

IN THE SUPREME COURT, STATE OF FLORIDA

HOULIHAN'S RESTAURANTS, INC.,  
D/B/A DARRYL'S,

Petitioner,

v.

CASE NO. SC05-1964  
CASE NO. 1D03-4755

APAC-FLORIDA, INC., A DELAWARE  
CORP., ET AL.,

Respondent.

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**CNL APF PARTNERS, L.P.'S ANSWER BRIEF TO  
INITIAL BRIEF OF PETITIONER,  
HOULIHAN'S RESTAURANTS, INC.**

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ON APPEAL FOR REVIEW OF A DECISION OF THE  
FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA  
CASE NO. 1D03-4755

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## PRELIMINARY STATEMENT

For purposes of Respondent CNL APF Partners, LP's "Answer to Initial Brief of HOULIHAN'S Restaurants, Inc.," the following symbols will be utilized: "A" shall refer to the Appendix accompanying the "Answer to Initial Brief of HOULIHAN'S Restaurants, Inc." "R" shall refer to the Record on Appeal. Reference shall be made to the record volume and appropriate page number. Example: R-V3:135 refers to volume 3, page 135.

The Petitioner, HOULIHAN'S RESTAURANTS, INC., shall be referred to as the Petitioner or HOULIHAN'S. The Respondent, CNL APF PARTNERS, INC., shall be referred to as the Respondent or CNL.

The decision of the lower tribunal is reported as Houlihan's Restaurants, Inc. v. APAC-Florida, Inc., et al., 911 So.2d 816 (Fla. 1st DCA 2005).

All emphasis and bracketed insertions are provided unless otherwise noted.

## STATEMENT OF THE CASE AND FACTS

The facts stated in Petitioner's Initial Brief leading up to the apportionment hearing accurately set forth what occurred. At the apportionment hearing, the trial court was called upon to apportion equitably between the landlord, CNL, and the tenant, HOULIHAN'S, the amount of \$1,100,000, paid by the Florida Department of Transportation based upon a mediated settlement.

At the apportionment hearing, the trial court heard testimony from expert real estate appraisers for CNL and HOULIHAN'S. The trial court also received into evidence a copy of the lease agreement between CNL and HOULIHAN'S. (R-V5: 640-668) After hearing the evidence of each side's expert witness and reviewing the pertinent language of the lease agreement, the trial court issued its Final Judgment of Apportionment Regarding Condemnation Proceeds, which accepted with one modification, the valuation analysis of CNL's expert appraiser. (R-V5: 695-700)

The full text of pertinent language of the lease agreement is found in the Record on Appeal and a synopsis is as follows:

### 6. CONDEMNATION

(a) In the event that the whole or any material part of the building on the Premises or such a material portion of the land (for purposes hereof, "material" shall mean more than 20% of the building on the Premises or more than 40% of the land or more than 20% of the parking available on the Premises) shall be taken during the term of this Lease or any extension or renewal thereof for any public or quasi-public use under any governmental law, ordinance, regulation or

by right of eminent domain, or shall be sold to the condemning authority under threat of condemnation ... Tenant shall have the option of terminating this Lease as of a date no earlier than the date of such taking

\* \* \*

(b) In the event of any taking which does not give rise to an option to terminate or in the event of a taking which does give rise to an option to terminate and Tenant does not elect to terminate, Landlord shall make its award available to Tenant and Tenant shall, to the extent of the award from such taking (which word "award" shall mean the net proceeds after deducting reasonable expenses of any settlement, or net purchase price under a sale in lieu of condemnation ["net purchase price" meaning the gross purchase price, less reasonable expenses] but shall exclude the value of Landlord's reversionary interest), promptly restore or repair the Premises

\* \* \*

(d) **If this Lease is terminated by reason of a taking, all damages awarded or sums paid in respect of a taking will become the property of Landlord and Tenant, respectively, as their interests appear immediately prior to the time of such taking.** (R-V5: 646-646)

