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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161095

JAMES K. WOOLFORD, et al.,

Appellants,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Appellee.

BRIEF OF THE VIRGINIA DEPARTMENT OF TAXATION

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STATEMENT OF THE CASE

The current matter arises out of the Appellants' application for land preservation tax credits ("LPC Credits") under the Virginia Land Conservation Incentives Act. This statute extends to donors of a qualified interest in real property transferrable tax credits "against the tax liability imposed by §§ 58.1-320 and 58.1-400" equivalent to "40 percent of the fair market value of the land or interest so conveyed." Va. Code § 58.1-512(A). Among other requirements, the statute provides that the fair market value of donations shall be "substantiated by a 'qualified appraisal' prepared by a 'qualified appraiser,' as those terms are defined under applicable federal law and regulations governing charitable contributions." Va. Code § 58.1-512(B).

After auditing the Appellants' LPC Credit application, the Department of Taxation (the "Department") determined the Appellants failed to meet this standard. The Department afforded the Appellants an opportunity to correct the issue, after which it issued a final determination letter, concluding, *inter alia*, that the Appellants' proffered appraiser did not possess the necessary "verifiable education and experience in valuing the type of property subject to the appraisal." 26 U.S.C. § 170(f)(11)(E)(iii). The trial court affirmed this determination, finding the Appellants failed to meet their burden to demonstrate compliance with the Code. Nothing found within the Appellants' lengthy protestations of unfairness

demonstrates the trial court erred in this conclusion, and its decision should be affirmed.

STATEMENT OF FACTS

Little dispute exists concerning the basic facts of this matter.[1] The Appellants granted a conservation easement on property they own in King William County to the Virginia Outdoors Foundation (the "Easement"). The Easement limits commercial development of the encumbered property, preventing its use for things such as a subdivision or retail business.[2] While one of the Appellants testified he intended to donate the Easement regardless of the valuation attached to it,[3] the Appellants now claim that the decision to grant the Easement turned on "favorable tax treatment" they expected at the time of the donation. Appellants' Brief ("App. Br.") at 4.

To receive this favorable tax treatment, the Appellants tendered an application to the Department for an award of LPC Credits. As noted previously, the Code requires that an applicant substantiate the "fair market value of the land"

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[1] The parties filed a Stipulation of Facts with the trial court concerning the majority of the underlying facts. *See* Stipulations of Fact, Joint Appendix ("JA") at 485-90.

[2] A copy of the Deed of Easement appears at JA 20-44.

[3] James Woolford testified at trial that he "would have" proceeded with granting the easement even in the absence of a favorable appraisal. Testimony of James Woolford, Feb. 24, 2016 Trial Transcript at 85:22-86:1 (JA at 650:21-651:1).

with a "qualified appraisal" from a "qualified appraiser." Va. Code § 58.1-512. In an effort to meet this requirement, the Appellants supported their application with an appraisal prepared by Michael Simerlein. This appraisal, dated November 25, 2011,[4] valued the Appellants' property prior to the grant of the Easement at "$13,500,000, of which $4,550,000 is allocated to the value of the minerals in the ground, $8,425,000 is allocated to the prospective going concern (mine operations and PP&E) and $525,000 is allocated to the remaining 174.7 acres of un-mined land." November 25, 2011 Simerlein Appraisal at 2 (JA at 52).[5] Mr. Simerlein

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[4] Notably, this appraisal is dated nearly two weeks after the Appellants executed the Deed of Easement and, more tellingly, four days after the Easement was formally accepted by the Virginia Outdoors Foundation. *See* Deed of Easement at 19-20; 20 (JA at 40-41; 44). It is, of course, the longstanding law of the Commonwealth that deeds are effective among the parties upon execution, and recordation is only to protect third parties. *See*, *e.g.*, *Glen Falls Ins. Co. v. Sheritt*, 95 F.2d 823, 825 (4th Cir. 1943) (collecting cases). Thus, the gift of the Easement was complete prior to the issuance of the appraisal report, severely undercutting the Appellants' central contention their grant of the Easement depended upon the results of the appraisal and the tax benefits they expected it to provide. *See*, *e.g.*, App. Br. at 8; JA at 688-690.

