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

RESPONSE TO VILLAGE MOTION *IN LIMINE* NO. 1 TO BAR DISTRICT 99'S APPRAISER, DALE KLESZYNSKI OR, IN THE ALTERNATIVE, HIS COMPARABLE SALES 1 THROUGH 3 AND 5 THROUGH 8

Defendant Community High School District 99 (the "High School District"), by DLA Piper US LLP, its attorneys, for its response to the Village of Woodridge's Motion *in Limine* No. 1 to Bar District 99's Appraiser, Dale Kleszynski or, in the Alternative, His Comparable Sales 1 through 3 and 5 through 8, states:

Dale Kleszynski is a well-respected appraiser with over 25 years of experience in the field. (Village Motion No. 1, Exhibit 1 at 35) He is a member of the Appraisal Institute and certified as an appraiser in the states of Illinois, Indiana and Michigan. *Id.* Mr. Kleszynski has extensive experience in appraising real estate, including large vacant land parcels such as the subject property in this case. *Id.*

The Village attacks Mr. Kleszynski's opinions on three basic grounds: (1) the Village alleges that the comparable sales offered by Mr. Kleszynski are not really "comparable"; (2) the

Village alleges that certain comparable sales cited by Mr. Kleszynski are based on hearsay and, for that reason, should not be admitted; and (3) certain comparable sales cited by Mr. Kleszynski constitute offers, not consummated sales, and, for that reason, should not be admitted. For the reasons stated below, none of these attempts to attack Mr. Kleszynski offer valid grounds to exclude either his testimony or the sales on which he based his opinions.

I. There is a Reasonable Basis for Comparison Between Each of Mr. Kleszynski's Comparable Sales and the Subject Property.

The Village seeks to exclude Sales 1 through 3 and 5 through 8 on the ground that they are not sufficiently comparable to the subject property. However, the Village's argument ignores the long-standing recognition by Illinois courts that no two pieces of real estate are exactly alike. City of Evanston v. Piotrowicz, 20 Ill.2d 512, 522, 170 N.E.2d 569, 575 (1960); City of Chicago v. Blanton, 15 Ill.2d 198, 202, 154 N.E.2d 242, 245 (1958). "Similar" does not mean "identical," and property may be similar for purposes of fruitful comparison, though each possesses various points of difference. Piotrowicz, 20 Ill.2d at 522, 170 N.E.2d at 575. Further, no fixed or general rule can be laid down regarding the degree of similarity which must exist between the property sold and the subject property in order to make evidence of a comparable sale proper. *Id.*; Blanton, 15 Ill.2d at 202, 154 N.E.2d at 245. Instead, sales are admissible if there is a reasonable basis for comparison between such sales and the subject property. Piotrowicz, 20 Ill.2d at 522, 170 N.E.2d at 575.

In seeking to exclude Sales 1 through 3 and 5 through 8, the Village focuses on the difference in zoning classification and highest and best use of the subject property and the sales properties.[1] The Illinois Supreme Court has held that the existence of a zoning dissimilarity does

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[1] The Village appears to base its claim, at least in part, on an assertion that the zoning classifications of the properties involved in the sales are not identical to the existing R-1 zoning of the subject property or to the Village's asserted highest and best use. In this regard, the

not constitute such a degree of dissimilarity as to render the evidence of such sales incompetent. Piotrowicz, 20 Ill.2d at 522-23, 170 N.E.2d at 576; Forest Preserve Dist. of Cook County v. Kercher, 394 Ill. 11, 20, 66 N.E.2d 873, 878 (1946). In urging this court to require a higher degree of similarity between the subject property and the sales properties, the Village cites J. Eaton for the proposition that "a comparable sale must have the same economic highest and best use of the property being appraised." (Village Motion No. 1 at ¶ 6) It is noteworthy that Illinois is *not* among the seven states which have cited Mr. Eaton. Indeed, none of the cases citing Mr. Eaton's book (*see* Village Motion No. 1 at Exhibit 3) appear to be citing the extreme rule which Mr. Eaton proposes. There is no Illinois caselaw supporting Mr. Eaton's, or the Village's, proposition that no sale may be considered as comparable unless it shares precisely the same highest and best use as the subject property. Instead, adopting Mr. Eaton's proposition would require a departure from the long-standing Piotrowicz recognition that "no rule can be laid down" regarding the degree of similarity required.

