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.	)

REPLY IN SUPPORT OF MOTION TO AMEND THE COMPLAINT FOR CONDEMNATION

The Plaintiff, the City of Bloomington, Indiana (the "City"), by counsel, pursuant to Rule 15 of the Indiana Rules of Trial Procedure and Ind. Code § 32-24-1-8(d), respectfully submits this reply in support of its Motion to Amend the Complaint for Condemnation.

INTRODUCTORY STATEMENT

In its December 20, 2019 Order (the "Order"), this Court sustained an objection asserted by 222 Hats LLC ("222 Hats") to the construction of a new Fourth Street Parking Garage (the "Project") because the Project included nonresidential, non-parking space on the first floor of the parking garage. In light of and out of respect for this Court's Order, the City is redesigning the Project to exclude any nonresidential, non-parking space from the Project.[1] As a result of this change in circumstances, the City has sought leave to amend its Complaint for Condemnation.

[1] The City's decision to amend its Complaint for Condemnation rather than to seek an appeal following a sustained objection is not and should not be construed as a waiver of any of the City's rights with regard to the Order.

The Motion to Amend the Complaint for Condemnation is consistent with the express language in Ind. Code § 32-24-1-8(d), which states that if a defendant's objection to an eminent domain lawsuit is sustained, the plaintiff, as one of its options, may amend the complaint. The Motion to Amend the Complaint for Condemnation also is consistent with case law which requires an amendment to conform to the evidence. Specifically, the City is altering its plans for the Project in response to the Court's concerns and has asked the Court for permission to amend its Complaint for Condemnation to conform to this change of circumstances. 222 Hats will not be prejudiced if the Court grants the City permission to amend it Complaint for Condemnation. Specifically, the City already tendered a written offer to 222 Hats to purchase the real estate and improvements necessary to build the Project. As such, 222 Hats is still entitled to fair and just compensation. The Motion to Amend the Complaint for Condemnation clarifies and warrants that the City no longer intends to include the *de minimis* nonresidential, non-parking space as part of the Project.

222 Hats has objected to the City's Motion to Amend the Complaint for Condemnation, claiming that "[a] Complaint can only be amended in an eminent domain case to conform to the evidence," and arguing that "[t]he City is now attempting to change facts because it lost at trial and the Court ruled in favor of Landowner." (Objection at 1.) Not so. There is nothing inappropriate or underhanded about the City's request as the City is merely following the language of the statute.

In fact, the amendment that the City seeks to make conforms to the changed circumstances of the Project and addresses the concerns raised by the Court in its Order. 222 Hats argues that even though the statute expressly permits the City to either amend its Complaint for Condemnation or appeal the Court's Order, this Court should, in fact, disregard the first half of the statute and rule that the City's only option is an appeal. Stated differently, 222 Hats asks this Court to

completely disregard a statutory provision. Indeed, if an amendment to a complaint following a sustained objection, as explicitly contemplated by Indiana Code § 32-24-1-8(d), is *not* appropriate in this situation, it is unclear when and under what circumstances an amended pleading might ever be appropriate. Therefore, consistent with the plain language of Indiana Code § 32-24-1-8(d) and the purposes of the eminent domain statute, the City respectfully requests that its Motion to Amend the Complaint for Condemnation be granted.

I. Legal Argument

A. The Indiana Code explicitly authorizes litigants to amend a complaint following a sustained objection.

The City's Motion to Amend the Complaint for Condemnation is expressly contemplated by the Indiana Code. Specifically, "[i]f 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." Ind. Code § 32-24-1-8(d) (emphasis supplied). Allowing the City to cure any deficiencies through an amended pleading fulfills the purposes of the eminent domain statute, which are to assure that (1) the land is being taken for a public purpose, and (2) that landowner receives just compensation for the taking:

> In fact, "[t]he state has inherent authority to take private property for public use." The Indiana Constitution and the Fifth Amendment to the United States Constitution require just compensation if this authority is exercised, and Indiana Code Chapter 32–24–1 outlines the process by which the State or other governmental entity is to initiate eminent domain proceedings. "The fundamental purpose of the eminent domain act is to ensure landowners receive just compensation for property taken for public use." Accordingly, we are not convinced that the failure to comply with Indiana Code Section 32–24–1–3(c) forever bars the state from acquiring that property so long as a property owner receives just compensation for the taking.