[5] This Court previously rejected an attempt, in the context of a tax dispute, by a party to "capitalize the projected earnings of a non-existent enterprise or projected use" of property to determine its fair market value. *Fruit Growers Express Co. v. City of Alexandria*, 216 Va. 602, 608, 221 S.E.2d 157, 161 (1976). In other words, the appraiser could not claim values based upon "future or prospective uses to which the land may be applied, predicated on speculation or conjecture." *Id.* at 607, 221 S.E.2d at 161 (quotation omitted). As noted, Mr. Simerlein attributed the vast majority of the value allegedly lost by grant of the Easement to the "prospective going concern." The Department raised this issue with the trial court (Motion for Summary Judgment at 11, JA at 286; Dec. 9, 2015

concluded that as a result of granting the Easement, the value of the encumbered property fell to $1,070,000, or a reduction of $12,430,000.

The Department issued LPC Credits to the Appellants based on this reduction, or a total of $4,972,000. In the issuance letter, the Department noted the credit issuance was "based solely on information supplied with your Form LPC notification." Jan. 10, 2012 Credit Issuance Letter (JA at 128). The letter continued:

> Any value of the donation on which the credit is claimed is subject to review, audit, and challenge by all appropriate tax authorities. The Virginia Department of Taxation makes no express or implied warranties regarding whether any tax benefits will be available to the Grantor or anyone to whom the credit is transferred. The Department will notify you further only if any portion of your credit is disallowed or otherwise adjusted by the Department. Such notification may be issued either before or after you file an income tax return claiming the credit, subject to the statute of limitations.

Id.

Thus, at the time the Appellants made the decision to sell tax credits to the Amici, both were on notice that the Department could, within the applicable statute of limitations, audit the Appellants' application and disallow the credit award.

Thereafter, the Department did just that. On December 3, 2013, the Department sent a letter to the Appellants identifying a number of issues, including

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Hearing Transcript at 30-31; JA at 416-17), but the trial court declined to address the issue (*id.* at 40; JA at 426).

"the qualifications of the appraiser" utilized by the Appellants. Dec. 3, 2013 Letter at 2 (JA at 132). Thereafter, the parties met on a number of occasions in an attempt to resolve the questions raised by the Department. The Appellants tendered a revised appraisal, revising downward the value of the Easement by approximately 19%, largely through adjustments to the discount rate applied to the cash flows attributable to the hypothetical mining operation. *See* March 19, 2014 Appraisal Report at 57 (JA at 223) (applying a 12% discount rate); Nov. 25, 2011 Appraisal Report at 36 (JA at 100) (applying an 8.5% discount rate). The Department found numerous defects with this revised appraisal, and on December 4, 2014, issued a Final Determination Letter disallowing the awarded credits. JA at 129-136. This litigation followed.

ARGUMENT

I. The Appellants failed to meet their burden to demonstrate the application was supported by a qualified appraisal prepared by a qualified appraiser.

A. Standard of review.

"In an appeal from a circuit court's decision to grant or deny summary judgment, this Court reviews the application of law to undisputed facts de novo. This appeal also presents questions of statutory interpretation, which the Court reviews de novo." *Huff v. Winston*, 292 Va. 426, 433, 790 S.E.2d 226, 228 (2016) (quotations and citations omitted). While the Court must accept those inferences

"from the facts that are most favorable to the nonmoving party," it is not required to accept inferences that are "forced, strained or contrary to reason." *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (2009) (quotation and citation omitted).

Further, the General Assembly has made clear that the burden of proof lies with the Appellants to demonstrate error by the Department. *See* Va. Code § 58.1-512(E) ("In any . . . court in the Commonwealth the burden of proof shall be on the taxpayer to show that the fair market value and conservation value at the time of the qualified donation is consistent with this section and that all requirements of this article have been satisfied."); Va. Code § 58.1-1825(D) ("It shall be the burden of the applicant in any such proceeding to show that the assessment or collection or action on a transferred credit or other tax attribute complained of is erroneous or otherwise improper."). This is consistent with the longstanding view under both federal and state tax law that "because tax credits and deductions are a matter of legislative grace, taxpayers bear the burden of proving entitlements to the credits they claim on their returns." *Norfolk Southern Corp. v. Comm'r of Internal Revenue*, 140 F.3d 240, 244 (4th Cir. 1998) (citation omitted). *See also Forst v. Rockingham Poultry Marketing Coop., Inc.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) ("exemption from taxation is to be strictly construed against the taxpayer, with all doubts resolved in favor of the Commissioner" such that "any

provision granting an immunity from taxes, whether called an exclusion, limitation or exemption, is narrowly construed.") (citations omitted).

