STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT VI
	) SS:	
COUNTY OF MONROE	)	CAUSE NO. 53C06-1906-PL-001293

CITY OF BLOOMINGTON, INDIANA,)
)
Plaintiff,)
)
v.)
)
222 HATS LLC, and GERMAN AMERICAN BANCORP, INC.,)
)
Defendants.)

MEMORANDUM OF LAW

The Plaintiff, the City of Bloomington, Inc. (the "City"), by counsel, respectfully submits this Memorandum of Law in advance of the show cause hearing scheduled for October 7, 2019.

Introduction

The City has initiated this condemnation lawsuit pursuant to the Eminent Domain Act, I.C. § 32-24-1 *et seq.* (the "Act") to acquire a property that will be used as a parking garage. The parking garage will replace the dilapidated Fourth Street Parking Garage and provide 512 parking spaces in downtown Bloomington.

As mandated by local ordinance, the plans for the ground level of the parking garage include some space that will be used for commercial purposes (perhaps retail space or office space). *See* Bloomington Code of Ordinances § 20.03.120 (Downtown Core Overlay (DCO) – Development standards) (requiring that any property with frontage on 4th Street, 3rd Street, or Walnut Streets "shall provide ground floor nonresidential uses along the applicable street frontage" and that "[e]nclosed parking garages shall not be counted toward the required nonresidential uses.").

The Defendant and property owner, 222 Hats LLC ("222 Hats"), has objected to the condemnation lawsuit and argued, among other things, that it is for a private use. However, 222 Hats' position is mistaken because Indiana law is clear that a parking garage serves a public purpose: "[T]o the extent that public parking facilities relieve congestion and reduce traffic hazards in the streets, they serve a public purpose." *Phillips v. Officials of City of Valparaiso*, 120 N.E.2d 398, 402 (Ind. 1954). The inclusion of commercial space on the ground floor of the parking garage, as required by a local planning and development ordinance, does not defeat the primary purpose of the taking, which is the construction of a public parking facility.

This brief summarizes the eminent domain process, providing an overview of the procedural posture leading up to the October 7, 2019 hearing. This brief then addresses each of the objections raised by 222 Hats and explains why each objection lacks merit under the law. At the conclusion of the hearing, the City respectfully requests that the Court overrule the objections of 222 Hats, appoint appraisers to assess the damages caused by the appropriation, and for all other appropriate relief.

I. Exercise of the Power of Eminent Domain

A. Good Faith Offer as Condition Precedent to Condemnation

At the outset, the Act requires a uniform offer to the landowner as a condition precedent to filing a condemnation lawsuit. I.C. § 32-24-1-5. The Act does not require that the offer be acceptable to the landowner. In fact, the inability of the condemnor and the landowner to agree on the price of the real estate is an element of the condemnor's case. *See* I.C. § 32-24-1-4(b)(6). So long as the condemnor's offer is based upon a stated opinion of the value of the real estate, the offer is legally sufficient. *See Murray v. City of Richmond*, 276 N.E.2d 519, 522 (Ind. 1971).

The City made a uniform offer to 222 Hats as required by the Act. But the parties have been unable to agree upon the purchase and sale of the property, thus necessitating these proceedings. (*See* Complaint, ¶¶ 9-12.)

B. Filing of the Complaint

A condemnation lawsuit begins with the filing of a complaint for appropriation of real estate pursuant to Ind. Code § 32-24-1-4. Thereafter, the clerk issues a notice requiring the defendants to appear before the court to show cause why the property should not be condemned. I.C. § 32-24-1-6. Here, the City filed its Complaint for Condemnation on June 7, 2019.

C. Objections

A landowner then has an opportunity to file objections to the proposed appropriation. Objections are to be filed, "not later than thirty (30) days after the date the notice [] is served on the defendant. However, the court may extend the period for filing objections by not more than thirty (30) days upon written motion of the defendant." I.C. § 32-24-1-8(b)(3). 222 Hats filed its objections on July 16, 2019. It refiled what appear to be identical objections on August 16, 2019.

