COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000319-D
(2006-CA-0188)

CORDELLA BASTON — **APPELLANT**

v.

COUNTY OF KENTON, KENTUCKY, ex rel.
KENTON COUNTY AIRPORT BOARD
and
KENTON COUNTY AIRPORT BOARD — **APPELLEES**

BRIEF OF APPELLEES

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that this Brief of Appellees has been sent by regular U.S. mail, first class, postage prepaid on this 6th day of October, 2009, to the following persons: Hon. Robert W. McGinnis, Special Judge, Harrison County Justice Center, 115 Court Street, Suite 5, Cynthiana, KY 41031; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Philip Taliaferro, Esq., Robert W. Carran, Esq., and Alice G. Keys, Esq., Taliaferro, Shirooni, Carran & Keys, PLLC, 1005 Madison Avenue, Covington, KY 41011.

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INTRODUCTION

In this appeal, the landowner in a condemnation case seeks to reinstate a jury verdict overturned by the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees believe that oral argument would assist the Court in its consideration of this appeal.

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COUNTERSTATEMENT OF THE CASE

In the early 1990s, the Kenton County Airport Board which operates the Cincinnati/Northern Kentucky International Airport, the largest in the state, commenced upon a program to construct a new North/South runway. As part of that program, the Airport undertook the required environmental study, surveying, engineering, and design for the project, and voluntarily began acquiring larger parcels which lay in the project area. Appellant's parcel was one of a handful requiring the exercise of the power of eminent domain by the Airport Board and Kenton County. The property owners of most of these properties requiring condemnation proceedings were represented by Mr. Taliaferro's firm.

The subject property consists of 7.883 acres, both zoned and used residentially, for more than four (4) decades before the condemnation action. The boundaries of the property appear on Trial Exhibit 2 at Appendix A. Four (4) streams marked in blue bisect the property through ravines. The property falls about 40 feet east to west. Most importantly, its only access to the public road system lies along Hill Road. Hill Road is a partly private, partly county road which is also partly paved. The parties agree that the right-of-way of Hill Road is 30 feet wide. At its northern extremity, Hill Road passes through a hairpin turn, crossing Elijah Creek over a narrow bridge, and intersects Hossman Road. Hossman Road, in turn, continues north and intersects KY 20.

The Airport introduced testimony from architect Andrew Piaskowy, who testified that the subject property via Hill Road was not accessible to tractor trailer traffic. Mr. Piaskowy created Trial Exhibit 8 at Appendix B. He testified that a tractor trailer needs a minimum of 50 feet radius in which to turn. That the outer wheels of the truck will follow the 50 foot

radius. The back inside wheels will follow a narrower turning radius. Mr. Piaskowy depicted these turning radiuses on Trial Exhibit 8 by the shaded area. Mr. Piaskowy further testified that the bridge crossing Elijah Creek in the center of the hairpin turn was not designed for intense truck traffic and would need to be rebuilt. Based on the condition of the bridge, the limitation of a 30 foot right-of-way, and the inability of a private developer to use eminent domain to acquire needed additional right-of-way, Mr. Piaskowy concluded that truck traffic physically could not access the subject property by Hill Road. (Tape 1, 10/24/05, 3:32:38.)

A civil engineer, Mr. Dan Riegler, also testified concerning the difficulties of truck access on Hill Road. Mr. Riegler testified much to the same effect as Mr. Piaskowy and depicted his opinions with three (3) illustrations in Trial Exhibit 30 at Appendix C. Mr. Riegler explained that Trial Exhibit 30 showed three (3) illustrations, all of which demonstrated the physical impossibility of a tractor trailer successfully negotiating the hairpin turn at the northern extremity of Hill Road. Mr. Riegler explained that Illustration No. 1 showed the truck successfully crossing the bridge represented by guardrails on Trial Exhibit 30. Illustration No. 1 showed that the tractor trailer would need to trespass onto private property adjoining Hill Road in order to complete its turn after clearing the bridge. Illustration No. 2 on Trial Exhibit 30 was described by Mr. Riegler as a scenario in which the tractor trailer operator was allowed to stop and reverse in order to try to stay within the right-of-way of Hill Road. This proved impossible. According to Mr. Riegler, Illustration No. 2 again demonstrated the need for the tractor trailer to enter onto private property beyond the right-of-way of Hill Road in order to complete the hairpin turn. Mr. Riegler described

Illustration No. 3 as a different approach wherein the truck operator used a tighter path to stay within the right-of-way. The turn, however, could not be completed without the trailer dropping off the bridge into the creek. (Tape 2, 10/25/05, 11:57:00 to 12:01:50.) Mr. Riegler further testified that Trial Exhibit 30 was the result of standard software used by civil engineers in analyzing sites and the needs of truck access relative to said sites.

In response to the testimony of architect Piaskowy and engineer Riegler, the landowner called civil engineer, Mr. Ray Erpenbeck. Mr. Erpenbeck merely testified that the turns on both Hossman Road and Hill Road could be "softened" within the existing right-of-way. Mr. Erpenbeck supplied no further details nor produced any exhibit to show effects of this "softening."

The Airport elicited testimony from its appraisal witness, Mr. Lance Brown, and a land use planner, Ms. Lara Robertson, to the effect that Boone County zoning requirements for industrial sites required a 50 foot right-of-way for access roads. (Tape 1, 10/24/05, 5:10:29.) As outlined in Appellant's Brief, Mr. Erpenbeck testified that he knew of three (3) locations in Boone County where a 30 foot right-of-way existed onto an industrial site. (Appellant's Brief, p. 2.) However, Mr. Erpenbeck cited no provision of the Boone County Zoning Code as authority that industrial access could be reduced from the 50 feet to his asserted 30 feet. Nor did Mr. Erpenbeck explain if these sites pre-dated the zoning code. Mr. Erpenbeck offered no testimony in rebuttal to architect Piaskowy's testimony concerning the need of a 50 foot turning radius as depicted on Trial Exhibit 8. With regard to Exhibit 30 produced by Mr. Riegler, Mr. Erpenbeck testified as depicted on page 25 of Appellant's Brief. The Court should note that in the excerpt the first two questions of Mr. Erpenbeck's

testimony dealing with softening curves and appearing on page 25 actually refer to Hossman Road, not to Hill Road. With regard to Hill Road and Trial Exhibit 30 presented by Mr. Riegler, the following exchange occurred:

> Q: Now as part of [Airport Engineer] Mr. Riegler's exhibits, he has prepared Exhibit 30 and he has drawings of this exact turn and show depictions on how trucks would have a terrible time making the turn as it exists, as it existed, this is on Exhibit 30, exactly the curve that you are going to soften out?
>
> A: Yes.
>
> Q: And can that be done in your engineering opinion, so that everything depicted in Riegler Exhibit 30 just aren't there?
>
> A: That is correct.

Tape 4, 10/27/05 at 8:54:40.

Mr. Erpenbeck offered no further rebuttal nor explanation as to the tractor trailer access issue. Mr. Erpenbeck presented no explanation, no diagrams, no other reference to software commonly employed by engineers which would illustrate how the hairpin turn in Hill Road could be "softened" within the existing 30 foot right-of-way to permit semi-trailer truck access to the subject property. This testimony constitutes the "bald" assertion referred to by the Court of Appeals in its Opinion.

