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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.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER SUSTAINING LANDOWNER'S OBJECTIONS

This matter came before the Court on Landowner's Objections to Plaintiff's Complaint for Appropriation of Real Estate ("Landowner's Objections") filed by Defendant Landowner, 222 Hats, LLC ("Landowner" or "222 Hats") on August 16, 2019. On October 4, 2019, Plaintiff, City of Bloomington, Indiana ("City", "Plaintiff", or "Condemnor") filed its Memorandum of Law in response to Landowner's Objections. Landowner filed its Response to City's Memorandum of Law on October 18, 2019. A show cause hearing was held on Landowner's Objections on October 7, 2019, at which Plaintiff appeared by its attorneys, Alan S. Townsend, Michael Rouker and Larry Allen, and Landowner appeared by its attorneys, J. Eric Rochford and David L. Ferguson. The Court heard argument on Landowner's Objections and took the matter under advisement pending submissions of findings of fact and conclusions of law by the parties.

The Court has considered Landowner's Objections, the City's Memorandum of Law, and Landowner's Response to Memorandum of Law and enters the following Findings of Fact, Conclusions of Law and Order Striking Defendant's Objections:

I.
FINDINGS OF FACT

1. 222 Hats owns title to the real estate located at 222 S. Walnut Street, Bloomington, Indiana, 47401 ("Subject Real Estate"). (Agreed Factual Stipulations, para. 1.)

2. The property owned by 222 Hats, contains a commercial building, 2800 square feet in size, in which 222 Hats operates a business, The Juan Sells.com Realty Co. (Agreed Factual Stipulations, para. 2; Landowner's Objections, para. 1; Testimony of Juan Carrasquel.)

3. City is seeking to acquire the Subject Real Estate, pursuant to Ind. Code 32-24-1, et. seq. and Ind. Code 36-1-4-5, to construct what will be the new Fourth Street Garage ("Project"). (Agreed Factual Stipulations, para. 5.)

4. City is not proceeding in this eminent domain lawsuit under the Redevelopment Act, IC 32-24-4.5, et. seq. (Plaintiff's Complaint for Appropriation of Real Estate.)

5. City has not made a determination, argument, nor consideration of the property being blighted. (Testimony of Alex Crowley.)

6. The existing Fourth Street Garage does not include any commercial retail space. (Testimony of Alex Crowley; Joint Exhibit 3, pg. 4.)

7. The existing Fourth Street Garage has between 350 and 400 parking spots. (Joint Exhibit 3, pg. 4; Testimony of Alex Crowley.)

8. On April 30, 2019, the City of Bloomington Board of Public Works approved Resolution 2019-43, authorizing a Uniform Property or Easement Acquisition Offer for the Real Estate. Resolution 2019-43 was added to the agenda of the Board of Public Works during the meeting on April 30, 2019. (Agreed Factual Stipulations, para. 6.)

9. On May 6, 2019, pursuant to the requirements of Indiana Code Section 32-24-1-5, the City personally delivered a Uniform Property or Easement Acquisition Offer to 222 Hats LLC member Juan Carlos Carrasquel. That same day, a copy of the Offer was sent by Certified Mail to 222 Hats LLC; its agent as registered with the Indiana Secretary of State, Mallor Grodner LLP; and to Juan Carlos Carrasquel. The City offered to purchase the Real Estate for $587,500.00 in its Uniform Property or Easement Acquisition Offer. The City's offer was based on the average of two independent appraisals acquired by the City. The offer notified Defendant that the City wanted to purchase the property for "the expansion and construction of the Fourth Street Parking Garage." (Agreed Factual Stipulations, para. 6.)

10. The City's Uniform Property or Easement Acquisition Offer was rejected, and the City filed its complaint on June 7, 2019. (Agreed Factual Stipulations, para. 7.)

11. Plaintiff's Complaint does not name Monroe County, Indiana as a defendant. (Plaintiff's Complaint for Appropriation of Real Estate.)

12. Plaintiff's Complaint does not mention the nearly 10,000 sq. ft. of private, commercial retail space included in the proposed Project. (Plaintiff's Complaint.)

