In The

Supreme Court of Virginia

RECORD NO. 161095

JAMES K. WOOLFORD and ELIZABETH P. WOOLFORD, AS TRUSTEES OF THE WOOLFORD TRUST U/A DTD 13 APRIL 2008, and WILLIAM W. WOOLFORD, IV and JANICE B. WOOLFORD,

***Appellants*,**

v.

VIRGINIA DEPARTMENT OF TAXATION,

Appellee.

BRIEF OF APPELLANTS

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INTRODUCTION

Among the hallmarks of good government, *fairness* must rank high on the list. But fairness has been denied to the Woolfords. Accepting the invitation of the General Assembly, as conveyed by its legislation, the Woolfords encumbered their farmland forever by a conservation easement appraised at over $12 million, and they donated that easement to the Commonwealth.

What the Woolfords received in return – and what their government led them to expect – were tax credits, measured at 40 percent of the value of their donation. Then their government reversed course. Claiming years later that the Woolfords' appraiser was not "qualified," state tax agents revoked *every penny* of tax credits, while the Commonwealth kept the easement, leaving the Woolfords forever subject to its burdens. This is not fair. No one can think that it is.

But the Woolfords do not base their case simply on the *unfairness* of what has been done to them. They base it on *the law*: (i) the Virginia statute that plainly tells state tax agents that they are to follow the federal law in defining the term "qualified appraiser," (ii) the federal law that plainly says the Woolfords' appraiser *is* qualified, and (iii) the law governing the conduct

of trials, which allows plaintiffs to *finish* presenting their case before that case can be subjected to the scrutiny of summary judgment, just to name a few.

In some cases, the law may be written in such a way that a court's hands are tied, where it cannot do what is fair. This is *not* such a case. Here, fairness and the law coincide. They both require that the judgment of the circuit court – and the actions of state tax agents – be reversed and that judgment be entered for the Woolfords, as this brief will explain.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by (a) ruling that the Woolfords' appraiser lacked the necessary education and experience to offer an appraisal of mineral property, and (b) affirming the Department's decision to disallow and rescind the tax credits previously awarded to the Woolfords. (Preserved: JA-978; JA-979–80(¶¶1-3)).[1]

2. The Circuit Court erred by excluding, as an issue in the case, the validity of the Department's post-audit decision to disregard Simerlein's appraisal, even though it did not determine the appraisal to be "false or fraudulent" as required by § 58.1-512(B), and to disallow the tax credits in their entirety. (Preserved: JA-978; JA-980(¶3); JA-982(¶10)).

3. The Circuit Court erred by granting the Department's motion *in limine,* thus excluding evidence from experts for the Woolfords. (Preserved: JA-978; JA-981–82(¶6); JA-565; JA-536–537).

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[1] References to the Joint Appendix are cited as "JA-__."

4. The Circuit Court erred by granting the Department's motion for summary judgment during trial, before the Woolfords rested their case-in-chief. (Preserved: JA-978; JA-982(¶7)).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case arises out of an action by the Virginia Department of Taxation ("Department") to take away millions of dollars in tax credits previously awarded to Appellants ("the Woolfords"),[2] under Virginia Code § 58.1-512, in recognition of their donation of a very valuable conservation easement on their Virginia farmland.

In November 2011, before granting the easement, the Woolfords obtained an appraisal from Michael Simerlein, a state-licensed, certified general real estate appraiser, who valued the proposed easement at $12,430,000 ("the Donation"). With this appraisal in hand, the Woolfords granted the easement, by deed of gift, to the Virginia Outdoors Foundation ("VOF"), an agency of the Commonwealth.

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[2] The Appellants are James K. "Jim" Woolford and Elizabeth P. Woolford, as Trustees of the Woolford Trust U/A DTD 13 April 2008, and William W. "Bill" Woolford, IV, and Janice B. Woolford (collectively "the Woolfords").

The Woolfords then applied for tax credits. The Department did not challenge Simerlein's appraisal, his qualifications, or any other aspect of the transaction. Instead, in January 2012, the Department awarded the Woolfords tax credits of $4,972,000, equal to 40 percent of the Donation's value, as provided by state law.

Nearly two years later, in December 2013, the Department initiated an audit. The opportunity for the Department to challenge the *value* of the Donation had expired, but the Department attacked the appraisal on other grounds, including its newly-minted claim that Simerlein was not "qualified" to appraise the Woolfords' property. In December 2014, the Department issued a Final Determination Letter, revoking *all* $4.97 million in tax credits.

This action did not reverse or return the Donation. The easement remains in place, and the Woolfords are faced with liability in excess of $4.97 million. Thus, the Commonwealth has acquired valuable property rights without providing the Woolfords the favorable tax treatment they reasonably expected when they made the Donation.

The Woolfords filed suit in the Circuit Court for King William County ("Circuit Court"), challenging the erroneous manner in which the Department conducted the audit and the findings in the Final Determination Letter, as

permitted by Code § 58.1-1825. In a pretrial decision, the Circuit Court limited the case to whether Simerlein was a "qualified appraiser" and whether he had provided a "qualified appraisal." JA-533–34. This excluded the Woolfords' claim that the Department wrongfully disregarded Simerlein's appraisal without finding it to be "false or fraudulent." *See* JA-11–12; JA-16–18. At that time, the Circuit Court also granted the Department's motion *in limine*, excluding testimony from six of the Woolfords' experts on the sole (and mistaken) ground that "the proposed experts would be offering legal opinions." JA-563.

Trial took place on February 24 and 25, 2016. Following testimony by Jim Woolford, Bill Woolford, and Simerlein, the Woolfords called their next witness, Bret Schardein. Before he could take the stand, counsel for the Department interrupted and orally "renew[ed] its motion for summary judgment based upon the questions concerning Mr. Simerlein's qualifications." JA-896.

The Woolfords still had two witnesses yet to testify,[3] JA-922–28, as well as additional exhibits, marked but not yet admitted. *See* JA-913, JA-

[3] These witnesses were Bret Schardein and Diana Gaston. JA-922–28.

915, and JA-919.[4] Even so, the Circuit Court granted the Department's motion, ruling from the bench and later incorporating its ruling into the final order:

> After hearing arguments on the motion and considering the testimony presented, the Court granted the Defendant's motion for summary judgment. The Court found that the ***Plaintiffs' appraiser lacks the necessary education and experience,*** as required by applicable federal law incorporated by Va. Code § 58.1-512.B, ***to offer an appraisal of mineral property***.
>
> Therefore, . . . the Court finds ***the decision of the Defendant to disallow the claimed tax credits was not erroneous or improper and that decision is affirmed.***

JA-976–77 (emphasis added).

On May 16, 2016, the Woolfords noted their appeal, JA-985–988, which this Court granted on March 24, 2017. JA-996.

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[4] These exhibits included: October 2011 email communications between Jim Woolford and Bill Woolford regarding plans for the sand and gravel mines, JA-913–14; Simerlein's July 2011 notes regarding the Woolfords' conservation easement, JA-915–18; and, a February 2014 letter from Simerlein to the Department outlining his personal study in preparation for the Woolford appraisal and the lack of any readily available formal coursework in "mineral rights evaluation," JA-919–21.

