

reconciled with the requirements of the Eminent Domain Code¹ or the record evidence, the trial court erred in denying Condemnee's post-trial motion. Accordingly, we reverse the trial court and remand the matter for a new trial.

Background

On January 14, 2015, PennDOT filed a declaration for a partial taking of Condemnee's 5.902-acre property that has been developed with a Best Western Hotel. The declaration sought a permanent acquisition of 1.140 acres of Condemnee's land for the placement of a new exit ramp from Interstate 70 and a temporary acquisition of 0.856 acres for use in the construction. On March 16, 2015, PennDOT paid Condemnee \$286,915 as what it considered to be just compensation for the partial taking of Condemnee's property. One year later, in March of 2016, PennDOT broke ground for construction, and it completed the project in November of 2018.

On March 30, 2017, Condemnee filed a petition for the appointment of a Board of Viewers, which the trial court granted. The Board viewed Condemnee's property on June 27, 2017, while the construction was underway. At the hearing on August 21, 2017, the parties presented expert testimony on the amount of the just compensation owed to Condemnee for PennDOT's taking. On September 12, 2017, the Board of Viewers awarded Condemnee \$2,908,000.

PennDOT appealed the Board of Viewers' award as excessive, and on October 21, 2019, the trial court began a three-day jury trial on the merits of PennDOT's appeal. On the first day, the jury viewed the site. Thereafter, Condemnee presented the testimony of four witnesses: Dr. Jayesh Gosai, President and owner of Condemnee; John Kadash, the hotel's manager; Michael Towers, an

¹ 26 Pa. C.S. §§101-1106.

expert in hotel property valuation; and Merico Lignelli, a certified real estate appraiser. PennDOT also presented four witnesses in support of its challenge to the compensation awarded by the Board of Viewers.

Dr. Gosai testified that the 83-room hotel was constructed in 2001; was solidly constructed; and operated at full capacity within two years of opening. Access was easy, and the noise from Interstate 70 was effectively buffered by the field between the hotel and exit ramp. Learning that the exit ramp would be moved 150 feet closer to the hotel, Dr. Gosai concluded that the noise from trucks braking on the new ramp would adversely affect guest comfort, as would the two years of construction on Condemnee's property. Dr. Gosai testified that post-construction, the hotel's occupancy rate has dropped to less than half of what it was pre-construction.

Dr. Gosai, who owns several other hotels, explained that hotel investors rely on Smith Travel Research, which produces the so-called STAR report, to measure hotel performance. The data relevant to a hotel's performance are occupancy and room rate; together they produce the average daily rate (ADR). Before PennDOT effected its taking of Condemnee's property, the hotel's ADR was \$100 per night. After construction began in early 2016, the ADR dropped to \$80 per night. Dr. Gosai attributed the ADR decline to PennDOT's taking. The STAR reports confirmed that since completion of the construction, the hotel's revenues have remained depressed. Competitors in the area, however, have seen their revenue improve. Condemnee made improvements to the hotel and adjusted the room rates, but these measures have not reversed the ADR decline.

Dr. Gosai testified that just compensation in the amount of \$2,908,000 was warranted because PennDOT's construction of the new exit ramp from

Interstate 70 has severely diminished the fair market value of Condemnee's property.²

Kadash, general manager of the hotel, confirmed that prior to PennDOT's taking, the hotel enjoyed a high ADR and excellent return business. He testified that the construction generated complaints from hotel customers about the early morning noise; the mud and dirt; and the difficulty accessing the hotel caused by the changes to traffic patterns associated with the project. Post-construction, management renovated the hotel and reached out to its former customer base in an effort to rebuild the business. Kadash testified that in 2013 and 2014, the hotel was running at approximately 90% occupancy. After PennDOT's taking, occupancy declined to approximately 30% to 40%.

Towers, an expert in the hotel industry and in the valuation of hotel properties, testified that Condemnee's property was ideal for a hotel use because of its location along the interstate; its visibility from the interstate; and its proximity to the demand for temporary lodging. Towers did a study to evaluate the impact of PennDOT's taking on the fair market value of Condemnee's property, using historical data from the STAR reports. On September 16, 2014, he produced a report that projected a significant decline in the hotel's ADR, and those projections have been largely confirmed by actual experience.

Towers explained that the decline in the oil and gas industry has adversely impacted all hotel properties in Condemnee's geographic region, but with the exception of Condemnee's hotel property, all have recovered. Towers attributed the inability of Condemnee to recover its customer base solely to PennDOT's condemnation.

² An owner of land is competent to testify as to the value of his property. *Sgarlat Estate v. Commonwealth*, 158 A.2d 541, 545 (Pa. 1960).

Lignelli, Condemnee's expert appraiser, testified that he used two approaches in his valuation of Condemnee's property. He used the comparable sales approach to value the land that was the subject of PennDOT's taking petition. He used the income approach to value the remaining real property.

Lignelli testified that the reconfiguration of the interchange impacted Condemnee's remaining property in several ways. It made access to the hotel confusing. In addition, the construction noise, PennDOT's placement of heavy road-building equipment on Condemnee's property and the repositioning of the ramp closer to the hotel all depressed the hotel's revenue. Lignelli considered these factors in doing his after-taking valuation of Condemnee's property.

To determine the fair market value of the two acres of land taken for PennDOT's highway project, Lignelli used comparable sales of vacant land acquired for a hotel use. Lignelli valued the 1.140 acres of Condemnee's land subject to the permanent taking at \$304,000. He valued the 0.856 acres subject to the temporary taking at \$55,600. He used 10% of the comparable sales price of the 0.856 acres to account for the temporary nature of the taking. In total, he valued the land taken by PennDOT at \$359,600.

