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August 17, 2017

OFFICIAL OPINION 2017-5

Daniel Repay, Executive Director
Little Calumet River Basin Development Commission
900 Ridge Road, Suite H
Munster, IN 46321

RE: Little Calumet River Basin Development Commission on Disposition of Real Property

Dear Mr. Repay:

YOUR REQUEST

I am in receipt of your letter dated August 10, 2017, requesting my interpretation of certain statutes, and my guidance “as to the appropriate method of disposing real property owned by the [Little Calumet River Basin Development] Commission.”

FACTUAL BACKGROUND

Created by Indiana’s General Assembly in 1980, the Little Calumet River Basin Development Commission (the “Commission”) is a “body corporate and politic” which acts as the principal state participant in collaborative efforts to curtail or eliminate flooding along the Little Calumet River in northwestern Indiana. See IC 14-13-2-4(4); *Frum v. Little Calumet River Basin Development Comm’n*, 518 N.E.2d 809 (Ind.Ct.App.1988). “Little Cal” construction projects related to flood control are planned and monitored by the U.S. Army Corps of Engineers, and rely largely on federal funding.

Although the Commission is semi-autonomous, when it is engaged in supporting the design, construction and maintenance of levees and other assets for preventing breaches in the area’s flood-plain defenses, its actions are clothed with a public interest, and lie at the epicenter of the state’s police powers. In order to discharge its role effectively, the Commission has broad powers to acquire property, to lease it, or to acquire it by means of eminent domain. See IC 14-13-2-12 & 13.

When *purchasing* land the Commission is required to “follow procedures for acquisition of land by the Indiana Department of *Transportation*.” IC 14-13-2-12(d) (emphasis supplied). Of course, the Commission may *sell* real property as well. IC 14-13-2-18(8), but the statutory instructions are not the same. Interestingly, when it comes to property disposition, the statute is silent on what set of procedures the Commission should use.

BRIEF ANSWER

A set of statutes beginning at IC 4-20.5-1 *et seq.* describe a process for disposing of surplus property under the authority of the Indiana Department of Administration (“IDOA”). These statutes, comprising the “IDOA Process,” govern the disposal of surplus lands held by the Commission in the present matter.

While there is a sprinkling of textual support here toward applying the Department of *Transportation*’s procedures (collectively, the “INDOT Process”)¹ in this matter, such an approach would likely impose a more cumbersome, more protracted, and potentially destabilizing set of additional requirements on the Commission’s ability to move ahead on matters of long-term flood control. More importantly, the law simply does not require the more elaborate INDOT process; indeed, its pointed exclusion from the surplus land disposition statute applicable to the Commission’s holdings constitutes a strong indication of legislative intent not to apply those provisions to situations such as that presented here. The Commission is therefore encouraged to move ahead under the prescribed IDOA Process of asset disposition.

QUESTION

The question presented is whether the Commission, in the absence of specific statutory direction, should use the procedures outlined in IC 4-20.5-7, the section which governs the disposition of property under the authority of the Indiana Department of Administration (“IDOA”), or whether the Commission should instead employ the process prescribed by law for those matters “*under the control* of the Indiana Department of Transportation” IC 4-20.5-7-1 (emphasis supplied). Moreover and more to the point, how do the differences between these two statutory processes impact the surplus land dispositions being contemplated by the Commission in this case?

ANALYSIS

Assuming that the property in question is owned by the Commission—essentially in trust, to safeguard the people’s interest in the promotion of effective, coordinated flood control—the Commission may follow the procedures for disposing of property using the “IDOA” process. The IDOA process as outlined in I.C. Art. 4-20.5 applies to “an agency that is an entity that holds title to or possesses property in the name of, or on behalf of,

¹ The process of disposition of surplus real property owned or controlled by INDOT may be found at I.C. 8-23-7 *et seq.*

the state,” I.C. 4-20.5-1.5-1, however it does *not* apply to “state property *under the control* of the *department of transportation*.” *Id.* (emphasis supplied). For purposes of this article, “agency” is defined as “an agency, a board, a bureau, a *commission*, a committee, a department, a division, an instrumentality, an office, or an officer of the state, [or] [a]n entity that holds title to or possesses property in the name of, or on behalf of, the state” I.C. 4-20.5-1-3 (emphasis supplied).

