In The

Supreme Court of Virginia

RECORD NO. 180810

VIRGINIA INTERNATIONAL GATEWAY, INC.,

Appellant,

v.

CITY OF PORTSMOUTH,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Circuit Court for the City of Portsmouth (the "Trial Court") erred in dismissing Virginia International Gateway, Inc.'s ("VIG") challenge to its real property tax assessment that was assessed by the City of Portsmouth, Virginia ("the City") for the 2015-2016 tax year. **(Preserved at Final Order Obj.)**

2. The Trial Court erred in disqualifying and refusing to credit the testimony of VIG's appraisal expert. The trial court refused to credit the testimony because, even though the appraiser held a Virginia appraiser's license for 2016 when he prepared his appraisal, he was not licensed in 2017 at the time of his trial testimony. **(Preserved at JA 184-87; Final Order Obj.)**

3. The Trial Court erred in failing to address or give any weight to the testimony of VIG's broker expert who opined at trial regarding the fair market value of the Ship to Shore Cranes (which the City assessed as real property). **(Preserved at JA 1734-37, 513-86; Final Order Obj.)**

4. The Trial Court erred by rejecting VIG's evidence of the fair market value of VIG's personal property based on the Trial Court's conclusion that transportation costs should not be a consideration for fair market value. **(Preserved at JA 1737-1741; Final Order Obj.; VIG's Post-trial brief, pp. 20-21).**

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

VIG is the owner of a semi-automated marine container terminal located in the City of Portsmouth, Virginia. The facility is one of the more technologically sophisticated marine container terminals in the world. It is leased to the Virginia Port Authority ("VPA"), which operates the terminal via the VPA's wholly-owned entity, Virginia International Terminals ("VIT").

The real property owned by VIG at the terminal includes the land, the buildings and improvements, the wharf, and large ship-to-shore cranes ("STS Cranes"), which are treated as real property for tax purposes. VIG's personal property includes, at least for purposes of this Appeal, rail mounted gantry cranes ("RMGs") and rubber tire gantry cranes ("RTGs").

For the 2015-2016 tax year, the City assessed VIG's real property, including the STS Cranes, at approximately $361 million. VIG challenged the assessment, contending that the actual fair market value of its real property was approximately $197 million.[1]

For calendar/tax years 2015 and 2016, the City assessed VIG's personal property (specifically, the RMGs and RTGs) as follows: for 2015, $34,800,000 for the RMGs and $2,255,000 for the RTGs; for 2016, $27,300,000 for the RMGs and $2,085,000 for the RTGs. VIG challenged these assessments as well, contending that the 2015 fair market values were $19,500,000 for the RMGs and $1,900,000 for the RTGs, and that the 2016 fair market values were $16,500,000 for the RMGs and $1,600,000 for the RTGs.

[1] Given the tax rates at issue, the difference in the two fair market value calculations represented an approximately $2 million per year difference in the amount of taxes due the City by VIG ($4.58 million versus $2.5 million).

VIG filed the real property and personal property cases as two separate actions. However, by Order entered on May 30, 2017, the Trial Court consolidated the two matters for discovery and trial.

Prior to trial, the City filed a motion for leave to file a counterclaim as to the real property claims. The City's counterclaim asserted that upon review it had determined that its $361 million assessment was actually too low and that the proper fair market value of VIG's real property was approximately $770 million. VIG objected, but the Trial Court granted the City's motion and permitted the counterclaim.[2]

The parties went to trial in late November of 2017. At trial, both VIG and the City took the position that the City's original $361 million real property assessment did not represent fair market value and had not been arrived at in accordance with proper real estate appraisal procedures. VIG also presented evidence that that the assessments of the personal property – specifically, the RMGs and RTGs – also exceeded fair market value.

Both VIG and the City presented the testimony of expert appraisers. VIG called Glen Fandl, a licensed real estate appraiser, to testify about the fair market value of all of the real property other than the STS Cranes. VIG

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[2] If the City's counterclaim had been successful, it would have increased VIG's tax bill by over $5 million per year – from $4.58 million to $9.78 million.

called a different expert, Maarten Verheijen, who is a Dutch broker specializing in marine container terminal equipment, to testify regarding the value of the STS Cranes in the real property case and the value of the RMGs and RTGs in the personal property case.

Relying on Virginia Code Ann. § 54.1-2011 (which generally addresses licensure requirements for real estate appraisers), during the trial the City repeatedly challenged Fandl's qualifications as an expert because he did not hold a Virginia appraisal license as of the date of trial. Fandl, whose principle appraisal licensure is in New York, had obtained a Virginia license effective for 2016, which is when he completed his final appraisal of VIG's real property. However, Fandl's Virginia license had lapsed at the end of 2016 and not been renewed for 2017. When these challenges were raised at trial, the Trial Court rejected the City's challenges, qualified Fandl as an expert appraiser and refused (at least during the trial) to strike or disregard his testimony.

