IN THE

Supreme Court of Virginia

RECORD NO. 180810

VIRGINIA INTERNATIONAL GATEWAY, INC.,

Appellant,

v.

CITY OF PORTSMOUTH, VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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Amplification of Factual Record

Glen Fandl ("Mr. Fandl") began his relevant association with the Appellant, Virginia International Gateway, Inc. ("VIG"), as a compensated tax consultant on or about March 6, 2015 to prepare and file VIG's tax returns and to advocate reduced real estate tax assessments on behalf of VIG. J.A. 192:4-20; J.A. 2021. After filing the personal property tax returns, as part of his duties in 2015 as a tax "consultant," Mr. Fandl developed an opinion of value of VIG's real property, i.e. the Main Parcel.[1] Mr. Fandl provided VIG with his opinion of value and used that value to advocate to the City a reduced real estate tax assessment on behalf of his client, VIG. *See* J.A. 471:22 – J.A. 476:3. According to Mr. Fandl, he was retained "to review the value and estimate and provide some counsel in terms of whether the assessment was equitable or that it represented fair market value." J.A. 416: 19-25.

After conducting research, inspecting the property, calculating depreciated values, and evaluating comparable sales, Mr. Fandl wrote to Mr. Holt W. ("Billy") Butt, III, a representative of the Office of the City

[1] At trial, the Parties referred to the relevant real property at issue as the Main Parcel. The term "Main Parcel" refers to the large parcel at issue, which includes all the land, buildings, improvements, and fixtures associated with VIG's shipping container terminal. The Main Parcel consists of approximately 579 acres of land, 15 buildings, site improvements, and giant ship to shore cranes.

Assessor, in 2015 to provide him with his opinion related to the fair market value of the Main Parcel. J.A. 420:1-22. Mr. Fandl's opinion of value was documented in a report structured similarly with much of the same information contained in his 2016 appraisal report, the report referenced throughout the Brief of Appellant. J.A. 420:23-421:3. During cross-examination, it was abundantly clear that Mr. Fandl's 2015 report and his 2016 report contained nearly identical information. For example, in comparing his 2015 and 2016 reports during his testimony, Mr. Fandl agreed that he utilized the same Portsmouth land sales, the same national waterfront sales, the same cost details and values for the buildings, the same cost details and values for the improvements, and the same cost details and value for the wharf in both his 2015 and 2016 reports. J.A. 420:12-432:18. The only additions to the report in 2016 that Mr. Fandl was able to identify during cross examination were a small customs gate inspection building, which Mr. Fandl classified as *di minimis*, and the "boiler plate" associated with an appraisal report. J.A. 419:15-432:18.

Despite developing an opinion of value, preparing a report, and doing all of the work typically associated with appraising real estate, Mr. Fandl failed to obtain a temporary license while he performed this work. *See* J.A. 2287. Not until 2016 did Mr. Fandl receive a temporary real estate

appraisal license, which he subsequently allowed to lapse prior to testifying at trial in 2017. *See* J.A. 2287. Mr. Fandl then proceeded to be deposed and then testify at trial for compensation, without a license. J.A.193:3. Accordingly, Mr. Fandl prepared his opinion of value and nearly all of the substantive aspects of his 2016 report without possessing the requisite license to perform such work. Then, he failed to maintain his temporary license for his deposition and the trial, both of which occurred in 2017.

Arguments and Authorities

I. The Trial Court Did Not Err in Excluding Glen Fandl's Testimony Because The Matter Was Fully Within The Court's Discretion to Decide.

VIG challenges the trial court's power to exercise its discretion to exclude the testimony of VIG's real estate appraisal witness Glen Fandl on the basis that he lacked a valid appraisal license[2] in 2015 (when he formulated his opinion) and again in 2017[3] (when he testified at trial). Appellant's Brief at 19; J.A. 2291, FN2. The admission of Mr. Fandl's testimony is committed to the sound discretion of the trial judge; this Court should reverse the trial court's decision only where the trial court has

[2] VIG refers to Mr. Fandl's "*allegedly*" unlicensed testimony. Appellant Brief at 20. Mr. Fandl's testimony at trial was not allegedly unlicensed. He expressly testified at trial that he was, at that time, unlicensed. Tr. 164-168. J.A. 193-197

[3] In footnote 2 of the Final Order the Court noted that Fandl had a temporary Virginia license only in 2016. J.A. 2291, FN2.

abused its discretion. *Brown v. Corbin*, 244 Va. 528, 531, 423 S.E.2d 176 (1992).

As the trial court correctly stated in its written opinion and Final Order, the decision to strike the testimony of an unlicensed appraiser was supported by law and was well within his discretion and power as a judge "to determine who may qualify as an expert witness to testify in any legal proceeding." J.A. 2291, FN3.

The trial court correctly summarized the scope of its authority on this issue: "[a]lthough the Court believes it has the power to qualify Mr. Fandl and allow his testimony, it will not." J.A. 2291, FN4. The trial court explained the legal reasoning and basis for its ruling as follows:

> The evolution of Virginia's real estate appraisers law and the uncertainty of a trial judge's authority to qualify an unlicensed appraiser as an expert have been amply reviewed in other cases. *See Lee Gardens Arlington Ltd. Partnership v. Arlington County Bd.*, 250 Va. 534; 463 S.E.2d 646 (1995)' *Commonwealth Transportation Comm'r v. Baxter*, 44 Va. Cir. 148 (Spotsylvania County 1997); and *Appalachian Power Co. v. Orr*, 40 Va. Cir. 370 (Washington County 1996). The 'power', to use the precise word contained in [Virginia Code §54.1-2010(B)], of a trial judge to determine who has the specialized training and knowledge to render an expert opinion is not the issue, for <u>*even if such power were not limited by the license requirement*</u>, <u>the exercise of that power where the opinion to be given was developed through illegal conduct would put the Court in the position of condoning and allowing unlawful activity</u>. Judge Ledbetter's opinion in the Commonwealth Transportation case cited above best expresses a trial judge's aversion to exercising a power which will serve to promote

