contends that the foundation was insufficient because the State failed to sufficiently qualify Barnhart as an expert regarding drug use. "Because 'lack of foundation' has no single defined meaning, an objection of 'lack of foundation' generally is of little or no use to a trial judge.... Because of the varied meanings for 'lack of foundation,' a party making an objection for lack of foundation must specify the foundational element he contends is lacking." [6] Accordingly, Chandler's trial objection, claiming only "lack of foundation" (and then lack of relevance), was insufficient to preserve this issue for appellate review.

[5] 4. Finally, Chandler contends that his trial attorney had a conflict of interest because counsel represented both Chandler and his co-defendant, then-girlfriend Denise Wilson, on the possession with intent to distribute charge. By brief, Chandler argues that "it is inconceivable how a single defense lawyer, representing co-defendants charged with possession, could effectively develop a theory of the case for both at the same time." Thus, Chandler claims he received ineffective assistance of counsel. We disagree.

[6] A transcript of a hearing on Chandler's claim is not before us, and Chandler does not cite or make reference to any such transcript in his brief. Accordingly, it does not appear that he obtained the testimony of his trial attorney with regard to the instant claim of ineffective assistance of counsel. "The burden is on the party alleging error to show it affirmatively by the record, and when [he] does not do so, the judgment is assumed to be correct and must be affirmed." [7]

[7] Moreover, Chandler did not object to joint representation at trial. Accordingly, "[i]n order for appellant to prevail on his claim that his attorney was operating under a conflict of interest that violated his right to counsel, he must show an actual conflict of interest that adversely affected his attorney's performance." [8] In that regard, we have reviewed the equal access defense presented on behalf of both Chandler and Wilson. Chandler's brother, Ronnie, testified at the preliminary hearing that the drugs belonged to him. At trial, Ronnie testified that the drugs belonged to "Sweet Pea" and "Ricky Griffeth" and that he had intended to use the drugs, but fell asleep. In addition, both Chandler and Wilson took the stand, and each testified that the drugs did not belong to them. In light of the specific testimony that neither Chandler nor Wilson possessed the drugs, we find no actual conflict of interest adverse to Chandler's defense engendered by trial counsel's joint representation and, thus, no ineffective assistance of counsel.[9]

Judgment affirmed.

SMITH, P.J., and ELLINGTON, J., concur.

255 Ga.App. 1

UNIFIED GOVERNMENT OF ATHENS–CLARKE COUNTY

v.

WATSON.

No. A01A2441.

Court of Appeals of Georgia.

March 13, 2002.

Reconsideration Denied April 12, 2002.

Both unified government and property owner sought judicial review of decision of special master, which awarded property own-

6. *Tolver v. State,* 269 Ga. 530, 532(2), 500 S.E.2d 563 (1998).

7. (Citation and punctuation omitted.) *Smith v. State,* 224 Ga.App. 819, 821(2), 481 S.E.2d 896 (1997); *Foreman v. State,* 200 Ga.App. 400, 401(3), 408 S.E.2d 178 (1991).

8. *Turner v. State,* 273 Ga. 340, 342(2)(a), 541 S.E.2d 641 (2001).

9. *Davis v. Turpin,* 273 Ga. 244, 246(3), 539 S.E.2d 129 (2000).

er $479,940 as actual market value of condemned property, with no consequential damages or consequential benefits. The Superior Court, Clarke County, Stephens, J., entered judgment on jury verdict finding that $2.775 million to be just and adequate compensation for taking. Unified government appealed. The Court of Appeals, Pope, P.J., held that: (1) valuation of property in condemnation proceedings that took into account possible change from single family zoning to multi-family zoning was not mere speculation; (2) testimony regarding former planning director's statements about unified government's willingness to work with property owner on rezoning were relevant to value; (3) experts did not act as mere conduit for opinion of another by considering testimony about director's statements; (4) at least one expert's valuation was consistent with requirement that property be valued on date of taking; (5) even if Court assumed error in testimony of expert witnesses that valued property as if rezoning occurred, unified government was not harmed, when verdict was consistent with valuation of expert that did not so err; and (6) remand for recalculation of award, to properly credit amounts received by property owner, was required.

Affirmed and remanded.

1. Eminent Domain ⇦134

In condemnation proceedings, where there is a possibility or probability that the zoning restrictions may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value provided such possible change in zoning regulations must not be remote or speculative.

