

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000417-D
(2008-CA-000696)

FILED

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SUPREME COURT CLERK

REUBIN BAILEY

APPELLANT

ON APPEAL FROM MADISON CIRCUIT COURT
ACTION NO. 06-CI-00442

vs.

PRESERVE RURAL ROADS OF MADISON
COUNTY, INC., AND CURTIS TATE

APPELLEES

BRIEF ON BEHALF OF APPELLANT

CERTIFICATE OF SERVICE

I certify in accordance with Civil Rules 76.12 (6) and 5.03 that a true copy of the foregoing brief on behalf of the Appellant, was mailed, postage prepaid, to the following persons at the address listed on this the 10th day of May, 2010, and that this brief was delivered in person with ten copies thereof to the Clerk, Supreme Court of Kentucky, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601-3415, this 10th day of May, 2010.

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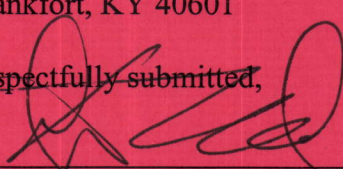
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INTRODUCTION

This case involves the discontinuance of a county road by the Madison County Fiscal Court and the question of whether a landowner who accesses his home via said road must now be made to suffer, by action of the Government, tens of thousands of dollars in maintenance expenses that result from Court-imposed public access across his property with no compensation from the State. This Court is asked to find that the interpretation of KRS 178.116 by the Madison County Circuit Court and Court of Appeals is one that leads to an unconstitutional taking, to adopt the constitutional interpretation and solution set forth herein, and determine that the Plaintiff/Appellees lacked standing to initiate this action.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant requests that oral arguments be held regarding this matter.

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STATEMENT OF THE CASE

This case is a dispute resulting from the discontinuance of a county road in Madison County, Kentucky. On August 23, 2005, the Madison Fiscal Court voted to discontinue the county road known as Dunbar Branch Road pursuant to KRS 178.070 due to what the Court of Appeals noted were “very expensive” maintenance costs, the roadbed washing out “due to high water,” and the fact that “the County was subject to federal fines due to the road’s environmental impact” as a result of portions of it running through a stream bed. 2008-CA-000696-MR, at 2; Appendix Exhibit 4. There exists no proof that Dunbar Branch Road was ever acquired in fee by the Government and, like many older county roads, the nature of the State’s access was in the form of an easement. *See* Section III below.

Reubin Bailey and his wife Sherill live on the discontinued Dunbar Branch Road in a small home on their farm not far from the Kentucky River. (R. Bailey depo. p. 1) After the County discontinued the road, he erected a gate to his property across the road where it intersects Doylesville Road. (*Id.* at 3) He also helped replace other gates along the road erected by other private landowners after the other gates were stolen. (*Id.* at 4) While there was no formal action by the Fiscal Court permitting him to do so, Mr. Bailey gated the property only after obtaining the oral approval of then-County Magistrate Billy Ray Hughes. *Id.*

The Appellees in this action (Plaintiffs below) include a resident of Madison County, Curtis Tate, who neither owns property accessed by, nor resides on, Dunbar Branch Road. (C. Tate depo., p. 20). The other Appellee is a corporation – Preserve Rural Roads of Madison County, Inc. – that claims to have one *alleged* member (Ida

Wall) who owns property exclusively accessed by the now discontinued and former Dunbar Branch Road.

Appellees filed their Complaint in the Circuit Court action, from which this appeal ultimately stems, and made allegations that in combination with the County's failure to follow the statutory procedure to discontinue a county road, Mr. Bailey has improperly impeded access to what were referred to as "county roads" including Dunbar Branch Road, by erecting a fence or fences across the road. The Plaintiffs further contended that "the property [likely meaning roadway] has not reverted to Ruben [sic] Bailey." (Record on Appeal, hereinafter "ROA", pp. 1-5).

Mr. Bailey, admitted in his Answer, as he did in his deposition, that he gated the former county road known as Dunbar Branch Road where it meets Doylesville Road and that this gate is erected on his property. (R. Bailey depo., pp. 3-7). He further testified at his deposition, as has been stated in open court, that "the people who live on the road" have access by key through the gate. (R. Bailey depo., p. 7). Finally, Mr. Bailey responded in his Answer that "the plaintiffs' cause of action may be barred by lack of standing to initiate and prosecute this action." (ROA, p. 21).

