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Monroe Circuit Court 6
Monroe County, Indiana

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
	) 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.)

RESPONSE TO CITY'S MEMORANDUM

Plaintiff, City of Bloomington, Indiana ("City" or "Condemnor"), filed its Memorandum of Law ("City's Memorandum") in response to Landowner's Objections filed on August 16, 2019. Landowner, 222 Hats, LLC ("Landowner" or "222 Hats"), raised five (5) Objections to the City's proposed taking. Each of the City's responses to Landowner's Objections are addressed below.

Landowner incorporates its objections and arguments in support thereof in this Response to City's Memorandum.

As Indiana eminent domain statutes are in derogation of common law property rights, they must be strictly construed, "both as to the extent of the power and as to the manner of its exercise." *Cemetery Co. v. Warren Sch. Twp. of Marion County*, 139 N.E.2d 538, 544 (Ind. 1957).

Objection 1.
Condemnor's Taking is Unlawful because it is not for a public use.

Landowner and the City agree that a taking for a private use is unlawful. Landowner's first Objection to the City's taking is that the City's proposed

Project is not for a public use, because it includes nearly 10,000 sq. ft. of commercial retail space, a purely private use. This commercial retail space will be leased to private entities who will enter into leases with the City. (Agreed Factual Stipulations, para. 9.) These private entities leasing the commercial retail space will have the legal right to deny the general public from its use at their pleasure. (Agreed Factual Stipulations, para. 9.)

The City's response to Landowner's Objection No. 1 is two-fold: One, that even if the taking is an unlawful private use, it is required by local ordinance, and thus is justified because the City must comply with the local ordinance. The City makes this argument in spite of the fact a waiver could have been applied for, but was not. (Agreed Factual Stipulation, para. 24.) To weaken its argument even further, the waiver would be decided by the City's own Plan Commission on the same basis as the City's request for four (4) other waivers. (Agreed Factual Stipulations, para. 18.) This argument fails as a matter of fact and law.

Two, that even if part of the use will be for an unlawful private use, it is an acceptable Constitutional violation because the violation is only "minor" as it relates to the entire Project. The City relies on caselaw only applicable to blight clearance redevelopment projects. The second argument fails as a matter of law and misconstrues the facts applicable thereto.

The Local Zoning Ordinance. The City's reliance on the local zoning ordinance as requiring a violation of the public use requirement of the Indiana Constitution fails as a matter of law because a local zoning ordinance does not supersede the Indiana Constitution. Moreover, the City's reliance on the local zoning ordinance as mandating a violation of the public use requirement of the Indiana Constitution fails as a matter of fact

because the City does not comply with the 50% requirement in the Ordinance – and thus the 50% requirement *cannot* be a basis for the nearly 10,000 sq. ft. of commercial retail space.

The law.

A local zoning ordinance does not trump the Indiana Constitution. "It is hornbook law municipal ordinances and regulations are inferior in status and subordinate to the laws and statutes of the state. . . [E]ven in cases of partial preemption, city ordinances or regulations undertaking to impose regulations which conflict with rights granted or reserved by the Legislature are invalid . . . at least as to those parts of a supplemental ordinance or regulation which conflict with the statute. Those parts are invalid and cannot be enforced." *City of Indianapolis. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987) (internal citations omitted). As a matter of law, the City cannot point to a local zoning ordinance as something with which it must comply to violate the Indiana Constitution.

The facts.

Next, the City's Project does not comply with Bloomington Municipal Code 20.03.120(e), which requires at least 50 percent first-floor non-residential and non-parking. The City argues that it must comply with BMC 20.03.120(e) and therefore must have first-floor commercial retail space. Unfortunately for the City, this argument lacks merit because the City does not comply with this requirement. As depicted in Joint Exhibit "A" attached to the Agreed Factual Stipulations and as Alex Crowley, Director of Economic and Sustainable Development, City of Bloomington, testified at the October 7, 2019 Show Cause Hearing, the "non-residential non-parking" area on the first floor of the

proposed project will only be roughly 12,000 sq. ft. (Testimony of Alex Crowley; Defendant's Exhibit B, Show Cause Hearing); whereas, the "parking garage" area of the first floor will be roughly 18,000 sq. ft. (Testimony of Alex Crowley; Defendant's Exhibit B, Show Cause Hearing). By the City's own admission, documentation and testimony, it will not comply with its local zoning ordinance BMC 20.03.120(e). As such, the City's argument that compliance with the local zoning ordinance mandates violating the Indiana Constitution is factually incorrect and without merit.