To determine the fair market value of Condemnee's entire property, Lignelli used the income approach. Lignelli used the hotel's net income before the taking to produce a before-taking fair market value of the entire property of \$5,614,000. He used the hotel's net income after the taking, which was depressed, to produce an after-taking fair market value of \$3,065,000. Stated otherwise, the proximity of PennDOT's construction project caused Condemnee's remaining property to sustain indirect damages of \$2,549,000. The direct damages of \$359,600

and the indirect damages of \$2,549,000 together produced total damages of \$2,908,600.

In support of its challenge to the just compensation awarded by the Board of Viewers, PennDOT presented the testimony of four witnesses. They were Tejas Gosai, former part-owner of Condemnee and the nephew of Dr. Jayesh Gosai; Vincent Komacko, Jr., a PennDOT employee; Karel Cubick, a noise expert; and John Dudash, a certified real estate appraiser.

Tejas Gosai testified that Condemnee's property catered to the oil and gas industry. He testified that the decline in the oil and gas industry had affected the occupancy rates of all hotels in the area, including Condemnee's property. When PennDOT began construction of the new exit ramp, Condemnee's hotel property experienced an immediate decline in revenue. As construction continued, competitors saw their revenue recover, but the revenue at Condemnee's property continued to fall.

Cubick, a senior environmental planner with MS Consultants, testified about a sound study he did for PennDOT to project noise levels along Interstate 70 in anticipation of the interstate's widening. The study did not focus on noise at the hotel location. The report, conducted in accordance with the standards of the Federal Highway Administration, concluded that the noise from the increased traffic on Interstate 70 from the time of construction until 2038 would not exceed 72 decibels and, thus, did not warrant remediation.

Komacko, right-of-way administrator for PennDOT, testified that the purpose of the project was to improve the safety of Interstate 70. It did so by reducing conflict points at the entrance and exit from Interstate 70; widening the

travel lanes of Interstate 70 to accommodate truck traffic; and making safety improvements to the new interchange located on Condemnee's property.

Finally, PennDOT presented the testimony of its expert appraiser, Dudash, to offer an opinion on the pre-taking and post-taking fair market value of Condemnee's property. He valued the land that was subject to PennDOT's declaration of partial taking at \$355,000. He used the cost approach to value the permanent taking of land, parking area, asphalt and grass. He used a two-year rental value to value the temporary taking of the 0.856 acres of Condemnee's property for construction. Dudash agreed with Lignelli that the highest and best use of Condemnee's property was as a hotel use. However, Dudash did not believe that the construction project adversely affected that use of Condemnee's remaining property. In his view, access and visibility were the same before and after the condemnation, and he stated that proximity to a highway interchange is optimal for a hotel.

Dudash testified that he used the income approach to value Condemnee's property. He opined to a before-taking fair market value of \$5,792,000 and an after-taking fair market value of \$5,437,000. The difference between the two valuations was \$355,000, *i.e.*, the value of the land that was the subject of PennDOT's declaration for a partial taking.

Nevertheless, Dudash agreed that Condemnee's property had experienced a drop in occupancy rates and revenue; that a drop in the ADR decreases the fair market value of such a property; that the standard for just compensation is what a willing and informed buyer would consider the fair market value; that capitalization of income is used to determine the fair market value of any commercial property; and that room occupancy rates and revenue are used to establish the fair market value of real property put to a hotel use. Dudash did not consider these

factors in his valuation of Condemnee's property because, in his view, the loss of business income is not compensable under Section 1105 of the Eminent Domain Code, 26 Pa. C.S. §1105. Thus, Dudash used the hotel's before-taking revenue to do both his before-taking and after-taking valuation of Condemnee's property.

Jury Verdict

The jury awarded Condemnee \$355,000 in damages, the number offered by Dudash. In a post-trial motion, Condemnee asserted that the jury's verdict was grossly inadequate because it awarded zero damages for the injury to the fair market value of Condemnee's real property caused by the proximity of PennDOT's project and, further, the verdict had not been molded to include delay damages. The trial court denied Condemnee's post-trial motion, and Condemnee appealed to this Court. Condemnee then filed a timely statement of errors complained of on appeal. *See* PA. R.A.P. 1925(b).

In its Rule 1925(a)³ opinion, the trial court acknowledged that the record evidence established a decline in the occupancy of the hotel on Condemnee's remaining property, as had been predicted by Towers in his 2014 expert report. However, PennDOT's evidence, if believed, attributed this decline to a downturn in the oil and gas industry. In addition, the trial court observed that PennDOT's "noise expert opined that the ramp reconfiguration did not impact the noise level at the hotel." Trial Court Op., 10/1/2020, at 4. Finally, the trial court reasoned that the

³ Pennsylvania Rule of Appellate Procedure 1925(a)(1) states, in relevant part, as follows:

General rule. Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall within the period set forth in Pa. R.A.P. 1931(a)(1) file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

PA. R.A.P. 1925(a)(1).

jury chose to credit the just compensation award proposed by PennDOT's expert and to reject the just compensation award proposed by Condemnee's expert. With respect to delay damages, the trial court reasoned that molding the verdict was inappropriate for a post-trial motion because the damages are added at the time of payment.

Condemnee appealed to this Court.

Appeal

On appeal, Condemnee raises one issue for our consideration, *i.e.*, that the trial court erred and abused its discretion in denying its post-trial motion for judgment N.O.V. or for a new trial. The jury verdict limited just compensation to PennDOT's taking of two acres of Condemnee's land and awarded no damages for the injury to Condemnee's remaining property caused by the construction project, which involved, *inter alia*, the placement of heavy equipment on land adjacent to the hotel building for over two years.

Condemnee argues that the jury verdict was unlawful for two reasons. First, the opinion of PennDOT's expert appraiser, Dudash, was not competent because it was based upon the erroneous assumption that the Eminent Domain Code did not permit an accounting of the hotel's depressed revenue to inform the calculation of the after-taking value of Condemnee's real property. Dudash's opinion was also incompetent because he assumed, contrary to the evidence, that the proximity of PennDOT's construction did not affect Condemnee's remaining property. Second, the jury verdict cannot be sustained on the theory that a decline in the oil and gas industry was solely responsible for the hotel's loss of revenue because PennDOT's evidence did not support such a finding, and Condemnee's evidence refuted that possibility.

