

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

NORMAN E. ROTH, ET AL.,

Petitioners/Appellants,

-against-

No. 110

THE CITY OF SYRACUSE, NEW YORK, ET AL.,

Respondents/Respondents.

20 Eagle Street
Albany, New York 12207
May 01, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

ALAN J. PIERCE, ESQ.
HANCOCK ESTABROOK, LLP
Attorneys for Petitioners/Appellants
100 Madison Street
Suite 1500
Syracuse, NY 13202

JOHN A. CIRANDO, ESQ.

D.J. & J.A. CIRANDO, ESQS.
Attorneys for Respondents
101 South Salina Street
Suite 1010
Syracuse, NY 13202

Sharona Shapiro
Official Court Transcriber

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUDGE LIPPMAN: Matter of Roth v.
Syracuse.

Counsel, would you like any rebuttal time?

MR. PIERCE: Yes, two minutes, please, Your
Honor.

CHIEF JUDGE LIPPMAN: Two minutes, sure.
Go ahead.

MR. PIERCE: May it please the court. My
name is Alan Pierce and I represent petitioners-
appellants.

We have two issues in this case, the first
of which is probably the more interesting one, and
that is whether or not the lead-based paint
contamination in my client's properties must be taken
into account or should be considered in the tax
assessment of those properties.

CHIEF JUDGE LIPPMAN: Why - - - why should
it be? What - - - what happened that makes this
property worth less money because of the lead or the
contamination?

MR. PIERCE: It's really a couple of steps,
Your Honor. The first is whether lead paint is a
contaminant, just lead-based paint is a contaminant
like all the other contaminants that the case law in

1 New York addresses: asbestos, solvents in the ground
2 - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but your - - -
4 your argument is that it should be lowered because it
5 is a contaminant and the property is devalued because
6 of it. How did you overcome - - - how do you
7 overcome the presumption that the value is what the
8 City has valued it at? Why is - - - what have you
9 done to show that that presumption in this case
10 shouldn't stand?

11 JUDGE GRAFFEO: And we're just talking
12 about the years 2001 to 2004?

13 MR. PIERCE: Yes, we are right now, Your
14 Honor, and five properties. In order to get here and
15 have a final order, my client with - - - stipulated
16 to dismiss forty other properties for these four tax
17 years. And - - -

18 CHIEF JUDGE LIPPMAN: But the trial judge
19 didn't put much weight into, you know, who you hired
20 to look at this, right?

21 MR. PIERCE: Well, he didn't. He'd have to
22 give it more weight than the city's expert because
23 his appraisals were struck. So to answer that
24 question, how do we get here, how do we overcome the
25 burden - - -

1 CHIEF JUDGE LIPPMAN: How do we get there,
2 yes.

3 MR. PIERCE: It's a contaminant, no
4 question about it; it's no different. And we get
5 there - - -

6 CHIEF JUDGE LIPPMAN: Assume - - - assume
7 we agree with you, but nothing is fixed - - -

8 MR. PIERCE: Yes.

9 CHIEF JUDGE LIPPMAN: - - - in terms of the
10 contamination, why do you get it lowered?

11 MR. PIERCE: Well, we've got a detailed
12 appraisal here that incorporates - - - so first of
13 all we start, we have the only appraisal on the
14 record.

15 JUDGE PIGOTT: Let's assume for a minute
16 that the City of Syracuse has got to raise 1,000
17 dollars, but every place - - - every house in the
18 city has lead paint. Can they raise any money, or is
19 that all - - - do you just say all the properties are
20 worth zero so there's no tax base?

21 MR. PIERCE: Well, I don't think that's
22 going to happen. I live in a house in the City of
23 Syracuse myself that's built in the 1930s. I have
24 lead paint. And last weekend when I went to my
25 garage and lifted my wood frame window, because the

1 windows in the house have been replaced but not the
2 wood frame windows in my garage, I knew I'm probably
3 breathing in some lead paint dust.

4 JUDGE PIGOTT: So you called - - -

5 JUDGE SMITH: You ask - - -

6 JUDGE PIGOTT: - - - an appraiser and you
7 said - - - you said reduce my assessed valuation to
8 zero, because I just opened my garage door.

9 MR. PIERCE: I didn't, and I'm never going
10 to challenge my assessment because it's cost - - -

11 JUDGE SMITH: But couldn't - - - why
12 couldn't you get the same appraiser to say your house
13 is worthless?

14 MR. PIERCE: Well, he'd have to look at my
15 particular house, and given the fact that I have a
16 brick - - -

17 JUDGE SMITH: Yeah, but he - - -

18 MR. PIERCE: I have a brick - - -

19 JUDGE SMITH: - - - that's what he does for
20 a living.

21 MR. PIERCE: Right, and that's what's
22 important here is we have a detailed appraisal that's
23 really un rebutted. And that's what's - - -