2. Eminent Domain ⇦262(1)

In condemnation proceedings, a trial court's ruling in admitting evidence with respect to the likelihood of a change in zoning restrictions will not be reversed absent a manifest abuse of discretion.

3. Eminent Domain ⇦205

Valuation of property in condemnation proceedings that took into account possible change from single family zoning to multi-family zoning was not mere speculation, where evidence indicated that rezoning was likely to affect market value, property had been zoned multi-family, but was rezoned as part of general rezoning of area, no evidence indicated that property was unsuitable for multi-family use, several experts opined, based on viewing property, and knowledge of zoning status and zoning classifications within county, that highest and best use of property was as multi-family development, and other evidence indicated that property was suitable for multi-family use in size, proximity to state university and downtown area, mixed use of property in general area, and deteriorating nature of single family housing in immediate area.

4. Eminent Domain ⇦202(4)

In condemnation proceedings, property owner's testimony that former unified government planning director asked property owner not to sue regarding rezoning of property from multi-family to single family, and told property owner that when that when he wanted to develop property for multi-family purposes, unified government would work with property owner, was relevant to property's value, even though director could not bind unified government in rezoning decisions, given that unified government's witness questioned property owner's decision not to challenge rezoning, and statements explained property owner's course of conduct in not earlier challenging rezoning.

5. Trial ⇦43

Admission of evidence lies in the sound discretion of the trial court.

6. Evidence ⇦151(1)

When the conduct and motives of the actor are matters concerning which the truth must be found, or in other words are relevant to the issues on trial, then information, conversations, letters, and replies, and similar evidence known to the actor are admissible to explain the actor's conduct.

7. Evidence ⚿314(1)

Hearsay cannot be introduced to show why a person did not engage in conduct which the person did not have the independent power to engage in.

8. Evidence ⚿555.6(7)

In condemnation proceedings, experts did not act as conduit for opinion of others, despite consideration of property owner's testimony that former unified government planning director asked property owner not to sue regarding rezoning of property from multi-family to single family, and told property owner that when that when he wanted to develop property for multi-family purposes, unified government would work with property owner, where witnesses conducted own independent investigations in forming opinions as to property's value and in determining that highest and best use of property was as multi-family development, one expert considered property, surrounding area, type of development, zoning of property and surrounding community, and distance from downtown, and other expert studied property, tax plats, and zoning history of property.

9. Evidence ⚿555.4(5)

Witness' opinion must be his own and he cannot act as a mere conduit for the opinions of others.

10. Evidence ⚿555.6(1)

Even if an expert's opinion of market value relies partly on hearsay, it is not invalid so long as they had a valid basis for forming the opinion.

11. Evidence ⚿555.6(3)

In condemnation proceedings, market value is exclusively a matter of opinion even though expressed as a fact, and thus fact that it was rested wholly or in part upon hearsay, would go merely to its weight and would not be a ground for valid objections. O.C.G.A. § 24–9–66.

12. Evidence ⚿555.6(7)

In condemnation proceedings, testimony of at least one of property owner's experts was consistent with requirement that property be valued on date of taking, even though property owner's expert witnesses considered potential rezoning of property from single-family classification to multi-family classification, where one expert witness valued property accounting for suitability for multi-family development, but not as if it had actually been zoned as multi-family development, and that expert testified that he did not take into account multi-family zoning as accomplished fact.

13. Eminent Domain ⚿134

Even where a different use is probable, the jury hearing a condemnation action cannot evaluate the property as though the new use were an accomplished fact, but rather, the jury can only consider the new use to the extent that it affects the market value on the date of taking.

14. Eminent Domain ⚿262(5)

In condemnation proceedings, even if appellate court assumed that trial court erred in allowing valuation testimony of property owner's expert witnesses who valued property as if rezoning for multi-family use had occurred, unified government was not harmed, given that jury was properly instructed as to value, and jury verdict was consistent with valuation of expert who did not value property as if rezoning were accomplished fact.

15. Eminent Domain ⚿263

Condemnation judgment had to be remanded so that unified government would be properly credited for amounts previously received by property owner, where trial court entered judgment in full amount of verdict together with accrued pre-judgment interest without properly crediting unified government with property owner's receipt of special master award.

McLeod, Benton, Begnaud & Marshall, William C. Berryman, Jr., Athens, Pursley, Howell, Lowery & Meeks, Charles N. Pursley, Jr., Atlanta, for appellant.

Fortson, Bentley & Griffin, J. Edward Allen, Jr., Richard L. Ford, Athens, for appellee.

