibit 11, which has already been admitted, which has
20 the floor plan. And maybe you can show the jury just
21 exactly what you're talking about on the first page, far
22 left.

23 [Whereupon, the photograph is shown]

24 A. Okay.

25 Q. Where is the entrance, first of all? Where's your

1 main entrance?

2 A. Main entrance to the building is right there

3 [indicates].

4 Q. Okay.

5 A. Alright. And the Apple area that we're -- that we
6 were talking about, is right here [indicates]. So in
7 order to partition that off for a tenant -- okay. There
8 [indicates]. We added this wall right there [indicates],
9 and let's see, and kind of opened up this area
10 [indicates].

11 Q. Are the red lines showing walls that were built when
12 you went to partition off the space? There are some
13 other red lines to the left.

14 A. That -- yes, we added -- that wall was there
15 [indicates], and this wall was there [indicates]. Sorry.
16 And there was a wall here and here [indicates], which we
17 took out.

18 Q. Were you successful in leasing this first-floor
19 space?

20 A. Yes, sir.

21 Q. And to whom did you lease the first floor?

22 A. The first tenant was a software development company,
23 which lasted until they kind of financially fell apart.
24 And then the second one was to a Pilates center.

25 Q. Were they -- was the Pilates center still there at

1 the day of the take? Were they your ---
2 A. They were ---
3 Q. --- tenant in that space?
4 A. And they were there after we left.
5 Q. Now, if you'd turn to the next page.
6 MR. WALKER: If we could have the next page on the
7 screen, please.
8 Q. [Mr. Walker] Is that the second floor?
9 A. Yes.
10 Q. And does it show any stairs from the ground up to
11 the second floor?
12 A. It does.
13 Q. Would you circle those?
14 A. [Witness complies]
15 Q. Was much required to renovate the second floor where
16 you could add the Life Spaces offices?
17 A. We -- from a -- okay. Lighting-control system is
18 still the same. The network was disconnected from the
19 main hub and relocated upstairs for them. And the audio-
20 visual systems remained constant to those -- to those
21 areas.
22 Q. Did you locate a tenant for the -- for the second
23 floor?
24 A. We did ---
25 Q. --- tenant in your offices? And who was that?

1 A. There was a company called Capellas who needed a
2 corporate office. They ran the bingo operations
3 throughout the state, and their corporate offices were
4 here.

5 Q. At this time, I'm going to turn ahead to the
6 condemnation and the project which is the reason that
7 we're here today. How did you learn about Palmetto
8 Railways' intent to put a rail line in the immediate
9 vicinity of your property?

10 A. I got a flier from the Army Corps of Engineers.

11 Q. Did you respond ---

12 A. --- a mailer.

13 Q. Did you respond in any way to that?

14 A. I did. I responded three separate times to their
15 inquiries.

16 Q. And what was your position with respect to the so-
17 called southern loop?

18 MR. BABCOCK: Your Honor, I would object to his
19 position concerning the southern route. It's got nothing
20 to do with the issues ---

21 THE COURT: --- alright. Restate your question,
22 counsel.

23 Q. [Mr. Walker] Did you make -- take any action with
24 respect to the notice that was given to you about the
25 plan to have the southern connection near or on your

1 property?

2 A. I did. There were several actions taken, besides
3 writing, suggesting alternatives ---

4 MR. BABCOCK: Your Honor ---

5 A. --- even with the ---

6 MR. BABCOCK: --- objection on the alternatives.
7 If we may be heard on this point, because it is
8 important.

9 MR. WALKER: I'll move on, Your Honor.

10 THE COURT: Alright.

11 Q. [Mr. Walker] Alright. Did your objections and
12 suggestions result, to your knowledge, in any change?

13 A. No.

14 Q. I'm going to ask you to turn to Exhibit 53.

15 [Whereupon, the witness views exhibit]

16 Q. Can you identify Exhibit 53?

17 A. Yes. This is a letter where I received notification
18 that they wanted to talk with us about taking our
19 property.

20 MR. WALKER: Your Honor, Landowner moves Defendant
21 53 into evidence.

22 THE COURT: Any objection?

23 MR. BABCOCK: Without objection.

24 THE COURT: Without objection, 53 is so admitted.

25 [Whereupon, Defendant's Exhibit Number 53 is

1 admitted into evidence by the Court]

2 [Whereupon, the exhibit is shown]

3 Q. [Mr. Walker] Who is this letter from?

4 A. Their agent, Oscar Rucker ---

5 Q. --- and specifically whom?

6 A. Oscar Rucker, with Michael Baker International.

7 Q. Does this letter indicate, at the end of the first

8 sentence -- or the last sentence of the first paragraph,

9 if your property is going to be implicated?

10 A. As part of that, yes.

11 Q. Would you read for us the first sentence of the

12 second paragraph?

13 A. We have been requested to proceed with meeting with

14 the landlords affected by this preferred alignment and to

15 begin the appraisal process.

16 Q. And go ahead and continue on with the next ---

17 A. We would like, therefore, to arrange a convenient

18 time to meet with you on site so we can discuss the

19 current plan and the appraisal process.

20 Q. Did you respond to Mr. Rucker's letter? And,

21 specifically, I'll direct your attention to Exhibit 54.

22 [Whereupon, the witness views exhibit]

23 A. I did.

24 Q. Can you identify Exhibit 54?

25 A. This is my letter I sent to him in response to his

1 inquiry.