PennDOT counters that Dudash’s testimony was competent because a condemnee’s loss of business income is not compensable under the Eminent Domain Code. It rejoins that Lignelli’s opinion was not competent because he capitalized the hotel’s depressed revenue to opine on the after-taking fair market value of Condemnee’s property, which is prohibited by Section 1105 of the Eminent Domain Code.

A motion for judgment N.O.V. requests the court to direct a verdict in favor of the losing party despite a jury verdict to the contrary. *Green Valley Dry Cleaners, Inc. v. Westmoreland County Industrial Development Corporation*, 861 A.2d 1013, 1016 (Pa. Cmwlth. 2004). There are two bases upon which a judgment N.O.V. can be entered: (i) “the movant is entitled to judgment as a matter of law” or (ii) “the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of movant.” *Id.* In reviewing the trial court’s decision to deny judgment N.O.V., the appellate court “must consider the evidence, together with all favorable inferences to be drawn therefrom, in a light most favorable to the verdict winner.” *Stange v. Janssen Pharmaceuticals, Inc.*, 179 A.3d 45, 53 (Pa. Super. 2018), *reversed on other grounds*, 126 A.3d 895 (Pa. 2015). The record evidence is used “to decide if there was sufficient competent evidence to sustain the verdict.” *Parker v. Freilich, M.D.*, 803 A.2d 738, 744 (Pa. Super. 2002). A trial court’s grant or denial of a judgment N.O.V. will be set aside only where there has been an error of law or abuse of discretion demonstrated. *Stange*, 179 A.3d at 53.

The scope of review of the denial of a motion for new trial is broader than for the denial of a motion for judgment N.O.V. because the appellate court reviews all the evidence. *Parker*, 803 A.2d at 744. A new trial should be granted

only in “truly extraordinary circumstances,” *i.e.*, where the jury’s verdict is “so contrary to the evidence as to shock one’s sense of justice.” *Armbruster v. Horowitz*, 813 A.2d 698, 703 (Pa. 2002) (citation omitted). Stated otherwise, only where there has been “an error of law that controlled the outcome of the case” will a new trial be ordered. *Schuenemann v. Dreemz, LLC*, 34 A.3d 94, 99 (Pa. Super. 2011). Where the record does not support the trial court’s reasons for its denial of a motion for a new trial, the trial court’s decision will be reversed. *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000).

In an eminent domain proceeding, where the jury had the “advantage of its own view of the property in arriving at its verdict,” this advantage “must be given considerable weight by the appellate court.” *Wolfe v. Redevelopment Authority of the City of Johnstown*, 273 A.2d 923, 927 (Pa. Cmwlth. 1971) (affirming jury verdict as not excessive). Here, the Board of Viewers viewed Condemnee’s property during construction, and the jury viewed the property in 2019 after the construction was completed.⁴

After a view of the site, a jury may base its award of just compensation on its own judgment and may disregard the expert testimony entirely. *Borough of Tamaqua v. Knepper*, 422 A.2d 1199, 1201 (Pa. Cmwlth. 1980). The jury is free to

⁴ The Court questions whether the jury’s view of Condemnee’s property after the construction was completed is entitled to considerable weight. It matters not, here, because the jury’s verdict was based on Dudash’s testimony, not its own judgment.

Condemnee contends that the trial court erred because it did not consider the disparity between the Board of Viewers’ award and the jury’s verdict when it denied Condemnee’s post-trial motion. Notably, a trial court may consider the Board of Viewers’ award when ruling on a party’s motion for a new trial. *Tinicum Real Estate Holding Corporation v. Department of Transportation*, 389 A.2d 1034, 1037 (Pa. 1978). The trial court made no mention of the Board of Viewers’ award in its Rule 1925(a) opinion.

choose a valuation between those offered by the experts. *Morrissey v. Department of Highways*, 269 A.2d 866, 868 (Pa. 1970).

We conclude that the trial court erred in relying upon PennDOT's expert evidence as the basis to deny Condemnee's post-trial motion. The testimony of PennDOT's expert was not competent for the reasons herein explained. Given the lack of competent evidence to support the trial court's reasons for affirming the jury verdict, a new trial must be held. *Harman*, 756 A.2d at 1123.

Analysis

I. Eminent Domain Code

We begin with a review of the applicable legal principles. The Eminent Domain Code requires the payment of "just compensation" for the taking of real property. Just compensation consists of

the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market value of the property interest remaining immediately after the condemnation and as affected by the condemnation.

26 Pa. C.S. §702(a) (emphasis added). Just compensation measures "the entire property interest" before and after the condemnation "as affected by the condemnation." *Id.* The Eminent Domain Code defines "condemn" as follows: "[t]o take, injure or destroy property by authority of law for a public purpose." 26 Pa. C.S. §103 (emphasis added). It further explains that the "fair market value" of property is

the price which would be agreed to by a willing and informed seller and buyer, taking into consideration but not limited to the following factors:

- (1) The present use of the property and its value for that use.
- (2) *The highest and best reasonably available use of the property and its value for that use.*
- (3) The machinery, equipment and fixtures forming part of the real estate taken.
- (4) *Other factors as to which evidence may be offered as provided by Chapter 11 (relating to evidence).*

26 Pa. C.S. §703 (emphasis added).

In a partial taking of property, Section 706(a) of the Eminent Domain Code provides that the after-taking fair market value shall consider the damages to the remaining property. It states:

In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken.

26 Pa. C.S. §706(a) (emphasis added). To determine “the fair market value of the remaining property,” “consideration” must be given to the “damages or benefits affecting the remaining property due to its proximity to the improvement[.]” *Id.*

To determine the value that a “willing and informed seller and buyer” would assign to a property, expert testimony may be used, and the Eminent Domain Code provides instruction on the methodology for setting a fair market value. Section 1105(2)(iii) states:

- (2) A qualified valuation *expert* may, on direct or cross-examination, *testify in detail as to the valuation of the property on a comparable market value, reproduction cost or*

capitalization basis, which testimony may include, but shall not be limited to, the following . . .