Case Law Relied Upon by the City. The City argues the private aspects of the Project are only incidental to the overall parking garage use. In support of this argument, the City relies upon two cases: *Kessler v. City of Indianapolis*, 157 N.E. 547, 549 (Ind. 1927); and *Hawley v. South Bend Dept. of Redevelopment*, 383 N.E.2d 333 (Ind. 1978). 222 Hats submits that an in-depth view of these cases shows that the single quote relied upon by the City from *Kessler* has been taken out of context and that *Hawley* applies only in limited circumstances.

Kessler v. City of Indianapolis. *Kessler* states simply the constitutional protection 222 Hats relies on: The power of eminent domain may be exercised only for public purposes and not for a private purpose and the taking of private property for a private use violates the constitutional rights of the owner. *Kessler*, 157 N.E. 147.

Kessler also provides insight into how Indiana courts should treat a condemning agency's attempt to limit the Court's inquiry into whether a particular use is public. The city in the Kessler case proposed a take of Kessler's property for the immediate purpose of providing a private drive for Kessler's neighbor. To justify the take, the city claimed it

might someday construct a park there. *Id*. *Kessler* states that the Court should not limit its inquiry to the stated purpose of the condemning agency:

> We believe that the inquiry of the courts is not limited alone to a consideration of whether the "use" — "park purposes" — which a city assigns in its condemnation proceedings as the use to be made of the property, is or is not a public use, (if that were true there would really be no limitation on the power of cities to acquire property), but that a consideration may be had of all the surrounding facts and circumstances tending to show what is the actual, principal and real use to be made of the property.

Kessler, 157 N.E. 457, 459. This is precisely and improperly what the City in the instant case is asking of this court. Moreover, *Kessler* clearly states that the power of eminent domain "cannot constitutionally be delegated for an essentially private purpose, even though a public purpose will be incidentally served thereby." Id.

The City relies on a single quote in *Kessler* (arguably *dictum)* to support its position that the nearly 10,000 sq. ft. of commercial space in the Project is only "incidental" to the overall public use and should therefore be permitted. (City's Memorandum of Law.) "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." *Id.*; *Kessler*, 157 N.E. at. 549. Merriam-Webster defines incidental as "1: being likely to ensue as a chance or minor consequence . . . 2: occurring merely by chance or without intention or calculation." (Merriam-Webster Dictionary, retrieved October 17, 2019, from www.merriam-webster.com/ dictionary/incidental. Merriam-Webster Online.) Mr. Crowley testified that that the City Council required the private commercial retail use as a requirement of the bond financing for the Project; that is, it was a requirement of approval of the Project and the City Administration deemed it to be a requirement.

(Testimony of Alex Crowley.) Because the commercial retail space was a requirement imposed by the City Council, the City Administration chose not to seek a waiver from the City Plan Commission of the ground floor non-residential (commercial retail) space requirement.

Thus, the commercial retail space was a requirement of the garage construction and not a chance or minor consequence of the garage. Nor was it something that occurred "merely by chance or without intention or calculation." (See Merriam-Webster dictionary definition of incidental.)

The *Kessler* quote relied upon by the City cites *Wisconsin River Improvement Co. v. Pier*, 137 Wis. 325 (1908) as an example of an "incidental" private use or benefit. *Pier* involved the public use of improving navigation of the Wisconsin River. *Id*. In order to effectuate the navigation of the river, the condemning agency needed to construct a dam. *Id*. The agency contracted with a private company to construct the dam. *Id*. The financing for the construction was at the expense of the private company and afterwards, the private company was allowed to collect the tolls arising from the navigation of the river. *Id*. Thus, the private entity constructed the dam at its sole expense and was to be paid from the collection of tolls. Essentially, the Court was pointing out that the fact that a private company profiting from the construction of a public work does not make it a private purpose.

