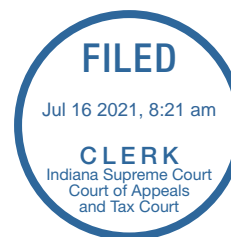


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Heritage Aggregates, LLC,
Appellant,

v.

CWA Authority, Inc.,
Appellee.

July 16, 2021

Court of Appeals Case No.
21A-PL-161

Appeal from the Marion Circuit
Court

The Honorable Sheryl Lynch,
Judge presiding
The Honorable Karen A. Springer,
Senior Judge issuing appealed
order

Trial Court Cause No.
49C01-1909-PL-40292

Weissmann, Judge.

[1] A landowner objected to a private utility’s eminent domain action, alleging that the private utility acted in bad faith by seeking to condemn land for an upgraded sewer line which might need to be moved due to planned interstate expansion. After later finding the interstate expansion would not affect the sewer project, the trial court determined that the landowner’s objections were moot. Whether the utility company initially acted in bad faith thereby entitling the landowner to relief remains a live controversy. Therefore, we reverse the court’s order as to that objection and remand for further proceedings consistent with this opinion.

Facts

[2] CWA Authority, Inc. (CWA) is a private utility company. With its State-delegated eminent domain powers, CWA filed a complaint in September 2019 to acquire an easement from Heritage Aggregates, LLC (Heritage). App. Vol. II, pp. 21-34. CWA sought the easement to construct a new sewer sludge line on the property, as the existing line was reaching the end of its useful life.

[3] Heritage objected, arguing CWA was acting capriciously and in bad faith by seeking to condemn property for a sewer line which might be moved due to the Indiana Department of Transportation’s (INDOT) planned Interstate 69 (I-69) extension. App. Vol. II, pp. 35-41. Heritage provided an October 21, 2019, email to support this claim, which stated, “[W]e . . . are under contract with [a CWA affiliate] to design the relocation of the SW Diversion Sewer caused by the proposed flyover I-69 / I-465 interchange.” App. Vol. II, p. 40. Based on

Heritage's objections, we understand the SW Diversion Sewer mentioned in the email to be the same line that runs through Heritage's property, the replacement of which prompted this eminent domain action. *Id.* at 36.

- [4] First, Heritage argued that INDOT would have to compensate CWA for the relocation of its sewer lines due to the I-69 project, but compensation would be greater if CWA installed new sewer lines as opposed to just moving the lines currently in existence. Heritage alleged, "[CWA] seeks to appropriate Heritage's property, not to operate the new sludge line, but to require INDOT to compensate [CWA] for the relocation of a new line." We refer to this as Heritage's "compensation objection."
- [5] Second, Heritage argued the action was premature because CWA could not proceed until it knew if the INDOT project would affect this sewer line. We refer to this as Heritage's "prematurity objection." The trial court rejected CWA's motion to strike both the compensation and prematurity objections.
- [6] Ten months after its initial filing, CWA filed a motion to overrule Heritage's objections to the eminent domain action. Attached to the motion was an affidavit swearing there was no overlap between the I-69 project and the sewer project. App. Vol. II, pp. 98-101. Meanwhile, Heritage requested discovery from CWA to determine "for example, why [CWA] sought to condemn the property in the first place, and the circumstances surrounding such decision, not whether the I-69 project would have any affect." App. Vol. II, p. 182. CWA

generally objected to Heritage's discovery requests and responded with one document and two pictures. App. Vol. II, pp. 146-69.

- [7] The trial court found that the sewer project will not be relocated, the State's needs for the INDOT project are now known, and Heritage was not entitled to an evidentiary hearing. App. Vol. II, pp. 18-19. It then overruled Heritage's compensation and prematurity objections, holding that they were now moot or lack merit because the interstate project would have no impact on the sewer lines at issue. The court found further delay could threaten public health and disrupt sewer service. Heritage now appeals pursuant to Indiana Code § 32-24-1-8(e), which authorizes appeal of an interlocutory order overruling objections in an eminent domain proceeding.

Discussion and Decision

- [8] Heritage argues that the trial court erred in overruling its compensation and prematurity objections, thereby permitting CWA to pursue its easement. The State may delegate its power of eminent domain to other entities, like CWA. *Utility Ctr., Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 733 (Ind. 2013). Eminent domain is a creature of statute, and its procedure is set forth in Indiana Code section 32-24-1 *et seq.* *Id.* Condemnation proceedings consist of two phases: (1) the legislative determination of the necessity of the taking; and (2) the judicial determination of just compensation for the taking. *Id.* This appeal is from the first phase, in which a defendant to a condemnation action may file objections. Ind. Code § 32-24-1-8(a).