After nine days of testimony and legal argument, the Trial Court took the issues under advisement. On March 22, 2018, the Trial Court issued a written opinion and Final Order. With respect to the real property dispute, the Trial Court dismissed VIG's application, dismissed the City's counterclaim, and ruled that the original $361 million assessment would

remain in place. The Trial Court acknowledged in the Final Order that, "both parties asserted (and it was proven) that the city assessor failed to follow generally accepted appraisal practices with regard to the real estate." (JA 2290). Nonetheless, the Trial Court ruled that since neither VIG nor the City had carried its burden of establishing a different fair market value, it had "no basis for ordering an adjustment" and therefore the only choice was to confirm the original assessment.

Notably, in its Final Order, the Trial Court reversed the position it took at trial with respect to Fandl's licensure. Whereas during trial the Trial Court had rejected the City's challenges and qualified Fandl as an expert, in the Final Order the Trial Court decided that the failure to be licensed other than in 2016 was fatal and refused to credit Fandl's testimony.

The Trial Court concluded that crediting Fandl's testimony would in effect be facilitating the commission of a criminal act, since developing an opinion of value of Virginia real estate without holding a license would constitute "illegal conduct" and would "put the [Trial] Court in the position of condoning and allowing unlawful activity." (JA 2291-92).

Given this ruling, the Trial Court did not consider any of Fandl's substantive testimony regarding the fair market value of VIG's real property. In addition, the Trial Court did not consider (or even discuss)

evidence presented by VIG regarding the value of the STS Cranes – in other words, the separate testimony of expert Maarten Verheijen, who testified as to the value of the STS Cranes, is not addressed at all in the Final Order.

With respect to the personal property case, the Trial Court ruled that VIG's testimony had included a deduction in value for the cost of transportation of the cranes at issue. The Trial Court determined that the transport cost deduction was not a proper element to consider in determining the fair market value of the RMGs and RTGs, and for that principal reason refused to adjust the personal property assessment.

VIG objected to the Final Order, filed a timely Notice of Appeal and now presents this Appeal to the Court. The Court should reverse the Trial Court's Final Order, find that Fandl's testimony as to value should have been considered, and with respect to both the real property and the personal property, find that the City's assessments exceeded fair market value and that the proper values are as presented in VIG's evidence at trial.

STATEMENT OF FACTS

VIG owns a several hundred acre tract of land located in the City of Portsmouth that is used as a marine container terminal. The property fronts on the Elizabeth River, which feeds to the Chesapeake Bay, which

feeds to the Atlantic Ocean. The City of Portsmouth's assessment of VIG's real estate for the 2015-2016 tax year (July 1, 2015 – June 30, 2016) was $361,084,820. The property included in this figure and assessed as real property by the City included land, buildings, the wharf, and eight ship-to-shore ("STS") cranes.

VIG believed the assessment exceeded the fair market value of its real property. Thus, it filed an application pursuant to Virginia Code Section 58.1-3984 and challenged the City's assessment. (JA 1). VIG contended that the appropriate fair market value for the real property at issue was $197,217,000, and VIG offered extensive testimony and evidence at trial to support that valuation.

VIG also believed that the assessments of its personal property, specifically certain RMGs and RTGs, exceeded fair market value. It therefore also filed a challenge to these assessments, and that case was consolidated with the real property matter for discovery and trial. (JA 20).

Testimony of Glen Fandl

VIG offered Glen Fandl as its expert real estate appraiser. Fandl has extensive experience in the appraisal of unusual and complex real estate, which he testified about on the record at trial. (JA 179-89). During trial the Trial Court recognized his expertise, overruled the City's challenges to his

qualifications, and chose to qualify him as an expert at trial. (JA 202, 205, 210).

With respect to Fandl's work, and the licensure at issue, it was undisputed at trial that Fandl held a real estate license in New York for all of the periods in question. He also held a Virginia license for 2016. (JA 194-95). Fandl's work related to this matter began in 2015. During 2015, he visited the property and prepared a preliminary valuation report. (JA 238, 241-42). However, Fandl's final appraisal report was completed in 2016 (trial had originally been scheduled to occur in 2016). (JA 248). He then testified about that final appraisal at trial in 2017.

Fandl's testimony regarding his appraisal focused on the three principal approaches to value that this Court has held must be considered, namely the income method, the cost method and the sales comparison method. (JA 273 et seq., 354-368). The income method essentially considers the amount of income generated by the real estate in arriving at a determination of value. The cost method considers the cost of building equivalent real estate, and discounts that replacement or reproduction cost by consideration of the real estate's actual life as compared to its useful life. Finally, the sale comparison method attempts to locate sales of

comparable properties and to then consider those sale prices as indicators of value. *Id.*

Fandl testified that he did not use the income approach. Specifically, he testified that the income generated at VIG for the relevant 2015-16 tax year came from a 2010 lease with the Virginia Port Authority. However, in using the income approach, Fandl testified that an appraiser must be careful to do two things: 1) make sure that the income, or rent, used for the income approach is "market rent," and not "contract rent" (i.e., that the income is actually a fair representation of what the market will pay for use of the property and not simply a "sweetheart" or other off-market deal); and 2) isolate the rental income attributable to the real estate as opposed to income attributable to other, non-real estate portions of the property (the assessment is supposed to represent the fair market value of the real estate alone, not the value of other non-real estate items that are contributing to the income stream). Fandl testified that to use the income approach, the 2010 lease income should be segregated between income attributable to the real property and income attributable to things other than the real property (personal property, the use of software, the automation of the port, etc.). Since it was not possible to determine the income

attributable to the real property, Fandl did not use that approach. (JA 355-365).