\* \* \*

## 17. ASSIGNMENT AND SUBLETTING

(a) Tenant shall have the full and free right to sublet, assign, or otherwise transfer its interest in this Lease and the Premises, without Landlord's approval, to: ... (ii) a **nationally or regionally recognized restaurant chain** where the chain has **not less than three (3) years prior operating experience with the same chain and concept**, and where the chain has the **financial capability** to pay all debt service obligations, **conversion costs** and rent payments as they come due

\* \* \*

(b) In connection with any assignment or subletting of the Premises by Tenant, **Tenant shall pay to Landlord all Annual Rent and Percentage Rent due under this Lease as received from any assignee of Tenant or sublessee of the Premises, together with twenty-five percent (25%) of any increase in rental payments received by Tenant** or on Tenant's behalf over and above the Annual Rent and Percentage Rent due under this Lease. (R-V5: 652)

CNL's expert real estate appraiser, Stephen Matonis, performed a full appraisal of the subject property, both before and after the taking. He valued the entire parcel before the taking at \$2.2 million and rendered an opinion that the value of the taking, along with severance damages, was \$1,645,000. (R-V4: 475-476) He testified that after the taking the remainder property had a value of \$625,000. (R-V4: 476)

As a part of his appraisal, CNL's expert did a study of market rent in the vicinity of this restaurant property. (R-V4: 478-479) In this study, Mr. Matonis determined that market rent for this type of restaurant was approximately \$25/sq. ft. (R-V4: 477) He testified that his method for calculating the leasehold value was based on whether or not the tenant had a rental advantage, that is, whether the lease rent rate is below the market rent rate. This was true in the instant case, with the lease rent rate being \$12.66/sq. ft. (R-V4: 478)

Mr. Matonis further testified that it was essential that the lease allow the tenant to sublet the premises in order to be able to realize this advantage in the marketplace and for the rental advantage to translate into a true market value.



(R-V4: 479-482) Therefore, he testified that the paragraph permitting subletting, with certain restrictions, found in the lease between CNL and HOULIHAN'S was essential to his analysis. (R-V4: 479)

He testified that in his view the important aspects of the subletting paragraph in the lease were:

- I. That the premises could only be sublet to a "nationally or regionally recognized restaurant chain where the chain has not less than three (3) years prior operating experience with the same chain and concept, and where the chain has the financial capability to pay all debt service obligations, conversion costs and rent payments as they come due;" and
- II. That HOULIHAN'S must pay over 25% of any increase in rental payments it received from a sublessee over and above the rent that it must pay to CNL under that lease. (R-V4: 479-482)

Using the rental advantage that HOULIHAN'S had under the lease, the difference between the \$25/sq. ft. market rent and the \$12.66/sq. ft. lease rent, Mr. Matonis calculated the amount that HOULIHAN'S, as tenant, could expect to receive for the entire 186 months that it had remaining on its lease term. Mr. Matonis made it clear that he was valuing the interest of HOULIHAN'S prior to the taking and as if the taking had never occurred. (R-V4: 483-484)

Mr. Matonis explained that he adhered to the paragraph in the lease which stated that any sums paid as a result of condemnation become property of landlord and tenant respectively as their interests appeared immediately prior to the time of

such taking. This meant that his valuation of HOULIHAN'S leasehold interest would have been as of the date December 11, 2001. Mr. Matonis explained his approach and its date of valuation, saying "as of the 11th of December, 2001, what interest in that physical real estate did the two participants in the physical real estate have, again, we have two participants, we have a leased fee participant and a leasehold participant." (R-V4: 484)

