INTRODUCTION

The Kentucky Planning Association and Scenic Kentucky, Inc., appeals a judgment ruling that the Movants may not enforce the Billboard Act against one of its own political subdivisions, the Board of Education of the Bellevue Independent School District, and that a commercial lease constitutes a "government function" by a local school district.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT

The Kentucky Planning Association and Scenic Kentucky, Inc., desire oral arguments on this matter. Kentucky Planning Association and Scenic Kentucky, Inc., believe oral arguments would be helpful to the Court given the unusual issues herein and the far reaching impact that may result.

STATEMENT OF CASE

The Kentucky Planning Association and Scenic Kentucky, Inc., adopt the Statement of Case as set forth in the Brief for the Appellant and incorporate it herein by reference.

ARGUMENT

I. Simply Generating Income is not a "Governmental Function" for Purposes of the Zoning Exemption.

None of the Authorities relied upon by the Court below support its conclusion that the billboard lease at issue is a governmental function entitled to the statutory exemptions provided in KRS 100.361(2) and KRS 100.324(4). *Breathitt County Bd. Of Educ., v. Prater*, 292 S.W. 3d

883 (Ky. 2009) is cited by the Court that "Kentucky courts have acknowledged that education is an integral part of state government and activities in direct furtherance of education will be deemed governmental, not proprietary". (Emphasis added). In the *Breathitt* opinion Judge Abramson provides background of the public policy relating to governmental immunity stating, "Given this underpinning, governmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e. public acts integral in some way to state government. The immunity does not extend, however, to agency acts which serve merely proprietary ends, i.e. non-integral undertakings of a sort private persons or businesses might engage in for profit." (Citations omitted) Id. at 887.

All of the Kentucky cases involving the zoning exemption follow this line of reasoning and factually involve "governmental functions integral in some way to state government". *City of Louisville Board of Zoning Adjustment v. Gailor*, 920 S.W. 2d 887 (Ky. App. 1996) (Correctional facility); *Hopkinsville-Christian County Planning Commission v. Christian County Board of Education*, 903 S.W. 2d 531 (Ky. App. 1995) (school athletic field); *Edelen v. County of Nelson*, 723 S.W. 2d 887 (Ky. App. 1987) (County jail).

The *Gailor* court specifically rejected the proposition that the zoning exemption did not apply to property not owned by the government, but rather that it "applies to a county's use of the property…" Id at 888. Thus, in all of these cases the question of any entitlement to the exemption is premised on a "land use" providing governmental functions, contrary to the Court below which focused on an incidental financial benefit derived by a private company undertaking a land use unrelated to government (school) functions.

The result below as well as the ownership issue in *Gailor*, is "Such a result [that] would be absurd and we must attempt to make that interpretation of a statute which does not lead to an absurdity." *Newport Benevolent Burial Assn. v. Clay*, 186 S.W. 658 (Ky. 1916). Id at 889.

II. If Allowed to Stand the Result Below Will Lead to Absurd Results.

Generating an income stream to a state agency or instrumentality as a basis for exemption from zoning will surely lead to unintended and unwanted consequences. The Court's decision cannot be confined to school boards and can be utilized by every water district, sewer district, municipality, etc., to embark on every profitable activity imaginable without, and in spite of, thoughtful, orderly land use planning which could lead to widespread incompatible and unwanted land uses. In fact, state agencies and instrumentalities, all of which could use additional funding, particularly under the present economy necessitating austerity measures by leasing its land to any sort of land use would effectively allow them to sell this exemption to the highest bidder. This outcome has been condemned by the courts.

If receipt of an income stream can justify cloaking an unwanted or otherwise unauthorized land use it would effectively create a parallel market for land with the enhanced value in not being subject to the time, expense and uncertain outcome of obtaining an appropriate zoning classification. A municipality (or a school board) cannot sell its exemption to the highest bidder, *Little Joseph Realty, Inc., v. Law of Babylon*, 335 NE d 387 (N.Y. 1976), aff'd 363 N.E. 2d 1163 (N.Y. 1977). In that case an asphalt plant operator leased from the municipality a portion of a waste disposal site. The record in that case revealed the "town's primary motive for entering into the arrangement was the large revenue which would inure to its benefit over the term of the lease…" 363 N.E. 2d at 1167. The Court applied the analysis as used in the Breathitt County case Op. Cit.