B. The 2006 IRS Notice did not require the trial court to rule in favor of the Appellants.

The Appellants largely rely upon not the plain text of the Code of Virginia or the Internal Revenue Code of 1986, as amended, but a non-binding notice issued in 2006 by the Internal Revenue Service. *See* App. Br. at 20-21. Saving for the moment the fact the trial court did rely on the plain text of the relevant statutes, *see* Section I(C), *infra*, the trial court was not bound to accept the notice.

Contrary to the suggestions of the Appellants, not all pronouncements of the Internal Revenue Service are "highly persuasive" much less "conclusive" as to the interpretation of the Internal Revenue Code. App. Br. at 20. The Internal Revenue Service may promulgate official regulations, which are subject to notice in the Federal Register, public comment, and then codification in the Code of Federal Regulations. While these carry the force of law, other pronouncements from the IRS do not. For example, Revenue Rulings

> do not have the force of law. They are the Commissioner's interpretation of the law which he may change when he concludes that he has been incorrect in an earlier interpretation . . . even if such change is made retroactive in effect [and] even though a taxpayer may have relied to his detriment on the Commissioner's prior position.

Norfolk Southern, 140 F.3d at 247 (citations and quotations omitted). The Fifth Circuit has noted that Revenue Rulings are "merely the opinion of a lawyer in the

agency and must be accepted as such." *Stubbs, Overbeck & Associates, Inc. v. U.S.*, 445 F.2d 1142, 1146-47 (5th Cir. 1971) (citations omitted). As succinctly stated by the *Stubbs* court, a Revenue Ruling has "[n]o more binding or legal force than the opinion of any other lawyer." *Id.* at 1447 (quotation and citation omitted).

IRS Notices, such as the one relied upon by the Appellants, receive even less judicial deference. These "notices do not carry the force of law" and "do not warrant *Chevron*-style deference." *Tax Analysts v. IRS*, 416 F. Supp. 2d 119, 126 (D.D.C. 2006) (citations omitted). *See also Paul v. Aviva Life and Annuity Co.*, No. 3:09CV-1490, 2011 U.S. Dist. LEXIS 74747 at *23 (N.D. Tex. July 12, 2011) ("Unlike Final Regulations adopted by the Treasury that have the force of law, IRS Notices are merely announcements or positions of the IRS that are not binding on courts and do not have the force of law.") (collecting cases).

The Fifth Circuit has noted that while Revenue Rulings "are to some degree authoritative [,] Notices are not." *Guilzon v. Comm'r Internal Revenue*, 985 F.2d 819, 822 (5th Cir. 1993) (citation omitted). "At best these notices can be considered as the IRS' litigating position." *Appleton v. Comm'r of Internal Revenue*, 140 T.C. 273, 291 (T.C. 2013) (citations omitted). Thus, it is far from "extreme" for the Department to adopt a litigating position based upon the statutory text itself rather than the IRS notice. App. Br. at 21. Nor is it for the Court to properly disregard such a notice as a somehow "conclusive" interpretation

of statutory text. *Id.* at 20. Indeed, as noted by the *Guilzon* court, "[e]ven if Notices had the same weight as Revenue Rulings, this Court made clear in *Foil* that we will look to Revenue Rulings only when a statute and its legislative history are *completely* ambiguous." *Guilzon*, 985 F.2d at 822 (emphasis in original) (citing *Foil v. Comm'r*, 920 F.2d 1199, 1201 (5th Cir. 1990)).

C. The trial court properly followed the plain language of the statute, which distinguishes among types of property.

Here, the statutory text contains not a hint of ambiguity, and even a cursory examination reveals the fallacy of the Appellants' argument. The section of the Internal Revenue Code governing charitable donations of real property, 170, adopted by Va. Code § 58.1-512, provides that a taxpayer may not obtain a charitable deduction for such a gift "unless such person meets the requirements of subparagraphs (B), (C), and (D), as the case may be, with respect to such contribution." 26 U.S.C. § 170(f)(11)(A)(i). Subparagraph (C) contains the requirement that a taxpayer must obtain a "qualified appraisal of such property." 26 U.S.C. §170(f)(11)(C).