2 MR. WALKER: Landowner moves 54 into evidence.

3 THE COURT: Any objection?

4 MR. BABCOCK: Yes sir, we do object to this.

5 THE COURT: Alright. What's the basis?

6 MR. BABCOCK: Your Honor, may we approach?

7 THE COURT: Yes, sir.

8 [Whereupon, an off-the-record bench conference is
9 held]

10 Q. [Mr. Walker] In response to Mr. Rucker's letter,
11 did you coordinate with him the time when he could come
12 to your property?

13 A. No.

14 Q. Did he ---

15 A. --- I told him it wasn't for sale.

16 Q. But, ultimately, did you meet with him at 179 [sic]
17 Meeting Street?

18 A. I did when he said there was -- we were going to
19 take it under the eminent domain. Okay, then come on.

20 Q. What happened when he came for his first visit to
21 the property when you were there?

22 A. He gave me an explanation of the process and the
23 actions that were required by us. He -- during that
24 process, I expressed the building and it's -- and its
25 intricacies -- it's tough for me not to get really

1 emotional about this. But expressed to him the amount of
2 work and the things we had done in that building's
3 preparation.

4 Walked him around, showed him all the steel that
5 we've looked at earlier because it's visible as you walk
6 around and explained to him the elements of the building.
7 Showed him the theater, everything.

8 Q. Did he communicate anything in response once you had
9 showed him these particular features?

10 A. He did. He expressed hesitation that he was --
11 wanted to get back with his group about Mr. Ford's
12 ability to pursue that appraisal.

13 Q. Was there any discussion with him about Gateway
14 Properties' desire and need to replace that building if
15 it were taken?

16 A. Immediately, yes. Yes, is the answer. And -- yes.

17 Q. Did you talk about whether or not there could be any
18 assistance with the new building that you were going to
19 have to ---

20 A. --- I did ---

21 Q. --- build?

22 A. And I said that -- I mean, rightfully so they gave
23 us plenty -- they were coming out there a year-plus in
24 advance. And I said, that's great, but I need to move
25 somewhere and I need to construct it because these

1 elements can't be replicated in existing spaces. And I
2 even -- and he came in with this eighteen-month
3 guideline. Anybody in a construction knows that from
4 design to completion, eighteen months for a commercial
5 building is like almost unheard of.

6 So I asked if there was any assistance that Palmetto
7 Railways could lend in support of the City's permitting
8 operation. Not for favors, just help to push it through
9 more expediently.

10 Q. Did you do anything else ---

11 MR. BABCOCK: --- may we approach, Your Honor?

12 THE COURT: Yes, sir.

13 [Whereupon, an off-the-record bench conference is
14 held]

15 Q. [Mr. Walker] Did you follow up the meeting with
16 Mr. Rucker with an email that was copied to him?

17 A. Yes.

18 Q. What was your purpose of sending that email that was
19 copied to Mr. Rucker?

20 A. To make sure I did not misinterpret what was said
21 during the meeting.

22 [Whereupon, the witness is shown exhibit]

23 Q. Is Defendant's 55 a copy of that email ---

24 A. --- it is ---

25 Q. --- much later ---

1 A. --- yes ---

2 Q. --- email? Does that contain your synopsis of the
3 meeting that you were describing?

4 A. It does.

5 MR. WALKER: Your Honor, Landowner moves 55 into
6 evidence.

7 THE COURT: Any objection?

8 MR. BABCOCK: The Court's indulgence.

9 THE COURT: Yes, sir.

10 [Whereupon, Mr. Babcock and Mr. Paavola confer]

11 MR. BABCOCK: No objection, Your Honor.

12 THE COURT: Alright. Without objection ---

13 MR. WALKER: Thank you.

14 THE COURT: Defendant's Number 55 is so entered.

15 [Whereupon, Defendant's Exhibit Number 55 is
16 admitted into evidence by the Court]

17 Q. [Mr. Walker] At the time of your meeting, did
18 Mr. Rucker provide you a map of the southern connection
19 and the affected properties, the one that's been admitted
20 into evidence already, that had ---

21 A. --- yes ---

22 Q. --- the yellow properties as being the affected
23 properties?

24 A. He did.

25 Q. During your visit and conversation with Mr. Rucker,

1 Railways' agent, was there any indication from him about
2 whether you should proceed with your efforts to notify
3 tenants and engage design professionals for your new
4 construction?

5 A. There was discussion about that.

6 Q. And what was indicated by you by Railways' agent?

7 A. Not to do so.

8 Q. Why? Did he say why?

9 A. Yeah. He says he's been in transactions with them,
10 before, that right at the last minute they changed their
11 mind.

12 Q. Alright. Did you, after meeting with Mr. Ford,
13 receive a letter from the appraiser that Mr. Ford
14 mentioned?

15 A. I did.

16 Q. Would you please take a look at Exhibit 57?

17 [Whereupon, the witness is shown exhibit]

18 A. That is the letter I received.

19 MR. WALKER: Landowner moves 57 into evidence.

20 THE COURT: Any objection?

21 MR. BABCOCK: No objection, Your Honor.

22 THE COURT: 57 is so admitted, without objection.

23 [Whereupon, Defendant's Exhibit Number 57 is
24 admitted into evidence by the Court]

25 Q. [Mr. Walker] Who wrote this letter to you?

- 1 A. Mr. Ford.
- 2 Q. What does he go over in this letter?
- 3 A. That he has been engaged by Palmetto Railways to
- 4 appraise my building.
- 5 Q. Did you coordinate a meeting with him to come to
- 6 your property, to Gateway's property, to inspect the
- 7 building?
- 8 A. I did.
- 9 Q. Were there other communications between you and him
- 10 about things he may want to do or information he may
- 11 need?
- 12 A. There were.
- 13 Q. As a result of those communications, did you provide
- 14 anything to Mr. Ford?
- 15 A. I did.
- 16 Q. What did you provide?
- 17 A. He had asked for an overview of the property, which
- 18 I called my real estate agent friend and asked him, I
- 19 didn't know what -- I don't know what you have to prepare
- 20 for somebody to get an overview. So he put together this
- 21 information packet about ---
- 22 Q. --- we're going to look at that in a minute.
- 23 A. Okay.
- 24 Q. So there was the information packet?
- 25 A. Right.