When asked through interrogatories to identify any "member of Preserve Rural Roads of Madison County, Inc., [who] owns real property that is accessed by any of the roads discontinued by action of the Madison Fiscal Court and complained of in the Complaint" the Plaintiffs allege that the only such individual is Ida Wall, an alleged corporation member who accesses her property through Dunbar Branch Road, the discontinued road at issue. When asked to produce any records supporting this bare allegation, the corporation responded that "there are no official membership records" but

reiterated the allegation that Ms. Wall is a contributor/member of the corporation.. (ROA, p. 127).

When deposed, Curtis Tate, the Preserve Rural Roads member who neither owns property on nor lives on Dunbar Branch Road, acknowledged that the directors of the corporation are three individuals who do not include Ida Wall. (C. Tate depo., pp. 4-5). He further testified as follows:

Q. What contribution has Ida Wall made to the corporation?

A. I'd have to go back and look at some of the records to see what the dollars were.

Q. What records do you have?

A. We've just got a list of who has put up money to help on this situation.

Q. And Ida Wall is one of those people?

A. Yes.

Q. Is this a *handwritten* list that someone has prepared?

A. Yes.

Q. Do you know whether she paid cash or tendered a check?

A. I would have to check on that. I'm not sure. * * * Jim Wall is also in the corporation and he's the one that received the money from her.

* * *

Q. So in terms of a record of membership of Ida Wall, there would be a check, you expect, that she made payable to this corporation? Is that right?

A. Let's see . . . there again, I'm not sure whether the check was written to the corporation or to Jim or to me. I can't remember.

Q. Does the corporation maintain a bank account?

A. No, sir.

Mr. Tate went on to testify that he had no good explanation for why he had not supplied the "list" to his attorney when he signed the previous responses to Defendant's discovery requests. (C. Tate depo., p. 14). In addition, in response to discovery requests asking that the Plaintiffs identify all witnesses as well as all persons having knowledge concerning any damages claimed, Ida Wall was never identified. (ROA, p. 128). In their response to Appellant's Motion for Summary Judgment, the Appellees tendered with their response a *typewritten* list (as opposed to the handwritten one which was mentioned) and a check from Ida Wall written to a "Dorothy Wall" (*not* to Preserve Rural Roads of Madison Co., Inc.). (ROA, pp.157-158).

Following extensive briefing by the parties, the Circuit Court entered an Order July 16, 2007, determining that the Madison County Fiscal Court "properly and legally utilized and [followed] the procedures set forth in KRS 178.070" and granted the Fiscal Court "judgment as a matter of law as regards all claims asserted against [it] in this action." (ROA, pp. 91-92).

In a subsequent Order entered April 2, 2008, the Circuit Court found that the Appellees were entitled to judgment as a matter of law against Reubin Bailey. The Court found that "Dunbar Branch Road is a county road that traverses through land owned by Defendant, Reubin Bailey. The Defendant, Reubin Bailey, has erected gates across the road and has maintained them since." The Circuit Court acknowledged its Order entered July 16, 2007, but did not amend or vacate it. The Court went on to state that "KRS 178.116 provides for the initiation of formal proceedings for the reversion to adjoining

land owners of a roadway formerly maintained by the county.... As no such proceeding has been initiated, the Defendant is without legal right or ownership to prohibit *others* from using the county road” (emphasis added). The Circuit Court granted the Appellees’ Motion for Summary Judgment in all respects and denied the Appellant’s Motion for Summary Judgment in all respects. The Court further ordered “that the Defendant, Reubin Bailey, shall forthwith remove any obstruction or barrier placed or maintained by him on or across Dunbar Branch Road and is permanently enjoined from any action that restricts or impedes access *of others* to or over said county road” (emphasis added) (ROA, pp. 160-162).

