COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

THE CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT	:	**CASE NO. 2010 CVH 02287**
Plaintiff	:	**Judge McBride**
vs.	:	
GATOR MILFORD, LLC, et al.	:	**DECISION/ENTRY**
Defendants	:	

Kegler, Brown, Hill & Ritter Co., L.P.A., Richard W. Schuermann, Jr. and John P. Brody, attorneys for the plaintiff The Clermont County Transportation Improvement District, 65 East State Street, Suite 1800, Columbus, Ohio 43215.

Santen & Hughes, William E. Santen, attorney for the defendant Gator Milford LLC, 600 Vine Street, Suite 2700, Cincinnati, Ohio 45202.

This cause is before the court for consideration of motions in limine filed by both the plaintiff Clermont County Transportation Improvement District and the defendant Gator Milford, LLC.

The court scheduled and held a hearing on the motions in limine on July 11, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motions, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

LEGAL ANALYSIS

"A motion in limine is a motion directed to the inherent discretion of the trial court judge to prevent the injection of prejudicial, irrelevant, inadmissible matters into trial."[1] "A ruling on a motion in limine is only a preliminary interlocutory order."[2]

(A) TESTIMONY OF DEFENSE EXPERTS REGARDING SAFETY ISSUES

The plaintiff requests an order preventing the defendant from offering any expert testimony regarding safety concerns at the subject property.

Essentially, this issue involves testimony that the alterations to the property have removed the ability from one of the access points to make a left hand turn onto State Route 28. Additionally, the defendant argues that, due to the taking, the access points have been shortened and will require a vehicle to turn more quickly into the front outlots. The defense experts posit that this will create a backlog of vehicles out onto State Route 28, thereby creating safety hazards on the defendant's property.

[1] *Mason v. Swartz*, 76 Ohio App.3d 43, 55, 600 N.E.2d 1121, 1129 (Ohio App. 6th Dist., 1991), citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201, 503 N.E.2d 142, 145.
[2] *Fearer v. Humility of Mary Health Partners* (March 14, 2008), 7th Dist. No. 06-MA-84, 2008-Ohio-1181, at ¶ 115, citing *Riverside Methodist Hosp. Assn. v. Guthrie* (Ohio App. 10th Dist., 1982), 3 Ohio App.3d 308, 310, 444 N.E.2d 1358.

"When a government appropriates property, the owner may be entitled to a two-fold remedy. *Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 415, 476 N.E.2d 695. The owner is entitled to 'compensation' for the property actually taken. Id. Compensation is the fair market value of the property. If the taking is only partial, the owner may be entitled to 'damages.' Id. Damages are the injury resulting from the taking to the 'residue' of the property still held by the owner, less any special benefits accruing to the residue from improvements."[3]

"In determining fair market value [for appropriation purposes], there are three recognized methods of appraisal: (1) cost of reproducing property less depreciation, (2) market data approach utilizing recent sales of comparable property, and (3) income or economic approach based on capitalization of net income."[4]

"In Ohio, there is a distinction between the 'compensation' which the state must confer upon the property owner for appropriated land, and the 'damages' the owner suffers as a consequence of the appropriation."[5] " 'Compensation' means the sum of money which will compensate the owner of the land actually taken or appropriated; that is, it is the fair market value of the land taken, irrespective of any benefits that may result to the remaining lands by reason of the construction of the proposed improvement. 'Damages' in the strict sense in which the term is used in an appropriation proceeding, means an allowance made for any injury that may result to the remaining lands (i.e., the 'residue') by reason of the construction of the proposed

[3] *Proctor v. N&E Realty, LLC* (June 16, 2006), 11th Dist. No. 2005-T-0051, 2006-Ohio-3078, ¶ 17.
[4] Id. at ¶ 18, quoting *Pokorny v. Local* 310 (1973), 35 Ohio App.2d 178, 180, 300 N.E.2d 464, reversed on other grounds (1974), 38 Ohio St.2d 177, 182, 311 N.E.2d 866.
[5] *Proctor v. Costal Bros.* (Dec. 1, 2006), 11th Dist. No. 2005-T-0111, 2006-Ohio-6343, ¶ 25.

improvement, after making all permissible allowances for special benefits, and the like, resulting thereto."[6]

