

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

MURFAM ENTERPRISES LLC,	)	
WENDELL MURPHY, JR.,	)	
TAX MATTERS PARTNER, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 8039-16, 14536-16,
	)	14541-16.
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

Trial in this case will begin on August 6, 2018. In the past week the parties have filed numerous motions *in limine* seeking the exclusion of expert witness reports on various grounds. We address in this order two of the Commissioner’s motions *in limine*. The first, filed on July 24, 2018 (Doc. 63), seeks to exclude from evidence an expert report signed by Mark P. Ashness, and the second, filed July 26, 2018 (Doc. 73), seeks to exclude from evidence an expert report signed by Dr. Kelly Zering. The petitioners (collectively, “Murfam”) have since filed their respective oppositions (Docs. 76, 77) to the Commissioner’s motions.

**Background**

**Ashness report**

Mr. Ashness’s expert report consists of a one-page letter signed by him, to which are attached a page entitled “Master Planned Community Experi[e]nce” with eleven entries listed, and three maps entitled “First Draft Capacity Plan” (dated December 3, 2010), “Capacity Plan for River & Landings Course” (dated June 4, 2018), and “Capacity Plan for River & Landings Course” (dated June 20, 2018). The opinion identifies Mr. Ashness as a Professional Engineer and after his

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name lists the credential “LEED AP”, which according to an Internet search stands for “Leadership in Energy & Environmental Design / Advanced Professional” as certified by an entity called “U.S. Green Building Counsel”. His opinions are stated in a single paragraph that reads:

The Capacity studies we prepared were intended to maximize the development potential of these specific areas along with maintaining acceptable engineering and land planning practice. Based upon our experience working in Duplin County; it is my opinion that each of the areas analyzed [*sic*] is compliant with the Duplin County Subdivision Ordinance; which allows for smaller lot size and setbacks with the requirement that a minimum of 25% open space is provided. The Capacity Exhibit includes a table reflecting the potential area delineated (using our base maps) as open space, road right-of-way, and lots within each golf course. Existing ponds and other natural areas on each course were left as open space on our capacity study. Each course still has over 25% open space remaining after the capacity study (see exhibit).

The first and second of Mr. Ashness’s maps appear as exhibits in two of Murfam’s expert reports, both by A. Franklin Dean, MAI--i.e., as Exhibit A to his December 27, 2010, appraisal report of “The River Course”, and as Exhibit A to his December 27, 2010, appraisal report of “The Landing Course”.

The Commissioner alleges that Mr. Ashness’s report fails to comply with Rules 143(g)(1)(A)-(D) because it fails to completely state Mr. Ashness’s opinions, and fails to provide the facts or data he considered in forming his opinions, to contain exhibits or information used to summarize his opinions, and to adequately state his qualifications. The Commissioner also contends that the report is not relevant, notes the very brief one page of text, and argues that the report is missing critical information regarding its purpose, that it fails to explain the report’s methodology, and that it fails to assist the Court with the question of valuation.

On the July 27, 2018, conference call between the parties, Murfam reiterated the argument contained in their response (Doc. 77) that Mr. Ashness’s report was an example of “the Murphys [going] the extra mile of asking the civil engineering firm to supply a letter confirming that the map reflects compliance with the Duplin County Subdivision Ordinance green space rule and permitted smaller lot size.” (Doc. 77 at 3, ¶ (iii)). They allege that the information contained in Mr. Ashness’s

report is a type of foundational data that is commonly relied upon by appraisers, and therefore does not require a separate expert report under Fed. R. Evid. 703.

### Zering report

Some of the property relevant to this case had previously been approved for use as a hog farm, and the expert report signed by Dr. Zering opines about characteristics of such farms. The three “References” listed at the end of report include a March 2011 article by Dr. Zering entitled, “To be or not to be Premium Pricing of Swine Facility Farm Sales in a de facto Moratorium Environment: The Case of North Carolina”. Dr. Zering’s report cites to his 2011 article in support of the opinion that property as to which a permit has been issued for hog farming (“permitted property”) commands a premium value, and the report reproduces tables from that article giving summary statistics of the monetary values associated with specific types of swine farms and their various attributes. In discovery the Commissioner sought from Murfam and Dr. Zering the data underlying the conclusions stated in Dr. Zering’s 2011 article, and reproduced in his expert report, but Murfam and Dr. Zering did not provide that information.