Thus, Fandl relied on the cost approach. (JA 368). This approach involved valuing the unimproved land by reference to comparable sales of other unimproved parcels, valuing the buildings by first determining their current cost of reproduction or replacement and then depreciating them to account for their age and valuing the improvements (including the wharf) by trending their original cost to the effective date of the assessment and then applying appropriate depreciation.

Fair Market Value of the Unimproved Land

To value the unimproved land, Fandl broke the categories of land down into the same categories used by the City assessor, namely waterfront land, commercial land and wetlands. He then provided a detailed analysis of each category, based on comparable land sales both in other locations around the country (with respect to the waterfront land) and in Portsmouth (with respect to the other commercial land). (JA 273-292).

In light of his analysis, Fandl testified that the fair market value of the land as unimproved was $26,465,000. (JA 292).

Fair Market Value of the Building Structures

Fandl then valued the building structures using the Marshall & Swift manual to determine replacement cost new for each building and then depreciating it based on consideration of several factors, including the depreciation schedules in the Marshall & Swift manual. (JA 309-14).

In his testimony at trial, Fandl went through in detail each of the building structures and described why he determined its value to be what it was. He explained his analysis, and VIG introduced (as its Exhibit 36-1) Fandl's conclusions with respect to the replacement cost and depreciation of each structure. (JA 315-30).

In light of this analysis, Fandl testified that the fair market value of the buildings and structures was $18,500,000. (JA 330).

Fair Market Value of Improvements and Wharf

Fandl also provided detailed testimony about his conclusions of value with respect to the improvements (paving, rail, etc.) and the wharf structure. He testified that he used original cost information, which he trended forward to determine the reproduction cost as of the date of the assessment in question (July 1, 2015). Fandl then testified how he depreciated those assets based on his research and the industry data that he reviewed,

including by reference to such sources as state highway department data. (JA 330-53).

Upon concluding this analysis, Fandl determined that the fair market value of the improvements was $61,126,000. (JA 349). He concluded that the fair market value of the wharf was $56,918,000. (JA 353).

Fair Market Value of the STS Cranes and Testimony of Maarten Verheijen

Because Fandl admittedly did not have expertise in valuing STS Cranes, at trial VIG offered Mr. Maarten Verheijen of CHE Brokers, who is based out of the Netherlands. Mr. Verheijen has extensive experience valuing port and container handling equipment and is one of the few brokers in the world that specializes in this type of equipment. (JA 513-19). The Court recognized Mr. Verheijen as an expert on the value of marine container terminal equipment, including STS cranes. (JA 519-20).

Mr. Verheijen offered testimony describing the function of STS cranes, the condition of the specific STS cranes on the VIG property and offered his opinion as to the fair market value of the cranes. (JA 520-86; VIG Ex. 36-2). Mr. Verheijen confirmed that the definition of fair market value he used in formulating his opinion was “the price a willing buyer and a willing seller would agree on” where there is a “seller that’s not under pressure to sell to a buyer that’s not under pressure to buy.” (JA 526).

Mr. Verheijen offered an extensive analysis of the fair market value of the STS cranes, which included his consideration of multiple factors including transportation costs, market factors and market trends, the cost of a new crane, power conversion, warranties and comparable sales. (JA 526-86). Mr. Verheijen testified that a buyer looking to purchase used cranes in the market would not spend more than 50-60% of the cost to purchase a crane new. (JA 579).

Ultimately, Mr. Verheijen testified that for the six STS cranes purchased in 2007 the fair market value he would apply was $3.8 million per crane (a total of $22.8 million dollars). (JA 580.) For the two STS cranes purchased in 2012, Mr. Verheijen testified that the fair market value was $5.7 million per crane (for a total of $11.4 million). (JA 581). Thus, in total, Mr. Verheijen opined that the fair market value of the eight STS cranes in 2015 was $34.2 million dollars. (JA 581).

The Personal Property Case

VIG presented evidence in support of its personal property challenge both via the deposition testimony of the City's Commissioner of the Revenue and Mr. Verheijen.

1. Testimony of Commissioner of Revenue

Through deposition testimony, Commissioner Edmonson confirmed that the City simply relied on the 50% of original cost methodology in assessing the VIG personal property at issue. (JA 768-72). Further, even after VIG contested the valuation of the property and provided information confirming that using the 50% formula resulted in assessment of VIG's property at greater than fair market value, the City never consulted or hired any industry experts with specialized knowledge regarding the specific personal property at issue (the cranes and spreaders). (JA 770-72).

2. VIG's Fair Market Value Evidence

Maarten Verheijen of CHE Brokers testified as to the value of the RMGs, RTGs and certain Bromma spreaders. (JA 586-660 (testimony); JA 2352 (sealed) (VIG Ex. 36-3)). As discussed above with respect to the real estate case, Mr. Verheijen has extensive experience valuing port and container handling equipment and is one of the few brokers in the world that specializes in this type of equipment. The Trial Court recognized him as an expert on the value of the RMGs, RTGs and spreaders. (JA 519-20).