In the case of *Ritchley v. Jones* (1974), 38 Ohio St.3d 64, 310 N.E.2d 236, the Ohio Supreme Court stated that "[c]onsequential damages are generally noncompensable on the theory that: '* * * Whatever injury is suffered thereby is an injury suffered in common by the entire community; and even though one property owner may suffer in a greater degree than another, nevertheless the injury is not different in kind, and is therefore damnum absque injuria.'"[7]

In the case at bar, the petition states that the project at issue stretches between the Bypass of State Route 28 and Cook Road in Milford. Both parties acknowledge that there are other business and owners along this length of property. Therefore, any inconvenience of the shortening of access drives and the shortening of the distance between businesses and State Route 28 is an injury or consequence suffered equally amongst the property owners on that road and is not unique to the property owned by the defendant. Therefore, any alleged safety injury due to the taking to widen the road would be suffered by the community as a whole and Gator Milford, even assuming it has suffered in some greater degree than other property owners, has not suffered an injury different in kind.

As a result, the motion in limine to restrict evidence pertaining to safety issues shall be granted.

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[6] Id. at ¶ 26, quoting *Wray v. Mussig* (Sept. 20, 1996), 11th Dist. No. 95-L-172, 1996 WL 586755.
[7] *Ritchley* at 68-69, quoting, Robert Mitchell Furniture Co. v. C. C. C. & St. Louis R. R. Co. (1900), 7 N.P. 639, affirmed, 65 Ohio St. 571, 63 N.E. 1133. See, also, 2 Nichols, Eminent Domain (3 Ed.) Sections 6.38 and 6.4; 2A Nichols, Eminent Domain (3 Ed.), Sections 6.4432 and 6.45; 1 Orgel, Valuation Under Eminent Domain (2 Ed.), Sections 3 and 4.

(B) FACTORS CONSIDERED BY ERIC GARDNER

The plaintiff seeks to exclude the testimony of defense expert Eric Gardner based on the factors he considered when formulating his appraisal, specifically safety issues, placement of the median, and circuity of travel.

The issue of testimony regarding "safety issues" has been addressed in the section above.

With regard to the median, Gardner will testify that the placement of the median and its effect of reducing one access point to a right-in, right-out only drive reduces the highest and best use from potential retail uses to small office use.

However, the placement of the median strip could have been done, with or without the take, at any time under the state's police power.[8] In *Ritchley*, "the Supreme Court found that the construction of a median strip on land appropriated for highway purposes which restricted left hand turns into a business property was not a compensable damage to the residue because it was placed there by the proper exercise of police power and circuity of access to the property was created."[9] In fact, the syllabus of the *Ritchley* case specifically states that "[w]here a median strip constructed on land appropriated for highway purposes causes inconvenience, but not loss of access, such inconvenience is not a compensable damage to the reside."[10]

In the case of *Proctor v. NJR Properties, LLC* (Feb. 25, 2008), 12th Dist. No. CA2007-02-028, the appellate court discussed the following:

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[8] *City of Steubenville v. Schmidt* (Dec. 13, 2002), 7th Dist. No. 01JE13, 2002-Ohio-6894, ¶ 18, citing *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 762, 607 N.E.2d 1155.
[9] Id.
[10] *Ritchley*, supra, paragraph three of the syllabus.

> "In a partial takings case, the owner is entitled to receive compensation not only for the property taken, but also for any damage to the residue as a result of the take. *Proctor v. French Hardware,* Fayette App. Nos. CA2002–06–010, CA2002–06–019, CA2002–06–021, CA2002–06–022, and CA2002–06–023, 2003-Ohio-4244, 2003 WL 21904848, citing *Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 415, 16 OBR 481, 476 N.E.2d 695. See also *Englewood v. Wagoner* (1987), 41 Ohio App.3d 324, 326, 535 N.E.2d 736. Damage to the residue is measured by the difference between the fair market values of the remaining property before and after the taking. *Englewood*. See also *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 763, 607 N.E.2d 1155. When determining the fair market value of the remaining property before and after the taking, those factors that would enter into a prudent businessperson's determination of value are relevant. *Norwood* at 415, 16 OBR 481, 476 N.E.2d 695. Factors may include loss of ingress and egress, diminution in the productive capacity or income of the remainder area, and any other losses reasonably attributable to the taking. *Proctor v. Thieken,* Lawrence App. No. 03CA33, 2004-Ohio-7281, 2004 WL 3090252, at ¶ 24. See also *French Hardware* at ¶ 12 (finding that access to the residue as well as any other item that may decrease the value of the residue may be considered in determining damages to the residue).
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> The law makes clear that property owners in a partial takings case can recover compensation for any damage to the residue resulting from the appropriation. See *Englewood,* 41 Ohio App.3d at 326, 535 N.E.2d 736 (stating that property owner can recover "compensation for any damage to the landowner's remaining property [the residue] as a result of the take"). Therefore, if a partial taking affects the property owner's access to the remainder of the property, that factor can be considered in determining damage to the residue. (Citation omitted.) *Thieken* at ¶ 25."[11]