> illegal conduct. This Court will follow and adopt the reasoning expressed by Judge Ledbetter and by Judge Smith (Appalachian Power, supra) and find that it was an abuse of power to recognize Mr. Fandl as an expert in real estate values in Virginia and permit his testimony because his appraisal work was unlicensed and he was again unlicensed at the time he gave his testimony. This being a bench trial, the expressed error does not necessitate a retrial and the testimony of Mr. Fandl is stricken.
>
> It is of concern to the Court that this is a harsh outcome, especially when one considers that experts are allowed to testify routinely in Virginia courts as to a vast array of issues without the necessity of obtaining a Virginia license, but **the requirement of a Virginia license in real estate or real property appraisals** is clear and **cannot be ignored**.

J.A. 2291, FN 3-4 (emphasis added).

VIG frames its first argument and second assignment of error as an "an issue of statutory interpretation" which this Court should review *de novo*. VIG is mistaken. The statute contains a clear and plain meaning. Neither Code Section 54.1-2011(A) nor Section 54.1-2010(B), cited by VIG in support of its argument is ambiguous in its language.

This Court has held that "under basic rules of statutory construction, we determine the General Assembly's intent from the words contained in the statute." *Alger v. Commonwealth*, 267 Va. 255, 259, 590 S.E.2d 563, 565 (2004). Thus "[w]hen the language of a statute is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not

mean what it actually has stated." *Baker v. Commonwealth,* 278 Va. 656, 660, 685 S.E.2d 661, 663 (2009).

Section 54.1-2011(A) provides in pertinent part that "except as provided in § 54.1-2010 . . . 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 . . . ." Virginia Code Section 54.1-2010 provides exemptions to the requirement of a license to engage in real estate appraisal for compensation, none of which were applicable to Mr. Fandl's testimony at trial. In footnote 3 of its final order/opinion, the trial court quoted paragraph (B) of *Code of Virginia* § 54.1-2010 which provides that "**Nothing contained herein shall proscribe the powers of a judge to determine who may qualify as an expert witness to testify in any legal proceeding**." J.A. 2291, FN 3 (emphasis added).

In its Brief, VIG cites both cases and statutes that hold that the decision to qualify Mr. Fandl as an expert was solely within the trial court's discretion. On page 19 of Appellant's Brief, VIG cites *Brown v. Corbin*, which states "[t]he admission of expert testimony is committed to the sound discretion of the trial judge, and [this Court] will reverse a trial court's decision only where that court has abused its discretion." *Brown*, 244 Va.

528, 531, 423 S.E.2d 176 (1992). VIG also cites Virginia Code §8.01-401.3 as giving "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." Appellant's Brief at 19-20. On page 23 of its Brief, VIG cites *Metamining, Inc. v. Barnette*, No. 2:12CV00024, 2013 U.S. Dist. LEXIS 89446, at *28 (W.D. Va. June 26, 2013 ("subsequent 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.").

Here, the trial court exercised its discretion and it did not rise to the level of abuse of discretion. This Court has explained that abuse of discretion means "'[o]nly when reasonable jurists could not differ can we say an abuse of discretion has occurred.'" *Sauder v. Ferguson*, 289 Va. 449, 459, 771 S.E.2d 664 (2015). This "discretion" by definition includes the court's discretion to ***not*** permit testimony. Applying that standard here, it cannot be said that reasonable jurists could not differ on the question of whether they would permit or exclude testimony for the reasons the trial court did here. At least some "reasonable jurists" would have the same "aversion to exercising a power which will serve to promote illegal conduct." J.A. 2292. The two jurists cited by the court in its Final Order came to the

same opinion. *See Commonwealth Transportation Comm'r v. Baxter*, 44 Va. Cir. 148 (Spotsylvania County 1997); *Appalachian Power Co. v. Orr*, 40 Va. Cir. 370 (Washington County 1996). Unless this Court finds those jurists to not be reasonable, the question has already been answered: the trial court here did not abuse its discretion.

Contrary to VIG's assertion in its Brief, the trial court did not hold that Section 54.1-2011 "required" exclusion of the expert or determine that a trial court could "never exercise [the power to qualify an unlicensed appraiser] because it would condone 'illegal conduct' and 'unlawful activity.'" Appellant Brief at 23-34. Rather, the trial court stated it was exercising its discretionary power under Section 54.1-2010(B) as to the admission of Mr. Fandl: "Although the Court believes it has the power to qualify Mr. Fandl and allow his testimony, it will not." J.A. 2292. And the exercise of that power and discretion was supported by all of the above-referenced law, cited by VIG itself.

While the trial court, in its Final Order, focused on Mr. Fandl's lack of licensure at the time of testifying, it was also explicitly clear that Mr. Fandl conducted all of the work upon which he relied while not licensed. He used all of the same comparable sales and even arrived at the same cost detail for all of the buildings and site improvements. J.A. 420:12-432:18. This

failure to adhere to Virginia licensure requirements permeates through the entirety of Mr. Fandl's testimony and serves to only compound his failures in other areas.

If the admission of expert testimony is truly committed to the sound discretion of the trial judge, then the lower court's decision to exclude Mr. Fandl's testimony is not an abuse of discretion. Accordingly, this Court must affirm the trial court's exercise of its discretion and power to strike the expert witness.

II. Assuming, *Arguendo*, The Trial Court's Decision To Exclude The Testimony Of VIG's Appraiser For Failure To Have An Appraisal License Was Erroneous, The Trial Court's Final Judgment Declining To Make Any Adjustment To The City's Real Estate Assessment Must Be Upheld on Several Bases In Accordance With The "Right Result For The Wrong Reason" Doctrine Articulated By This Court.