> Turning then to the relationship between the governmental vis-à-vis proprietary function dichotomy and the town's obligation to comply with zoning regulations, the general rule is equally clear: A local government may carry out its governmental operations without regard to zoning restrictions, but it is subject to the same restrictions that are imposed on a nongovernmental landowner when it acts in a proprietary capacity.
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> Granted that the legal classification of a particular municipal activity as a governmental or proprietary is, in this transitional age, subject to change with time and circumstance, the operation of a landfill "must today be stamped a governmental function" and even the manufacture of asphalt, as for public road building, may very well be. But, in the case now before us, the plant did not manufacture asphalt for use by, or for sale to the town or its constituent agencies. It was operated solely by and for the commercial benefit of Posillico as a private entrepreneur. The lease, therefore, could not serve to clothe Posillico with immunity from the zoning laws.

The record below indicates that the Norton lease only allows school related advertising in the event digital formats are approved. This may or may not happen. As it stands there is no benefit, other than a relatively small amount of income, to the Bellevue Board of Education. In contrast Norton Outdoor Advertising will likely gain substantial revenues in such a high traffic area. Per *Little Joseph Realty* and *Breathitt*, Bellevue cannot sell its exemption to Nortons.

III. The Absurd Results May Have Catastrophic Consequences for the Commonwealth.

Apart from the visual blight[1] that would ensue from a proliferation of billboards, this wildly broad exemption may cause federal authorities to deem that the Commonwealth has lost "effective control". As set forth in *Wheeler v. Comm'r of Highways*, 822 F2d 586, 588-90 (6th. Cir. 1987).

> "The Billboard Act and regulations were adopted in response to the federal Highway Beautification Act of 1965. 23 U.S.C. § § 131-136 (1982) ("Act"). This Act provides for the regulation and control of outdoor advertising devices adjacent to interstate and federal-aid primary highways. Its purpose is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." *Id §*131(a). The Act

1 The United States Supreme Court has stated that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm". *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490, 510, 101 S. Ct. 2882, 2893-94 69 L. Ed. 2d 800, 816 (1981).

> requires each state participating in the highway beautification program to exercise "effective control" over outdoor advertising. It prohibits advertising devices located within 660 feet of the interstate or federal-aid primary highway, or if located outside urban areas, such devices are prohibited beyond 660 feet if visible from the highway. "Effective control" means that signs, displays, or devices within the prescribed area shall be limited to directional and official signs, signs advertising the sale or lease of property on which they are located, signs advertising activities conducted on the property on which they are located, signs of historic or artistic significance, and signs advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the interstate or primary system. *Id.* § 131(c). The penalty for not complying with the Act is the forfeiture of ten percent of the state's federal highway funds until such time as the state provides for effective control. *Id.* § 131(b)."

Federal highway funding for any state that fails to adopt "effective controls" of outdoor advertising devices and junkyards along the Interstate and primary highway system is to be reduced "amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title [23 USCS § 104], until such time as such State shall provide for such effective control." 23 U.S.C. § 103(b). This sanction has been applied and could well deprive Kentucky of significant funding.[2]

CONCLUSION

Based upon the foregoing arguments and authorities, The Kentucky Planning Association and Scenic Kentucky, Inc., support the Commonwealth's request that the Campbell Circuit Court be reversed and the Court reinstate the Kentucky Transportation Cabinet's Final Order dated September 2, 2009.

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2 See *South Dakota v. Adams* 587 F.2d 915 (9th Cr. 1978), *cert. denied,* 441 U.S. 961, 99 S. Ct. 2404, 60 L Ed.2d 1065 (1979). See also, *South Dakota v. Goldschmidt*, 635 F2d 698 (8th Cir. S.D. 1980), cert den 451 U.S. 984, 101 S. Ct. 2316, 68 L. Ed 2d 841 (1981).