POPE, Presiding Judge.

In 2000, the Unified Government of Athens–Clarke County instituted special master condemnation proceedings to acquire approximately 50 acres of land owned by Billy L. Watson. The special master awarded Watson $479,940 as the actual market value of the property, with no consequential damages or consequential benefits. Both parties appealed the award to the superior court. Following trial, a jury found $2,775,000 to be just and adequate compensation for the taking of the property. The Unified Government appeals the judgment entered on the jury's verdict.

The Unified Government claims that the trial court erred (1) by admitting evidence of a possible change in zoning, (2) in allowing hearsay evidence, and (3) in allowing expert witnesses to opine on the value of the property as if it had been actually rezoned. Watson and the Unified Government agree that the judgment should be corrected to reflect amounts previously disbursed to Watson from the special master's award. For reasons set forth below, we find no reversible error.

The record shows that the Watson property is located in an area known as "East Athens," approximately a mile from downtown Athens and within walking distance of the campus of the University of Georgia. The Unified Government condemned the land for use as a public park. The property was zoned RS–10 at the time of taking, which restricts development to single-family residences. The area immediately surrounding the property is zoned single-family residential, although the surrounding homes were described as deteriorated. The general area is mixed use, including a multi-family, a commercial, and a governmental tract. Before Watson purchased it in 1987, the property was zoned for multi-family housing development.

[1, 2] 1. The Unified Government claims that the trial court erred in admitting remote and speculative evidence of a possible change in property zoning.

> [W]here there is a possibility or probability that the zoning restrictions may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value [provided] such possible change in zoning regulations must not be remote or speculative.

(Punctuation omitted.) *Civils v. Fulton County,* 108 Ga.App. 793, 797(2)(b), 134 S.E.2d 453 (1963). A trial court's ruling in admitting evidence with respect to the likelihood of a change in zoning restrictions will not be reversed absent a manifest abuse of discretion. *Hall County v. Merritt,* 233 Ga. App. 526, 527–528(1), 504 S.E.2d 754 (1998). We find no such abuse here.

[3] The Watson property was at one time zoned as a multi-family property and was rezoned as part of a general rezoning of the area, but there is no indication that the property was rezoned because it was unsuitable for multi-family use. Several experts opined, based on viewing the property, and with full knowledge of its current zoning status and the zoning classifications within Athens–Clarke County, that the highest and best use of the property was as a multi-family development. One of the Unified Government's own witnesses testified that the highest and best use of the property was as multi-family development. There is also evidence that the property was suitable for multi-family use in its size, its proximity to the University of Georgia and downtown Athens, the mixed use of property in the general area, and the deteriorating nature of the single-family housing in the immediate area.

The Unified Government presented the testimony of the planning director of the Unified Government's Planning Department and a local developer to show that a rezoning of the property to multi-family was unlikely, but it was inherent in their testimony that a rezoning of the property to multi-family was possible. Specific evidence of the suitability of the property for multi-family use, as well as the location of the property and the nature of the neighborhood, indicates that a valuation taking into account a possible change in zoning was not mere speculation. As there is evidence that a rezoning of the property to

multi-family in the near future was sufficiently likely to affect its market value, the trial court did not demonstrate manifest abuse of discretion in allowing the jury to consider such evidence.

Relying on *DeKalb County v. Dobson,* 267 Ga. 624, 482 S.E.2d 239 (1997), and *Gwinnett County v. Davis,* 268 Ga. 653, 492 S.E.2d 523 (1997), the Unified Government questions whether evidence that the property's highest and best use as a multi-family development was relevant to the question of whether the property could be rezoned to allow for such a use. *Dobson* and *Davis* are distinguishable because they involved constitutional challenges to a property's zoning. In a condemnation case, we have allowed consideration of the suitability of property for a different use from that allowed by current zoning in expert testimony regarding market value. See *Hall County v. Merritt,* 233 Ga.App. at 527–528(1), 504 S.E.2d 754 (jury not restricted solely to present zoning).