Mr. Verheijen first opined regarding the value of the RMGs and explained that in determining the fair market value he considered things such as market trends, the restriction on the market for automated stacking

cranes (ASCs), the brand of the machine, the year, the number of load cycles the machine has done, the cost to transport, the need for electrical conversion, and how wide the machines are (i.e., how many containers can be stacked underneath). He testified regarding the need to update the RMG machines to the latest software or convert the machines to manual to appeal to buyers in the market. Mr. Verheijen looked at the value of the RMGs in their current condition, the value if they were updated and the value if they were retrofitted to a normal RMG. Ultimately, Mr. Verheijen took the average of these three approaches and opined that the fair market value of the 30 RMGs was $650,000 per unit in 2015 and $550,000 per unit in 2016. (JA 586-632).

Mr. Verheijen next opined regarding the value of VIG's four RTGs. He explained that in determining the fair market value he considered things such as market trends, the tonnage of the machine, the brand of the machine, the year, the number of running hours and cycles, the fuel costs, and how wide the machines are (i.e., how many containers can be stacked underneath). Ultimately, Mr. Verheijen opined that the fair market value of the four RTGs was $475,000 per unit in 2015 and $400,000 per unit in 2016. (JA 633-43).

With respect to all of the marine container equipment, Mr. Verheijen testified that buyers always pay the costs of transportation and therefore the transportation costs must be an element of consideration in determining the price that a willing buyer would pay a willing seller in that unique market. (JA 573-74).

Thus, the fair market value testimony of Mr. Verheijen (the only expert to testify for either party with first-hand knowledge regarding the values of marine container terminal equipment) establishes that the City significantly overvalued the RMGs and RTGs in its 2015 and 2016 personal property assessments. Adjusting the City's original personal property assessment to account for the lower fair market values, VIG established at trial that its total personal property assessment should be adjusted to $32,145,050 for 2015 and $28,675,050 for 2016.

3. The City's Expert, David Cole

Instead of defending the Commissioner of Revenue's assessment and the 50% of cost methodology, the City offered the testimony of expert appraiser David Cole who provided an additional opinion as to the fair market value of the RMGs, RTGs and spreaders.

However, Mr. Cole's testimony was not credible. Notably, Mr. Cole admitted that he did not even know what an RMG or RTG was before being

hired by the City to conduct this valuation. (JA 1032-33). Further, Mr. Cole admitted that the only "market data" he consulted was the data he found in the CHE report created by VIG's expert Mr. Verheijen. (JA 1033-34). On cross examination, he admitted that he did not actually know what a buyer in the relevant market would pay for the RMGs. (JA 1034-35). In the absence of any such experience or knowledge, he developed a "useful life" metric to arrive at his value opinion – but on cross examination he admitted that buyers in the market actually may not rely on his "useful life" metric in determining the price to pay for these assets. (JA Tr. 1038-40).

Further, while the City and Mr. Cole attempted to attack Mr. Verheijen's use of transportation cost as a factor in his value conclusion, Mr. Cole admitted that transportation cost would be a factor in a market where the buyer always bore the transportation costs. (JA 1041-45). Given that Mr. Verheijen testified that buyers always bear the cost of transportation in the market for marine container terminal cranes, Mr. Cole's admission should have been determinative.

The Trial Court's Final Order

The Trial Court took all of the evidence under consideration. In its March 22 Final Order, as discussed above, with respect to the real property case it concluded that Fandl's testimony should not have been credited

given that he was only licensed in 2016. It did not discuss Mr. Verheijen's testimony regarding the STS Cranes. The Trial Court therefore denied VIG's application for an adjustment of the 2015-16 assessment.

In the Final Order, the Trial Court appears to have taken the position that, even though it had the power to qualify an unlicensed appraiser as an expert, it is a power that could never be exercised given the requirements of licensure more generally. Specifically, the Trial Court stated that while it believed it "had the power to qualify Fandl and allow his testimony," it declined to do so, because "the requirement of a Virginia license in real estate or real property appraisals is clear and cannot be ignored," and doing so would put the court "in the position of condoning and allowing unlawful activity." (JA 2291-92 (Final Order)).

With respect to the personal property case, the Trial Court principally took issue with Mr. Verheijen's use of transportation cost as a factor. The Trial Court determined that considering transportation cost would not lead to "fair market value," but rather "fair market value removed," which the Trial Court held was not proper. (JA 2299 (Final Order)).