Subparagraph (E) then provides the definition of "qualified appraisal," which includes the key requirement at issue – a qualified appraisal must be "conducted by a qualified appraiser" who "demonstrates verifiable education and experience in valuing the type of property subject to the appraisal." 26 U.S.C. § 170(f)(11)(E)(i)(II); 26 U.S.C. § 170(f)(11)(E)(iii)(I). According to the

Appellants, "type of property subject to the appraisal" can only mean the broad category of real property. The Appellants rely on both the 2006 Notice and Black's Law Dictionary to advance this contention, App. Br. at 23-26, but these arguments ignore the language used by Congress in the Internal Revenue Code.

If it were the intent of Congress (and by implication, the General Assembly), that any licensed real estate appraisal would do, it would not have inserted the additional "type of property" requirement into the Internal Revenue Code. As belied by the citations above, Subparagraph E contains two separate provisions, each of which must be met, in order for an individual to become a qualified appraiser. First is romanette (ii), which provides, *inter alia*, that the "term 'qualified appraiser' means an individual who has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary." 26 U.S.C. § 170(f)(11)(E)(ii)(I). In short, the individual is a licensed appraiser.

Romanette (iii) then imposes a second, additional requirement, evaluated by the trial court and quoted above. As to any "specific appraisal," an individual shall not be treated as qualified unless he or she can demonstrated "verifiable education and experience in valuing the type of property subject to the appraisal." 26 U.S.C. § 170(f)(11)(E)(iii)(I). *See also Alli v. Comm'r*, T.C. Memo 2014-15, at * 38 (T.C.

2014) ("Section 170(f)(11)(E)(iii) *further provides* that an individual" is not a qualified appraiser unless "the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal.") (emphasis added) (quoting 26 U.S.C. § 170(f)(11)(E)(iii)(I)). If anyone who is a licensed appraiser under state law were sufficient, Congress would not have imposed this additional requirement in the Internal Revenue Code. "Type of property subject to the appraisal" must be read, as it was by the trial court, to mean the particularized category of property at issue, not simply (as would the Appellants) broad categories of "real" or "personal" property.

D. Industry standards and Mr. Simerlein agree with the plain language of the statute.

Two additional sources support the statutory interpretation adopted by the trial court. Although not expressly referenced by the trial court in its order, the Uniform Standards of Professional Appraisal Practice view the question of property types similarly to the Internal Revenue Code. In the Competency Standard for appraisers, these standards note that in order to obtain competency, an appraiser must have "familiarity with a specific type of property or asset" not just real property in general. 2014-15 Uniform Standards of Professional Appraisal Practice at U-11.

Mr. Simerlein himself confirmed this with his testimony on direct examination at trial:

> Q: When you indicate property type, what exactly do you mean by that?
>
> A: Property of -- well, I break it generally into commercial and residential and then complex residential and then you've got rural and farm. You have conservation easements, but then that's more of a subset of the general. I have broad-based experience in commercial; simple commercial, complex commercial, complex residential, subdivisions, proposed subdivisions, plan developments and then more simple residential, waterfront estates.

Feb. 24, 2016 Trial Transcript at 146:17-147:5 (JA at 711:17-712:5). *See also id.* at 147:20-148:12 (JA at 712:20-713:12) (noting that when he worked on his first appraisal involving mineral property it was "a different kind of a product type we haven't worked before."). The Appellants cannot claim surprise or ignorance that "type of property" means something beyond simply "real property" when their own appraiser admits as much in his trial testimony.

E. The Internal Revenue Code requires more than simply notice.

The Appellants' journey to anywhere other than the express statutory requirements takes them next to a provision found in the Treasury Regulations at 26 C.F.R. § 1.170A-13(c)(5). This requires that an appraiser include certain information on the face of an appraisal. According to the Appellants, so long as Mr. Simerlein included a recitation in his appraisal that he was properly qualified, no further inquiry is required. App. Br. at 29. This, like their other contentions, ignores the plain language of the applicable statute as well as case law interpreting the regulation and underling Internal Revenue Code provisions.