In this case, Mr. Kleszynski's highest and best use of the subject property is sufficiently similar, albeit not identical, to the uses of each of Mr. Kleszynski's cited sales to permit valuable comparison – all consist of medium to high-density residential development, which is sufficiently similar to Mr. Kleszynski's determined highest and best use of medium density residential development. In the case of Sale Number 3, Mr. Kleszynski acknowledged that the permitted high density-residential development required a downward adjustment to the sales price. However, this downward adjustment does not signal that the sale is too dissimilar as to warrant exclusion. To the extent the Village disagrees with Mr. Kleszynski's comparable sales,

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Village's argument constitutes nothing more than a collateral attack on Mr. Kleszynski's opinion that there is a reasonable probability that the subject property would be rezoned. The Village has separately stated its argument regarding the reasonable probability of rezoning in its Motion *in limine* No. 8, to which the High School District is filing a separate response.

there will be ample opportunity for the Village to draw the jury's attention to any weaknesses in Mr. Kleszynski's opinions at trial.

The Village also challenges the competency of Sale Number 1 because the development rights resulted from settled litigation. (Village's Motion No. 1 at ¶14) It is not clear whether the Village cites this circumstance in an attempt to point out a dissimilarity or if the Village believes the resulting development rights do not represent realistic or reasonable development rights for the sales parcel, and the Village offers no rationale or support for its challenge on this ground. Value is a function of the highest and best use of a property, not the means by which a particular highest and best use is achieved. Further, there is nothing to indicate that the settled litigation resulted in unreasonable or unrealistic development rights for the sales property. Accordingly, the Village's argument in this regard should be rejected.

The Village challenges Sales 5 and 6 on the ground that the sales properties are within walking distance to train stations, whereas the subject property is not. As discussed above, complete uniformity between properties is not required, or even realistic, for a sale to be used as a comparable in valuing property. In this instance, the Village offered no rationale or support for why the proximity to a train station would confuse the appraiser's analysis of the extent to which the comparable sales are reliable. Access to transportation generally, be it train, plane or automobile, is one of many factors regularly considered by appraisal experts in rendering opinions as to value. Ease of access to one type of commuter transportation system does not render a property so unique as to be incomparable to another property that may have access to another type of commuter transportation system.

The Village also challenges Sales 5 and 8 on the ground that these properties are not the same size as the subject property. Mr. Kleszynski noted that downward adjustments were made

for all sales, except Sale Number 7 (which the Village does not challenge on this basis) on account of differences in size to the subject property. (Village Motion No. 1, Exhibit 1 at 27) The Village offered no rationale or support for why the differences in size would fatally confuse the analysis.

Finally, the Village challenges Sale Number 6 on the ground that the property sold constituted platted lots. In challenging Sale Number 6 on this ground, the Village misinterprets the rule cited in Central Illinois Public Service Co. v. Gibbel, 65 Ill.App.3d 890, 382 N.E.2d 846 (4th Dist. 1978). The mere fact that land conveyed consists of platted lots does not render the property incomparable *per se*. Instead, the rationale for excluding such sales is that the purchase price of subdivided lots reflects the significant expense incurred in grading the land, paving streets, installing utilities and other infrastructure and otherwise improving and preparing a subdivided tract of land. *See* Forest Preserve District of Cook County v. Wallace, 299 Ill. 476, 478, 132 N.E. 444, 445 (1921). Thus, Gibbel, cited by the Village as authority for excluding Sale 6, involved the sale of a subdivided lot on a developed lake. 65 Ill.App.3d at 894, 382 N.E.2d at 849-850. City of Chicago v. Pridmore (also cited by the Village) involved the sale of 28 platted lots available for use as building sites. 12 Ill.2d 447, 450, 147 N.E.2d 54, 56 (1957). In this case, Sale 6 was not the sale of lots in an improved residential subdivision. Instead, Sale 6 involved parcels of land for which the substantial cost of development had not yet been incurred. They were sold not as lots for homes, but acreage on which mixed-use buildings were eventually developed.

The Village's attempts to distinguish the physical, locational or legal characteristics of the comparable sales from the subject property reveal nothing more than the typical distinguishing characteristics that appraisal experts consider on a regular basis. None of these

characteristics, either individually or in the aggregate, are so unique or confusing as to outweigh their usefulness in this case. None trigger an established rule of law establishing inadmissibility as a matter of law. Accordingly, the Village's motion to exclude Sales 1 through 3 and 5 through 8 on the basis that they are distinguishable properties should be denied.

II. Dale Kleszynski's Verification of Sales Through Attorneys Does Not Render his Testimony Incompetent.

The Village seeks to exclude Dale Kleszynski's testimony on the ground that he relied on certain materials that would not be directly admissible as evidence. Since at least 1981, when the Illinois Supreme Court adopted Federal Rules of Evidence 703 and 705 with respect to expert testimony, Illinois law provides that the basis of an expert's opinion need not itself be admissible in evidence, so long as the information is of a type reasonably relied upon by experts in the particular field. City of Chicago v. Anthony, 136 Ill.2d 169, 554 N.E.2d 1381, 1384 (1990); Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981) (adopting Federal Rules of Evidence 703 and 705).

In this case, the Village alleges that Mr. Kleszynski relied on an appraisal report prepared by Ken Polach. (This was not the appraisal prepared by Mr. Polach in connection with settlement attempts in this case, but rather an appraisal by Mr. Polach in a completely unrelated case.) However, the record reveals that Mr. Kleszynski did not rely on the conclusions propounded by Mr. Polach in that appraisal, but instead became aware of comparable sales that were cited in the Polach report. Mr. Kleszynski subsequently verified the facts and circumstances of these sales through conversations with attorneys Steve Helm and Jim Wagner. (Exhibit A, Kleszynski Deposition at 136) Sales data, even if previously cited by another appraiser, is precisely the type of information that is reasonably and regularly relied upon by appraisal experts, even if it would not be directly admissible on its own as evidence.

Accordingly, the Village's motion seeking to exclude Dale Kleszynski's testimony should be rejected.

III. There is Sufficient Evidence to Support Admission of Comparable Sales 7 and 8 as *Bona Fide* Offers.

The Village's contention that offers are not admissible unless there is an absence of comparable sales is not supported by the caselaw. In stating that Illinois courts do not recognize offers where there are actual comparable sales, the Village over-extends the Second District Court's decision in Illinois State Toll Highway Authority v. Dicke, 208 Ill.App.3d 158, 566 N.E.2d 1003 (2d Dist. 1991). The Court in Dicke involved an offer to purchase that was received *after* the filing of the condemnation petition. Importantly, the Court in Dicke did not purport to overrule its previous decisions, or those of the Illinois Supreme Court, favoring "great liberality" in admitting valuation evidence. City of Chicago v. Lehmann, 262 Ill. 468, 104, N.E. 829 (1914); *see e.g.,* Lake County Forest Preserve Dist. v. O'Malley, 96 Ill.App.3d 1084, 421 N.E.2d 980 (2d Dist. 1981) ("It is doubtful that the absence of comparable sales is a firm prerequisite to the admission of offers to purchase."). *Bona fide* offers are precisely the type of evidence reasonably and routinely relied upon by appraisal experts and, accordingly, are admissible. *See* City of Chicago v. Anthony, 136 Ill.2d 169, 554 N.E.2d 1381 (1990); *see also* Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981) (adopting Federal Rules of Evidence 703 and 705 with respect to expert testimony).[2]