STATEMENT OF FACTS

Virginia's Land Preservation Tax Credit Program

This case involves the Virginia Land Conservation Incentives Act of 1999, Code § 58.1-510 *et seq.* ("The Act"). The Act's purpose is to "encourage the preservation and sustainability of Virginia's unique natural resources, wildlife habitats, open spaces and forested resources." § 58.1-510.

Under the Act, taxpayers can obtain tax credits equal to 40 percent of the fair market value of any "qualified donation" to an eligible conservation agency, including "the Commonwealth . . . [or] instrumentality thereof . . . ." § 58.1-512(A) and (C)(2), (4). It is undisputed that the Woolfords' grant of the conservation easement constitutes a "qualified donation" and that VOF is an "instrumentality of the Commonwealth."

The primary issue here is whether the Woolfords' appraiser – a state-licensed, certified general real estate appraiser – is a "qualified appraiser" of the Woolford's property within the meaning of *federal* law, which Virginia law expressly adopts. *See* Code § 58.1-512(B).

The Woolfords' Conservation Easement

The Woolfords own a 451-acre farm in King William County ("the Property"). JA-606. Several years ago, the Woolfords discovered that valuable sand and gravel deposits lie beneath the surface. JA-608. In 2011, Jim and Bill Woolford debated whether to encumber their Property with a conservation easement and forego the wealth underground. JA-660–61, 665–66.

Before finalizing their decision, the Woolfords obtained an appraisal from Michael Simerlein, a certified general real estate appraiser licensed by the Virginia Real Estate Appraiser Board ("Appraiser Board"). Simerlein provided his written appraisal on November 25, 2011. He valued the Property at $13.5 million without the easement, and at $1,070,000 with the easement, a reduction of $12,430,000. This reduction constitutes the value of the Donation.

After receiving Simerlein's appraisal, the Woolfords made a final decision and recorded the easement – a deed of gift to VOF – with the Clerk of the Circuit Court on November 28, 2011. The easement covers the entire Property and prohibits surface mining, thus preventing extraction of sand and

gravel. The Woolfords then submitted their application for tax credits to the Department, along with Simerlein's appraisal. JA-487–88.

Virginia law allows the Department to require a second appraisal and make its own determination of value. But, it only has 30 days to give notice of its intent to do so. *See* § 58.1-512(D)(4)(a). The Department did not exercise this option. JA-489. Thus, it irrevocably accepted the value reached by Simerlein, a point the Department has conceded.[5] Accepting Simerlein's valuation of $12,430,000, and applying the requisite 40 percent, the Department issued the Woolfords tax credits of $4,972,000 in January 2012. JA-488.[6]

Virginia law also allows donors to sell unused credits to other taxpayers, § 58.1-513, and the Woolfords transferred credits to over 150 other Virginia taxpayers, with the Woolfords paying the Department $248,600 for administering the transfers. JA-2; JA-251.

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[5] *See* JA-273–74 n.1 (admitting that "Defendant did not exercise its right to require an additional appraisal within 30 days . . . ." and noting that the Department's concern is "not that the number was too high . . . ."); *see also* JA-308–09 (statement by Department counsel, conceding, "we're precluded [from challenging value]. That ship [h]as sailed.").

[6] Given Virginia's use of the federal standard, the Donation will not qualify for a state tax credit if it does not qualify as a charitable deduction for federal income tax purposes. The Woolfords took a federal deduction for the Donation, and the IRS has not challenged it. JA-694.

All seemed well. Then, in December 2013, the Department decided to conduct an audit. JA-488(¶28); JA-12; JA-257. Negotiations lasted a year, but proved unsuccessful.[7] In December 2014, the Department issued its Final Determination Letter, which revoked all $4,972,000 in tax credits, claiming, among other things, that Simerlein was not a "qualified appraiser." JA-489(¶29); JA-129–136. Notably, the Department *did not* find that Simerlein's appraisal was "false or fraudulent," terms of importance in an audit. *See* Code § 58.1-512(B).

Simerlein's Qualifications

Simerlein is licensed by Virginia as a certified general real estate appraiser and, as such, is licensed to appraise "all types of real estate and real property," Va. Code § 54.1-2009, including the Woolfords' Property. This is enough for Simerlein to meet the requirements of federal law, as interpreted by the IRS. *See infra* at 18–21. But there is more.

Simerlein has been appraising real estate since 1992 and has been licensed in Virginia since 1994. JA-700–02. He holds a Master's degree in

[7] During those negotiations, Simerlein provided a supplemental appraisal in March 2014. JA-488(¶28). This appraisal showed the value of the Donation as $10,180,000, a decrease from the original figure, reflecting cash flow adjustments to address the Department's concerns.

"Real Estate Appraisal and Investment Analysis" from the University of Wisconsin-Madison. JA-701.

Simerlein began working on conservation easements and donations in 1998, and they have been his specialty since 2002. JA-702. Since 2009, he has performed "close to 100" appraisals for conservation easement donations. *Id.* Forty percent of those appraisals have been in King William or rural counties nearby. JA-708. Until now, the Department has never refused any of his appraisals and has never questioned their veracity or valuations. JA-710.

In his career, Simerlein has appraised twenty different categories of real estate – including mineral properties with sand and gravel deposits – and has performed 350 discounted cash flow analyses to value income-producing properties. JA-703. Before he appraised the Woolfords' Property, Simerlein's experience with Virginia sand and gravel mines included four engagements:

- In 2000, Simerlein appraised a 200-plus acre estate in Smithfield regarding a proposed sand and gravel operation covering 40 acres. JA-712–13. As this was Simerlein's first sand and gravel appraisal, he took the time

to educate himself on how this market works and worked with a supervisory appraiser. *Id.* JA-830.

- In 2005, James City County hired Simerlein to appraise a 40-acre tract being condemned for a school. Simerlein's task included assessing damages to the remainder of the owner's land, where a sand and gravel pit was located. This engagement required Simerlein to take into account the quality of sand and gravel and decide whether the highest and best use of the remainder was continued pit mining or a residential development, a process that required analysis of both options. JA-714–16.

- In 2007, Simerlein saw his next sand and gravel engagement. It was in Charles City County and covered about 103 acres and 3 million tons of material. Simerlein reviewed the appraisal performed by his subordinate. JA-713–714.

- In 2011, Simerlein appraised a sand extraction operation in Middlesex County, with a quantity of materials between one million and two million tons. JA-715–16.

Three of these engagements required discounted cash flow analyses to determine the property's value, processes identical to the analysis used in appraising the Woolfords' Property. JA-717.

The Circuit Court disparaged Simerlein's experience and faulted him for not having taken "courses entitled mining or mining appraisal." R-1503/342. Yet, there is no such licensing category and no evidence such coursework is required by any legal or professional standards – or even available. One need not be a geologist to appraise mineral property, just as one need not be a farmer to appraise farmland. Even so, Simerlein obtained valuable information by conferring with a professional geologist, whose report on the Woolfords' Property formed part of the basis for his appraisal. JA-796, 809, 895; JA-236–38.