1 Q. And anything else that you provided to him?

2 A. Yes. He asked for cost data, so I contacted my

3 accountant and asked him if he would write up -- extract

4 from the cost associated with that building so that I

5 could share with Mr. Ford.

6 Q. Did you relay that to Mr. Ford?

7 A. I did.

8 Q. Let's go to Exhibit 59.

9 [Whereupon, the witness is shown exhibit]

10 Q. You were referring to a brochure that was done by a

11 real estate friend.

12 A. Yes.

13 Q. Can you identify Defendant's Exhibit 59?

14 A. This is the real estate package prepared for

15 Mr. Ford and Palmetto Railways for the building.

16 Q. Did you provide it to Mr. Ford?

17 A. Yes.

18 MR. WALKER: Your Honor, Defendant Landowner moves

19 59 into evidence.

20 MR. BABCOCK: Without objection, Your Honor.

21 THE COURT: Without objection, 59 is so entered.

22 [Whereupon, Defendant's Exhibit Number 59 is

23 admitted into evidence by the Court]

24 [Whereupon, the exhibit is shown]

25 Q. [Mr. Walker] Let's just start with the cover page.

1 First, is that an accurate photograph of your building?
2 A. That's an accurate photograph of the building.
3 Q. Up in the upper right-hand corner, what does it say?
4 A. Premier office building.
5 Q. Did you consider that an office building?
6 A. No. But that's not -- the real estate agent did.
7 Q. I'm sorry. You have to speak up ---
8 A. --- no ---
9 Q. --- loudly.
10 A. I did not. But the real estate agent put that up
11 there.
12 Q. Alright.
13 A. I think it was a copy-paste from when they were
14 leasing the second floor.
15 Q. Who leased the second floor?
16 A. He did, my -- Daniel Atwell, with the --
17 THE COURT REPORTER: What's the name again?
18 THE COURT: Daniel?
19 A. Daniel Atwell.
20 Q. [Mr. Walker]. And what's the name of his company?
21 A. Roadstead Real Estate Advisors.
22 Q. Okay. Let's go to page 2.
23 [Whereupon, the witness complies]
24 Q. Does that create a narrative of the building? A
25 partial narrative?

- 1 A. Partial narrative.
- 2 Q. Did you prepare this, or did Daniel Atwell?
- 3 A. Atwell did.
- 4 Q. Would you go to the third page? What does the third
5 page show?
- 6 A. Income and expenses of the building.
- 7 Q. Was that prepared by you?
- 8 A. No. But I'm sure I had -- I gave Daniel pieces of
9 it, like a water bill, electric bill.
- 10 Q. And if you'd go to the next page, please.
- 11 [Whereupon, the witness complies]
- 12 Q. What is that showing?
- 13 A. Maps.
- 14 Q. Let's talk about the photograph on the right. Did
15 your building come with parking? Your property have
16 parking?
- 17 A. Oh, yes sir; a lot of parking.
- 18 Q. And then if we go to the next two pages, what are
19 those?
- 20 A. Floor plans.
- 21 Q. Okay. Let's go to the next page with text.
- 22 [Whereupon, the witness complies]
- 23 Q. It says building engineering highlights.
- 24 A. Uh-huh.
- 25 Q. Does that contain some of the descriptions of the

1 structural features that we've talked about ---
2 A. --- it does ---
3 Q. --- earlier today?
4 A. It does.
5 Q. Is that the number of parking spaces at the bottom?
6 A. Correct.
7 Q. Go to the next page.
8 [Whereupon, the witness complies]
9 Q. Are these other photographs of the construction that
10 we went over earlier?
11 A. They are.
12 Q. And if we go to the next page, what's that called?
13 A. Energy and management control systems.
14 Q. The next ten pages or so, maybe even fifteen,
15 dealing with all kinds of electronics and systems, who
16 put that together for Mr. Atwell?
17 A. I did. Well, I sent him the links of the elements
18 involved in the construction of the building.
19 Q. And as we scroll through these, are these various
20 technological features incorporated, most of them
21 incorporated, in the building?
22 A. Yes.
23 Q. When Mr. Ford was in the building, did you walk him
24 through the theater, the acoustical room, and all the
25 various rooms that we looked at this morning?

1 A. I did.

2 Q. At some point, did you hear from Mr. Rucker that you
3 should notify your tenants?

4 A. Yes.

5 Q. Did you do that?

6 A. I did.

7 Q. Did you also, at that point, proceed to do anything
8 as Roadstead with respect to a new building? The design
9 professionals. Did you ---

10 A. Oh, not Roadstead, but ---

11 Q. --- I mean, not Roadstead. I'm sorry.

12 A. Right.

13 Q. Gateway Properties ---

14 A. --- I ---

15 Q. --- of Charleston.

16 A. I called Steve Morey, who was involved in the
17 original construction of that building, to initiate --
18 they have to start with the City and design, blah, blah,
19 blah. But I called Steve to get that process underway to
20 build a new building.

