

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.)
)

**LANDOWNER’S OBJECTION TO PLAINTIFF’S
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Defendant Landowner, 222 Hats, LLC (“Landowner” or “Hats”), by one of its attorneys, J. Eric Rochford, files its Objection to Plaintiff’s Motion for Leave to File Amended Complaint (“objection”).

In support of its objection, Landowner shows the Court that:

Summary of Objection

Plaintiff City of Bloomington (“City”) is not permitted to amend its Complaint in this case. This Court ruled on facts outside of the Complaint and ordered the Complaint dismissed as a matter of law and fact, which issues cannot be cured by an amendment to the Complaint.

A Complaint can only be amended in an eminent domain case to conform to the evidence. City requests, by unverified Motion, to amend its Complaint, after a trial on the merits. The City’s motion for leave to amend baldly contradicts City’s designated witness representative’s testimony given under oath in open Court. The City’s request to amend also contradicts admissions and facts stipulated by City and presented to the Court by City. City requests these contradictions to sworn testimony and admissions/stipulations, all in an attempt to change the Project for which City sought to improperly take Landowner’s property. Moreover, this unsworn filing lacks any showing that the required approvals have been obtained or could possibly be obtained. The testimony and admissions/stipulations from the trial in this case proved that a requirement of financing the Project was the presence of the commercial/retail/private property as part of the Project.

The City is now attempting to change facts because it lost at trial and the Court ruled in favor of Landowner. This is not permitted by Indiana law nor the Indiana Eminent Domain Code (IC 32-24-1 et. seq.).

The City's sole remedy is to take an appeal from the Court's Order Sustaining Objection in the manner that appeals are taken from final judgments in civil actions, pursuant to IC 32-24-1-8(d).

1. On December 20, 2019, this Court entered its Order Following Hearing on Objections and Sustaining Objection to Complaint for Appropriation ("Court's Order Sustaining Objection"). In its Order Sustaining Objection, the Court concluded that the City's proposed taking was prohibited and that "the Complaint is dismissed on that basis."

2. Despite the City's Complaint being dismissed by virtue of the Order Sustaining Objection, on December 30, 2019, City filed its Motion to Amend the Complaint for Condemnation ("City's Motion to Amend"). In its motion, City simply states that "under the circumstances" it would like permission to amend its pleading pursuant to IC 32-24-1-8(d). Landowner understands "the circumstances" alleged by the City to mean the Court sustaining Landowner's Objection and holding that the City's proposed project is not for a public use. City also fails to notify the Court that IC 32-24-1-8(d) provides the City the remedy of taking an appeal.

3. Plaintiff's Motion to Amend and the proposed Amended Complaint attached thereto are not verified. As such, none of the "alternative" facts contained therein are verified by any representative of the City and no City representative can be held accountable for the veracity of these statements.

4. City's Motion to Amend alleges that "The Project shall be exclusively used as a parking garage, as that use is defined by Bloomington Municipal Code 20.11.020 In order to move forward with the [allegedly] redesigned Project, the City's petition for site plan approval from the Bloomington Plan Commission shall include a request for a waiver from the first-floor nonresidential requirement. . . . [T]hat the City no longer intends to include nonresidential retail space as part of the Project." To Landowner's best knowledge and information, the City has not formally redesigned nor even commissioned its architects to make the requested changes to the Project as alleged, nor has the City

revised its bond applications for funding the project, nor has the City made any request to the City zoning or planning boards for approvals of the allegedly “to be” redesigned project.

5. The above allegations in City’s Motion to Amend are inconsistent with testimony at the October 7, 2019 Hearing on Landowner’s Objections. At the Hearing, Alex Crowley, Director of Economic and Sustainable Development, City of Bloomington, testified that the City Council *required* the commercial/retail aspect of the Project as a condition of approval of the funding for the Project. The unverified request to amend alleges this component is being removed from the Project, even though Mr. Crowley testified under oath that it was specifically required and necessary in order to obtain the City Council’s approval of funding for the Project.

6. Moreover, the above allegations are inconsistent with one-third (8 of 24) of the facts previously stipulated and submitted to this Court by *both* City and Landowner – Paragraph Nos. 5, 9, 10, 11, 18, 21, 22, and 23 are all contradicted by and inconsistent with City’s Motion to Amend and its proposed Amended Complaint (Agreed Factual Stipulations, filed October 1, 2019).

7. The City’s proposed Amended Complaint also contains misstatements of fact and law, including:

- a. “The City has the statutory authority to undertake this Project and may exercise the power of eminent domain” Proposed Amended Complaint, Para. 7 – this is directly contrary to the Court’s Order Sustaining Objections;
- b. “[T]he City has also discussed opportunities with 222 Hats, LLC member Juan Carlos Carrasquel to have a space in the new structure that matches or exceeds his current real estate footprint . . .” Proposed Amended Complaint, Para. 9 – this cannot be factually correct if the City revises the Project as it has alleged;

c. “The Project was approved for a public purpose and found to be in the public interest by the City of Bloomington Board of Public works in its Resolution 2019-43, approved at a public meeting held on April 30, 2019.” Proposed Amended Complaint, Para. 3 – the previously approved Project was ruled by this Court to be for an improper private purpose, therefore, the “approved Project” referred to in Paragraph No. 3 of the proposed Amended Complaint is improper as a matter of law and this allegation is a misstatement of fact. The “Project” referred to the proposed Amended Complaint seems to refer to multiple renditions of this improper project.

8. Amendment to the Complaint is improper in this case because the Court ruled on facts outside of the face the Complaint, sustained the public use Objection as a matter of law, and dismissed the Complaint.

9. “If an objection is sustained, the plaintiff may amend the complaint or may appeal from the decision in the manner that appeals are taken from final judgments in civil actions.” IC 32-24-1-8(d). In this case, an amendment does not cure the defects with City’s Complaint. Instead, the only remedy to City is to take an “appeal from the decision in the manner that appeals are taken from final judgments in civil actions.” The Court’s Order Sustaining Objections was a ruling on facts outside the face of the Complaint, which served as a judgment on the issues before the Court and is an appealable final order. As such, an appeal is the City’s remedy, not amendment.

10. “When . . . an objection sets up matters not apparent on the face of the complaint, it does not perform the office of a special demurrer, but of an answer, and tenders an issue of fact to be tried by the judge.” *Westport Stone Co. v. Thomas*, 94 N.E. 406, 410 (Ind. 1911). This is precisely what occurred in the instant case. Landowner filed its Objections, which, along with the testimony at the October 7, 2019 Show Cause Hearing, brought before this Court facts outside of the face of the

Plaintiff's Complaint (i.e. the exact private nature of the project, including but not limited to its private, commercial retail component that was required by the City Council to approve funding for the Project). Subsequently, the Court entered its Order Sustaining Objection, which served as a final order/judgment and the Court dismissed the Complaint.

11. "When amendments are required to be made by leave of court it is necessarily implied that the court may refuse leave in the exercise of sound legal discretion which will only be reviewed for abuse of discretion." *State ex rel. Joint County Park Bd. of Ripley, Dearborn and Decatur Counties*, 91 N.E.2d 916, 919 (Ind. 1950). Due to the "summary nature of [eminent domain proceedings], . . . it is the clear duty of the trial court to expedite the closing of the issues. Certainly no amendment should be permitted if not made with due diligence on the part of the moving party. The limited right to amend must not be exercised to defeat the summary nature of the action." *Id.* The City in this case has not done any due diligence as to the likelihood of its "revised" project being approved by the numerous local governmental bodies to which it is subject (City Council, Redevelopment Commission, Board of Zoning Appeals, Plan Commission, etc.). Mr. Crowley already testified that the Project's funding mandated the first floor non-residential component of the Project. Moreover, the parties stipulated the City Council "expressly required" the first floor nonresidential component of the Project. (Agreed Factual Stipulations, filed October 1, 2019). Landowner submits no due diligence has been performed by the City, no meetings of public bodies have been held, no submissions prepared nor submitted. Rather, the City's attorneys are simply requesting to modify facts with their unverified petition after the Court ruled on the facts and law. The summary nature of this proceeding should be preserved – the issues closed, the case was tried to the Court on the merits - the Court should sustain the Objection and deny the City's improper attempt to amend its Complaint.

12. In a case in which the trial court sustained a public use objection by the landowner, the trial court properly denied amendment to the Complaint. *Continental Enterprises, Inc. v. Cain*, 387 N.E.2d 86, 90 (Ind. Ct. App. 1979). In *Continental*, the trial court denied any amendment to the Complaint after the Court sustained the landowner's public use objection, and the Indiana Supreme Court held that "The trial court . . . denied the motion [to amend] on the ground that evidence of public purpose had been taken into consideration when it made its finding that Continental sought the easement for a private purpose. The court correctly denied the motion. ***Amendments under IC 32-11-1-5 [now IC 32-24-1-8] are proper only when necessary to make the complaint conform to the evidence.***" *Id.* (emphasis added), citing *Indianapolis Water Co. v. Lux*, 64 N.E.2d 790 (Ind. 1946). This is precisely what we are dealing with in the instant case. Moreover, instead of trying to conform to the evidence before this Court, City is doing the opposite – it is rendering stipulated facts, pleaded facts, and witness testimony given under oath inaccurate/false. Amendment of the Complaint is not permitted when done to contradict, rather than conform to, the evidence.

13. The Indiana Supreme Court has held the right to amend the Complaint in an eminent domain case to be severely limited and only for the purpose of conforming the pleadings to the evidence. (*Joint County Park Bd.*, 91 N.E.2d at 919; and *Continental Enterprises*, 387 N.E.2d at 90). That is not what the City seeks here; the City seeks to do the opposite: contradict sworn testimony and stipulated facts after a trial on the merits. Moreover, this Court's Order Sustaining Objection was a final order/judgment on the facts and law before the Court, after a trial on the merits and a dismissal of the case. As such, an amendment to a pleading does not defeat or otherwise circumvent a judgment on the facts. The City's recourse is to take an appeal pursuant to IC 32-24-1-8(d).

WHEREFORE, Defendant Landowner, 222 Hats, LLC, respectfully requests that the Court deny Plaintiff's Motion for Leave to File Amended Complaint; and all other just and proper relief in the premises.

Respectfully submitted,

/s/ J. Eric Rochford
J. Eric Rochford
Attorney for Landowner, 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 Trial Rule 5(G) with regard to information excluded from the public record under Administrative Rule 9(G).

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

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Landowner's Objection to Plaintiff's Motion for Leave to File Amended Complaint has been duly served upon the counsel of record listed below, email, U.S. mail, postage prepaid or through the Indiana Electronic Filing System on this 10th day of January 2020:

David L. Ferguson
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/s/ J. Eric Rochford
J. Eric Rochford
Attorney for Landowner, 222 Hats, LLC