(iii) *The capitalization of the net rental or reasonable net rental value of the condemned property*, including reasonable net rental values customarily determined by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises, *as distinguished from the capitalized value of the income or profits attributable to any business conducted on the premises of the condemned property.*

26 Pa. C.S. §1105(2)(iii) (emphasis added). In short, the “capitalization basis” for establishing the fair market value of the condemnee’s “entire property,” 26 Pa. C.S. §706(a), includes the “capitalization of the net rental or reasonable net rental value of the condemned property[.]” 26 Pa. C.S. §1105(2)(iii).

Notably, Section 1105(2)(iii) distinguishes the “capitalization of the net rental value” as a basis for valuing condemned property from the “capitalized value of the income or profits attributed to any business conducted on the premises of the condemned property.” *Id.* Income may be capitalized to set the fair market value of the condemned real property but not to set the value of “any business” conducted on the condemned property. *Id.* Treatise authority explains the difference. “[T]he loss of income to a business” may be used to determine the “effect of the condemnation on the real estate.” HERBERT BASS ET AL., SNITZER PENNSYLVANIA EMINENT DOMAIN, Appendix A-16 (2017). However, it cannot be used to value a business that leases the real property subject to condemnation. *Id.*

Section 1105(2)(iii) uses the phrase “capitalization of the net rental value,” which simply means capitalization of income. This was explained by the 1964 report of the Joint State Government Commission, which states as follows:

One of the basic methods of appraising property is to capitalize income attributable to the property. This method is generally not accepted by the courts, including the Pennsylvania courts, and consequently evidence thereof is excluded even though an expert appraiser insists that this approach is the only approach to ascertaining market value in a specific case. In many cases, this method of valuation would certainly be a factor which a willing, well-informed purchaser and seller would consider in reaching an agreement on a sales price. If an expert used this method, he should be permitted to so state and give his reasons therefor and a breakdown thereof. Only the reasonable net rental value of the property itself may be capitalized. The income or profits of any business conducted on the property may not be capitalized to show the value of the property; this is in accord with existing Pennsylvania law.

26 Pa. C.S. §1105, Comment, Subdivision (2)(iii) (emphasis added). Noting that income capitalization is “generally not accepted by the courts,” the report nevertheless suggested that an expert who uses “this method [] should be permitted to so state and give his reasons therefor.” *Id.*

Since 1964, when the Joint State Government Commission issued its report, Pennsylvania courts have routinely accepted the capitalization of income approach to set the fair market value of commercial real property in many contexts. *See, e.g., Cedarbrook Realty, Inc. v. Cheltenham Township*, 611 A.2d 335, 343 (Pa. 1992); *In Re Appeal of/Property of Cynwyd Investments*, 679 A.2d 304, 308 (Pa. Cmwlth. 1996); *Appeal of V.V.P. Partnership*, 647 A.2d 990, 992-93 (Pa. Cmwlth. 1994). The “income approach” is the common “method of appraising real property based on *capitalization of the income that the property is expected to generate.*” BLACK’S LAW DICTIONARY 914 (11th ed. 2019) (emphasis added). This is because a real property’s ability to generate income determines the price a willing and informed buyer will pay for the property. *V.V.P. Partnership*, 647 A.2d at 992-93.

Under the income approach, “the annual net rental income expected from the property is divided by the investment rate of return, or capitalization rate,” to arrive at the fair market value of the real property. *Cynwyd Investments*, 679 A.2d at 308.

The case law precedent is instructive on these principles.

In re Urban Redevelopment Authority of Pittsburgh (Pittsburgh Outdoor Advertising Corporation), 272 A.2d 163 (Pa. 1970), addressed the valuation of a business tenant’s leasehold interest, which was affected by a condemnation of the building it occupied. Specifically, the tenant was a billboard business that had leased the roof and exterior wall of a building that was condemned by the Redevelopment Authority of Pittsburgh. At the time of the condemnation of the building, three years and seven months remained on the lease. The tenant sought just compensation for the loss of its leasehold interest, arguing that its business income over three years constituted a “net rental” value under the Eminent Domain Code.⁵ The Supreme Court rejected this argument. It explained that income attributable to the location of the signs should be reflected only in the fair market value of the real property subject to the condemnation. The Supreme Court further stated:

The problem of rental versus business income of a lessor of condemned property as it relates to the permissible scope of expert testimony under the [Eminent Domain] Code is important and relevant in the valuation of a condemned [f]reehold which is subject to lease, but not to the valuation of a condemned [l]easehold. *The law of Pennsylvania has long been that the value of a condemned leasehold interest is the difference between the fair rental value of the leased premises and the rent actually*

⁵ Notably, *Pittsburgh Outdoor Advertising Corporation* involved Section 705 of the Eminent Domain Code, Act of June 22, 1964, Special Session, P.L. 84, *as amended, formerly* 26 P.S. §1-705, repealed by the Act of May 4, 2006, P.L. 112, the precursor to 26 Pa. C.S. §1105(2)(iii). Substantively, Section 1105(2)(iii) is the same as its precursor.

reserved in the lease. Getz v. Philadelphia [and] Reading Railroad Company, 105 Pa. 547 (1884); Snitzer, Pennsylvania Eminent Domain Code, [§] 201(2)-9. Put another way, if the fair rental value of the premises at the time of the taking is greater than the rent being paid under the terms of the lease, this difference, projected over the life of the lease and discounted to present net worth, represents the value of what has been taken. This “fair market value” test has remained the law, and has not been altered by the Eminent Domain Code.

Pittsburgh Outdoor Advertising Corporation, 272 A.2d at 165 (emphasis added).