21 Q. Was he involved at all in the original construction?

22 A. Yes.

23 Q. What was his capacity?

24 A. He was the project manager.

25 Q. Is Steve here today?

1 A. He is.

2 Q. Where is he?

3 A. In the back.

4 Q. Did in fact, Palmetto Railways proceed with the
5 formal condemnation and appraisal process?

6 A. They did.

7 Q. Did you hear from Mr. Ford or Mr. Rucker about what
8 the appraised value was soon after the visit in
9 September, or was it a while later?

10 A. It was a while later.

11 Q. Could you please turn to Defendant's Exhibit 65?
12 Actually, let's go to 66.

13 [Whereupon, the witness complies]

14 Q. Do you recognize 66?

15 A. Yes.

16 Q. What is that?

17 A. The cover letter from Oscar Rucker sending me their
18 appraisal and -- now, and an authorization to offer me
19 money for the property.

20 MR. WALKER: Your Honor, Landowner moves Defendant's
21 Exhibit 66 in evidence.

22 THE COURT: Any objection?

23 MR. BABCOCK: Without objection.

24 THE COURT: Without objection, 66 is so admitted.

25 [Whereupon, Defendant's Exhibit Number 66 is

1 admitted into evidence by the Court]

2 Q. [Mr. Walker] Alright. What was the -- was there an
3 enclosure referenced in this letter to you of January 19?

4 A. Yeah, there were.

5 MR. WALKER: If we could feature the second and --
6 the second paragraph and the short sentence underneath,
7 please.

8 [Whereupon, exhibit shown on screen]

9 Q. [Mr. Walker] Was the appraisal actually enclosed?

10 A. Yes.

11 Q. What was the amount of the offer?

12 A. A million eight.

13 Q. Did you immediately respond to that offer?

14 A. I did.

15 Q. Did you accept that offer?

16 A. I did not.

17 Q. Why didn't you accept that offer?

18 A. It was far below the cost that we had in the
19 building.

20 Q. And on the cost that you had in the building, you
21 mentioned that you had sent that information to Mr. Ford.
22 If you would go to Defendant's 63, please?

23 [Whereupon, the witness complies]

24 Q. Do you recognize those emails?

25 A. I do.

1 Q. What are those emails and what is the subject of
2 those emails?

3 A. It is an exchange between me and Palmetto Railways'
4 appraiser, Mr. Ford, on the cost information associated
5 with 1799 Meeting.

6 Q. And what is the date of these events?

7 A. In the October, 2016 range.

8 MR. WALKER: Your Honor, Landowner moves to
9 introduce Defendant's Exhibit 63 into evidence.

10 THE COURT: Any objection?

11 MR. BABCOCK: Objection, Your Honor.

12 THE COURT: What's the nature of your objection?

13 MR. BABCOCK: The email itself is forwarding an
14 email between the witness and an accountant, Brandon
15 Hoffman, who on the second page makes certain accounting
16 calculations. He's not an appraiser. It's hearsay.

17 THE COURT: Yeah. I'm ---

18 MR. BABCOCK: --- it's hearsay ---

19 THE COURT: --- I mean that's the nature of your
20 objection?

21 MR. BABCOCK: Hearsay objection.

22 THE COURT: Alright. Exception?

23 MR. WALKER: Yes.

24 THE COURT: What's the exception?

25 MR. WALKER: It was received -- it's the notice to

1 Palmetto Railways and what the costs were, a notice of --
2 that was sent to their appraiser and copied to Oscar
3 Rucker.

4 If you look to the top email, it's copied to their
5 right-of-way agent to show that the accountant for the
6 property owner has sent the actual costs figures as
7 adjusted by inflation. And it was in their possession,
8 they had it.

9 And it's also relevant, since we are seeking
10 replacement costs to that cost.

11 THE COURT: Alright. What I'm asking is he made a
12 hearsay objection. You're saying it falls under which
13 exception of the hearsay?

14 MR. WALKER: I'd say ---

15 THE COURT: --- which one? Pick one. Pick one. Go
16 pick one and tell me why you pick it.

17 MR. WALKER: Okay. I am going to pick that this was
18 actual -- it was information imparted to them, so notice
19 of what the reconstruction costs are. And also -- I
20 would also ask the witness -- I would say it's a business
21 record.

22 Q. [Mr. Walker] Did you keep a record of all the emails
23 that you sent? First, did you prepare this email?

24 A. Yeah. Well, yes. It's -- it ---

25 Q. In the ordinary course?

1 A. Correct. In the ordinary course.

2 Q. And is it your practice to save your emails?

3 A. It is.

4 Q. Did you have any reason to doubt the information
5 that was given to you by Mr. Hoffman?

6 A. No.

7 Q. Did it jive with what you considered or remembered
8 the cost to be?

9 A. Yes.

10 MR. WALKER: So, Your Honor, we'd say it's a
11 business record. And we'd also say that it's to show
12 that Palmetto Railways had notice of the particular
13 figure as to what the costs would be, what costs were in
14 this property.

15 THE COURT: Alright.

16 MR. BABCOCK: First off, Your Honor, it's not in the
17 ordinary course of Mr. Fabian's business. He's trying to
18 backdoor the hearsay.

19 They are offering it for the substance. The
20 accountant is not an appraiser. They have -- a witness
21 is going to testify later about some estimates that he
22 produced. They have an appraiser that's going to testify
23 about his figure for just compensation. This is trying
24 to get another figure before the jury that -- frankly, it
25 wouldn't be admissible if the accountant was here. But

1 it's certainly hearsay because they've got the substance,
2 the information that would not be admissible if he were
3 here. But they don't have him here.

