

**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 ALLOW TESTIMONY OF
REASONABLE PROBABILITY OF REZONING**

Defendant Community High School District 99 (the "High School District), by DLA Piper US LLP, its attorneys, moves this Court for an order either allowing testimony of a reasonable probability of rezoning, because all appraisal witnesses concur that the highest and best use involves a change from the existing zoning, or, in the alternative, to hold an *in camera* preliminary hearing on the reasonable probability of rezoning. In support of the motion, the High School District states:

The subject property is currently zoned R-1 under the Village of Woodridge's zoning ordinance. That zoning classification allows single-family, detached residential homes on lots of no less than 43,560 square feet. Woodridge Zoning Ordinance, §§ 9-5A-1 and 9-5A-3. Both planning witnesses are and each appraiser designated in this case is of the opinion that the

highest and best use for the subject property is for a more intense residential use that would require some form of zoning approval by the Village of Woodridge:

- Planner Allen Kracower, on behalf of the Village, believes that the highest and best use is for single-family, detached residential homes on lots of no less than 12,000 square feet.
- Appraisers Roger Tibble and Joseph Thouvenell, on behalf of the Village, believe that the highest and best use is for single-family, detached residential homes on lots of no less than 12,000 square feet, echoing the conclusion of Mr. Kracower.
- Planner George Kisiel, on behalf of the High School District, believes that the highest and best use is for single-family, attached or detached residential homes, at gross densities of four to nine dwelling units per acre.
- Appraiser Gary DeClark, on behalf of the High School District, believes that the highest and best use is for single-family, attached or detached residential homes, at gross densities of up to eight dwelling units per acre.
- Appraiser Dale Kleszynski, on behalf of the High School District, believes that the highest and best use is for medium density, single-family, attached or detached residential homes.
- Broker Michael Haney, on behalf of the High School District, believes that the highest and best use is for a mixed development of single-family homes and townhomes.

Each of these witnesses expressed the opinion that there was a reasonable probability of a change from the existing zoning. The High School District witnesses were explicit; the Village witnesses were unsure whether the highest and best use would be accomplished with a change in the underlying zoning classification or with the approval of a special use planned unit development by the Village. None of these witnesses expressed an opinion that the highest and best use of the subject property was development pursuant to the existing zoning.

In an eminent domain case, it is proper to base value not only upon the highest and best use permitted under the existing zoning classification, but also under other zoning classifications where there is a reasonable probability of the granting of such zoning. Department of

Transportation v. Western National Bank of Cicero, 63 Ill.2d 179, 185, 347 N.E.2d 161, 165 (1976). The rationale is that the market would gauge the likelihood of the contingency and discount its effect on property value. Lake County Forest Preserve District v. Petersen, 93 Ill. App. 3d 731, 734, 417 N.E.2d 862, 865 (2nd Dist. 1981).

Before a jury may hear testimony based on a theory of reasonable probability, there must be a preliminary determination of admissibility by the court. Illinois State Toll Highway Authority v. Heritage Standard Bank, 250 Ill. App. 3d 665, 681, 619 N.E.2d 1321, 1331 (2nd Dist. 1993). This is not a finding of law, for the ultimate determination of reasonable probability is for the jury. Department of Public Works v. Association of Franciscan Fathers, 69 Ill.2d 308, 316, 371 N.E.2d 616, 619 (1977). Even if there is conflicting evidence, the issue may still go to the jury. Illinois State Toll Highway Authority v. Heritage Standard Bank, 250 Ill. App. 3d 665, 681, 619 N.E.2d 1321, 1331-32 (2nd Dist. 1993). The ultimate questions of whether there is a reasonable probability and whether there will be an impact on value are for the jury. Lombard Park District v. Chicago Title & Trust Co., 103 Ill. App. 2d 1, 9, 242 N.E.2d 440, 445 (2nd Dist. 1968). The test of admissibility to be applied by the court is the sufficiency of the evidence when weighed against mere possibility or speculation. Lake County Forest Preserve District v. Petersen, 93 Ill. App. 3d 731, 735, 417 N.E.2d 862, 865 (2nd Dist. 1981). No formal hearing is necessary (*see* Forest Preserve District of Du Page County v. Brookwood Land Venture, 199 Ill. App. 3d 973, 978, 557 N.E.2d 980, 985 (2nd Dist. 1990) (offer of proof to which no objection was made deemed sufficient), although one is often held.