As emphasized, the action of the Circuit Court did not restrict road usage to those landowners who access their property via the former county road. Instead, the road was to be open and the State’s access easement maintained by the Circuit Court’s April 2, 2008, Order. However, by virtue of the Circuit Court’s earlier Order of July 16, 2007, responsibility for maintenance of the road was transferred from the public and placed upon those landowners, such as Reubin Bailey, whose sole means of access to their homes and land is via the former county road.

Mr. Bailey then appealed to the Kentucky Court of Appeals. The Appellees have not filed a notice to appeal either of the above-mentioned Orders of the Circuit Court. The Court of Appeals in an unpublished opinion (2008-CA-000696), ruled that the Plaintiffs possessed standing and that no unlawful taking occurred

ARGUMENT

The Circuit Court's Order and the Court of Appeals' decision should be vacated and reversed, and Appellant Mr. Bailey's Motion for Summary Judgment should be granted because these decisions below improperly allow the government to continue public access to the private property of Mr. Bailey, while at the same time saddling him with what should be the government's obligation to maintain this as a public road, to the tune of tens of thousands of dollars a year. When the county discontinued Dunbar Branch Road as a county road, the county surrendered its easement and with it any control it had had over access to the road. If the county intended to continue to control the road, the county is obliged to continue to pay to maintain it. But once the county discontinued it as a county road, it had no authority to force Mr. Bailey to maintain the roadbed on his property. Purporting to discontinue Dunbar Branch Road as a public-access road, while at the same time forcing Mr. Bailey to pay to maintain the roadway for public access, constitutes an impermissible physical taking by the Government of Reubin Bailey's private property.

Appellant will set forth the standard of review on appeal, the lack of standing by the Appellees, relevant statutory and case law, and the fact that the Circuit Court and Court of Appeals' decisions both read and apply KRS 178.070 and 178.116 in a manner that violates U.S. Constitution Amendments 5 and 14 and Kentucky Constitution Section 13. A solution is then offered that interprets the statutes in conjunction with common law in a manner that is consistent with the constitutional prohibition against imposing upon private parties obligations that property belong to the government. The solution is that in circumstances such as those presented by this case and in order to avoid an

unconstitutional reading of a presumptively valid statute, the discontinued road that is presumed to have been originally acquired by the Government via easement, must revert entirely back to the property across which it runs subject only to a private right of access, arising by necessity, for those landowners who enter their property via the discontinued road. Accordingly, the decisions of the Kentucky Court of Appeals and Madison Circuit Court entered on April 2, 2008, should be reversed and Summary Judgment entered in favor of the Appellant.

I. STANDARD OF REVIEW

The Madison Circuit Court granted “Summary Judgment in Favor of Plaintiffs [Appellees]” by Order entered April 2, 2008. In Dossett v. New York Mining and Manufacturing, Co., 451 S.W.2d 843 (1970), the Supreme Court of Kentucky stated that “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment.” In Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001), the Kentucky Court of Appeals stated that “[b]ecause summary judgment involves only legal questions . . . an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” Accordingly, the standard of review in the present case is *de novo*.

II. THE APPELLEES HAVE NO STANDING AGAINST THE APPELLANT, REUBIN BAILEY

At the outset of this lawsuit and as a defense in Appellant's Answer Mr. Bailey stated that “[t]he plaintiff's cause of action may be barred by lack of standing to initiate and prosecute this action.” (ROA, p.21). In the Circuit Court's first Order entered July 16, 2007, the Court stated that the Fiscal Court had discontinued Dunbar Branch Road

and followed the requirements of the applicable statute – KRS 178.070. (ROA, pp. 91-92). Appellees did not appeal that decision.

There exists no action that either Curtis Tate or Preserve Rural Roads of Madison Co., Inc. may have against Reubin Bailey because neither Mr. Tate nor Preserve Rural Roads of Madison Co., Inc. has been wronged by Reubin Bailey. Only those private property owners who own property accessed by Dunbar Branch would have standing to bring suit against Reubin Bailey upon his gating the road, and that would only occur if he did not provide them reasonable access. None of those private property owners are named in this lawsuit.