Mr. Matonis's calculations included a 25% deduction from the rental increase from the lease rate to the market rate and a deduction for costs and delays associated with the conversion of the restaurant for use by a sublessee. (R-V4:484-490) These modifications were necessary to account for the restrictions on subletting contained in the lease. Mr. Matonis stated that these costs and delays would be required in the real world if HOULIHAN'S were to sublease this premises to a national or regional restaurant chain. The conversion cost, which Mr. Matonis testified was an estimate he had received from a contractor familiar with restaurant construction and conversion, was \$400,000. Additionally, Mr. Matonis stated that it was his opinion that there would be a six month delay in the receipt of any rent by HOULIHAN'S because of the time needed for finding a new tenant and converting the building to a new use. (R-V4: 484-495)

Mr. Matonis testified that the net present value of HOULIHAN'S leasehold interest was \$240,000. He then took this value as a percentage of the total value of

the entire property before the taking, \$2.2 million. This yielded a percentage of 10.81%, that being the percentage interest of the tenant in the entire property. That is, the percentage that represents the tenant's leasehold interest out of the entire fee simple. He applied this percentage to the total amount awarded in compensation and damages of \$1.1 million for a value of \$119,790 as HOULIHAN'S interest in the settlement proceeds. (R-V4: 485-491)

In its Final Judgment Regarding Apportionment of Condemnation Proceeds, the trial court accepted most of Analysis I of CNL's expert. (R-V5: 695-700) The one exception is that the trial court found that the value of the property remaining to CNL after the taking needed to be factored into the calculation of CNL's leased fee and HOULIHAN'S leasehold interest. (R-V5: 697) The trial court referred to this property as the reversion, although it used the value assigned to by CNL's appraiser to the property remaining after the taking, \$625,000. The present value of the reversion, the property that CNL would have gotten back if the lease had run its full term, was estimated by HOULIHAN'S appraiser to be \$311,584 (R-V4:548)

The trial court accepted Mr. Matonis's conclusion that in order for HOULIHAN'S to realize its leasehold advantage and convert that into a market value, HOULIHAN'S would need to sublease the property. (R-V5: 695-700) Following Mr. Matonis's calculations, the trial court simply deducted from

Mr. Matonis's value before the taking, \$2,200,000, the value of the remainder property, which Mr. Matonis had testified was \$625,000. (R-V5: 476) This left a value of \$1,575,000. Therefore, the trial court determined what percentage HOULIHAN'S leasehold interest of \$240,000 was of \$1,575,000. The court concluded this was 15.24% and applied that percentage to the total recovery of \$1,100,000, awarding HOULIHAN'S \$167,618.99 and CNL, for its 84.76% interest, the amount of \$932,381.01. (R-V5: 698)

The court made specific findings in its final judgment. Foremost among these was the acceptance of the valuation methodology of CNL's expert and the rejection of the appraisal testimony of HOULIHAN'S expert witness. (R-V5: 697) The court specifically accepted the testimony of CNL's expert that in order for HOULIHAN'S to obtain a new tenant, the property would likely remain vacant for six months while the new tenant is secured and that, because the restaurant used "unique architectural features of a weathered, old Florida look, any new tenant would need to substantially remodel the building to fit the new tenant's public image." (R-V5: 697) The trial court found that Mr. Matonis' estimated cost of renovating the property of \$400,000 was conservative. (R-V5: 697) The trial court also specifically accepted as a part of its methodology, the opinion of CNL's expert that in order for HOULIHAN'S to realize any market value for its leasehold advantage, HOULIHAN'S would be required to sublease the property in

accordance with the restrictions contained in the lease agreement. (R-V5:  
695-700)

The First District Court of Appeal affirmed the trial court's judgment and  
this appeal ensued.

## SUMMARY OF ARGUMENT

The trial court clearly utilized the remainder or reversionary interest of the property when it calculated its apportionment of the condemnation proceeds. Although this methodology yielded an equitable result, the proper value of the reversionary interest might have been the one presented as if the taking had not occurred, that is, the present value of the landlord's property at the end of the 186 month lease term.