While the regulation itself may only be a "reporting requirement," *Alli*, T.C. Memo 2014-15 at *40,[6] the underlying Internal Revenue Code provision most certainly is not. The actual statute makes clear that the appraiser must "*demonstrate*[] verifiable education and experience," not merely claim that he or she has it. 26 U.S.C. § 170(f)(11)(E)(iii)(I) (emphasis added).

Case law interpreting the statute, contrary to the Appellants' contention, also makes it clear that simply stating that one is a licensed appraiser is insufficient to meet the requirements of the Internal Revenue Code. For example, in *Bruzewicz v. United States*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009), the appraisal in question included information on the appraiser's licensure. However, the court rejected this as being sufficient to demonstrate he was a qualified appraiser. *Id.* at 1205 (the specific regulatory requirements "cannot be viewed as unimportant" as an appraiser's background and experience "provides the IRS with some basis on

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[6] Mr. Simerlein may or may not have met the reporting requirement. *Alli* makes clear that "the purpose of the charitable contribution reporting regulations is to provide the IRS with sufficient information to evaluate the claimed deduction and deal effectively with the prevalent use of overvaluations." *Alli*, T.C. Memo 2014-15 at *25 (collecting cases). "The appraiser's qualifications constitute important information because they provide necessary context permitting the IRS to evaluate a claimed deduction." *Id.* at * 35 (collecting cases). The trial court noted that Mr. Simerlein failed to include information concerning any education or experience in valuing minerals or mineral rights in the appraisals. Feb. 23, 2016 Trial Transcript at 333:12-16 (JA at 898:12-16). If the purpose of the reporting requirement is to provide "sufficient information," Mr. Simerlein failed to do so here.

which to determine whether the valuation in an appraisal report is competent and credible evidence to support what in some cases may be a very large tax saving.”).[7]

F. The Appellants’ remaining arguments do not support their central contention.

The Appellants advance several additional arguments in their brief, in an effort to “accomplish indirectly what [they] cannot do directly” through interpreting the plain language of the statute, in furtherance of an attempt to transform someone with no education and scant experience valuing mineral property into a mineral appraiser. *Campbell v. Commonwealth*, 246 Va. 174, 187, 431 S.E.2d 648, 655 (1993). First, inaction by the IRS offers no support to their claims. The fact, for example, that the IRS chose not to challenge the qualifications of an appraiser (who subsequently had his licenses suspended for overvaluing conservation easements) in *Esgar* does not mean that Mr. Simerlein met the definition of a qualified appraiser here. *Esgar Corp. v. Comm’r*, T.C. Memo 2012-35 at *15 n. 9 (T.C. 2012). Nor does the fact the Appellants apparently won the audit lottery with the IRS shed any light on whether or not Mr.

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[7] *Bruzewicz* is but one of a number of cases, like *Alli*, where courts concluded that an appraiser failed to meet the definition of a “qualified appraiser” within the ambit of 26 U.S.C. § 170 and the various regulatory provisions enacted based on that statute. While these decisions typically focus on the older regulatory provisions mandating that the appraisal include sufficient information to allow the IRS to evaluate the qualifications of the appraiser, all reject appraisers as not being a “qualified appraiser” as that term is “defined under applicable federal law and regulations governing charitable contributions.” Va. Code § 58.1-512.

Simerlein actually met the requirements of the Internal Revenue Code. *See* App. Br. at 9 n. 5; 25.

Nor do the requirements[8] used by the Virginia Department of Transportation shed any light on the meaning of the Internal Revenue Code. *Id.* at 26. Whether or not VDOT accepts a particular appraisal in the context of an eminent domain action simply has no bearing on whether the same appraisal meets the requirements of Va. Code § 58.1-512, a fact readily acknowledged by the trial court. *See* Feb. 24, 2016 Trial Transcript at 261:7-14 (JA at 826:7-14).