[4, 5] 2. The Unified Government claims that the trial court erred in admitting an out-of-court statement of John Davis, who was a former planning director for the Unified Government. Watson testified that, in 1990, Davis asked Watson not to sue the Unified Government over the single-family zoning of the property, but that "when the time came that [Watson] wanted to develop the property, they would work with [him]." The Unified Government further objects to the trial court's admission of (a) a second reference by Watson to Davis's representation, and (b) two references by Watson's agent Queen to Davis's out-of-court statement. The Unified Government also claims the trial court erred in allowing reference to Davis's hearsay statement, and in allowing its use in forming an opinion, in the expert testimony of urban planner Robert Steubing, and real estate appraiser Bill Stripling. "The admission of evidence lies in the sound discretion of the trial court. (Citation omitted.)" *Dept. of Transp. v. Mendel,* 237 Ga.App. 900, 902(2), 517 S.E.2d 365 (1999).

[6] The trial court allowed Watson and Queen to testify to the out-of-court statements made by Davis for the purpose of explaining Watson's course of conduct in not earlier challenging the zoning of the property. The Unified Government argues that the hearsay could not be used to explain Watson's conduct because Davis could not bind the Unified Government in rezoning decisions, and because Davis's statements were not relevant. "When ... the conduct and motives of the actor are matters concerning which the truth must be found (i.e., are relevant to the issues on trial), then information, conversations, letters and replies, and similar evidence known to the actor are admissible to explain the actor's conduct." (Citations omitted.) *Momon v. State,* 249 Ga. 865, 867, 294 S.E.2d 482 (1982).

The Unified Government's first witness, William Gottschalk, questioned Watson's decision not to challenge the rezoning of the property. Gottschalk testified that, if the property were worth more if it were zoned for multi-family use, then "what owner would not race to the zoning commission and have it zoned multi-family? If it could have been zoned multi-family, it would have been zoned multi-family." We are satisfied that the statements by Davis were properly admissible to explain Watson's conduct in not challenging the zoning of the property.

[7] *Phillips v. Aetna Cas. &c. Div.,* 148 Ga.App. 351, 251 S.E.2d 180 (1978), upon which the Unified Government relies, is distinguishable. The Unified Government maintains that Davis's hearsay testimony was irrelevant because he did not have ultimate authority over rezoning. In *Phillips,* we found that hearsay testimony could not be introduced to explain the conduct of a witness in not dispatching a truck where it could not be shown the witness had the authority to dispatch the truck. Id. at 353, 251 S.E.2d 180. In other words, hearsay cannot be introduced to show why a person did not engage in conduct which the person did not have the independent power to engage in. In contrast, Davis's hearsay statement was introduced to explain why Watson decided to not challenge the zoning, which Watson was capable of doing.

[8–11] With respect to the expert testimony of Steubing and Stripling, the Unified Government argues that they impermissibly

relied upon the hearsay statement of Davis in concluding that the property could be rezoned. "A witness' opinion must be his own and he cannot act as a mere conduit for the opinions of others." (Citations and punctuation omitted.) *Hall County v. Merritt,* 233 Ga.App. at 528(2), 504 S.E.2d 754. Nevertheless, even if an expert's opinion of market value relies partly on hearsay, it is not invalid so long as they had a valid basis for forming their opinion. "Market value is exclusively a matter of opinion even though expressed as a fact. It may rest wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion." (Citations and punctuation omitted.) Id.; OCGA § 24–9–66. "If it is based on hearsay this would go merely to its weight and would not be a ground for valid objections." (Citations omitted.) *Schoolcraft v. DeKalb County,* 126 Ga.App. 101, 103(2), 189 S.E.2d 915 (1972). See *Clayton County Water Auth. v. Harbin,* 192 Ga.App. 257, 258(3), 384 S.E.2d 453 (1989).

The witnesses conducted their own independent investigations in forming their opinions. In determining the highest and best use of the property, Steubing considered the property, the surrounding area, the type of development and zoning on the property and surrounding community, and its distance from downtown Athens. In determining valuation, Stripling, among other things, studied the property, the tax plats, and the zoning history of the property. Although Steubing and Stripling were aware of Davis's hearsay statements regarding a rezoning, the witnesses did not act as "mere conduits" for the opinion of others. The trial court did not err in allowing reference to hearsay in the testimony of Steubing or Stripling.

[12, 13] 3. The Unified Government claims the trial court erred by allowing Watson's expert witnesses to opine on the value of the property as if it had been actually rezoned from its single-family classification to a multi-family classification. "Even where a different use is probable, the jury cannot evaluate the property as though the new use were an accomplished fact; the jury can only consider the new use to the extent that it affects the market value on the date of taking." (Citation, punctuation and emphasis omitted.) *Colonial Pipeline Co. v. Williams,* 206 Ga.App. 303, 304, 425 S.E.2d 380 (1992).