The Airport called appraiser Lance Brown to testify concerning his opinion of the fair market value of the subject property, and particularly with regard to the highest and best use of the property. Mr. Brown testified that he had spoken to Boone County Planning Department and had been told that Boone County would expect that in order for the subject

property to be rezoned "Industrial," Hill Road's thirty foot right-of-way would need to be expanded to fifty feet. Mr. Brown testified as follows:

> A: Well to widen the 30 foot right-of-way to 50 feet requires the acquisition of additional right-of-way on property not owned by Baston. To acquire additional right-of-way on property not owned by you, you have to acquire it from an adjacent property. Well that requires either an agreement from the adjacent property owner or a condemnation – you have to take it from them. The bottom line is that that relies on the uncertain actions of others. If you are a developer, you can't – you don't have the right of eminent domain and you can't go in there and take additional right-of-way to make your road bigger so you can build an industrial building on your property.... So once I got to legally permissible and came to the conclusion that wasn't very realistic, to a large extent my question was answered about what's your highest and best use was. My highest and best use reverted back to a use that was consistent with the existing zoning. Either continuation of the single-family use that exists or redevelopment of it with some other residential use that's permitted within the zone.

Tape 2, 10/25/05, 2:56:17.

The Court should note that Appellant mischaracterizes Mr. Brown's testimony on page 3 of its Brief where it attributes testimony to Mr. Brown that it would be physically possible to develop the Baston property industrially. In reality, the question asked was, "Could the Baston property be developed industrially? Given enough money?" Mr. Brown kept the condition "given enough money" to his affirmative answer, "Given enough money, yes." (Tape 2, 10/25/05, 4:11:12.) So there is no doubt concerning Mr. Brown's testimony, several minutes later still on cross-examination by landowner's counsel, Mr. Brown testified, "From an industrial standpoint, the physical constraints, the cost constraints of being able to use it as industrial, it didn't work." (Tape 2, 10/25/05, 4:46:22.)

The Court of Appeals reversed the jury verdict not only because there was no proof that it was physically possible to use the subject property industrially, but additionally because the verdict was the product of passion and prejudice. In its Opinion, the Court of Appeals outlined a persistent pattern of inappropriate questions and argument presented by landowner's counsel throughout the trial. From his opening statement in which landowner's counsel told the jury they would need to decide if the Airport was operating in good faith in the way that they were treating folks, objection overruled (Tape 1, 10/24/05, 1:47:50), to closing argument in which counsel argued "... Which I'm sorry, I don't think that's right, I don't think that's enough, I don't think that is the kind of compensation that she deserves for hanging in there. That's not her measure of justice on this day." (Tape 4, 10/27/05 at 2:28:28.) Landowner's counsel engaged in a deliberate pattern of asking improper questions, calculated to appeal to the jury's passion and prejudice by depicting the Airport as a large callous corporation grinding down the poor widow Baston.

Landowner's counsel subpoenaed Mr. Dale Huber, an Airport executive, to testify as on cross. Counsel questioned Mr. Huber about a letter sent in 1995 to the landowner offering to purchase her property on a voluntary basis under a noise mitigation program. (Tape 3, 10/26/05, 9:49:10.) Landowner's counsel next questioned Mr. Huber about a letter sent to the owner of another parcel involved in the runway acquisition project, a Mr. Wayne Jones. (Also represented by landowner's counsel.) Landowner's counsel asked Mr. Huber:

> Q: And after that letter was sent out, you yourself know that Mr. Jones from testimony was scared and did not then go forward with any development, don't you?
>
> MARTIN: OBJECTION, YOUR HONOR.

JUDGE: SUSTAINED.

Q: Did Mr. Jones go forward with any development after that letter?

MARTIN: OBJECTION, YOUR HONOR.

JUDGE: What does Mr. Jones have to do with this case?

Mr. Taliaferro, in open court, proclaimed, "It kills the whole –

MARTIN: OBJECTION

TALIAFERRO: area for development."

MARTIN: OBJECTION

TALIAFERRO: That's the reason and this is the proof of it.

MARTIN: I have a motion, Your Honor. (Referring to the County's first motion for a mistrial.)

Tape 3, 10/26/05, 9:54:05.

At which point, counsel asked to approach the bench. At the bench conference, the Airport renewed its motion for mistrial "because he's asking questions and speaking in court about basically the effect of a project which we all know doesn't come into the case." Mr. Taliaferro responded, "The effect of the project does come into the case if it kills the development potential." The trial judge noted to Mr. Taliaferro, "You're right back into what they're talking about." To which Mr. Martin for the Airport renewed his motion for a mistrial. The Judge overruled the motion for mistrial, concluding, "No questions have been answered" and instructed Mr. Taliaferro to steer away from this.

The next question to Mr. Huber by Mr. Taliaferro was,

Q: Mr. Huber, after the letter of 1997 in the area around Baston and the area around Victory Park, no more industrial development occurred, even up to the present, isn't that correct?

MARTIN: Objection.

JUDGE: Overruled.

Landowner's counsel then asked,

Q: In the area around Baston where the new runway is going to be put, tell the jury if you can think of one industrial development that occurred there?

MARTIN: Objection, Your Honor. I renew my motion

JUDGE: Overruled.

Mr. Taliaferro then asked,

Q: Now in the area around the rest of the Airport, isn't it a fact that there was dramatic growth around the Airport corridor from 1996 and 1997 up to the very present, including the new Toyota sale just a few days ago.

Mr. Taliaferro then shifted tactics and five questions later, asked Mr. Huber if he hadn't been involved in acquiring millions of dollars worth of property. Objection was made by Airport counsel; the Judge sustained.

The next question asked by Mr. Taliaferro to Mr. Huber:

Q: And does the Airport own over 7,000 acres around the Airport?

MARTIN: Objection.

JUDGE: Sustained.

Tape 3, 10/26/05, 10:01:28.

At which point the Airport renewed its motion for mistrial a third time. The Judge again overruled the motion, concluding the answers haven't come in.

At 10:30:13, Mr. Taliaferro began questioning Mr. Huber about the Airport implementing a plan to reduce air emissions. At 10:30:54, Mr. Taliaferro asked:

Q: And how many millions of dollars have you spent to attempt to minimize this?

MARTIN: Objection.

JUDGE: Sustained.

Q: And how many times have you been fined by the state for your pollution into Elijah Creek?

MARTIN: Objection.

JUDGE: Sustained.

Tape 3, 10/26/05, 10:32:13.

Q: And the Airport has violated that, have they not, because it's been a violation of that agreement. [Referring to a noise monitoring agreement with the Sisters of Charity Mother House in Cincinnati, Ohio.]

MARTIN: Objection.

JUDGE: Sustained.

Tape 3, 10/26/05, 10:56:09.

At 11:16:56, Mr. Taliaferro concluded his testimony by asking Mr. Huber if he didn't recommend a "brand new appraiser, Lance Brown, from northern Cincinnati as an appraiser in this case." Airport counsel objected and the Judge sustained. And Mr. Taliaferro finally asked, "Since you are in charge of everything in terms of property acquisition, tell this jury

how many appraisers that the Airport has under contract." Airport counsel objected and the Judge sustained.

The Court of Appeals correctly set aside the verdict after reviewing the tactics of landowner's counsel, concluding that landowner's counsel had appealed to the passion and prejudice of the jury and that the comments in open court and questions principally to Mr. Huber dealing with other properties purchased by the Airport as part of the project violated KRS 416.660.

ARGUMENT

I. The Court of Appeals Correctly Reversed the Trial Verdict since There Was No Affirmative Evidence Supporting a Finding of the Highest and Best Use as Industrial Rather than its Current Residential Use and Residential Zoning.

The Court of Appeals reversed the jury verdict which placed a high industrial value of $85,000 per acre, or $670,000, on the subject property. The evidence established that the subject parcel of real estate had been zoned and used residentially since the 1950s. The parcel contained 7.883 acres which was traversed by four (4) separate streams and sloped a difference of about forty feet from west to east downhill towards a creek. The only access to the public road system was through Hill Road, which the unrefuted evidence showed was impassable to semi-trailer trucks.