Ida Wall – one such private property owner who was provided a key to the previously erected gate – may or may not be a member of Preserve Rural Roads of Madison Co., Inc. Her status, however, has never been established. As noted above, Ms. Wall was never disclosed as an injured party or even one having knowledge relevant to plaintiffs/Appellees’ lawsuit when Curtis Tate responded in writing and under oath to Appellant’s discovery requests (ROA p 127). As noted by the Court of Appeals, “no official membership records were ever produced” by the Corporation and Ms. Wall’s only connection to the corporation was “a check she allegedly wrote in support of the organization” but that was made out not to that corporation but to her relative “Dorothy Wall.” (2008-CA-000696, p. 7; ROA p. 158). It is not the obligation of Appellant to disprove the status of one whose standing to bring a cause of action has never been established.

Further, as provided in Kentucky Rule of Civil Procedure 17.01, “[e]very action shall be prosecuted in the name of the real party in interest.” The rule then provides that the following may also bring suit on someone’s behalf:

personal representative, guardian, curator, committee of person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a county, municipal corporation, public board or other such body, a receiver appointed by a court, the assignee or trustee of a bankrupt, an assignee for the benefit of creditors, or a person expressly authorized by statute to do so.

CR 17.01. Neither Mr. Tate nor Preserve Rural Roads of Madison Co., Inc. meets any of these exceptions such that they would be able to bring an action on behalf of Ida Wall or any other private property owner who might have been affected by the gate Reubin Bailey put up across the discontinued road.

The question is not whether Appellees had standing to bring an action against the Madison Fiscal Court to try and enjoin an official act. The Madison Fiscal Court is not a party to this appeal and Appellees have failed to appeal the Madison Circuit Court’s Summary Judgment in favor of the Fiscal Court. The question is whether Appellees had standing to bring an action against Reubin Bailey. They did not.

Both the Appellees and the Court of Appeals incorrectly rely upon Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green, 207 S.W.3d 7 (Ky. App. 2006) as it relates to standing. Their reliance is misplaced. Warren involved whether members of the public had standing to object to the city of Oakland’s rezoning plan. The Court found that “there was evidence that residents of the city of Oakland will be directly affected by the Transpark development. Consequently, we agree with the trial court the appellants have standing to appeal.” Id. at

13. Warren has nothing to do, however, with a private cause of action against an individual citizen.

The Kentucky Supreme Court stated that “[i]t is fundamental that in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit.” Healthamerica Corp. v. Humana Health Plan, 697 S.W.2d 946, [page cite for quotation] (Ky.1985) (citing Lexington Retail Beverage Dealers Assn. v. Department of Alcoholic Beverage Control, 303 S.W.2d 268 (Ky. 1957)). The property beyond the gate that Mr. Bailey erected on his property is now entirely private property as discussed in Sections III and IV below, none of which is owned by the Appellees. As such, the Appellees, Preserve Rural Roads of Madison Co., Inc. and Curtis Tate, have no standing as they have no interest in the private property beyond the gate.

Despite the fact that no private landowner is a party, Appellant Mr. Bailey acknowledges that he may not unreasonably interfere with the private easement across his land arising by necessity¹ and held by landowners of property adjoining the roadway. Com. Dept. of Fish & Wildlife v. Garner, 896 S.W.2d 10, 14 (Ky. 1995). The gating of the roadway, however, does not constitute an unreasonable interference so long as keys are provided to all property owners who access their property via such easement. Id. As the servient tenant, Mr. Bailey does not “forfeit his right to protect the land he owns simply because it is crossed by a pathway.” Id. As every landowner has been provided keys to access their property, as testified to by Mr. Bailey, and none of the persons who reside on this property or access their property by this “discontinued” road has complained about access to their property, no unreasonable interference has occurred.

¹ Without getting too deep in the rural weeds of the methods by which easements may be established, suffice it to say that such an easement arises by “necessity.” See Gosney v. Glenn, Ky.App., 163 S.W.3d 894, 900 (2005).

Based on the facts herein, no cognizable complaint has been made by the Appellees against Reubin Bailey, nor do they have standing to assert a right of access. As such, Appellant's Motion for Summary Judgment should have been granted and Appellees' Motion for Summary Judgment should have been denied.

