



ATTORNEYS FOR APPELLANTS

James A. Carter
Elizabeth S. Schmitt
Dinsmore & Shohl LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Barry L. Loftus
Heather L. Emenhiser
Stuart & Branigin LLP
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Krause-Franzen Farms, Inc.,
David P. Krause, Jane E.
Krause, and Philip C. Krause,
Appellants,

v.

Tippecanoe School Corporation,
Appellee.

June 28, 2021

Court of Appeals Case No.
21A-PL-115

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P. Meyer,
Judge

Trial Court Cause No.
79D02-2005-PL-49

Brown, Judge.

[1] Krause-Franzen Farms, Inc., David P. Krause, Jane E. Krause, and Philip C. Krause (collectively, “Landowners”) appeal the trial court’s order in favor of Tippecanoe School Corporation (“TSC”) on its condemnation action and overruling Landowners’ objection. We affirm.

Facts and Procedural History

[2] This case involves certain real property located in Tippecanoe County owned by Landowners (the “Real Estate”) which, according to property tax assessment records, consists of three parcels totaling approximately 42.974 acres. The Real Estate is located to the south and adjacent to property held by TSC and upon which Klondike Elementary School and Klondike Middle School are located.

[3] In 2013, the Tippecanoe Long Range Facility Planning Working Group, which “discusses enrollment trends, future needs, building concerns, [and] school boundaries,” discussed building a school in the Klondike area and identified property for possible acquisition by TSC to recommend to the TSC School Board. Transcript Volume II at 28. In June 2018, CSO Architects completed a feasibility study examining enrollment growth and made “recommendations on what a new school could look like and how many students that could accommodate.” *Id.* at 38. The feasibility study presented proposals consisting of building a new elementary school on a separate site or building a new middle school on a separate site and renovating the existing elementary and middle schools for use by elementary students. In November 2018, CSO Architects updated the study and recommended that TSC “[r]elocate Klondike Middle School to a new facility on a separate site, the location of which is to be

determined,” an approach that the TSC School Board ultimately selected. Exhibits Volume III at 249.

[4] Meanwhile, at least as early as June 2018, TSC corresponded with Landowners and David, Jane, and Phillip’s mother about the purchase of the Real Estate by TSC. According to a letter written by David, Jane, and Phillip, their mother had discussed the need for additional land with TSC’s attorney before her death.

[5] On August 26, 2019, the TSC School Board met with Area Plan Commission officials to discuss county trends and developments, and the Commission was “able to take . . . school boundary maps and overlay them on top of the county maps” to show growth in relation to the elementary school boundaries. Transcript Volume II at 33. A Residential Subdivision and Building Permit Activity Report dated the same day indicates that ten major subdivisions had been filed and approved with the Area Plan Commission from January 2016 to August 2019 within the school boundaries of Klondike Elementary.

[6] In January 2020, TSC and Landowners were in negotiations and exchanged “offers and . . . counteroffers” concerning the Real Estate, and TSC was “long discussing plans and . . . intentions to . . . build [the] new Middle School and reconfigure the existing buildings.” *Id.* at 47. On February 4, 2020, Dr. Scott Hanback, the Superintendent of TSC, met with Landowners and discussed how TSC “keeps pace with the growth” employing a “multifaceted approach” that includes shifting boundaries to place students in schools that have capacity, and

the recent enrollment trend for the district, which showed a “steady pattern of growth.” *Id.* at 43-44.

[7] On February 24, 2020, Dr. Hanback met with the TSC School Board to discuss the land acquisition and plans for the new Klondike Middle School and gave a presentation covering a formal facility and enrollment study completed by a third party, the status of buildings in terms of aging and need of improvement, the use of portable classrooms across the district, and enrollment trends by school. Regarding the Klondike schools’ usage of portable classrooms,¹ the presentation indicated that Klondike had previously utilized four portables prior to building a new brick and mortar wing which worked “for a while,” and “then just this last school year, [TSC] purchased three new portables and put them back on the property . . . because Klondike was again running out of space.” *Id.* at 32-33. On March 3, 2020, the TSC School Board authorized a resolution ratifying a Uniform Property or Easement Offer for the Real Estate as had been presented to Landowners, and Landowners subsequently rejected the offer.