A reasonable probability theory may be presented by a party if the prospect of relief from the governmental restriction is sufficiently likely that its anticipation would have an appreciable impact upon present market value. Lake County Forest Preserve District v. Petersen, 93 Ill. App.

3d 731, 734, 417 N.E.2d 862, 865 (2nd Dist. 1981). In considering a reasonable probability of rezoning, the court looks at such factors as growth patterns, change of use patterns, the character of the neighborhood, demand for certain types of land use, comparable sales at prices reflecting anticipated rezonings, the physical characteristics of the subject property and the age of the zoning ordinance. Lombard Park District v. Chicago Title & Trust Co., 103 Ill. App. 2d 1, 8, 242 N.E.2d 440, 444 (2nd Dist. 1968). These factors reveal the flexibility of a zoning ordinance (Forest Preserve District of Du Page County v. Kelley, 69 Ill. App. 3d 309, 315, 387 N.E.2d 368, 373 (2nd Dist. 1979)), but are not meant to provide a prognostication of what the zoning body might do on a particular application for rezoning (Oak Brook Park District v. Oak Brook Development Co., 170 Ill. App. 3d 221, 232, 524 N.E.2d 213, 220 (2nd Dist. 1988)).

In this case, no preliminary hearing is needed to determine that there is a reasonable probability of rezoning because all appraisal witnesses opine that the highest and best use of the subject property is something other than the existing one-acre minimum lot size R-1 residential zoning. Because each appraiser will testify that some zoning action by the Village of Woodridge would occur to develop the property at its highest and best use, this Court need not resolve whether some change in the existing restrictions is reasonably probable; that fact is undisputed.

The Village Witnesses

The Village's planner witness, Allen Kracower, opined that the "highest and best use from a planning perspective is for residential single-family detached use approximately in the range of lots of averaging 12,000 square feet." (Exhibit A, Kracower Deposition at 31) Kracower did not attempt to define what the precise zoning classification might eventually be. "I haven't defined a district, but it could be rezoned under the special use plan development provisions of R-1 which drop the lot size dramatically down, maybe to the next district, but no

less than 12,000 square feet.” (Exhibit A, Kracower Deposition at 32) The basis of Kracower’s opinion is the surrounding development: “I was looking at some of the lots to the south. I looked at the governmental complex to the east, and I thought that 40,000 was a very high – a very high number for a single-family lot in the overall marketplace, and that most of the single-family zonings had averages less than that, but not down to 7,500 or 8,500. In the range of about 12,000 square feet.” (Exhibit A, Kracower Deposition at 75) “I thought the 12,000 was more in the mid-range of other subdivisions, and I have a bunch of ordinances in my files that I turned over to you which prove that to be the case.” (Exhibit A, Kracower Deposition at 76)

Village appraiser Roger Tibble concurred with Kracower. He agreed that the highest and best use¹ of the property would be single family detached residential, with lot sizes in the 12,000 square foot range instead of the 40,000 square foot minimum range. (Exhibit B, Tibble Deposition at 71) That may or may not require a change in the zoning district – it might be accomplished by approval of a PUD under the R-1 zoning, but in any event it would require some Village action over and above the existing zoning. *Id.* Tibble’s conception of the highest and best use of the property could not be developed as of right under the existing zoning. *Id.*

Village appraiser Joseph Thouvenell also concurred with Kracower. “I specifically thought the density should be a little more than the current zoning which allows for one unit per acre. I believe I said 12,000-square-foot lots, which is essentially 3 point something units per acre.” (Exhibit D, Thouvenell Deposition at 24) Thouvenell relied on the Village’s

¹ Tibble defined “highest and best use” by using I.P.I. (Civil) Jury Instruction No. 300.84, including the optional second sentence to be used in a reasonable probability case. (Exhibit C, Tibble Report at 13) Tibble did so upon direction from the Village’s counsel. (Exhibit B, Tibble Deposition at 44-45)

Comprehensive Plan and the R-3 zoned Highlands residential subdivision to the south of the subject property. (Exhibit E, Thouvenell Report at 21) Thouvenell concluded:

I agree with Mr. Krackower [*sic*] that there is a reasonable probability of a rezoning to a higher density that [*sic*] the current 1 lot per acre. Based upon my review of Woodridge and surrounding areas, it appears that lots in the 11,000 to 13,000 square foot range are most probable. This Highest and Best Use opinion recognizes the 9.91 acres of wetlands and buffers.

