

STATE OF INDIANA)
)SS:
COUNTY OF MONROE)

IN THE MONROE CIRCUIT COURT

CAUSE NO. 53C06-1906-PL-001293

CITY OF BLOOMINGTON, INDIANA,
 Plaintiff,

v.

222 HATS, LLC and
GERMAN AMERICAN BANCORP, INC.
 Defendants.

**ORDER FOLLOWING HEARING ON OBJECTIONS AND
SUSTAINING OBJECTION TO
COMPLAINT FOR APPROPRIATION**

The Court held a show cause hearing on the Defendant 222 Hats, LLC’s (“222 Hats”) objections to the Complaint for Condemnation on October 7, 2019. The Plaintiff appeared by representative and by counsel. The Defendant 222 Hats, LLC appeared by representative Juan Carrasquel and by counsel. The Defendant German American Bancorp, Inc. appeared by representative and by counsel. Witnesses were sworn and evidence presented. The Court, being duly advised and considering the same, now finds and orders as follows:

FINDINGS OF FACT

1. 222 Hats owns title to the real estate located at 222 S. Walnut St., Bloomington, IN, 47401 (“Real Estate”), which is legally described as follows:

The South Half of In-Lot Number Thirty-three (33) in the City of Bloomington, Indiana, as set out on the original Plat of the City of Bloomington, Indiana, as shown in the Plat Book No. O at page 4 (now plat Cabinet B, Envelope 1), in the office of the Recorder of Monroe County, Indiana.

Tax Parcel No. 53-05-33-310-173.000-005; Auditors Parcel No. 013-05940-00

(Agreed Factual Stipulations (“AFS”) paragraph 1.)

2. The Real Estate is a commercial building, 2800 square feet in size, and which 222 Hats operates a real estate business.
3. The City is seeking to acquire the Real Estate pursuant to Indiana Code §32-24-1, *et seq.* and I.C. § 36-1-4-5, to construct what will be the new Fourth Street Garage. (“Project”).
4. 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. (AFS paragraph 6.)

5. The City has not made a determination, argument, or consideration of the Real Estate being blighted. The proposed Project is intended to replace the aging and existing Fourth Street Garage.
6. The existing Fourth Street Garage does not include any commercial retail space.
7. The existing Fourth Street Garage has between 350 and 400 parking spots.
8. On May 6, 2019, pursuant to the requirements of I.C. § 32-24-1-5, the City personally delivered a Uniform Property or Easement Acquisition Offer (“Offer”) to 222 Hats member Juan Carlos Carrasquel. That same day, a copy of the Offer was sent by certified mail to 222 Hats, by 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 Offer. The City’s Offer was based on the average of two independent appraisals acquired by the City. The Offer notified 222 Hats that the City wanted to purchase the Real Estate for “the expansion and construction of the Fourth Street Parking Garage.”
9. The City’s Offer was rejected, and therefore on June 7, 2019, as required by I.C. § 32-24-1-5.5(b), the City filed its Complaint.
10. The Complaint for Condemnation states that “in 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 Fourth Street Parking Garage, which shall occupy the parcels of land between the northwest corner of W. 3rd St. and S. Walnut St. and the South West corner of W. 4th St. and S. Walnut Ave.”
11. The Complaint states that in connection with pending and carrying out the project, the City has determined that it is necessary for the City to take, appropriate, acquire, remediate, and make use of the whole of the Real Estate for the Project.
12. The Complaint does not state that the proposed Project includes 12,320 net square feet for nonresidential and non-parking use on the first floor.
13. The parties agree that the Project, as proposed by the City, is accurately depicted in Exhibit A and Exhibit B attached to the Agreed Factual Stipulations. The Project will include approximately 30,000 square feet of space on the first floor, of which 12,320 square feet will be nonresidential non-parking use. 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. The remaining approximately 18,000 square feet on the first floor will be for parking related purposes.

14. The Project's non-residential space will not be restricted to government 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 3,640 square feet of nonresidential space will be used for the City's parking operations, city information technology infrastructure, public restrooms, and dedicated bicycle parking.
15. The Project will include a total of 511 parking spaces, which is only an additional 115-255 parking spaces that already exist in the Fourth Street Parking Garage. Although spaces within the existing Fourth Street Parking Garage signed 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.
16. The City has obtained two appraisals for the purpose of establishing lease rates pursuant to the procedures in I.C. § 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.
17. The City has contracted with FC Tucker, a real estate broker, to assist with finding tenants for the commercial retail space in the project.
18. 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 (B.M.C.)
19. Included within the UDO, the City has development standards for certain geographic regions referred to as overlays.
20. The project will be constructed and exist the downtown core overlay.
21. B.M.C. § 20.03.120(e) requires that any structure with frontage on, in relevant part, Walnut Street, Third Street, and Fourth 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.
22. The current design in depiction of the project has been submitted to the 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 UDO. Therefore, the City has requested relief, by waiver, from B.M.C. § 20.03.120(e) as follows:

- a. B.M.C. § 20.03.120(b)(2) Maximum Structure Height: Bloomington's UDO in for the Downtown Core Overlay allows for a maximum height of 40 feet. The Project calls for the development of 510 parking spaces with six parking decks. As a result, the maximum height of the project is 75'8" 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.
23. City of Bloomington has not requested a waiver from B.M.C. § 20.03.120(e) that requires first floor nonresidential use for the project.
24. The commercial retail aspect of the projects design was explicitly requested by the City Council and approved by the redevelopment commission. The City Council required the commercial retail aspect of the project to approve funding for the project.
25. As of October 1, 2019, the City of Bloomington Board of zoning appeals has not formally considered the project or any requested variance.
26. As of 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.
27. 222 Hats has not objected to City's Complaint based on necessity.
28. 222 Hats has not objected to City's complaint based on lack of good faith offer.
29. 222 Hats has filed five objections, as follows:
- a. City's taking is unlawful because it is not for a public use;
 - b. City's Complaint is defective because it does not actually describe Condemnor's project, most importantly, the fact that it includes a commercial shopping center, a nonpublic use;
 - c. City's Complaint is defective because it alleges and is based upon a violation of Indiana law;
 - d. City's Complaint is defective because it fails to name a necessary party with an interest in the subject Real Estate.

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

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this case and the parties herein.
2. The City is entitled to exercise the power of eminent domain generally, pursuant to I.C. § 36-1-4-5, and the City's Complaint has been brought within the statutory framework for eminent domain.
3. Because the parties do not dispute that the City made a good faith offer to purchase the Real Estate, the burden of proof is on the landowner to show that its objection should be sustained. *City of Evansville v. Reising*, 547 N.E.2d 1106, 1109 (Ind. Ct. App. 1989).
4. The Defendants' written objections must present the Court with legally sufficient reasons why the condemning authority should not be allowed to appropriate the real estate interests that it seeks to acquire. I.C. § 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, 688 (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 but 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 and exercising the power so conferred.

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

7. 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 (Ind. 1957). Indiana eminent domain statutes are in derogation of the common law, and therefore must be strictly construed, "both as to the extent of the power and as to the manner of his exercise." *Id.* at 544.

Objection Number 1: Not for Public Use

8. “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 v. Indianapolis*, 157 N.E. 547, 549 (Ind. 1927). “Public use” generally is said to cover a use affecting the public generally, as distinguished from private individuals. *Fountain Park Co. v. Hensler*, 155 N.E. 465, 470 (Ind. 1927). It is also something more than public service; it “must partake somewhat of a governmental attribute.” *Id.* In Indiana, “public use” is one “that the general public ha[s] 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; and it the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it, or that the public will receive an incidental or prospective benefit therefrom. *Id.* The test is whether the public has a legal right to the use, which cannot be withdrawn by the owner. *Id.*
9. Eminent domain cannot be exercised for an essentially private purpose, even if a public purpose is incidentally served; at the same time, a use which is public in character which justifies the use of eminent domain does not lose its public character just because the resulting exercise of the eminent domain power would incidentally result in a private benefit. *Kessler* at 549. However, when the intention to confer a private benefit forms part of the purpose of the taking, and when the public and private uses cannot be separated, the proceeding may not be permitted to be taken as to that part that is public in character. *Id.* In *Kessler*, the evidence showed that the portion of land which was subject to the taking for the stated purpose of acquiring ground for future park purposes was also sought by the City of Indianapolis for the private use of a nearby land owner. The Indiana Supreme Court did not uphold the proposed taking. *Id.* at 550.
10. Here, the City proposes a parking garage with approximately 8600 square feet of nonresidential retail space on the first floor of the garage, a use most definitely private, not public. The retail space is not something that can be used by the public as a matter of right, but it can be restricted in access by the owner or lessee of the space. It cannot be separated from the public purpose of the garage; the plans of the proposed development are required to contain this nonresidential space. The private portion of the garage is incidental to the public use. Under *Fountain Park* and *Kessler*, the taking cannot proceed.
11. The City cites *Hawley v. South Bend Department of Redevelopment*, 383 N.E.2d 333 (Ind. 1978) as support for the proposition that a taking can be supported even if a private purpose is incidental to a public use. The *Hawley* case does not apply to these facts. In *Hawley*, the Court analyzed a taking in the context of blighted property and redevelopment of that property as incidental to public use, stating that so long as the ultimate use of the property was related to a discernable public purpose (e.g., clearing of slums as a benefit to public safety and welfare), the incidental private use would not defeat the taking by eminent domain. In this case, the same principles do not apply. While the garage on the historic footprint may have had defects which were beyond

repair, the 222 Hats Real Estate is by no means in a blighted area. The Court does not find the authority controlling.

12. The Court concludes that the retail use of the proposed Project, which cannot be separated from the public aspect, prohibits the taking of the 222 Hats Real Estate. The Court therefore sustains Objection 1, and the Complaint is dismissed on that basis.
13. Because the Court has sustained Objection Number 1, the Court refrains from addressing the remaining objections.

SO ORDERED, this 20th day of December, 2019.



Holly M. Harvey
Judge, Monroe Circuit Court VI

DISTRIBUTION:

Plaintiff
Defendants
File/RJO