Finally, the 2008 proposed regulations, contrary to aiding the Appellants' arguments, App. Br. at 30-32, strongly support the conclusion reached by the trial court. These expressly require "professional or college-level coursework" *and* two or more years of experience in valuing the "relevant type of property." 73 Fed. Reg. 45908, 45918.[9] The proposed regulations go on to define "relevant type of property" as the "category of property customary in the appraisal field for an appraiser to value." While the Appellants suggest yet again this means only "real

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[8] The requirements maintained by the Department are consistent, in that the appraiser must be a "qualified appraiser." *Cf.* App. Br. at 26 (quoting Rulings of Tax Comm. (Mar. 12, 2007)). In this context, "qualified appraiser" is a statutorily-defined term.

[9] The Appellants erroneously quote these proposed regulations suggesting the education and experience requirements are written in the disjunctive. App. Br. at 31. Not only does this misstate the proposed regulations, it misstates the conjunctive requirement that appears in the text of the statute.

property," their own appraiser, as noted above, notes that there are multiple "types of property" within the field of real estate appraisal. Feb. 24, 2016 Trial Transcript at 146:17-147:5 (JA at 711:17-712:5). *See also id.* at 147:20-148:12 (JA at 712:20-713:12).

In short, as properly concluded by the trial court, as a matter of law Mr. Simerlein lacks the requisite "verifiable education and experience in valuing the type of property subject to the appraisal" – mineral property – necessary to meet the requirements of the Internal Revenue Code and Code of Virginia. One cannot infer qualifications Mr. Simerlein himself admits he does not possess. *Id.* at 263:19-264:8 (JA at 828:19-829:8). The decision of the trial court, rendered after having heard Mr. Simerlein testify in full, should be affirmed.

II. The Department may reject an appraisal without deeming it false or fraudulent.

The Appellants suggest that the Department may not reject an appraisal unless it declares the appraisal "false or fraudulent" under the last sentence appearing in Va. Code § 58.1-512(B). Otherwise stated, the Department must accept an appraisal from an otherwise unqualified appraiser unless it declares the

resulting appraisal to be false or fraudulent. No such restriction appears in the Code.[10]

Va. Code § 58.1-512(B) requires the Department to make several distinct determinations. These include whether an applicant has provided the requisite "qualified appraisal" prepared by a "qualified appraiser" as those terms are defined by the Internal Revenue Code; whether the appraiser in question is licensed by the Commonwealth of Virginia;[11] and whether the appraiser "falsely or fraudulently overstates the value" of the donated property.

The trial court property recognized this multipart construction. During the September 2, 2015 motions hearing the court noted "the way I read this subparagraph B, it's really a two test: Number one, you've got to be qualified, and if you're qualified, then you look at whether or not the appraiser did a false or fraudulent appraisal." Sept. 2, 2015 Hearing Transcript at 19:3-7 (JA at 320:3-7).

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[10] The Department concurs with the Appellants that this presents a question of statutory interpretation, which this Court reviews *de novo*. App. Br. at 35; *Huff*, 292 Va. at 433, 790 at 228.

[11] This separate requirement further undercuts the Appellants' central contention that mere licensure is sufficient to meet the definition of qualified appraiser. Under the Code, the question of licensure is separate from the question of qualification. *See* Va. Code § 58.1-512(B) ("In order to qualify for a tax credit under this section, the qualified appraisal shall be signed by the qualified appraiser, who must be licensed in the Commonwealth of Virginia as provided in § 54.1-2011 . . .").

And this construction is compelled by the plain, unambiguous language selected by the General Assembly.[12]

Even looking beyond the plain language of the Code, long-standing rules of statutory construction compel rejecting the interpretation offered by the Appellants. Each part of a statute must be given effect unless doing so would lead to an absurd result. *See*, *e.g.*, *Tilton v. Commonwealth*, 196 Va. 774, 784, 85 S.E.2d 368, 374 (1955) (noting principle that "every provision in or part of a statute shall be given effect if possible."). The parts must also be interpreted as a "consistent and harmonious whole" without "singling out a particular phrase." *VEPCO*, 266 Va. at 388, 309 S.E.2d at 311. Here, the various requirements contained in Va. Code § 58.1-512(B) are not linked by any conjunctive language; rather, each stands alone, imposing different requirements on applicants, and must be viewed in that way. And, of course, one could present an appraisal that was neither "false" nor "fraudulent," and yet the appraiser offering it could lack the requisite qualifications to prepare such an appraisal. Otherwise stated, though his conclusions might not be so erroneous as to be false, nor motivated by such