This Court has often held that "[a]ppellate courts do 'not review lower courts' opinions, but their judgments.'" *Miller & Rhoads Building v. City of Richmond*, 292 Va. 537, 542, 790 S.E.2d 484 (2016) (citing *Evans v. Commonwealth*, 290 Va. 277, 288 n.12, 776 S.E.2d 760, 766 n. 12 (2015) (quoting *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015))). "In instances where a trial court's decision is correct, but its reasoning is incorrect, and the record supports the correct reason, we uphold the judgment pursuant to

the right result for the wrong reason doctrine." *Haynes v. Haggerty*, 291 Va. 301, 305, 784 S.E.2d 293, 294 (2016).

Under the right result for the wrong reason doctrine, "it is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons." *Id*. (citing *Perry v. Commonwealth*, 280 Va. 572, 579, 701 S.E.2d 431, 435 (2010) (quoting *Schultz v. Schultz*, 51 Va. (10 Gratt.) 358, 384 (1853))).

This Court has further held "we are not limited to the grounds offered by the trial court in support of its decision, and [we are] 'entitled to affirm the court's judgment on alternate grounds, if such grounds are apparent from the record.'" *Summers v. Syptak*, 293 Va. 606, 612, 801 S.E.2d 422 (2017)(citing *Perry v. Commonwealth*, 280 Va. 572, 582, 701 S.E.2d 431, 437 (2010) (quoting *AMM v. Sch. Dist. of Greenville Cnty*., 303 F.3d 523, 536 (4th Cir. 2002)). *See also Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 542, 790 S.E.2d 484, 487 (2016) ("'This Court may uphold a judgment even when the correct reasoning is not mentioned by a party in trial argument or by the trial court in its decision, as long as the record contains sufficient information to support the proper reason.'") (quoting *Haynes v. Haggerty*, 291 Va. 301, 305, 784 S.E.2d 293, 294

(2016)). The trial court's exclusion of Mr. Fandl's opinion testimony resulted in the real estate case being correctly decided in favor of the City for want of any opinion of value for the real estate in VIG's case in chief.

A. Mr. Fandl's Opinion Rested on a Foundation of Erroneous Assumptions and Falsehoods

Even if the trial court had not excluded Mr. Fandl's opinion for lack of a real estate appraiser's license, Mr. Fandl's opinion would have been properly excluded on an entirely separate basis: Mr. Fandl's expert opinion was founded upon assumptions that had no basis in fact and therefore was inadmissible. Thus, the result would have been the same.

In a challenge to a tax assessment, the taxpayer must show by a preponderance of the evidence that, *inter alia*, the property in question is valued at more than its fair market value. Va. Code Ann. § 58.1-3984. In an attempt to meet its burden of proof, VIG relied largely upon the testimony of Mr. Fandl. As noted above, following eight days of evidence, a day of argument, and simultaneous closing and response briefs from both parties, the trial court struck and disregarded Mr. Fandl's testimony. J.A. 2292. The trial court's ruling on this issue was correct for the reasons stated above. For other reasons not addressed by the trial court, it would have been reversible error if the court had ruled otherwise as explained below.

This Court has consistently and repeatedly articulated the requirements for the admission of expert testimony. "Expert opinion may be admitted to assist the fact finder if such opinion satisfies certain requirements, 'including the requirement of an adequate factual foundation.'" *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 154, 766 S.E.2d 893, 897 (2015) (quoting *Forbes v. Rapp*, 269 Va. 374, 381, 611 S.E.2d 592, 596 (2005)). "Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible. *CNH America LLC v. Smith*, 281 Va. 60, 67, 704 S.E.2d 372, 375 (2011) (quoting *Vasquez v. Mabini*, 269 Va. 155, 160, 606 S.E.2d 809, 811 (2005). "Furthermore, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed." *Id.* Code § 8.01-401.1 does not "sanction[] the admission of expert testimony based upon a mere assumption which . . . has no evidentiary support." *Lawson v. Doe*, 239 Va. 477, 483, 391 S.E.2d 333, 336 (1990). A trial court's decision to admit such unsupported testimony is "subject to reversal on appeal." *Vasquez*, 269 Va. at 160, 606 S.E.2d at 811.

In *Countryside Corporation v. Taylor*, 263 Va. 549, 561 S.E.2d 680 (2002), this Court addressed the validity of an appraiser's opinion that is

based on an erroneous factual foundation. There, this Court said of the appraiser Jay Call's opinion:

> . . .[W]hen Call made his evaluations in 1999, he essentially assumed a fiction and based his opinion of damages on that fiction. . . . [A]n expert opinion based upon an assumption that the Taylors did not own that strip of land and, thus, did not have access to the road in question is one clearly founded on an assumption that has no basis in fact. Accordingly, we hold that Call's expert testimony was speculative and unreliable as a matter of law.

Countryside, 263 Va. at 553 (emphasis added). Accordingly, expert opinion based on assumptions that have no basis in fact render an expert's opinion and testimony speculative and unreliable as a matter of law.

For the following reasons Mr. Fandl's opinions and testimony were based on assumptions that had no basis in fact and were therefore unreliable as a matter of law; thus, his testimony was inadmissible regardless.

As alleged by VIG in its Amended Application, the Main Parcel included the underlying land, the buildings and improvements, as well as the ship-to-shore ("STS") cranes, as constructed on July 1, 2015. J.A. 16-19. With respect to the Main Parcel, VIG challenged Tax Parcel Number 0719-0010 (the land), Tax Parcel Number 0719-0012 (the eight STS Cranes), and Tax Parcel Number 0719-0014 (the buildings).

From the beginning, Mr. Fandl's appraisal opinion for the Main Parcel was based on multiple erroneous assumptions of fact. Mr. Fandl testified

that he valued 610 acres, 14 buildings, and various improvements, including the wharf. J.A. 255 17-24; J.A. 258 – 269 10-2; J.A. 270 22-25. The 610 acres and the 14 buildings provided the core factual foundation on which Mr. Fandl's opinion of value was based. This core factual foundation was erroneous and included demonstrably false factual assumptions. As the factual foundation for his opinion of value was based on erroneous assumptions (such as the total acreage of the property, among other things), it rendered his opinion(s) of value unreliable and inadmissible as a matter of law.

Mr. Fandl testified that he valued 610 acres. J.A. 255 17-24; J.A. 258-269 10-2; J.A. 70 22-25. However, City Exhibits 8[4] and 9[5] (J.A. 2376), which are two surveys of the Main Parcel completed in 2014 and 2016, clearly demonstrate that the correct acreage of the Main Parcel is actually approximately 579 acres. Page number 4492 of the record transmitted from the trial court, which is contained within the 2014 survey, clearly

[4] A full copy of the City's Exhibit 8, as entered at trial, was not included in the Joint Appendix. Only the last page of the City's Exhibit 8, as entered at trial, is located at J.A. 2375. A full copy of City's Exhibit 8 can be found between pages 4491 and 4510 of the record transmitted from the Circuit Court of the City of Portsmouth to this Court.

[5] A full copy of the City's Exhibit 9, as entered at trial, was not included in the Joint Appendix. Four pages of the 26 pages survey are included. J.A. 2376 -2379. The full copy of City Exhibit 9 is located between pages 4511 and 4536 of the recorded the record transmitted from the Circuit Court of the City of Portsmouth to this Court.

shows the actual correct acreage of the Main Parcel was shown to be closer to 579 acres. Aside from containing a map depicting the bounds of VIG's land, both the Main Parcel and two irrelevant residential parcels, the second page of each survey contains an acreage breakdown. A more legible table illustrating the acreage breakdown is contained on J.A. 2377, copied below:

AREA TABLE

	SQ. FT.	ACRES
PARCEL 1 (PARTIAL)	16,199,372	371.886
PARCEL 1A	2,232,497	51.251
PARCEL 1B	830,753	19.071
PARCEL 1C	75,791	1.740
PARCEL 1D	2,180,174	50.050
PARCEL 1E	63,539	1.459
PARCEL 1F	746,751	17.143
* PARCEL 1 PROPERTY TOTAL	22,328,877	512.600
SOUTH RR (NAVY)	53,140	1.220
NORTH RR (NAVY)	184,690	4.240
30" RAW WATER	78,939	1.812
COAST GUARD BLVD.(INCLUSIVE)	152,134	3.492
WILD DUCK LANE/WYATT DR. RELOCATED	160,122	3.676
TOTAL PARCEL 1 EXCEPTIONS/RIGHT-OF-WAY	629,025	14.440
* PARCEL 2 PROPERTY TOTAL	2,399,201	55.078
PARCEL 3	382,959	8.791
PARCEL 3A	74,207	1.704
PARCEL 3B	59,385	1.363
* PARCEL 3 PROPERTY TOTAL	516,551	11.858
30" RAW WATER	19,036	0.437
RAILROAD	60,402	1.387
MISC. PRIVATE PROP.	333	0.007
TOTAL PARCEL 3 EXCEPTIONS/RIGHT-OF-WAY	79,771	1.831
* PARCEL 4 PROPERTY TOTAL	9,950	0.228

In comparing the map outlining the bounds of VIG's property to the table above, the relevant parcels are 1, 1A, 1B, 1C, 1D, 1E, 1F, 2, 3, and 3B. Parcel 3A and Parcel 4 are the two irrelevant residential parcels and need not be considered in valuing the Main Parcel. After deducting the acreage for the two residential parcels and also deducting the "Total Parcel 1 Exceptions," the Main Parcel totals less than 580 acres, more than 30 acres less than the amount of acreage that Mr. Fandl valued.

The erroneous acreage assumption was critical because it undermined every aspect of Mr. Fandl's land valuation analysis. Mr. Fandl separated the acreage of the Main Parcel into three categories: waterfront (21 acres), commercial buildings (332.346), and wetlands (256.713) for a total of approximately 610 acres. J.A. 2300. Mr. Fandl then valued each category at a separate and different value per acre/square foot. Because Mr. Fandl started with an incorrect acreage for the entire parcel, his breakdown among the categories was also erroneous, and led to an erroneous value for each category of acreage, and then to an erroneous value for the entire parcel and renders his testimony inadmissible as a matter of law and not simply subject to loss of credibility on cross examination or refutation.

In addition to failing to value the correct acreage, Mr. Fandl also failed to value all of the buildings located on the Main Parcel. As shown above, the two ALTA Surveys clearly show the boundaries of the Main Parcel. Both surveys, which bookend Mr. Fandl's date of valuation, show additional land and a building west of Coast Guard Boulevard. Page 4492 of circuit court record (sheet 7); Page 4520 of circuit court record (sheet 10). On Page 4492, there is clearly a structure identified as "1 story metal 'maintenance facility'." Likewise, page 4520 of the trial court record, which

is the corresponding sheet located within the 2016 survey, also clearly shows a structure identified as "1 story metal 'maintenance facility'." Despite agreeing that there was a maintenance facility located in this location, J.A. 447 11-20, Mr. Fandl admitted that he did not value this building. J.A. 478 6-8. Consistent with this acknowledgement is the failure of Mr. Fandl to include the maintenance facility in his listing of buildings that he did value throughout the course of his unlicensed work. *See* J.A. 2300. This building is just over 20,000 square feet. *See* page 4520 of the trial court record. That makes this building that Mr. Fandl failed to value the third largest building on the Main Parcel. *See* J.A. 2330. It is not an insignificant omission.

Thus, despite having access through his client, the property owner, to all of the information he might need to ascertain the acreage accurately, Mr. Fandl valued the Main Parcel as if it were 610 acres, not the actual 579±, and failed to value all of the fifteen buildings located on the Main Parcel. These failures eviscerate the factual foundation upon which Mr. Fandl based his opinion of value and made his testimony inadmissible as a matter of law. Due to his erroneous assumptions of fact, Mr. Fandl failed to properly appraise the real estate and VIG failed to meet its burden to prove

the value of the subject property. As a result, VIG could not prevail at trial in its application to correct the assessment of its real estate.

Accordingly, even assuming, *arguendo*, the trial court's decision to exclude Mr. Fandl's testimony because he was not licensed at the time of trial was incorrect, Mr. Fandl's opinion would properly have been excluded as unreliable as a matter of law based on its erroneous factual foundation, and VIG's real estate case would have been dismissed for the same reason – lack of a valid opinion of value for the real estate. Therefore, the trial court's judgment dismissing VIG's real estate case was correct for a different reason than the one stated by the court in its Final Order.

B. Mr. Fandl Only Appraised Some, Not All, of the Subject Property

Further compounding his error in valuing the property, Mr. Fandl did not include in his appraisal the value of the STS cranes located on the Main Parcel which were classified by the City as improvements to the real property and included in the City's assessment of the parcel. Mr. Fandl in fact admitted on cross examination that he had not valued the entirety of the property. J.A. 471 18-20 (Q. So you have an opinion of value of some but not all of the real estate – A. That is correct.). Instead, VIG elicited testimony from Maarten Verheijen regarding the value of the STS cranes. Counsel for VIG then simply added the two opinions together.

This Court has specifically admonished appraisers for conducting mathematical functions to arrive at opinions of values because arithmetic is not an acceptable appraisal method. *City of Richmond v. Jackson Ward Partners, L.P.*, 284 Va. 8, 21, 726 S.E.2d 279, 286 (2012)("We noted that the appraiser's methodology was "'an arithmetic formula,' which is not an accepted appraisal method.")(quoting *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 417, 665 S.E.2d 834, 846). In *West Creek*, this Court found that "West Creek's evidence did not rebut the presumption of correctness afforded the assessments" because the appraiser simply conducting mathematical calculations. *West Creek*, 276 Va. at 417-18, 665 S.E.2d at 847.

Yet, despite this admonishment, VIG attempted to do just that, add Mr. Fandl's (factually erroneous) partial opinion of value with Mr. Verheijen's opinion of value as to the STS cranes. Further, and perhaps underlining this Court's admonition, is the Uniform Standards of Professional Appraisal Practice ("USPAP") Assemblage Rule, Standard 1-4, which states that "[w]hen analyzing the assemblage of various estates or component parts of a property, an appraiser must analyze the effect on value, if any, of the assemblage. An appraiser must refrain from valuing the whole solely by adding together the individual values of various estates or

component parts." J.A. 1682:5-23. As the moving party in this case, VIG bears the burden to establish "the effect on value, if any, of the assemblage," but has failed to offer any testimony or opinion whatsoever regarding the assemblage. VIG has done that which both this Court and USPAP prohibit by valuing the whole "solely by adding together [or conducting arithmetic,] the individual values" of Mr. Fandl and Mr. Verheijen. This violation of both legal and appraisal principles renders VIG's opinion of the fair market value of the Main Parcel inadmissible as a matter of law. For this reason, the Court properly disregarded VIG's evidence of fair market value.

C. Mr. Fandl's Advocacy for VIG Was Apparent in Selection of Sales and Disregard of the Nature of the Subject Property

Further, in addition to relying upon incorrect factual assumptions and an unsubstantiated foundation, Mr. Fandl's selection of "comparable" sales for his land valuation also demonstrates his lack of understanding of the Main Parcel and advocacy as tax consultant on behalf of VIG in his work. This permeates all of his testimony and would serve as an independent basis for which this Court should uphold the judgment for the City without remanding the proceedings. Mr. Fandl selected six national waterfront sales and used three waterfront *offerings*. J.A. 231223-13; J.A. 280:18-22. These allegedly "comparable" sales consist of, *inter alia*, a preservation

area adjacent to a densely populated neighborhood located in Cape Coral, Florida. J.A. 1681 1-25. This nature preservation area is located adjacent to a densely populated neighborhood and has very strict zoning restrictions associated with its designation as a preservation area. *Id*. The unrebutted testimony of John Soscia, the City's expert appraiser, established that a shipping company would never construct a port container terminal in this location. *Id*. Mr. Fandl's decision to include a nature preservation area with very strict zoning limitations as a comparable property to a 579 acre world class shipping terminal is mystifying and erroneous. This decision aptly demonstrates that Mr. Fandl failed in developing a proper understanding of the Main Parcel. This lack of understanding led to the creation of an erroneous factual foundation upon which to base his opinions. Because of Mr. Fandl's faulty factual foundation, Mr. Fandl's opinions, and testimony, are inadmissible as a matter of law.

Another comparable sale that Mr. Fandl included in his analysis was a piece of property located within the Port of Long Beach that "may have been the best…a very good comp." J.A. 2306; J.A. 1665:13-1666:6. This very good comparable sale had a sale price of $12,400,000 for 12.97 acres, representing a per acre value of $956,052. J.A. 2306; J.A. 1666:1-3. Despite being a very good comparable property, Mr. Fandl did not use what

admittedly "may have been the best" in his final calculations. J.A. 2312 (omitting the high and low per acre values of $956,402 from Long Beach and $160,058 from the preservation area, respectively); J.A. 281:17-20. The exclusion of what perhaps was Mr. Fandl's best comp is as equally mystifying as his decision to include a nature preservation area as a data point in his analysis, unless explained by development of this opinion in 2015 while advocating as a tax consultant on behalf of VIG.