The property owner argued and presented value testimony from its appraiser based only on a highest and best use of industrial warehouse. On page 7 of its Opinion, the Court of Appeals noted that the landowner's engineer, Mr. Erpenbeck, "... provided no affirmative

evidence that the road could be improved within the existing right-of-way, nor did he present evidence that additional land could be acquired from neighboring properties to accomplish such a modification." On page 8 of its Opinion, the Court of Appeals noted:

> The lack of access and the failure to develop proof as to the mere possibility, let alone the cost, of creating the necessary access should have prohibited any testimony as to industrial values. The jury simply cannot speculate as to the highest and best use of the property.

The Court of Appeals concluded on page 9 of its Opinion:

> We conclude that the jury verdict assessing Baston's property at the high end of the industrial values, despite its residential zoning and use, only supports the conclusion that the jury was influenced by the improper tactics of Baston's counsel.

In so holding, the Court of Appeals followed well-established Kentucky law dealing with the highest and best use of property in condemnation cases. The Court of Appeals' Opinion should be affirmed.

A review of the pertinent trial testimony affirms that the Court of Appeals properly analyzed and reached a sound conclusion in its reversal of the trial verdict. The County and the Airport introduced testimony from an architect, Mr. Andrew Piaskowy. Mr. Piaskowy testified at trial regarding Exhibit 8 which he had prepared. In his opinion, a semi truck and trailer could not make the hairpin turn at the north end of Hill Road and cross the bridge without going outside of the right-of-way. On Tape 1 from 10/24/05 at 3:32:38 the following testimony was offered:

> Piaskowy: The other issue that was apparent was the access road wasn't even on the property itself, but the access road on Hill had a pretty severe S-turn, in fact it's more than an S-turn, it's more of a hairpin turn and there was a real concern with gaining access to the site from Hossman Road because of that.

Baker: Is that depicted on Exhibit 8?

Piaskowy: Yes it is.

Baker: Could you explain to the jury what you're showing there.

Piaskowy: The gray indicates the turning radiuses – the outside radius of a truck is 50 feet. A truck to make a 90 degree turn – a semi-tractor trailer – needs a 50 foot turning radius and that's indicated by the outside line. The inside line is the radius that the inside wheels would need so as a truck turns the far right-hand wheel is going to make the biggest radius and the wheel in back on the left-hand side will make the smallest radius. Well that creates a fairly wide amount of pavement that's needed for a truck to make that 90 degree turn. What I was indicating by this diagram is the red indicates Hill Road from the information I gleaned from Boone County and I overlaid these gray semi arcs that would indicate the truck turning radius and what it told me is that this truck would have to leave the road and enter onto somebody else's property to make that turn.

Baker: And is that of course permitted?

Piaskowy: It is not permitted.

Baker: And as an architect, when you are designing a site do you need to take into consideration turning radiuses for trucks that might be using the property.

Piaskowy: Absolutely, and I would have found it very difficult if Boone County Zoning wouldn't have required this issue be addressed before they would allow development to be built – an industrial development to be built.

Baker: And in your opinion would that require somehow the acquisition of additional real estate?

Piaskowy: Yes it would, in my opinion.

Baker: A person developing the Baston site doesn't have the right to just go up and build the road wider up there, do they?

Piaskowy: No. And not only that but it would really add to the cost because we're also dealing with the bridge that would have to no doubt be rebuilt. I doubt if it was built to take intense truck traffic.

Baker: Did – Are these – this truck turning radius that we're talking about, is that in standard literature that architects consult when they do this planning?

Piaskowy: Yes, I have access to planning manuals that I refer to on an ongoing basis and this information was taken from a graphic standard book that I've used for many years.

Baker: And do you recall the name of that book?

Piaskowy: Well the author is Ramsey/Sleeper and I think it's just called Graphic Standards.

Trial Exhibit 8 used by Mr. Piaskowy to illustrate his testimony clearly shows the 50 foot minimum turning radius for a semi trailer lying well outside the 30 foot right-of-way on Trial Exhibit 8. (See Appendix B, Trial Exhibit 8.) In Mr. Piaskowy's opinion, the Boone County zoning authorities would require the road to be rebuilt prior to granting a zone change. But whether or not the zoning authorities required the road to be rebuilt, there is no doubt that it is physically impossible for a tractor trailer truck to negotiate the hairpin turn at the north extremity of Hill Road without leaving the right-of-way. As discussed below, before evidence may be submitted to the jury for use other than the present use, the landowner must establish that the new use is physically possible on the parcel.

Subsequent to Mr. Piaskowy's testimony, civil engineer, Mr. Dan Riegler, testified on behalf of the County and Airport. Mr. Riegler introduced Exhibit 30, which he created using software standard in the industry for analyzing semi trailer truck turns. Exhibit 30 sets forth three (3) different illustrations of how a truck might approach the hairpin turn at the

northern extremity of Hill Road. Illustration No. 1 shows that the truck would need to leave the 30 foot right-of-way and enter into private property in order to cross the bridge marked by the guardrails. Illustration No. 2 shows that even if the truck is permitted to stop and back up, it is still not able to negotiate the hairpin turn without leaving the right-of-way of Hill Road. Illustration No. 3 shows that in order to stay within the 30 foot right-of-way of Hill Road, the truck would need to leave the bridge and enter the creek. Mr. Riegler concluded that it was physically impossible for a semi-tractor trailer to negotiate the hairpin turn at the intersection of Hossman and Hill Road. (Tape 2, 10/25/05, 11:57:14 to 12:01:50.)

The testimony of Mr. Piaskowy and Mr. Riegler remained unrebutted. The landowner submitted testimony from Mr. Erpenbeck, its civil engineer. Mr. Erpenbeck used no illustrations, no software, or no exhibit showing how a tractor trailer truck could negotiate the hairpin turn and narrow bridge at the northern extremity of Hill Road. In fact, a careful reading of Mr. Erpenbeck's testimony reveals at no time does Mr. Erpenbeck actually testify that a tractor trailer truck can negotiate the Hill Road hairpin turn without leaving the public right-of-way. The landowner in its Brief points to testimony of Mr. Erpenbeck in which he suggests a "softening" of the curves on both Hossman Road and Hill Road. On page 25 of its Brief, the landowner quotes part of Mr. Erpenbeck's testimony as follows:

Q: Now is part of the plan you submitted and the cost that you have calculated a softening of that curve?

A: Uh, yes it is.

Q: Okay. And is there sufficient right-of-way in there to soften that curve so the tractor trailer trucks can use it?

A: Yes there is.

Q: Now as part of [Airport engineer] Mr. Riegler's exhibits, he has prepared Exhibit 30 and he has drawings of this exact turn and show depictions on how trucks would have a terrible time making the turn as it exists, as it existed, this is on Exhibit 30, exactly the curve that you are going to soften out?

A: Yes.

Q: And can that be done in your engineering opinion, so that everything depicted, all the problems that are depicted in Riegler Exhibit 30 just aren't there?

A: That is correct.

Tape 4, 10/27/05, 8:54:40.

The Court should note that in the context of this testimony the first two (2) questions about softening the curve clearly refer to the curves on Hossman Road, not Hill Road. It is certainly possible to read the last two questions as also referring to Hossman Road, not Hill Road, but even giving landowner the benefit of the doubt that Mr. Erpenbeck was referring to the curve on Hill Road, there is no explanation, exhibit, or demonstration of how a tractor trailer truck can make the hairpin turn on Hill Road. Mr. Erpenbeck offered no refutation whatsoever to the testimonies of Mr. Piaskowy or Mr. Riegler. Mr. Erpenbeck did not challenge either Mr. Piaskowy or Mr. Riegler nor that Exhibit 8 and Exhibit 30 inaccurately depicted the true state of affairs. Mr. Erpenbeck merely testified that in his opinion, after softening the curves, "all problems that are depicted in Riegler Exhibit 30 just aren't there." This is the so-called "bald assertion" referred to by the Court of Appeals in its Opinion. The Court of Appeals correctly concluded that Mr. Erpenbeck's simple assertion is not sufficient evidence for the jury to conclude that Hill Road could serve as an access road for tractor trailers and that it was thus physically possible for the Baston property to be used as an

industrial warehouse. At page 8, the Court of Appeals correctly concluded, "The lack of access and the failure to develop proof as to the mere possibility, let alone the cost, of creating the necessary access, should have prohibited any testimony as to industrial values. The jury simply cannot speculate as to the highest and best use of the property."