But *Colonial* is not directly applicable here. The expert testimony in *Colonial* concerned the diminished retail value of a specific hypothetical lot subdivided on the property. We noted that the condemnee's expert "could have testified to his opinion of the value of the remaining land as of the date of taking based upon its enhanced value because of its adaptability as a residential subdivision[;] he could not testify as to the value before and after the taking based upon his assumption of the value as if the property had already been subdivided." *Colonial,* 206 Ga.App. at 305, 425 S.E.2d 380. Here, at least one expert witness valued the property accounting for its suitability for multi-family development, but not as if it had been actually zoned as a multi-family development. Appraiser Stripling, whose valuation of the property was the same as reflected in the jury verdict, testified that he did not take into account a multi-family zoning as an accomplished fact:

> Q: So you made no adjustment whatsoever from the current RS–10 zoning to a multi-family zoning.
>
> A: No, I recognized that in the adjustments that I applied, that we're not zoned that, so it's going to take something to get there. If it had already been zoned RM–1, of course, we wouldn't be here, but I would have put a higher price on it.

The Unified Government notes that Stripling never explains how he factors in the cost and risk of rezoning in reaching his opinion valuation. Nevertheless, he was not required to state all the facts on which his opinion was based. See *Hollywood Baptist Church &c. v. State Hwy. Dept.,* 114 Ga.App. 98, 100(4), 150 S.E.2d 271 (1966). As Stripling's testimony is consistent with the requirements for the introduction of opinion evidence with regard to the value of the property on the date of taking, the trial court did not err in allowing it.

[14] Furthermore, the trial court instructed the jury that they should not consider any likelihood of change in zoning "as an

accomplished fact, but only the effect that the probability would have on the value of the property as of the date of taking." See *Dept. of Transp. v. Pilgrim*, 175 Ga.App. 576, 579(3), 333 S.E.2d 866 (1985). Even if we assume, without deciding, that the trial court erred in allowing the valuation testimony of Watson's other expert witnesses because they valued the property as if it were currently zoned for multi-family use, the Unified Government was not harmed because the jury was properly instructed as to value, the opinion of expert Stripling was admissible, and the jury found the valuation of the property to be the same as the valuation reached by Stripling. As any error was harmless, no reversal is required. Id.

[15] 4. The Unified Government claims the trial court erred in entering judgment in the full amount of the verdict together with accrued pre-judgment interest without properly crediting the Unified Government with Watson's receipt of the special master's award. Watson agrees. Accordingly, the judgment entered must be corrected so that the Unified Government is properly credited for amounts previously received by Watson.

Judgment affirmed and case remanded with direction.

BLACKBURN, C.J., and MIKELL, J., concur.

255 Ga.App. 6

GEORGIA 20 PROPERTIES LLC

v.

TANNER.

No. A01A2541.

Court of Appeals of Georgia.

March 27, 2002.

Reconsideration Denied April 12, 2002.

Land purchaser brought action for specific performance against vendor. The Superior Court, Jackson County, McWhorter, J., granted summary judgment for vendor, and purchaser appealed. The Court of Appeals, Johnson, P.J., held that: (1) earlier probate proceeding adjudicating vendor's right to sell timber interests was not res judicata to action for specific performance, and (2) property was part of testator's estate at time vendor signed purchase agreement.

Affirmed in part, reversed in part, and remanded with direction.

1. Judgment ⚿562, 585(3), 682(1), 713(1)

Probate court's decision denying administrator of estate the right to sell timber rights to estate property was not res judicata barring action for specific performance by purchaser of fee interest in property; causes of actions were different, parties were different, there had been no decision on the merits by a court of competent jurisdiction, and purchaser had no opportunity to be fully and fairly heard in probate proceeding.

2. Judgment ⚿562, 585(1), 668(1), 678(1)

Res judicata requires identity of the cause of action, identity of parties or their privies, and an adjudication on the merits by a court of competent jurisdiction.

3. Judgment ⚿713(1)

The party against whom res judicata is raised must have had a full and fair opportunity to litigate the issues.

4. Executors and Administrators ⚿39

Property was part of estate when administrator executed a contract of sale to purchaser, where estate was still open, testator's will directed that property be sold and the proceeds be distributed upon the death of the last of testator's nieces and nephews, and property had not yet been sold or distributed.

5. Contracts ⚿303(4)

A party cannot avoid the obligations of a contract by frustrating the performance of a condition precedent.