4 THE COURT: What do you say, counsel, about the
5 witness' testimony that the -- he kept emails of this
6 sort in the normal course of business as a part of his
7 business record? And, of course, counsel is relying on
8 the business-record exception. What do you think?

9 MR. BABCOCK: You can't -- you don't get your own
10 way around hearsay by keeping a copy of a document that
11 you sent. That's coming out and sent to somebody else,
12 it's in their records. You can't just keep your own
13 email and say that's a business record.

14 Furthermore, there's been no testimony that
15 Mr. Fabian or Gateway or E-Life is in the business of
16 coming up with reproduction costs for a building. That's
17 not their business.

18 THE COURT: Alright. So you're saying this document
19 couldn't be a part of Mr. Fabian's business records?

20 MR. BABCOCK: Correct.

21 THE COURT: Is that your argument?

22 MR. BABCOCK: Yes, sir.

23 THE COURT: I respectfully disagree and I'm going to
24 allow it subject to your objection. Alright.

25 MR. WALKER: Thank you. Could we have Defendant's

1 Exhibit 63.

2 [Whereupon, Defendant's Exhibit Number 63 is
3 admitted into evidence by the Court]

4 Q. [Mr. Walker] But before we get to the numbers were
5 you intending to provide the most accurate numbers you
6 possibly could?

7 A. Yes, sir.

8 Q. Who did you turn to to derive the actual figures
9 that were spent when constructing the building for
10 Gateway?

11 A. My accountant.

12 Q. Did you do anything to tamper with the figures that
13 he presented?

14 A. No, sir. Matter of fact, I asked him for permission
15 to share it.

16 Q. Did ---

17 MR. BABCOCK: --- Your Honor obviously, I'd like a
18 continuing objection.

19 THE COURT: Continuing objection so noted, counsel.

20 Q. [Mr. Walker] Did the numbers that he came up with
21 jive with what your recollection of the actual costs were
22 and any confirmation that you made of the actual costs?

23 A. Yes.

24 MR. WALKER: If we could go to page 2. If we go
25 down to the second paragraph?

1 [Whereupon, the exhibit is shown]

2 Q. [Mr. Walker] And is he responding to your request
3 here?

4 A. Yes.

5 Q. And what does this say?

6 A. At my request, we extracted the actual cost --
7 sorry, I'm going there -- from various schedules that
8 accountants keep.

9 From these schedules, you request we develop an
10 estimated cost to rebuild your facility by applying
11 current labor rates, land values, and other related
12 financial factors.

13 The result of our analyses listed below are
14 estimates and do not represent audited numbers, nor do
15 they reflect the actual contractor bids' bid estimates.
16 In other words, if a contractor was to do it, his...

17 Q. Did he adjust his figure, the 2007 figures, by any
18 coefficient?

19 A. By inflation. What the actual inflation rate was.

20 Q. Thank you. In your experience, are construction
21 costs staying equivalent to inflation?

22 A. Not that I have experienced.

23 Q. Alright. Thank you. At some point, did you receive
24 the actual notice of condemnation?

25 A. I did.

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March 26, 2019

1 Q. And when would you have received that?

2 A. In October of that year.

3 Q. 2017?

4 A. Yes.

5 Q. After receiving the notice of condemnation, did you
6 receive another communication from Palmetto Railways
7 dealing with your occupancy?

8 A. Yes.

9 Q. I'll ask you to turn to page -- or Exhibit 68.

10 [Whereupon, the witness complies]

11 A. Uh-huh. That's a -- that's a letter I received the
12 next day.

13 MR. WALKER: Your Honor, Landowner moves to enter
14 Defendant's Exhibit 68 into evidence.

15 THE COURT: Any objection?

16 MR. BABCOCK: Objection, Your Honor, as to relevance
17 here.

18 THE COURT: Alright.

19 MR. BABCOCK: And may we approach?

20 THE COURT: Yes. Since that's a legal objection, do
21 you want me to take the jury out?

22 MR. BABCOCK: Yes, sir.

23 THE COURT: Alright. Y'all stretch your legs,
24 freshen up. Don't talk about the case to each other.
25 Just freshen up while you're out there. Stretch your

1 legs.

2 [Whereupon, the jury exits the courtroom at 2:55
3 p.m.]

4 THE COURT: Mr. Babcock?

5 MR. BABCOCK: Yes, sir. The letter, Exhibit 68, is
6 a letter from Railways to Mr. Fabian. It involves the
7 process after the date of taking. Again, the valuation
8 issue before the Court is October 19, 2017. So
9 everything that happens after that has nothing to do with
10 the valuation on the date of taking.

11 We're getting into the whole issue of what happens
12 after the property has been acquired by Railways to
13 relocate and to have owners and tenants move out.
14 There's a whole process for that. That's the relocation
15 process. As part of that, there's assistance given to
16 them. They are sometimes allowed to stay, getting --
17 making rental payments.

18 Remember, Your Honor, in this case this is exactly
19 what the Landowner did. He was entirely entitled to it.
20 He was able to draw down the 1.8 million-dollar offer.

21 THE COURT: Right. Right.

22 MR. BABCOCK: He's entitled to do that.

23 THE COURT: Right.

24 MR. BABCOCK: He did that. He gets that money to
25 use for whatever he wants. But the Railway process has

1 to go forward like any condemnation with going forward
2 with the construction and all that sort of thing. So
3 that whole process of -- and nobody wants to leave, no
4 owner, no tenant, but they have to. So the whole process
5 that -- of getting them out as quickly as you can so that
6 you can move forward with the project.

7 There's a series of communications that Mr. Fabian
8 and Railways communicated over a period of time on
9 various issues, but that's all to move them from the
10 process to get them located.