13. Resolution 2019-43, attached to Plaintiff's Complaint, does not mention the nearly 10,000 sq. ft. of private, commercial retail space included in the proposed Project. (Plaintiff's Complaint, Exhibit A.

14. Despite the City's claim that they need the Subject Real Estate to "construct a public parking garage," to provide context and reference, the City presented evidence to the Court comparing the Project with two wholly private projects, one of which includes a parking garage component. (Joint Exhibit 9; Joint Exhibit 10.) Neither of these projects were subject to the requirements of B.M.C. § 20.03.120(e)(2). (Testimony of Alex Crowley; Agreed Factual Stipulations; Joint Exhibits 9 and 10.)

15. The Project, as proposed by City, is accurately depicted in Exhibit A and Exhibit B attached to the Agreed Factual Stipulations. (Agreed Factual Stipulations, para. 9.) The Project will include approximately 30,000 sq. ft. of space on the first floor, of which 12,320 square feet will be non-residential non-parking use (Agreed Factual Stipulations, para. 9.) Included within this non-residential, non-parking space is approximately 8,677 square feet divided into four sections that the City will lease to private entities or persons, for commercial purposes, including but not limited to retail. (Agreed Factual Stipulations, para. 9; testimony of Alex Crowley.) The remaining approximately 18,000 sq. ft. of the first floor will be for parking related purposes. (Testimony of Alex Crowley; Landowner's Exhibit B, Show Cause Hearing.)

16. The Project's non-residential space will not be restricted to governmental tenants or governmental uses. It will be subject to written leases. Tenants of the commercial space will have the right to exclude the general public from the leased areas. The remaining 3,643 square feet of non-residential space will be used for the City's parking operations, City information technology infrastructure, public restrooms, and dedicated bicycle parking. (Agreed Factual Stipulations, para. 9.)

17. The Project will include a total of 511 parking spaces, which is only an additional 115-155 parking spaces than already exist in the Fourth Street Parking Garage. (Testimony of Alex Crowley; Joint Exhibit 3, pg. 4.) Although spaces within the existing Fourth Street Parking Garage are assigned to tenants in CFC's Fountain Square Mall, it is unknown how many parking spaces in the Project will be dedicated to tenants in CFC's Fountain Square Mall or in the commercial retail space in the Project. (Testimony of Alex Crowley.)

18. The City has obtained two appraisals for the purpose of establishing lease rates pursuant to the procedures in Indiana Code Section 36-7-14-22, under which the City anticipates offering the commercial space for lease. However, the City has not yet formally offered any of the potential commercial space for lease. (Agreed Factual Stipulations, para. 11.)

19. City has contracted with F.C. Tucker, a real estate broker, to assist with finding tenants for the commercial retail space in the Project. (Testimony of Alex Crowley; Landowner's Objections, para. 6.)

20. The City has received two inquiries regarding potential commercial space in the Project: (1) on May 17, 2019, the City received an email from William Beggs of Bunger and Robertson, LLP, inquiring whether there may be "commercial/office space included in the design of the 4th Street Garage" and expressing interest for the relocation of his law firm; (2) on June 5, 2019, Council Member Stephen Volan sent an email to the City inquiring about the commercial space and conveying the interest of a local grocery cooperative, Bloomingfoods, to potentially locate there. On June 14, 2019, Alex Crowley responded to Council Member Volan's inquiry. Crowley stated that the City would solicit inquiries and proposals for the commercial space in the future, and Bloomingfoods could submit their requirements "at that time." (Agreed Factual Stipulations, para. 13; testimony of Alex Crowley.)

21. The City has a Unified Development Ordinance (UDO) that governs both uses and design for structures within the City, which is located generally in Title 20 of the Bloomington Municipal Code. (Agreed Factual Stipulations, para. 14.)

22. Included within the UDO, the City has development standards for certain geographic regions referred to as overlays. (Agreed Factual Stipulations, para. 15.)

23. The Project will be constructed and exist in the Downtown Core Overlay. (Agreed Factual Stipulations, para. 16.)

24. B.M.C. § 20.03.120(e) requires that any structure with frontage on, in relevant part, Walnut Street, 3rd Street, and 4th Street provide ground floor nonresidential uses. B.M.C. § 20.03.120(e)(2) states:

> All properties to which this subsection applies shall provide ground floor nonresidential uses along the applicable street frontage. No less than fifty percent of the total ground floor area shall be used for such nonresidential uses. Enclosed parking garages shall not be counted toward the required nonresidential uses. (Agreed Factual Stipulations, para. 18.)