In *Pittsburgh Outdoor Advertising Corporation*, the condemnor’s expert valued the tenant’s leasehold interest based upon the amount of rent being paid by the tenant to occupy the condemned building, or \$300 per year. The tenant did not suffer any other loss from the condemnation because the tenant could “obtain a lease of a comparable location for the same amount of rent, construct its billboards at that location with the award for the replacement value of the billboards and realize an identical income flow.” *Id.*

Morgan Signs, Inc. v. Department of Transportation, 723 A.2d 1096 (Pa. Cmwlth. 1999), also concerned the valuation of a leasehold interest. There, PennDOT condemned real property that was developed with five outdoor advertising signs. The tenant and owner of the outdoor signs, Morgan Signs, could not relocate the signs to another place in the township because of zoning restrictions. To establish the fair market value of its leasehold interest, Morgan Signs capitalized its business income to produce a valuation of \$130,106, which the trial court awarded as just compensation for the taking of its leasehold interest. This Court reversed.

Referring to the 1964 Joint State Government Commission report, this Court explained that income cannot be capitalized to establish the value of a

leasehold interest. Citing *In re Right of Way for State Route 0060 (Patrick Media Group)*, 720 A.2d 154 (Pa. Cmwlth. 1998), this Court explained how a leasehold interest is valued in a condemnation:

Where a leasehold interest has been taken, just compensation is the difference between the fair rental value of the leased premises and the rent actually reserved in the lease. *The value of this differential is typically referred to as the “bonus value” of the lease because if the fair rental value at the time of the taking is greater than the rent being paid by the lessee, the lessee is receiving a bonus under the terms of the lease.* This bonus, projected over the remaining term of the lease and discounted to its present worth, constitutes damages which the lessee is entitled to recover. In other words, the measure of damages is the amount that anyone would pay for the unexpired term over and above the rent and other charges fixed in the contract of the lease. While the measure of “bonus value” may not justly compensate a condemnee where only a partial taking is involved, this approach is the method of valuation where an entire leasehold interest has been condemned.

Morgan Signs, 723 A.2d at 1099 (citations omitted) (emphasis added). Stated otherwise, if the tenant’s lease calls for a rental amount that is favorable to the tenant, the compensation owed by the condemnor is limited to that “bonus” value. *Id.* In the obverse situation, *i.e.*, where the condemnation allows the tenant to exit a lease with unfavorable rental terms, the tenant does not experience a loss but, rather, a benefit. In no case is the tenant entitled to compensation for the loss of its business income because the business, an intangible property, can be moved to new quarters.

In *Morgan Signs*, this Court further explained that the Eminent Domain Code now provides special damages for those with a leasehold interest in real property that is condemned. It stated:

The law in this Commonwealth is well settled that income flow evidence is inadmissible in determining the just compensation for property subject to condemnation. Additionally, *because the [Eminent Domain] Code clearly provides a method of compensation to those property owners who are unable to relocate their property*, we find that the trial court committed an error of law when it allowed income flow evidence to support Morgan's claim for damages on the basis of Morgan's inability to relocate the advertising devices due to zoning restrictions.

Morgan Signs, 723 A.2d at 1099 (emphasis added). The authorization of special damages for the displacement of a business is set forth in Chapter 9 of the Eminent Domain Code. 26 Pa. C.S. §§901-907. Special damages include, for example, the recovery of moving expenses. *See* 26 Pa. C.S. §902(a)(1).

These cases establish that the value of a condemned leasehold interest is based on the difference between the value of the rental property and the rent required by the lease. *Pittsburgh Outdoor Advertising Corporation*, 272 A.2d at 165. The leaseholder's loss of income is not part of this valuation because its business can be moved. *Id.* Even where the business cannot be moved, the value of the condemned leasehold interest is based on the value of the lease, not the value of the business holding the lease. *Morgan Signs*, 723 A.2d at 1099. Rather, the tenant's compensable losses are those covered by special damages. *See, e.g.*, 26 Pa. C.S. §902(a)(1).

Deer Creek Drainage Basin Authority v. Pacoma, Inc., 487 A.2d 1033 (Pa. Cmwlth. 1985), considered a condemnation that involved a partial taking of real property. There, a sewer authority condemned part of a public golf course for the construction of a sewer line. The construction produced noise and dust; caused the removal of trees; and required the placement of manholes within the playing area of the golf course. To demonstrate the impact of the construction on its remaining

property, the condemnee introduced evidence of the difference in gross receipts before, during and after the condemnation. Over the sewer authority's objection, the trial court admitted this evidence. This Court affirmed the trial court.

We explained that the gross receipts were not offered as a separate item of damages but, rather, to show that the “after value was adversely affected by the loss of patronage[.]” *Id.* at 1035. Stated otherwise, the evidence demonstrated “*the claimed loss of patronage due to the installation and presence of the sewer.*” *Id.* at 1034 (emphasis added). This Court explained that

loss of business is a factor to be considered in determining the depreciation of the market value of a property. Section 602 of the Eminent Domain Code⁶ . . . provides that just compensation shall consist of the difference between the fair market value of the condemnee's property interest before the condemnation and as unaffected thereby and the fair market value of his property remaining immediately after such condemnation and as affected thereby. Section 705(1), [formerly] 26 P.S. § 1-705(1)[,] permits the statement of evidence of all facts and data touching on value.

Deer Creek, 487 A.2d at 1035 (emphasis added). *Deer Creek* established that business income should be used when establishing the after-taking fair market value of real property that suffers an injury from the proximity of the condemnor's project.

In sum, the Eminent Domain Code expressly allows the use of the income approach to determine the fair market value of income-producing real property. 26 Pa. C.S. §1105(2)(iii). However, the income approach cannot be used to establish the value of a leasehold interest of any tenant conducting a business on the real property subject to the condemnation.