For a lease to have market value, the tenant must have a rent rate that is below market and the ability to sublease. A tenant can then go into the marketplace and enjoy the benefit of his rental advantage. Before the taking, Petitioner had the right to sublet the premises under certain conditions and a rental rate that was below the prevailing market rates. In order to value this interest, it is necessary to calculate the value of a hypothetical sublease situation in which HOULIHAN'S took advantage of its below market rent over the remaining 186 months of its lease. CNL's expert performed this calculation, paying strict attention to the mandates of the lease in question.

CNL's expert complied with paragraph 6 of the lease and performed a valuation analysis which showed the value of both CNL's and HOULIHAN'S interests at a time immediately prior to the taking. He followed the language of the lease in his analysis, as required by Florida law. K-Mart Corporation v.

Department of Transportation, 633 So.2d 131 (Fla. 2nd DCA 1994). In addition, Mr. Matonis properly applied sections 17(a) and (b) of the lease relating to rights and limitations on the subletting of the property by HOULIHAN'S. Employing language directly from the lease, Mr. Matonis determined that the market value of HOULIHAN'S leasehold interest was limited, although not eliminated, by the language of the lease relating to subletting. The important part of his analysis was that in order for HOULIHAN'S to realize any market value from its rental advantage, the premises would need to be subleased and some income stream provided to HOULIHAN'S. Mr. Matonis afforded HOULIHAN'S the full benefit of its bargain under the lease, providing it with the net present value of its potential income stream for the entire remaining term of the lease.

CNL's expert correctly analyzed the positions of both landlord and tenant prior to the time of the taking. In doing this, Mr. Matonis acknowledged HOULIHAN'S substantial rental advantage and calculated that rental advantage in favor of HOULIHAN'S for the entire 186 months remaining on HOULIHAN'S lease. (R-V4: 490-495)

HOULIHAN'S incurred a loss when it sold its property to CNL for half of its market value in a sale-leaseback transaction. This loss incurred by HOULIHAN'S at the time of the sale eliminates any true advantage that HOULIHAN'S may have possessed based upon its low rent rate. The fact that HOULIHAN'S had paid half

the rent in advance demonstrates that it truly possessed no rental advantage as of the time of the taking.

If HOULIHAN'S truly prepaid half its rent in advance, any savings that it may have obtained through a lower than market rent over the term of the lease would only be the recovery of that rent prepayment by HOULIHAN'S. This reasoning strongly supports the propriety of the market analysis presented by CNL's expert appraiser. This analysis provided HOULIHAN'S with full compensation for the amount that it could have been paid in the marketplace for its leasehold interest.



## ARGUMENT

### **I. THE TRIAL COURT CONSIDERED AND UTILIZED THE REVERSIONARY INTEREST WHEN IT APPORTIONED THE CONDEMNATION PROCEEDS BETWEEN LANDLORD AND TENANT.**

The trial court clearly utilized the remainder or reversionary interest of the property when it calculated its apportionment of the condemnation proceeds. The remainder value that the trial court used, however, was an "after" value for the property. That is, it was the value assigned by CNL's appraiser to the property after it had been damaged by the taking. (R-V5: 698) Although this methodology yielded an equitable result, because the lease language mandated that the parties' interests be viewed prior to the taking, perhaps the proper value of the reversionary interest should have been the one presented as if the taking had not occurred, that is, the present value of the landlord's property at the end of the 186 month lease term. This amount, as determined by HOULIHAN'S appraiser, was \$311,584. (R-V4: 548). The only possible change to the trial court's method, therefore, which might match more closely with the lease language, would be to subtract the present value of the reversion from the before value of the whole taking for a value of \$1,890,000. Employing the methodology of the trial court, this would give HOULIHAN'S an ownership interest of 12.70% or a proper apportionment of \$139,683.54 from the \$1.1 million settlement.