In order to meet the preliminary test for admissibility, an offer to purchase must be made for cash, in good faith, by a purchaser of good judgment, who is acquainted with the value of the

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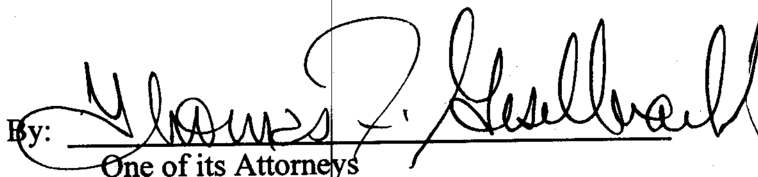
[2] Note that many of the decisions cited by the Village for the proposition that offers are not admissible unless actual sales are unavailable were decided *prior* to the Illinois Supreme Court's decision to adopt Federal Rules of Evidence 703 and 705 with respect to expert testimony.

real estate and has sufficient ability to pay. City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill.2d 421, 145 N.E.2d 30, 45 (1957).

In this case, Sales 7 and 8 satisfy the preliminary requirements as to *bona fide* offers. Mr. Kleszynski verified the existence and terms of written contracts for each of these sales with Steve Helm and Jim Wagner, counsel familiar with the circumstances of the sales; the contracts provided for a cash purchase price payable at closing; and the contract purchaser in both cases, Kimball Hill Homes, Inc., is a highly-sophisticated and well-recognized homebuilder, capable of completing the transactions and was well-acquainted with the property. Further, the offers at issue and the information used to verify them are precisely the type of information regularly relied upon by appraisal experts. Finally, as further evidence of the credibility of these sales, the transaction in Sale 7 closed with respect to a portion of the property subsequent to the filing of this condemnation suit. Accordingly, Sales 7 and 8 satisfy the preliminary requirements for admissibility of offers.

WHEREFORE, defendant Community High School District 99 respectfully requests the Court to enter an order allowing the testimony of Dale Kleszynski in its entirety.

COMMUNITY HIGH SCHOOL DISTRICT 99



Date: February 28, 2008

By: ______________________
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IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

DUPAGE COUNTY, ILLINOIS

COPY

THE VILLAGE OF WOODRIDGE,)
ILLINOIS, a Municipal)
Corporation,)
Plaintiff,)
vs.) Case No. 05 ED 64
BOARD OF EDUCATION OF)
COMMUNITY HIGH SCHOOL)
DISTRICT 99, a Body Politic)
and Corporate, COUNTY BOARD)
OF SCHOOL TRUSTEES OF DUPAGE)
COUNTY, ILLINOIS, a Body)
Politic and Corporate, For)
the Use and Benefit of)
School District Number 99,)
DuPage County, Illinois, and)
Unknown Others,)
Defendants.)

The deposition of DALE J. KLESZYNSKI, MAI, SRA, called for examination, taken pursuant to the provisions of the Code of Civil Procedure and the Rules of the Supreme Court of the State of Illinois pertaining to the taking of depositions,

PENGAD-Bayonne, N.J.
Exhibit A

1 A. No.

2 Q. -- relating to Mayneland Farms?

3 A. No.

4 Q. You're relying solely on the

5 information that was in Mr. Pollock's appraisal as

6 part of the Brock-Brodie litigation?

7 A. As well as interviewing counsel that

8 represented the Brock-Brodie estate.

9 Q. What counsel was that?

10 A. Helm and Wagner.

11 Q. Mr. Geselbracht was of record in that

12 litigation, wasn't he?

13 A. I don't know the answer to that

14 question.

15 Q. So what did either Mr. Helm or

16 Mr. Wagner tell you with respect to this contract

17 that is underlying your Sale Number 8?

18 A. In my discussions with them relative to

19 this contract, I asked them if the information

20 associated with this particular transaction was

21 accurate. It was -- they used Ken Pollock as a

22 witness in this matter. I went through the

23 information with Ken Pollock and made arrangements

24 to go ahead and view the documents and copy the