Here, F.A. Wilhelm is handling the demolition of the old garage and the construction of the new garage. The Kessler Court would say that the fact that a private, for-profit company has been hired to do the job does not make this project a private use or benefit. Moreover, in the *Pier* case, the Wisconsin court found that the financing

scheme employed by the condemning agency did not make the construction of the dam a private use or benefit even where the private construction company was given the right to collect tolls on the river for its reimbursement of the construction costs. *Pier*, 137 Wis. 325. Similarly, here, where bonds will be used to finance the Project, the fact that a private agency may be retained to sell the bonds will not make the construction or use of the Project a private use or taking.

However, 222 Hats contends that the taking of its 3,000 square feet of commercial space to construct the Project with nearly 10,000 square feet of commercial, retail space is an unlawful, unconstitutional private use or benefit because the City required this aspect of the Project in order for the Project to be funded. The Kessler Court held that: "Where . . . the intention to confer a private use or benefit forms the purpose *or a part of the purpose of the proceeding or taking* the power of eminent domain may not be exercised." Id. (emphasis added). The City agreed that the first-floor non-residential use for the Project was an "aspect of the design . . . explicitly requested by the City Council and approved by the redevelopment commission." (Agreed Factual Stipulations, para. 21.) Moreover, Mr. Crowley testified at the Show Cause Hearing that the City Council would only approve the funding of the Project if the nearly 10,000 sq. ft. of commercial retail space was included. (Testimony of Alex Crowley.) Based upon the agreed facts and City's testimony, the commercial retail aspect of the Project not only formed a "part of the purpose" for the Project, but it was a requirement to get funding – meaning, but for the nearly 10,000 sq. ft. of commercial retail space (a solely private use) the Project (and this proceeding) would not be approved or have occurred.

Hawley v. South Bend Redevelopment Comm'n. Next, the City relies upon *Hawley* as justification for violation of the Indiana Constitutional requirement of public use. *Hawley* does not apply to the facts of the instant case because it applies only to blight or slum clearance for redevelopment projects. Hawley also does not apply to the facts of the instant case because it was abrogated by the post-Kelo enacted IC 32-24-4.5 et. seq. Finally, even if Hawley could be found to apply and provides a type of "proportionality test," that test must be addressed in context of what has been added by the Project and taking.

In *Hawley*, the South Bend Redevelopment Commission determined a portion of the downtown area to be a "blighted area" and property within this area was acquired by the Commission "with a view toward redevelopment by private investment." *Hawley*, 383 N.E.2d 333, 335. The Commission sanctioned a report that "concluded that the area was blighted and that the proposed shopping mall would be an economic boon to the area." Id. at 337. The property owners impacted by the proposed takings objected on public use ground. The Court reasoned that it needed to address, among other things, "whether or not a private property owner has a right to raise the issue that a public official or a public body is acting outside its power and scope of authority and is arbitrary and capricious in attempting to seize private property for other than a public purpose, and in fact, for private use of another private party." Id. at 340. The Court held that "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." Id. (*citing Alanel Corp. v. Indianapolis*

Redevelopment Comm'n, 154 N.E.2d 515, 522 (Ind. 1958)). Next, the Court held that "So long as the eventual use of the property is related to a discernable 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." Id. (emphasis added.) The Hawley Court held that once the public purpose of blight/slum clearance is achieved, the resulting use is essentially irrelevant because the blight was eliminated – thus, this is a decision that does not apply to the City's proposed taking in this case.