[8] On May 6, 2020, when “negotiation conversations with [Landowners] weren’t productive any longer,” TSC filed a complaint for condemnation of the Real Estate alleging that TSC was in need of additional school buildings, facilities and related improvements for public school use, acquisition of the Real Estate

¹ According to Dr. Hanback, the portables, or mobile classrooms, were used as a stopgap measure before the renovation of existing schools or the building of new schools.

would help meet that need, and TSC intended to use the property for construction, operation, and maintenance of school buildings and related improvements for public school purposes. *Id.* at 35. On August 24, 2020, Landowners filed an objection to TSC’s complaint, arguing that TSC’s need to acquire the Real Estate was remote and speculative.

[9] On December 2, 2020, the court held a hearing on Landowners’ objection at which Dr. Hanback testified that TSC asked for permission to enter the land before initiating the suit but the Landowners declined, he had “folks . . . standing ready” to enter the Real Estate to collect soil sampling, deal with drainage concerns, and conduct the due diligence site planning necessary for the overall schematic plan, and that he would move forward with such functions if granted permission by the Landowners or the court. *Id.* at 51. He testified that the TSC School Board took official action at the October meeting to formally engage Scholer Architects, a firm which had previously worked for its with respect to two of TSC’s other middle schools which utilized the same base floorplan and model which TSC intended to use for Klondike Middle School. He explained the 2020-2022 Capital Acquisition Plans, which contained a list of all TSC proposed capital expenditures exceeding ten thousand dollars and included a “Land” line item under 2021 and 2022 years with a corresponding appropriation amount, and he answered affirmatively when asked if the line items were connected to the Klondike Middle School project and if there was “money in your budgets” to purchase the Real Estate. *Id.* at 53. He testified that the line item in a Capital Projects document that

“says KMS Building” was “an abbreviation for Klondike Middle School,” which was a “placeholder for our C.F.O. to know that she needs to begin . . . budgeting for . . . , in [the] debt service schedule[], a very significant project,” and indicated that 2020 was the anticipated start date, “because you begin incurring cost on these projects . . . long before a shovel ever hits the ground.” *Id.* at 54. He testified that the project had an estimated cost of fifty million dollars, indicated the estimated start and completion date were delayed by a year, and when asked if estimated completion in 2025 was a “good rough estimate,” answered: “I think it could get done sooner.” *Id.* at 56. When asked how financing a school was related to the land acquisition, he testified:

[T]here’s a lengthy process to . . . sell bonds and put this on our debt service schedule. You . . . wouldn’t do that until you . . . have your construction documents out there and, and you’re . . . putting a shovel in the ground. So, you know, . . . I definitely wouldn’t do it before I have title . . . on land. I don’t, . . . I wouldn’t do that on land that I don’t own. And . . . since we don’t own the land at this point, I would not . . . recommend to our board to go through the steps of formally, you know, selling bonds to acquire the cash to begin paying bills for such a project of this magnitude.

Id. at 57. He answered affirmatively when asked if it would be irresponsible to acquire cash through the issuance of bonds before acquiring land.

[10] When shown a report reflecting TSC’s September annual enrollment from the 1996-1997 school year through the 2020-2021 school year for each elementary

and middle school, he indicated that he did not agree that enrollment at Klondike Elementary and Middle School was flat and testified:

[I]f you look in the Klondike row, Klondike Elementary, September 1996, . . . you'll see one thousand nine, that's the number . . . of students that attend. . . . When you see September of 1999, you'll see a significant drop at the Klondike Elementary enrollment. That's because at that time, you'll see two new schools that came on board in [TSC,] Wea Ridge Elementary and Burnett Creek Elementary. . . . Then as time goes on, it begins to stabilize. Then it begins to grow. Again, so much so that in September of 2012, you'll see they're right back to a thousand five students. Then, . . . which is very crowded for that building But then in September of 2013, we decided to make a school boundary change. We have just added on to the Burnett Creek Elementary School so that it could accommodate more students and we changed the boundaries again and we shifted a number of students out of Klondike Elementary into the bigger Burnett Creek Elementary School. . . . Then again, it, it kind of stays that way for a couple of years. Then they just continue to creep up with new, you know, residential in that area, new students enrolling and so much so that in the last school year, 2019, they were right back at a thousand four students. So, they, I guess, the way I looked at it is, every time we . . . lop off a boundary and shift kids to another school, Klondike Elementary builds itself back up. So, it is, it is definitely not a declining enrollment school. It . . . continues to be one of our fastest growing elementary schools.