11 So it's not relevant. And it's prejudicial, because
12 he had to leave and they had to move him as quickly as
13 they could. So that's all a process.

14 THE COURT: Alright. Okay. Yes?

15 MR. WALKER: Your Honor, Railways' appraiser is
16 going to testify. Ms. Haskell has stated in her report
17 that Mr. Fabian, the tenant, tore all kinds of things out
18 of the building and left the building in a state of
19 disrepair.

20 And the purpose of this letter, as well as other
21 email -- there are two other emails -- is to show that he
22 was under the gun to get out of there. And then we're
23 going to link it up with two more emails where he was --
24 he was told that he could remove items and did not have
25 to leave the building room-clean or repair it because it

1 was going to be destroyed, contrary to the suggestion in
2 her appraisal.

3 And so what we're doing here is showing that -- I'm
4 not getting into the relocation allowance, I'm getting
5 into the condition of the premises that his appraiser has
6 made these -- cast these dispersions on as to why the
7 premises were in the condition they were in when she
8 inspected the property seven months later.

9 THE COURT: Let me ask you this. Remember a little
10 while ago, a few minutes ago, we talked about the
11 gentleman who was out there who wore two hats. One was a
12 relocation...

13 MR. BABCOCK: Mr. Rucker.

14 MR. WALKER: Mr. Rucker.

15 THE COURT: Rucker, right. And I think we had some
16 dialog about that.

17 MR. BABCOCK: Yes, sir.

18 THE COURT: And I guess I'll pose this to you,
19 Mr. Walker. Is it -- I've read the letter, and it talks
20 about -- first of all, it's after the date that counsel
21 has talked about, October ---

22 MR. BABCOCK: --- 19, 2017 ---

23 THE COURT: --- 2017. But when I read the letter,
24 it seems to me -- and you maybe can elaborate. It seems
25 to me it's just -- it's totally talking about relocation.

1 It's talking about rent, and how much rent is due, and
2 when it's due, and all like that. That goes into
3 relocation. I think that's -- I'm just -- I'm just
4 hearing counsel's objection and I'm leaning towards
5 sustaining his objection unless you tell me otherwise.

6 It just seems to me like he has a valid objection
7 regarding the content of this letter. Twofold: one was
8 because it's -- you know, it's after the date; and then
9 also it talks about relocation.

10 MR. BABCOCK: And, Your Honor, we may be able to
11 take care of Mr. Walker's issue. Number one, there's no
12 question that Mr. Fabian was allowed to take anything he
13 could take.

14 THE COURT: Right.

15 MR. BABCOCK: We don't have a problem with that.

16 Number two, we're not going to be offering evidence
17 by Ms. Haskell that the interior of the building was torn
18 up because he removed stuff. We're not going to be
19 offering that testimony. So we're not going to get into
20 any of the areas Mr. Walker is worried about. And we
21 agree that he could take what he -- what he took.

22 THE COURT: Alright. So my ruling is -- I'll
23 sustain your objection as to the letter.

24 MR. BABCOCK: Thank you, Your Honor.

25 THE COURT: And then we can move forward. That

1 would be Defendant's Exhibit Number 68. Before we bring
2 the jury back, let me see a Bailiff. Could you get a
3 Bailiff?

4 MR. WALKER: And they're -- we may as well address
5 the next two emails so we don't impose on the jury again.

6 THE COURT: Alright. Let me just tell them
7 something for just a second.

8 [Whereupon, the Court confers with the Bailiff.

9 THE COURT: Alright. Let's go ahead and address the
10 other two.

11 MR. WALKER: Okay. And the next two exhibits were
12 specifically directly towards the removal of specific
13 things that he did with permission.

14 THE COURT: 69?

15 MR. WALKER: It's 69, and it's the top paragraph of
16 the second page, Your Honor.

17 THE COURT: Alright.

18 MR. WALKER: The one that starts with as you may
19 recall.

20 THE COURT: Yes.

21 MR. WALKER: And when I said that we'd be willing to
22 redact everything related to relocation, what I was
23 suggesting is other than the date of the email, we'd
24 redact everything but that one paragraph at the top. And
25 we can submit that redacted email later.

1 THE COURT: Alright. Redact everything except the
2 top paragraph?

3 MR. WALKER: Correct.

4 THE COURT: Let me read it. Let me see what it
5 says.

6 [Whereupon, the Court reviews documents]

7 THE COURT: What do you say, Mr. Babcock?

8 MR. BABCOCK: Your Honor, I think if -- if what
9 Mr. Walker is offering to do is to redact everything on
10 page 1 and all we have is this one paragraph that begins
11 as you may recall? Is that what you're offering?

12 MR. WALKER: Yeah. Just the top paragraph because
13 -- just that paragraph.

14 MR. BABCOCK: So nothing else ---

15 MR. WALKER: --- I'll think the rest ---

16 MR. BABCOCK: --- nothing else ---

17 MR. WALKER: --- of it -- I'll take out the rest of
18 two and take out three.

19 THE COURT: Nothing else on the second page ---

20 MR. WALKER: Yeah. This will be the only part ---

21 THE COURT: --- again, the moving on part ---

22 MR. WALKER: --- we'd just show the to and from and
23 then have this.

24 MR. BABCOCK: As long as everything is redacted
25 except for that one paragraph, I don't object to that.

1 THE COURT: Alright. Okay.

2 MR. WALKER: And then the next one is on a similar
3 vein. This is 70, and it has to do with removal of the
4 door, the theater screen, and pedestal.