**II. THE REASON FOR VALUING HOULIHAN'S SUBLEASE OF THE PROPERTY WAS TO DETERMINE A FAIR MARKET VALUE FOR THE LEASEHOLD PRIOR TO THE TAKING IN COMPLIANCE WITH PARAGRAPH 6(d) OF THE LEASE.**

Although the trial and appellate courts both correctly accepted the proper methodology for apportioning condemnation proceeds, and arrived at an equitable distribution of those proceeds, there appears to have been a misunderstanding as to the reason for calculating the value of subleasing the property by the tenant HOULIHAN'S. The lease mandated that the interests of the parties be viewed as they appeared immediately prior to the taking. This is consistent with standard appraisal practices and that each owner, landlord and tenant, should be made whole and compensated for losses based on the ownership interest that each possessed before the taking.

The interest that HOULIHAN'S possessed prior to the taking was the right to occupy and use the property undisturbed for the term of the lease, in accordance with the lease terms. Its use was restricted and contingent upon the terms of the lease, including the obligation to pay rent. The reason that the issue of subletting becomes important is because this is the only way a tenant can be said to possess a leasehold of any market value.

For a lease to have market value, the tenant must have a lease rate that is below prevailing market rents and possess the ability to sublease. With these two factors present, a tenant can go into the marketplace and enjoy the benefit of his

rental advantage. Before the taking, HOULIHAN'S possessed the right to sublet the premises under certain conditions and a rental rate that was below the prevailing market rates. HOULIHAN'S, therefore, possessed a positive leasehold interest.

In order to value this interest, it is necessary to calculate the value of a hypothetical sublease situation in which HOULIHAN'S took advantage of its below market rent over the remaining 186 months of its lease. For that reason, calculating the present value of the rental income that HOULIHAN'S could have received over the remaining term of its lease is the proper methodology for valuing its leasehold interest. Mr. Matonis performed this calculation, paying strict attention to the mandates of the lease in question.

The Benton dissent shows most clearly this misapprehension. The methodology employed did not utilize costs incurred for subletting after the taking. The concept of subletting was used as a tool to determine the market value of the leasehold interest and, therefore, the subletting would have had to occur before the taking in order for HOULIHAN'S rental advantage to be turned into market value.

Petitioner furthers and attempts to benefit from this misunderstanding in its Initial Brief. Petitioner interjects this objection to Mr. Matonis's method as a new argument that was never made at trial. Nowhere in its argument at trial did Petitioner object to the method used by CNL's expert on the grounds that the

sublease occurred after the taking. (R-V4: 607-622) Counsel for Petitioner appears to have understood at that time, prior to the opinion below of the First DCA, that the sublease concept was used to show the value of HOULIHAN'S leasehold position before the taking. The new argument is improperly raised in this forum. Florida courts have long held that appellate courts may consider objections to evidence only on grounds specifically stated at trial, and when a party raises a different ground on appeal, the point is not preserved. See Tallahassee Furniture Co., Inc. v. Harrison, 582 So.2d 744 (Fla. 1<sup>st</sup> DCA 1991); Johnson v. Canteen Corp., 528 So.2d 1364 (Fla. 3<sup>d</sup> DCA 1988); Palm Beach Aviation, Inc. v. Kibildis, 423 So.2d 1011 (Fla. 4<sup>th</sup> DCA 1982).

**III. CNL'S EXPERT USED A PROPER METHOD AND PRESENTED EVIDENCE OF AN EQUITABLE APPORTIONMENT OF THE CONDEMNATION PROCEEDS .**

**A. Mr. Matonis Correctly Applied All Relevant Lease Terms When Determining The Values Of CNL's And Houlihan's Interests**

CNL's expert clearly complied with paragraph 6 of the lease and performed a valuation analysis which showed the value of both CNL's and HOULIHAN'S interests at a time immediately prior to the taking. In addition, because his analysis involved a determination of the market value of HOULIHAN'S leasehold interest, Mr. Matonis properly applied sections 17(a) and (b) of the lease relating to rights and limitations on the subletting of the property by HOULIHAN'S. It is

immaterial that HOULIHAN'S never actually subleased the property. The important part of the analysis is that in order for HOULIHAN'S to realize any market value from its rental advantage, the premises would need to be subleased and some income stream provided to HOULIHAN'S. This income stream was set out in Mr. Matonis's analysis.

