

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001194-MR

COMMONWEALTH OF KENTUCKY  
TRANSPORTATION CABINET  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 01-CI-005547

RAY MCDONALD, D/B/A  
MCD LAND DEVELOPMENT CORPORATION

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant Commonwealth of Kentucky

Transportation Cabinet (the Cabinet), appeals the trial court's  
determination in an eminent domain case. We affirm the trial  
court's decision.

The Cabinet filed a petition in Jefferson Circuit Court  
on August 13, 2001, initiating an eminent domain action against  
Appellee Ray McDonald d/b/a MCD Land Development Corporation,

(MCD). The Cabinet desired to seize a portion of MCD's land to provide a location for a new road. A Commissioners award was made on August 28, 2001, finding that the value of the seized property was \$891,280 and that the lost rent incurred was \$35,000. The total sum of the award was \$926,280.

The original plans submitted by the Cabinet included construction of a 14 foot noise reduction wall separating MCD's frontage from the Jefferson Boulevard. MCD protested the total blocking of access from the roadway. On December 17, 2001, the parties agreed to work together in such a way that MCD's frontage to Jefferson Boulevard would not be blocked. A right of entry judgment was entered into, granting the Cabinet immediate right to entry and possession, and requiring the Cabinet to pay the compensation for the property within thirty days. An interlocutory Agreed Judgment was prepared and signed by the parties. This Agreed Judgment provided that all exceptions must be filed within 30 days of the judgment. The Agreed Order Judgment was entered on December 19, 2001.

On January 25, 2002, the Cabinet filed a Notice of Exceptions to the Commissioner's award. MCD objected to the Exceptions as not being timely filed. The Cabinet also filed a motion to hold the case in abeyance pending resolution of the issue regarding the noise reduction wall claiming that this issue affected the value of the property and the award to be

paid for seizure of the land. The trial court refused to permit the Cabinet to file the Exceptions, and entered final judgment in accordance with the Commissioner's report. The trial court relied upon Kentucky Utilities v. Brashear, Ky. App., 726 S.W.2d 321 (1987), which held that absent a proper motion for enlargement of time, the court does not have discretion to permit filing of exceptions beyond the thirty day statutory limit. See also Stidham v. Department of Transportation, Ky. App., 579 S.W.2d 372 (1978), expressly holding that KRS 416.620 "prohibits the filing of exceptions at any time after 30 days from the date of the interlocutory judgment. . . ." Id., at 374.

The Cabinet claims that time did not begin to run with regard to the filing of Exceptions to the Commissioner's report until January 7, 2002, the date on which the Commissioner's award was paid into court. The Commonwealth asserts that its Exceptions were therefore timely filed. KRS 416.620(1) expressly provides that "within thirty (30) days from the date of entry of an interlocutory judgment authorizing the petitioner to take possession of the property, exceptions may be filed by either party." The Cabinet asserts that the entry of the interlocutory judgment in this action did not trigger the thirty day period because the interlocutory judgment did not authorize the petitioner to take possession of the property. This

contention is controverted by the actual terms of the judgment, which permitted the Cabinet to take immediate possession of the property.

The Cabinet argues that it only earned the right to take possession of the property when it paid the Commissioner's award. KRS 416.610(2)(c) states that a condemnor is "entitled to take possession of the property at such time as the amount of compensation awarded by the commissioner is paid to the owner or to the clerk of court." KRS 416.610 provides for entry of an interlocutory judgment. The interlocutory judgment is the judgment referred to in KRS 416.620(1) as triggering the start of the thirty day period for filing exceptions. KRS 416.620(6) holds that if no exceptions are filed within 30 days of the interlocutory judgment, final judgment may be entered. The interlocutory agreed judgment expressly provided that if no exceptions were filed within 30 days of entry of the judgment, the Master Commissioner was required to execute a deed giving ownership of the land to the Cabinet.

The Cabinet then asserts that even were its Exceptions untimely, the trial court's denial of its notice of filing such exceptions was an abuse of discretion. The Cabinet claims that the location of the noise reduction wall was of such gravity that new commissioners should have been appointed to review the question and "arrive at a new and accurate Commissioners award."

The Commissioners in the present case made their determination after review of the plan submitted by the Commonwealth, which called for a lengthy noise reduction wall separating MCD's property from Jefferson Boulevard. The record shows that the parties changed the location of this wall by agreement. The Cabinet claims that the change in location of the wall will greatly benefit the property, and should therefore cause a drastic reduction in the award made.

KRS 416.580(1) requires the commissioners to award such a sum "as will fairly represent the reduction in the market value of the entire property." The Cabinet claims that the award was in excess of the actual reduction in value suffered by MCD. The Cabinet claims that the size of the award granted MCD was unconstitutionally large. As no exceptions were timely filed, this argument is not preserved for review.

For the foregoing reasons, we affirm the trial court's denial of the notice of filing exceptions, and entry of final judgment in this matter.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven A. Edwards  
Louisville, Kentucky

BRIEF FOR APPELLEE:

John H. Dwyer, Jr.  
Louisville, Kentucky