5 THE COURT: Alright. Let me -- let me ask counsel
6 about this, in terms of how you redact here in Charleston
7 County. Obviously, these exhibits are going to at some
8 point go back to the jury; right? Correct?

9 MR. WALKER: Yes. I'm going to ---

10 THE COURT: --- so you're going -- you're going to
11 ---

12 MR. WALKER: --- what I would propose is that we not
13 show it to the jury now but we put it in subject to the
14 redaction, and then I put in the fully redacted and the
15 court reporter the fully redacted one.

16 Or I would substitute it for everybody's notebook, a
17 fully redacted one. They don't have this. And I can do
18 that tomorrow morning. It doesn't have to go to -- it's
19 not going to the jury today?

20 THE COURT: Well, I thought you did it the old
21 magic-marker way. Y'all -- they don't -- they don't do
22 it that way here in Charleston?

23 MR. WALKER: We redact.

24 THE COURT: Well, just do it -- you can do -- I'm --
25 that's fine.

1 MR. WALKER: Yeah. I'm just going to substitute
2 another one later.

3 MR. BABCOCK: As long as we see that it's fully
4 redacted and you can't, like you say, read through it or
5 something.

6 THE COURT: Uh-huh. Right.

7 MR. WALKER: Right. Alright. So there we go. We
8 can show them this [indicates] sentence, and then we
9 would go on...

10 [Off the record momentarily]

11 MR. BABCOCK: I've no -- I have no problem with that
12 one paragraph.

13 THE COURT: What about the subsequent page after
14 that?

15 MR. WALKER: 70.

16 THE COURT: 70.

17 [Off the record momentarily]

18 MR. WALKER: Yeah, that's what it would look like.

19 THE COURT: That's 69.

20 MR. WALKER: I think it would be the heading, Todd.

21 MR. BABCOCK: And I think, Trent if you take out the
22 first email and just have a second email from the from-
23 to, and that paragraph, I think ---

24 MR. WALKER: --- yeah. I agree. That's what we'll
25 do. Are you talking about the first one? 69?

1 MR. BABCOCK: 69? Yes.

2 MR. WALKER: Yeah. That's what we'll do.

3 MR. BABCOCK: We're now on 70?

4 MR. WALKER: Yes, sir.

5 MR. BABCOCK: Right. Well, 70, Your Honor, we get
6 back into the eligible moving expenses, which is the
7 relocation process.

8 THE COURT: Which is -- what paragraph are you
9 reading?

10 MR. BABCOCK: It's -- Exhibit 70 has its first
11 paragraph, and the first sentence says: Palmetto
12 Railways has approved you to move the door, loft --
13 entrance, theater screen, and security pedestals, after
14 we discussed -- which we discussed in our meeting last
15 week on 1799 Meeting Street location.

16 I'm okay with that.

17 MR. WALKER: And we'll delete -- we'll delete the
18 rest of -- the next sentence, which refers to relocation.

19 THE COURT: Alright.

20 MR. BABCOCK: I'm okay with that.

21 THE COURT: Okay.

22 MR. WALKER: And we will do that.

23 [Off the record momentarily]

24 THE COURT: 69 and 70 are admitted with the
25 redaction. That's without objection.

1 MR. WALKER: Subject to the redaction. And we will
2 provide hard copies, replacement pages, in all notebooks.
3 THE COURT: Alright. Have you got that, Madam Court
4 Reporter?
5 THE COURT REPORTER: Yes. Thank you.
6 THE COURT: Okay. Good.
7 MR. BABCOCK: That's acceptable, Your Honor.
8 THE COURT: Alright. That's fine.
9 [Off the record momentarily]
10 MR. BABCOCK: That's page 3 of 69?
11 MR. WALKER: Yes, all the texts.
12 MR. BABCOCK: I'm okay with that.
13 MR. WALKER: Okay.
14 THE COURT: Alright.
15 MR. WALKER: Your Honor, may we have -- may we have
16 two minutes?
17 THE COURT: Yes.
18 [Whereupon, a recess is taken from 3:07 p.m. to 3:13
19 p.m.]
20 THE COURT: Alright. It looks like everybody is in
21 place.
22 [Whereupon, the jury enters the courtroom at 3:15
23 p.m.]
24 THE BAILIFF: Everyone present, Your Honor.
25 THE COURT: Alright. Thank you. Yes, sir?

1 MR. WALKER: Your Honor, to pick up where we left
2 off, the landowner is withdrawing the offer of Exhibit
3 68.

4 THE COURT: Alright. So noted.

5 CONTINUED DIRECT EXAMINATION

6 BY MR. WALKER:

7 Q. Mr. Fabian, did you have email exchanges with the
8 agents for Railways about the removal of items ---

9 A. --- I did ---

10 Q. --- from the property?

11 A. Yes.

12 Q. And is Exhibit 69 one of those emails?

13 [Whereupon, the witness is shown exhibit]

14 A. Yes, sir.

15 Q. And I direct your attention to the top of the second
16 page.

17 A. Yes.

18 Q. Is that a communication that you had with Railways
19 by -- a discussion that you had on the property with John
20 Rowe, who worked with Mr. Rucker?

21 A. Correct.

22 Q. Does it accurately reflect that?

23 A. It does.

24 MR. WALKER: Your Honor, we would offer a redacted
25 version of 69 that redacts everything but the top

1 paragraph of page 2 and the to-and-from email heading.