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[12] *See*, *e.g.*, *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Supervisors of Fairfax County*, 285 Va. 604, 613, 740 S.E.2d 548, 553 (2013) ("[w]hen a statute is unambiguous, we must apply the plain meaning of that language.") (quoting *Appalachian Power Co. v. State Corp. Comm'n,* 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012)). *See also Virginia Elec. & Power Co. v. Bd. of County Supervisors*, 226 Va. 382, 387, 309 S.E.2d 308, 311 (1983) ("courts should not construe statutory language which is facially unambiguous.") (citations omitted).

perniciousness to be fraudulent, he still might not be in a position to present them because his training and experience do not lend the requisite credibility to make them reliable. Nothing in the statutory language suggests the General Assembly intended that the Department must nonetheless accept such an appraisal.

Nor does anything contained in the last sentence, relied upon by the Appellants, suggest it is in any way to be read as a restriction on the powers of the Department in auditing an LPC Credit application. Instead, it makes express that should the Department make such a finding on audit, it "may" disregard the appraisal, even if it otherwise was prepared by a licensed, qualified appraiser. Va. Code § 58.1-512(B). The only way to give effect to the construction chosen by the General Assembly is as was done by the trial court, and its decision in this regard should be affirmed.

III. The trial court did not abuse its discretion in excluding the proffered legal opinion experts.

The decision to admit expert testimony, by statute and under the case law of this court, lies chiefly with the trial court. Va. Code § 8.01-401.3 provides that a trial court "may" allow a party to offer testimony from a properly-qualified expert where such testimony "will assist the trier of fact." A decision as to whether or not to admit expert testimony is left to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *See*, *e.g.*, *Hyundai Motor Co., Ltd. v. Duncan*, 289 Va. 147, 155, 766 S.E.2d 893, 897

(2015). "A circuit court, though, has no discretion to admit clearly inadmissible evidence." *Id.* (quotation and citation omitted). Even if such testimony would provide such assistance, an expert cannot testify as to "any opinion which constitutes a conclusion of law." *Id.*

The Appellants spill much ink claiming the excluded experts would testify not as to the legal question presented (whether or not Mr. Simerlein was a "qualified appraiser") but to "facts about the qualification of the appraiser." Such an argument ignores the proffer made by the Appellants at the trial court, and imparts to these individuals a truly unique type of expertise. Before the trial court, each of the experts in question was identified as being prepared to offer "[t]testimony regarding the qualifications of the appraiser" "based on his review of the appraisal." Feb. 16, 2016 Witness Proffer at 1-2 (JA at 457, 458). How this would amount to providing "facts" about the appraiser's qualifications is difficult to discern, as it suggests the expert would be able to divine some sort of factual predicate that is not readily apparent from the texts of the appraisal itself. App. Br. at 41.

Rather, the proffers suggest, as concluded by the trial court, these witnesses were being offered to opine "that Mr. Simerlein is correct, that his appraisal was fine." Feb. 22, 2016 Hearing Transcript at 43:16-17 (JA at 540:16-17). As recited in full by the Court at its February 22, 2016 motions hearing:

> Here's what I'm – here's the order of the Court . . . I'm not going to allow the additional quote-unquote expert witnesses to come in and testify, because I find under the Rules in Virginia under testimony of experts, they're really trying to draw a conclusion of law. They're trying to tell me the way I read your proffers, they were going to come in and testify that Mr. Simerlein is correct; that his appraisal was fine. That's really the job of the Court. You know, the Court feels that I can read the requirements for a qualified appraiser and I can make that determination. I don't think I need an expert to tell me whether or not somebody is qualified. So I am going to exclude the quote-unquote expert witnesses.

Id. at 43:25-44:23 (JA at 540:25-541:23).

The trial court's ruling was correct. Certainly, the trial court is in the best position to determine whether the proffered evidence would aid in its consideration of the issues,[13] and its discretion should be respected. There can be little question after reviewing the proffers, the proposed testimony of the experts fell squarely within the category of offering a legal conclusion. Testimony as to the "sufficiency of the appraisal report"[14] goes to the heart of the legal question

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[13] This Court has noted that expert testimony is inadmissible on any subject where a lay finder of fact is "equally capable of reaching his or her own conclusion." *Brown v. Corbin*, 244 Va. 528, 531, 423 S.E.2d 176, 178 (1992). As evaluation of the qualification of expert witnesses is committed to the sound discretion of the trial court, it necessarily follows that the trial court is "equally capable of reaching his" own conclusion as to the qualifications of Mr. Simerlein.