AUTHORITIES AND ARGUMENT

I. The Trial Court Erred in Rejecting Glen Fandl's Testimony Based on Fandl's Failure to Hold a Virginia Appraiser's License for 2015 and 2017

A. Standard of Review

The decision whether to qualify an expert as such at trial is typically one within the discretion of the trial court. *Brown v. Corbin*, 244 Va. 528, 531 (1992). However, it is well-established that "an issue of statutory interpretation is a pure question of law which [this Court] reviews de novo." *Conyers v. Martial Arts World of Richmond*, *Inc.*, 273 Va. 96, 104 (2007). "When the language of a statute is unambiguous, [this Court] [is] bound by the plain meaning of that language." *Id.* "If a statute is subject to more than one interpretation, [this Court] must apply the interpretation that will carry out the legislative intent behind the statute." *Id.*

Because the Trial Court's decision here turned on the application and interpretation of Virginia Code Ann. §§ 54.1-2010 and 2011, this Court should subject that decision to de novo review.

B. Expert Qualifications

Virginia Code § 8.01-401.3 provides that expert testimony is admissible where it would assist the trier of fact to understand the evidence or to determine a fact in issue. It indisputably gives trial courts the

discretion to permit the testimony of experts who are qualified to opine on the subjects upon which they are designated to testify.

Here, the Trial Court, during the trial below, found that Fandl was qualified to provide opinion testimony regarding the fair market value of the real property owned by VIG. Only after trial concluded did the Trial Court reverse course and decide to exclude Fandl's testimony, erroneously concluding that this Court's decision in *Lee Gardens* and Code Section 54.1-2011 effectively required exclusion because permitting Fandl's allegedly unlicensed testimony would be tantamount to permitting a criminal act.

C. The *Lee Gardens* Opinion and the General Assembly's Amendments of Virginia Code § 54.1-2010

Virginia Code § 54.1-2011 states that it is "unlawful to engage in the appraisal of real estate or real property for compensation or valuable consideration in this Commonwealth without first obtaining a real estate appraiser's license in accordance with Board regulations . . . ." § 54.1-2011(A). Section 54.1-2010 in turn contains various exemptions from the licensure requirement. Prior to July 1, 1995, 54.1-2010 did not contain any exemptions for expert testimony in court (as explained below, this changed in 1995).

In November 1995, this Court issued its opinion in *Lee Gardens Arlington Ltd. P'ship v. Arlington Cty. Bd*., 250 Va. 534 (1995), which interpreted and applied the language of the statute as it existed prior to July 1, 1995. In that decision, this Court held that a private tax consultant could not testify to the value of commercial real estate because he was not a Virginia-licensed appraiser. *Id*. at 540.

As noted, however, several months before the date of the *Lee Gardens* decision – specifically, July 1, 1995 – the General Assembly amended Section 54.1-2010 to add the following: "Nothing herein shall proscribe the powers of a judge to determine who may qualify as an expert witness to testify in any legal proceeding. This provision is declarative of existing law."

Although the *Lee Gardens* opinion was issued after the July 1, 1995 effective date of the amendment to Virginia Code § 54.1-2010(B), the amendment is not mentioned in the opinion at all – perhaps because the trial court's decision in that case not to qualify the expert occurred prior to July 1 and therefore prior to the effective date of the amendment.

Instead, in *Lee Gardens* this Court relied on a 1993 Opinion of the Attorney General interpreting § 54.1-2011 to bar expert testimony unless the witness was licensed as an appraiser. And this Court further observed

that since the General Assembly had not amended the law in response to the Attorney General opinion, that opinion should be considered binding. *Id.* Of course, as of the date of the *Lee Gardens* decision the General Assembly had, in fact, amended the statute to change the applicable law that had been interpreted by the Attorney General in 1993. But there is no mention of the 1995 amendment in the *Lee Gardens* opinion.

Even after the 1995 amendment, and in light of *Lee Gardens*, at least some trial courts in Virginia determined that real estate appraisal experts were still required to be licensed in Virginia. Those decisions in part turned on the inclusion of the phrase, "this provision is declarative of existing law" in the 1995 amendment. These courts reasoned that "existing law" consisted of the 1993 Attorney General opinion, and therefore that opinion and *Lee Gardens* required all experts offering appraisal opinion testimony to be licensed in Virginia. *See*, *e.g.*, *Commonwealth Transp.Comm'r v. Baxter*, 44 Va. Cir. 148 (Spotsylvania Cty. 1997).

In 1999, presumably in response to *Lee Gardens* and the subsequent trial court decisions, the General Assembly amended 54.1-2010(B) still further. This time it deleted the language from the 1995 amendment stating that, "this provision is declarative of existing law." *See* 1999 Va. HB 2334.

Thus, the 1999 amendment to Section 54.1-2010(B) definitively confirmed that the prohibitions contained in Section 54.1-2011 did not apply to a trial court's decision of whether to qualify an expert to opine as to the value of real estate in Virginia courts. And it removed any concern regarding whether the decision in *Lee Gardens* should be read to hold otherwise. Indeed, that has been the conclusion of one of the few courts to consider the issue since 1999. *See Metamining*, *Inc. v. Barnette*, No. 2:12CV00024, 2013 U.S. Dist. LEXIS 89446, at *28 (W.D. Va. June 26, 2013) ("[S]ubsequent to the *Lee Gardens* decision, the Virginia General Assembly adopted a statutory amendment that specifically preserves the discretion of a trial judge regarding who might qualify as an expert in real property valuation.")