⁶ Notably, Section 602 of the Eminent Domain Code, Act of June 22, 1964, Special Session, P.L. 84, *as amended*, formerly 26 P.S. §1-602, repealed by the Act of May 4, 2006, P.L. 112, was the precursor to 26 Pa. C.S. §702(a).

II. Expert Valuation of Bentleyville Garden Inn, Inc.

In its first argument, Condemnee argues that the testimony of PennDOT's expert appraiser, Dudash, was incompetent. First, Dudash based his opinion upon an erroneous interpretation of Section 1105 of the Eminent Domain Code. Second, PennDOT's taking as of March 16, 2015, depreciated the fair market value of Condemnee's real property because the property lost the ability to generate income at the pre-taking levels. Dudash erred in giving no consideration to the effect of the project on Condemnee's remaining property put to a hotel use. Third, Dudash assumed facts not in evidence.

Dudash agreed with Condemnee's expert appraiser, Lignelli, that the highest and best use of Condemnee's property was as a hotel and that income capitalization was the appropriate method for determining the fair market value of Condemnee's property. It is clear, however, that Dudash did not use the income approach to opine on the after-taking fair market value of Condemnee's property. Dudash testified as follows:

So I am going to walk through the exact same steps I did in the before. But now I am going to consider the area. Instead of being 5.902 acres, it's now 4.762 acres. We lose some land; we lose some parking area, some asphalt, some grass. I am going to value it as if those items are not there. In addition, we have that temporary construction easement, so I am going to assign a rental there. Basically, I am going to deduct the cost that a knowing user would have to pay to lease that ground before they give it back to you.

Notes of Testimony (N.T.), 10/23/2019, at 95; Reproduced Record (R.R.) at 333a. In calculating his after-taking value of Condemnee's property, Dudash stated that he did not consider "damages related to business loss" caused by the highway project

because he believed that loss not to be compensable. N.T., 10/23/2019, at 103; R.R. 341a. Dudash erred in several respects.

First, Dudash was mistaken that the Eminent Domain Code did not permit him to consider the hotel's depressed revenue to calculate his after-taking valuation of Condemnee's property. To the contrary, the statute expressly authorizes a valuation on the basis of a "capitalization of the net rental or reasonable net rental value of the condemned property" 26 Pa. C.S. §1105(2)(iii). This is distinguished from the capitalization of "income or profits" of a business conducted by a tenant. *Id.* Dudash did not understand the distinction, and neither does PennDOT. It directs the Court to *Morgan Signs*, 723 A.2d at 1096, which concerned the valuation of a leasehold interest, not the valuation of real property. PennDOT elides the *authorization* of capitalizing income to value real property with the *prohibition* against capitalizing income to value a leasehold interest. 26 Pa. C.S. §1105(2)(iii). They are different. *See also* SNITZER PENNSYLVANIA EMINENT DOMAIN, Appendix A-16. So long as income is capitalized for the valuation of real property this methodology is expressly authorized by Section 1105(2)(iii) of the Eminent Domain Code. As in *Deer Creek*, Condemnee's after-taking revenue decline was not offered as a separate item of damages but to show the depreciation in the after-taking fair market value of Condemnee's property.

Second, Dudash did not consider the "*damages or benefits specially affecting the remaining property* due to its proximity to the improvement for which the property was taken," as required by Section 706(a) of the Eminent Domain Code, 26 Pa. C.S. §706(a) (emphasis added). Instead, Dudash assumed that damages to Condemnee's remaining property could not be considered because PennDOT's construction project was temporary in nature. Again, he was mistaken. The ramp

itself was permanent, and the disruption caused by the almost three-year construction project was lasting in its effect. Dr. Gosai explained that the construction project caused “a nice thriving business” to become completely unprofitable; it is now a building that “requires a lot of money for the upkeep but no profit” and is “a very speculative investment for anybody who would buy this hotel.” N.T., 10/22/2019, at 47-48; R.R. 59a-60a. Tejas Gosai and Kadash confirmed that even after the construction ended, the property’s revenue did not improve; the harm to the hotel has been “long-term.” N.T., 10/22/2019, at 81-82, N.T., 10/23/2019, at 22; R.R. 93a-94a, 260a.

As was established in *Deer Creek*, 487 A.2d at 1035, the loss of revenue before, during, and after construction is relevant to establish the damages to Condemnee’s remaining property put to a hotel use. There is no evidence, or contention, that PennDOT’s “improvement” produced a benefit for purposes of 26 Pa. C.S. §706(a).

By contrast, Lignelli’s after-taking value considered the property identified in PennDOT’s declaration of taking as well as the impact upon Condemnee’s remaining property caused by the proximity of PennDOT’s “improvement” to Interstate 70. Lignelli explained:

[t]he indirect damage was the loss of net income, which when you lose net income, you lose value. If that property is producing less money, bringing in less money, it’s worth substantially less on the after value.

N.T., 10/22/2019, at 192; R.R. 204a. He further explained that Condemnee’s property is

making less money. The net income has been reduced . . . net income equals value. . . it’s just like us. If we – one year we make

\$100,000 a year, the next year we make \$50,000 a year, our life is probably not going to be the same. Same thing when it comes to value. If you're making half as much as you were making before, your property probably reduced by 50[%] in value.

N.T., 10/22/2019, at 192-93; R.R. 204a-05a. Lignelli testified that willing and informed buyers and sellers are

looking at the return on their investment. The money that they have to put up, they want to see what the return is, how much they are going to get back, and that's how they base value. That's the same way an appraiser bases value.

N.T., 10/22/2019, at 198; R.R. 210a. Consistent with Sections 706(a) and 1105 of the Eminent Domain Code, Lignelli capitalized the revenue generated by Condemnee's property to opine on the pre-taking and after-taking fair market value of Condemnee's entire property, which included both the loss of land and the impact of PennDOT's improvement upon Condemnee's remaining property.