In his July 26, 2018, motion *in limine* the Commissioner seeks to exclude from evidence Dr. Zering’s report altogether for his failure to include in the report (or in the alternative, his failure to subsequently make available to the Commissioner) the underlying data that was used in forming his opinions about the premium associated with the sale of permitted properties.

Murfam argues that Dr. Zering does not opine on the value of the property subject to the conservation easement but instead opines that there is a premium value associated with permitted property, for which Dr. Zering cites his March 2011 article. Murfam says it offers his report for the conclusion that “the value of the undisputed per-head premium ... remains a helpful contextual description of the consequences of the [hog permit] moratoriums.” (Doc.76 at 3, ¶ (vi)).

## Discussion

### I. Mr. Ashness’s report

Under Rule 143(g)(1), the Tax Court requires parties to include certain information with their expert reports, and the Commissioner contends that Mr. Ashness’s report fails to do so. Mr. Ashness’s report is indeed extremely economical, in that it attempts to comply with all of Rule 143(g)(1)’s requirements

in one page plus attachments, but we do not conclude that it fails to meet those requirements. Mr. Ashness's professional credentials are indeed tersely presented, and at trial the Commissioner will have the opportunity to probe them. It is true that the report by itself does not speak to the valuation of the subject property, but that is not its purpose. Its purpose, instead, is to render the opinion that the development plans reflected on the maps are in compliance with the zoning ordinances.

Murfam maintains that Mr. Ashness's report is separately submitted out of an abundance of caution. Murfam contends that maps like those Mr. Ashness validates are reasonably relied on by appraisers and could properly be incorporated into the appraisal reports of A. Franklin Dean even without a separate expert opinion by the engineer. Federal Rules of Evidence 703, allows an opining expert to reasonably rely on certain information, and such information need not be admissible for the opinion itself to be admitted. Accordingly, we will deny without prejudice the Commissioner's motion *in limine* to exclude Mr. Ashness's report because we expect that, as Murfam alleges, the appraiser who relies on underlying facts given in Mr. Ashness's maps will validate them as routinely relied on by valuation experts. The Commissioner may renew his motion at trial, if he perceives that Mr. Ashness's expertise is lacking or that Murfam attempts to rely improperly on Mr. Ashness's report.

## II. Dr. Zering's report

Rule 143(g)(1) requires that a report prepared by an expert witness contain: (A) a complete statement of all opinions the witness expresses and the basis and reasons for them; (B) the facts or data considered by the witness in forming them; and (C) any exhibits used to summarize or support them. The Commissioner contends that Dr. Zering's report violates this rule because the underlying data summarized in Dr. Zering's March 2011 article was not provided in the expert report or produced to him, pursuant to his request. Murfam contends that the absence of this data is insignificant, because he simply cites to the article for "one undisputed point".

However, Dr. Zering's expert report does not simply state that permitted properties command a premium and cite to his 2011 article in support of that conclusion. Instead, Dr. Zering's expert report reproduces entire tables evidently derived from that article. Those tables include summary statistics of the monetary values associated with specific types of swine farms and their various attributes. While Dr. Zering does not opine on the value of the subject property, he does

apparently opine--by way of the reproduction of the tables from his 2011 article--on the specific values of the premiums associated with hog farm permits.

Accordingly, we will grant the Commissioner's July 26, 2018, motion *in limine* in part, and will exclude from evidence the portions of Dr. Zering's expert report that discuss, cite to, or reproduce any portion of the 2011 article. To the extent that the parties dispute whether, as a general matter, there is a premium value associated with a property that has received a permit for hog farming, Murfam may offer Dr. Zering as an expert to opine at trial on that general question.

Therefore it is

ORDERED that the Commissioner's July 24, 2018, motion *in limine* (Doc. 63) concerning the report of Mr. Ashness is denied without prejudice. It is further

ORDERED that the Commissioner's July 26, 2018, motion *in limine* (Doc. 73) is granted in part, in that the portions of Dr. Zering's report that discuss, cite to, or reproduce any portion of the 2011 article, "To be or not to be Premium Pricing of Swine Facility Farm Sales in a de facto Moratorium Environment: The Case of North Carolina" are excluded from evidence.

**(Signed) David Gustafson  
Judge**

Dated: Washington, D.C.  
August 1, 2018