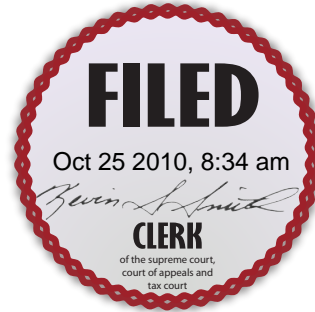


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANTS:

ATTORNEYS FOR APPELLEE:

JOHN A. KRAFT
Young, Lind, Endres & Kraft
New Albany, Indiana

RICHARD R. FOX
STEVEN A. GUSTAFSON
New Albany, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID L. LIND and)
EDWARD D. DETERS,)
)
Appellants-Defendants,)

vs.)

No. 22A01-1002-PL-94

NEW ALBANY FLOYD COUNTY)
DEPARTMENT OF PARKS)
AND RECREATION,)
)
Appellee-Plaintiff.)

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0904-PL-787

October 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

David Lind and Edward Deters each objected to the condemnation of some of their lands for a public park, and their objections were overruled. They argue on appeal the proposed use was not in compliance with the zoning ordinances and the justification for the park was not an adequate basis for the exercise of eminent domain. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2002, the New Albany Floyd County Department of Parks and Recreation (“the County”) sought a grant for the development of a park and in 2003, it appeared before the county zoning board for a use variance to develop and operate the proposed park. The zoning board approved the request with the conditions that “[c]ontact shall be made to the County Engineer for proper road cut for traffic flow” and “[p]athway corridors need to be wide enough to permit maintenance and fire equipment. The main road shall be wide enough to allow two (2) cars to pass.” (Table of Evidence at 37.)

In 2004, the County acquired title to land for the park. It brought a complaint for eminent domain on April 17, 2009, to acquire land from Lind, Deters, and others (including Paul and Barbara Wolfe) for an ingress and egress roadway for the proposed park. The road would follow an existing private way that would be paved and otherwise improved. On May 18, 2009, Lind and Deters objected on the grounds the taking violated a county zoning ordinance governing the size of a right of way and violated certain conditions that had been imposed on the county. The Wolfes also filed objections. The trial court overruled the objections of Lind and Deters on October 8, 2009, but it sustained the Wolfes’ objections and

allowed the County to amend its complaint “as to the Defendants Wolfe.” (App. at 177.) The trial court did not appoint appraisers at that time.

The County amended its complaint on November 24, naming Lind and Deters as defendants along with the Wolfes and repeating its averments against Lind and Deters as in the original complaint. On December 14, Lind and Deters responded to the amended complaint and renewed their objections. On February 17, 2010, the court issued an Order of Appropriation and Appointment of Appraisers. Lind and Deters filed their notice of appeal eight days later.

DISCUSSION AND DECISION

Eminent domain proceedings are statutory, and where the statute fixes a definite procedure, it must be followed. *Hass v. State Dept. of Transp.*, 843 N.E.2d 994, 997 (Ind. Ct. App. 2006), *reh’g denied, trans. denied*. The procedure for the exercise of eminent domain is outlined at Indiana Code ch. 32-24-1. We have summarized the process as follows:

First, when the complaint is filed a notice is issued and served on the landowner requesting his appearance at a stated time to show cause, if any he have, why the land should not be appropriated. If he believes he has cause he may file “objections.” If no objections are filed, or if those filed are overruled, an order of appropriation is entered and three appraisers are appointed and ordered to file their report appraising the damage to the landowner resulting from the appropriation.

Second, within twenty days of the date the report of appraisal is filed, either or both parties may file “exceptions” to the appraisal. If timely filed, exceptions raise the issue of the amount of the landowner’s damages. That issue is tried *de novo* by the judge, or by a jury if timely requested. If no exceptions are timely filed the appraisers’ award becomes final.

Id. (quoting *Lehnen v. State*, 693 N.E.2d 580, 581-82 (Ind. Ct. App. 1998), *trans. denied.*)

The “objections” phase of an eminent domain proceeding concerns the propriety of the taking itself, while the “exceptions” phase concerns the issue of just compensation. *Id.* at 998. An appeal can arise from either phase.

1. Timeliness of Appeal

The County argues Lind and Deters did not appeal in time. If a defendant does not timely appeal from an interlocutory order overruling objections, he waives review of those issues. *Hass*, 843 N.E.2d at 998. The controlling statute provides: “If the objections are overruled, the court shall appoint appraisers as provided for in this chapter. Any defendant may appeal the interlocutory order overruling the objections and appointing appraisers in the same manner that appeals are taken from final judgments in civil actions[.]” Ind. Code§ 32-24-1-8(e).

Lind and Deters objected to the eminent domain proceeding on May 18, 2009. The court overruled those objections, but sustained Wolfes’ objections and ordered the County to amend its complaint. The County amended its complaint on November 24, and Lind, Deters, and the Wolfes refiled their objections. On February 17, 2010, the court overruled the objections and appointed appraisers. Lind and Deters appealed eight days later.

The County argues Lind and Deters were obliged to appeal the September 15 order that overruled their objections. But that order did not appoint appraisers, and we decline to disregard the explicit language of the controlling statute. *See* Ind. Code§ 32-24-1-8(e) (“Any defendant may appeal the interlocutory order overruling the objections *and appointing*

appraisers . . .”) (emphasis added). As the February 17 order was the first order to do both, this appeal was timely.