However, unlike in the case at bar, the appropriation and construction of improvements in the *NJR Properties* case resulted in the complete loss of the formerly available right-in access at Montgomery Road.[12] This result meant that a business

[11] *Proctor v. NJR Properties, LLC* (Feb. 25, 2008), 12th Dist. No. CA2007-02-028, at ¶¶ 15-16.
[12] Id. at ¶ 28.

which formerly had access points at both Montgomery Road and Crestview Drive was now relegated to a single access point (Crestview Drive).[13] In the case at bar, the property at issue still has two access points at State Route 28. One of those access points has been reduced to right-in, right-out only access, but access to the road still remains. Consequently, the analysis contained in the *NJR Properties* case is distinguishable from the case at bar.

Similarly, in the case of *Proctor v. Hankinson* (Aug. 20, 2009), 5th Dist. No. 08CA0115, 2009-Ohio-4248, the Ohio Department of Transportation objected to any testimony relating to the defendant's loss of access to State Route 161, arguing that the "loss of direct access to S.R. 161 caused by the appropriation was not compensable as damage to the residue."[14] The trial court allowed testimony regarding access to the property.[15] However, in that case, the testimony at issue was that *removal of direct access* to State Route 161 and the creation of service roads to the properties were factors in his determinations that the highest and best use of the property went from commercial and/or residential development to no commercial development, and in his opinion, reduced the fair market value of the parcels.[16] Such a situation is distinguishable from the restriction of left-turn access at one access point in the case at bar.

The defendant argues that the case of *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati* (2008), 118 Ohio St.3d 131, 886 N.E.2d 839, has changed this analysis. When discussing compensation for denial of access from developed or undeveloped

[13] Id.
[14] *Proctor v. Hankinson* (Aug. 20, 2009), 5th Dist. No. 08CA0115, 2009-Ohio-4248, at ¶ 36.
[15] Id.
[16] Id. at ¶ 35.

property, the court noted its prior determination that "[a]n owner of a parcel of real property has a right to access public streets or highways on which the land abuts. Therefore, any governmental action that substantially or unreasonably interferes with this right constitutes a taking of private property within the meaning of Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution."[17] However, the *Hilltop* case also involved property where access to a road (River Road) was completely eliminated due to the erection of a retaining wall.[18]

The court finds that there is nothing in this case which would allow testimony regarding the median as a compensable basis of damages; therefore, such testimony will not be permitted.

Likewise, the court finds that testimony regarding internal circuity within the subject property is impermissible.

"[T]he state may, in the lawful exercise of police power, regulate a property owner's easement of access without compensation so long as there is no denial of ingress and egress."[19] "Generally, in Ohio law, circuity of travel to and from real property is not compensable, but circuity of travel created within the owner's property is compensable.[20] "Circuity of travel within one's own property occurs when one entrance or exit is removed and another is not recreated."[21] Further, "circuity of travel created within the property owner's property is compensable where the burden is placed solely on the owner's property and not on the general public."[22]

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[17] *Hilltop* at ¶ 32.
[18] Id. at ¶ 9.
[19] *State ex rel. Habash v. Middletown* (Dec. 19, 2005), 12th Dist. No. CA2005-04-094, 2005-Ohio-6688, at ¶ 15.
[20] *Hilliard v. First Indus., LP*, 165 Ohio App.3d 335, 846 N.E.2d 559, 2005-Ohio-6469, at ¶ 26 (Ohio App. 10th Dist., 2005).
[21] Id.
[22] *Habash* at ¶ 16.