Moreover, Hawley was decided prior to *Kelo v. City of New London*, 545 U.S. 469 (2005) as well as to the enactment of IC 32-24-4.5 et. seq., which is the Chapter in the Indiana Eminent Domain Code for "Procedures for Transferring Ownership or Control of Real Property Between Private Persons." The Indiana legislature passed IC 32-24-4.5 et. seq. in 2006, immediately following the *Kelo* decision. This Chapter permits the taking of a parcel of real property to ultimately be transferred to a private party only in certain circumstances, which generally includes unsafe structures, unsanitary structures, and where the "acquisition . . . is expected to accomplish more than only increasing the property tax base of a government entity" IC 32-24-4.5-7. When viewed in light of the Hawley decision, IC 32-24-4.5 et. seq., would have been applicable to the *Hawley* taking because the real estate was transferred to a private party to construct a shopping center that was going to create an "economic boon to the area." The taking in Hawley would not be permitted under the IC 32-24-4.5 et. seq. statutory framework. Because Hawley predates the enactment of IC 32-24-4.5 et. seq., and that Hawley applies only to blight elimination/slum clearance and only by redevelopment commissions, it is not applicable to the instant case.

Proposed Proportionality Test. Finally, the City argues that the private nature of the Project is "only incidental to" or "ancillary to the ultimate purpose of building the parking garage." (City's Memorandum of Law.) In support of this position, the City directs the Court to view the square footage of the whole Project (roughly 180,000 sq. ft.) with the square footage of the private aspect of the Project (roughly 8,500 sq. ft.). This appears to be a test of the proportionality of the whole Project to the private portion. However, the City misconstrues how a proportionality test should be viewed.

If the Court is inclined to view the Project in terms of a proportionality test, it must be viewed considering what is being added to the subject area. The City already owns the real estate where the existing garage is located, and nothing prevents it from constructing a new garage in its existing footprint – no condemnation would be needed and no public use requirement would be imposed. The City has chosen to "expand" the footprint of the Project which requires taking Landowner's property and the addition of roughly 10,000 sq. ft. of commercial retail space. The existing parking garage contains roughly 400 parking spaces. (Joint Exhibit 3, pg. 4.) The proposed Project anticipates having roughly 515 parking spaces. (Testimony of Alex Crowley.) The Project proposes to add 8,677 sq. ft. of commercial retail space that will be leased to private entities with leases and the right to exclude the general public therefrom.

Thus, the proportionality test should be: whether the addition of roughly 115 parking spaces (about a 25% increase to the existing garage) is only ancillary to the addition of 8,677 sq. ft. of commercial retail space that is required by the City Council for the Project to be funded. When viewed with the proper proportionality, the primary focus of the Project is commercial retail space and not the addition of parking for the

Bloomington community or its visitors – especially because the City requires the commercial retail space to fund the Project.

Objection 2.

Condemnor's Complaint is defective because it does not factually describe Condemnor's Project, most importantly the fact that it includes a commercial shopping center, a non-public use.

In response to Landowner's Objection No. 2, the City simply argues that a general allegation of the use to which the property is to be put is sufficient. The City misconstrues Landowner's Objection.

Landowner objects based upon the fact that the City's allegation that "the City intends to construct a new, expanded 4th Street Parking Garage" is vague and misleading. The City refers to an "expansion" of the existing garage. However, the existing garage does not have any first-floor commercial retail space, which the proposed new garage will have. Nowhere in the City's Complaint is the commercial retail space mentioned. But for Landowner providing the actual information about the garage and its private components (nearly 10,000 sq. feet of commercial retail space) to the Court's attention, the Court would have to do its own research to understand the true extent of the Project. The Eminent Domain Code does not contemplate putting such a burden on the Court to investigate a condemning agency's proposed project.

A vague, factually inaccurate description of the use to which Condemnor seeks to put the property it is taking does not strictly comply with the requirement of IC 32-24-1-4(b)(3). As such, Condemnor's Complaint should be dismissed, or, in the alternative, Condemnor should be ordered to amend and serve an amended Complaint with a proper description of the use to which it seeks to put the property.

Objection 3.

Condemnor's Complaint is defective because it alleges and is based upon a violation of Indiana law.

In response to Landowner's Objection No. 3, the City argues that the failure to include the taking of Landowner's property on the agenda was not a violation of Indiana law. In support of its position, the City cites to several opinions from the Indiana Public Access Counselor. Landowner does not dispute these decisions.

However, Landowner was not relying upon a determination or opinion by the Indiana Public Access Counselor. Instead, Landowner is simply arguing that any action taken is void under Indiana law – meaning the Resolution upon which Condemnor solely relies is an action that is rendered void. "A governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. A rule, regulation, ordinance or other final action adopted by reference to agenda number by item alone is void." IC 5-14-1.5-4. The City utilizes an agenda. The City did not include the taking of Landowner's property on its agenda.