This market value analysis is similar to an analysis valuing a fee simple property. The analysis looks at the amount that a hypothetical willing buyer would pay a hypothetical willing seller. In the valuation of fee simple property, it is immaterial that the property is never actually sold. The job of the appraisal expert is to determine what it would have sold for in the marketplace in order to determine its proper value at the time of the taking. The fact that HOULIHAN'S never subleased the property does not make Mr. Matonis's analysis speculative. It is the normal course of practice in real estate appraisal to render an opinion, based on proper research and underlying facts, which predicts the value of a parcel of property based on what it could sell for in the marketplace.

As the foregoing makes clear, the trial court properly accepted Mr. Matonis's analysis which included provisions contained in the lease relating to subletting. These provisions not only provided that 25% of any rental advantage received by HOULIHAN'S would be paid over to CNL, but also that only certain subtenants could be brought in by HOULIHAN'S. This limitation on subtenants gave rise to

the portion of Mr. Matonis's analysis which stated there would be a lease-up period of six months to find a national or regional restaurant chain to sublease the property, and that a subtenant coming in to occupy the property would need to pay \$400,000 for conversion of the restaurant from a Darryl's to its own brand name.

Again, in this instance the clear language of the lease applies. The lease clearly states that any subtenant must be a nationally or regionally recognized restaurant chain "where the chain has not less than three years prior operating experience with the same chain and concept and where the chain has the financial capability to pay all debt service obligations, **conversion costs** and rent payments as they come due." (emphasis added) The clear language of this provision shows that the parties contemplated the necessity of conversion costs in the event the property were to be subleased. Clearly, some conversion costs would be necessary if this restaurant were to be subleased and Mr. Matonis's estimate of \$400,000 for the amount of the conversion costs was unrefuted as a proper amount in the trial court.

CNL's expert carefully followed the controlling language of the lease in his analysis, as required by Florida law. Simpson v. Fillichio, 560 So.2d 331 (Fla. 4th DCA 1990); K-Mart Corporation v. Department of Transportation, 633 So.2d 131 (Fla. 2nd DCA 1994). In fact, given the clear language of the lease provisions with regard to subletting, it would have been improper for CNL's expert to fail to

include the relevant limitations on subletting in his analysis of HOULIHAN'S leasehold interest. The limitations contained in the lease reduced the market value of HOULIHAN'S leasehold interest. These limitations are analogous to restrictions which may be found on fee simple properties, such as deed or zoning restrictions. It would be improper for an appraiser to determine a value for a fee simple parcel of property and ignore relevant deed or zoning restrictions on the use of the property.

The most important lease provision dealing with termination stated that the landlord's and tenant's interests should be valued "as their interests appear immediately prior to the time of such taking." (R-V5: 646) This would mean, as CNL's expert clearly stated, that the interests of each party must be viewed prior to the taking, and as if no taking had ever occurred. This fact makes it clear that HOULIHAN'S constant reference to actions that occurred after the taking, its loss of "a very valuable lease rate" and the fact that CNL held title to the remainder property after termination, are irrelevant to a proper analysis under the clear language of the lease. A proper analysis of the interests of the parties prior to the taking would not involve any issues relating to whether the tenant lost the lease or whether the landlord retained the remainder property after the tenant terminated the lease.