"It is well settled that a municipality has the discretion to determine the necessity of a taking." *Michael v. City of Bloomington, Ind. Bd. of Pub. Works*, 804 N.E.2d 1225 (Ind. Ct. App. 2004). "[T]he necessity of the taking by an entity with authority to use eminent domain is presumed," and therefore "[t]he burden is on the party objecting to the taking to establish that the taking is not necessary." *Id.* "Additionally, in meeting that burden, it is not enough for the challenger to show that the condemning authority could achieve its purpose by condemning less land than what is described in the complaint." *Id.* "It is only where the challenger has shown that the taking is fraudulent or a subterfuge for a private use that a court may inquire into the

necessity of the take." *Id.* "A court cannot substitute its opinion as to the expediency or necessity of the taking for the opinion of the condemning authority." *Id.*

D. Disposition of Objections at Hearing

Ind. Code § 32-24-1-6 contemplates a hearing at which the landowner may attempt to show cause why the condemnor is not entitled to acquire the property. If a hearing on objections is held, the only issues before the Court are those stated in the objections concerning the right of the condemnor to exercise the power of eminent domain. *Smith v. Cleveland, C.C. & St. L. Ry. Co.*, 81 N.E. 501, 508 (Ind. 1907).

Indiana Code 32-24-1-4(b)(6) requires the condemnor to affirmatively plead that it has been unable to agree on a purchase price with the owners of the acquisition. It also is the condemnor's burden to prove that such an offer was made to purchase the property. *City of Evansville v. Reising*, 547 N.E.2d 1106, 1109 (Ind. App. 1989). Thereafter, the burden of proof to prove a valid objection to the taking is upon defendants. *Id.*

If the trial court sustains any of the landowner's objections to the condemnor's condemnation complaint, that ruling has the same effect as, under former practice, the sustaining of a demurrer in an ordinary civil case. *City of Lebanon v. Pub. Serv. Co. of Indiana*, 14 N.E.2d 719, 721 (Ind. 1938). With the abolishment of demurrers, the effect under current law would be that of granting a motion to dismiss. If objections which are filed are stricken or overruled, the court should satisfy itself as to the regularity of the proceedings and plaintiff's right to exercise the power of eminent domain and then appoint appraisers to assess the damages and benefits to defendants' real estate caused by the appropriation. I.C. § 32-24-1-7(c).

II. Response to Objections Filed by 222 Hats LLC

222 Hats has raised five separate objections to be addressed at the hearing, none of which has any merit. Each objection is discussed in turn below.

A. Bloomington's taking is for a public purpose and is lawful.

222 Hats' first objection is that the City's taking is not for a public use. Specifically, 222 Hats contends that the City is seeking the property to "construct a commercial shopping center to lease to commercial, non-public entities." (Objections at 3-4.) In taking this position, 222 Hats overlooks and mischaracterizes the primary purpose of the project, which is the construction of a public parking facility that will provide 512 parking spaces in downtown Bloomington. Indiana case law is clear that a parking garage serves a public purpose: "[T]o the extent that public parking facilities relieve congestion and reduce traffic hazards in the streets, they serve a public purpose." *Phillips*, 120 N.E.2d at 402.

222 Hats suggests that there is something nefarious about the fact that the plans for the parking garage include commercial space on the ground floor. But there is nothing improper about this aspect of the project. Instead, Bloomington's local ordinance pertaining to development standards for the downtown area requires that any property with frontage on 4th Street, 3rd Street, or Walnut Streets "shall provide ground floor nonresidential uses along the applicable street frontage. No less than fifty percent of the total ground floor shall be used for such nonresidential uses. Enclosed parking garages shall not be counted toward the required nonresidential uses." *See* Bloomington Code of Ordinances § 20.03.120 (Downtown Core Overlay (DCO) – Development standards). Nor is such a requirement peculiar to Bloomington. Several comparable Indiana cities' zoning ordinances contain similar first-floor nonresidential

requirements.[1] As a result, the inclusion of commercial space on the ground floor is intended to comply with this planning and development ordinance, and it is not driven by any improper or fraudulent motive.

"The question whether a particular use is public or private is a judicial question." *Sexauer v. Star Milling Co.*, 90 N.E. 474, 476 (Ind. 1910). "[A] use which is in itself of a public character justifying the exercise of the power of eminent domain does not lose its character as such by the fact that the exercise of the power for such use will incidentally result in a private use or benefit." *Kessler v. City of Indianapolis*, 157 N.E. 547, 549 (Ind. 1927). For example, in *Hawley v. South Bend, Department of Redevelopment*, 383 N.E.2d 333 (Ind. 1978), the Court addressed a challenge to eminent domain proceedings that were instituted to acquire a downtown section of South Bend that was blighted and that was to be redeveloped by private investment. The Court found that the resale of the property to construct a shopping mall after the blighted area was removed was only incidental to the primary public purpose:

> First, the resale of any property in the area by the Redevelopment Commission takes place only after the principal public use and purpose the slum clearance or elimination of a blighted area has been accomplished. Hence, the resale can be seen as merely incidental to the main thrust of the Redevelopment Act. *Alanel Corp. v. Indianapolis Redevelopment Comm.* (1958) 239 Ind. 35, 48, 154 N.E.2d 515, 522.
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> Second, the resale of the property to private enterprise under conditions in which the property will be developed into a shopping mall open to the public is clearly within the realm of a "public purpose". In enacting the Redevelopment Act, the General Assembly, in its "declaration of public policy," stated that the redevelopment of blighted areas is a "public and governmental function (which) will benefit the health, safety, morals and welfare, and will serve to protect and increase property values (and) that the clearance, replanning and redevelopment

1 See, e.g., South Bend Municipal Code § 21-03.06(a)(J) and (a)(K), Central Business District; Valparaiso Zoning Ordinance Part III, Article XXIII, Section 2310 (59); Central Business District (available on page 136 at http://ci.valparaiso.in.us/DocumentCenter/View/233/Zoning-Ordinance) (last viewed Oct. 1, 2019); Jeffersonville Zoning Ordinance Article Four, Section 4.25 and 4.26 (available on pages 58 and 61 at https://s3.amazonaws.com/cityofjeffnet/Jeffersonville-Zoning-Ordinance-Master-Copy-REV-7-5-20192.pdf) (last viewed Oct. 1, 2019).

> of such blighted areas are public uses and purposes for which public money may be spent and private property acquired." IC s 18-7-7-2 (Burns 1974). So long as the eventual use of the property is related to a discernible public purpose or use, the actions of redevelopment commissions will not be disturbed on the ground of a public taking of private property for a private purpose. In the case at bar, the proposed shopping mall is such a public purpose.

Hawley, 383 N.E.2d at 340-41.

The same result is warranted here, as the principal public use of the property is as a public parking facility. The inclusion of first ground commercial space (whether office or retail space) in the parking garage is only incidental to that purpose and is otherwise consistent with Bloomington's planning and development ordinance. Indeed, the proposed parking garage to be constructed includes 180,855 square feet of space and, of that space, only 8,677 square feet of space is to be used for commercial purposes on the first floor frontage. The commercial space – which amounts to less than five percent of the entire project – is ancillary to the ultimate purpose of building the parking garage.

Notably, the primary authority relied by 222 Hats in its objection, *Fountain Park Co. v. Hensler*, 155 N.E. 465, 472 (Ind. 1927), involved a situation in which the Indiana legislature adopted legislation which allowed certain private chautauqua institutions to exercise eminent domain proceedings to secure tracts of land for their assemblies.[2] The Indiana Supreme Court rejected that giving such authority to a private institution for its private meetings constituted a public use. The taking at issue here for a public parking garage is readily distinguishable.

B. The complaint accurately describes the project at issue.

In its second objection, 222 Hats claims that the complaint is defective "because it does not factually describe Condemnor's Project, most importantly the fact that it includes a

2 According to Wikipedia, "Chautauqua (/ʃəˈtɔːkwə/ shə-TAW-kwə) was an adult education movement in the United States, highly popular in the late 19th and early 20th centuries. Chautauqua assemblies expanded and spread throughout rural America until the mid-1920s. The Chautauqua brought entertainment and culture for the whole community, with speakers, teachers, musicians, showmen, preachers, and specialists of the day."

commercial shopping center . . . .” (Objections at 6.) 222 Hats is mistaken.

The Indiana Code requires that the complaint set forth “[t]he use the plaintiff intends to make of the property or right sought to be acquired.” I.C. § 32-24-1-4(b)(3). A general allegation of the use that is to be made of the acquisition is sufficient to satisfy the requirements of the Act. *See Vandalia Coal Co. v. Indianapolis & L. Ry. Co.*, 79 N.E. 1082, 1083 (Ind. 1907). Likewise, a general allegation of the necessity of the taking of the acquisition for its intended use is also sufficient. *Eckart v. Ft. Wayne & N.I. Traction Co.*, 104 N.E. 762, 763 (Ind. 1914).

Here, the City’s Complaint accurately describes the intended purpose of the property to be acquired: “[i]n the course of the exercise of its responsibilities and police powers to provide for public facilities and works, the City intends to construct a new, expanded 4th Street Parking Garage, which shall occupy the parcels of land between the northwest corner of West 3rd Street and South Walnut Street and the southwest corner of West 4th Street and South Walnut Avenue[.]” (Complaint, ¶ 2.) This general allegation is sufficient to satisfy the Act.

C. The complaint is not based upon a violation of Indiana law.

In its third objection, 222 Hats argues that the City’s resolution approving the project was not properly noticed in an agenda posting as required by Indiana’s Open Door Law, I.C. § 5-14-1.5-4, and that the bond resolution did not contain a finding of the public purpose of the bond as required by I.C. § 36-7-14-25.1. Neither of these contentions has any merit.