With respect to the bond, the Common Council of the City of Bloomington did not adopt a resolution specifying the public purpose of the bond as required by IC 36-7-14-25.1. Resolution 19-06, which is attached to Landowner's Objections, specifically states: "WHEREAS . . . the Common Council . . . must adopt a resolution specifying the public purpose of the bond . . . ." The findings section of Resolution 19-06 does not include a finding of the public purpose of the bond. Despite the City's argument, the public purpose of the bond is not plainly stated; in fact, it is not stated at all.

Objection 4.

Condemnor's Complaint is defective because it fails to name a necessary party with an interest in the subject property.

In response to Landowner's Objection No. 4, the City simply argues that "there is no evidence that [Monroe County] has a lien on the property." The City goes on to liken its failure to name a necessary party as similar to not naming a tenant on the property. This argument and comparison both fail.

A county does not file a lien on property for real estate taxes that are not yet due. Instead, the "lien attaches on the assessment date of the year for which the taxes are assessed" as a matter of law. IC 6-1.1-22-13(a); see also *Van Prooyen Builders, Inc. v. Lambert*, 907 N.E.2d 1032, 1035 (Ind. Ct. App. 2009). Thus, Monroe County, Indiana may be entitled to payment of real property taxes. *Southtown Properties, Inc. v. City of Fort Wayne*, 840 N.E.2d 393 (2006). Because the lien attaches as a matter of law, it goes without saying that "there is no evidence" in the chain of title of a lien for property taxes. The City's argument is without merit. The County is a necessary party with an interest in the real estate.

Next, the City compares its failure to name the County as though it didn't name a tenant on a property. The City is correct that tenants are often times not named as defendants in condemnation cases. However, a tenant has a landlord-tenant relationship formed via a contract (usually a lease). The lease between landlord and tenant governs their relationship as to a condemnation taking. A tenant does not have a lien by operation of law on property. Thus, this comparison is unharmonious.

Objection 5.

Condemnor's Complaint is defective because it requests relief to which Condemnor is not entitled.

The City generally does not respond to Landowner's Objection No. 5, other than saying that it is similar to Objection No. 1. If anything, Objection No. 5 is most similar to Objection No. 2 (a vague and ambiguous description of the project does not strictly comply with the Eminent Domain Code).

Landowner's Objection No. 5 states that the City's Complaint describes the project it seeks to construct as a "public parking garage." However, the Project includes nearly 10,000 sq. ft. of commercial retail space. But for Landowner bringing this non-private aspect of the Project to the Court's attention, the Court would have had to conduct its own research outside of the record in this case to understand the true nature of this Project. The Project is not simply a parking garage. The Project is a commercial retail shopping center with a parking garage above it. The City's own evidence at the Show Cause Hearing compared the Project with two other wholly-private developments – one a commercial retail center with parking above, and the other an apartment complex with commercial retail on the first floor. The City compares the proposed instant Project with completely private developments but argues that this development is somehow public.

The use to which Landowner's property will be put (a development they compare only with other private developments and uses) is not adequately disclosed in the City's Complaint.

III.
CONCLUSION

Accordingly, Landowner's Objections should be sustained because the City's Project is not a public use, or, in the alternative, the City should be ordered to amend its Complaint to comply with Indiana Law.

Respectfully submitted,

/s/ Eric Rochford
J. Eric Rochford, *Attorney for Defendant, 222 Hats, LLC*
Atty. No. 29742-29

CERTIFICATION OF COMPLIANCE WITH TRIAL RULE 5(G)

I do hereby certify that the foregoing or attached court record or document complies with the requirements of Ind. Trial Rule 5(G) with regard to information excluded from the public record under Ind. Administrative Rule 9(G).

/s/ Eric Rochford
J. Eric Rochford
Attorney for Defendant, 222 Hats, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Response to City's Memorandum has been duly served upon all counsel of record listed below, via the Indiana Electronic Filing System, on this 18th day of October 2019:

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