The law in Kentucky, at least since 1942, has required a landowner in a condemnation case to demonstrate through credible evidence that the subject property could reasonably be put to a different use in the near future before permitting testimony of valuation based on the new use. In Hoskin v. Commonwealth, 290 Ky. 400, 161 S.W.2d 169 (1942), the former Court of Appeals affirmed a trial court's rejection of valuation testimony based on a residential subdivision of the subject property when there was no proof of a market or demand for building lots in the vicinity. As condemnation cases became more prevalent in the 1950s and the 1960s, again Kentucky's highest court reversed a series of jury verdicts where the landowner failed to present sufficient evidence of the likelihood of an alternate use. The Court reversed the verdict in Comm., Dept. of Hwys. v. Gearhart, 383 S.W.2d 922 (Ky. 1964) since the Court had permitted testimony concerning the presence of coal on the subject property which was being used as a farm. Gearhart formulated what became the general rule as follows:

> Our cases have consistently observed the rule that it is appropriate to admit testimony of the adaptability of property for particular uses, even though the property is not been being so used. However, the rule is subject to the qualification that if the land is reasonably adaptable to another use, there must be an expectation or probability in the near future that it can or will be so used.

Gearhart at p. 926.

Relying on Gearhart, Kentucky's highest court reversed a jury verdict in Dept. of Highways v. Robinette, 386 S.W.2d 719 (Ky. 1965). The Court concluded that testimony concerning the presence of coal underlaying the land was highly prejudicial when the land was being used as a dairy farm. The Court noted that there was no evidence of the intention or expectation of mining the coal in the near future in that case.

In Comm., Dept. of Hwys. v. Creason, 402 S.W.2d 426 (Ky. 1966), Kentucky's highest court again reversed a jury verdict on facts remarkably similar to the case at bar. In that case, the landowner's valuation was premised on the suitability of the land for subdivision or industrial usage since the property was approximately 500 feet from the city limits of Campbellsville, Kentucky. In reversing, the Court noted, however, that the only access to the property was by way of a 10 foot graveled right-of-way. The Court formulated the rule as follows:

> It would seem fair therefore in condemnation cases to value the land taken on the basis of its use at the time of the taking unless it can be shown that an expectation or probability of residential or commercial uses in the near future can be shown.

The Court concluded that:

> Testimony as to the value of the property for residential or industrial purposes was not justified and confused or misled the jury in reaching a verdict.

Creason at p. 427.

In again reversing a jury verdict in Paintsville-Prestonsburg Airport Board v. Galbraith, 433 S.W.2d 868 (Ky. 1968), the Court of Appeals held that if the possibility for building purposes is remote and speculative this will render any evidence of such use inadmissible. Galbraith at p. 871. In that case, the Airport Board was condemning the

property which was used for agricultural purposes and lay six (6) miles from the nearest town. Even though at the time of the taking a new state highway was under construction, which would if completed eventually reach this property, at the time of the taking, the property was not served by a public highway. The Court concluded:

> In view of the fact that the area proposed to be subdivided is approximately as large as the entire city of Paintsville, Pikeville or Prestonsburg, lies six miles from the nearest incorporated town of any size, and was not at the time of the taking serviced by a public road, we do not believe the proof shows the highest and best use to be anything other than agricultural.

Galbraith at p. 871.

The Court continued in formulating the general rule:

> ... We recognize that evidence can be adduced and that highest and best use might be something other than the present use but in order for this to be true, there must be an expectation or probability that in the near future *it will be so used.* (Emphasis original.)

The discussion of the principles of law surrounding highest and best use in condemnation cases is discussed in Big Rivers Elec. Corp. v. Barnes, 147 S.W.3d 753 (Ky. App. 2004). Barnes correctly notes that the point of any analysis of highest and best use begins with the current use of the subject property at the time of the taking. The landowner is only permitted to testify to values based on a different use if it can be shown that the property reasonably may be put to the alternate use in the near future. Barnes formulated the rule as such:

> In condemnation cases, the value of the land taken is based on "its use at the time of the taking unless it can be shown that an expectation or probability of ...uses in the near future can be shown. Creason, 402 S.W.2d 427. (Emphasis added.) In determining the market value of land we look to the highest and best use of the property at the time of taking.... Paintsville-Prestonsburg Airport Board v. Galbraith, 433 S.W.2d 868, 870 (Ky. 1968).

> We recognize that evidence can be adduced that the highest and best use might be something other than the present use but in order for this to be true, there must be an expectation or probability in the near future it will be so used. Id. at 871. *See also* Comm., Dept. of Highways v. Carraco, 476 S.W.2d 175 (Ky. 1972); Comm., Dept. of Highways v. Melwood Development, Inc., 487 S.W.2d 684 (Ky. 1972); Stevens Estate, 502 S.W.2d 71. (Citations and emphasis original.)

In the case at bar, the landowner has fallen far short of this standard. Admittedly the parties agree the use and zoning of the subject property at the time of taking was residential and had been for many years previous. The Airport Board argues that evidence of industrial value should not have been permitted because the landowner offered no proof that it was possible, let alone probable, that the subject property would be used as industrial property in the near future. The burden was on the landowner to establish that the alternate use was both physically possible and reasonably probable in the near future. Mr. Erpenbeck's "bald assertion" simply falls short of the required showing. There was no reasonable basis for the jury to conclude that Hill Road could be modified at any reasonable expense to accommodate tractor trailer traffic within the existing 30 foot right-of-way. Neither did any evidence permit the jury to conclude that additional land could be obtained to enlarge the right-of-way. Mr. Erpenbeck's bald assertion merely invited speculation on the part of the jury that the road could provide access within its existing right-of-way. There was no evidence of any agreements with any adjoining property owners to convey sufficient right-of-way to permit the reconstruction of Hill Road to accommodate large truck traffic. Neither was there any evidence that the narrow bridge at the northern extremity of Hill Road could accommodate "intense truck traffic." Mr. Piaskowy had testified that neither the bridge nor the existing right-of-way would accommodate truck traffic. Mr. Riegler had likewise so testified and

used Exhibit 30 to demonstrate three different illustrations, all showing it impossible for a tractor trailer to navigate Hill Road within the existing right-of-way. Such being the case, Mr. Erpenbeck's bald assertion provides no more reasonable expectation that Hill Road could accommodate truck traffic than the use of a magic wand.

The issue of truck access on Hill Road came as no surprise to the landowner. Kenton County and the Airport Board had filed a Motion in Limine to strike Mr. Nickerson's appraisal prior to trial because of his failure to explain within his appraisal report how truck traffic could negotiate Hill Road. The Court took the matter under submission but never ruled. Again, objection to Mr. Nickerson's opinion was posed at trial. (Tape 4, 10/27/05, 11:48:00 to 11:49:32.) The objection was overruled. Finally, the County and the Airport Board filed a Motion for a New Trial (R., Vol. II at 149-157) in which again the County and the Airport Board argued that the evidence clearly indicated the property was not suitable for industrial development because tractor trailers could not access the subject property along Hill Road. The only competent evidence for the jury to consider was Mr. Brown's testimony that because the property could not be used for industrial purposes, that its current residential zoning was appropriate. The property owner clearly failed to meet its burden of proof to establish that industrial use was possible and reasonably expected in the near future. Having failed that burden, Mr. Nickerson should not have been permitted to testify to industrial values and the jury should not have been permitted to consider Mr. Nickerson's value testimony.