24 JUDGE SMITH: But can't anybody with lead
25 in his house get the same appraisal?

1 MR. PIERCE: I don't think so, Your Honor.
2 It's going to depend on the extent of it. So first
3 of all - - -

4 JUDGE GRAFFEO: But your client can still -
5 - - is still renting, or at least during these years
6 was still able to rent these premises to students - -
7 -

8 MR. PIERCE: Yes.

9 JUDGE GRAFFEO: - - - and didn't spend any
10 money on abatement, from what the record shows.

11 MR. PIERCE: Correct.

12 JUDGE GRAFFEO: So as the Chief Judge asked
13 you, how do you surmount the presumption?

14 MR. PIERCE: And that's what I'm trying to
15 say.

16 JUDGE GRAFFEO: Where's the diminution in
17 market value?

18 MR. PIERCE: We've got - - - let's start
19 with the building blocks to the appraisal. First, we
20 have - - -

21 JUDGE PIGOTT: Well, let's not, because - -
22 -

23 MR. PIERCE: Okay.

24 JUDGE PIGOTT: You've got this income
25 capitalization approach. Can't the court say I'm not

1 buying that because I see what you're doing here.
2 But the fact of the matter is is you're getting money
3 every month out of those - - - those properties, and
4 I don't think that that's the right approach. I
5 think the sales comparison approach is the one that
6 ought to be used, you didn't do it, I'm not - - - I'm
7 not finding in your favor. What's the flaw in that
8 reasoning?

9 MR. PIERCE: Well, the trial judge didn't
10 necessarily say that. He criticized - - -

11 JUDGE PIGOTT: Anyway.

12 MR. PIERCE: Right. He criticized - - -
13 but he said - - - our expert testified that that
14 didn't work here because he didn't, ultimately, use
15 sales comparison, and I know it's the preferred
16 method, but it wouldn't work here because you
17 wouldn't have the detailed information about the - -
18 - whether it had lead, where it - - - whether - - -
19 how much the lead was. And that's what's important
20 here.

21 JUDGE SMITH: Well, as I understand it,
22 what the city did was they just capitalized the rents
23 in a fairly simple calculation, right? Or did you -
24 - - or did you do that? Your appraiser - - -

25 MR. PIERCE: We did - - - we did income

1 capitalization.

2 JUDGE SMITH: Yeah, and then you subtr - -
3 - and then you - - - you subtracted the impact of the
4 contamination.

5 MR. PIERCE: Yes.

6 JUDGE SMITH: But what evidence is there
7 that the impact - - - that the contamination was
8 having any impact on value in those years?

9 MR. PIERCE: Our appraiser - - - well, our
10 appraiser went through - - - he used a recognized
11 model.

12 JUDGE SMITH: Your appraiser testified that
13 the rents weren't affected.

14 MR. PIERCE: Yes. And you've got the case
15 from - - - you've got the case from Minnesota,
16 Westling, where the property was earning - - - which
17 followed this court's Commerce Holding case, which is
18 the backbone of this whole issue. It followed the
19 Commerce Holding theory and said even though that
20 property was earning 144,000 dollars a year in
21 income, it was worthless, based on the contamination
22 at that property and the cost to cure, a method that
23 was adopted by this court in Commerce Holding.

24 JUDGE SMITH: How can - - - that seems so -
25 - - how can it be worthless when he's taking rent out

1 of that property every year and he's - - - not only
2 in those years; he's apparently been taking rent out
3 of it since.

4 MR. PIERCE: Yes.

5 JUDGE SMITH: How can it be worthless if
6 it's - - - will you give it to me? I'll take it.

7 MR. PIERCE: Well, again, we're following -
8 - - I really - - - I understand your argum - - - I
9 understand your skepticism. When my - - - this is my
10 client; when he came to me with this and he showed me
11 Commerce Holding, I'd never heard of it. I read it
12 in great detail.

13 JUDGE PIGOTT: But that's - - - all right,
14 that's a big, you know, two-and-a-half acre pollution
15 issue, and I get, you know, the point you're trying
16 to make with that. But as Judge Smith just
17 suggested, why doesn't somebody just give him five
18 bucks and relieve him of this incredible burden that
19 these houses obviously are upon him?

20 MR. PIERCE: Well, nobody has.

21 JUDGE PIGOTT: Because he said they're - -
22 -

23 MR. PIERCE: Nobody has.

24 JUDGE PIGOTT: He said they're - - -

25 MR. PIERCE: He had the properties for

1 sale; that's in the record.

2 JUDGE PIGOTT: Well, he said they're a
3 dollar apiece, right? They're worth - - -

4 MR. PIERCE: Pardon?

5 JUDGE PIGOTT: They're worth a buck apiece?

6 MR. PIERCE: Well, and keep in mind that
7 here he didn't know how bad the contamination was, so
8 when he grieved, he asked for tw - - - he asked the -
9 - - the assessments to be reduced from about sixty-
10 five on these five properties to twenty.

