ATTORNEYS FOR APPELLANT:

JOHN R. VISSING
DAWN R. ELSTON
Vissing, Grannan & Elston, LLC
Jeffersonville, Indiana

ATTORNEY FOR APPELLEE:

JOHN W. MEAD
Mead, Mead & Clark, P.C.
Salem, Indiana

IN THE COURT OF APPEALS OF INDIANA

CLARK COUNTY BOARD OF AVIATION COMMISSIONERS,	)	
Appellant,	)	
vs.	)	No. 10A01-1012-PL-659
MARGARET A. DREYER,	)	
Appellee.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel E. Moore, Judge
Cause No. 10C01-0902-PL-187

December 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Clark County Board of Aviation Commissioners ("the Board") appeals the order of the Clark Circuit Court ordering the Board to pay Margaret A. Dreyer ("Dreyer") $865,000 in compensation for land that was taken by the Board through the use of the power of eminent domain. On appeal, the Board claims that the trial court abused its discretion in admitting evidence regarding the highest and best use of the taken property. Concluding that the Board failed to properly preserve any evidentiary issue by the failure to contemporaneously object to the admission of the evidence it now challenges, we affirm.

Facts and Procedural History

In 2009, the Board decided to expand the Clark County Regional Airport. In order to do so, the Board needed to acquire certain real estate owned by Dreyer. Dreyer accepted the Board's offer to purchase that part of her land that did not lie in a flood zone for $55,000 per acre, but she rejected the Board's offer of $3,000 per acre for the remaining land. After its offer was rejected, the Board filed an eminent domain action on February 27, 2009. The trial court then appointed appraisers, who eventually determined that Dreyer was entitled to compensation in the amount of $201,100. Dreyer then filed an objection to the appraisers' report and requested a jury trial.

A jury trial on the issue of compensation commenced on November 22, 2010. At trial, Dreyer's hired appraiser, J. Michael Jones, testified that, in his opinion, the real estate at issue was worth $15,000 per acre, for a total of $1,090,740 for 72.716 acres. The Board's appraiser testified that the land was worth only $3,000 per acre due to its location in a flood zone. Jones acknowledged that some of the land would have to be

elevated but estimated that it would only cost $4,000 per acre to fill and further testified that he had taken such costs into consideration in coming to his estimate of $15,000 per acre.

The Board's appraisers used values based on agricultural use even though the land was zoned as "light industrial" because, in their opinion, the land could not be used for light industrial purposes without significant expenditure to raise the land out of the flood zone. Indeed, one of the Board's witnesses estimated that it would cost up to $15,000 per acre to fill the land to the elevation required to prevent flooding. The Board's appraisers testified that the land was worth between $205,293 and $259,730. On November 24, 2010, after a three-day trial, the jury returned a verdict in favor of Dreyer in the amount of $865,000. The Board now appeals.

Discussion and Decision

On appeal, the Board claims that the trial court abused its discretion in admitting evidence regarding the highest and best use of the condemned property that did not comport with the current condition of the property. In eminent domain cases, as in other cases, the admission of evidence is a matter of trial court discretion. Lucre Corp. v. Cnty. of Gibson, 657 N.E.2d 150, 152-53 (Ind. Ct. App. 1995), trans. denied. We will reverse a trial court decision regarding the admission of evidence only upon an abuse of that discretion, which occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn from those facts and circumstances. Id.

As Dreyer notes, the Board made no objection to the evidence it now claims was improperly admitted by the trial court. In fact, our review of the transcript reveals that although the Board's counsel vigorously cross-examined Jones, the Board made no objections to Jones's testimony. See Tr. pp. 102-170.

As our supreme court stated in Raess v. Doescher:

> Only trial objections, not motions in limine, are effective to preserve claims of error for appellate review. Failure to object at trial to the admission of the evidence results in waiver of the error, notwithstanding a prior motion in limine. Furthermore, a claim of trial court error in admitting evidence may not be presented on appeal unless there is a timely trial objection "stating the specific ground of objection, if the specific ground was not apparent from the context." Ind. Evidence Rule 103(a)(1). To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection that is sufficiently specific to alert the trial judge fully of the legal issue. A mere general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review.