On page 3 of its Brief, the landowner incorrectly states that appraiser Lance Brown admitted it would be physically possible to develop the Baston property industrially. The

citation is to Tape 2, 10/25/05 at 4:11:06. The statement grossly mischaracterizes Mr. Brown's testimony. At that point, Mr. Brown was asked by landowner's counsel whether **given enough money** the property could be developed industrially, to which he answered, "Given enough money, yes." This is far different than saying that it is his opinion the property could be developed industrially as its highest and best use and would be financially feasible. In fact, Mr. Brown's testimony was quite the opposite. Mr. Brown testified that he had met with the Boone County planning authorities and was told that the right-of-way of Hill Road would need to be increased from 30 feet to 50 feet, and for him this ruled out any industrial use. As he explained:

> Well that requires either an agreement from adjacent property owners or condemnation. You have to take it from them. The bottom line is that it relies on the uncertain actions of others. If you are a developer, you can't – you don't have the right of eminent domain and you can't go in there and take additional right-of-way to make your road bigger so you can build an industrial building on your property... So once I got to legally permissible and came to the conclusion that wasn't very realistic, to a large extent my question was answered about what's your highest and best use was. My highest and best use reverted back to the use that was consistent with the existing zoning. Either continuation of the single family use that exists or redevelopment of it with some other residential use that's permitted within the use.

Tape 2, 10/25/05, 2:55:19.

When questioned by landowner's counsel on cross-examination about the use of the property as industrial, Mr. Brown testified:

> From an industrial standpoint, the physical constraints, the cost constraints of being able to use it as industrial, it didn't work.

Tape 2, 10/25/05, 4:46:22.

On page 4, landowner's counsel once again mischaracterizes Mr. Brown's testimony by stating that Mr. Brown testified that the fair market value of the Baston property as industrial would be in the range of $60,000 to $90,000 per acre. Such was not Mr. Brown's testimony. Mr. Brown testified that industrial property in the general area fell within the range of $60,000 to $90,000 an acre. At no time did he testify that the Baston property could be used as industrial or would fall into that range. In fact as stated above, his testimony was that for the Baston property, given the physical and economic restraints, industrial didn't work. (Tape 2, 10/25/05, 4:46:22.) Any attempt by landowner's counsel to recast Mr. Brown's testimony as allowing for industrial development of the Baston property is simply false.

The Court of Appeals correctly reversed the jury verdict because it obviously reflected industrial values and the landowner had failed to meet its required burden of proof that the subject property was capable of supporting an industrial use. The testimony of architect Piaskowy and engineer Riegler to the effect that the hairpin turn and narrow bridge at the northern extremity of Hill Road precluded tractor trailer access to the subject property remained unrefuted. Mr. Erpenbeck's mere assertion that all these problems could be dealt with, with no further explanation or demonstration as to how Hill Road could be modified within the existing right-of-way to accommodate tractor trailer traffic, is nothing more than an invitation to the jury to speculate. There is no reasonable basis that a juror could conclude that tractor trailer traffic could negotiate Hill Road. The subject property lacked any other access to the public road system. Thus, there is no reasonable basis that the property could be used to support industrial warehouse use.

The Court of Appeals' conclusion on page 8 of its Opinion is well supported by the evidence and the law of Kentucky. A survey of Kentucky cases dealing with testimony concerning highest and best uses alternative to the existing use shows that the landowner must present evidence of a reasonable basis of the expectation or probability in the near future that the alternate use will be adopted. Paintsville-Prestonsburg Airport Board v. Galbraith, 433 S.W.2d 868, 871 (Ky. 1968). The landowner simply failed this burden.

Relying on the Paintsville-Prestonsburg Airport Board case, the Court of Appeals' Opinion held:

> Even though there is a possibility that [the property] may some day be developed for [industrial] purposes... if the possibility is remote and speculative this will render any evidence of such use inadmissible.
>
> We conclude that the jury verdict assessing Baston's property at the high end of the industrial value, despite its residential zoning use, only supports the conclusion that the jury was influenced by the improper tactics of Baston's counsel.

The Court of Appeals correctly analyzed this record and the case law and reached the proper conclusion in reversing the jury's verdict. The Court of Appeals' Opinion should be affirmed.

II. The Court of Appeals Correctly Reversed the Jury Verdict on the Alternate Basis of the Landowner's Attorney's Misconduct in Persisting in Asking Clearly Inadmissible Questions.

The Court of Appeals correctly determined that the jury verdict was so tainted with passion and prejudice that it should be set aside.

After reviewing numerous improper questions posed by landowner's counsel, at the bottom of page 5 and the top of page 6 of its Opinion, the Court of Appeals concluded:

> Without a doubt, counsel's intent was to appeal to the passion and prejudice of the jury by painting the Airport as a large wealthy entity running roughshod over a poor widowed woman. Unfortunately, while the trial court frequently sustained Appellants objections, it erroneously ruled that neither an admonition nor mistrial was necessary since the objectionable questions had not been answered. However, we believe that it is irrelevant whether the questions were answered as the prejudice resulted from the questions themselves.

On page 7 of its Opinion, the Court noted, "While an isolated instance of improper conduct, or in this case improper questioning may not be prejudicial, when it is repeated in colorful variety by an accomplished orator its deadly effect cannot be ignored." Louisville & NR Co. v. Smith, 27 Ky.L.Rptr. 257, 84 S.W. 755, 759 (1905).

A review of the record suggests the Court of Appeals ruled appropriately. In his opening statement, counsel for the landowner told the jury about a letter from the Airport ten (10) years prior to the date of taking in which the Airport advised the landowner that on a voluntary basis, it may be willing to acquire her property under an existing noise mitigation program. Beginning on Tape 1, 10/24/05 at 1:47:50, landowner's counsel states:

> Now if you go back to that letter in 1995, where they are trying to buy you out because of the noise, you've got to question whether or not the Airport – you've got to – one of the things you've got to determine is whether or not the Airport is operating in good faith in the way they're treating folks.

The Airport counsel objected. Good faith is never an issue for the jury to decide. Comm., Dept. of Hwys. v. Cooksey, 948 S.W.2d 922 (Ky. App. 1997). However, the Court overruled the objection. Tape 1, 10/24/05 at 1:48:05.

Landowner's counsel continued his good faith theme. As part of its case in chief, landowner's counsel subpoenaed Mr. Dale Huber, the second highest executive at the Airport and questioned him about numerous improper subjects. Landowner's counsel questioned Mr. Huber about a letter written by Airport counsel to a Mr. Jones, another parcel acquired for the runway. The following exchange occurred:

Q: And after that letter was sent out, you yourself know that Mr. Jones from testimony was scared and did not then go forward with any development, don't you?

MR. MARTIN: Objection, Your Honor.

JUDGE: Sustained.

Q: Did Mr. Jones go forward with any development after that letter?

MR. MARTIN: Objection, Your Honor.

JUDGE: What does Mr. Jones have to do with this case?

Mr. Taliaferro in open court proclaimed, "It kills the whole –

MR. MARTIN: Objection.

MR. TALIAFERRO: area for development.

MR. MARTIN: Objection.

MR. TALIAFERRO: That's the reason. And this is proof of it.

MR. MARTIN: I have a motion, Your Honor.

Tape 3, 10/26/05, 9:54:05.

At which point counsel asked to approach the bench. At the bench conference, the Airport moved for a mistrial "because he's asking questions and speaking in court about basically the effect of the project which we all know doesn't come into the case." Mr. Taliaferro

responded, "The effect of the project does come into the case if it kills the development potential." The trial judge noted to Mr. Taliaferro, "You're right back into what they're talking about." To which Mr. Martin for the Airport renewed his motion for a mistrial. The judge overruled the motion for mistrial, concluding that no questions have been answered and instructed Mr. Taliaferro to steer away from this.