Id. at 58-60. He elaborated:

[W]e have to have more capacity in that quadrant of the county and, and because the middle school is so outdated, well both schools are outdated and need improvement, the elementary and the middle school, . . . it's more feasible for us to build the new

middle school, move the existing 6-8 kids to the new middle school, go back and renovate the middle school for purposes of probably kids grades, you know 4 or 5 or grades 3, 4 and 5. Then that will lighten the load on the Klondike Elementary property and we can make renovations there to make that more functional and, and have more capacity for . . . the continued growth that we have in that area and probably connect those two

Id. at 60.

[11] When asked to explain the practical reasons to move forward with the proposed plan in the CSO Architects feasibility study, he indicated that the main concern was aging facilities, which were “very difficult to . . . manage and upkeep,” it “reaches a point where you can only do so much” given there were “undersized areas in . . . both schools,” Klondike Elementary did not have a kitchen large enough to serve all the elementary school and required lunches to be made at the middle school and shuttled to the elementary school, and the electrical, plumbing, and HVAC work would all need upgraded, which was very difficult to do, given that “sections of that building . . . are . . . dating back to . . . the mid-50[s] and . . . late 60[s].”² *Id.* at 61-62. He testified the two schools were landlocked with relation to the Klondike Road expansion project, which caused confusion in the morning and dismissal procedures in light of the car and school bus traffic for the approximately fifteen hundred students. He testified the schools were not “up to . . . standard” with respect to certain security issues

² Plaintiff’s Exhibit 4 is a construction history map of the Klondike Elementary and Middle schools and shows that half of the buildings were constructed in or before 1974.

and TSC wanted to upgrade the facilities to make them more functional for educational programming, citing examples in science, band, and choir classes, and, in the case of the Middle School, to match the standards at TSC's other middle schools. *Id.* at 62. He indicated that the advantage of acquiring the Real Estate was "to have the capacity to accommodate . . . students . . . in a much better fashion." *Id.* at 63.

[12] During cross-examination, Dr. Hanback answered affirmatively when asked if he testified during his deposition that TSC intended to issue bonds to raise the fifty million dollars. Concerning the public approval process needed to issue bonds, he indicated that TSC had not yet published notice for a preliminary determination public hearing, but testified it would know when it might do so "[a]s soon as we can know that we own the land." *Id.* at 77. When asked about deposition testimony in which he was alleged to have indicated that "if the referendum fails or if the remonstrance race fails the project would be killed or delayed," Dr. Hanback testified that there was a timeline that stated "you have to either significantly change your project or . . . not do that particular project . . . and retool it and come back later." *Id.* at 80.

[13] On December 22, 2020, the court entered an order overruling Landowners' objection and finding that TCS was entitled to appropriate the Real Estate, undisputed facts demonstrated the plans to build a new Klondike Middle School on the Real Estate were "real and not speculative," and TSC complied with the statute and relevant case law in demonstrating its "immediate" plans. Appellants' Appendix Volume II at 24.

Discussion

[14] “[T]he power of eminent domain is inherently vested in the State but can be delegated to other entities by the legislature.” *Util. Ctr., Inc. d/b/a Aqua Ind., Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 733 (Ind. 2013) (quoting *Vickery v. City of Carmel*, 424 N.E.2d 147, 148 (Ind. Ct. App. 1981)). Ind. Code § 20-26-5-4(a) provides in part: “[T]he governing body acting on the school corporation’s behalf has the following specific powers: . . . acquire . . . an interest in real estate or real estate improvements, as the governing body considers necessary for school purposes . . . by eminent domain”

[15] In *State v. Collom*, this Court observed:

It has long been established that the necessity of taking property for public use is purely a legislative question and not a proper subject for judicial review; where the intended use is public, this question may be determined by such agency and in such manner as the legislature may designate. *Wampler v. Trustees of Indiana University*, 241 Ind. 449, 453, 172 N.E.2d 67, 69 (1961). Thus, “a court may not inquire into the administrative determination of the propriety, reasonableness, or necessity for the taking of property by eminent domain by a proper authority, except for fraud, or where the proceeding is a subterfuge for taking property for private use.” *Cemetery Co. v. Warren School Twp. of Marion County*, 236 Ind. 171, 189, 139 N.E.2d 538, 546-47 (1957). As our supreme court has explained:

The courts have the right to determine *the legal authority* and right under which the power of eminent domain is exercised. This does not mean, however, that the courts may assume the administrative act of determining the *necessity or reasonableness* of the decision to appropriate and take the land. To us, this appears to be a matter for the

determination of the legislature or the corporate body to whom the legislature has delegated such a decision. We do not think the court has the power to inquire into the wisdom or propriety of such judgment unless a question of fraud or bad faith is raised as where an attempt is made to show that the property taken will not be used for a public purpose, or the proceeding is a subterfuge to convey the property to a private use.