PennDOT argues that under Lignelli's methodology, Condemnee will "recover the loss of income arising from the alleged loss of business attributed to the construction project." PennDOT Brief at 18. We disagree. As Lignelli stated, he considered the loss of income to determine the change in the "*value of the property.*" N.T., 10/22/2019, at 191-92; R.R. 203a-04a (emphasis added). Lignelli's approach is fully consistent with Section 1105(2)(iii) of the Eminent Domain Code and *Deer Creek*.⁷

PennDOT also complains that Lignelli used revenue data too remote in time, *i.e.*, from 2016 through 2018. It contends that the taking took place on March

⁷ The Board of Viewers credited Lignelli's expert report and Dr. Gosai's testimony to establish its award of \$2,908,600. Board of Viewers' Report, 9/12/2017, at 3. The Board of Viewers stated that "[t]he taking does impact the overall value of the site and hotel operations." *Id.*

16, 2015, when PennDOT paid Condemnee what it considered to be just compensation. One year later, in March of 2016, PennDOT broke ground for the project. PennDOT asserts that Section 702 of the Eminent Domain Code requires just compensation to be based on the fair market value of the real property “immediately before” and “immediately after” the taking.⁸ PennDOT Brief at 16. In support, PennDOT cites *In re Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right of Way for State Route 79, Section W10*, 798 A.2d 725 (Pa. 2002) (*State Route 79*).

In *State Route 79*, PennDOT filed a declaration of partial taking in 1993 for 12 acres of the condemnee’s property, which left 32 acres remaining. The condemnee argued that PennDOT’s taking landlocked the remaining property. In 1997, while the litigation for the 1993 condemnation was proceeding, PennDOT filed another declaration of taking to condemn land needed for a driveway to provide access to the condemnee’s land. The Supreme Court held that evidence of the 1997 taking was not admissible in the litigation on the 1993 taking because the term “immediately” used in Section 602(a) of the Eminent Domain Code⁹ “literally allows for no lapse between the taking and the point at which a condemnee’s remaining property is valued.” *State Route 79*, 798 A.2d at 734.

⁸ Section 702(a) states that just compensation is the difference between the fair market value of the condemnee’s “*entire property interest immediately before the condemnation*” and “*immediately after the condemnation.*” 26 Pa. C.S. §702(a) (emphasis added). Notably, the term “condemnation” includes the injury to the entire property, *i.e.*, the property remaining. 26 Pa. C.S. §103 (condemn is “[t]o take, *injure or destroy property* by authority of law for a public purpose” (emphasis added)).

⁹ Former Section 602 of the Eminent Domain Code, repealed by Act of May 4, 2006, P.L. 112, was the precursor to 26 Pa. C.S. §702(a). *See supra* note 6.

State Route 79 is distinguishable. The instant case does not involve two consecutive condemnations. In any case, PennDOT's taking had an immediate impact on Condemnee's remaining property.

We will assume that PennDOT's taking occurred on March 16, 2015, when it paid Condemnee, even though PennDOT did not break ground for one more year. When Towers performed his study in 2014, he projected a significant decline in the ADR to result from PennDOT's improvement that would adversely impact the "income that the property is expected to generate." BLACK'S LAW DICTIONARY 914 (11th ed. 2019) (definition of "income approach"). The ADR data for the years 2016 to 2018 largely confirmed Towers' projections and, therefore, are relevant. Simply, on March 16, 2015, an informed buyer would have used Towers' projections or something similar to determine the investment value of Condemnee's property, at a time when Condemnee was scheduled to lose the use of 30% of its land; to have trucks and heavy equipment parked thereon for at least two years; and to have the grassy field serving as a buffer from the highway converted into a new roundabout for the exit. PennDOT's taking was not a secret. The project became public knowledge on January 14, 2015, when PennDOT filed its declaration of partial taking, and it would have been considered by any willing and informed buyer trying to estimate the expected income from Condemnee's property. We reject PennDOT's challenge to Lignelli's opinion, which conformed to Section 702(a) of the Eminent Domain Code.

Condemnee also challenges Dudash's statement that the hotel's access and visibility did not change "substantially" and, thus, PennDOT's "improvement" did not figure into his opinion. N.T., 10/23/2019, at 96; R.R. 334a. "Opinion testimony must be based on either the expert[']s own knowledge of the facts or upon

testimony [provided] by other witnesses.” *Earlin v. Cravetz*, 399 A.2d 783, 785 (Pa. Super. 1979). Here, the facts assumed by Dudash were directly contradicted by Condemnee’s evidence, and PennDOT did not provide any contrary evidence.

Dudash viewed the property once during construction, in July 2017. He also examined the recorded plan that showed the property boundaries and the location of the improvements. Simply, Dudash did not testify from his own knowledge of how PennDOT’s activities affected Condemnee’s property during the construction, which started in March of 2016 and ended in November of 2018. His statement that access was unchanged, for example, is inaccurate.

The uncontradicted evidence shows that before construction, Gosai Drive provided access to the hotel. After the construction started, Wilson Road provided access to the hotel parking lot, behind the hotel, which caused the entrance and exit from the hotel to be “complicated and confusing to the guests.” N.T., 10/22/2019, at 62; R.R. 74a. These new traffic patterns around the hotel were difficult to navigate. The construction occurred next to the hotel’s entrance, and part of the hotel’s parking lot was closed to accommodate the cranes, bulldozers, cement trucks, and earth movers. Cement was mixed on-site next to the hotel’s parking lot, generating excessive dust. It is inescapable that the highway project affected Condemnee’s remaining property put to a hotel use. Dudash’s assumptions that the project did not affect access or visibility to the property’s hotel are not supported by the record.

We conclude that Dudash’s opinion was incompetent. He erred in assuming that a decline in the hotel revenue, whether projected or actual, could not be used to do an after-taking fair market value of Condemnee’s property and by limiting the damages to the partial taking. The only competent expert testimony on

the fair market value of Condemnee's property was that of Lignelli. He properly capitalized the revenue generated by the property to establish his after-taking value and considered the injury to Condemnee's remaining property.