25. The current design and depiction of the Project has been submitted to City's Plan Commission for review, approval, and waiver(s).The current design cannot be developed by right because the design does not comply with B.M.C. § 20.03.120, the

Downtown Core Overlay Development Standards of the City of Bloomington Unified Development Ordinance. Therefore, the City has requested relief, by waiver, from B.M.C. § 20.03.120 as follows:

a. B.M.C. § 20.03.120(b)(2) Maximum Structure Height: Bloomington UDO in for the Downton Core Overlay allows for a maximum height of 40 feet. The Project calls for the development of 510 parking spaces with 6 parking decks. As a result, the maximum height of the Project is 75 feet 8 inches above the lowest grade at the building.
b. B.M.C. § 20.03.130(b)(6) Recessed Entrance: Bloomington's UDO requires recessed entrances for pedestrians. The Project's initial design included pedestrian entrances that were immediately adjacent to the existing north south alley.
c. B.M.C. § 20.03.130(c)(1) Façade Modulation: Bloomington's UDO requires façade modulation for the frontage of a building with a minimum façade length of 25 feet and a maximum façade length of 65 feet. Because the Project is a parking garage, the façade modulation and variation hampers the functionality of the interior parking spaces.
d. B.M.C. § 20.03.130(c)(3) Building Height Step Back: Bloomington's UDO also requires a building step-back of the façade for wall heights over 45 feet. The functionality of the parking garage facility cannot accommodate this step back requirement. (Agreed Factual Stipulations, para. 19.)

26. The criteria the Plan Commission considers when deciding whether or not to grant relief in the form of a waiver from the Downtown Core Overlay standards are set forth at B.M.C. § 20.03.100. The Plan Commission must find that the Project:

a. Complies with all review standards of B.M.C. § 20.09.120, site plan review, and
b. Satisfies the design guidelines set forth in B.M.C. § 20.03.140, downtown core overlay—design guidelines.
c. The plan commission is encouraged to consider projects that include a high degree of best practice sustainable development design features that are unique designs which are not incompatible with their surroundings, and that contribute to the diversification of downtown housing and/or contribute to addressing the community's affordable housing challenge. (Agreed Factual Stipulations, para. 19.)

27. The current design will also require relief from B.M.C. § 20.05.035 Entrance and Drive Standards. Bloomington's UDO requires entrances and drives along an arterial or collector street to be no more than 34 feet wide and at least 100 feet from the nearest intersection. The Project calls for a 40-foot entrance off of 4th Street, which is similar to the entrance of the old 4th Street Garage that is approximately 50 feet from the nearest intersection. The City of Bloomington Board of Zoning Appeals has the authority to grant a variance from the Entrance and Drive requirement in accordance with B.M.C. § 20.09.130. (Agreed Factual Stipulations, para. 20.)

28. City of Bloomington has not requested a waiver from B.M.C. § 20.03.120(e) that requires first floor non-residential use for the Project. (Agreed Factual Stipulations, para. 21.)

29. The Project does not comply with B.M.C. § 20.03.120(e) that requires first floor non-residential use for the Project, because only approximately 12,000 square feet are non-residential and non-parking, while approximately 18,000 square feet will be parking area. Of the approximately 12,000 sq. ft. allocated by the City to "non-residential and non-parking area," up to 3,600 sq. ft. of that space is actually going to be used for "parking support operations" and "dedicated bicycle parking," which the City somehow does not attribute to "parking area." (Testimony of Alex Crowley; Landowner's Exhibit B, Show Cause Hearing; Agreed Factual Stipulations, para. 9.)

30. The commercial retail aspect of the Project's design was explicitly requested by the City Council and approved by the Redevelopment Commission. (Agreed Factual Stipulations, para. 21.) In fact, the City Council required the commercial retail aspect of the Project to fund the Project. (Testimony of Alex Crowley.)

31. Without the commercial retail portion of the Project, the Project would not receive funding and the Project would not have proceeded. (Testimony of Alex Crowley.)

32. As of October 1, 2019, the City of Bloomington Board of Zoning Appeals has not formally considered the Project or any requested variance. (Agreed Factual Stipulations, para. 22.)

33. As of the October 1, 2019, the City of Bloomington Plan Commission has not voted or otherwise made a determination or vote on the Project or any waiver associated with the Project. (Agreed Factual Stipulations, para. 23.)

34. The Bloomington Plan Commission has the authority, by waiver, to grant relief from the requirement of first floor non-residential use for the Project that is otherwise required by Unified Development Ordinance Section 20.03.120(e). (Agreed Factual Stipulations, para. 24.)

35. Landowner has not objected to Plaintiff's Complaint based on necessity.

36. Landowner has not objected to Plaintiff's Complaint based on good faith offer.

37. Landowner has filed five objections, including:

a. Condemnor's taking is unlawful because it is not for a public use.
b. 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.

c. Condemnor's Complaint is defective because it alleges and is based upon a violation of Indiana law.
d. Condemnor's Complaint is defective because it fails to name a necessary party with an interest in the Subject Real Estate.
e. Condemnor's Complaint is defective because it requests relief to which Condemnor is not entitled.

II.
CONCLUSIONS OF LAW

It is therefore concluded as a matter of law that:

1. The Court has jurisdiction of this case and the parties herein.

2. Plaintiff brought this eminent domain case pursuant to the Indiana Eminent Domain Act, IC 32-24-1, *et seq*.

3. Plaintiff has the authority to exercise the power of eminent domain pursuant to IC 36-1-4-5.

4. In an eminent domain case, a defendant may file written objections, the purpose of which is to present to the court legally sufficient reasons why the condemning authority should not be allowed to appropriate the real estate interests that it seeks to acquire. IC 32-24-1-8.

5. Objections may either address defects on the face of the complaint or raise facts in addition to those disclosed in the complaint that would defeat the condemning authority's claim. *Joint County Park Board of Ripley, Dearborn and Decatur Counties v. Stegemoller*, 88 N.E.2d 686 (Ind. 1949).

6. In determining whether objections are legally valid, the Indiana Supreme Court has limited judicial inquiry to:

> First, whether the property appropriated is sought to be taken for use that is so far public that the Legislature has power, under the Constitution, to authorize the appropriation of property for such a use;

> [S]econd, whether the Legislature has conferred upon the plaintiff by a general law or otherwise, within its constitutional authority, the power to appropriate for that use the particular property sought to be taken; and,
>
> [T]hird, whether the plaintiff has proceeded and is proceeding in conformity with the law in exercising the power so conferred.

Shedd v. Northern Indiana Public Service Co., 188 N.E. 322, 327 (Ind. 1934).

7. An eminent domain case is a bifurcated proceeding. *Board of Aviation Commissioners of City of Warsaw v. Kosciusko County Superior Court*, 430 N.E.2d 754 (Ind. 1982). At the first stage of the proceedings, objections to the proposed taking are addressed. *Id.* at 755. The second stage of the proceedings involves the determination of damages resulting from the taking. *Id***.** at 755.

8. "The courts have the right to determine the legal authority and right under which the power of eminent domain is exercised." *Cemetery Co. v. Warren School Twp. of Marion County*, 139 N.E. 2d 538, 545. Additionally, 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." Id. at 544.

9. Landowner has met its burden on its first Objection that the proposed taking is not for a public use, and it should be sustained as a matter of law.

a. **<u>The Project is not a Public Use</u>**. A "taking for private use is . . . a deprivation of property without due process of law. Although the words 'public use' do not appear in the Indiana Constitution, it has always been held that private property can only be appropriated under the right of eminent domain when such appropriation is for a public use." *Fountain Park v. Hensler*, 155 N.E.2d 465, 469 (Ind. 1927) (citing *Waterworks Co. v. Burkhart*, 41 Ind. 364). With respect to whether a particular use is public relates to "whether the Legislature might reasonably have considered the use to be public." *Id*. at 469-70. Although there is no specific definition of what constitutes a "public

use," the Indiana Supreme Court has stated that it is "something more than public service, it must partake somewhat of a governmental attribute, otherwise hotels and similar private institutions although they are completely bound to serve the public, would come within the definition." *Id*. at 470. "[I]t seems to be well settled in Indiana that it is essential to constitute public use that the general public have the right to a definite and fixed use of the property appropriated, not as a mere matter of favor or by permission of the owner, but as a matter of right . . .." *Id*. "The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." *Id*. (citing *Market Co. v. Railroad Co*., 142 Pa. 580 (1891). "The character of the use, whether public or private, is to be determined by the extent of the right of the public to use it, and not by the extent to which the right is or will be used." *Westport Stone co. v. Thomas*, 94 N.E. 406 (Ind. 1911). "An owner of an Indiana business has long had the absolute right to exclude a visitor or customer, subject only to applicable civil rights laws." *Donovan v. Grand Victoria Casino & Resort, L.P*., 932 N.E. 2d 1111, 1112 (Ind. 2010). The public will not have a fixed and definite use of the commercial retail space in the Project because this space will be leased to private individuals or entities pursuant to leases, which will permit the lessees to exclude the general public at lessee's pleasure. Additionally, the City proposes to take Landowner's commercial retail building so that the City can construct its own commercial retail center in its place – this is not what the Legislature intended as "public use." As such, the Project cannot be considered a public use and the City's taking is unconstitutional.

b. **Additional Context for Definition of Public Use**. Although Chapter 4.5 of the Indiana Eminent Domain Code is not applicable to this proposed taking, I.C. 32-24-4.5-1 defines "public use" as the:

> (1) possession, occupation, and enjoyment of a parcel of real property by the general public or a public agency for the purpose of providing the general public with fundamental services, including the construction, maintenance, and reconstruction of highways, bridges, airports, ports, certified technology parks, intermodal facilities, and parks;
> (2) leasing of a highway, bridge, airport, port, certified technology park, intermodal facility, or park by a public agency that retains ownership of the parcel by written lease with right of forfeiture; . . .

The City's proposed commercial retail use in the Project would not fall within the Legislature's definition of "public use" as

found in IC 32-24-4.5-1. As such, the Legislature could not have envisioned nearly 10,000 sq. ft. of commercial retail space being leased to private entities as falling within the realm of "public use."

c. **Local Zoning Ordinances are Subordinate to State Statue and 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 B.M.C. § 20.03.120(e), which applies to the Subject Real Estate and requires that at least fifty percent (50%) of the first floor be non-residential and non-parking uses, as necessitating a violation of the Indiana Constitution. Moreover, the City admits that its Project does not comply with the local zoning ordinance's 50% first floor non-residential, non-parking requirement. As such, the City's claim it must comply with B.M.C. § 20.03.120(e) as a basis for the private use in the Project, when the City does not in fact comply with the ordinance, is an argument without merit.

d. **The Court Must Look into the Whether the Use is Public or Private**. "[T]he inquiry of the courts is not limited alone to a consideration of whether the 'use' . . . 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 v. City of Indianapolis*, 157 N.E. 457, 459 (Ind. 1927). "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.) "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." *Kessler*, 157 N.E. at 459. This Court cannot, as the City has requested, limit its

inquiry based solely on what the City states in its Complaint as to the alleged use of the Subject Real Estate. Additionally, and more importantly, City admits, through Factual Stipulations and testimony, that the commercial retail component of the Project was a mandatory requirement of the City Council. Thus, it is undisputed that the private, commercial retail component formed a part of the purpose of the taking. In fact, the private, commercial retail component formed a necessary and substantial part of the purpose of the Project. Finally, the taking of Landowner's commercial retail property so that a governmental entity can construct its own commercial retail property is not an incidental result. This result – adding 8,700 sq. ft. of commercial retail space to a parking garage that previously had none – is an intentional and necessary result of the City Council's actions and Resolution 2019-43. The character of the project required a massive, private, commercial retail component; whereas, the parking area was just a "rebuild" of what existed. In light of all the facts and circumstances, the City cannot use eminent domain to acquire the Subject Real Estate to construct nearly 10,000 sq. ft. of commercial retail space for private use.

e. **City Admits it will Sell or Lease Space to Private Parties but Does not Comply with Redevelopment Act**. The City's proposed use to which it will put the commercial retail space is admittedly private. The City has sanctioned appraisals, pursuant to IC 36-7-14-22, which only applies to the "sale or lease to the public of any of the real property acquired" under this Chapter. IC 36-7-14-22(b). The City is not seeking to acquire the Subject Real Estate under the Redevelopment Act, IC 36-7-14, et. seq. Thus, the City has sought the benefits of the Redevelopment Act but has chosen not to comply with its provisions. Importantly, IC 36-7-14, et. seq., only applies to: "an (1) area needing redevelopment; (2) economic development area; (3) allocation area previously established under IC 36-7-15.1-37 through . . . -58." IC 36-7-14-1(c). The City has not made nor even considered the Subject Real Estate to be "an area needing redevelopment" nor "an economic development area," as provided in IC 36-7-14-1, which are sometimes more commonly referred to as "blight." As such, the City is seeking to acquire the Subject Real Estate as though it is a blighted property, area needing redevelopment or an economic development area, but the City has not made and could not make such determinations because the Subject Real Estate is in great condition, occupied by a business and highly valuable. Only in a situation in which the Subject Real Estate was "blighted," could the City proceed with the Project. Otherwise, the Project is a clearly private use.

f. **The Holding in *Hawley* Does Not Apply in this Case**. *Hawley v. South Bend Dept. of Redevelopment*, 383 N.E.2d 333 (Ind. 1978), does not apply to the facts of the instant case. The *Hawley* holding expressly applies only to blight or slum clearance for redevelopment projects. *Id*. Additionally, *Hawley* 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. The area taken in Hawley was determined to be a "blighted area" and was taken "with a view toward redevelopment by private investment." *Id*. at 335. The Hawley 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 of 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)). "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*. Hawley applies only to redevelopment commissions taking real estate for blight/slum clearance and for economic improvement – these facts have not been alleged nor are they present in the instant case.

g. Landowner's Objection No. 1 is sustained, and Plaintiff's Complaint shall be dismissed.

10. Landowner has met is burden on its second Objection that the Plaintiff's Complaint does not accurately or factually describe the Condemnor's Project, specifically that it includes nearly 10,000 sq. ft. of private, commercial retail space, and it should be sustained as a matter of law.

a. "The complaint must state the following: (3) The use the plaintiff intends to make of the property or right sought to be acquired." IC 32-24-1-4(b).
b. "[S]tatutes of eminent domain are in 'derogation of the common law rights to property [so] they must be strictly construed, both as to the extent of the power and as to the manner of its exercise.'" *Utility Center, Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 735 (Ind. 2013) (quoting *Cemetery Co. v. Warren Sch. Twp*., 236 Ind. 171 (Ind. 1957).
c. Plaintiff's Complaint describes the Project as only "a new, expanded 4th Street Parking Garage . . .." (Plaintiff's Complaint.) In order for the Court to understand the actual expanse and scope of the Project, it would be required to do its own research to understand that the Project actually includes nearly 10,000 sq. ft. of private, commercial retail

space. This burden is not on the Court to research the Condemnor's Project and whether it is in fact public or private.

d. Additionally, the City's comparison of the Project to the projects shown in Joint Exhibits 9 and 10 is alarming. The projects shown in and used as reference points by the City are admittedly wholly private projects. Thus, a vague description of the Project in Plaintiff's Complaint is misleading.
e. Landowner's Objection No. 2 is sustained, and Plaintiff shall amend its Complaint to properly describe the Project, including the fact that there will be nearly 10,000 sq. ft. of private, commercial retail space.

