In The

Supreme Court of Virginia

RECORD NO. 180810

VIRGINIA INTERNATIONAL GATEWAY, INC.,

Appellant,

v.

CITY OF PORTSMOUTH,

Appellee.

REPLY BRIEF OF APPELLANT

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SCV: Submitted on 05-31-2019 15:10:59 EDT for filing on 05-31-2019

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ARGUMENTS IN RESPONSE TO APPELLEE'S BRIEF

I. De Novo is the Proper Standard of Review

The issue at hand involves interpretation of a statute – specifically, does Virginia Code Ann. § 54.1-2011 require an expert appraiser to be licensed or face exclusion – and the import of this Court's prior decision in *Lee Gardens Arlington Ltd. Partnership v. Arlington County Bd.*, 250 Va. 534 (1995), given the later amendments to the statutory scheme. Both are classic examples of situations where *de novo* review is appropriate. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007).

The City's contention that the Trial Court stated that it believed it had the power to qualify FandI and allow his testimony does not alter this reality. The full context of the Trial Court's opinion makes clear that it did not truly believe – in the words of the Trial Court, "even if such power were not limited by the license requirement, the exercise of that power where the [expert] opinion was developed through illegal conduct would put the Court in the position of condoning and allowing unlawful activity." (JA 2291-92). The only way an expert opinion would be developed through illegal conduct or put a Court in the position of condoning and allowing unlawful activity would be if the licensure statute applied in these circumstances.

That question is one of statutory interpretation, and thus subject to *de novo* review.

II. There Was No Basis to Exclude Fandl Based on 2015 Work

In its Opening Brief, VIG pointed out the legal reasons that Virginia's statutory appraisal license scheme does not require exclusion. In addition, VIG noted that since Fandl was licensed in 2016 – when he completed and signed his final appraisal report, about which he testified at trial in 2017 – it was improper to exclude him, regardless of the applicability of the licensure statute.

In its brief, the City pushes back against both arguments. With respect to the latter, it suggests that because Fandl did background work and developed a draft of his appraisal report in 2015 (before he was licensed in 2016), the Trial Court's decision to exclude his testimony was correct.[1]

Applying the statute this broadly, however, would lead to shifting results and arbitrary line-drawing. At what point would an appraiser have done "too much" background work such that licensure is required? An appraisal report represents much of the totality of an individual appraiser's education and experience in the field. At what point does that background

[1] If the licensure statute does not require experts to be licensed, this issue is immaterial.

merge into the specifics of a particular assignment such that licensure is required?

If this Court is inclined to conclude that the licensure statute requires experts to be licensed in Virginia to be qualified as experts (and, as argued elsewhere, it should not), the rule should be clear, and should only require that appraisers be licensed at the time they issue and sign the appraisal report.

III. The Trial Court Was Not Right for the Wrong Reasons

The City argues the Trial Court was right, even if for the wrong reasons, because Fandl's testimony was flawed. The City is wrong.

A. Fandl Used the City's Own Acreage Calculations

The City first points to alleged errors in Fandl's acreage calculations. This argument suffers from a glaring flaw, namely that Fandl used *exactly* the same acreage calculations that the City used for the 2015-16 assessment at issue. He used *exactly* the same acreage included on the property cards provided to him by the City assessor. (JA 220-21).

Indeed, as the testimony at trial conclusively established, even as of the date of trial in November/December 2017, the City had not changed its published acreage of the property – it was still the same acreage used by Fandl, or 610 total acres.

Here is the testimony from the City Assessor at trial in which he reviews the City Assessor's property cards for the property at issue:

> Q: … And do you recognize that [Plaintiff's Exhibit 15] as the property card for the parcel 10 that we've been talking about?
> A: Yes, sir.
> Q: Okay. And it shows a – I think you said this before, but it shows a total acreage of 610; correct?
> A: Correct.
> Q: By the way, parcel 10 continues to show total acreage of 610 all the way up through the moment we're sitting here, correct?
> A: It does.
> Q: The City hasn't made any changes to that at all at any point in time since 2015; correct?
> A: Correct.

(JA 1102, lines 11-25) (*See also* JA 1114-17 (discussion by City Assessor of fact that City information continued to show 610 acres as of the date of the trial testimony in the transcript, December 1, 2017); JA 384-85 (testimony by Fandl confirming that all of the City's published documentation up to and during trial showed 610 acres)).

The City actually introduced a revised tax map at trial attempting to revise the parcel at issue. But the City conceded that the map it introduced was actually made on November 27, 2017, i.e., during the first day of trial – almost two-and-one-half years after the effective date of the real property assessment being challenged, July 1, 2015. (JA 454 (tax map at issue "made yesterday")).

Finally, to the extent Fandl (and the City) valued 610 acres instead of 579, the difference in value was not material, and actually slightly benefited the City. (JA 386-87 (testimony by Fandl confirming that the slight difference in acreage would not change his opinion of value)).[2]

B. Fandl's Alleged Failure to Value One Structure was Not Error

Fandl also used the property cards supplied to him by the City to appraise the buildings that the City showed on its property cards as being included in the 2015-16 assessment. At trial, the City took Fandl to task for not appraising a corrugated metal building that the City did not actually include in its property cards as having been assessed. (JA 386-87 (Fandl testimony confirming that building not on property card); JA 2022 et seq. (Plaintiff's Exhibit 15, which is the property record cards supplied by City Assessor to Fandl for the 2015-16 assessment)).

Again, Fandl testified that the building was a corrugated metal building in a parking lot and that it did not change his overall opinion of value. (JA 386-87).

[2] The City objected to questions posed to Fandl at this point in his testimony, contending that his opinion had not previously been disclosed. In overruling the objection, the Trial Court recognized the fundamental problem with the City's attacks on Fandl for using the acreage numbers supplied by the City, stating, "Disclosed? How can he disclose it if the City didn't disclose it to him? The objection is overruled." (JA 389).

Furthermore, if the City did not include the building in its 2015-16 assessment in the first place, the fact that Fandl did not include it in his appraisal is of no import.

C. A Separate Appraisal of the STS Cranes Was Proper

Finally, the City argues that Fandl should have included the STS Cranes in his appraisal, rather than rely on the appraisal of those fixtures provided by VIG's broker expert, Maarten Verheijen. The City cites to this Court's ruling in *City of Richmond v. Jackson Ward Partners, L.P.*, 284 Va. 8, 21 (2012), and asserts that adding the value of the STS Cranes to the rest of the real estate was improper because "arithmetic is not an acceptable appraisal method."

Of course, there is not even a hint of similarity between this Court's holding in *Jackson Ward Partners* and this case. There, an appraiser appraised eight separate, non-contiguous parcels of property in bulk as a single apartment complex, and then assigned a value to each tax parcel via a mathematical formula.

There are no similarities between the two cases, other than the fact they both involve property taxes. Fandl's approach was proper. STS Cranes are massive structures used to lift containers on and off of vessels. Fandl relied on an expert in the value of these kinds of unique fixtures to appraise

them. He testified that this was typical within the appraisal industry, namely finding someone with expertise when the property involved a fixture that was beyond the appraiser's area of expertise. (JA 369-74 ("It happens all the time. That is what you do.”))

This is not appraisal by arithmetic. Rather, it is an accepted and typical approach when the real property at issue includes unique fixtures. And there is no precedent of this Court that suggests otherwise.

D. Fandl's Comparable Sales Were Appropriate

The City then attacks Fandl's use of certain comparable properties that he used in valuing the land portion of the property (i.e., the "dirt," as separate and distinct from the buildings and improvements). The City focuses on two in particular – but the City fails to note that Fandl actually reviewed nine total national properties and nine total Portsmouth-specific properties. (JA 282-84 (Fandl testimony discussing process and answering question from Trial Court re: methodology); JA 2301-13 (Plaintiff's Exhibit 36-1, relevant sections of Fandl report identifying comparable properties and discussing his land value analysis)).

Indeed, as the City seems to recognize, Fandl's adjustments to the sale prices of these comparables to account for differences between the subject property and the comparables meant that Fandl's lowest comparable

per acre value was $400,289 per acre (JA 2313), whereas the sale price for the property the City spends the most time criticizing (the Cape Coral comparable) was just $160,058. In other words, Fandl did not use a low sale price of $160,058 in valuing the subject land, he used a low price of $400,289. Thus, the City's criticism is misplaced, and a red herring at best.

IV. The Trial Court's Failure to Consider Verheijen's Testimony on the STS Cranes Was Error

A. Verheijen Did Not Need an Appraiser's License

The City argues that Verheijen needed an appraiser's license to provide testimony as to the value of the STS Cranes, which are treated as fixtures, and therefore real property, for tax purposes. The Court should reject this argument.

First, the City claims that VIG is "contradicting itself" by arguing that Verheijen does not need a license because the STS Cranes are not "real estate" or "real property." (Appellee's Brief 25). There is no contradiction.

As was clear in VIG's opening brief, the issue is that the appraisal licensure statute contains its own specific definitions of "real property" and "real estate." Virginia Code Ann. § 54.1-2009. VIG's position is simply that fixtures are not included in either of these specific definitions – regardless of whether, as a general matter, fixtures are considered real property for tax purposes.

Section 54.1-2009 defines "real estate" as an "identified parcel or tract of land, including improvements thereon, if any." Fixtures are not parcels or tracts of land, and they are not improvements. The Section defines "real property" as "one or more defined interests, benefits or rights inherent in the ownership of real estate." A fixture is not an "interest, benefit or right" inherent in the ownership of real estate.

Thus, even assuming the appraisal licensure statute would apply to exclude an expert in the first place (which, as VIG has argued in this appeal, it should not), that statutory scheme does not apply to fixtures, regardless.

B. Verheijen's Methodology Was Proper

The City next argues that Verheijen's approach was itself flawed. The fact is, however, that Verheijen is one of the leading brokers globally in the sale of marine container terminal cranes. If there is any expert on earth well positioned to determine what a willing buyer would pay a willing seller for these cranes (i.e., what the fair market value of these pieces of equipment would be), it is Verheijen.

Indeed, there was no serious challenge to the reality that Verheijen knows the minds of buyers and sellers in this unique market. Where the question at hand is what those buyers would pay the sellers, Verheijen's testimony is directly on point and, in fact, the only testimony provided by any

witness that actually directly addressed what real buyers in this unique market actually would pay. (JA 1033-34 (Testimony of David Cole, City's equipment expert, admitting that all of the relevant market information he found came from Verheijen's report and that he actually had no idea what a buyer would actually pay for the cranes at issue)).

Under the circumstances of this case, Verheijen's failure to use formulaic methodologies in lieu of actual market knowledge and experience is not a basis to ignore his directly relevant and persuasive testimony.

V. The Trial Court's Rejection of Personal Property Value Was Error

Finally, the City claims the Trial Court's personal property conclusion – which rejected VIG's expert's evidence – was proper. There are numerous flaws in this argument.

A. The Trial Court's Conclusion Was Factually Incorrect

The City points to the Trial Court's statement in the Final Order to the effect that the cranes at issue had "already changed hands twice, first by lease and second by sale of that lease." What the Trial Court apparently meant was that the cranes were included in a 2010 lease between the private owners of the VIG property and the Virginia Port Authority ("VPA"), and that in 2014 there was a stock purchase transaction whereby the stock ownership of VIG was purchased by its current owners.

Neither of these was an actual sale of property. In fact, all of the real estate appraisers in the case declined to use the 2014 transaction because it was a stock purchase transaction rather than a sale. Thus, using these transactions as evidence allegedly contradicting VIG's expert's evidence was in error.

B. The City's Expert Was Not Credible

The City then attempts to match its expert, David Cole, against Verheijen. Even a cursory review of Cole's testimony shows how futile this attempt is. Cole did not actually know what an RMG or RTG was prior to being retained for this case. (JA 957). When he visited VIG in August of 2017, just a few months before trial, it was the "first time [he had] ever in [his] life been up close and personal to RMGs and RTGs." (JA 957).

Perhaps even more striking, August of 2017 was also the first time Mr. Cole had ever been on a marine container terminal, period. (JA 958). He even admitted that he did not actually know what a buyer would pay a seller in this unique market. (JA 1034-35).

Thus, to the extent the City attempts to match Cole's expertise in marine container terminal equipment against Verheijen's, that attempt must be rejected.

C. The City's "North America" Argument is Fallacious

Finally, the City's argument on page 35 of its brief regarding the "emphasis" on North America as a market for automated cranes stretches the record to its breaking point.

According to the City, "Mr. Cole also testified that approximately 1/5 of all orders for new (not used) RMGs/ASCs in 2013 were arriving in North American ports (a fact disregarded by Mr. Verheijen). J.A. 1018 12-16. Because of this burgeoning emphasis on automation taking place in and around North American terminals, Mr. Cole testified that he saw more opportunity in North America for the possible sale of used RMGs/ASCs." (Appellee's Brief 35).

But a review of the record shows that, not only did Verheijen not "disregard" this fact, *Mr. Cole was actually referencing data from Verheijen's report*, not any independent knowledge gained by Mr. Cole, who knows nothing about this industry (as he candidly admitted). (JA 2355-56 (portions of Verheijen report containing data cited by Cole)).

Also, Cole cited a one-time blip in 2013 that was simply not, as described by the City, evidence of any "burgeoning emphasis" on automation in North America. A review of the actual data (again, from Verheijen's report, the source of all market knowledge in this case), shows that in 2012, there

were only seven such cranes sold into North America (out of 80 worldwide), in 2011 zero (out of 118 worldwide), in 2010 five (out of 107), in 2009 five (out of 185), and in 2008 eight (out of 163). (JA 2355).[3]

In sum, accepting Cole's musings on the worldwide market – a person who knows nothing about it – over the testimony of one of the leading brokers in marine container terminal equipment is error and not supported by the very data source he cites.

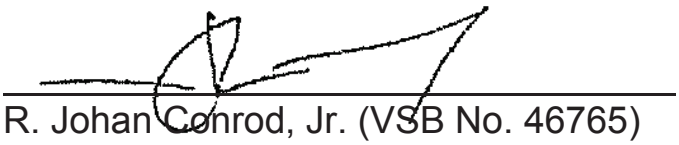
CONCLUSION

The Court should reverse the judgment of the Trial Court. The Court should find that Mr. Fandl's lack of a Virginia license in 2015 or 2017 did not require that his testimony be excluded. The Court should credit Mr. Fandl's testimony and Mr. Verheijen's testimony as to the fair market value of VIG's real property and enter final judgment setting the 2015-16 real property assessment at $197,217,000. The Court should also reverse the Trial Court's decision with respect to VIG's personal property and adjust the assessment of the RMGs for 2015 and 2016 to $19,500,000 and $16,500,000 respectively, and adjust the assessment of the RTGs for 2015 and 2016 to $1,900,000 and $1,600,000, respectively.

[3] In 2007 there were 30, but those are the cranes at issue.

May 31, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2019, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellant have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Reply Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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