In addition to his specific experience appraising property with sand and gravel deposits using discounted cash flow analyses, Simerlein gained competency to appraise the Woolfords' Property by personally and independently conducting "a drive-through inspection of the property, review of regional production statistics (over 20 years); review of the Geotechnical Report and initial interviews with Froehling & Robertson representatives; phone interviews and meetings with knowledgeable pit owners/operators; a meeting with the Director of King William County's Planning Office and initial phone contacts with a Department of Mines, Minerals & Energy representative." JA-920. Simerlein also reviewed his prior sand/gravel

appraisal work and published information from reputable industry sources. *Id.*

As previously noted, the Woolfords had several exhibits, marked but not yet introduced, when their case was cut short. *See supra* at 6. One was a letter from Simerlein to the Department outlining his personal study in preparation for the Woolford appraisal and the lack of any readily available formal coursework in "mineral rights evaluation." JA-920 (discussing review of published trade information: *Appraisal of Real Estate*, 12th ed., *The Appraisal of Construction Rocks*, 2nd ed., and articles published by reputable appraisal industry sources). This letter was especially important because it addressed the issue of education, an area in which the Circuit Court mistakenly thought Simerlein was deficient and which, under prevailing professional standards, Simerlein met.

SUMMARY OF ARGUMENT

Virginia has adopted the federal definition of "qualified appraiser." Under the federal definition – and IRS guidance – Simerlein is qualified to appraise the Woolfords' Property because he is licensed by Virginia to do so. The Circuit Court erroneously ruled that Simerlein is not a "qualified appraiser" on the theory that he "lacks the education and experience" to

appraise "mineral property." JA-976. In so ruling, the Circuit Court failed to apply federal law. Disregarding IRS guidance, the Circuit Court created its own *ad hoc* category of property as well as its own criteria for education and experience.

Even if "mineral property" were the relevant "type of property," the Circuit Court erred by ruling that Simerlein did not possess the requisite education and experience. Under the Uniform Standards of Professional Appraisal Practice ("USPAP"), Simerlein was qualified to appraise "mineral property." It would have been error for the Circuit Court to have ruled against Simerlein's qualifications even as a finder of fact. But, on summary judgment, the Circuit Court ruled that Simerlein was unqualified as *a matter of law*, denying the Woolfords the benefit of all permissible inferences and compounding its error.

The Circuit Court also erred by excluding from the case a key issue: the Department's decision to disregard the Simerlein appraisal even though it "was not false or fraudulent." Under § 58.1-512(B), the Department may not do so.

The Circuit Court also erred by excluding three appraisal experts, who could have provided valuable testimony – not legal conclusions – on

industry-recognized practices, such as the lack of any subspecialty in "mineral property," the practice of using personal study to obtain competency with respect to real estate of a sort not previously appraised, and the significance of Simerlein's four previous sand and gravel appraisals.

The Circuit Court erred as well by granting summary judgment in the middle of the Woolfords' case-in-chief, especially when (i) one of the remaining witnesses was the state tax agent who signed the Final Determination Letter, and whose examination could have undercut the Department's case, and (ii) one of the remaining exhibits directly addressed issues of Simerlein's qualifications.

ARGUMENT AND AUTHORITIES

Simerlein is a "Qualified Appraiser." The Circuit Court Erred by Ruling Otherwise (Assignment of Error 1).

A. Standard of Review

Entitlement to summary judgment is a question of law, which the Court reviews *de novo*. *See, e.g.*, *Transp. Ins. Co. v. Womack*, 284 Va. 563, 567 (2012). On summary judgment, the trial court and this Court must accept as true those inferences that are most favorable to the non-moving party – the

Woolfords. *See, e.g., Dudas v. Glenwood Golf Club*, 261 Va. 133, 136 (2001).

B. Overview of Applicable Law

This brief discusses a number of statutes, regulations, administrative authorities and other sources, including the following:

- **The Virginia Statute:** Virginia adopts the federal definition of "qualified appraiser" and otherwise lays out the procedures to be followed by the Department in providing credits for conservation easements. Code § 58.1-512.
- **The 2006 Federal Statute:** A 2006 amendment provides a revised definition of "qualified appraiser." 26 U.S.C. § 170(f)(11)(E).
- **The 2006 IRS Notice:** The IRS has explained the meaning of "qualified appraiser" with respect to real property. The IRS said taxpayers should rely upon this guidance until formal regulations are adopted. *See* Internal Revenue Bulletin: 2006-46 (Nov. 13, 2006) Notice 2006-96, *Guidance Regarding Appraisal Requirements for Noncash Charitable Contributions.*

- **The 2008 *Proposed* Regulations:** The IRS has never adopted regulations to displace the 2006 IRS Notice. The agency proposed regulations in 2008; but, as *proposed* regulations, they have no weight and are mentioned here only because the Department relied on them in the Circuit Court.
- **The 1996 Reporting Regulation:** This regulation predates the 2006 Federal Statute. Although this regulation was not cited by either the Department or the Circuit Court in proceedings below — and is merely a "reporting requirement" — it is discussed here to complete the analysis. *See* 26 C.F.R. § 1.170A-13(c)(5)(i).

C. Simerlein is a Qualified Appraiser Under Federal Law.

Virginia law explains how the value of the Donation is determined:

> The fair market value of qualified donations made under this section shall be [1] determined in accordance with § 58.1-512.1 and [2] substantiated by a "qualified appraisal" prepared by a **"*qualified appraiser*,"** as those terms are defined under ***applicable federal law and regulations governing charitable contributions*.**

Code § 58.1-512(B) (emphasis added). Thus, the question becomes whether Simerlein meets the *federal* requirements to be a "qualified appraiser" of the Donation.

The 2006 Federal Statute calls for an appraisal "by a qualified appraiser," which requires "verifiable education and experience in valuing the type of property subject to the appraisal." 26 U.S.C. § 170(f)(11)(E)(iii)(I) (emphasis added).[8]

The Circuit Court did not identify any authority to guide its application of the "type of property" standard or the "education and experience" standard

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[8] The 2006 Federal Statute reads:

> (ii) Qualified appraiser. Except as provided in clause (iii), the term 'qualified appraiser' means an individual who—
>
> > (I) 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,
> > (II) regularly performs appraisals for which the individual receives compensation, and
> > (III) meets such other requirements as may be prescribed by the Secretary ***in regulations or other guidance.***
>
> (iii) Specific appraisals. An individual shall not be treated as a qualified appraiser with respect to any specific appraisal unless-
>
> > (I) the individual demonstrates ***verifiable education and experience in valuing the type of property*** subject to the appraisal, and
> > (II) the individual has not been prohibited from practicing before the Internal Revenue Service . . . .