The very next question from Mr. Taliaferro was:

Q: And Mr. Huber, after the letter of 1997 [the Jones letter] in the area around Baston, in the area around Victory Park, no more industrial development occurred even up to the present, is that correct?

MR. MARTIN: Objection.

JUDGE: Overruled.

Tape 3, 10/26/05, 9:57:16.

Mr. Taliaferro then asked:

Q: In the area around Baston where the new runway is going to be put, tell the jury if you can think of one industrial development that occurred there.

MR. MARTIN: Objection, Your Honor. I renew my motion.

JUDGE: Overruled.

Tape 3, 10/26/05, 9:58:24.

Mr. Taliaferro then asked:

Q: Now in the area around the rest of the Airport, isn't it a fact that there was dramatic growth around the Airport corridor from 1996 and '97 up to the very present, including the new Toyota sale just a few days ago?

Tape 3, 10/26/05, 9:58:44.

Counsel's open court statements about killing development in the whole area are improper for two (2) reasons. It directly implicates the effect of the runway project itself which is prohibited by KRS 416.660(2). This is discussed in the next section. The comments also imply to the jury that the Airport is again acting in bad faith as a pattern with other landowners, in this case Mr. Jones. Landowner's counsel next asked Mr. Huber if he hadn't been involved in acquiring millions of dollars of property. (Tape 3, 10/26/05, 10:01:19.) Objection by Airport counsel was sustained. Landowner's counsel asked Mr. Huber if the Airport didn't own over 7,000 acres of real estate. (Tape 3, 10/26/05, 10:01:28.) Again, the Airport's objection was sustained.

Again the Airport renewed its motion for mistrial at 10:01:40. The judge again overruled the motion, reasoning that the answers haven't come in. As the Court of Appeals recognized, it's not the answer, it's the question that is prejudicial. At the bench, Airport counsel argued that the questions were being asked about assets at that point and that that has nothing to do with the issues at trial. The judge turned to Mr. Taliaferro and stated, "You're getting there and you're crossing the line." The judge then repeated that what the Airport has purchased around there "is irrelevant to this case." However, again the Court gave no admonition to the jury and again overruled Airport counsel's motion for mistrial.

Mr. Taliaferro then pursued other property the Airport had taken for the runway project, claiming that it prevented development, chiefly a piece of property which landowner's counsel claims would have been developed by "Au Chocolat" except that the Airport stopped it. (Tape 3, 10/26/05, 10:24:13 to 10:25:30.) The landowner's counsel asked, "And as soon as the Airport found out what the Hemmers were going to put on the

Sears-Wallace there, tell the jury what the Airport did to the Hemmers." (Tape 3, 10/26/05, 10:24:13). The objection by Airport counsel was sustained at 10:25:27. However at 10:26:21, landowner's counsel stated that had the Au Chocolat been on the Sears-Wallace property, wouldn't that have made the whole area more valuable in terms of value. Again, Airport counsel's objection was sustained.

Mr. Taliaferro questioned Mr. Huber about the Airport implementing a plan to reduce air emissions and asked at 10:30:54,

Q: And how many millions of dollars have you spent to attempt to minimize this?

MR. MARTIN: Objection.

JUDGE: Sustained.

Q: And how many times have you been fined by the state for your pollution into Elijah Creek?

MR. MARTIN: Objection.

JUDGE: Sustained.

Q: And the Airport has violated that, have they not, because it's been a violation of that agreement. [Referring to a noise monitoring agreement with the Sisters of Charity Mother House in Cincinnati, Ohio.]

MR. MARTIN: Objection.

JUDGE: Sustained.

The Court should note that at no time did landowner's counsel ever offer any evidence that the Airport had been fined for polluting Elijah Creek or that the Sisters of Charity had raised an issue with their agreement with the Airport. These were totally bogus

issues. A few minutes later, at 11:16:56, landowner's counsel asked Mr. Huber if he didn't recommend the brand new appraiser, Lance Brown from northern Cincinnati, as an appraiser in this case. Again, Airport counsel objected and the judge sustained the objection. Mr. Taliaferro then asked Mr. Huber to tell the jury how many appraisers that the Airport has under contract, to which Airport counsel again objected, and the Court sustained the objection.

In closing argument, landowner's counsel continued its theme of bad faith on behalf of the Airport by arguing to the jury, "... Which I'm sorry, I don't think that's right, I don't think that's enough, I don't think that is the kind of compensation that she deserves for hanging in there. That's not her measure of justice on this day." (Tape 4, 10/27/05, 2:28:28.)

Even one improper reference to inadmissible evidence is sufficient for a mistrial in a condemnation case. In Big Rivers Electric Corp. v. Barnes, 147 S.W.3d 753 (Ky. App. 2004), the Court of Appeals reversed and granted a new trial because landowner's counsel made one reference to an offer from Peabody Coal. Offers are inadmissible as opposed to sales. The Court reasoned at 762, "[O]nce the jury heard about the offer, it would have been hard to disregard." Here, landowner's counsel made multiple references to the Airport's purchase of neighboring parcels and killing development in the whole area. The jury could not ignore these repeated statements, particularly without even an admonition from the Court.

Kentucky courts have long and consistently set aside verdicts based on attempts to inflame jurors' passions by references to size and wealth of parties and deliberate and persistent improper questions. Rockwell International Corp. v. Wilhite, 143 S.W.3d 604 (Ky.

App. 2003), *review denied*; Clement Bros. Co. v. Everett, 414 S.W.2d 576 (Ky. 1976), *rehearing denied*; Dept. of Hwys. v. Sanders, 396 S.W.2d 781 (Ky. 1965); Comm., Dept. of Hwys. v. Darch, 374 S.W.2d 490 (Ky. 1964); Walden v. Jones, 289 Ky. 395, 158 S.W.2d 609 (1942).

In Comm., Dept. of Hwys. v. Darch, 374 S.W.2d 490 (Ky. 1964), the Court recognized the "cumulative prejudicial effect" of improper questions and admissions before the jury in reversing the verdict. In Clement Bros. Co. v. Everett, 414 S.W.2d 576 (Ky. 1976), the Court reversed the award of damages where the defendant "...was pictured as a rich, grasping, foreign corporation running ruthlessly roughshod over the poor, honest, long-suffering citizens of Barren County...." In Sanders, the Court noted at page 783, "...the persistence of counsel for appellee to place his client in the class of the unwilling, downtrodden, and mistreated was calculated to have no other effect than to inflame and prejudice the mind of the jury or a part of the jury...." In reversing the verdict in Walden v. Jones, at 612 the Court noted:

> There is no law applicable to the poor that is not likewise applicable to the rich, nor is any law applicable to the rich that is not likewise applicable to the poor, and an endeavor on the part of an attorney or litigant to inflame the minds of the jury by referring to the financial status of either of the parties is improper.

Landowner's counsel portrayed the Airport as being a large, wealthy entity blatantly persecuting the poor widow Baston by stopping development around her property in pursuit of its runway project. The excessive verdict proves that these improper tactics inflamed the jury. The jury valued the property at a huge value, even for industrial property, even though

the proof showed that semi trailer trucks could not access the subject property. The verdict resulted from passion and prejudice and disregarded the evidence.

In Rockwell International, the Court of Appeals established a standard of setting aside verdicts "where there is a reasonable probability that the verdict of the jury has been influenced by such conduct." At page 631, near the end of the opinion, the Court reasoned,

> Because counsel should not introduce extraneous matters before a jury or by questions or comments, endeavor to discuss unrelated subjects where there is a reasonable probability that the verdict of the jury has been influenced by such conduct, it must be set aside.