Hutchinson v. City of Madison, 987 N.E.2d 539, 542–43 (Ind. Ct. App. 2013), *trans. denied*, (internal citations omitted).

In its objection to the Motion to Amend the Complaint for Condemnation, 222 Hats claims that "[a]mendments under [IC 32-24-1-8] are proper only when necessary to make the complaint conform to the evidence." (Response at 6 (quoting *Continental Enterprises, Inc. v. Cain*, 387 N.E.2d 86, 90 (Ind. Ct. App. 1979)). But the City's request to amend the Complaint for Condemnation does not violate that principle. In *Continental Enterprises*, the plaintiff, Continental Enterprises, sought to acquire an easement over unsubmerged land adjoining the peninsula it owned, which had been formed when the State dammed a nearby river. *Id.* at 88. After its initial request was denied, the plaintiff sought to amend its complaint to allege a public purpose and to have title to the easement vested in the county. *Id.* at 90. However, the Court of Appeals found that the requested amendment was appropriately denied because, while the plaintiff alleged that its project now had a public purpose, the evidence continued to fail to support any public purpose. *Id.* at 91-92. In its decision, the Court of Appeals examined the corporation's alleged public purposes and rejected them:

> Continental's president testified that although no plans had been drawn up, the peninsula might be used as a "church site or something of that nature." Such a use of the peninsula would not imbue the condemnation of the easement with a public purpose. The fact that the party seeking the condemnation is of a religious, educational or other "public benefit" nature does not entitle it to take private land for its own purposes rather than for public purposes. That view has been expressly disavowed lest ". . . churches, lodges, clubs, civic organizations, temperance organizations, theatres, circuses . . . an endless chain . . . ." acquire a power which is an attribute of sovereignty. *Fountain Park Co. v. Hensler* (1927), 199 Ind. 95, 115, 155 N.E. 465, 472.
>
> It was also suggested that a road would enable the public to have access to Continental's beaches. This is no more sufficient to demonstrate public purpose than the suggestion that a religious group might be served.
>
> "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." *Fountain Park Co. v. Hensler*, 155 N.E. at 470 . . . [T]here is nothing to prevent Continental from denying the public use of its own property. It makes no claim that, for example, it

> will turn over its beaches for a public park. Thus, no public purpose is served by providing a road which deadends into private property merely because there is a possibility that the public will be given access to that property.

Id. at 90-91. The corporation seeking to utilize eminent domain in *Continental Enterprises* suggested that it would use the peninsula for a church site or that it would use the easement to provide roadway access to the plaintiff's private beach. *Id.* The Court examined these uses, determined that neither use was public, and therefore ruled that "an allegation of public purpose was not supported by the evidence." *Id.*

In contrast, the City has expressly chosen to alter its plans for the parking garage to remove all nonresidential, non-parking space. Unlike the corporation in *Continental Enterprises*, the City is not trying to manufacture a public purpose out of facts already contained in the Court's record. Rather, the City is requesting leave to amend its Complaint for Condemnation because the Project has been redesigned for a singular and undeniably public use—public parking. As such, the City's request to amend the Complaint for Condemnation does, in fact, conform to this change of circumstances and the evidence. And unlike *Continental Enterprises*, where the purpose of the condemnation was a private one even after amendment, the purpose behind the City's requested condemnation (to build a public parking garage) is undeniably a public one, and 222 Hats has never argued that a parking garage serves anything other than a public purpose. *Phillips v. Officials of City of Valparaiso*, 120 N.E.2d 398, 402 (Ind. 1954) ("[T]o the extent that public parking facilities relieve congestion and reduce traffic hazards in the streets, they serve a public purpose."). As a result, this Court should follow the Court of Appeals' example, perform an examination of the modified purpose, and then conclude that the Project now serves an exclusively public purpose. The City's request to amend the Complaint for Condemnation is entirely consistent with the eminent domain statutes and the changed circumstances.