26 U.S.C. § 170(f)(11)(E)(iii)(I) (emphasis added). The term "other guidance" includes, of course, the 2006 Notice, elevating it to the status of mandatory authority.

to the facts at hand. Instead, it adopted the approach created by the Department – solely for this case – and said that Simerlein "lacks the necessary education and experience . . . to offer an appraisal of *mineral property*." JA-976 (emphasis added). This is error.

1. The 2006 IRS Notice Shows the Error by the Circuit Court.

Inasmuch as the task here is to apply federal tax law, the explanation of that law by the IRS should be highly persuasive, if not conclusive. In the 2006 IRS Notice, the IRS Commissioner told taxpayers to rely on his interpretation of "qualified appraiser," then explained that term in a way that addressed *both* the "type of property" standard and the "education and experience" standard – and that shows Simerlein to be qualified.

First, the reliance instruction:

> This notice provides transitional guidance relating to the new definitions of "qualified appraiser" and "qualified appraisal" in § 170(f)(11) of the Internal Revenue Code . . . as added by § 1219 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (2006) ("the PPA").
>
> The Service and the Treasury Department expect to issue regulations under § 170(f)(11). ***Until those regulations are effective, taxpayers may rely on this notice to comply with the new provisions added by § 1219 of the PPA***.

The 2006 IRS Notice § 1 (emphasis added).

Then, the explanation:

> An appraiser will be treated as having met the minimum ***education and experience*** requirements [of the federal statute] if … ***[f]or real property***… the appraiser is ***licensed*…** **for the *type of property*** being appraised in the state where the property is located.

Id. at §§ 1 and 3.03(3) (emphasis added).

In Virginia, where the Property is located, there is no licensing subspecialty in "mineral property." An appraiser with Simerlein's license is authorized to appraise "all types of real estate and real property." Code § 54.1-2009. Thus, under the 2006 IRS Notice, Simerlein meets the "education and experience" requirements to appraise the Woolfords' Property.

In opposing the Petition for Appeal, the Department did not deny that Simerlein satisfies the 2006 IRS Notice. Instead, the Department argued, in effect, that the IRS Commissioner misunderstands federal tax law, that the IRS is being too lenient, and that the Department knows better than the IRS what *federal tax law* really means. Opp. Br. at 7, 10. That is an extraordinary – indeed, an extreme – position, and one that exposes the weakness in the Department's case.

2. Proceedings in the U.S. Tax Court Support the Woolfords' Position

A search of U.S. Tax Court decisions reveals no case where a state-licensed real estate appraiser was found to lack the education and experience necessary to be a "qualified appraiser" within the meaning of the 2006 Federal Statute. Instead, *Esgar Corp. v. Comm'r*, T.C. Memo 2012-35 (T.C. 2012), *aff'd*, 744 F.3d 648 (10th Cir. 2014), illustrates how that statute is applied where an appraisal is in dispute. *Esgar* involved a conservation easement on land containing sand and gravel. T.C. Memo 2012-35, at *1-2; 744 F.3d at 651. The reported decisions show that the landowner's appraiser was a state-licensed general real estate appraiser, but they give no indication that he had any formal coursework or even previous experience in "mineral property." Yet, in enforcing federal law, the IRS Commissioner *conceded* that the appraiser was a "qualified appraiser." T.C. Memo 2012-35, at *15-16. Instead, the IRS Commissioner challenged only the *value* reported in the appraisal. 744 F.3d at 651-52. Here, the Department forfeited the opportunity to challenge the value reached by Simerlein, s*ee supra* at 9 n.5, and, under applicable federal law, its challenge to his qualifications must be rejected.

3. There is No Authority for the Circuit Court's View that "Type of Property" Means "Mineral Property."

Even without the 2006 IRS Notice, there is nothing to suggest that the phrase, "type of property," should be diced so finely as to treat "mineral property" as the relevant property type.

First, the 2006 Federal Statute does not deal just with real estate. It addresses all types of property – books, art, jewelry, stocks, bonds, *etc*. – sweeping them all into its purview as "charitable contributions." "[Courts] assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citing authorities). In the ordinary meaning of words, real estate is understood to be a distinct "type of property," separate from chattels and intangibles. *Cf.* Black's Law Dictionary 286–287, 1410–1412 (10th ed. 2014) (definitions of property, real property, and chattel). For purposes of appraising donations of interests in land, Congress intended "type of property" to mean real estate, not some sub-category of real estate.

Second, if real estate is to be broken down into various *sub-types* of property for purposes of federal tax law, by what principle does a court identify the relevant level of specificity? If real estate in general is not the relevant level, is it rural real estate versus urban real estate? Or, is it

farmland versus woodlands? Or, is it farmland with mineral deposits versus farmland without them? The Circuit Court treated "mineral property" as the relevant property type, but it gave no principled basis for its decision, nor did the Circuit Court explain why it stopped at "mineral property" and did not divide that subtype even more finely (*e.g.*, quartz sand, silicon sand, # 5 gravel, # 3 gravel, slate, granite, *etc*.).

4. The Department's Position Undermines Legislative Intent.

The Department's rejection of the IRS interpretation undermines legislative intent in two ways:

First, under the IRS interpretation, appraisers are "qualified" to conduct the appraisal if they are licensed by the state to appraise the real estate at issue. By hiring Virginia-licensed appraisers, landowners know in advance that their appraisers will be accepted as "qualified."

Under the Department's approach, however, being licensed is not enough, and landowners can never know for sure whether the appraisers they hire will be accepted as "qualified" until after they have *already granted* the easement. If, as here, the Department later decides the appraiser is "not qualified," it is too late. The Department can retract the tax credits, but the landowner cannot retract the easement.

Such an unpredictable and arbitrary tax system is grossly unfair. It will scare away landowners who would like to donate conservation easements, but who will be afraid that what happened to the Woolfords could happen to them. This is not what the General Assembly intended when it adopted a tax credit program to encourage conservation easements.

Second, the Department's position destroys the federal-state uniformity that the General Assembly intended when it created the program. The Virginia tax *credit* program follows a similar federal tax *deduction* program. When it comes to who is a "qualified appraiser," the General Assembly said, in effect: *just follow the federal law*. *See* Code § 58.1-512(B). The IRS has not questioned Simerlein's qualifications as an appraiser, and the Woolford's federal tax deduction remains intact. JA-694. The Department also should have accepted Simerlein as qualified. Instead, the federal-state uniformity intended by the General Assembly has been unraveled by the very agency meant to carry it out.

The error by the Department – and the Circuit Court – is further underscored by several additional considerations:

- Despite its refusal to abide by them here, the Department's own *Guidelines for Qualified Appraisals* mirror the federal approach regarding appraiser qualification: "The appraisal must be prepared by a *qualified appraiser who is licensed in Virginia* pursuant to Va. Code § 54.1-2011." Rulings of Tax Comm. (Mar. 12, 2007), Doc. 07-9, http://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/ 07-9 (emphasis added).

