

**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

POST-TRIAL MOTION

Defendant Community High School District 99 (the "High School District"), by DLA Piper US LLP, its attorneys, for its post-trial motion pursuant to 735 ILCS 5/2-1202(b), moves to vacate the Final Judgment Order entered on the verdict on April 10, 2008, and states:

I. THE COURT SHOULD RECONSIDER, REHEAR AND VACATE ITS ORDER OF MAY 25, 2007 DENYING THE HIGH SCHOOL DISTRICT'S TRAVERSE, AND DISMISS THE CONDEMNATION.

A. The Village's Proposed Use of the Property Does Not Meet the Statutory Requirements of 65 ILCS 5/11-61-2.

The evidence at the bench trial on defendant's Traverse showed that the Village's real planned use of the Property is not one of the uses qualifying for a taking pursuant to 65 ILCS 5/11-61-2. The Village has authority under § 11-61-2 only to take property for "streets, alleys, avenues, sidewalks, wharves, parks, and public grounds." 65 ILCS 5/11-61-2. In this case, the Village's real purpose in acquiring the Property is to develop portions of the Property with expanded Village facilities, including police and public works facilities. These are not qualifying uses under § 11-61-2.

Because these uses are not specifically included in the very limited list for which § 11-61-2 authorizes the eminent domain taking of public land, the Village lacked authority to condemn.

B. The Court Erred in Denying the High School District Discovery on the Basis of the Village's Determination That the Taking of the Property Is Necessary and Not Detrimental to the Public.

In preparing for the Traverse hearing, the High School District sought discovery as to the basis for the Village's determination that the public need required the taking of the Property for a park. Accordingly, the High School District sought to depose the Village mayor and members of the Village Board and to compel the Village to produce documents related to the Village's ordinances regarding the supposed public need to forcibly acquire the Property from the High School District (the "Village Ordinances"). Because the scope of discovery requested by the High School District was clearly related to the unique issues that arise under § 11-61-2 – namely, whether the taking of the Property is necessary and will be detrimental to the public – the Court erred in denying the High School District this discovery.

To establish the Village's authority under § 11-61-2, the Village had to establish that the taking of the Property would not be detrimental to the public. In this case, there were two competing legislative determinations of the public need, and two competing legislative determinations of what is good for, or detrimental to, the public. The Village Ordinances, declaring that it is "necessary and desirable" for the Village to acquire the Property, stand in stark contrast to the High School District resolution of August 15, 2005 (the "Resolution") determining that the Property is necessary, suitable and convenient to the High School District and further specifying why its taking will be detrimental to the public.

As a case of first impression, the Court should have granted broad latitude in discovery. The Court allowed the Village to obtain discovery regarding the facts underlying the High School District's legislative determination regarding public need, including deposing members of the High School District's Board regarding the basis of their vote on the Resolution. However, the Court

denied the High School District the ability to engage in such discovery with respect to the Village's corresponding determination – a determination that was clearly self-serving, and should have been subjected to more rigorous inquiry.

The High School District's requests for documents and notices of deposition to the mayor and members of the Village Board were narrowly tailored to obtain discovery solely on the issue of whether the taking of the Property by the Village for a park was necessary or would be detrimental to the public. They were calculated to lead to evidence that this Court ruled was subject to discovery – so long as it was from the High School District. Accordingly, the Court erred in denying the High School District's discovery requests, and in ruling irrelevant any inquiry into the basis of the Village's determinations.

C. The Court Erred in Refusing to Grant Legislative Deference to the High School District's Resolution.

The Court felt that the High School District's Resolution was not entitled to deference as a legislative determination because it was "inherently at conflict with itself." (Tr. 5-24 (p.m.) at 147) This finding appears to have been based on mistaken assumptions as to the scope of the High School District's powers, the applicability of the Illinois Property Tax Code, and an erroneous interpretation of the Resolution. The Court does not appear to have fully considered all the evidence supporting the Resolution. The Court erred in failing to give the Resolution proper legislative deference.

First, the Court mistakenly assumed that the only way in which the High School District could realize the taxable value of the Property would be by selling it to a taxable user. (Tr. 5-24 (p.m.) at 147) However, there are several scenarios under which the High School District could own all or a portion of the Property and still realize the Property's taxable value. Loss of the Property to the Village would wholly frustrate the High School District's ability to realize the taxable value of the Property under *any* circumstances. Not only would the Property entirely remain exempt from property taxation due to Village ownership, but the High School District would no longer enjoy any

of the benefits of property ownership that would otherwise offset any burden resulting from the Property's tax-exempt status.

