

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT  
WHEATON, DU PAGE COUNTY, ILLINOIS**

**VILLAGE OF WOODRIDGE**, a municipal  
corporation,

Plaintiff,

v.

**BOARD OF EDUCATION OF COMMUNITY  
HIGH SCHOOL DISTRICT 99**, a body politic and  
corporate, **COUNTY BOARD OF SCHOOL  
TRUSTEES OF DU PAGE COUNTY, ILLINOIS**;  
a body politic and corporate, for the use and benefit  
of School District Number 99, Du Page County, Illinois  
and **UNKNOWN OWNERS**,

Defendants.

No. 05 ED 64

**MOTION TO CERTIFY  
FOR INTERLOCUTORY APPEAL**

Defendant Community High School District 99 (the "High School District"), by DLA Piper US LLP, its attorneys, moves pursuant to Illinois Supreme Court Rule 308 to certify that the order denying defendant's Traverse, entered on May 25, 2007, and the order denying defendant's Motion to Reconsider, entered on September 13, 2007, involve a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. In support of the motion, the High School District states:

This is an eminent domain suit by the Village of Woodridge (the "Village") to take approximately 45 acres of real estate (the "Property") away from the High School District. The Village bases its authority for exercising the power of eminent domain to take the High School District's public property on Section 11-61-2 of the Illinois Municipal Code:

The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys,

avenues, sidewalks, wharves, parks, and public grounds; and for these purposes or uses to take real property or portions thereof belonging to the taking municipality, or to . . . school districts, boards of education . . . and park districts or park commissioners, even though the property is already devoted to a public use, when the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public.

65 ILCS 5/11-61-2. This Court ruled after a two-day hearing that the Village had satisfied the necessary pre-conditions to allow it to proceed under this provision. The High School District moved for reconsideration, and the Court denied the motion.

Because there is substantial ground for a difference of opinion on the statutory authority for the Village's condemnation here, and because an immediate appeal may lead directly to the ultimate termination of the litigation, this Court should pursuant to Illinois Supreme Court Rule 308 certify the issue for immediate appeal to the Second District of the Appellate Court. The High School District moves to certify the following question:

May a municipality take, through the power of eminent domain, the property of a school district that is land-banked for future use and held as a non-cash investment?

The Court's determination whether to certify a question of law for interlocutory appeal under Rule 308 is discretionary. Interlocutory certification in no way intimates that the Circuit Court felt that its decision was in error. A.E. Staley Mfg. Co. v. Swift & Co., 65 Ill. App. 3d 427, 382 N.E.2d 667, 669 (1st Dist. 1978). Instead, it is a determination that the interests of justice and of the particular case could be expedited and advanced by an immediate interlocutory appeal to address a legal issue of importance. This is such a case.

#### **I. THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.**

This is a case of first impression. Although it has been on the books for 74 years, there are no cases interpreting § 11-61-2 in the context of a village's exercise of eminent domain to take school district property or property of another public entity. As reflected in the briefing and

argument of the parties and the decision of this Court, there is substantial ground for difference of opinion as to the question of law involved in this case – whether a municipality may take through the power of eminent domain property of a school district that is land-banked for future use and held as a non-cash investment.

The statute allows the use of eminent domain only when the taking will not (a) materially impair or interfere with the use already existing and (b) not be detrimental to the public. The duly elected boards of both the Village and of the High School District determined that their use of the property would best serve the public – and the Board of the High School District went further, to determine that the taking of the property by the Village would be detrimental to the public. In this circumstance, the principle of separation of powers required the Court to defer to both legislative determinations. Thus, as the High School District has argued, the Court was left with no basis to choose which of the two public bodies would be able to use the property. *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 24-27, 672 N.E.2d 1178, 1189-90 (1996) (questions relating to the efficiency and thoroughness of the school system left to the wisdom of the legislative branch); *Bd. of Ed. of Dolton School Dist. No. 149 v. Miller*, 349 Ill. App. 3d 806, 812,-13, 812 N.E.2d 688, 694 (1st Dist. 2004) (circuit court has no authority to decide that school funds should be used to build sidewalks to protect public safety).

Nevertheless, the Court made a factual finding that the taking by the Village would not be detrimental to the public. Interlocutory review is warranted to determine whether this finding – in conflict with the High School District Board’s contrary legislative finding – went beyond the scope of the proper power of the judiciary.