- When the Virginia Department of Transportation ("VDOT") acquires an interest in land, it must pay the fair market value, as shown by an appraisal "prepared by a real estate appraiser licensed in accordance with [§ 54.1-2009 *et seq*.]." Code § 33.2-1001. Again, there is no such thing as a special license to appraise "mineral property." Real estate with mineral deposits may be valued and taken based on the report of an appraiser with the same qualifications as Simerlein. Under the Circuit Court's approach, an appraiser who is *qualified* to value the land, if the Commonwealth were to *take* it by eminent domain, may be *unqualified* to value that same land, if the owner were to *donate* an interes*t* in it to the Commonwealth. Such an irrational result should not go uncorrected.

- Unless and until they are removed from the ground, minerals are real estate. *Va. Coal & Iron Co. v. Kelly*, 93 Va. 332, 336 (1896) ("Land

includes everything belonging or attached to it. . . . It includes the minerals buried in its depths . . . ."). "Mineral deposits . . . are . . . classed as real property so long as they remain a par*t of the* land, but if the minerals [are] extracted, they *cease* to be real property and beco*me personal*ty." Black's Law Dictionary 1412 (10th ed. 2014) (definition of "real property") (quoting authority). The sand and gravel at issue here remain in the ground and, thus, are part of the real estate and not a separate "type of property." Simerlein is "qualified appraiser" of that real estate because he has the requisite state license.[9]

5. Simerlein is a "Qualified Appraiser" Under the 1996 Reporting Regulation.

As previously noted, the IRS has never displaced the 2006 IRS Notice with formal regulations explaining the term, "qualified appraiser." There is, however, a pre-2006 regulation that addresses the same term, but with a different purpose. The 1996 Reporting Regulation imposes reporting requirements on appraisers. Although neither the Department nor the Circuit

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[9] In conducting an appraisal of mineral-bearing property, an appraiser obviously will need to approach the matter differently than if there were nothing of value beneath the surface. Simerlein did so and did so competently; however, these are issues beyond the scope of the Circuit Court's rulings or this appeal.

Court relied on the 1996 Reporting Regulation in proceedings below, some discussion of it will help round out the analysis of applicable federal law.

The 1996 Reporting Regulation focuses on the need for the appraiser to provide a certain declaration in order to be a "qualified appraiser." Densely-packed, the regulation states:

> (5) Qualified appraiser – (i) In general. The term ***"qualified appraiser"*** means an individual (other than a person described in paragraph (c)(5)(iv) of this section[10]) ***who includes on the appraisal summary*** (described in paragraph (c)(4) of this section), ***a declaration that*** –
>
> > (A) The individual either holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis;
> >
> > (B) ***Because of the appraiser's qualifications as described in the appraisal (pursuant to paragraph (c)(3)(ii)(F) of this section),***[11] ***the appraiser is qualified to make appraisals of the type of property being valued***;
> >
> > (C) The appraiser is not one of the persons described in paragraph (c)(5)(iv) of this section; and

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[10] The exceptions found in paragraph (c)(5)(iv) consist of specific categories of individuals who have conflicts of interests or the strong appearance of such conflicts. Simerlein does not fall into any of those categories, and the Circuit Court did not suggest he does.

[11] The referenced subparagraph, (c)(3)(ii)(F), requires that the appraiser's declaration include "background, experience, education, and membership, if any, in professional appraisal associations."

> (D) The appraiser understands that an intentionally false or fraudulent overstatement of the value of the property described in the qualified appraisal or appraisal summary may subject the appraiser to a civil penalty . . . [and] the appraiser may have [future] appraisals disregarded . . . .

26 C.F.R. § 1.170A-13(c)(5)(i) (emphasis added).

This regulation does not provide any objective standards for what "qualifications" are needed to appraise any "type of property." Instead, it is simply a reporting requirement, as the Tax Court has repeatedly explained:

> [W]e have held that section 1.170A-13(c)(5)(i), Income Tax Regs., is a ***reporting requirement*** and that the plain language of the regulations states that in order to be a qualified appraiser, an individual must include on the appraisal summary a declaration [A] that he holds himself out as an appraiser, [B] that he is so qualified, [C] that he is not an ineligible individual, and [D] that he understands the consequences of a fraudulent overvaluation.

Alli v. Comm'r, T.C. Memo 2014-15, at *40 (T.C. 2014) (emphasis added) (citing *Friedberg v. Comm'r*, T.C. Memo. 2013-224, at *27 (T.C. 2013)).

In *Alli*, the Tax Court ruled that "[b]ecause [the appraiser] did not make such a declaration on petitioners' appraisal summary, he is not a qualified appraiser under the regulations." *Id.* In contrast, Simerlein, did make the required declaration. JA-111–14; JA-236–38. He is therefore, a "qualified appraiser" under the 1996 Reporting Regulation.[12]

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[12] There are only two exceptions in the 1996 Reporting Regulation for

D. The Shifting Rationales Used by the Department Illustrate the Fallacy of Its Position.

The Department seems unable to settle on a theory to support its position. The Department initially relied upon the 2008 Proposed Regulation. JA-280. But, when opposing the Woolfords' Petition for Appeal, the Department dropped that argument and invoked USPAP. Opp. Br. at 9. Neither rationale supports the Circuit Court's ruling.

1. The 2008 Proposed Regulation

The Department relied below on the 2008 Proposed Regulation, which was never adopted. It argued that the "proposed Treasury regulations governing such appraisals" require "actual formal 'coursework in valuing the category of property' at issue." JA-280 (citing *Internal Revenue Bulletin 2008-14* at 4) (quoting 73 Fed. Reg. 45908 (Oct. 6, 2008)). But, a *proposed* regulation has no authority, and it certainly does not displace the guidance

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when the appraiser's declaration is not efficacious – one dealing with conflicts of interest and the other dealing with guilty knowledge by the donor. *See* 26 C.F.R. § 1.170A-13(c)(5)(ii)–(iv). Neither exception is relevant here, and no other exception can be added. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.").

provided by the 2006 IRS Notice, which the IRS said taxpayers should rely upon until regulations are effective.

Even if it were adopted, the 2008 Proposed Regulation would not help the Department. The proposed regulation would require "professional or college-level *coursework* [or two-year's experience] in valuing *the relevant type of property*." 73 Fed. Reg. 45908, 45918 (quoting proposed regulation § 1.170A-17(b)(2)(A)) (emphasis added). But, the "relevant type of property" still does not mean something as narrow as "mineral property." Instead, the proposed regulation says: "The relevant type of property means the category of property *customary in the appraisal field* for an appraiser to value." *Id.* (quoting proposed regulation § 1.170A-17(b)(3)(i)) (emphasis added). What is customary in the Virginia real estate appraisal field is for state-licensed real estate appraisers, like Simerlein, to appraise "*all types* of real estate and real property." Code § 54.1-2009 (emphasis added). Thus, real estate – not some subcategory thereof – is the relevant property type for purposes of defining the formal coursework contemplated by the 2008 Proposed Regulation.

Simerlein has a Master's degree in "Real Estate Appraisal and Investment Analysis" and, at the time of trial, over twenty year's experience

in real estate appraisals, clearly showing that he would comply with the 2008 Proposed Regulation, if it were ever adopted.