The conduct in this case is egregious, intentional, and persistent. The accusation leveled against the Airport that it tried to kill development in the area is so prejudicial that the legislature has seen fit to bar it by statute. KRS 416.660(2). The Judge's own recognition in the context of the trial of landowner's counsel's impropriety is manifest on the record.

By refusing to admonish the jury, the Court gave the impression that landowner's counsel's comments were appropriate and valid for consideration by the jury. In refusing to sustain the repeated objections to the evidence of killing development in the area, the Court had created in the minds of the jury the impression that such considerations were valid and appropriate to their deliberations.

In Risen v. Pierce, 807 S.W.2d 945 (Ky. 1991), the Kentucky Supreme Court reversed a verdict where far less egregious conduct occurred. In that case in closing argument, counsel for plaintiff referred to a photograph which had been excluded from evidence. The comments by counsel were to the effect that the other side wanted the

photograph excluded because it hurt their case. Justice Lambert, writing for the Court, stated at page 949, quoting Louisville & N.R. Co. v. Gregory, 284 Ky. 297, 144 S.W.2d 519 (1940),

> We have written that when counsel deliberately goes outside the record in the jury argument and makes statements directly or inferentially which are calculated to improperly influence the jury, this court will reverse the judgment.

Further, the Chief Justice stated, "We cannot overlook such behavior as it is antithetical to a fair trial." In the next paragraph, the opinion continues,

> While we cannot say with certainty that the improper argument affected the result, we cannot say it did not. A party aggrieved by egregious argument should not be required to demonstrate prejudice, ordinarily an impossible task, for to do so would in most cases render reviewing courts powerless to correct the error. Moreover, we take this opportunity to state that such conduct will not be tolerated. Our decision in Horton v. Herndon, 254 Ky. 86, 70 S.W.2d 975, 977 (1934) fairly states the law of Kentucky and we reaffirm our reliance thereon
>
> > With the view of securing fairness in jury trials we have adopted a rigid rule to prevent counsel from going outside the record in their argument to the jury. The rule is that where an attorney makes a prejudicial statement of fact unsupported by the evidence and the improper argument is brought to the court's attention, the court should promptly reprimand him and instruct the jury to disregard the statement and if it is so prejudicial that it may improperly influence the jury, should set aside the verdict obtained by such an attorney and the failure of opposing counsel to ask that the jury be discharged is not a waiver of proper action by the court.

This rule was clearly violated in the trial below. Repeated requests for a mistrial and even for an admonition of the jury to disregard this improper evidence were overruled. Even though the Court sustained the objections of Airport counsel on numerous occasions to the improper questions, the fact of the matter is that the jury heard the improper questions and the improper comments, and the Court cannot say that this improper argument did not affect

the result of the verdict. The failure of the Court to stop the testimony or admonish the jury clearly invited the jury to consider the effect that the runway project itself had on the subject property and further invited the jury to punish the Airport as if it had done something wrong. Added together with comments about the jury judging the good faith of the Airport in dealing with folks, the amount of land that the Airport owned, the millions of dollars it had spent on acquiring property, it is obvious that the jury was invited to view the Airport as a large entity running roughshod over a poor widow woman. In his closing argument, the landowner's attorney made a direct appeal to the jury in this regard. At Tape of 10/27/05 at 2:28:28, counsel argued to the jury:

> ... Which I'm sorry, I don't think that's right, I don't think that's enough, I don't think that is the kind of compensation that she deserves for hanging in there. That's not her measure of justice on this day."

Counsel again portrays his client as hanging in there. (Tape of 10/27/05 at 2:35:45.) These references to "hanging in there" complete a theme begun in opening statement, with comments about judging the Airport's good faith in dealing with folks through comments of the Airport's acquisition of other parcels for this runway project "killing development in the whole area," to comments about the millions of dollars spent by the Airport in land acquisition and other programs, the thousands of acres owned by the Airport. The landowner's counsel was obviously appealing to the passion and prejudice of the jury, painting the picture of his small widow client bravely struggling against the large, rich and heartless Airport. This conduct is unacceptable in any trial, but in a condemnation trial, it is especially prejudicial. Since the taking of private property for public use involves an element of coercion, jurors are all too willing to assume the worst at the slightest provocation

against the condemnor. Courts must be doubly vigilant to guard against the prejudice created by inflammatory comments calculated to exacerbate the stereotype.

Under the test laid out in the Risen case by the Kentucky Supreme Court, this verdict must be set aside. The Risen opinion directs reversal when counsel deliberately goes outside the record and makes statements directly or inferentially calculated to improperly influence the jury. Certainly we cannot say the improper comments did not affect the jury. Considering that the prejudicial effect of these comments was not even softened by an admonition, which was repeatedly refused by the Court, the verdict certainly bears all the hallmarks of being tainted with prejudice. The Court of Appeals properly reversed the jury verdict. At page 6 of its Opinion, the Court of Appeals ruled:

> Furthermore, we agree with the rationale espoused in Risen v. Pierce, 807 S.W.2d 945, 949 (Ky. 1991), that "[w]hile we cannot say with certainty that the improper argument affected the result, we cannot say that it did not....

The Supreme Court should not tolerate the intentional, repeated and calculated choice of landowner's counsel to inject highly prejudicial matters into the trial. Such tactics taint the entire proceedings and mock the very pursuit of justice.

III. The Court of Appeals Should Be Affirmed since the Court Correctly Concluded That Certain Conduct by Landowner's Counsel Was in Violation of KRS 416.660(2) and No Admonition Was Given to the Jury.

An alternate basis for sustaining the Court of Appeals Opinion arises from KRS 416.660(2). Comments made by landowner's counsel that the Airport had "killed development in the whole area" and questions posed to the Airport executive regarding the Au Chocolat/Hemmer parcel clearly violated the prohibitions of KRS 416.660(2).

KRS 416.660(2) provides:

> Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation or the construction of the project shall be disregarded in determining fair market value. The taking date for valuation purposes shall be either the date the condemnor takes the land, or the date the trial of the issue of just compensation, whichever occurs first.

At trial, the parties stipulated the date of taking as being the first day of trial. Landowner's counsel's comments in open court violated KRS 416.660. Landowner's counsel sought to impress upon the jury that the Airport, again in bad faith, had suppressed development around the Baston parcel in order to acquire the land on the cheap. Landowner's counsel asked Mr. Huber a series of questions about whether any industrial development occurred in the vicinity of the subject property since 1997, a full eight (8) years prior to the date of taking. As set forth above on pages 8 through 10, a colloquy occurred in which landowner's counsel questioned Mr. Huber about the Wayne Jones property and stated in open court, "It kills the whole area for development." The Airport's motion for mistrial was overruled during the bench conference. The Airport's request for an admonition was denied and landowner's counsel was permitted to question Mr. Huber that since 1997 no more industrial development occurred around the Baston property. Although the Airport objected to this testimony, the Court overruled it repeatedly.

If as the landowner contends the announcement of the runway killed industrial development in the area around Baston, such is precisely the type of evidence which KRS 416.660(2) bans. The statute directs that any diminution or enhancement in the value

"...substantially due to the general knowledge of the imminence of condemnation or the construction of the project shall be disregarded in determining fair market value."

At the bottom or page 17 of its Brief, the landowner argues:

> The Court of Appeals' Opinion, if it were to become final, will leave a condemnor free to stifle development around a future project and then argue for a lower fair market value based upon the lack of (sic) ongoing development. The meaning of the statute is plain. The meaning and intent of the statute is to protect both parties from artificial impact of the announced project on the property to be taken, either up or down, by allowing both parties to present evidence that an increase or decrease is causally the result of such artificial impact.