III. THE GOVERNMENT-IMPOSED ACCESS RIGHTS ACROSS REUBIN BAILEY'S PRIVATE PROPERTY TERMINATED UPON DISCONTINUANCE OF THE ROAD BY THE FISCAL COURT

Contrary to the Court of Appeals' opinion wherein they place a requirement upon Mr. Bailey that he "produce . . . evidence of prior ownership of the roadbed," no such requirement exists under law. 2008-CA-000696-MR, p.9. In fact, the presumption is that he owns the roadbed subject to an access easement possessed by the Government. "In the absence of any showing to contrary, we will presume that the county only acquired an easement over the ground occupied by [an] old road for use by the public [when it became a county road]; and, this being so, when its use was abandoned [discontinued here] the ground occupied by the road reverted to the Appellants, who own the land on both sides of it and over which it runs. The [county's discontinuance] of the use invests the owner of the land with the right to the possession, which he [or his predecessor in title] had surrendered for the public use." Waller v. Syck, 146 Ky. 181, 142 S.W. 229, 231 (1912) and Ky. OAG 83-304 and 84-358. There exists no evidence in the present case that the County had ever obtained title to the roadbed in fee and, thus, the Government is presumed to have held only a right of access. Id.

Like any easement, an access right consists partly of rights and partly of responsibilities. These responsibilities can be explicit in the document granting the right

or rights; alternatively, the responsibilities can be implied or imposed as a matter of law. See Sarver v. Allen County, 582 S.W.2d 40, 41 (Ky. 1979) and KRS 178.420, imposing a maintenance obligation upon county road departments.

When the Government discontinued Dunbar Branch Road, it was obligated by KRS 178.320 to “turn over to the county clerk all documents of title to [the] right of way . . . and all documents relating to discontinuation of [the] public roads, including maps, plats, and surveys.” As all county roads are a subset of all public roads,² this statutory requirement is applicable here. The primary reason for such a requirement is to provide the public access to the acquisition, ownership, and relinquishment of property rights acquired by the Government.

The portion of the discontinued Dunbar Branch Road that exists across the property of Reubin Bailey is now his subject only to a private right of easement³ for the benefit of the individuals who use the discontinued road to access their property. While this is not the case with every discontinued road (such as boundary and other roads discussed below) this is the only reading of the relevant statutes that does not result in an unconstitutional taking in the present case.⁴ To understand why this is so it is necessary to begin with the two statutes that envision discontinuance of a county or public road and the relevant case law.

The two relevant statutes are KRS 178.070 and KRS 178.116. KRS 178.070 addresses the discontinuance of county roads only and does not apply to all public roads. As mentioned, county roads are a subset of public roads. County roads are those roads

² KRS 178.010(1)(b); Blankenship v. Acton, 159 S.W.3d 330, 333 (Ky.App. 2004) (citing Sarver v. Allen County, 582 S.W.2d 40 (Ky. 1979)).

³ See *supra*, note 1.

⁴ As discussed in Section IV below

accepted by the county's Fiscal Court such that they are contained within a county road system and are maintained using public funding. KRS 178.010(1)(b). In Sarver v. Allen County, 582 S.W.2d 40, 41 (Ky. 1979) (citing Riley v. Buchanan, 116 Ky. 625, 76 S.W. 527, 528 (1903)), the Court stated that “[p]rior to 1914 it was recognized that an ‘acceptance’ by the county could be accomplished informally, e.g., by maintenance of the road at county expense.” The Court went on to state that “[s]ince the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road.” 582 S.W.2d at 41 (citing Rose v. Nolen, 166 Ky. 336, 179 S.W. 229, 230 (1915); Illinois Central Railroad Co. v. Hopkins County, 369 S.W.2d 116, 118 (Ky. 1963)). Otherwise, though a road may be “public,” it is not necessarily a “county road.” The obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and biways that chance to become “public” through processes of dedication or prescription over which the counties have no choice or control. Sarver at 41.

Sarver implies that “county roads” are maintained by the county, and that was certainly the case with respect to the former Dunbar Branch Road. KRS 178.420 also indicates that county roads are to be maintained at the expense of the Government. This is a sensible responsibility that the Government undertakes when it takes, is granted, or otherwise acquires a right of access. Thus, when the Fiscal Court discontinued Dunbar Branch Road due to what the County Judge Executive cited as “\$30,000.00” in maintenance expenses over “the last five years” it ceased to be a county road. Transcript of Minutes, p. 2, Appendix Exhibit 4.⁵

⁵ Previously filed of record by Plaintiffs/Appellees via Notice of Filing dated February 6, 2007, prior to the entry of Summary Judgment by the Madison Circuit Court.