883 N.E.2d 790, 796-97 (Ind. 2008) (citation and internal quotations omitted).

By failing to object to the evidence now challenged, thereby denying the trial court the opportunity to make a final ruling on the matter in the context in which the evidence was introduced, the Board failed to preserve any evidentiary error for purposes of appeal. See id. (concluding that appellate claim of evidentiary error was barred by procedural default where appellant failed to object on grounds raised on appeal); In re Guardianship of Hickman, 805 N.E.2d 808, 822 (Ind. Ct. App. 2004) (concluding that appellant waived appellate claim of evidentiary error by failing to make a contemporaneous objection at trial to the evidence challenged on appeal).

But waiver notwithstanding, the Board would not prevail. It appears that the Board's main complaint is that Jones's appraisal was based on the highest and best use of the land being "light industrial," whereas the evidence indicated that the land was currently used for agricultural purposes. The law of eminent domain entitles the owner of the condemned property to damages based on the "highest and best use of the property at the time of the taking." City of Gary v. Belovich, 623 N.E.2d 1084, 1088 (Ind. Ct. App. 1993) (citing State v. Peterson, 269 Ind. 340, 343, 381 N.E.2d 83, 85 (1978)). The measure of damages is the highest price a willing buyer would pay and a willing seller would accept, both being fully informed, and the property being exposed for a reasonable period of time. Id. (citing Black's Law Dictionary 971 (6th ed. 1990)). "The key words, 'both being fully informed,' mean that any knowledgeable buyer or seller would have to be aware of the legal use which would bring the highest value." Id.

As the Board acknowledges in its brief, a land owner is entitled to the value of the property at its highest and best use, not necessarily the use to which it is presently being put. City of Carmel v. Leeper Elec. Servs., Inc., 805 N.E.2d 389, 396 (Ind. Ct. App. 2004). This recognizes that, at the time of the taking, an owner might not be using his or her property for the most valuable use to which it is then naturally adapted. Taylor-Chalmers, Inc. v. Bd. of Comm'rs of LaPorte Cnty., 474 N.E.2d 531, 533 n.2 (Ind. Ct. App. 1985). Thus, if the land has a higher market value by reason of uses to which it may be adapted, but to which it has not yet been put, the owner is entitled to the greater value. Lucre, 657 N.E.2d at 155. "The market value of the condemned property insofar

as that value is presently enhanced by the property's adaptability for some use may be shown, but the possible future value of the specific future use may not be proven." Id.

Here, the evidence favoring the jury's verdict indicates that the highest and best use of the land at issue was light industrial. The land was zoned for light industrial use, and although it was not currently being used for industrial purposes, Dreyer had sold some adjoining parcels for light industrial use. Many of the surrounding properties were used for industrial and warehouse purposes. And Jones, without objection, testified that the highest and best use of the land was light industrial.

Much of the Board's argument revolves around the apparently undisputed fact that much of the land at issue lies in an area prone to flooding and that fill would have to be used to elevate the land for light industrial purposes. But Jones's testimony regarding the highest and best use of the land took into account that much of the land needed to be elevated to be suitable for non-agricultural uses. The Board's witnesses testified similarly, but indicated that the elevation of the land would be much more expensive than Jones estimated. Although the Board's estimates of such costs were much higher, the jury was not required to credit the testimony of the Board's witnesses over Jones. See Lucre, 657 N.E.2d at 156 (on review of jury's award in eminent domain cases, we will neither reweigh evidence nor judge witness credibility). And the fact that the land at issue might need to be elevated using fill does not render Jones's testimony inadmissible. See State v. Vaughan, 243 Ind. 221, 227, 184 N.E.2d 143, 146 (1962) (testimony regarding the amount of fill that would be required to bring condemned land to an elevation suitable for commercial purposes was admissible because the jury needed to

consider "whether the land is presently adapted to the proposed uses or whether a major alteration in the land is necessary in order to make it adaptable for a particular use.").

In conclusion, the Board failed to preserve the issue of the admissibility of Jones's testimony by failing to object thereto at trial. Even when the Board's argument is considered on its merits, Jones's testimony regarding the highest and best use of the taken land was not inadmissible.[1]

Affirmed.

BAILEY, J., and CRONE, J., concur.

[1] We further note that the jury's award of damages was within the bounds of the evidence adduced at trial. The Board's experts testified that the property was worth as low as $3,000 per acre. Dreyer's expert testified that the property was worth $15,000 per acre. The jury returned a verdict of $865,000, which is equivalent to a valuation of $11,895.59 per acre. We will not disturb an award of damages in an eminent domain proceeding where the award is within the bounds of the probative evidence adduced at trial. Lucre, 657 N.E.2d at 156.