

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-003148

08/01/2024

HONORABLE SCOTT A. BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

AMERICA M YOUNG

WILLIAM MORRIS FISCHBACH III

v.

CITY OF PHOENIX, THE

ANDREW ABRAHAM

GIANNI PATTAS
DAVID BARLOW
DARYL D MANHART
JUDGE BLANEY

RULING

The Court has reviewed and considered Defendant's *Motion on Evidence, Argument, Jury Instructions as to Future Rights to Use Property Versus Existing Rights*; Plaintiff's *Response to Defendant's Motion on Evidence, Argument, Jury Instructions as to Future Rights to Use Property Versus Existing Rights*; and the record in this case.

Defendant's *Motion* seeks to preclude evidence and argument by Plaintiff regarding highest and best use or possible variances which may or may not be granted and which arguably might increase the value at some future time. Defendant seeks a similar ruling with regard to any jury instructions.

THE COURT FINDS as an initial matter that Defendant's *Motion* is an untimely motion *in limine*, filed eight business days prior to the start of trial. The Court recognizes that the Court permitted the briefing after Defendant raised the issue at the final trial management conference. But Defendant should have been able to identify this issue and immediately alert the Court, at the very latest, when Defendant received Plaintiff's proposed jury instructions. The delayed identification of this critical issue has left the Court scrambling to search the docket for relevant

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prior rulings from the undersigned judge and the judge previously assigned to this four-year-old case.

Plaintiff relies on Judge Mahoney's prior ruling on the City's *Daubert* motion, arguing "[f]ollowing briefing and a formal *Daubert* hearing, the [C]ourt denied the City's *Daubert* motion because 'Mr. Brown's opinions are both relevant and reliable.'" *Response* at 2. But Judge Mahoney's ruling is unhelpful to the present issue because, in ruling "from the bench," she did not provide an analysis of why the opinions were relevant and reliable.

Defendant relies on the Court's August 16, 2022 ruling on Plaintiff's *Motion for Partial Summary Judgment*, arguing that it is law of the case that "just compensation" is determined as of the specific date on which the land use law is enacted, not what the property could be worth on some future date. *Motion* at 3. Defendant's argument has some merit.

THE COURT FINDS, however, that Plaintiff is not arguing for an increased valuation based upon some future date. As the Court understands Plaintiff's argument, Plaintiff is arguing that the property's value should be determined based upon the specific date on which the land use law is enacted, and that value should include whether the property owner could have reasonably expected on that date that variances would be available. Framed in that manner, Plaintiff's arguments do not violate the law of the case because they do not rely on future value after the actual granting of a particular variance – they rely on present value, and included in that valuation is an expectation that variances would be available to the property owner.

THE COURT FURTHER FINDS that it cannot rule on whether Plaintiff's arguments regarding possible variances are too speculative until the Court hears the actual testimony and any associated foundation for the opinion. But it appears that Defendant's challenge to the expert testimony would be more appropriately addressed through vigorous cross-examination. *See State v. Bernstein*, 237 Ariz. 226, 231 ¶ 22 (2015) ("[C]ross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") (citing Ariz.R.Evid. 702 cmt. (2012)). The Court recognizes that the Court's role as gatekeeper does not supplant "traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony." *Preston v. Amadei*, 238 Ariz. 124, 134-35 (App. 2015) (disapproved of on other grounds by *Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160 (2017)).

IT IS THEREFORE ORDERED denying Defendant's *Motion* in part. Plaintiff is permitted to present evidence of the valuation of the property consistent with the ruling above. But the Court will withhold ruling on Defendant's speculation objection until such time as the testimony is elicited at trial.