[14] The Appellants suggest in their brief the proposed testimony went not to the legal question presented but rather would be testimony regarding industry standards or, in the parlance of a malpractice action, the standard of care. App. Br. at 42; 42 n.16. Putting aside whether such testimony would have been relevant to the question before this Court, the proffers tendered by the Appellants at trial were not offers of testimony on industry standards. They were offers of testimony as to

presented, and the trial court properly exercised its considered discretion to exclude such testimony.

IV. The trial court did not err in granting the renewed motion for summary judgment.

The last argument presented by the Appellants is one of timing. In short, the Appellants contend the trial court was required to allow them to complete the presentation of their case before ruling on the renewed motion for summary judgment. App. Br. at 44-47. They pin this argument not to any provision of the Rules (which, of course, expressly allow a party to "make a motion for summary judgment at any time after the parties are at issue," Rule 3:20) but on treatise references and two case references.[15]

However, when viewed in the context of the procedural history of this case, it becomes readily apparent the trial court did not commit any sort of procedural

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the particular individual appraiser and appraisal at issue in the case and whether, in the view of the expert, those met the applicable legal standard.

[15] One case, *Durham v. Nat'l Pool Equip. Co.*, 205 Va. 441, 138 S.E.2d 55 (1964), involved the provisions of an alleged oral contract. This Court had little difficulty determining in such a circumstance, the trial court should have allowed the testimony of additional witnesses. *Id.* at 448, 138 S.E.2d at 60. The second, *Rouse v. Great Atlantic & Pacific Tea Co.*, 216 Va. 293, 217 S.E.2d 891 (1975), quoted at length by the Appellants, involved a defense of contributory negligence. While this Court suggested the trial court should have allowed additional testimony, it found any error harmless and affirmed the decision of the trial court. Neither case supports the idea the trial court acted prematurely here in granting the summary judgment motion concerning Mr. Simerlein's qualifications after Mr. Simerlein completed his testimony.

error in granting the motion. The parties fully briefed the question at issue in the fall of 2015, and the trial court held a hearing, on the record, on December 9, 2015. At the hearing, the trial court indicated it felt it would be "improper" to issue a ruling "right now" on the motion. Dec. 9, 2015 Hearing Transcript at 29:5-16 (JA at 415:5-6). Instead, the trial court thought it proper to receive testimony from Mr. Simerlein prior to issuing the ruling. *Id.* It was only after receiving this testimony that the ruling was finally granted.

The question presented by this appeal centers on whether or not Mr. Simerlein met the definition of a "qualified appraiser." None[16] of the additional evidence the Appellants claim they would offer bears on that question. The Appellants point to the fact they would have called an employee of the Department of Taxation (Ms. Gaston) and an employee of King William County (Mr. Schardein). *See* App. Br. at 5 n. 3; 47. How testimony from Ms. Gaston could help demonstrate that Mr. Simerlein possessed the requisite education and experience to offer an appraisal of mineral property is far from clear. Similarly with Mr. Schardein, who was the planning and zoning administrator of the local

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[16] The Appellants also reference three exhibits, App. Br. at 47; 6 n.4, which they claim they intended to introduce but were precluded because of the trial court granting the summary judgment motion. However, the authors of these exhibits, whose testimony would be required to authenticate them, had already testified (the brothers Woolford and Mr. Simerlein), and at no time during their testimony did the Appellants attempt to offer the exhibits.

jurisdiction. The trial court acted properly when it granted the renewed motion, and its decision should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 28, 2017, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to William H. Hurd, Esq., counsel for appellant, at william.hurd@troutmansanders.com; and Craig D. Bell, Esq., counsel for proposed amici, at cdbell@mcguirewoods.com. In accordance with Rule 5:26(h), I certify that this document contains 6088 words, in compliance with Rules 5:26(b) and 5:26(e).

By: s/ J. Duncan Pitchford
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