Second, the Court mistakenly dismissed the High School District's assertion in the Resolution that it could not receive full compensation for the Property in the eminent domain lawsuit. Although the High School District would receive what the law defines fair market cash value as "just compensation" in the eminent domain lawsuit, the forcible taking will deny the High School District the many intangible and future benefits incident to property ownership that an eminent domain lawsuit cannot, and is not designed to, recompense, including use for a future school site, use for athletic fields, and investment purposes. (Tr. 5-24 (p.m.) at 163; Tr. 5-25 at 24-25)

Third, the Court concluded that, despite the findings set forth in the Resolution, the High School District does not need a third high school; or, even if it did, the High School District could not build one because it does not have, and cannot obtain, voter approval to finance the construction; and that the Property is not needed for any other school facilities, nor could any be constructed on the Property. These determinations constituted policy conclusions and political prognostications outside the scope of proper judicial authority. They were inconsistent with both the evidence and the High School District's authority and discretion under Illinois law. *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 24-27 (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 (1st Dist. 2004) (circuit court has no authority to decide that school funds should be used to build sidewalks to protect public safety).

The Court should not have relied on the results of various referenda or the community survey in determining that the High School District does not need the Property for school facilities. As a matter of law, in the event appropriate funds become available, the High School District Board may decide to construct a third high school or other instructional facilities without the need to seek voter approval. 105 ILCS 5/10-22.36 (no referendum required where the funds are (i) derived from the

sale or disposition of other land or buildings, (ii) received as a grant under the School Construction Law, or (iii) received as gifts or donations). Further, the High School District has identified facilities other than instructional buildings – primarily, athletic fields – for which the Property is currently needed and to which the referendum requirement does not apply. 105 ILCS 10-22.36 (referendum requirement applies only to buildings to be used for instructional purposes). Except in the narrow case in which a referendum is required under § 10-22.36 of the School Code, popular opinion does not dictate the High School District’s development or disposition of the Property.

D. The Court did not Adequately Consider the High School District’s Existing Use of the Property as an Asset for Investment Purposes, With Which the Village’s Taking Would Materially Impair and Interfere, thus Preventing the Village from Availing Itself of Section 11-61-2.

The Court found that the only existing uses of the Property were those of the Village and the Park District, and that the High School District “has not put [the Property] to any already existing use.” (Tr. 5-25 at 169) The Court did not meaningfully consider that holding the property for investment or future use is itself an “existing use.” Holding real estate for investment purposes is a significant tool for Illinois school districts, as it is the only practical form of long-term mid- to high-yield investment available to school districts permitted by Illinois law. Real estate is also a very attractive investment for school districts – the holding costs of maintaining property as an investment tool are minimal, and with its inherent lack of liquidity and potential to directly fulfill school facility needs, real estate is an asset beyond the reach of claimants who would otherwise seek immediate or short-term use of liquid assets. The significance to school districts of holding real estate for investment purposes is further evidenced by the affidavits previously submitted by the High School District with its Motion to Reconsider from various school superintendents across the State. The High School District’s authority and discretion to hold real estate for investment purposes is confirmed by the Illinois General Assembly’s 1996 action to significantly expand the powers of Illinois school districts to include “all other powers . . . requisite or proper for the maintenance,

operation and development of any school or schools under the jurisdiction of the board,” even if such powers are not specifically listed in the School Code. 105 ILCS 5/10-20.

The Court’s finding did not adequately take into account the High School District’s existing and continued use of the Property as a permissible long-term, high-return investment vehicle. The Village’s taking would entirely terminate and thus materially interfere with this existing use in violation of § 11-61-2. Conversion through condemnation is also detrimental to the public interest, because it would deny the High School District and its taxpayers a long-term growth investment and leave the cash received from the eminent domain proceeding susceptible to outside claimants. This public detriment is compounded by the lack of comparable real estate in which to invest such cash upon this forced liquidation. The taking is thus not authorized by § 11-61-2.

E. The Court did not Adequately Consider the Public Detriment that Would Result from the High School District’s Loss of the Property, Which Would Preclude the Village’s Ability to Take the Property Pursuant to Section 11-61-2.

The Court erred in failing to adequately consider the public detriment that would result from the High School District’s involuntary loss of the Property. The Court’s decision did not specifically support its conclusion that the taking of the Property would not be detrimental to the public and, further, appeared to apply the wrong standard. The Court’s public interest “weighing” of the various uses advanced by the Village, the Park District and the High School District was not appropriate judicial consideration, either in general or specifically under § 11-61-2. Indeed, the question is not whether the use proposed by the condemnor is more or less detrimental to the public than the condemnee’s existing or proposed use; instead, the question is whether the involuntary transfer of title to the Property, and the resulting inability of the High School District to use and control the Property, is detrimental to the public. And, in considering the public interest, the Court should have recognized that the High School District encompasses more territory and more people than the Village of Woodridge. Thus, even if the taking would not be materially detrimental, on balance, to the Village’s public, it would be materially detrimental to the High School District’s public –

particularly to those members of the public who do not reside in Woodridge, will not benefit from the taking and, because they cannot vote in local Woodridge elections, have no ability to participate in any democratic process in response to the Village's legislative decisions.

In this case, losing the Property would entirely thwart the High School District's efforts to use the Property to meet its current and emerging real estate and facility needs and investment goals. Until this suit, the High School District actively pursued developing the Property, initially with a third high school and more recently with athletic or other specific school facilities to fulfill identified and continuing High School District needs to support all its students – not just those residing in Woodridge. The interference with that effort and, ultimately, the High School District's ability to realize the full potential of the Property for school purposes, is particularly devastating in light of the evidence demonstrating that adequate, stand-alone replacement property does not exist in the High School District. Due to its size, central location, condition and available transportation and utility infrastructure, the Property is uniquely suited to meet the High School District's facility needs.

The evidence established that the High School District's loss of the Property would require the High School District in the near future to expend further tax dollars to find suitable replacement land. In the meantime, condemnation would place a large amount of cash in the High School District's coffers that could not be invested long-term and would therefore be susceptible to claims from tax objectors, employee unions and others. Both results would be detrimental to the public.

II. EVEN IF THE COURT ALLOWS THE VILLAGE'S CONDEMNATION TO PROCEED, THE COURT'S RULINGS DENYING LEGITIMATE CROSS-EXAMINATION OF THE VILLAGE'S APPRAISERS AND BARRING ONE OF THE HIGH SCHOOL DISTRICT'S APPRAISERS REQUIRES A NEW TRIAL ON THE AMOUNT OF JUST COMPENSATION.

A. The Court Erred in Barring Cross-Examination on the Village Appraisers' Consideration of an Offer to Purchase the Property by Dartmoor Homes.

The Court erred in barring evidence of Dartmoor Homes' offer to purchase the Property (the "Dartmoor Offer") for the limited purpose of impeaching the Village's appraisal witnesses. The

High School District did not seek to introduce the Dartmoor Offer as direct evidence of value, but instead for the limited purpose of impeaching the Village's appraisal witnesses.

In reaching their conclusions as to the highest and best use and the value of the Property, both of the Village's appraisal witnesses specifically considered the Dartmoor Offer, which consisted of a base purchase price of \$10,000,000, which would be increased by \$160,000 for each single family detached home (up to 127) and \$68,000 for each townhome (up to 54) ultimately approved to be developed on the Property. Although both of the Village's appraisers concluded that the maximum number of dwelling units under the Dartmoor Offer were not the highest and best use of the Property, neither appraiser refuted the Dartmoor Offer formula. Applying this formula to both the Village appraisers' conclusions as to the highest and best use of the Property would result in a significantly higher purchase price for the Property than the Village's appraisers concluded – \$20,320,000 versus the Village's asserted values of approximately \$10,250,000 and \$11,220,000.

The Court's exclusion of the Dartmoor Offer for the limited purpose of impeachment appears to be based on *Department of Public Works and Buildings v. Lambert*, 411 Ill. 183 (1952), and *Illinois State Toll Highway Authority v. Dicke*, 208 Ill. App. 3d 158 (2nd Dist. 1991). However, both of these cases involved efforts to use offers as direct evidence of value. Neither *Lambert* nor *Dicke* involved use of the offers for impeachment purposes, where the opposing party's appraisers had specifically considered the offers. Further, *Dicke* and *City of Chicago v. Anthony*, 136 Ill.2d 169 (1990), on which *Dicke* is based, could find no foundation that offers were the type of evidence that appraisers reasonably relied upon in reaching their conclusions. Here, by contrast, the Village's appraisers each explained that the USPAP appraisal standards actually require appraisers to consider offers made on the property, like the Dartmoor Offer.

Because the High School District sought to use the Dartmoor Offer only for the limited purpose of impeaching the Village's appraisers, both of whom specifically relied on it, neither *Dicke* nor *Lambert* applied. Accordingly, the Court erred in barring use of the Dartmoor Offer.

B. The Court Erred in Barring High School District's Appraiser Gary DeClark from Testifying.

In barring appraiser Gary DeClark from testifying for the High School District, the Court mistakenly concluded that Mr. DeClark's methodology utilized a land residual or subdivision approach to value. In fact, Mr. DeClark utilized the direct sales comparison approach, the commonly accepted approach to valuing vacant land and the approach used by all other appraisers in this case. Accordingly, the Court erred in barring Mr. DeClark from testifying.

In accordance with the direct sales comparison approach, Mr. DeClark considered sales of comparable vacant land. After adjusting for differences between the parcels sold and the Property, Mr. DeClark determined the value of the Property to be \$19,690,000. As is typical appraisal practice, Mr. DeClark first expressed each comparable sale in terms of a unit of comparison. In this case, Mr. DeClark used the unit price of dollars per dwelling unit. He divided the purchase price for each sale property by the number of dwelling units approved to be developed thereon. After making adjustments to the comparable sales prices to account for differences between the sales properties and the Property, Mr. DeClark was then able to determine a value for the Property based upon his conclusion as to the number of dwelling unit that would be the highest and best use of the Property.

Contrary to the Court's apparent assumption, at no time did Mr. DeClark's analysis require him to consider the cost of subdividing or developing the comparable sales properties or the Property – Mr. DeClark's analysis relied solely on sales of vacant land and compared those vacant land sales prices to the Property. The per dwelling unit value that Mr. DeClark distilled for each comparable sale and for the Property was based solely on the vacant land purchase prices, and did not include any adjustment for development costs – because there were no develop costs to account for.

As noted in the High School District's Response to the Village's motion *in limine* seeking to bar Mr. DeClark from testifying, the Appraisal Institute recognizes that appraisers may select different units of comparison for expressing values. The Appraisal of Real Estate at 338 (12th Ed.

2001) (“Unit prices may be expressed as price per square foot, front foot, acre, lot dwelling unit, or other unit used in the market.”); *see also id.* at 425 (listing examples of units of comparison). This method is regarded in the appraisal industry as a “specialized unit of comparison.” As noted by Mr. DeClark, market participants typically compare land and sales prices on a per dwelling unit basis, and such an analysis is especially appropriate where, as in this case, even the Village concedes that value depends upon density. (Village Motion No. 2, Exhibit 1 at 34; Village Motion No. 2, Exhibit 2 at 98) Mr. DeClark’s selection of dwelling unit as the unit of comparison did not require use of a different methodology for determining value than had he selected area as a unit of comparison – the units are merely different means of expressing value under the direct sales comparison approach. Accordingly, the Court erred in barring Gary DeClark’s testimony.

III. CONCLUSION.

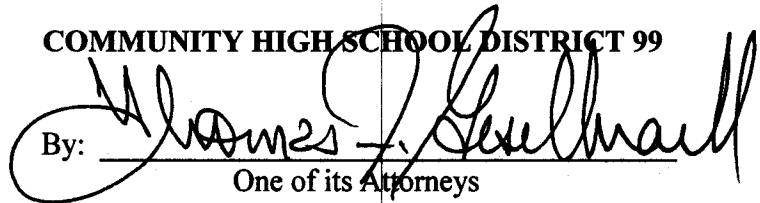
For the reasons stated above, the Final Judgment Order dated April 10, 2008 should be vacated, the order of May 25, 2007 denying the High School District’s Traverse should be vacated, and an order entered instead granting the High School District’s Traverse and dismissing the Complaint for Condemnation.

If the Court does not vacate its order denying the High School District’s Traverse, this Court should nevertheless vacate the Final Judgment Order dated April 10, 2008, and order a new trial on the amount of just compensation.

COMMUNITY HIGH SCHOOL DISTRICT 99

By: _____

One of its Attorneys



Date: April 23, 2008

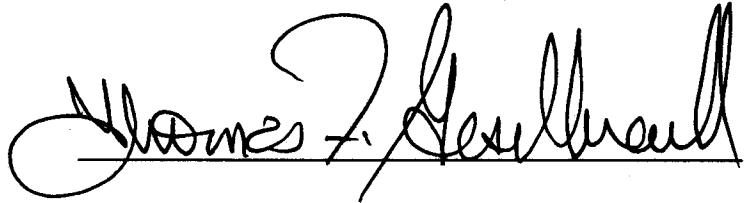
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CERTIFICATE OF SERVICE

I, Thomas F. Geselbracht, an attorney, hereby certify that I caused the foregoing POST-TRIAL MOTION 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 23rd day of April, 2008, with proper postage prepaid.

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