The second set of cases relied upon by 222 Hats comes from 1949 and 1950, *State ex rel. Joint Cty. Park Bd. of Ripley, Dearborn and Decatur Ctys. v. Verbarg*, 91 N.E.2d 916 (Ind. 1950) and its companion *Joint Cty. Park Bd. of Ripley, Dearborn & Decatur Ctys. v. Stegemoller*, 88 N.E.2d 686 (Ind. 1949). As with *Continental Enterprises*, the *Joint County* cases differ significantly from the facts of this case. In the *Joint County* cases, the trial court sustained several objections in an eminent domain proceeding based on the notion that a park board had been improperly created and therefore could not exercise the power of eminent domain. *Joint County*, 88 N.E.2d at 688-690. The Supreme Court overruled the trial court, holding that it was inappropriate to challenge the Park Board's creation in an eminent domain proceeding and that the Park Board had authority to use eminent domain. *Id.* at 690.

The Supreme Court affirmed and further clarified its ruling on rehearing. *Joint Cty. Park Bd. of Ripley, Dearborn & Decatur Ctys. v. Stegemoller*, 89 N.E.2d 720 (Ind. 1950). In a separate proceeding, the Park Board sought a writ of mandamus requiring the trial court to overrule the objections that the trial court has previously sustained. *Joint County*, 91 N.E.2d at 918. The Supreme Court denied the writ and, in dicta, mentioned that in eminent domain proceedings the objecting party should amend its objections with "due diligence" so as to keep the proceeding moving and not "defeat the summary nature of the action." *Id.* at 919.[2] Nonetheless, the Supreme Court noted that the decision to allow the amendments was within the "sound legal discretion" of the trial court. *Id.*

[2] This was a reference to the Court's earlier opinion on rehearing holding that due to the summary nature of the proceedings, defendants could file objections that joined demurrers and answers in the same filing to expedite the proceedings, which overruled then-existing precedent. *See Stegemoller*, 89 N.E.2d at 720-21.

Other than clearly reaffirming that this Court may consider the City's Amended Complaint for Condemnation, the *Joint County* cases have no bearing on this lawsuit. Unlike *Joint County*, in this lawsuit (1) the facts changed in a material fashion (i.e. all non-residential, non-parking uses have been removed), and (2) the City did not delay following this Court's Order. To the contrary, within ten days of the Court's Order, the City filed its Motion to Amend the Complaint for Condemnation. Neither party is or will be prejudiced by the City's amended pleading. In *Joint County*, had the objecting parties been permitted to amend their objections time and again, ad infinitum, the acquisition of the property never would have taken place and the eminent domain proceeding would have continued interminably. No similar concern is presented by this Court permitting the City to amend its pleading based on a significant and material change in the facts underlying the case—a change made directly in response to directives issued by this Court and in a good faith effort to re-craft the Project so as to conform with this Court's Order.

B. The City would not mislead the Court regarding the redesigned garage and any suggestion to the contrary is inappropriate.

222 Hats suggests that the City's Motion to Amend the Complaint for Condemnation should be denied because its filing is unsworn. (Response at 1.) But nothing in Section 32-24-1-8(d) requires that amended pleadings be verified. *See* Ind. Trial Rule 11(c) (stating in relevant part, "Except when specifically required by rule, pleadings or motions need not be verified or accompanied by affidavit."). Furthermore, the City and its counsel stand by the representations that they have made to this Court concerning the changed course of action that the City is taking in response to the Court's Order. The City would never mislead the Court regarding its intent with regard to the Project. Any suggestion by 222 Hats to the contrary ignores the multitude of penalties that would result if the City were to deliberately mislead this Court regarding its stated intent as it

relates to the Project. The City has directly and unequivocally represented that it is redesigning the Project to remove all nonresidential, non-parking areas.

Furthermore, if the Motion to Amend the Complaint for Condemnation is granted, the evidence presented at any evidentiary hearing will demonstrate that the parking garage is in fact being redesigned to remove any nonresidential, non-parking space other than the office space necessary to administer the public parking garage, which space would be considered a necessary accessory (and public) use at any parking facility. To that end, the City has attached an early modification of the Project as Exhibit A and is prepared to present sworn testimony and other evidence concerning the modifications to the Project.

222 Hats appears to misunderstand key aspects of the record. For example, 222 Hats states that Alex Crowley "testified that the Project's funding mandated the first floor non-residential component." (Objection at 5, ¶11.) In doing so, 222 Hats then suggests that the City is legally precluded from seeking relief from the first floor nonresidential, non-parking requirement codified at Bloomington Municipal Code § 20.03.120(e) on the theory that the City would have to refile its bond application.[3] 222 Hats is mistaken. 222 Hats further suggests, contrary to the record, that the City somehow stipulated that the first floor nonresidential, non-parking requirement could not be waived because the "City Council 'expressly required' the first floor nonresidential component of the Project." (Objection at 5, ¶11.) Not so.

[3] In Paragraph 4 of its Objection, 222 Hats asserts that the City would have to refile its bond but fails to cite a statute or precedent that would require the City to do so. That is because no such requirement exists. The City is not required to resubmit its bond application due to the circumstances presented by this case. Indeed the bonds for this Project already have been issued and bond counsel confirms that the bonds may be used to finance the redesigned garage in much the same way as they would have been used for a garage that included non-residential, non-parking first floor space.

In fact, the Parties stipulated to precisely the opposite: "City of Bloomington has not requested a waiver from B.M.C. § 20.03.120(6) that requires first floor non-residential use for the Project. This aspect of the design was explicitly *requested* by the City Council." (Agreed Factual Stipulations ¶21) (emphasis supplied). The City Council did not and cannot prohibit the Plan Commission from granting a waiver—that power resides with the Plan Commission alone, and the City would never have stipulated to the contrary. 222 Hats mistakenly contends that the Parties' Stipulation describes a mandatory condition imposed by the City Council when, in fact, the Stipulation describes a permissive, non-binding aspiration.

In those same Stipulations, the Parties went on to clarify that it would be perfectly legal and permissible for the City to obtain a waiver of the first floor requirement from the Bloomington Plan Commission:

> 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 ¶24.) Again, 222 Hats' suggestion that the Plan Commission has somehow been precluded from considering or granting a waiver of the first floor nonresidential, non-parking requirement is not accurate. The Project can legally move forward without including first floor nonresidential, non-parking space.

C. The City's ability to obtain waivers and/or variances from the Plan Commission and Board of Zoning Appeals is not in doubt and has not previously been in doubt in this case.

222 Hats also suggests that the City would not be able to obtain the necessary approvals from the Board of Zoning Appeals and the Plan Commission if the City moved forward with the redesigned garage: "[T]his unsworn filing lacks any showing that the required approvals have been obtained or could possibly be obtained." (Objection at 1.) 222 Hats is incorrect.

As noted above, there is no legal requirement that the bond application be resubmitted and, therefore, there is no concern that the City Council would have to reconsider this Project. Therefore, the only question is whether the Plan Commission and Board of Zoning Appeals might grant the waivers and variances necessary for completion of the Project. As the Parties have noted from the beginning, the garage will require a number of such waivers and variances. (Agreed Factual Stipulations ¶18-21.) These waivers and variances are unremarkable for a Project of this size in downtown Bloomington, and the City's ability to obtain said waivers and variances did not generate any controversy during the course of this proceeding.

222 Hats has expressed concern that the City has not demonstrated an ability to obtain the waivers and variances. However, the City anticipates no difficulty obtaining waivers or variances. In light of this Court's Order sustaining 222 Hats' objection, the City will advise its Plan Commission that the first floor nonresidential, non-parking requirement of the Municipal Code is legally unenforceable for this Project. The City's Plan Commission meticulously follows the law, and the City's administration would not permit it to do otherwise. Moreover, the Plan Commission is well aware of how crucial this garage is for the residents of the City, and it will not refuse to approve this Project.

From the outset, the City has demonstrated a desire to meticulously follow the requirements of creating the Project in a manner that would provide the public with a safe structure for parking while actively engaging with downtown Bloomington. The City initially proceeded with the good faith intention of complying with local code requirements imposed by the City Council requiring the inclusion of a first-floor nonresidential, non-parking component at the facility. As a result of this Court's Order, however, that part of the Project is no longer an option. Therefore the City has modified its design of the Project to comply with this Court's Order and now presents a purely

public facility. As the property in question is vital to the intended public utility of this Project, the City should be permitted to move forward with the condemnation, and 222 Hats should be entitled to its just compensation in accordance with the law.

II. Conclusion

Under the circumstances, the Plaintiff, the City of Bloomington, respectfully renews its request that the Court enter an Order (a) granting the City of Bloomington permission to file the Amended Complaint for Condemnation, and (b) providing for all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing "Reply in Support of Motion to Amend the Complaint for Condemnation" has been served upon the following counsel of record by electronic service through the Court's system and/or by first class, United States mail, postage prepaid, this 21st day of January, 2020:

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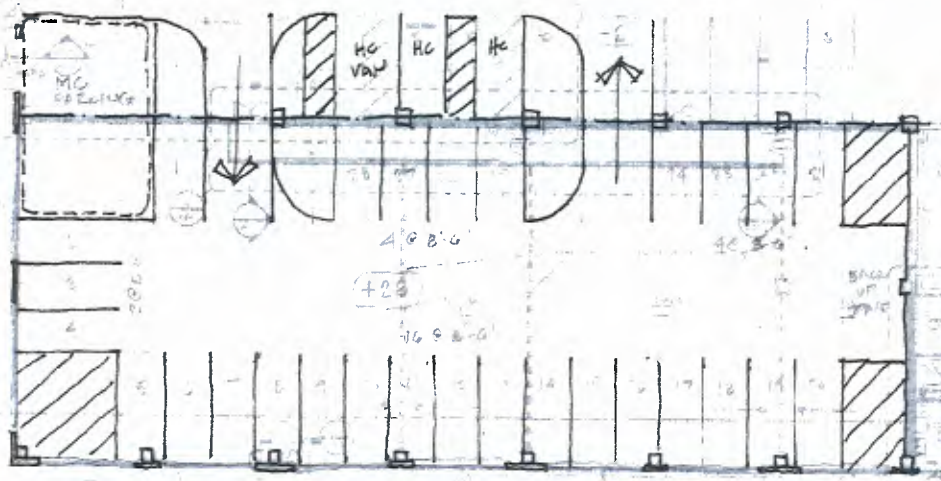
EXHIBIT A

City of Bloomington - 4th Street Parking Garage
1/10/2020

Deletion of commercial spaces; additional parking spaces incl. handicap (van and car), standard spaces.

Parking Garage Offices and bicycle depot remain unchanged.



KEEP OFFICES & SPEED RAMP AS ORIGINALLY DESIGNED

+26 TOTAL

3/64" = 1'-0"

City of Bloomington - 4th Street Parking Garage
1/10/2020

Revised Walnut elevation - deletion of commercial storefront - replaced by building standard finishes congruent with original design

Parking Garage Offices and bicycle depot remain unchanged.