2 MR. BABCOCK: Without objection.

3 THE COURT: Alright. So noted.

4 [Whereupon, Defendant's Exhibit Number 69 is
5 admitted into evidence by the Court]

6 MR. WALKER: Could we have the redacted version,
7 please sir? Could you feature that?

8 [Whereupon, the exhibit is shown]

9 Q. [Mr. Walker] Mr. Fabian, what does this email
10 document in terms of your communications with Mr. Rucker?

11 A. That we were removing items from ---

12 Q. --- maybe the easiest thing is for you to read it.

13 A. Okay.

14 As you may recall, on Monday I stated there were a
15 few items, such as electronically controlled ---

16 Q. --- slow down.

17 A. I'm sorry.

18 Q. Please. A few items such as electronically
19 controlled ---

20 A. --- controlled switches and dimming drivers that we
21 needed to extract, to which you responded as no issue as
22 long as there were no longer -- as long as we're no
23 longer occupying the facility. As we walked through, you
24 also suggested that there would be no need to clean up
25 the debris left from our moving and extraction of the

1 components and devices. The building would be demolished
2 and there would be no need for expending costs addressing
3 these matters.

4 Q. Did Mr. Rowe write anything objecting to this?

5 A. No.

6 Q. Did you have a second email with Mr. Rowe on
7 December 20th where he wrote you about your request to
8 move -- remove certain items?

9 A. Where is that? I'm sorry.

10 Q. Exhibit 70.

11 [Whereupon, the witness is shown exhibit]

12 A. Yes. Sorry.

13 MR. WALKER: Your Honor, based on our discussion
14 while the jury was out, Landowner offers Defendant's
15 Exhibit 70 with the second sentence of the first
16 paragraph redacted.

17 THE COURT: Alright.

18 MR. BABCOCK: Without objection.

19 THE COURT: Alright. So admitted, without
20 objection.

21 [Whereupon, Defendant's Exhibit Number 70 is
22 admitted into evidence by the Court]

23 Q. [Mr. Walker] Would you please publish this for the
24 jury. This is Wednesday, December 20th from Mr. Rowe.

25 A. Uh-Huh ---

1 Q. --- who's with Michael Baker, the agent for the
2 Railways.
3 A. Palmetto Railways has approved you to remove the
4 door, the theater screen, and security pedestal, which we
5 had discussed in our meeting last week from the 1799
6 Meeting Street location.
7 Q. Did you remove anything from -- that was built into
8 the building itself, without first consulting with Mr.
9 Rowe or Mr. Rucker?
10 A. No.
11 Q. What do you understand mechanical systems to refer
12 to?
13 A. The air-conditioners.
14 Q. Did you remove any air-conditioners?
15 A. No.
16 Q. Earlier you said that Gateway was -- Gateway
17 Properties of Charleston intends to build a new facility.
18 Where is that new facility going to be?
19 A. 1831 Meeting Street Road.
20 Q. If you could turn to the aerial that's in evidence
21 as Exhibit 1. We've have that on the screen. Could you
22 show us where -- does that ---
23 A. --- yes ---
24 Q. --- show 1831?
25 A. There [indicates].

1 Q. Will Gateway Properties own that?

2 A. It will. It's in the family.

3 Q. Have you undertaken steps towards that project?

4 A. Yes. Specifically, we've engaged Design Build
5 Services to create architectural -- all the drawings
6 required for permitting. And that process is underway
7 with the City of Charleston.

8 Q. Will this building have the same internal
9 infrastructure as the one at 1799?

10 A. Yes.

11 Q. Has Design Build prepared a construction estimate
12 for you? Let me ask you this. Did Design Build, at your
13 request, do a construction estimate to replicate the
14 building you had at 1799 Meeting Street if they were to
15 replace the building that you had?

16 A. The answer to that is they didn't do it for me. I
17 -- when -- it's a -- it's kind of a -- Mr. Hartnett, in
18 doing his appraisal, had asked about the cost side of
19 1799. And in that process, I connected him with Mr.
20 Morey to provide those cost numbers. And he ---

21 Q. --- have you reviewed those numbers?

22 A. I have reviewed those numbers.

23 Q. Does -- do those construction costs and the scope of
24 that work include any of the items that you removed from
25 1799 Meeting Street?

1 A. No.

2 Q. In your opinion, as the owner of 1799 Meeting
3 Street, was it simply an office building?

4 A. No.

5 Q. In your opinion, as the owner, should it be valued
6 as simply an office building?

7 A. No.

8 Q. In your opinion, as an owner, what type of building
9 is it?

10 A. It is a specialty purpose building.

11 Q. In your opinion, as an owner, is \$1,800,000 just
12 compensation for the value of the property taken?

13 A. No.

14 Q. The last thing I want to talk about, Fred is whether
15 or not you ever listed 1799 Meeting Street.

16 A. Yes, I did.

17 Q. Did you ever list 1799 Meeting Street?

18 A. I did.

19 Q. Would you tell the jury -- we talked about listing
20 it. Did you -- would you tell the jury what you did with
21 respect to listing it for sale?

22 A. Sure. My real estate buddy was ---

23 Q. --- what's his name?

24 A. Daniel Atwell. Sorry. Was leaving the company that
25 he was with and a start-up, they wanted a portfolio of

1 the products. And he said can you help me, and I said
2 list everything we got. I said I don't want to sell it.
3 But that way he's got some inventory. And this was many
4 years back so the -- so I can't say that I never listed
5 it. I did.

6 Q. Did you ever have any intent to sell it at what it
7 was listed for?

8 A. No. No.

9 Q. Would you have done that?

10 A. No.

11 MR. WALKER: That's all I have at this time, Your
12 Honor.

13 THE COURT: Alright. Mr. Babcock?

14 MR. BABCOCK: May it please the Court?
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