In *State ex rel. Habash v. Middletown* (Dec. 19, 2005), 12th Dist. No. CA2005-04-094, 2005-Ohio-6688, the court held that the "public improvement does not create internal circuity of travel, as it has not removed an entrance or exit without creating a new one. Rather, appellee has essentially reduced the size of the apron between appellants' parking lot and Cin-Day Rd. by constructing a curb and two 15-foot aprons to regulate the flow of traffic to and from appellants' property from the road."[23]

In the case at bar, the ability to make a left-hand turn into and out of one access point on the subject property has been eliminated, which the defendant argues creates circuity of travel within its property. However, this is not a case where one entrance or exit has been removed and another was not recreated. Customers driving on the subject property can still exit and enter the property at this access point, they simply must do so making a right-hand turn. The other option for these customers is to drive to the other access point to make a left-hand turn, which is a choice in the hands of those driving on the property. This is not the elimination of access at either point; it has merely restricted the choice of which way one can turn at one of the access points. Therefore, no circuity of travel is forced by the restriction, instead it is each driver's choice how they wish to enter and exit the property. However, there has been no elimination of ingress and egress at one point entirely which has forced circuity of travel within the property.

Consequently, the court has determined that Eric Gardner considered several impermissible factors when calculating the damages to the subject property. Since Gardner himself stated in his deposition that he cannot separate out the various factors, the court can see no option before it other than to disallow his testimony as it would currently be given at the trial on this matter.

[23] Id. at ¶ 17.

(C) VALUATION METHODOLOGY USED BY ERIC GARDNER

The court finds that the motion to exclude the testimony of Eric Gardner based on improper valuation methodology is rendered moot

(D) DEFENDANT'S MOTION TO EXCLUDE ARGUMENT IT IS NOT ENTITLED TO DAMAGES FOR LOSS OF ACCESS

The issues raised by the motion are the same as those discussed in the previous section. As a result, the motion in limine shall be denied.

(E) TESTIMONY REGARDING BUSINESS LOSSES

The plaintiff seeks to prevent the defendant from offering evidence or testimony regarding loss of business income.

The court in the case of *Cincinnati v. Banks*, 143 Ohio App.3d 272, 757 N.E.2d 1205 (Ohio App. 1st Dist., 2001), set forth the following summary of Ohio law as it relates to the loss of business income in appropriation cases:

> "The city predicates its challenge to the admissibility of evidence of lottery profits or net operating income on the 'business losses' rule. See Oswald, Goodwill and Going Concern Value: Emerging Factors in the Just Compensation Equation (1991), 32 B.C.L.Rev. 283. The business-losses rule is a judicial construct that holds that the owner of appropriated property may not be compensated for the loss of future profits from any commercial enterprise on the

property. See *Preston v. Stover Leslie Flying Serv., Inc.* (1963), 174 Ohio St. 441, 23 O.O.2d 100, 190 N.E.2d 446, paragraph five of the syllabus; *Sowers v. Schaeffer, supra,* at 459, 44 O.O. at 421-422, 99 N.E.2d at 317. The theory underlying the application of the rule by Ohio courts to deny compensation for lost future profits is that commercial profits 'depen[d] * * * upon the acumen and skill of the one who carries on the business,' *Sowers v. Schaeffer, supra,* at 459, 44 O.O. at 421, 99 N.E.2d at 317, and thus the '[l]oss of future profits * * * is too speculative and uncertain for an accurate and satisfactory measurement of the [appropriated property's] present value * * *.' *Preston, supra,* paragraph five of the syllabus. The rule has, in turn, provided a basis for the exclusion from appropriation proceedings of evidence of lost future profits on the ground that such profits are not relevant to a determination of the issue of just compensation or that the admission of such evidence might confuse the jury and lead to an improper award.

The business-losses rule does not, however, erect an insuperable barrier to compensation of the property owner for lost future profits. Rather, the rule requires the trial court to 'look to the evidence to determine whether it is of such a character as to take the determination of [lost future profits] out of the field of speculation.' Thus, compensation for lost future profits may be permitted if such profits can be 'proved with reasonable exactitude.' *Preston, supra,* at 447, 190 N.E.2d at 451.