11. Landowner has met its burden on its third Objection that the Plaintiff's Complaint is based upon a violation of Indiana law.

a. "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 or item alone is void." IC 5-14-1.5-4.
b. The entire basis of Plaintiff's Complaint is Resolution 2019-43, which was approved improperly. As such, that "approval" is void pursuant to IC 5-14-1.5-4.
c. "The Common Council of the City of Bloomington must adopt a resolution specifying the public purpose of the bond . . .." IC 36-7-14-25.1. The Bond Resolution fails to adopt a resolution specifying the public purpose of the bond as required by IC 36-7-14-25.1. "The legislative body of the unit must adopt a resolution that specifies the public purpose of the bond . . .." The Bond Resolution, upon which Condemnor is relying to fund the acquisition and construction of its project, was done improperly because it does not contain a finding of "the public purpose of the bond."
d. Because Condemnor's Complaint is premised upon a violation of Indiana law, IC 5-14-1.5-4 and its funding source findings fail to comply with IC 36-7-14-25.1, they are either void or defective.
e. Landowner's Objection No. 3 is sustained, and Plaintiff shall amend its Complaint once it has properly complied with Indiana law.

12. Landowner has met its burden on its fourth Objection that the Plaintiff's Complaint fails to name a necessary party, Monroe County, Indiana, which has an interest in the Subject Real Estate.

a. "The complaint ***must*** state the following: (2) The 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." IC 32-24-1-4(b)(2).

b. "[S]tatutes of eminent domain are in 'derogation of the common law rights to property [so] they must be strictly construed, both as to the extent of the power and as to the manner of its exercise.'" *Utility Center, Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 735 (Ind. 2013) (quoting *Cemetery Co. v. Warren Sch. Twp*., 236 Ind. 171 (Ind. 1957).
c. Real property in Indiana is assessed on January 1 and is due and payable the following year. IC 6-1.1-2-1.5.
d. Since real estate taxes are paid in arrears, they act as a lien on the real property from the assessment date until the due date, and "[t]his lien attaches on the assessment date of the year for which the taxes are assessed." 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).
e. Strict compliance with the Indiana Eminent Domain Code mandates that Monroe County, Indiana, who holds a lien on the Subject Real Estate as a matter of law, be named as a defendant.
f. Landowner's Objection No. 4 is sustained, and Plaintiff shall amend its Complaint to include Monroe County, Indiana as a defendant.

13. Landowner has met its burden on its fifth Objection that the Plaintiff's Complaint requests relief to which Plaintiff is not entitled.

a. A condemnation "complaint must state . . . (3) The use the plaintiff intends to make of the property or right sought to be acquired." IC 32-24-1-4(b)(3).
b. Upon the deposit of the damages assessed under IC 32-24-1-9, "plaintiff may take possession of and hold the interest in the property so acquired *for the uses stated in the complaint*, subject to the appeal . . .." IC 32-24-1-10.
c. The relief requested by the City is only to construct a "parking garage." (Plaintiff's Complaint.) However, the City apparently sought all along to construct a commercial shopping center with nearly 10,000 sq. ft. of commercial retail space as well. This fact was only known by the Court upon the filing of Landowner's Objections.
d. Strict compliance with IC 32-24-1-4(b)(3) requires a more detailed allegation in Plaintiff's Complaint as to the nature and scope of Plaintiff's proposed Project. Without a sufficient description, Plaintiff would be limited in the rights that it can exercise upon possession of the court award under IC 32-24-1-10.
e. Additionally, the City's comparison of the Project to the projects shown in Joint Exhibits 9 and 10 is alarming. The projects shown in and used as justification for its inclusion of 10,000 s.f. of commercial, retail space by the City are admittedly wholly private projects. Thus, a vague description of the Project in Plaintiff's Complaint is misleading,

particularly because the City itself compares the Project with only private developments.

f. Moreover, if one were to take the City's argument to its logical conclusion, it would be permitted to construct whatever type of building, public or private, after it has gained possessory rights under false pretenses as to the actual project, pursuant to IC 32-24-1-10.
g. Landowner's Objection No. 5 is sustained, and Plaintiff shall amend its Complaint to properly describe the Project, including the fact that there will be nearly 10,000 sq. ft. of private, commercial retail space.

III.

ORDER SUSTAINING LANDOWNER'S OBJECTIONS

The Objections to Plaintiff's Complaint for Appropriation of Real Estate, filed by Defendant, 222 Hats, LLC, are SUSTAINED, and Plaintiff's Complaint is hereby DISMISSED.

SO ORDERED by this Court on this _____ day of November/December, 2019.

_____
Judge, Monroe Circuit Court. No. 6

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