2. If USPAP Provides the Standard, the Circuit Court Still Erred.

In opposing the Petition for Appeal, the Department invoked USPAP to suggest that "an appraiser must have 'familiarity with a specific type of property or asset,' not just real property in general." Opp. Br. at 9 (quoting Comment to USPAP Competency Rule, but disregarding USPAP discussion of how competency is acquired). But, nothing in the Circuit Court's order refers to USPAP, and a USPAP definition for "type of property" was not the focus of the proceedings in the Circuit Court.

Moreover, if USPAP is to be the standard for what "type of property" means, it also must be the standard for what "education and experience" mean. Yet, the Circuit Court never discussed Simerlein's education and experience in terms of USPAP standards, and a review of those standards shows that Simerlein meets them.

The idea that a state-licensed appraiser must have *formal coursework* in the specific category of real estate to be appraised is an invention of the Department. USPAP provides a less restrictive approach: "Competency can be acquired in various ways, including, but not limited to, *personal study by*

the appraiser . . . ." Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* U-11 (2010–2011 ed.) (emphasis added). Thus, a licensed real estate appraiser can acquire the necessary education in a specific category of real estate by personal study – *i.e.* self-education – just as Simerlein did in appraising the Property.

To use a familiar analogy, a lawyer who has passed the bar but never studied some subcategory of law in law school (say, worker's compensation law) can become competent in that area of practice by self-study. He need not go back to law school or take formal coursework.[13]

Similarly, as Simerlein testified:

> USPAP gives you the latitude to develop competency before and during the appraisal – before you engage the work and during the appraisal process. . . . [A]s long as you understand that local market, have the core concepts down, you're very qualified to appraise . . . even though you've never done one before.

JA-727–29.

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[13] *See* Va. Sup. Ct. Rule pt. 6, sec. II, 1.1 ("A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.")

Adhering to USPAP requirements, Simerlein gained competency in appraising "mineral property" through self-study and his experience in previous sand-and-gravel appraisals. Simerlein explained that he gained competency through "a drive-through inspection of the property, review of regional production statistics (over 20 years); review of the Geotechnical Report and initial interviews with Froehling & Robertson representatives; phone interviews and meetings with knowledgeable pit owners/operators; a meeting with the Director of King William County's Planning Office and initial phone contacts with a Department of Mines, Minerals & Energy representative." JA-920. Simerlein also reviewed his four prior sand/gravel appraisal work and published information from reputable industry sources. *Id.* Each of these experiences contributed to his competency in this area. *Id.*; *see also* JA-712–16 (describing prior sand and gravel appraisals and reviews). This evidence certainly permits the inference that Simerlein was qualified by education and experience to appraise the Woolford's Property and, on summary judgment, the Circuit Court was required to make that inference. *See, e.g., Dudas*, 261 Va. at 136 (2001).[14] By granting summary judgment for the Department, the Circuit Court erred.

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[14] The summary judgment ruling is made all the more erroneous by the

II. Simerlein's Appraisal Was Not "False or Fraudulent" and, thus, Cannot Be Disregarded in an Audit. (Assignment of Error 2).

A. Standard of Review

This assignment of error involves questions of law under Code § 58.1-512(D)(4): (i) whether the Department may disregard an appraisal that its audit does not find to "false or fraudulent," and (ii) if so, whether the Department is then required to "determin[e] the fair market value of the property and the amount of tax credit to be allowed under this section." These questions must be reviewed *de novo*. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007) ("issue of statutory interpretation is a pure question of law which an appellate court reviews de novo").

B. The Department's Failure to Find the Appraisal "False or Fraudulent" is Fatal to Its Position.

The Department's 2014 audit did not find the 2011 Appraisal to be "false or fraudulent" under Code § 58.1-512(D)(4). Thus, its challenge to Simerlein's qualifications came too late. The limitations imposed by the

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Circuit Court's decision to exclude other evidence relating to Simerlein's qualification, including: the Woolfords' USPAP experts (Assign. of Er. No. 3, discussed *infra* at 40–43) and evidence that the Woolfords' had not yet presented when their case-in-chief was cut short. (Assign. of Er. No. 4, discussed *infra* at 43–47).

"false or fraudulent" language must be understood in the context of the larger set of limitations that the General Assembly has placed on the Department when it processes applications for conservation easement tax credits.

First, when a taxpayer submits an appraisal in connection with an application for conservation easement tax credits, the Department has only 30 days to challenge the value:

> ***If within 30 days*** after an application for credits has been filed the Tax Commissioner provides written notice to the donor that he has determined that the preparation of a ***second qualified appraisal*** is warranted, the application shall not be deemed complete until the fair market value of the donation has been finally determined by the Tax Commissioner.

§ 58.1-512(D)(4) (emphasis added). For the Department to determine that a *second qualified appraisal* is warranted necessarily means that the Department has already determined that the appraisal submitted by the taxpayer is qualified – it is the *first* qualified appraisal. And finding that the taxpayer submitted a qualified appraisal means that finding that the work was performed by a qualified appraiser. *See* 26 U.S.C. § 170(f)(11)(E)(i) ("qualified appraisal" means an appraisal "which – is conducted by a qualified appraiser"). Thus, under the Virginia statute, the qualified appraisal/qualified appraiser issues must be decided by the Department within 30 days after receiving the application.

Second, when the Department asks for a second appraisal, further restrictions apply: "The Tax Commissioner shall make a final determination within 180 days of notifying the donor . . . ." Again, the point is to bring any issues to a quick resolution.

Here, the Department chose not to call for a second qualified appraisal within the 30-day time period. Thus, the Department is statutorily precluded from challenging the value of the Donation shown by Simerlein's 2011 appraisal – *a point the Department has repeatedly acknowledged*. *See supra* at 9 n. 5.

In other words, the Department admits it cannot reduce the value of the Donation from the $12.43 million found in the original appraisal down to, say, $10 million. Yet, the Department believes it can reduce the value, in effect, all the way to *zero* by attacking the qualifications of the appraiser. Such a tactic violates "the well-known maxim that a person may not do indirectly what he cannot do directly." *Clinchfield Coal Co. v. Robbins*, 261 Va. 12, 20 (2001) (citing *Phillips v. Schools*, 211 Va. 19, 22-23 (1970)).[15]

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[15] This maxim is applicable to the Commonwealth. *E.g., Campbell v. Commonwealth*, 246 Va. 174 (1993) ("We will not in this appeal permit the Commonwealth to accomplish indirectly what it cannot do directly."); *McClintock v. Richlands Brick Corp*., 152 Va. 1 (1928) (applying principle to actions by General Assembly).

The Department also may audit an appraisal. But, the constraints placed on the Department in earlier phases of the process continue to govern and are reinforced by an additional constraint:

> Any appraisal that, upon audit by the Department, is determined to be ***false or fraudulent***, may be disregarded by the Department in determining the fair market value of the property and the amount of tax credit to be allowed under this section.

§ 58.1-512(B) (emphasis added). There are two key points:

First, by naming one circumstance when the Department is authorized, in the context of an audit, to disregard completely an appraisal, the General Assembly intended to exclude all other circumstances from having that consequence. *See Fisher v. Tails*, 289 Va. 69, 75 (2015) (by granting appraisal rights to minority shareholders in certain specific situations, the General Assembly intended to exclude other situations as a basis for appraisal rights); *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246 (2001) ("Our construction of the statute is governed by the maxim *expressio unius est exclusio alterius,* which provides that the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute."). Because the Department did not determine Simerlein's appraisal to be "false or fraudulent," it cannot disregard that appraisal. Simerlein's valuation still governs.

Second, even if the Department were somehow able to disregard Simerlein's appraisal on other grounds, it still must "determin[e] the fair market value of the property and the amount of tax credit to be allowed under this section." § 58.1-512(B). Violating this requirement, the Final Determination Letter contained no determination of fair market value and, instead, wiped out the entire tax credit.

Apparently, in the Department's view, when taxpayers submit appraisals that are *false or fraudulent*, they are still able to enjoy tax credits, but with the Department "determining the fair market value of the property and the amount of tax credit to be allowed." But, when taxpayers submit *honest* appraisals – even *accurate* ones – they may be treated worse. If the Department deems an appraiser "unqualified" – the taxpayer receives no credit whatsoever. This is perverse, and it is surely not what the General Assembly intended when it enacted a tax credit plan to encourage landowners to donate conservation easements. "[A] statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007) (citing cases).

These issues should have been addressed by the Circuit Court and resolved in the Woolfords' favor; it was error for the Circuit Court to have excluded them from the case. While this Court may wish to remand them for consideration in the first instance by the Circuit Court, it need not do so because the law is clear.

III. The Circuit Court Erred by Excluding Expert Testimony. (Assignment of Error 3).

A. Standard of Review

A decision to admit or exclude expert testimony generally rests within the sound discretion of the trial court, *Dowdy v. Commonwealth*, 278 Va. 577, 600 (2009); however, a ruling that is "plainly wrong" is an abuse of discretion. *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 575 (2011). The Circuit Court excluded expert testimony from professional appraisers solely on the grounds that "the proposed experts would be offering legal opinions." JA-563. But, professional determinations are not legal conclusions. *See, e.g., Padula-Wilson v. Wilson*, No. 1203-14-2, 2015 Va. App. LEXIS 123, at *7–8 (Ct. App. Apr. 14, 2015). A ruling to the contrary is plainly wrong and an abuse of discretion. Moreover, whether any given expert opinion is a *legal* opinion is a question of law, to be reviewed *de novo*.

B. The Excluded Experts Were Not Offering Legal Opinions.

If the Court concludes that Simerlein is a "qualified appraiser" under federal law, that conclusion, standing alone, will require reversal of summary judgment. The Circuit Court's error in excluding expert testimony will be less important (though guidance may help avoid similar questions with respect to issues remaining on remand). On the other hand, if the Court concludes the "qualified appraiser" issue turns on some other basis (*e.g.*, industry standards such as USPAP), then the Circuit Court's error in excluding these witnesses assumes critical importance.

By granting the Department's motion *in limine*, the Circuit Court excluded testimony from three real estate appraisal experts *solely* on the theory that "the proposed experts would be offering legal opinions." JA-563. This was error.

The appraisal experts would have provided facts about the "qualification of the appraiser" and the "qualification of the appraisal report." JA-457–58. Encompassed within those categories of testimony are facts and professional opinions about the appraisal industry, such as the lack of any industry-recognized subspecialty in "mineral property," the practice of using personal study to obtain competency, and the significance, in terms of

industry-recognized competency, of Simerlein's four previous sand and gravel appraisals. Such testimony could help form the *factual predicates* for a legal conclusion. But, such testimony *is not* a legal conclusion.

Expert testimony regarding *industry standards* is clearly admissible. *See, e.g., Norfolk & Portsmouth Belt Line R.R. Co. v. Wilson*, 276 Va. 739, 745 (2008); *Morgen Indus. v. Vaughan*, 252 Va. 60, 64 (1996); *First Capital Realty, Inc. v. Prince Fairfax-Virginia Finuncane Assocs. Joint Venture*, 14 Va. Cir. 107 (Va. Cir. Ct. 1988) ("expert testimony regarding the standards and practices of the real estate industry is admissible.").[16]

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[16] Courts from other jurisdictions agree. *See, e.g., Brown v. Interbay Funding, LLC*, 417 F. Supp. 2d 573, 579 (D. Del. 2006) (expert testimony needed to establish standard of care in real estate appraisal industry); *Riverstone Dev. Co. v. Garrett & Assocs. Appraisals*, 195 So.3d 251 (Ala. 2015) (expert testimony used to "establish[] industry standard with regard to real-estate appraisal errors"); *Ark. Appraiser Licensing & Certification Bd. v. Emig*, 2009 Ark. App. 507 (Ark. Ct. App. 2009) (involving "duel of experts on a specialized matter–the standards and required practices for real estate appraisals"); *Crawford v. Signet Bank*, 179 F.3d 926 (D.C. Cir. 1999)(claim of negligent real estate appraisal required expert testimony on industry standard of care); *Kearney v. Auto-Owners Ins. Co*., No. 8:06-cv-595-T-23TGW, 2009 U.S. Dist. LEXIS 108918, at *27 (M.D. Fla. Nov. 5, 2009) (permitting experts to opine on "what ordinary and reasonable claims handling practices consist of and whether or not [an insurer] complied with those standards"); *Travelers Indem. Co. v. Royal Oak Enters., Inc*., No. 5:02-cv-58-Oc-10GRJ, 2004 U.S. Dist. LEXIS 29575, at *9 (M.D. Fla. Aug. 20, 2004) (finding that opinions as to the customs and practices of the insurance industry concerning insurance coverage determinations do not constitute legal opinions or conclusions of law).

In short, if the Court concludes that the "qualified appraiser" issue turns on industry standards, such as USPAP, or on another factual basis within the topics on which these experts were proffered, then it was error for the Circuit Court to have excluded them. The Circuit Court's judgment should be vacated, the order *in limine* reversed, and the case remanded for a new trial.[17]

IV. Summary Judgment Must Be Vacated Because the Circuit Court Erred When It Cut Short the Woolfords' Case-In-Chief. (Assignment of Error 4).

A. Standard of Review

This assignment of error presents a question of law, specifically, whether the grant of summary judgment before the Woolfords rested their case violated the applicable rules. This is a legal issue which the Court reviews *de novo*. *See Hale v. Maersk Line Ltd.*, 284 Va. 358, 372 (2012)

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[17] The Circuit Court also excluded testimony from three sand and gravel experts, JA-263–267; JA-457–461, again concluding that they would be offering "legal opinions." JA-563. On remand, these experts should be allowed to testify on such matters as the market demand for sand and gravel, the quantity and quality of the Woolfords' sand and gravel, and the business of sand and gravel mining operations – all of which may help demonstrate that Simerlein provided a "qualified appraisal." Thus, this part of the Circuit Court's order *in limine* should be reversed as well.