Nor does the rule, as the city would have it, compel the exclusion of any and all evidence of profits or income generated by a business operated on appropriated property. It is axiomatic that evidence that is inadmissible for one purpose may be admissible for another purpose. Thus, in *Sowers v. Schaeffer, supra,* the Ohio Supreme Court acknowledged that, '[a]s a rule, profits from commercial businesses on [appropriated] premises can not be shown.' The court noted, however, that an estimation of the value of appropriated property necessarily entails an inquiry into 'its best and most valuable uses.' The court thus held that testimony to income from the rental of summer dwellings on appropriated property was admissible 'to show the kinds of businesses to which the premises [were] adaptable.' *Id.* at 458-459, 44 O.O. at 421-422, 99 N.E.2d at 317."[24]

[24] *Banks* at 285-286.

The defendant will not be permitted to present testimony regarding K-Mart and that company's exit as their tenant in order to prove future commercial losses as part of its requested damages. The court would note that its rulings on the issues in the sections above regarding testimony as to safety issues, circuity of travel, and placement of the median are equally applicable to this topic and evidence of these issues will not be permitted under the rubric of demonstrating "business losses."

The court would also note that if the defendant intends to introduce evidence regarding K-Mart's decision to leave to site or other internal K-Mart information, such evidence would appear at first blush to suffer a serious hearsay problem. However, since defense counsel has not determined how any such information would be presented, there is nothing definite at this time for this court to rule upon. For the purposes of ensuring that the trial runs as smoothly as possible, the court will order that, before attempting to introduce any information regarding K-Mart and its exit from the premises, that defense counsel obtain an evidentiary ruling in advance.

If the defendant has an alternative purpose for introduction of evidence regarding K-Mart, including to show the best and most valuable use of the property, the defendant must first demonstrate to the court how it intends to present admissible testimony on this issue that is not subject to the hearsay rule. Once such a showing has been made, the court will then rule on the issue of whether the evidence as it is intended to be presented falls into one of the exceptions to the "business losses" rule.

(F) FINANCIAL STATUS OF GATOR INVESTMENTS AND JAMES GOLDSMITH

The defendant seeks to exclude "references to the financial status of Gator Investments" and "any references to the financial status of James Goldsmith."

The defendant correctly notes that the wealth and net income of Gator Investments and/or James Goldsmith has no bearing on the facts of the present case and, therefore, would be inadmissible. The plaintiff has indicated it has no intention of inquiring into the wealth or net income of the plaintiff or its principal.

The plaintiff does note that it may have some inquiry into James Goldsmith's general experience in the commercial real estate industry. This would appear to be an appropriate inquiry, although the court cannot rule on such a matter prior to trial without knowing specifically what questions plaintiff's counsel is going to ask on this topic.

Therefore, the motion in limine shall be granted on a limited basis to specifically prevent inquiry into the wealth or net income of Gator Investments and James Goldsmith, although such an order appears to be unnecessary as plaintiff has no intention of reaching these issues. Any remaining inquiries by the plaintiff that deal with the experience or success of James Goldsmith in the commercial real estate industry will be ruled upon at trial when the court can consider the appropriateness of the questions asked by plaintiff's counsel.

(G) MOTION TO EXCLUDE PRIOR APPRAISALS OF THE PROPERTY

The defendant seeks to exclude references or evidence of prior reports, appraisals, testimony or other information from prior appraisals of the subject property performed by defense expert Eric Gardner.

The defendant argues that the prior reports were prepared based on the petitioner's previous petitions. The plaintiff has filed two amended petitions during the pendency of this case. The parties in this case disagree as to the significance of the changes between the second amended petition and the first amended petition. Both parties agree that there were changes to the right-of-way but they disagree as to the effect of these changes.

A prior appraisal of the subject property done in response to the action filed in the present case is relevant evidence. The plaintiff can question Eric Gardner regarding the differences between his two appraisals and Gardner, as an expert witness on the subject of appraisals, should be able to explain why his opinion as to damages increased after the second petition was filed.