The Court also found that the High School District “has not put [the Property] to any already existing use.” In this regard, the Court rejected the notion that holding the property for

investment or future use to meet existing school needs are “existing uses” for purposes of § 11-61-2. In light of the importance to Illinois school districts of holding real estate for investment purposes as part of an overall capital improvement plan – as illustrated by the affidavits submitted to this Court by superintendents from other school districts as friends of the court – interlocutory review of this Court’s ruling is further warranted.

This case has raised a legal issue of importance far beyond the mere borders of the subject property. There is substantial ground for difference of opinion as to the meaning and operation of § 11-61-2, and for that reason this case should be reviewed by the Appellate Court.

**II. AN IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.**

Not only should this case be reviewed, but it should be reviewed by the Appellate Court immediately. Based on the caselaw under Illinois Supreme Court Rule 308, this is the kind of case that warrants interlocutory appeal, because one outcome of such an appeal would obviate the need for any further proceedings in the Circuit Court.

The decision in Voss v. Lincoln Mall Management Co., 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988) is a key to understanding Rule 308. The opinion in that case undertook a comprehensive review of the cases under Rule 308 and its federal analog that addressed the issue of when an immediate appeal would materially advance the ultimate termination of the litigation. Voss specifically contrasted the application of Rule 308 in two cases: Renshaw v. General Telephone Co., 112 Ill. App. 3d 58, 445 N.E.2d 70 (5th Dist. 1983), where interlocutory appeal was refused because the case would have to be tried in any event, and Ewing v. Liberty Mutual Insurance Co., 130 Ill. App. 3d 716, 474 N.E.2d 949 (5th Dist. 1985), which allowed an interlocutory appeal where the appeal could result in a dismissal of the complaint, which would avert the need for trial. Voss, 112 Ill. App. 3d at 445-46, 519 N.E.2d at 1059.

Voss went on to cite Lerner v. Atlantic Richfield Co., 690 F.2d 203, 211-12 (Temp. Em. Ct. App. 1982), which held that one of the circumstances where an interlocutory appeal might be appropriate is a case where a trial would be necessary if a defense were overruled pertaining to the right to bring the action. Voss summarized the cases under the federal analog as granting or upholding the grant of certification for immediate appeal where involving a question of law as to which one possible resolution would necessarily dispose of the case. Voss, 112 Ill. App. 3d at 448, 519 N.E.2d at 1061.

Thus, a key question under Rule 308 is whether an immediate appeal could obviate the need for a trial. Here, an interlocutory reversal of the Circuit Court's ruling on the Traverse is one possible appellate resolution that would terminate this case without the need for any trial. If the order denying the Traverse is reversed, this case will be over; if the order denying the Traverse is affirmed, the case will proceed to trial with no loss or prejudice of any kind. This is therefore precisely the kind of case in which Rule 308 certification is contemplated.

Although a trial on the issue of just compensation in this case is not likely to last more than several weeks, that fact should not deter certification and immediate appeal. Voss noted:

[O]ne group of commentators suggests that [a potentially short trial] should not be "raised to an absolute condition of appealability," since in some cases "a highly debatable question . . . is easily isolated from the rest of the case, . . . offers an opportunity to terminate the litigation completely, and . . . may spare the parties the burden of a trial that is expensive for them even if not for the judicial system," so that [t]he availability of appeal should not depend entirely on estimates of trial length.

Voss, 112 Ill. App. 3d at 449, 519 N.E.2d at 1061, citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3930, at 165 (1977).

There would be no prejudice to the Village from an interlocutory appeal. The stated Village purpose of acquiring the Property for parks and public space would not be impeded,

because the Property continues to be leased to the Woodridge Park District. Any conceivable delay to the Village's plan to use the Property for police and public works facilities should not be considered, because this Court refused to recognize that plan.

### III. CONCLUSION.

This case presents an important issue of law for which an immediate appeal may result in a termination of the litigation without the need for trial, and with no prejudice to any party. This case thus falls squarely within the parameters of Rule 308. This Court should certify the question proposed above to allow immediate, interlocutory consideration of the issue and thus avoid the additional time and expense of an unnecessary trial.

A proposed Order certifying the question for appeal under Rule 308 is attached and incorporated by reference.

COMMUNITY HIGH SCHOOL  
DISTRICT 99

By: 

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