Id., 236 Ind. at 188, 139 N.E.2d at 545 (emphasis in original).

* * * * *

Necessity under Indiana’s eminent domain statutes is not limited to the “absolute or indispensable needs of [the State], but is considered to be that which is reasonably proper and useful for the purpose sought.” *See Ellis v. Public Service Co. of Indiana, Inc.*, 168 Ind. App. 269, 272, 342 N.E.2d 921, 923 (1976) (discussing utility eminent domain proceedings). Moreover, “[o]ur policy should not be such as to place an undue burden upon the State in acquiring land for such public improvements as highway construction when such improvements are considered to be in the public interest.” *State v. Heslar*, 257 Ind. 307, 315, 274 N.E.2d 261, 266 (1971). All issues concerning the expediency and necessity of the taking of private property “are exclusively for the legislature. Unless the action of the legislature is arbitrary, and the use for which the property is taken is clearly private, the courts will not interfere.” *Guerrettaz v. Public Service Co. of Indiana*, 227 Ind. 556, 561, 87 N.E.2d 721, 724 (1949).

720 N.E.2d 737, 741 (Ind. Ct. App. 1999).

[16] Landowners argue that TSC is acting beyond its authority by appropriating property which is not presently necessary and point to *Country Estates, Inc. v. NIPSCO*, 258 N.E.2d 54 (Ind. 1970). In *Country Estates*, the condemnor had “no

plans drawn” nor “any appropriation of money” for the construction of a specified line, and its own engineer testified that he had “no personal knowledge when the line would be constructed.” 258 N.E.2d at 56. In *Meyer v. NIPSCO*, the companion case to *Country Estates*, the evidence was based on speculation by the condemnor’s engineer that “sometime in the future, maybe as much as six or ten years in the future, there will possibly be a necessity for an additional line.” 258 N.E.2d 57, 58-59 (Ind. 1970). In both cases, the Indiana Supreme Court held that NIPSCO had exceeded its statutory authority by appropriating property which it might possibly need in the future but for which it had no immediate plans or need. Thus, the question was not one “of a degree of necessity to accomplish the purposes . . . in providing for . . . immediate needs and needs in the reasonably foreseeable future,” but rather “of whether there is any necessity *whatever* to justify the taking.” 258 N.E.2d at 59 (emphasis added). *Accord* 258 N.E.2d at 56-57 (“[T]he evidence submitted by [condemnor’s] own engineer clearly demonstrates that *the taking of the additional 50 feet* was for a remote and speculative use and thus unlawful as being outside the scope of . . . statutory authority.” (emphasis added)).

[17] The facts in *Country Estates* and *Meyer* are distinguishable from those in this case. Here, it is apparent from a review of the evidence that the school corporation is attempting to appropriate the Real Estate to accomplish its educational purposes, not some future, speculative need. TSC is currently faced with capacity conditions, security concerns, transportation issues and aging instructional facilities. It cannot provide students in Klondike Middle School

with the same educational opportunities of other students in the district, and Klondike Elementary School relies on the Middle School to provide its students with lunches. It is not unreasonable to infer that enrollment will continue to rise in the Klondike schools, exacerbating the need for the additional Middle School facility. Unlike the condemning authority in *Country Estates* and *Meyer*, TSC is not appropriating property because it might, someday, wish to use the property. Contrary to Landowners' contentions, the evidence does not point solely to a conclusion that TSC has exceeded its authority. *See Rudolph Farm, Inc. v. Greater Jasper Consol. Sch.*, 537 N.E.2d 1199, 1202 (Ind. Ct. App. 1989) ("Contrary to Rudolph Farm's contentions, the evidence does not point solely to the conclusion that the school corporation has exceeded its authority . . . by appropriating property without a present or fair and reasonable future need.").

[18] For the foregoing reasons, we affirm the trial court.

[19] Affirmed.

Bradford, C.J., and Crone, J., concur.