**B. The Method Used By CNL's Expert And Accepted By The Trial Court Is Consistent With Case Law And Treatises On Leasehold Valuation.**

The methodology employed by Mr. Matonis was consistent with sound appraisal practices and with Florida case law relating to leasehold valuations. Florida courts have long held that the proper method for valuation in an eminent domain case is the "market value" of the interest to be obtained by the condemning authority. Case law has defined market value as "the amount which would be paid for property to a willing seller, not compelled to sell, by a willing purchaser, not compelled to purchase, taking into consideration all uses to which the property is adapted and might reasonably be applied." State Road Department v. Stack, 231 So.2d 859, 860 (Fla. 1st DCA 1969).

Although lessees in Florida are generally entitled to share proportionately in a condemnation award for the land value of their leasehold interests taken, this right can be limited or eliminated by the language of the lease agreement. Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); Elmore v. Broward County, 507 So.2d 1220 (Fla. 4th DCA 1987). In the instant case, the lease language restricting subletting by HOULIHAN'S limited HOULIHAN'S leasehold value and reduced its proportional share of the condemnation award. As the above cases have held, this language cannot be ignored, as HOULIHAN'S has argued, simply because it has a negative impact on the value of the tenant's interest.



Employing language directly from the lease, Mr. Matonis determined that the market value of HOULIHAN'S leasehold interest was limited, although not eliminated, by the language of the lease relating to subletting. Applying these limitations, Mr. Matonis afforded HOULIHAN'S the full benefit of its bargain under the lease, providing it with the net present value of its potential income stream for the entire remaining term of the lease, 186 months.

The concept of a leasehold interest and its valuation are not confined to takings jurisprudence. The valuation of leasehold interests is commonly performed in the real estate appraisal industry. See *The Appraisal of Real Estate*, 83 (12th ed., Appraisal Institute 2001). When a lease is created, the tenant acquires the right to possess and use the property in accordance with the terms of the lease. This right is given in exchange for the tenant's obligation to pay rent, abide by the other terms specified in the lease, and ultimately surrender the property to the fee owner. See Id.

The Appraisal Institute noted that: "[t]he relationship between contract and market rent greatly affects the value of a leasehold interest. A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant." Id. Leasehold interests are typically valued using an income capitalization approach. The income to be capitalized, and therefore the value to

the leasehold position, is the difference between contract rent and market rent. See Id.

Another Appraisal Institute publication, *Real Estate Valuation in Litigation*, which primarily addresses appraisal issues in eminent domain litigation, devotes an entire chapter to leasehold valuation. The author, James Eaton, states that the comparison of contract rent to market rent is, in fact, a threshold matter before any type of further analysis is made. Eaton begins the section on leasehold valuation as follows:

"To affect the value of the leased fee estate, a lease must meet two conditions. First, the remaining term of the lease must be long enough so that, **if the property were placed on the market, a potential purchaser would recognize the lease** and be willing to pay more or less for the property because of its existence. Second, the contract rent specified in the lease must be either higher or lower than the existing market or economic rent. Again, the difference between the contract rent and the economic rent must be substantial enough to affect what an able, willing buyer would pay for the property."

J.D. Eaton, MAI, SRA, *Real Estate Valuation in Litigation*, 389 (2d ed. Appraisal Institute 1995).

CNL's expert correctly analyzed the positions of both landlord and tenant prior to the time of the taking. In doing this, Mr. Matonis acknowledged HOULIHAN'S substantial rental advantage and calculated that rental advantage in favor of HOULIHAN'S for the entire 186 months remaining on HOULIHAN'S lease. (R-V4: 490-495) Mr. Matonis also, however, had to apply language that is

relevant to the market value of HOULIHAN'S leasehold interest contained in the lease's assignment and subletting clause. Although HOULIHAN'S stresses the importance of following the lease language in an apportionment analysis, it chooses to ignore this important lease language when arguing for a proper valuation of the interests of each of the parties.