In not awarding any damages for injury to Condemnee's remaining property put to a hotel use, the jury relied solely upon Dudash's valuation, which was incompetent. Accordingly, the jury's verdict cannot stand.

III. Causation for Condemnee's Loss of Revenue

In its second issue, Condemnee asserts that the evidence of record did not demonstrate that the decline in the oil and gas industry caused the decline in revenue experienced by Condemnee. In his testimony, Tejas Gosai acknowledged telling a journalist that the downturn in the oil and gas industry had affected the hotel business. Condemnee notes, however, that these remarks addressed the experience of all hotels in the relevant geographic region. Further, the press interviews occurred before PennDOT broke ground and without the benefit of industry data. "It is absurd to believe that any decline in the oil and gas industry affected only one hotel in the geographic region." Condemnee Brief at 29. PennDOT counters that the jury chose to accept this testimony, which was its right to do.

In its opinion, the trial court cited Tejas Gosai's response to a question by PennDOT's counsel. The question concerned a press article published in May 2016 entitled "Gosai Takes More Bearish Stand on His Hotels that Cater to Drillers." N.T., 10/23/2019, at 29; R.R. 267a. Tejas Gosai testified:

[PennDOT's counsel]. And did you specifically tell the journalist that when oil and gas production was going full board, you had [] almost full occupancy rates, but that the downturn in the drilling cut into your business?

[Tejas Gosai]. *I said a lot of that.* And if I can respond, it was great.

The Court: No. The question is, did you say that to them?

[Tejas Gosai]. I said something to the person who wrote this article. What was published may or may not have been what I said to them.

N.T., 10/23/2019, at 29-30; R.R. 267a-68a (emphasis added). Tejas Gosai further testified as follows:

[PennDOT's counsel]. And then in that article, did you also say, "We lost maybe 25[%] occupancy in 180 days"?

[Tejas Gosai]. When the construction started. Yeah.

[PennDOT's counsel]. And so did you also say, "For ten years, we slowly went up to 90[%]. In some nights, we were over 100[%] capacity. Sadly, this isn't happening now"? You can look at the article. It's in quotations. Is that in quotations in the article?

[Tejas Gosai]. It is. But then again, *I don't know exactly what I said, and none of this is factoring in and talking about the construction that took place.*

N.T., 10/23/2019, at 30; R.R. 268a (emphasis added). Under oath, Tejas Gosai explained that it was PennDOT's construction that caused the loss of "a ton of business – a ton of business that never came back." N.T., 10/23/2019, at 37; R.R. 275a.

Tejas Gosai testified that Condemnee's decline in revenue was permanent and solely caused by PennDOT's taking. Notably, PennDOT presented no evidence on when the decline in the oil and gas industry took place or how that decline affected Condemnee's revenue.

By contrast, Condemnee presented evidence to show that PennDOT's taking caused an immediate decline in the hotel's occupancy. After construction ended in November 2018, the hotel's performance continued to be depressed, but the performance of its competitors improved. The only variable to explain this difference in performance is the permanent damage to Condemnee's remaining property caused by PennDOT's construction project that lasted over two years.¹⁰

PennDOT did not rebut Condemnee's evidence that the decline in the property's net rental value related solely to PennDOT's highway improvement project, and it did not present evidence that would support the inference that the oil and gas industry was solely responsible for this revenue decline. If the jury believed this to be the case, that belief was contrary to the evidence. PennDOT's sole witness, Tejas Gosai, testified otherwise, *i.e.*, that it was the taking that caused this injury to Condemnee's property. Accordingly, the jury's verdict cannot stand.

Conclusion

We conclude that the trial court erred and abused its discretion by denying Condemnee's motion for a new trial. The after-taking valuation of Condemnee's property offered by PennDOT's expert was not competent or based on evidence in the record. As a result, the trial court erred in relying on PennDOT's expert, whose opinion controlled the outcome of the case. Likewise, PennDOT did not offer any evidence that the decline in revenue experienced by Condemnee's

¹⁰ Condemnee challenges the trial court's statement that PennDOT's "noise expert opined that the ramp reconfiguration did not impact the noise level at the hotel." Trial Court Op., 10/1/2020, at 4. Condemnee points out that this expert, Cubick, did a study of the long-term noise impact of PennDOT's widening of Interstate 70 to determine whether noise remediation was required. We agree that Cubick did not study construction noise or its impact upon the hotel's appeal to customers. However, the accuracy of the trial court's characterization of Cubick's opinion is irrelevant to whether Dudash's opinion was competent or whether the jury had evidence that the decline in Condemnee's revenue was caused solely by the decline in the oil and gas industry.

property was attributed to a decline in the oil and gas industry, and it did not rebut Condemnee's evidence that the decline in revenue at Condemnee's property was attributed solely to PennDOT's taking. Given the lack of evidence to support the trial court's reasons for affirming the jury verdict, a new trial is warranted on the amount of just compensation owed by PennDOT.

Accordingly, we reverse the trial court's order denying Condemnee's motion for a new trial and remand this matter to the trial court for a new trial.¹¹

MARY HANNAH LEAVITT, President Judge Emerita

¹¹ Because the trial court erred and abused its discretion in denying Condemnee's motion for a new trial, we need not address Condemnee's request for judgment N.O.V.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by the :
Commonwealth of Pennsylvania, :
Department of Transportation of :
Right-of-Way for State Route 00700, :
Section 21H, in the :
Borough of Bentleyville :
 :
 :
v. : No. 703 C.D. 2020
 :
 :
Bentleyville Garden Inn, Inc. :
c/o Kamlesh B. Gosai, President, :
Appellant :

ORDER

AND NOW, this 1st day of October, 2021, the June 25, 2020, order of the Washington County Court of Common Pleas (trial court) is REVERSED, and the matter is REMANDED to the trial court to hold a new trial on the matter.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, President Judge Emerita