With regard to the Open Door Law, to the extent that 222 Hats had any issue in how the project was noticed (or not) upon an agenda, it was required to raise the issue by filing an action within 30 days of the alleged violation – something it failed to do. *See* I.C. § 5-14-1.5-7(b)(2). As a result, the issue of whether the bond resolution was appropriately noticed is an improper collateral attack and not properly before this Court.

And even had the issue been raised during the required thirty-day period, the City's actions do not violate the Open Door Law. The Open Door Law does not require the governing bodies of public agencies, such as the City of Bloomington Board of Public Works, to utilize an agenda.[3] Nor does the Open Door Law prohibit a governing body from modifying or adding to an agenda during a meeting. Indiana's Public Access Counselor, the state administrative agency charged with resolving disputes related to the Open Door Law, has repeatedly confirmed that agendas may be modified or added to during a meeting.[4] 222 Hats contention that the City violated the Open Door Law is mistaken.

With regard to the alleged deficiency in the bond resolution, the Indiana Code requires that "[t]he legislative body of the unit must adopt a resolution that specifies the public purpose of the bond . . . ." I.C. § 36-7-14-25.1(c). Here, the bond resolution expressly states that the City "intends to construct a public parking garage on Fourth Street" and that such project "will serve a public purpose and be of public benefit." (*See* Complaint, Exhibit A (Resolution 2019-43, Board of Public Works Fourth Street Parking Garage Authorization to Purchase).) Thus, the public purpose of the bond is plainly stated, and 222 Hats' objection is misplaced.

D. The complaint accurately identifies all necessary parties with interest in the subject property.

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3 While the Open Door Law requires the governing bodies of public agencies to provide *notice* of public meetings, it does not require governing bodies to utilize an agenda. I.C. § 5-14-1.5-5. Notice of a public meeting's date, time, and location is *not* the same as an agenda of business that might be considered during the meeting. Notices and agendas are different items, and 222 Hats has confused them.

4 *See, e.g.,* Op. of the Public Access Counselor 05-FC-147 ("There is nothing in the Open Door Law that requires a public agency to utilize an agenda. Also, the notice requirements in the Open Door Law do not require that an agency give advance notice of what will be discussed during a public meeting . . . This office has stated many times that a governing body may add to or deviate from its agenda during the course of a meeting."); Op. of the Public Access Counselor 09-FC-40 ("It has long been held by this office, though, that "[b]ecause the ODL does not require an agenda, it is not a violation of the ODL to add or omit discussion items during the meeting or otherwise deviate from the agenda." *See Opinion of the Public Access Counselor 04-FC-166* . . . The premise that a governing body may deviate from its agenda is also provided on page 9 of my office's *Handbook on Indiana's Public Access Laws, Updated April 2008,* available at www.in.gov/pac."); Op. of the Public Access Counselor 12-FC-112 ("If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting.").

As noted above, the complaint must include "[t]he names of all owners, claimants to, and holders of liens on the property, if known, or a statement that they are unknown. These owners, claimants, and holders of liens shall be named as defendants." I.C. § 32-24-1-4(b)(2).

222 Hats contends that the City's Complaint is defective because it does not name Monroe County, Indiana, and that Monroe County "may have an interest in the subject property by virtue of real estate taxes it may be owed." (Objections at 9-10.) 222 Hats is grasping at straws. Even if Monroe County "may be owed" taxes, there is no evidence that it has a lien on the property. Additionally, 222 Hats cannot complain that another party was not named in the condemnation complaint, as the failure to name a tenant as a party defendant in a condemnation lawsuit is not grounds for objection by the owner. Therefore, this objection is also appropriately overruled.

E. The complaint seeks appropriate relief under Indiana law.

Finally, 222 Hats objects that the complaint is defective "because it requests relief to which [the City] is not entitled." (Objections at 10-11.) This objection is essentially the same as the first, as 222 Hats contends that the City's Complaint only alleges that it is seeking to construct a parking garage and fails to mention the first floor retail space. This argument fails for the same reasons identified above. The parking garage is the primary purpose of the taking and is an appropriate basis for the use of the City's eminent domain powers. The fact that the parking garage will incidentally include first floor commercial space in order to comply with a planning and development ordinance does not negate this public purpose nor does it render the taking unlawful.

Conclusion

For the foregoing reasons, the City respectfully requests that this Court overrule the objections of 222 Hats, appoint appraisers to assess the damages caused by the appropriation, and for all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing "Memorandum of Law" has been served upon the following by electronic service through the Indiana E-Filing System (IEFS) this 4th day of October, 2019:

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