[9] We give great deference to the trial court in eminent domain proceedings. “Where there is evidence to support the trial court’s judgment that the plaintiff was entitled to exercise the power of eminent domain, the reviewing court will not set aside such judgment.” *First Nat’l Bank of Mishawaka v. Penn-Harris-Madison Sch. Corp.*, 255 Ind. 403, 265 N.E.2d 16, 18 (1970) (citing *Matlock v. Bloomington Water Co.*, 196 Ind. 271, 146 N.E. 852 (1925)). We will not presume anything in favor of the appellant, we indulge all reasonable presumptions in favor of the trial court, and the record must exhibit the errors for which reversal is sought. *Id.*

[10] We find that the prematurity objection is moot because the interstate project clearly will not encompass the land at issue. However, Heritage is entitled to their day in court on the compensation objection. We therefore affirm in part, reverse in part, and remand.

I. Judicial Review

[11] As a preliminary matter, the parties disagree as to whether judicial review is proper in this case. By statute, a defendant may object to the proceedings:

- (1) because the court does not have jurisdiction either of the subject matter or of the person;
- (2) because the plaintiff does not have the right to exercise the power of eminent domain for the use sought; or
- (3) for any other reason disclosed in the complaint or set up in the objections.

Ind. Code § 32-24-1-8(a).

[12] This appeal concerns the third prong because Heritage contends CWA acted in bad faith by filing an eminent domain action for a sewer line at risk for relocation due to the interstate project. Necessity or reasonableness is “a matter for the determination of the legislature or the corporate body to whom the legislature has delegated such a decision.” *Cemetery Co. v. Warren Sch. Twp.*, 236 Ind. 171, 139 N.E.2d 538, 546 (Ind. 1957). Judicial review is appropriate, however, where “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.*; see also *Derloshon v. City of Fort Wayne ex rel. Dep’t of Redevelopment*, 250 Ind. 163, 234 N.E.2d 269, 271 (1968) (“[A] citizen has a right constitutionally to defend against subterfuge and bad faith in the seizure of his property. . . .”). Bad faith eminent domain proceedings will not be approved. See *Derloshon*, 234 N.E.2d at 275.

[13] Here, Heritage properly raised a question of bad faith in its timely objections. App. Vol. II, pp. 35, 89. Judicial review is therefore proper.

II. Mootness

[14] The trial court found that INDOT’s I-69 project will not affect CWA’s project. That finding led the trial court to conclude that Heritage’s objections were moot because “the basis for [Heritage’s] objections no longer exist.” App. Vol. II, p. 16.

[15] But not all of Heritage’s objections are moot. An issue becomes moot when: (1) it is no longer “live” or the parties lack a legally cognizable interest in the outcome; (2) the principal questions have ceased to be matters of real controversy between the parties; or (3) the court on appeal is unable to provide relief. *See Comm’r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1209 (Ind. 2015) (citing *In re. Tina T.*, 579 N.E.2d 48, 52 (Ind. 1991)). Now that CWA knows INDOT’s I-69 project will not interfere with the sewer line project, the prematurity objection has ceased to be a matter of real controversy between the parties. However, the compensation objection is still live, as the question of the existence of bad faith is not an idle academic inquiry. Heritage retains a legally cognizable interest in the outcome—that is, its property interest and up to \$25,000 in “reasonable costs and attorney’s fees incurred for the objection.” Ind. Code § 32-24-1-8(h). A real controversy between the parties exists because they continue to dispute whether CWA’s initial filing for eminent domain was done in bad faith.

[16] The trial court failed to make a finding on the basis of Heritage’s compensation objection. Heritage alleged CWA pursued the sewer project to maximize its future compensation from INDOT by installing a new sewer line which it would soon need to relocate. A later determination that INDOT will not require CWA to move its sewer project—meaning INDOT will not have to compensate CWA—does not disprove bad faith; rather, it proves that any bad faith machinations would have been fruitless. If CWA did act in bad faith to

secure additional compensation by INDOT, it should not escape scrutiny simply because the plan did not come to fruition.

- [17] We reverse the trial court's rejection of the compensation objection as moot and remand for further proceedings.

III. Evidentiary Hearing

- [18] Heritage argues it is entitled to an evidentiary hearing on remand. We agree. Where the defendant objects on bad faith grounds, the defendant has a right to be heard, and it is proper for courts to inquire into the utility's purported use and the surrounding facts and circumstances "tending to show what is the actual, principal and real use to be made of the property." *Hawley v. South Bend, Dep't of Redevelopment*, 270 Ind. 109, 383 N.E.2d 333, 340 (Ind. 1978) (citing *Derloshon*, 234 N.E.2d at 271; *Kessler v. City of Indianapolis*, 199 Ind. 420, 157 N.E. 547 (Ind. 1927)). "Every litigant is entitled to his day in court on the issue of whether or not he is a victim of capricious, arbitrary, governmental action." *Derloshon*, 234 N.E.2d at 273.

- [19] We affirm the portion of the trial court's order overruling the prematurity objection, reverse the portion of the order overruling the compensation objection, and remand for further proceedings consistent with this opinion.

Kirsch, J., and Altice, J., concur.