But how far does this analysis go in transforming the importation of a “process” from INDOT into INDOT’s germination of an actual proprietary interest in the land? Although the statutes make clear that when it comes to *acquiring* property, the Commission must use the methods INDOT uses. However, once the property is conveyed, it does not belong to INDOT and it is not controlled by INDOT. The “INDOT process” of acquisition is merely being deployed as a paradigm for the conduct of a purchase by a distinct entity—the Commission. The fact that this paradigm was adopted by the drafters to describe the appropriate means of acquisition does not thereby change the end result: an acquisition of real estate by the Commission, not an actual conveyance of ownership, possession or control of any kind to INDOT.

The acquisition side of the ledger, then, teaches us that while imitation may be the sincerest form of flattery, it does not change the nature of the thing—a parcel of land, in this case—into something else, owned by someone else. INDOT remains a stranger to the transaction, title passes to the Commission, and the requirements are met.

A different tale is told upon *disposition* of a piece of property by the Commission, *i.e.*, where the Commission is in the position of seller rather than acquirer. The specific chapter governing the disposition of real property pursuant to the IDOA process, I.C. 4-20.5-7, adds an additional consideration to the analysis. The chapter on applicability forewarns that “this [c]hapter applies to the disposition of state property, with or without consideration, [but] this chapter does not apply to the sale of state property ... under the control of the department of transportation.” I.C. 4-20.5-7-1(a) and (c). Thus, if the Commission’s property were to be considered “under the control of” INDOT, the INDOT process would certainly triumph over all, that is, it would be the only process that could be used to dispose of the parcels at issue in the present matter.

As noted before, however, neither statute specifically categorizes real property sales by the Commission as being subject to INDOT control. In this regard, however, it has often been remarked that “in construing a statute, it is just as important to recognize what a statute does not say as it is to recognize what a statute does say.” *Boone Cty. State Bank v. Andrews*, 446 N.E.2d 618, 620 (Ind. Ct. App. 1983). In light of (1) the lack of specific statutory direction on this point; (2) the contrast between prescribing the INDOT process in the first part of the statute, followed by complete silence on the point in part 2; (3) long-established principles of statutory interpretation holding that the expression of one term in a series, followed by the absence of the other, creates a presumption that the drafters intended to exclude the omitted term²; and (4) the IDOA process, being of

² This tenet of statutory construction is often expressed in the Latin as, *Expressio unius est exclusio alterius*. *BLACK'S LAW DICTIONARY* (Thompson Reuters 2014), at 701.

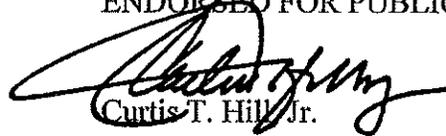
broadier application in the nature of the default procedure; it is clear that the Commission should sell its surplus property according to the IDOA process.

It may at first appear strange that the Commission would be directed by law to buy according to the INDOT process, but to sell according to the IDOA process. But on closer inspection, in this difference may lie the true sense and reason behind the result. Comparing closely the two processes, we see one major distinction between them: the INDOT process would require the Commission, before selling it to anyone else, to first offer the property for sale *at fair market value to the owner of the abutting property*. See I.C. 8-23-7-14 (emphasis supplied).

CONCLUSION

The Commission has arrived—having crystalized its own priorities relating to flood control—at a point in its planning cycle where it feels comfortable letting some of its property go for purposes of economic development. And, it would appear that a number of developers are interested. What is described here is a point in which many of the efforts of the past in flood control may come to fruition in the form of enhanced economic activity on dry land. It makes sense, then, that the statutes would not impose at the eleventh hour a process (*i.e.*, the INDOT process) which could well interfere or cause significant delays in the realization of a chapter of the planning process that is coming to a successful close.³ This policy reason does not substitute for, but lends weight and sensibility to the analysis as it produces results where people live and work.⁴

SUBMITTED, and
ENDORSED FOR PUBLICATION:



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³ “We learned a great deal from the flood of September 2008 and have invested wisely in resources. It won’t relieve the residents’ anxiety, but it does reduce the possibility of another repeat of that flood.” L. A. Franklin, *Flooding fears return to residents along Little Calumet River*, TIMES OF NORTHWEST INDIANA, June 10, 2011. (Quoting James Mandon, Munster town engineer).

⁴ “Even a little sprinkle makes us nervous. With these rains we are very anxious.” *Id.* (Quoting Sam Falcon, resident of Northcote Avenue, Munster).