The argument is false for two reasons. First, in the context of this case the Airport never argued or attempted to argue for a lower fair market value based on the lack of ongoing development. The Airport argued that the Baston property was not susceptible to industrial warehouse development because of its total lack of access for semi tractor trailer trucks. Likewise, neither did the landowner ever argue that its comparable sales should have been higher but for the project. In point of fact, none of the landowner's comparable sales came from the area immediately surrounding the subject property. Mr. Nickerson used the highest industrial sales he could find regardless of location.

The argument is also false because the stifling of development of the future project area inevitably occurs in any condemnation project. Once the Airport identified the area to be acquired for its new runway, it was committed to a specific area. As developers learned of the specific area, they would factor it into their business plan, thus benefitting some and perhaps disadvantaging others. Any road project would have the same impact. Once the corridor becomes public knowledge, commercial property may benefit while residential

values may decline. It is the purpose of KRS 416.660(2) to neutralize this effect on the parties. This is precisely why increases or decreases in value resulting from the general knowledge of the project is to be disregarded. The landowner invites this Court to ignore the plain meaning of KRS 416.660(2) and substitute its judgment for that of the Legislature. Unless found constitutionally impaired, this Court must uphold KRS 416.660(2) as the valid law of the Commonwealth.

On Tape 3 of 10/26/05 at 9:54:57, the Airport twice moved for a mistrial because of landowner's counsel stating that "the project killed the whole area for development." A statement more clearly violative of KRS 416.660(2) would be hard to imagine. The judge overruled the motions for mistrial. The judge also refused a request for an admonition on the basis that the question had not been answered. The Airport argues that these comments were highly prejudicial. At 10:25:15 of the same tape, the high degree of prejudice contained in this outburst became obvious. The following testimony occurred. Landowner's counsel asked:

> Q: If you hadn't done that [referring to the Airport's purchase of the Hemmer parcel], wouldn't there have been Au Chocolat, this massive building right here just a little bit north of –
>
> MR. BAKER: Objection, Your Honor.
>
> JUDGE: Sustained.
>
> Q: Well Au Chocolat then, after you stopped this, you told them you were going to take the property, did Au Chocolat then put their building right here at $82,500 an acre with the requirement that Hemmer build their property?
>
> A: I only know where Au Chocolat ended up. I don't know any of the details or anything else.

Pointing to the map, landowner's counsel stated:

Q: Is this Au Chocolat?

A: I don't know. I mean, it's not marked out there what it is.

Q: Is this Toyota?

A: It's close to the area.

Q: And is this Levi?

A: I believe that's the case. Those are fairly large buildings. I can tell what they are.

Q: Isn't Au Chocolat building just north of Toyota?

A: That building is located north of Toyota on 237, yes.

Q: And had Au Chocolat been on the Sears-Wallace property, wouldn't that have made the whole area more valuable?

MR. BAKER: Objection, Your Honor.

Q: In terms of value –

JUDGE: Sustained.

The Supreme Court should note that KY 237 is several miles from the subject property, being at the next exit west off I-275 from the KY 20 exit, which serves as closest to the subject property.

The impact of this testimony is twofold. It appears to create a comparable sale of $82,500 an acre (coincidentally very close to the price fixed by the jury) based on a sale that did not occur. Second, the questions and answers make it appear that the Airport again acted in bad faith in acquiring the Hemmer property. In point of fact, the Hemmer parcel not purchased by Au Chocolat would not have made the area more valuable. It fronted on KY

20, not on a 30 foot partially paved road with a hairpin turn over a narrow bridge. Landowner's counsel created a phantom sale which never occurred and argues as if it were a real sale. The effect on the jury, however, is patently clear. Landowner's counsel leaves the impression that the Airport, through bad faith, killed a deal on a nearby parcel with a price of $82,500 an acre to disadvantage Baston. The jury having heard these remarks from landowner's counsel, just like the jury having heard the $500,000 offer in the Risen case, is not likely to disregard the comment.

The legislature has prohibited this type of testimony in enacting KRS 416.660(2). The trial judge tried mightily to prohibit landowner's counsel from introducing the testimony. However, once the damage was done, a mistrial should have been granted. The prejudice to Kenton County and the Airport is obvious and palpable. This error alone could not be cured by the jury instruction as argued by the landowner. Rather, the County and the Airport's motions for mistrial should have been sustained. The motion for a new trial on this basis should have been sustained. The Court of Appeals correctly set aside the jury verdict as tainted by submissions contrary to KRS 416.660(2).

IV. Kenton County and the Airport Are Not Barred from the Appeal for Failure to Move for a Directed Verdict at Trial.

On page 30 of its Brief, the landowner argues:

> By failing to move for a directed verdict, the Airport failed to preserve its argument that there was insufficient evidence to allow the jury to consider industrial value.

Such an argument errs. A motion for directed verdict in a condemnation case is never appropriate when differing value evidence has been presented. Commonwealth, Dept. of Highways v. Enoch, 523 S.W.2d 633 (Ky. 1975). On page 634, the Court opined:

> The only ground on which a motion for judgment n.o.v. can be granted is that the movant asked for and was entitled to a directed verdict at the close of all evidence... Obviously such a judgment can never be proper in a condemnation case if there is any conflict in the valuation evidence... It would not have been possible for the trial court to direct a verdict fixing this value. Hence there was no sustainable for a judgment n.o.v.

In the case at bar, likewise, there was differing valuation evidence. Thus a directed verdict would never have been appropriate and the County and the Airport were not required to make this futile gesture.

V. The Fact That the Verdict Was Within the Range Does Not Preclude That the Verdict Was the Product of Passion and Prejudice.

Baston argues that the fact that the jury's verdict was within the range of values testified to by the experts at trial dispels any notion that it was excessive. The Court of Appeals correctly recognized on page 6 of its Opinion that Kentucky law has long since held that a verdict within the range may still be the subject of passion and prejudice. In Commonwealth, Dept. of Highways v. Gearhart, 383 S.W.2d 922 at 925 (Ky. 1964), Kentucky's highest court held:

> Patently, the verdict is within the range of value figures. However, this alone is not sufficient to foreclose inquiry whether the verdict is palpably excessive; neither does it preclude testing whether the verdict is adequately supported by evidence of probative value. We have recognized the rule that a verdict will not be disturbed as excessive, generally, unless it shows bias or prejudice, or is based on estimates unsupported by the facts or so extravagant as to create a probability that the estimates are incorrect.

The Baston verdict fails all three of these criteria: the verdict shows bias; is based on industrial value estimates unsupported by facts; and, is extravagant.

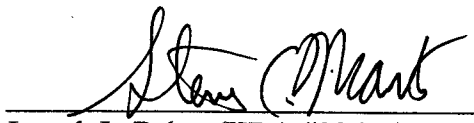
In this case, the jury fixed its verdict at the high end of the industrial range and very near the $82,500 per acre figure for the phantom Au Chocolat sale. As the Court of Appeals correctly noted, there was no proper evidence supporting this figure. The landowner failed to introduce sufficient evidence for a jury to reasonably conclude that the highest and best use of the subject property was for industrial use and thus the Airport's objection to Mr. Nickerson's opinion should have been sustained. The jury should have been directed to disregard Mr. Nickerson's value testimony.

CONCLUSION

The ruling of the Court of Appeals setting aside the verdict should be affirmed. The Court of Appeals recognized that the only value evidence properly before the jury was Mr. Brown's value testimony. Landowner failed to prove that the current residential use of the subject property could reasonably be expected to become industrial in the near future. Landowner's failure to demonstrate how semi trucks could access the subject property precluded testimony valuing the property as an industrial use.

The Court of Appeals likewise recognized the verdict was tainted by passion and prejudice connected to landowner's counsel's deliberate and persistent pattern of misconduct at trial. Properly, the Court of Appeals refused to condone such improper tactics. A heavy dose of comments and testimony contrary of KRS 416.660(2) tainted the verdict as well. The ruling of the Court of Appeals should be affirmed.

Respectfully submitted,



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