(circuit court's post-trial decision to grant summary judgment is a question of law reviewed de novo).

B. The Circuit Court's Premature Granting of Summary Judgment is Error.

When the Department's counsel interrupted the Woolfords' case-in-chief and moved for summary judgment, the Woolfords had two witnesses yet to call. They also had exhibits, marked but not yet introduced. *See supra* at 6. Because the Woolfords had not yet rested their case, it was error for the Circuit Court to grant summary judgment against them.

The rule governing summary judgment contains two pertinent sentences:

> [1] Any party ***may make*** a motion for summary judgment ***at any time*** after the parties are at issue . . . [2] If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, ***upon sustaining a motion to strike the evidence***, that the moving party is entitled to judgment, the court shall enter judgment in that party's favor.

Va. Sup. Ct. R. 3:20.

These sentences work in tandem. The first explains when a party may *make* a motion for summary judgment; the second explains when a court may *grant* such a motion. In some cases, summary judgment may be appropriate before trial begins. But, this was not such a case. Where, as

here, the case proceeds to trial, there is only one circumstance when a trial court may grant summary judgment: "upon sustaining a motion to strike the evidence."

As explained by one leading treatise: "[D]uring the course of a trial, summary judgment is a *consequence* of a successful motion to strike." Friend & Sinclair, Friend's Virginia Pleading and Practice § 13.06 (2007 ed.) (emphasis in original).[18] As Friend goes on to explain, his view is grounded in Virginia Code § 8.01-378, which provides:

> ***If the trial judge has granted a motion to strike*** the evidence of the plaintiff or the defendant, the judge shall enter summary judgment or partial summary judgment in conformity with his ruling on the motion to strike.

Id. (emphasis added).

Thus, neither the applicable rule (Rule 3:20) nor the applicable statute (§ 8.01-378) contemplates a midtrial award of summary *unless* there has first been a successful motion to strike. Here no motion to strike the Woolfords' evidence was ever made (and, logically, a motion to strike the plaintiff's

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[18] *See also* Bryson, Virginia Civil Procedure § 11.7 (6th ed.) ("[I]f the proceeding has reached the stage of the plaintiff's taking evidence, the preferable procedure should be to permit that to be completed before the motion [for summary judgment] is granted.").

evidence *cannot* be made until the plaintiff has finished *presenting* his evidence).

Allowing a plaintiff to finish his case is standard trial procedure: "If the motion [for summary judgment] is made during trial, *the nonmoving party should be given the opportunity to complete presentation of his or her case prior to the court's ruling on the motion*." Virginia Civil Benchbook for Judges and Lawyers § 2.16 (2016-2017 ed. Matthew Bender) (emphasis added).

Where trial courts have failed to adhere to this procedure, this Court has not hesitated to correct them. In *Rouse v. Great Atlantic & Pacific Tea Co.*, 216 Va. 293 (1975), this Court said:

> The plaintiff was prevented from presenting all of his evidence during the trial because the trial judge sustained the motions to strike the evidence and entered summary judgment after only the plaintiff and a medical witness had testified. Although Rule 3:18 [now 3:20] allows a party to make a motion for summary judgment "at any time after the parties are at issue," ***the court in this case should have allowed the plaintiff to complete his case in chief.***

Id. at 294 n.17. The same is true here. The Circuit Court should have allowed the Woolfords to complete their case in chief.

In *Durham v. Nat'l Pool Equip. Co.*, 205 Va. 441 (1964), the circuit court sustained a motion to strike plaintiff's evidence before plaintiff had rested his case. This Court found that plaintiff "was entitled to introduce other

evidence" and that "sustaining of the motion to strike was premature" and "reversible error." *Id.* at 448. Thus, this Court reversed the judgment and remanded the case for a new trial.

The Woolfords are likewise entitled to introduce other evidence, including the testimony of Schardein and Gaston and their remaining exhibits, especially since that evidence could affect the outcome of the case. Here, as in *National Pool,* it was premature and reversible error for the Circuit Court to grant the Department's motion for summary judgment.[19] The Court should, at a minimum, vacate the judgment and remand the case for a new trial.

CONCLUSION

The Woolfords ask for the following relief:

1. This Court should vacate and reverse the Circuit Court decision, rule affirmatively that Michael Simerlein is a "qualified appraiser" under federal and state law, and remand the case for further proceedings. This

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[19] "Well established principles require that error be *presumed prejudicial* unless the record clearly shows that the error *could not have* affected the result." *Dandridge v. Marshall*, 267 Va. 591, 597 (2004) (emphasis added). *Accord Spence v. Miller*, 197 Va. 477, 482 (1955) ("Error is presumed to be prejudicial unless it plainly appears that it could not have affected the result."). The Department bears the burden of overcoming the presumption of prejudice. It is a burden they cannot meet.

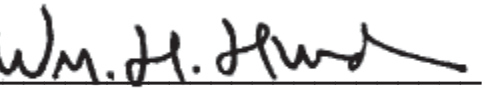
Court also should order that, upon remand, the Woolfords shall be permitted to call their experts on industry standards as well as their sand and gravel experts and introduce such other evidence as may be admissible on any remaining issues.

2. In the alternative to (1), the Court should vacate the Circuit Court decision and remand the case for a new trial, in which the Woolfords shall be permitted to call their experts on industry standards as well as their sand and gravel experts, and introduce such other evidence as may be admissible on any remaining issues.

3. In either case, the Court should rule that the Department exceeded its authority under Code § 58.1-512(B) when it used the audit to disregard Simerlein's appraisal based on "qualified appraiser/qualified appraisal" issues. In the alternative, if this Court concludes that Simerlein's appraisal may be completely disregarded, it should require the Department to "determin[e] the fair market value of the property and the amount of tax credit to be allowed". Or, in the alternative, this Court should remand these § 58.1-512(B) issues for full consideration in the first instance by the Circuit Court.

Respectfully submitted,

JAMES K. WOOLFORD, *et al*.
Appellants

By: 
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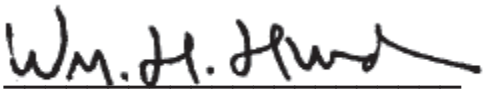
CERTIFICATE

Pursuant to Va. Sup. Ct. R. 5:26(h), I hereby certify the following:

1. I have complied with Rule 5:26(h) and have included the signature, Virginia State Bar Number, address, telephone number, facsimile number, and email address of at least one counsel of record.

2. This Brief complies with the page limitations contained in Rule 5:26(b).

3. Three printed copies of the foregoing Brief of Appellants and Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, one copy was electronically filed pursuant to Va. Sup. Ct. R. 5:26(e) and Va. Sup. Ct. R. 5:32(a)(3), and one copy of the Brief of Appellants was served via electronic mail, and an electronic copy on CD of the Brief of Appellants and Joint Appendix was served via UPS Ground Transportation, upon counsel for the Appellee, J. Duncan Pitchford, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 202 North 9th Street, Richmond, Virginia 23219, jpitchford@oag.state.va.us, this 3rd day of May, 2017.



William H. Hurd