In sum, even if *Lee Gardens* is considered to have been "existing law" at the time of the 1999 amendment, the 1999 amendment made clear that the 54.1-2010(B) provision exempting trial court expert qualification decisions from the requirements of the licensure statute was not declarative of existing law. Accordingly, *Lee Gardens* is not controlling.

D. The Trial Court's Final Order Was in Error

In the Final Order, the Trial Court appeared to conclude that the Virginia Code provisions discussed above gave it a power to qualify an

unlicensed appraiser, but – in effect – determined that such power was one the Trial Court could never exercise because it would condone "illegal conduct" and "unlawful activity." (JA 2291-92 (Final Order)).

The Trial Court relied on two state circuit court decisions decided in 1996 and 1997 (i.e., two decisions issued prior to the 1999 amendment of 54.1-2010(B) making clear that *Lee Gardens* did not control): *Commonwealth Transp. Comm'r v. Baxter*, 44 Va. Cir. 148 (Spotsylvania Cty. 1997), and *Appalachian Power Co. v. Orr*, 40 Va. Cir. 370 (Washington Cty. 1996). In particular, the Trial Court specifically cited Judge Ledbetter's opinion in *Commonwealth Transportation* as "best express[ing] a trial judge's aversion to exercising a power which will serve to promote illegal conduct." (JA 2292 (Final Order)).

However, Judge Ledbetter's opinion relied in material part upon the fact that the 1995 amendment to 54.1-2010 (which added section (B)) contained the phrase "This provision is declarative of existing law" as the last sentence to the amendment. 44 Va. Cir. at 151. In Judge Ledbetter's words, "[t]o hold that the General Assembly enacted the amendment for the purpose of correcting and overturning the Attorney General's earlier opinion [relied upon by the Supreme Court in *Lee Gardens*] would nullify the last sentence of the amendment." *Id.*

By amending the statute further in 1999 and removing the "declarative of existing law" provision, the General Assembly made clear that *Lee Gardens* (and the 1993 Attorney General opinion upon which it relied) did not – and does not – control the issue. In other words, even if Judge Ledbetter's view was arguably correct in 1997, after the 1999 amendment it was no longer controlling or persuasive.

Indeed, if the Trial Court were correct, such an interpretation would effectively wipe Section 54.1-2010(B) from the Virginia Code. Since courts are obliged to give meaning to every word of a statute, the Trial Court's conclusion cannot be correct.

Either *Lee Gardens* controls and an expert must be licensed, or the General Assembly amendments control and a trial court need not treat the lack of a license as determinative. Instead, as in virtually every other context, the Trial Court would be free to qualify an expert on the value of real estate based on the qualifications of the expert. *See Commonwealth v. Allen*, 269 Va. 262, 274 (2005) ("In the absence of express statutory requirements for the qualification of an expert witness in this particular type of proceeding, we will apply the general rules applicable to expert testimony in other civil cases. *See* Code § 8.01-401.3.")

Notably, if the qualifications of the expert were the sole consideration here, the Trial Court would have qualified Fandl. Not only did the Trial Court qualify him during trial, but in the Final Order the Trial Court stated that Fandl's "history of licensure in the State of New York and twice temporarily in Virginia, along with his previous designation as an appraiser by the American Society of Appraisers, was adequate evidence of his expertise enabling him to formulate a knowledgeable opinion as to real estate values." (JA 2290).

Given that the General Assembly has stated unequivocally that the licensure statute does not bear on a trial court's decision to qualify an expert, the Trial Court here erred by relying on the licensure statute to bar the consideration of Fandl's testimony. This Court, therefore, should reverse the Trial Court and either (i) remand for further proceedings or (ii) in the alternative (and as discussed below), consider the fully-developed record and enter a final order finding that the 2015-16 real property assessment exceeded fair market value and adjusting the assessment consistent with the evidence presented by VIG at trial.

E. Fandl Was Licensed When He Issued His Appraisal

There is also a further error in the Trial Court's Final Order. Even assuming *Lee Gardens* and the 1993 AG Opinion remains controlling,

Fandl indisputably was licensed in 2016 at the time that he issued and signed his appraisal report. His testimony at trial in 2017 merely reiterated the conclusions contained in his 2016 report, which was issued at the time he held a Virginia license (trial had originally been scheduled to occur in 2016). Thus, he complied with the statute, since he held a Virginia license when he reached his opinion and conclusion of value as to the fair market value of VIG's real property.

For this additional reason, the Trial Court's ruling excluding his testimony was in error, and this Court should reverse.

F. The Court May Also Issue an Opinion Determining the Fair Market Value of VIG's Real Property

As an alternative to remand, should this Court reverse the Trial Court's determination as to Fandl's qualification as an expert, the Court could, and should, enter an order finding the fair market value of the real property to be consistent with the testimony provided by Fandl at trial. *See Tysons Int'l Ltd. P'ship v. Bd. of Fairfax Cty.*, 241 Va. 5, 12 (1991) (observing that, pursuant to Va. Code § 8.01-681, where the "facts before it are sufficient to attain the ends of justice," the Court should "render judgment on the merits").

While the Trial Court refused to credit that testimony in the Final Order, the record at trial was fully developed with Fandl's testimony.

Therefore, this Court could reach a decision on the actual fair market value of the real estate without requiring the Trial Court to conduct that analysis in the first instance. *Id.* (holding that in light of the testimony by the landowner's expert appraiser, "the facts before [the Court] were sufficient" to render final judgment).

Here, VIG presented detailed evidence supporting fair market values as follows: Land = $26,465,000; Buildings = $18,508,000; Improvements = $61,126,000; and Wharf = $56,918,000. Also, as discussed below, VIG presented evidence through the testimony of Maarten Verheijen as to the fair market value of the STS Cranes, specifically $34,200,000. Thus, the total real property assessment should be adjusted downward to $197,217,000.

II. <u>The Trial Court Erred By Failing to Give Consideration to the Testimony of Maarten Verheijen as to the STS Cranes</u>

A. Standard of Review

The Trial Court also erred by failing to give any consideration to the testimony of Mr. Verheijen as it related to the STS Cranes. Typically, "[t]he judgment of a trial court, sitting without a jury, is entitled to the same weight as a jury verdict and will not be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it." *Lower Chesapeake Assoc. v. Valley Forge Ins. Co.*, 260 Va. 77, 86

(2000). However, the Final Order's discussion of VIG's real property case focused solely on Fandl's lack of licensure and never addressed the evidence involving the STS Cranes that was presented through the testimony of Mr. Verheijen, not Fandl.

B. Mr. Verheijen's Testimony Should Have Been Considered

Mr. Verheijen is an equipment broker, not a real estate appraiser. But since he testified as to the value of the STS Cranes (which are treated as fixtures and therefore real property for taxation purposes) and not as to the value of the land, buildings or improvements, the licensure analysis was different as to his testimony.

Specifically, even assuming the licensure statute has some relevance to the admission of expert testimony (which, as discussed above, it does not), the licensure statute does not apply to the appraisal of fixtures, rather to land and improvements on land. Virginia Code Ann. § 54.-2011 states that, "it shall be unlawful to engage in the appraisal of real estate or real property for compensation or valuable consideration in this Commonwealth without first obtaining a real estate appraiser's license." Va. Code Ann. § 54.1-2011(A). "Real property" is defined as "one or more defined interests, benefits or rights inherent in the ownership of real estate."

Va. Code Ann. § 54.1-2009. “Real estate” is defined as “an identified parcel or tract of land, including improvements thereon, if any.” *Id*.

The STS Cranes are not land, and they are not improvements. They are fixtures. As a result, they are not “real estate” or “real property” under the statute. No Virginia real estate appraiser’s license was required to appraise the STS Cranes, again, even assuming the licensure statute applies at all.

Furthermore, as the Trial Court found during the trial, Mr. Verheijen was indisputably qualified to testify as to the fair market value of marine container terminal equipment – indeed, as one of the few brokers in the world specializing in such equipment, Mr. Verheijen was uniquely suited to testify as to the fair market value of the STS Cranes.

Thus, the Trial Court’s failure to address Mr. Verheijen’s testimony on the STS Cranes in the Final Order was in error and was material. In fact, the difference between the City’s assessment of the STS Cranes and Mr. Verheijen’s testimony about the value of the STS Cranes was approximately $28 million ($62,322,200 assessment versus Verheijen’s opinion of $34,200,000).

The Court should credit Mr. Verheijen’s testimony and adjust the assessment of the STS Cranes accordingly.

III. <u>The Trial Court Erred By Rejecting VIG's Evidence as to the Fair Market Value of VIG's Personal Property</u>

A. Standard of Review

Typically, "[t]he judgment of a trial court, sitting without a jury, is entitled to the same weight as a jury verdict and will not be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it." *Lower Chesapeake Assoc. v. Valley Forge Ins. Co.*, 260 Va. 77, 86 (2000). However, the Trial Court's conclusions regarding the fair market value of the personal property – and in particular the key decision regarding whether transportation costs could be considered in determining fair market value – was a determination of law, or at the very least a mixed question of law and fact, and therefore subject to de novo review. *Nelson v. Commonwealth*, 281 Va. 212, 215 (2013) (observing that mixed questions of law and fact are reviewed de novo).

B. Standards Applicable to Personal Property Challenges

The City requires all taxpayers to file personal property tax returns reporting original cost of the specific item. For valuation purposes, the City then depreciates that item or assesses it at 50 percent of cost. While this method of assessment (50% of cost) is common across the Commonwealth in valuing personal property, this Court has made clear that principles of uniformity cannot be used to justify an assessment that is

higher than fair market value. *See W. Ref. Yorktown*, *Inc. v. Cty. of York*, 292 Va. 804, 823 (2016) (noting that in assessing personal property based on a percentage of original cost must "yield to a more fine-grained assessment when the percentage of original cost method fails as a proxy for market value").

Thus, taxpayers have the right to challenge the personal property assessments and to point out overvaluations by the Commissioner of Revenue. *See* Va. Code Ann. § 58.1-3503(B) (providing that "[a] commissioner of revenue shall upon request take into account the condition of the property . . . includ[ing] . . . technological obsolescence of the property"); Va. Code Ann. § 58.1-3507 (mandating that "the commission of revenue shall, upon the written request of the taxpayer, consider any bona fide, independent appraisal by the taxpayer").