In this case, the Fiscal Court proceeded in accordance with KRS 178.070, which provides as follows:

The fiscal court may direct any county road to be discontinued. Notice must be published, according to the provisions of KRS 178.050, and in addition, notices must be placed at three (3) prominent and visible public places within one (1) mile of the road. After posting the notices, the fiscal court shall appoint two (2) viewers who have no vested interest in the discontinuance of the road and who, together with the county road engineer, shall view the road and report in writing at the hearing what inconvenience would result from the discontinuance. Upon presentation of the report and other evidences, if any, at a public meeting of the fiscal court, the court may discontinue the road.

These procedures were followed and the road was discontinued, as ratified in the Order from the Madison Circuit Court, which the Appellees have not appealed.

The key question then becomes – whether upon discontinuance Dunbar Branch then became a public road or reverted back to the property from which it came no longer subject to any access easement. The Appellees and the Court of Appeals incorrectly maintain that following discontinuance of a county road via KRS 178.070, if all the landowners do not join together and proceed pursuant to KRS 178.116 (set forth below), then the Government retains access through the Bailey property, but Mr. Bailey must maintain it for the County.

This is exactly the conduct prohibited by the U.S. Supreme Court when it explained *the essence of the law of takings* under the Constitution: “The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49 (1960). This is exactly why Mr.

Bailey should not be forced to bear the public burden of tens of thousands of dollars of road maintenance while being subject to Government imposed access across his land.

In this case, the only constitutional reading of the relevant statutes, as set forth in Section IV below, is that title to the roadbed reverted entirely to the adjacent landowners, including Mr. Bailey, subject only to a private right of access arising by necessity. *See Waller v. Syck*, 142 S.W.2d 229 (1912) and Ky. OAG 83-304 and 84-358. This is true for two reasons. First, Waller provides that “[t]he [discontinuance] of the use [by the county] invests the owner of the land with the right to the possession, which he [or his predecessor in title] had surrendered for the public use.” *Id.* at 231. Second, due to the Legislature’s failure to recognize and address in KRS 178.116 exactly the circumstances with which we are confronted here, such a reading is the only constitutional path that is consistent with the principles of takings jurisprudence.

KRS 178.116 states the following:

- 1) Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least one (1) of the following conditions exists:
 - (a) A public need is served by the road;
 - (b) The road provides a necessary access for a private person;
 - (c) The road has been maintained and policed by the county or state within a three (3) year period.
- (2) If the only condition which exists is for a necessary access for a private person, by a joint petition of all parties entitled to such access, the road shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged.
- (3) If the only condition which exists is for a necessary access for a private person, by joint petition of all parties entitled to such access, the road shall be closed to public use but remain open in accordance

with its condition and use for the access of the private parties involved.

(4) If a county road has been discontinued under the provisions of KRS 178.070, then by *a joint petition of all private parties entitled to necessary access* the road shall be closed to public use but remain open in accordance with its condition and use for the access of the private parties involved, or by *a joint petition of all parties entitled to necessary access* the road shall revert to the owner or owners of the tract or tracts of land to which it originally belonged.

(5) For the purposes of this chapter “necessary access” shall be construed to include access to any farm, tract of land, or dwelling, or to any portions of such farm, tract of land, or dwelling.

The problem is that the legislature failed to provide specifically for the circumstances in the case at hand. Those circumstances are illustrated when one asks the question – what happens if all the property owners entitled to access do not wish to file a joint petition with the statute’s unspecified body requesting that the road be closed to public use but remain open in accordance with its condition and use for the access of the private parties involved? The Court of Appeals answers that the maintenance obligation simply be shifted onto the private landowner and the Government maintain its access. But we know such action is specifically prohibited by Armstrong.