However, the court would caution the parties and their witnesses to not refer specifically to any prior petitions filed by the plaintiff. "An amended pleading, once properly filed, replaces the original complaint."[25] Once a party chooses to amend their pleading, the amended pleading supersedes the original pleading and the original pleading is thereafter treated as nonexistent.[26] Therefore, while there can be references to the changes to the appropriation, the improvements, the breadth of the

[25] *Barnes v. Beechwood* (Aug. 3, 2006), 8th Dist. No. 87100, 2006-Ohio-3948, ¶ 9. See, also, *Morris v. Morris*, 189 Ohio App.3d 608, 939 N.E.2d 928, ¶ 32 (Ohio App. 10th Dist., 2010).
[26] Id.

take, etc., it would be improper for any party to this case to refer specifically to any petition filed before the second amended petition because those prior petitions have been superseded and are to be treated as nonexistent.

(H) "BEST PRACTICES" TESTIMONY BY JOHN GALLAGHER

The defendant seeks to exclude "any references or arguments regarding 'best practices' in transportation and safety" by the plaintiff's expert John Gallagher. The defendant argues that Gallagher should testify to a reasonable degree of engineering certainty as opposed to the "best practices" in transportation and safety.

At the hearing on this matter, counsel for the plaintiff indicated that Gallagher will be asked to testify to a reasonable degree of engineering certainty at trial. The court sees no prejudice or surprise to the defendant if Gallagher offers what will essentially be the same opinions as set forth in his expert report but couches his opinions in terms of a reasonable degree of engineering certainty as opposed to best practices in the industry.

The court will grant the motion in limine only to note that Gallagher's expert testimony will need to be stated to a reasonable degree of engineering (or other relevant industry) certainty in order to comply with *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579, 593-594.

(I) MOTION TO EXCLUDE EXPERT TESTIMONY BY JOHN SMILEY

The defendant seeks to exclude the expert testimony of John M. Smiley, arguing that he lacks the proper qualifications to offer opinions regarding the damages caused by the taking and that his opinion testimony will be speculative.

John Smiley is the president of Land Strategies, a land development firm. Smiley's curriculum vitae states that he has served as a consultant/developer on commercial and residential site development, with his commercial experience including projects such as retail centers, office parks, and development projects for companies such as Walgreens and CVS Pharmacies. In his current position, Smiley assists clients with such matters as land development, market research and analysis, comprehensive site analysis, and site selection. Previously, Smiley was employed by corporations such as McDonald's and Kentucky Fried Chicken as a real estate manager/representative.

The plaintiff argues that Smiley's testimony will be used to rebut the testimony of Eric Gardner as to the highest and best use of the outlots on the property. Specifically, the plaintiff intends for Smiley to testify to a comparison of the suitability for commercial development of the outlots before and after the take. The plaintiff has specifically stated that it is not offering Smiley's as an expert in the area of real estate valuation.

Pursuant to Evidence Rule 702:

> "A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

The court has read the opinion statement of John Smiley included in the plaintiff's proposed exhibits. It is a short one-page letter and a second page listing attributes of the site as "good," "better," "unchanged," etc. There is little detail about how his conclusions were formulated or what standards went into concluding how to rate the listed attributes in the chart on the second page. John Smiley was not deposed by either party and, as a result, the court has no information before it other than this short report. In order to best examine his opinions and their reliability thereof, the court finds that it would be prudent to hold a hearing during which Smiley could testify essentially as he would at trial so the court has a better understanding of the opinions he seeks to offer and the basis for those opinions. The court will schedule the hearing for the morning of one of the days of trial and a specific date will be discussed with counsel at the hearing on exhibits to be held on August 9th.

(J) REFERENCES TO THE BOARD OF ZONING APPEALS

The defendant seeks to exclude any and all references to possible future actions by the Board of Zoning Appeals. The plaintiff seeks to introduce the testimony of the Miami Township Administrator who is to testify that he would have been supportive of a request for a zoning variance had one been made by the defendant.

The court finds that the plaintiff can ask James Goldsmith if he applied for a zoning variance, as this particular question and answer would be relevant. However, the court finds that evidence that an official would have been supportive of any such request is not relevant and is purely speculative. The Board of Zoning Appeals has the sole discretion in determining the outcome of a variance request.[27] To present testimony that a township administrator would have supported a variance request made by the defendant offers no relevant information and seeks only to lead the jury to speculate that a variance would have been granted by the Board of Zoning Appeals had it been requested.

The court finds that the motion in limine to exclude references to possible future actions by the Board of Zoning Appeals shall be granted.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

[27] See, R.C. 519.14(B).

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 8th day of August 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride