UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CATHOLIC HEALTHCARE INTERNATIONAL, INC., *et al.*, Plaintiffs, v. GENOA CHARTER TOWNSHIP, *et al.*, Defendants.	No. 21−cv−11303−SDK−DRG Hon. Shalina D. Kumar Magistrate Judge David R. Grand

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO EXCLUDE THE OPINIONS OF DEFENDANTS' "EXPERT" SCOTT BOHLEN UNDER FED. R. EVID. 702

ISSUES PRESENTED

1. Whether Scott Bohlen's ("Bohlen") proposed opinions must be excluded under Fed. R. Evid. 702(c)-(d) because, although he identified a client-specific methodology for determining suitable property, he admitted that he did not apply that methodology to Catholic Healthcare International, Inc. ("CHI").

2. Whether Bohlen's proposed opinions must be excluded under Fed. R. Evid. 702(c)-(d) and 402 for lack of relevance as Bohlen could not determine if the properties in his report were actually available to CHI.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Evid. 702(c)-(d)

Fed. R. Evid. 402

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)

United States ex rel. TVA v. 1.72 Acres of Land, 821 F.3d 742 (6th Cir. 2016)

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

Livingston Christian Schs. v. Genoa Charter Twp., 858 F.3d 996 (6th Cir. 2017)

ARGUMENT IN REPLY

The Township's everything-and-the-kitchen-sink response does not cure the fundamental problem with Bohlen's expert report: he did ***not*** use "the process [he] utilize[s] to identify potential properties for a client's desired use" to come up with the five properties listed in his report. When asked whether he used his stated process to come to the conclusions in his report, he unequivocally answered: "No." (Bohlen Tr. 37:2-5, ECF No. 175-24, PageID.7986). His report is thus inadmissible and the Township cannot use Google Maps to navigate around this conclusion.

I. Bohlen Did Not Reliably Apply a Reliable Methodology.

The Township's response ignores the requirements of Rule 702: "To be admissible, any relevant scientific or technical evidence must be the 'product of reliable principles and methods' and must have been 'reliably applied' in the case. That is what matters most." *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021). Instead, the Township asks this court to ignore Bohlen's own methodology to allow speculations because Bohlen has been a realtor for twenty-five years. But experience-based experts cannot provide "assumptions" or "guesses." *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008).

Expert opinions "must include how and why the expert reached a particular result, not merely the expert's conclusory opinions." *Williams v. Syphan*, No. 22-3222, 2023 U.S. App. LEXIS 2554, at *8 (6th Cir. Jan. 31, 2023) (cleaned up).

The Township's broad claim that any method was followed is belied by Bohlen's deposition. (*See* Defs' Resp. at 13, ECF No. 184, PageID.9070). He did not know CHI's actual aesthetic, environmental, or contemplative requirements, (Bohlen Tr. 38:2-40:12, ECF No. 175-24, PageID.7987-89), he did not consider whether the properties identified in his report would also require special land use approval, (*id*. at 62:16-23, PageID.8011), and he did not consider price or value, one of the "more important" factors, (*id*. at 33:20-23, PageID.7982). Bohlen did none of the things he said an expert would do to determine suitable properties.

Bohlen's deposition admissions matter. Courts cannot "put[] some general seal of approval on an expert after he has been qualified but before any questions have been posed to him. The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question. And the problem for the [Township] is that the wheels of [Bohlen's] expertise came off the wagon upon basic probing." *United States v. Farrad*, 895 F.3d 859, 883 (6th Cir. 2018) (cleaned up).

While the Township quotes the bumblebee analogy from *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994)[1], it fails to apply its principles. *Berry* does not stand for the proposition that experience-based experts do not need to follow a

[1] Notably too, *Berry* was decided prior to the Supreme Court's ruling that applied *Daubert* to non-scientific testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

method and reliably apply it. Overturning the trial court in *Berry*, the Sixth Circuit held that experience-based expert testimony was inadmissible (*i.e.* not a weight issue). The court concluded that the expert's "methodology was as suspect as his conclusions" because it was cursory and "did not review the underlying facts." *Id.* at 1352. Likewise here, in addition to Bohlen's lack of methodology, his deposition testimony revealed he did not review (or was not provided) the underlying facts:

- "I did not have knowledge of any specific criteria that the plaintiff would have used." (Bohlen Tr. 41:13-14, ECF No. 175-24, PageID.7990);
- "No, I wasn't aware that there was any requirement for [a wooded and secluded area for prayer trails]." (*Id.* at 40:11-12, PageID.7989);
- "I did not do any specific analysis of [the process to get the contemplated project approved through the local municipality]." (*Id.* at 41:17-42:6, PageID.7990-91).

In addition to the categorical denial that he used his methodology to find potential properties, Bohlen was asked individually about every single bullet point of his "process," (*see* Bohlen Report, ECF No. 175-11, PageID.7511-12), and stated unequivocally each time that he did not follow a single point. (Bohlen Tr. 35:4-22 [bullet points 1-3]; 42:14-21 [bullet point 4], 47:2-24 [bullet points 5 & 6], 50:17-23 [bullet point 7], ECF No. 175-24, PageID.7984, 7991, 7996, 7999). Bohlen's list of five properties did not come from any application of a reliable method; it came from a parcel size filter on a realtor site that essentially has the same information as Zillow.

(*Id*. at 118:5-119:18, PageID.8067-68) (explaining that the information on Realcomp is available on other "public facing" sites like Zillow and Homes.com).[2] *See Berry*, 25 F.3d at 1350 ("If everyone knows this, then we do not need an expert . . . .").

This court "must not lose [its] grip on the two 'key handholds' of Rule 702—a reliable methodology, reliably applied." *Williams*, 2023 U.S. App. LEXIS 2554, at *5. Bohlen's report is not admissible.

II. Bohlen's Report is Not Relevant.

For expert testimony to be admissible, it must be relevant. *United States v. Lavictor*, 848 F.3d 428, 441 (6th Cir. 2017) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)). "Rule 702 confers a gatekeeping role on trial judges to ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id*.

All property in existence on earth is not relevant to this Court's analysis, but that is the position that the Township repeatedly takes. Obviously such a position would render RLUIPA completely useless as another property will always exist. Rather, property must be an available, feasible alternative to be relevant. *See Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017).

[2] The Township claims the search was also filtered for vacant land, yet one of only five parcels contains a bowling alley, driving range, putt-putt, and four softball fields, so the application of this "method" is obviously not reliable. (*See* Defs.' Resp. at 13, ECF No. 184, PageID.9070).

"The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry*, 25 F.3d at 1351. The specific question that is relevant here is not whether other properties were available at some point in time in the abstract, but whether other properties were available alternatives *for CHI* when it sought to develop its prayer campus. When asked, Bohlen unequivocally stated that he did not know if the property was available to CHI. (Bohlen Tr. 96:19-21, ECF No. 175-24, PageID.8045) ("There's -- there's really no way to know at that moment in time whether any or all of these properties or any other properties may have been available."); (*id*. at 97:15-16, PageID.8046) ("Without going back in time, it would be hard to identify specific properties that could be available.").

The Township must also show that the properties are feasible for them to be relevant. A rare bottle of aged Jack Daniels is an alternative morning beverage to my homebrewed, morning coffee, but that does not make it feasible. Four of the five properties Bohlen identifies in his report require the exact same special land use approval as the CHI property. The Township's position that these four properties are feasible, alternative locations for the CHI Project begs the question: if these properties are feasible, then ***why not the CHI Property?*** Defendants are in a catch-22 here. If they want to assert these properties are feasible, and thus relevant to the case, then by any and all objective criteria, the CHI Property is a feasible location

for the CHI Project and ***Defendants have conceded this entire case***. If, on the other hand, these properties are not feasible, alternative locations, then Bohlen's report is not relevant and thus not admissible. The Township cannot have it both ways. *United States ex rel. TVA v. 1.72 Acres of Land*, 821 F.3d 742, 750-51 (6th Cir. 2016) (excluding expert testimony because the expert report ignored feasibility and zoning requirements); *see also United States v. City of Troy*, 592 F. Supp. 3d 591, 609 (E.D. Mich. 2022) (rejecting property as a feasible alternative location where it required special land use approval).

The only property that does not require the same special land use approval is not a comparator. It is not in the Township, it has an abandoned bowling alley, it is in the epicenter of a busy commercial district, and it sold for $2 million. (Bohlen Report, ECF No. 175-11, PageID.7511-12; Bohlen Tr. 65:9-13, ECF No. 175-24, PageID.8014). This is as dissimilar from the $1 serene and wooded CHI Property as a 16 oz. morning Jack is to a 16 oz. morning coffee. This lack of relevance is not surprising. As explained *supra*, Bohlen had no idea what CHI's specific needs and requirements were. Without knowing CHI's needs, Bohlen could not possibly opine on a feasible alternative.

It is important to note that this is not a fact dispute; it is an issue of law for the Court. *See Livingston Christian*, 858 F.3d at 1001 ("the substantial-burden inquiry [of which feasible alternative locations is a factor] . . . is a question of law"); *see*

also City of Troy, 592 F. Supp. 3d at 609 (rejecting at summary judgment a town's assertion that certain properties were feasible alternative locations).

The Township "point[s] out that 'rejection of expert testimony is the exception, rather than the rule.' That is presumably because most experts satisfy each feature of the Rule 702 inquiry." *Williams*, 2023 U.S. App. LEXIS 2554, at *13-14 (internal citation omitted). But that does not lessen the "whole point of *Daubert* . . . to ensure that is always so, not that it is sometimes so." *Id*. (citing cases where the Sixth Circuit has upheld the exclusion of expert testimony).

CONCLUSION

The Court should disregard or strike every portion of Defendants' motion for summary judgment or supporting record that relies on Bohlen's report or testimony.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (Ariz. Bar No. 009616; DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
6218 Georgia Ave NW, Suite 1#403
Washington, D.C. 20011
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Robert J. Muise, Esq. (P62849)
Kate Oliveri, Esq. (P79932)
P.O. Box 131098
Ann Arbor, Michigan 48113

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2026, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/ *David Yerushalmi*
David Yerushalmi, Esq.