The answer is that in some cases, such as those involving a boundary road or a road across public land, the road becomes no longer a county road, but merely a public one, open to use by the public. In other cases, such as the one presently before the Court, the only constitutional way to read the statute is to recognize that the Government forfeits entirely their easement through the private property, with the landowners’ property being subject only to a private right of access, as envisioned in the statute, for access by the private parties to their homes and land.

**IV. THE CIRCUIT AND APPELLATE COURTS' RULINGS
CONSTITUTE AN UNLAWFUL TAKING AND USE BY THE
GOVERNMENT OF THE PROPERTY OF THE APPELLANT, REUBIN
BAILEY**

The United States Constitution, Amendment 5 provides in pertinent part that “[n]o person . . . shall be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.” By virtue of Amendment 14 to the United States Constitution, Amendment 5 was made applicable to the several States. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). The Kentucky Constitution, Section 13, provides “nor shall any man’s property be taken or applied to public use without . . . just compensation being previously made to him.”

Over time, the concept of a “taking” of one’s property has evolved to include interference with the use or enjoyment of one’s property as well as the more traditional notion of taking as a physical seizure through condemnation or occupation of property. For example, the U.S. Supreme Court has found that a Government-issued prohibition interfering with the economic development of one’s property can, under certain circumstances, constitute a taking requiring compensation by the State. *Lucas vs. South Carolina Coastal Council*, 505 U.S. 1003 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

This distinction between “physical” versus “regulatory” takings is a long-standing one in the jurisprudence of the United States Supreme Court that has existed since Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 555 U.S. 302, 319-24 (2002). To understand this distinction consider the following from footnote 19 of *Tahoe-Sierra*: “Condemnation of a leasehold gives the government possession of the

property . . . and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.”⁶

In the present case, however, Mr. Bailey’s property is not being appropriated as a whole to be used for a site to construct, for example, a county sewage treatment facility (physical taking), nor is a moratorium being placed for some temporary or permanent period over his ability to develop his property (regulatory taking) such as in Lucas. This case is a bit of a hybrid, but the Government’s maintenance of its *access through his property* while bearing none of the responsibilities that are concomitant with such right is a taking, a possession, and a right of use that is *physical in nature*.⁷ And it is this type of physical appropriation that is the “greater affront to individual property rights.” Tahoe-Sierra at 321.

In the present case, the violent expansion of Appellant Mr. Bailey’s obligations with respect to his property came about after he acquired it, and the nature of the expansion is, if the decisions below are allowed to stand, permanent. When Reubin

⁶ The following cases cited in Tahoe-Sierra illustrate the distinction between physical takings, such as condemnations, versus regulatory takings such as development moratoriums. **Physical:** Compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. United States v. General Motors Corp., 323 U. S. 373 (1945), United States v. Petty Motor Co., 327 U. S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U. S. 256 (1946), it is required to pay for that share no matter how small. **Regulatory:** A government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, Block v. Hirsh, 256 U. S. 135 (1921); that bans certain private uses of a portion of an owner’s property, Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U. S. 470 (1987); or that forbids the private use of certain airspace, Penn Central Transp. Co. v. New York City, 438 U. S. 104 (1978), does not constitute a categorical taking. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions. Yee v. Escondido, 503 U. S. 519, 523 (1992).

⁷ Its hybrid aspect derives solely from the fact that the Government is taking one of Mr. Bailey’s many rights in his property while shifting all responsibilities associated with that right to Mr. Bailey. This splitting of rights is in the nature of regulatory takings. However, as the Government imposed access involves physical occupation and use of property, the nature of this taking is physical and not regulatory.

Bailey acquired his land, the roadbed running across his property must be presumed to have been a county road acquired as an easement for the public use. Waller, 142 S.W.2d at 231. At the time of acquisition the cost of maintenance of this county road was therefore borne by the public. Now, as the result of the rulings below, the Government would retain what amounts to a right of access across his land, and the use of it, whereas all the responsibility of maintenance amounting to tens of thousands of dollars would be borne by Mr. Bailey.⁸ This is the uncompensated and prohibited taking.