Moreover, while it is true that a locality need not prove the correctness of an assessment for the presumption of correctness to attach, once the taxpayer establishes that the locality's assessment is erroneous and "exceeds fair market value," the presumption is rebutted and no longer applies. *See W. Ref. Yorktown*, 292 Va. at 818.

C. Mr. Verheijen's Testimony Was Credible and Persuasive

As discussed above, Mr. Verheijen is indisputably one of the leading brokers in the world dealing with marine container terminal equipment. He testified in detail as to the fair market value of the RMGs and RTGs based on his training and experience and unique understanding of the buyers and sellers in the market for marine container equipment.

Notwithstanding his expertise and unique understanding of the market, the Trial Court refused to adopt Mr. Verheijen's opinions of value, which included discounts to the total fair market value to account for costs associated with transporting the cranes[3] to a different location, likely overseas. Key to the Trial Court's decision was the court's view that the costs associated with transporting the RMGs and RTGs to another location were not a proper consideration in a fair market value analysis. (JA 2297-99).

The Trial Court stated that the cranes had been sold in place via a lease and a sale of the lease (thereby suggesting that the cranes could be valued in place without the need for consideration of transportation to a

[3] The personal property at issue consists of RMGs and RTGs, i.e., rail mounted gantry cranes and rubber tire gantry cranes. The RMGs move back and forth on rails, and are automated so that they can be controlled remotely (i.e., controlled by operators in a control room using joysticks to move the RMGs and watching the movement on a monitor). The RTGs are operated by a driver sitting on the crane itself.

different location), and also suggested that including transportation costs would transform the value from "fair market value" to "fair market value removed." (JA 2299).

However, the Trial Court's analysis was flawed. First, the Trial Court's references to a lease and sale of lease presumably were references to (i) the 2010 lease between VIG's predecessor in interest and the Virginia Port Authority, and (ii) the later stock purchase transaction whereby VIG's predecessor sold its ownership interest to VIG. Neither transaction was an actual sale of property.

Second, the evidence was undisputed that Verheijen's testimony was made with reference to this Court's definition of fair market value, namely the price a willing buyer would pay a willing seller when neither was under any compulsion to buy or sell. *Keswick Club, L.P. v. Cty. of Albemarle*, 273 Va. 128, 136 (2007) (defining fair market value as the "sale price when offered for sale 'by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.'") (quoting *Tuckahoe Woman's Club v. City of Richmond*, 199 Va. 734 (1958)).

And Mr. Verheijen's testimony about transportation costs was not unique to the VIG property. As discussed above, he unequivocally opined that in the unique market for this equipment, buyers *always* pay the costs of

transportation. He also testified, as one of the persons in the world most knowledgeable about the sale of used marine container terminal cranes, that the market for the VIG RMGs and RTGs was most likely overseas, thus requiring all of the adjustments to value that he included in his opinion testimony.

There was no evidence to contradict or even fairly challenge Mr. Verheijen's testimony. The City's expert, David Cole, had no experience with RMGs or RTGs prior to being retained in this case and admitted that any market information he acquired about the cranes was obtained from Mr. Verheijen's report. And Mr. Cole agreed that in a market where the buyer always pays the costs of transportation, the price would include the cost of transportation. (JA 1043-46). Indeed, at the conclusion of a line of questioning on this specific issue, Mr. Cole was asked and answered as follows:

> Q: … So in my hypothetical, the buyers are always incurring the cost of transportation, and so the seller, in order to sell it, always has to take into account this transportation cost. So assuming that I'm right about my hypothetical, then that market analysis [that price will always include the transportation cost] is accurate; correct?
> A: That analysis would be accurate assuming that the seller is willing to sell at that price.

(JA 1046).

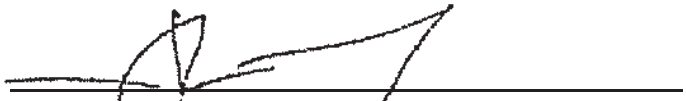
In light of the detailed testimony of Mr. Verheijen addressing the fair market value of the RMGs and RTGs in detail, in light of his testimony that the markets for these cranes was overseas and that buyers always incur the transportation cost, and in light of even Mr. Cole's admission that in such a market transportation cost will always be reflected in the price, the Trial Court erred by rejecting Mr. Verheijen's testimony and VIG's evidence of fair market value of its personal property.

CONCLUSION

For the reasons outlined above, 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 $16,500,00, respectively, and adjust the assessment of the RTGs for 2015 and 2016 to $1,900,00 and $1,600,000, respectively.

April 22, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2019, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via hand delivery, upon:

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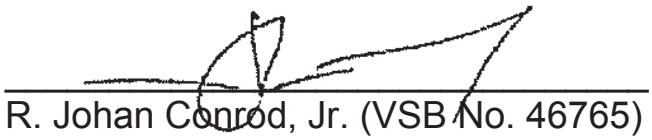

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