

**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. 3
TO BAR DISTRICT 99'S APPRAISER, GARY DECLARK,
FROM TESTIFYING TO OR RELYING ON CERTAIN SALES**

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. 3 to Bar District 99's Appraiser, Gary DeClark, From Testifying to or Relying on Certain Sales, states:

Gary DeClark has been actively engaged in real estate valuation and counseling for thirty years. (Village Motion No. 2, Exhibit 1 at Addendum A) He is a member of the Appraisal Institute, a past president of its Chicago Chapter, and a certified appraiser in eleven states, including Illinois, Indiana, Michigan and Wisconsin. *Id.* Mr. DeClark has successfully completed numerous real estate and related courses and seminars sponsored by the Appraisal Institute, accredited universities and other organizations, and he is currently certified by the Appraisal Institute's voluntary program of continuing education. *Id.* Mr. DeClark has been qualified as an expert witness for valuation purposes in the Circuit Courts of Cook County, Lake

County, Du Page County and Kane County, Illinois; the Circuit Court of Lake County, Indiana; the Northern and Southern Indiana Federal District Courts; and the Northern Illinois Federal District Court. *Id.*

The Village argues in this motion that the comparable sales offered by Mr. DeClark are not really “comparable” because the sales properties do not have the same highest and best use as the subject property, and that Sale 2 is distinguishable from the subject property. For the reasons stated below, none of these attempts to attack Mr. DeClark state valid grounds to exclude his testimony or the comparable sales which he considered.

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

The Village seeks to exclude Mr. DeClark’s testimony on the ground that the comparable sales offered by Mr. DeClark are not sufficiently comparable to the subject property. Specifically, the Village argues that the highest and best uses for the comparable sales are not identical to the highest and best use of 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.

With respect to highest and best use, the Illinois Supreme Court has held that the existence of a zoning dissimilarity does 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. 3 at ¶ 7) It is noteworthy that Illinois is *not* among the seven states which have cited Mr. Eaton’s treatise. Indeed, none of the cases citing Mr. Eaton’s book (*see* Village Motion No. 3 at Exhibit 3) appear to be citing the extreme rule which Mr. Eaton proposes. Contrary to the Village’s assertion, Mr. DeClark has not ignored the mandates of the Appraisal Institute, because the Appraisal Institute has not adopted Mr. Eaton’s proposition. (*See* Exhibit A, The Appraisal of Real Estate, at 437 (12th Ed. 2001) (recognizing that adjustments may need to be made to account for differences in zoning and highest and best use).) Further, there is no Illinois caselaw supporting Mr. Eaton’s, or the Village’s, proposition. 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. DeClark’s highest and best use of the subject property is sufficiently similar, albeit not identical, to the uses of each of Mr. DeClark’s cited sales to permit valuable comparison— all consist of medium to high-density residential development, which is sufficiently similar to Mr. DeClark’s determined highest and best use of medium density mixed single-family detached and single-family attached residential development. Additionally, Mr. DeClark made adjustments to Sales 2 and 4 to account for what he concluded to be densities that were higher

than would be achievable for the subject property. (Village Motion No. 2, Exhibit 1 at 36) To the extent the Village disagrees with Mr. DeClark's comparable sales, there will be ample opportunity for the Village to draw the jury's attention to any weaknesses in Mr. DeClark's opinions at trial.

There is sufficient similarity between the highest and best uses of the comparable sales offered by Mr. DeClark and the highest and best use of the subject property to permit a useful comparison for the purpose of valuation. Accordingly, the Village's motion to exclude Mr. DeClark's testimony on the basis that the comparable sales are distinguishable should be denied.

II. There is a Reasonable Basis for Comparison Between Sale 2 and the Subject Property.

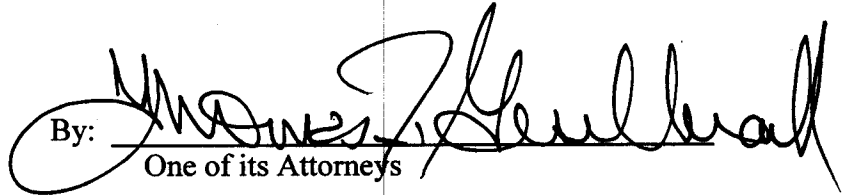
The Village seeks to exclude Sale 2 – Residences at Seven Bridges – on the ground that it is distinguishable from the subject property. Specifically, the Village focuses on differences in the date of sale, the size of the parcel and the specific use of the property. As noted above, complete uniformity between comparable sales and the subject property is not required, nor is it realistic. Further, Mr. DeClark identified features common to both properties – similar density, irregular shape, topography, presence of wetlands, access to arterial roadways. (Village Motion No. 3, Exhibit 2 at 106-107) To the extent the properties were distinguishable, Mr. DeClark made appropriate adjustments. (Village Motion No. 3, Exhibit 1 at 35) The distinguishing features reflect 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. Accordingly, the Village's motion to exclude Sale 2 on the basis that it is distinguishable from the subject property should be denied.

The Village also seeks to exclude Sale 6 – Forest View Subdivision – on the ground that it involved the sale of subdivided lots. The High School District does not object to this portion of the Village’s motion. However, because there is sufficient basis for comparison between the other comparable sales offered by Mr. DeClark and the subject property, the Village’s motion to exclude Mr. DeClark’s remaining comparable sales, and his testimony, should be denied.

WHEREFORE, defendant Community High School District 99 respectfully requests the Court to enter an order allowing the testimony of Gary DeClark except for his Sale No. 6.

COMMUNITY HIGH SCHOOL DISTRICT 99

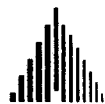
Date: February 28, 2008

By: 
One of its Attorneys

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EXHIBIT A

PENGUIN-Backbone, N. J.

buyer or buyer's agent must confirm the ultimate use for which the comparable was purchased.

For example, an apartment complex purchased for conversion to condominiums may reflect a sale price above the market level for apartment properties. This property would not be an appropriate comparable for the "as is" valuation of an apartment complex for which no change in use is intended or one for which the highest and best use remains apartment use.

In the valuation of vacant land, zoning is one of the primary determinants of the highest and best use of the property because it serves as the test of legal permissibility. Thus, zoning or the reasonable probability of a zoning change is typically a primary criterion in the selection of market data. When comparable properties with the same zoning as the subject are lacking or scarce, parcels with slightly different zoning but a highest and best use similar to that of the subject may be used as comparables. These comparables may have to be adjusted for differences in utility if the market indicates that this is appropriate; on the other hand, a difference in the uses permitted under two zoning classifications does not necessarily require an adjustment if the parcels have the same use.

Sometimes, dissimilarities in sale prices reduced to compatible units—e.g., price of land per square foot of permissible building area—can be attributed to the different zoning classification requirements. For example, because of differences in parking requirements or landscaping requirements, site development costs for two parcels under different zoning classifications may differ even if the parcels have the same highest and best use. These dissimilarities must be considered.

Non-realty Components of Value

Non-realty components of value include personalty, business concerns, and other items that do not constitute real property but are included in either the sale price of the comparable or the ownership interest in the subject property. These components should be analyzed separately from the realty. In most cases the economic lives, associated investment risks, rate of return criteria, and collateral security for such non-realty components differ from those of the realty.

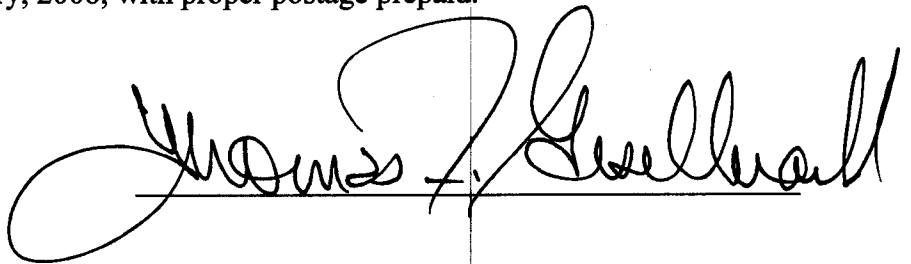
Furniture, fixtures, and equipment in a hotel or restaurant are typical examples of personalty. In appraisals of properties in which the business operation is essential to the use of the realty, the value of the non-realty component must be analyzed. If the value of the non-realty component cannot be separated from the value of the property as a whole, the appraiser should make clear that the value indication using the sales comparison approach reflects both the value of the real estate and the value of the

CERTIFICATE OF SERVICE

I, Thomas F. Geselbracht, an attorney, hereby certify that I caused the foregoing RESPONSE TO VILLAGE MOTION *IN LIMINE* NO. 3, TO BAR DISTRICT 99'S APPRAISER, GARY DECLARK, FROM TESTIFYING TO OR RELYING ON CERTAIN SALES, to be served upon:

Phillip A. Luetkehans
Robert W. Funk
Schirott & 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 28th day of February, 2008, with proper postage prepaid.

A handwritten signature in black ink, reading "Thomas F. Geselbracht", is written over a horizontal line. The signature is cursive and stylized.