**IV. BECAUSE HOULIHAN'S ORIGINALLY SOLD THE PROPERTY TO CNL FOR HALF ITS MARKET VALUE, ITS PURPORTED RENTAL ADVANTAGE OVER THE LEASE TERM IS ILLUSORY.**

The parties agree, and the trial court accepted, that the property in question was sold by HOULIHAN'S to CNL for half its market value and that the rental rate charged by CNL to HOULIHAN'S in its sale leaseback transaction was approximately half the market rent. What this means is that HOULIHAN'S incurred a loss when it sold its property to CNL for half of its market value. Presumably, it was given the opportunity to recover this loss over the course of its lease with CNL because the lease rental rate was approximately half of the market value.

This loss incurred by HOULIHAN'S at the time of the sale negates any true advantage that HOULIHAN'S may have possessed based upon its low rent rate. Petitioner is correct in its Initial Brief when it states on page 21 that, prior to the taking, HOULIHAN'S possessed the "right to use and enjoy the improved premises for the term of the lease at half the market rent, having already effectively

paid half of the rent in advance." It is the very fact that HOULIHAN'S had paid half the rent in advance that it truly possessed no rental advantage as of the time of the taking.

HOULIHAN'S paid for the right to remain in undisturbed possession of the property both when it sold the property for half of its value and when it paid its monthly rental payments to CNL. If, as stated by Petitioner in its Initial Brief on page 23, HOULIHAN'S had "effectively prepaid half the rent in advance," any savings that it may have obtained through a lower than market rent over the term of the lease would simply be the recovery of that rent prepayment by HOULIHAN'S. Therefore, valuing HOULIHAN'S below market rent without measuring the actual income that HOULIHAN'S could have derived through subletting, would show that HOULIHAN'S leasehold interest had little or no value.

Although Respondent has not taken the position at any time during this litigation that HOULIHAN'S leasehold interest was valueless, the above reasoning strongly supports the propriety of the analysis put forth by CNL's expert appraiser and adopted as proper by the trial court. This analysis provides HOULIHAN'S with full compensation for the amount that it could have received in the marketplace for its leasehold interest.

**V. PETITIONER'S EXPERT FAILED TO FOLLOW MANDATE OF THE CONDEMNATION PARAGRAPH IN THE LEASE.**

HOULIHAN'S expert appraiser used the value of the property after the taking, \$625,000, in his apportionment calculations. As the Petitioner's Initial Brief notes on page 9, HOULIHAN'S appraiser determined the value of CNL's leased fee interest by calculating its reserve rent under the lease and the value of its reversionary interest but then subtracted the **after** taking value of \$625,000 from CNL's **before** taking, leased fee value, as determined by this appraiser. This methodology clearly deviates from the express provisions of the lease which mandate that the interests of the parties be viewed immediately prior to the taking. Conditions as they existed after the taking, i.e., that CNL is left with damaged remainder property, or that HOULIHAN'S is able to terminate the lease, are irrelevant to the apportionment calculation because the lease mandates that the interests of the parties be valued as they appeared immediately prior to the time of the taking.

## CONCLUSION

The majority opinion of the lower tribunal is consistent with the principles of eminent domain law in the state of Florida and it affirmed a lower court opinion that adopted a proper method for fairly and equitably apportioning the condemnation proceeds. For that reason this Court should affirm the decision of the First District Court of Appeal below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to M. Stephen Turner, Esquire, Charles S. Stratton, Esquire, and Gino Luzietti, Esquire, Broad and Cassel, 215 South Monroe Street, Suite 400, Post Office Drawer 11300, Tallahassee, Florida 32302; and Alan E. DeSerio, Esquire, Post Office Box 1485, Brandon, Florida 33509-1485 on this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

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John T. Wettach, Jr.

**CERTIFICATE OF TYPEFACE COMPLIANCE**

This pleading uses 14 point Times New Roman type, a font that is proportionately spaced, and which is in compliance with Fla. R. App. P. 9.210.

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John T. Wettach, Jr.

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