What option does Reubin Bailey have but to maintain the road so that he may access his home? His alternatives are to abandon his home and property or suffer the maintenance costs that were so substantial as to cause the Madison Fiscal Court to abandon those very responsibilities. Yet the Government, through the Fiscal Court's action and the Circuit Court's ruling, purports to retain all rights of access while shifting all maintenance responsibilities to Mr. Bailey. He asks the Court to consider that not only are the maintenance costs substantial, but the impact on the value of the Bailey property is even more substantial. It is such as to make it worthless. No buyer who was ready to purchase the Bailey home and land for value \$X would continue with the purchase when they then learn that the home and land come not only with the pre-existing right of access by the Government across it, but now with the maintenance costs previously borne by the Government shifted entirely to the prospective purchaser if that purchaser desires to access the property. No such prospective purchaser would undertake such an obligation, nor would he or she assume the potential liability for injury to

⁸ This is not to say that there will exist no maintenance obligation for the road when used by the Mr. Bailey and the ten or so persons who access their land via said road. However, the differential between such nominal costs versus the tens of thousands of dollars repeatedly expended by the county for Government imposed public access is, to say the least, enormous.

members of the public who could hardly be classified as trespassers if they were using a Government-imposed public right of access.

This is not to say that every discontinuance of a county road via KRS 178.070 will lead to a prohibited taking. In many cases, in fact, this will not be the case. For example, county roads that are discontinued and that run across publicly owned land would constitute no such taking. Nor would the discontinuance of county roads that constitute a boundary of private land but whose maintenance costs are not transferred to the private landowner because the private landowner does not access his property via that discontinued road. Thus, KRS 178.116 is not unconstitutional on its face, it is simply the manner in which the Circuit Court and Court of Appeals interpret and apply it that leads to a result contrary to takings jurisprudence.

V. A CONSTITUTIONAL VIOLATION CAN BE AVOIDED

“It is an elementary principle that where the validity of a statute is assailed, and there are two possible interpretations, by one of which the statute would be constitutional and by the other it would not, it is the duty of the court to adopt that construction which would uphold it.” Gibson v. Commonwealth, 209 Ky. 101, 272 S.W. 43, 44 (1925). The only way to avoid a violation of U.S. Constitution Amendments 5 and 14 and Kentucky Constitution Section 13 and at the same time observe the common law dictates set forth in Waller is to come to the conclusion presented herein. Notably, such an interpretation is not prohibited by either of the relevant statutes.

That is, when discontinuance of a road is properly accomplished via K.R.S. 178.070, if the roadbed (1) is not shown to have been acquired by the County in fee⁹ and (2) the road is used to directly access the private home and property of a landowner, then the roadbed remains part of the property over which it lies, subject only to a private right of easement across it for the use of those individuals who access their property and homes via this road.

VI. CONCLUSION

The Madison County Fiscal Court complied with the provisions of KRS 178.070 in discontinuing Dunbar Branch Road, and this determination by the Circuit Court has never been appealed. It is undisputed that the discontinued Dunbar Branch Road runs across property of Reubin Bailey and absent proof to the contrary, where it ran across his property this former county road constituted an easement for public access prior to discontinuance. It is undisputed that Mr. Bailey has gated the road where it crosses his property and he has provided access to all parties who use the road to get to their homes and land.

Subsequent to discontinuance, to allow Government imposed access while simultaneously imposing upon a private homeowner the obligation to maintain a discontinued road at the cost of tens of thousands of dollars constitutes a constitutionally prohibited unlawful taking without compensation by the State. Accordingly, in circumstances such as those presented in this case and in order to avoid an

⁹ The question might legitimately raised – what if the roadbed had been acquired in fee? Does a discontinuance forfeit the Government's title in fee just as it forfeits an easement when it discontinues a road? Little justification for a different result can be found. However, that is not the circumstance presented by this case; the Government here only has access by easement.

unconstitutional reading of a presumptively valid statute, discontinuance must be recognized as forfeiture by the County of Government imposed access through private property, such that the landowners' property is thereafter subject only to a private right of access, arising by necessity, for those landowners who enter their property via this discontinued road. Wherefore, the decisions of the Kentucky Court of Appeals and Madison Circuit Court entered on April 2, 2008, should be reversed and Summary Judgment entered in favor of the Appellant.

Respectfully submitted,

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