2. Compliance with Zoning Ordinances

We are unable to address Lind and Deters’s argument the use sought by the County “is not in compliance with required zoning ordinance” and therefore is “an illegal use prohibiting the exercise of eminent domain,” (Appellants’ Br. at 7), as Lind and Deters do not tell us what the applicable zoning requirements are or why these eminent domain proceedings would be illegal thereunder.

In 2003, the County sought and was granted a variance for the park, with certain conditions. After that, the plans for the park were scaled back significantly. The County Planner testified there had been a comprehensive re-zoning in 2006. Lind and Deters refer us to a statement by the Planner that the land is now zoned “Agricultural-Residential,” (Table of Evidence at 66), but they do not explain what that designation means, what it permits and prohibits, or why the park as currently contemplated would violate the ordinance. Lind and Deters direct us to testimony by the Planner suggesting the park would be within the “Parks and Recreation” zoning designation, (Tr. at 88), but they do not direct us to evidence that a park would be an impermissible use in an area zoned “Agricultural-Residential.”

On appeal, it is a complaining party’s duty to direct our attention to the portion of the record that supports its contention. *Cnty. Care Ctrs., Inc. v. Ind. Family and Soc. Servs. Admin.*, 716 N.E.2d 519, 530 (Ind. Ct. App. 1999), *trans. denied sub nom. Cnty. Care Ctrs.*,

Inc. v. Tioga Pines Living Ctr., 735 N.E.2d 229 (Ind. 2000). This is mandated by our appellate rules. See Ind. Appellate Rule 46(A)(8)(a) (the argument “shall contain citations to . . . parts of the Record on Appeal relied on . . .”). The purpose of the rule is to relieve courts of the burden of searching the record and stating a party’s case for him. *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 729 (Ind. Ct. App. 2009). We therefore will not reverse on the ground “the exercise of eminent domain by the Parks Department was for a purpose not allowed by the Zoning Ordinance.” (Appellants’ Br. at 9.)

3. Immediate Need to Exercise Eminent Domain

Lind and Deters argue the County’s “need to spend unused grant money” was not an “immediate need or a fair and reasonable future need to exercise eminent domain.” (*Id.* at 9.) “The question of the necessity or expediency of a taking in eminent domain lies within the discretion of the Legislature and is not a proper subject for judicial review.” *Hass*, 843 N.E.2d at 999 (quoting *Wampler v. Trs. of Ind. Univ.*, 241 Ind. 449, 454, 172 N.E.2d 67, 70 (1961)). There, we declined to review a contention the state department of transportation failed to prove a public need for the Appellants’ land, as that was a legislative question. *Id.* And see *Cemetery Co. v. Warren School Tp. of Marion County*, 236 Ind. 171, 188, 139 N.E.2d 538, 546 (1957) (Courts may determine the legal authority and right under which the power of eminent domain is exercised, but may not “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 therefore decline to review the County’s determination of the necessity or expediency of this taking in eminent domain.¹

CONCLUSION

Lind and Deters did not demonstrate the taking violated the applicable zoning code, nor could they demonstrate error in the determination of the necessity or expediency of the taking. Thus, we affirm the trial court’s decision.

Affirmed.

ROBB, J., and VAIDIK, J., concur.

¹ We question whether the standard Lind and Deters offer -- that the County is required to establish the condemnation “is reasonably proper, suitable, and useful for the purpose sought,” (Appellants’ Br. at 10) -- applies to this case. Lind and Deters cite *Indianapolis Water Co. v. Lux*, 224 Ind. 125, 134, 64 N.E.2d 790, 793 (1946) (“[w]hat is necessary land is held to be such as is reasonably proper, suitable and useful for the purpose sought”).

The *Lux* court was reviewing a condemnation pursuant to a statute that did not apply to eminent domain proceedings by a county government:

[a]ny corporation organized under the law of the state of Indiana, authorized by its articles of incorporation to furnish, supply, transmit, transport or distribute electrical energy, gas, oil, petroleum, water, heat, steam, hydraulic power or communications by telegraph or telephone to the public or to any town or city, or to construct, maintain or operate turnpikes, toll bridges, canals, public landings, wharves, ferries, dams, aqueducts, street railways or interurban railways for the use of the public or for the use of any town or city, is hereby authorized and empowered to take, acquire, condemn and appropriate land, real estate or any interest therein, for carrying out such purposes and objects together with all accommodations, rights and privileges deemed necessary to accomplish the use for which the property is taken, including the right to construct railroad siding, switch or industrial tracks connecting its plant or plants or facilities with the tracks of any common carrier.

§ 3-1713, Burns’ 1946 Repl. (emphasis supplied.) Such a corporate condemnor, per the statute, could “take, acquire, condemn and appropriate a fee-simple estate, title and interest in such quantity or amount of land as it deems necessary for its proper uses and purposes.” *Id.*, quoted in *Guerrettaz v. Public Service Co. of Ind.*, 227 Ind. 556, 560, 87 N.E.2d 721, 723 (1949) (emphasis supplied by *Guerrettaz* Court).