Aside from attempting to value a terminal container facility with reference to a nature preserve, Mr. Fandl also fails to recognize important variables of terminal properties. Specifically, Mr. Fandl does not know whether any of the allegedly comparable properties have vertical obstructions between the open ocean and the quay; nor does he know the travel time between the open ocean and the quay. J.A. 457-462. This failure to understand important variables affecting the value of a terminal property renders Mr. Fandl's analysis inadmissible and/or incredulous.

Another demonstration of Mr. Fandl's lack of understanding the Main Parcel was borne out during questioning regarding the lack of demonstrable adjustments, or lack thereof, that he made to these allegedly comparable sales with significantly different channel depths. Mr. Fandl's six comparable sales and three offerings have channel depths of 45 feet,

15 feet, 20 feet, 45 feet, unknown, 30 feet, 35 feet, unknown, and unknown. J.A. 457-462. None of these properties are situated on a channel with 50 foot depth. In attempting to minimize his lack of understanding related to this important variable, Mr. Fandl stated that "5 feet is not overly material." J.A. 1661:3. However, as the Court noted, a difference of just five feet matters to shipping companies "so five feet does matter." J.A. 1661 3-16. While the Court recognized the significant of just a five foot difference in channel depth, Mr. Fandl did not.

All of the above clearly demonstrates that Mr. Fandl either advocated for his client and/or failed to understand the Main Parcel, grounded his partial opinion of value upon an erroneous factual foundation, made demonstrably false assumptions of fact, and lacked admissibility or any credibility before the trial court. He even failed to value the entire Main Parcel. Therefore, independently of whether the trial court correctly exercised its discretion in striking Mr. Fandl's testimony, these reasons suffice for this Court to apply the "right for the wrong reason" doctrine as a matter of law.

III. The Trial Court Did Not Err In Not Addressing in the Final Order The Testimony Of Maarten Verheijen As To The Value Of The STS Cranes

The trial court did not err in not addressing the testimony of VIG crane broker expert Maarten Verheijen as to the value of the STS cranes because Maarten Verheijen was not a licensed appraiser and Verheijen did not follow applicable Virginia law in reaching is estimate of value. He did not value all of the Subject Parcel of real estate. Moreover, the admission of Mr. Verheijen's testimony is within the sound discretion of the trial judge; therefore, this Court should reverse the trial court's decision only where that court has abused its discretion." *Brown v. Corbin*, 244 Va. 528, 531, 423 S.E.2d 176 (1992).

A. Verheijen Was Not A Licensed Real Estate Appraiser

Once the trial court struck the testimony of Mr. Fandl, the testimony of Maarten Verheijen ("Mr. Verheijen") as to the value of the STS cranes, the only cranes on the subject property that are assessed and taxed as real estate, became superfluous because VIG could not prove the value of the real estate, a foundational requirement. See *City of Richmond v. Jackson Ward Partners, L.P.*, 284 Va. 8, 19, 726 S.E.2d 279, 285 (2012)(quoting *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 417, 665 S.E.2d 834, 847 (2008). Assuming *arguendo* that Mr. Verheijen's testimony would be sufficient to establish the fair market value of a portion

of the real property, the trial court correctly did not consider his testimony because he was unlicensed.

Oddly, VIG asserts that although the STS cranes are treated as fixtures and therefore are real property for taxation purposes, the "licensure statute does not apply to the appraisal of fixtures," but only to land and improvements on land. Appellant's Brief at 29. A fixture, however, is real property and thus part of the parcel's taxable fair market value. Therefore, VIG's claim that Virginia's license requirement for engaging in the appraisal of real property does not apply to Mr. Verheijen because he did not testify to the value of land, buildings or improvements is incorrect. Appellant's Brief at 29.

Contradicting itself, on the very next page of its brief, VIG claims that the STS cranes "are not 'real estate' or 'real property'." Appellant's Brief at 30. VIG ends by asserting that the Court should credit Mr. Verheijen's testimony and adjust the assessment of the STS cranes.[6] The STS cranes have been classified as real estate and valued by the City as such for a number of years. VIG did not challenge that classification below in the trial

[6] Although the STS cranes were assigned a parcel number separate from the other real estate, this was done by the City for billing convenience due to limitations of the city billing computer software. The STS cranes in fact sit on the wharf, which is a site improvement to the property and is valued as part of the Main Parcel. J.A. 1210:7-10; J.A. 2391.

court, did not assign error to this fact, and cannot raise the issue for the first time in this Court. Therefore, VIG needed to produce a licensed real estate appraiser at trial to value the entirety of VIG's real property, including the value of the STS cranes, and it failed to do so.

As explained above, Virginia Code Section 54.1-2011 provides 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." However, Mr. Verheijen, who VIG acknowledged is not a real estate appraiser, Appellant Brief at 29, but an equipment broker from the Netherlands, does not have *any* license as an appraiser, in either his home country or the United States. When asked whether the Netherlands has any licensing for equipment appraisers, Mr. Verheijen testified that since joining the EU, "anybody can call themselves an appraiser." J.A. 608.

B. Verheijen Failed To Follow Any Discernable Methodology In Assessing the STS Cranes and Explicitly Violates Virginia Law and USPAP Provisions

In Virginia, real estate assessments that are not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing

Officers (IAAO) are deemed erroneous under the standards set forth in Virginia Code Section 58.1-3984. Accordingly, a valuation proffered to the court for the purpose of challenging a real estate assessment as erroneous fails to sustain a taxpayer's burden unless it is arrived at in accordance with those same standards, thereby providing the court with a comparable basis for evaluating the assessment. In this case, Mr. Verheijen's procedure for valuing the STS cranes did not meet the standards that real estate assessments in Virginia are required to meet.

This Court has held that there are three generally accepted "approaches" to ascertaining market value of real estate. They are the "sales comparison," "income capitalization," and "cost" approaches. *County Bd. of Arlington v. Commonwealth*, 240 Va. 108, 112, 393 S.E.2d 194 (1990) (citing *Arlington County Board v. Ginsberg*, 228 Va. 633, 639, 325 S.E.2d 348, 351 (1985)). As fixtures to real property, the STS cranes should have been valued utilizing one or more of these three approaches. However, when asked whether he was familiar with these three generally accepted "approaches" to valuing real estate, Mr. Verheijen testified:

> If you are referring to any standards of appraising in the United States, then, no, we've never heard of them. We've never -- ***we do not adhere to those standards because we are not from the United States***. As in any sales comparison approach, I

> think the steps of that are very basic, and it's something that I think we've also applied in this report. . . . ***I'm not familiar with any steps that any appraiser organization here would use***.

Virginia Code Section 58.1-3984(B) provides in pertinent part:

> The burden of proof shall be on the taxpayer to rebut such presumption and show by a preponderance of the evidence that the property in question is valued at more than its fair market value . . . and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property.

Because Mr. Verheijen's opinions were not arrived at in accordance with the valuation methodologies and the generally accepted appraisal practices, procedures, rules, and standards prescribed by professional appraisal organizations recognized—and required by statute—in the Commonwealth and the rest of the United States, his opinions fell far short of satisfying the standards that real estate assessments in Virginia are required to meet.

While VIG may argue that Verheijen conducted a sales comparison approach related to the STS cranes, that conclusion is unsupported by the evidence. First, Verheijen relied upon a single sale of STS cranes, the details of which he was unable to divulge for confidentiality reasons. J.A. 706:1-715:15. This confidential and supposedly comparable sale lacked

any ascertainable detail through which the Court could evaluate its potential import. The trial court specifically noted as such in a discussion with Verheijen that indicates the trial court disregarded his testimony on this point. See J.A. 715:7-15. Pointedly, the trial judge commented "that particular sale as it confirms [Verheijen's] value really is of no value to [the court]." J.A. 715:13-15.

Moreover, as set forth above in the discussion regarding Mr. Fandl's failure to opine as to the whole Main Parcel, VIG failed to establish the value of the Main Parcel as a singular unit. Mr. Fandl attempted to value some of the Main Parcel and Verheijen attempted to value the other portion of the Main Parcel. At no point did anyone provide any analysis regarding the effect of combining those two opinions together. This violates USPAP's assemblage rule discussed above, and this Court admonition against considering mathematic equations an appraisal. *City of Richmond v. Jackson Ward Partners, L.P.*, 284 Va. 8, 21, 726 S.E.2d 279, 286 (2012)("We noted that the appraiser's methodology was "'an arithmetic formula,' which is not an accepted appraisal method.")(quoting *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 417, 665 S.E.2d 834, 846 (2008)). In short, even if Mr. Verheijen had been found credible—and he was not—he still does not have a credible opinion of value for the

entire property as is required. *Id.* Therefore, it would have been error for the trial court to revise the value of any real property appraised solely by Mr. Verheijen.

Therefore, the trial court's implicit decision (without stating so) to not address Mr. Verheijen's value of the STS cranes was not plainly wrong or without evidence to support it, and should be upheld.

IV. The Trial Court Did Not Err By Rejecting the Valuation of VIG's European Equipment Broker as to the Value of VIG's Personal Property Because He Speculated as to Removal Costs and Failed to Apply the Definition of "Fair Market Value" as Set Forth By This Court

As noted by the trial court below, Article X, Sections 1 and 2 of the Constitution of Virginia provide in pertinent part that "[a]ll assessments of . . . tangible personal property shall be at their fair market value, to be ascertained as prescribed by law." Va. Const. Art. X, §1, 2, *accord Western Refining Yorktown v. County of York*, 292 Va. 804, 816, 793 S.E.2d 777 (2016). This Court has defined "fair market value" as the price a property will bring when offered for sale by one who desires, but is under no obligation to sell it, and is bought by one who has no immediate necessity to purchase it. *Id*. at 820, 793 S.E.2d 777 (2016) (citing *Tuckahoe Woman's Club v. City of Richmond*, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958)).

On appeal, this Court views the evidence and all reasonable inferences arising therefrom in the light most favorable to the prevailing party at trial. *Western Refining*, 292 Va. at 816, *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000). Thus, "[a] judgment should be reversed for insufficient evidence only if it is plainly wrong or without evidence to support it." Id. (*citing Edmonds v. Edmonds*, 290 Va. 10, 18, 772 S.E.2d 898, 903 (2015) (internal quotation marks omitted). In a bench trial such as this, the trial court determines the credibility of the witnesses' conflicting testimony and the weight of the evidence. *Wetlands Am. Trust, Inc., v. White CloudNine Ventures*, L.P., 291 Va. 153, 173-74, 782 S.E.2d 131, 143 (2016).

Applying the above standard of review and the presumption of correctness to this case, this Court must conclude that the trial court did not err in upholding the assessment and sustain the judgment of the trial court as explained below.

A. The Taxpayer Evidence of Removal Costs Failed to Follow Virginia Law of "Fair Market Value" and Was Speculative and Inadmissible

The trial court held that VIG had not met its burden of proving that the RMGs and RTGs were overvalued. Mr. Verheijen calculated the value of the RMGs and RTGs by including shipping/removal costs. J.A. 615: 14-18.

By this inclusion, Mr. Verheijen's opinion contradicted longstanding Virginia law on the definition of fair market value and became speculative.

After hearing all of the evidence, the trial court found that "[r]emoval is not a constitutional nor statutory element of fair market value in Virginia and its inclusion in VIG's expert's valuation equation renders that testimony flawed." J.A. 2299. The trial court further explained:

> It was undisputed that these very cranes have already changed hands twice, first by lease and second by sale of that lease, and on neither occasion was removal necessary. Removal and conversion cost are not required by the general understanding of fair market value and are too speculative to be considered as a special factor in valuing these cranes[7].

Id. (emphasis added). The trial court accepted the evidence and testimony of the City's personal property appraisal expert, who derided VIG's market approach as not meeting the universally accepted definition of fair market value. *Id*. As explained by the City's expert, a faculty member of the American Society of Appraisers with 34 years of experience in machinery and equipment appraisals, where removal of the property to another

[7] Mr. Verheijen also used a deduction for transportation costs in his calculation of the fair market value of the STS cranes. While the trial court did not expressly indicate as much, its findings regarding the speculative and unproven nature of transportation costs of the RMGs is applicable to the transportation costs of the STS cranes, as Mr. Verheijen was also unable to discuss any sales of those cranes in which a buyer paid for transportation of the asset. See Section III(B).

location is a relevant fact, the American Society of Appraisers defines the transaction as "fair market value removed." *Id*; J.A. 2417.

Thus Verheijen committed both a legal and factual error. As discussed above, it is a legal error because including removal costs violates this Court's own standard of fair market value. Similarly, it is a factual error because Mr. Verheijen's conclusion that removal costs have to be included in any potential sale was refuted by the fact—as noted by Judge Hawkes in the Final Order—that the RMGs and RTGs had been transferred twice without removing them from the property. Final Order at 11. Further, at the time of the trial no used RMGs had been sold on the secondary market. This makes Mr. Verheijen's calculation speculative because he does not have comparable cost estimates for moving the RMGs. In fact, the trial court found that Mr. Verheijen's deduction of removal costs is speculative. J.A. 2299. As a result, Mr. Verheijen had an erroneous and speculative factual foundation and the trial court was inadmissible as a matter of law.

B. The Trial Court's Finding That Taxpayer's Removal Cost Deduction Was Speculative and Not Proper Is Well-Supported By The Record

Independently of whether removal costs should be considered as a part of the fair market value definition in certain circumstances, VIG still

failed to support its position regarding removal costs in this case. As noted by the trial court, the evidence elicited at trial by VIG regarding "removal and conversion costs…[was] **too speculative to be considered** as a special factor in valuing these cranes." J.A. 2299 (emphasis provided). "[G]reat deference is accorded a trial court's factual findings. This is so because the judge, as fact finder, sees and hears the witnesses and, therefore, is better able to determine their credibility and weigh their testimony." *Tuomala v. Regent University,* 252 Va. 368, 375, 477 S.E.2d 501, 505-06 (1996). Under this standard of review, "the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support." *Jennings v. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 600, 659 S.E.2d 283, 287 (2008).

After hearing eight days of evidence, the trial court had ample opportunity to gauge the credibility of all of the witnesses that appeared before it to provide testimony in support of, or in rebuttal to, the parties' respective positions. It cannot be said that the trial court's findings were without evidence or plainly wrong.

Here, the trial court took it upon itself to inquire as to this issue of removal costs. After hearing testimony regarding the similarity between the

City's expert personal property appraiser, David Cole ("Mr. Cole"), and Mr. Verheijen, prior to accounting for removal costs, the trial court pointedly asked Mr. Cole for his opinion regarding the market for these RMGs and RTGs. J.A. 1018 1-5. ("I think [Verheijen's] premise was that there was no real market in Virginia; that the only market is [a] global market and most probably in Europe. How does that—how do you deal with the existence or nonexistence of the market?).

Mr. Cole responded to the trial court's questions with three reasons as to why he did not include removal and transportation costs. First, there is no known secondary market for used RMGs/ASCs, a fact upon which both Mr. Cole and Mr. Verheijen agree. At the time of trial, no one had ever purchased a used RMG. J.A. 1018: 6-11. This is because RMGs/ASCs are custom built machines tailored specifically to the "local standards and ambient conditions as well as customer colors and numbers." J.A. 1018: 10 -11; J.A. 2147. Secondly, 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.

J.A. 1019 21-25. This testimony went unrebutted by VIG and provides evidence to support the trial court's decision to find Mr. Verheijen's removal costs speculative. The Court, relying upon Mr. Coles' unrebutted testimony, was unconvinced by Mr. Verheijen's testimony that the fictitious used RMG market automatically had to be located in Europe. There is evidence to support that factual finding. For this reason, this Court should uphold the trial court's finding.

Accordingly, the trial court's judgment to not allow a reduction from the value of the personal property for removal costs is neither plainly wrong nor without evidence to support it and entitled to great deference. Therefore, this Court should not allow VIG to undermine the discretion of the trial judge during the appellate process.

Conclusion

For the reasons set forth above, this Court should affirm the judgment of the trial court.

The Court should find that the trial court did not err in exercising its discretion to strike the testimony of Mr. Fandl. In the alternative, should the Court believe that the trial court should have allowed the testimony of Mr. Fandl, then this Court should determine that remand is unnecessary because Mr. Fandl's testimony was inadmissible as a matter of law for

reasons not related to Mr. Fandl's licensure status, i.e. lack of faction foundation and erroneous factual assumptions.

Further, this Court should also find that the trial court correctly did not rule upon the testimony of Mr. Verheijen, as that testimony was insufficient to establish the fair market value of the Main Parcel. In the alternative, the trial court made a factual finding regarding the speculative nature of the cost associated with removing the STS cranes and that finding should not be disturbed as the Court has a factual basis upon which to rely in making that factual finding.

Lastly, the Court made the same factual finding regarding the transportation costs, i.e. removal costs, associated with the RMGs. That finding should also remain undisturbed because it was supported by evidence adduced during the nine day trial of the issues.

DATED: May 17, 2019

CITY OF PORTSMOUTH, VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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