(Exhibit E, Thouvenell Report at 22)

The High School District Witnesses

The High School District witnesses also agree that there is a reasonable probability of changing the current zoning on the subject property, although to a slightly higher density. Planner George Kisiel opined that the existing R-1 zoning is an interim or “holding” zone. (Exhibit F, Kisiel Deposition at 78) Because there is no R-1 development in Woodridge anywhere near the subject property, the R-1 zoning creates a conflict from a land use perspective. (Exhibit F, Kisiel Deposition at 100) Based in part on the Comprehensive Plan’s recommendations that “low to medium density” residential development be placed “along major roadways, near high-intensity activity areas, or at key in-fill locations,” that “new medium and high density housing should be located in selected nodal locations, or in areas that serve as a transitional use between low-density residential and non-residential uses,” and that “new high density development would also be appropriate adjacent to public parks or other significant open space features,” Kisiel opined that the highest and best use of the subject property is low to medium density residential development. (Exhibit F, Kisiel Deposition at 92-95, 108-12, 139-40) The Comprehensive Plan defines low to medium density residential development as one to seven units per acre, and medium to high density residential as eight to 16 units per acre. (Exhibit F, Kisiel Deposition at 111)

Kisiel's opinion is that the highest and best use is single-family residential, attached or detached, at a gross density of four to nine units per acre. (Exhibit F, Kisiel Deposition at 128-129) Kisiel believes that there is a reasonable probability that the Village would re-zone the property to allow such development, based on "the suitability of a mix of single-family detached and single-family attached on the site based on the context, the land use, the ability of the site to support that development. It has to do with the fact that zoning classifications that would permit that are located adjacent to the subject property." (Exhibit F, Kisiel Deposition at 130) In concluding that there was a reasonable probability, Kisiel also considered the physical characteristics of the subject property, its location, the availability of utilities, adjacent and nearby uses, the trend of development, the Comprehensive Plan and zoning, demand for uses in the area, other rezonings and variations and the age of the zoning ordinance. (Exhibit G, Kisiel Report at 7-10 and Supplement)

Appraiser Gary DeClark for the High School District opined that the highest and best use is for medium density residential development, at about eight dwelling units to the acre. (Exhibit H, DeClark Report at 29; Exhibit I, DeClark Deposition at 84) DeClark found the reasonable likelihood of rezoning to be strong, assuming a neutrally motivated municipality, and based on consideration of such factors as the physical characteristics of the subject property, the available utilities, the location of the subject property, the history of changing uses in the area, growth patterns in the area, the demand for certain uses in the area, sales of similar properties at prices reflecting anticipated rezonings, the age of the zoning ordinance and the Comprehensive Plan, the provisional nature of the R-1 zoning, and rezonings of nearby properties. (Exhibit H, DeClark Report at 22-29; Exhibit I, DeClark Deposition at 147-53)

Appraiser Dale Kleszynski for the High School District also opined that the highest and best use is for medium density residential development. (Exhibit J, Kleszynski Report at 2) Based on area development patterns and market activity, he concluded that a zoning change to allow such development would be reasonably probable. *Id.* The existing R-1 zoning is inconsistent with area development patterns, the subject property's in-fill character and its locational amenities. (Exhibit K, Kleszynski Deposition at 28-29) Kleszynski learned from personal consultation with the Woodridge Planning Department that the process for zoning changes was typical of that in most municipalities – “every case is reviewed independently, and that it goes through a process of workshops where things are ironed out relative to the needs of the community,” and then there is final approval by the municipal authorities. (Exhibit K, Kleszynski Deposition at 37)

The housing stock around the subject property is, according to Kleszynski, “tired and aging.” Kleszynski's experience in communities similar to Woodridge is that in-fill sites like the subject property are being developed “to satisfy the demands of an aging population and target maintenance-free empty-nester-style-type homes which traditionally include duplex, townhomes and some forms of . . . attached single-family residential . . .” (Exhibit K, Kleszynski Deposition at 57) Based in part on the market demand, and on the lack of any knee-jerk rejection of any zoning changes by the Village, Kleszynski concluded that it was reasonably probable that a zoning change could be achieved to meet his conception of the highest and best use. (Exhibit K, Kleszynski Deposition at 61-65)

Broker Michael Haney believed that the subject property could be developed for a residential use consistent with the surrounding properties, and the depiction of the subject property in the Comprehensive Plan. (Exhibit L, Haney Deposition at 14) The Comprehensive

Plan designates the subject property as part of the Village Center, and based on typical urban planning approaches, “it seemed unlikely that you would have a very low-density property in the middle of your village surrounded by higher density.” (Exhibit L, Haney Deposition at 73) Based on the adjacent developments and on zoning recently granted by the Village to the nearby Girl Scout camp property, Haney believed that “a town home or single-family product was the most likely use for the site.” (Exhibit L, Haney Deposition at 33, 36-37) For those reasons, Haney’s opinion of value was based on a reasonable probability of rezoning. (Exhibit L, Haney Deposition at 58-60)

No Need for Preliminary Hearing

Where each planning or appraisal witness concludes that the highest and best use is not development pursuant to the existing zoning, but rather slightly more intense development pursuant to a Village zoning approval, the fact of reasonable probability of some change in zoning is uncontested. Thus, this Court need not hold a preliminary hearing, but should allow the jury to decide the effect on value of whatever zoning change is reasonably probable.

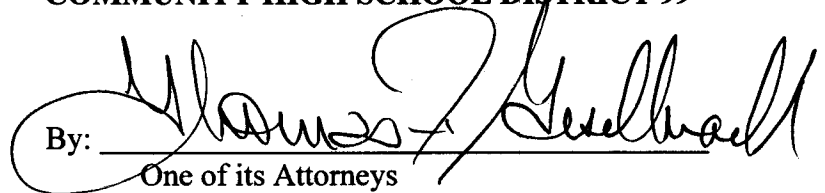
Alternatively, the evidence set forth in the reports and depositions of the expert witnesses for each party establishes that the parties’ respective theories of highest and best use, based on a reasonable probability of some Village zoning action, do have an adequate foundation, and are not “mere possibility or speculation.” Accordingly, this Court should rule that there is an adequate foundation for testimony of reasonable probability of rezoning, and allow the issue to be presented to the jury.

Finally, in the event that this Court needs to hear testimony from the individual expert witnesses to rule on the adequacy of the foundation for the testimony of reasonable probability,

the High School District requests that the Court hold an *in camera*, preliminary hearing on reasonable probability outside the presence of the jury.

WHEREFORE, defendant Community High School District 99 respectfully requests this Court to enter an order allowing the testimony of witnesses that there is a reasonable probability of rezoning, or, in the alternative, to hold a hearing *in camera* to establish that there is sufficient foundation to allow the witnesses to testify to a reasonable probability of rezoning.

COMMUNITY HIGH SCHOOL DISTRICT 99

By: 
One of its Attorneys

Date: February 15, 2008

Thomas F. Geselbracht
Mariah F. DiGrino
DLA PIPER US LLP -74250
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601-1293
(312) 368-4094

CERTIFICATE OF SERVICE

I, Thomas F. Geselbracht, an attorney, hereby certify that I caused the foregoing MOTION TO ALLOW TESTIMONY OF REASONABLE PROBABILITY OF REZONING to be served upon:

Phillip A. Luetkehans
Robert W. Funk
Schriott & Luetkehans, P.C.
105 East Irving Park Road
Itasca, Illinois 60143

by e-mail delivery to rfunk@sl-atty.com and by depositing true and correct copies so addressed in the United States postal drop located at 203 North LaSalle Street, Chicago, Illinois, before 5:00 p.m., this 15th day of February, 2008, with proper postage prepaid.


Thomas F. Geselbracht