11 JUDGE PIGOTT: But can't - - -

12 MR. PIERCE: So we're - - -

13 JUDGE PIGOTT: Can't - - -

14 MR. PIERCE: - - - dropping it to twenty.

15 JUDGE PIGOTT: Can't you see, though, where
16 a finder of fact might not buy this argument?

17 MR. PIERCE: And I think that's because
18 they didn't really look at the law that says - - -
19 and let's talk about the stigma cases. If - - -
20 because I know you're saying, well, if - - - if he's
21 making money out of the property and there's no order
22 to remediate the lead paint, why does he get this
23 benefit.

24 JUDGE PIGOTT: No, why does he - - -

25 MR. PIERCE: And the same - - -

1 JUDGE PIGOTT: Why doesn't he - - - why
2 doesn't he give the houses away? I mean, they're - -
3 - the whole testimony is it's a burden.

4 MR. PIERCE: Well, there's - - -

5 JUDGE PIGOTT: He's not making any money.
6 In fact, he's losing money. In fact, now he's got to
7 invest all this money. The case is worth - - - you
8 know, the house is worth a buck. And Judge Smith
9 made an - - - I'll give him two.

10 MR. PIERCE: Well - - -

11 JUDGE PIGOTT: Now he's doubled his money.

12 MR. PIERCE: Right, but - - - but I come
13 back to the fact that there's recognized case law in
14 New York that stigma alone - - - we're talking
15 property that's already cleaned up.

16 JUDGE RIVERA: Yeah, but what - - - I'd
17 like to hear a little bit more about the stigma. If
18 you're talking about - - -

19 MR. PIERCE: Yes.

20 JUDGE RIVERA: - - - about lead paint,
21 there's lots of property that has lead paint.
22 Buyers, renters understand that. What's the nature
23 of the stigma that's particular or peculiar to the
24 properties in this case?

25 MR. PIERCE: Well, I don't know that it's

1 unique or particular property, but we know on these
2 properties how extensive the lead paint contamination
3 is because we hired these experts.

4 JUDGE PIGOTT: But isn't it true, and
5 didn't your expert agree that the lead paint bur - -
6 - plague, or whatever you want to call it, the
7 problem with lead paint in the cities is with kids
8 under six. And that's what all of the studies are
9 aimed at, you know, and you're not - - - you're
10 renting to college kids. And you haven't - - - you
11 haven't said these houses are too dangerous for us to
12 put college kids in, and therefore we're going to
13 board them up and then we're going to go ask for a
14 reduction in our taxes because obviously they're not
15 earning any income.

16 MR. PIERCE: Too dangerous isn't the test,
17 Your Honor - - -

18 JUDGE PIGOTT: I know.

19 MR. PIERCE: - - - from this court or from
20 other courts. If we've got - - - what amazes me is -
21 - - is - - - not amazes me, but we've got an existing
22 body of law, the New York Power Authority case, the
23 "cancerphobia" case on the EMF power lines.

24 JUDGE GRAFFEO: Yeah, but Commercial (sic)
25 Holdings says that it's the taxpayer's burden to show

1 the diminution in the market value. And where does
2 this record show that?

3 MR. PIERCE: It does in the expert
4 appraisal. This is income-producing property.

5 JUDGE GRAFFEO: There's - - -

6 MR. PIERCE: Income capital - - -

7 JUDGE GRAFFEO: There's comparables that we
8 can look at to - - - to justify the drop in value
9 that you're claiming in this case?

10 MR. PIERCE: The expert testified that - -
11 - that you wouldn't have that kind of detailed
12 information as to the presence of lead paint, whether
13 it had been remediated. You know, when you go - - -
14 I can drive down the street, I can look - - -

15 JUDGE SMITH: But it wasn't known in the -
16 - - I mean, put aside everything else. Suppose - - -
17 suppose in 2008 someone discovered gold on the
18 property, can the city come back and say, hey, that
19 gold was there all along so I'm raising your value
20 retroactively back to as long as the gold was there?

21 MR. PIERCE: Well, I think the - - - I
22 guess the question might be whether the gold was in a
23 little bag hidden in the wall, and you can take it
24 out and deport it, or is the house made of gold. Is
25 the house is made of gold, I guess, technically, the

1 city could say that's part of the real property
2 value. But I think what - - - here what I really
3 want to emphasize is if an un - - - a not reasonable
4 fear of cancer, which this court said must be taken
5 into account in value, and - - - and if stigma alone
6 - - -

7 JUDGE SMITH: Well, unreasona - - -

8 MR. PIERCE: - - - after a property's been
9 cleaned up - - -

10 JUDGE SMITH: I can see - - - unreasonable
11 fear - - - totally unreasonable fear of cancer can
12 make your house unmarketable.

13 MR. PIERCE: Yes.

14 JUDGE SMITH: But what evidence is there,
15 other than this - - - the mathematical computation of
16 the expert, that these houses are unmark - - - or
17 that their fair market value is a dollar? I mean,
18 did he try - - - try offering them for five dollars
19 and see if he could attract any buyers?

20 MR. PIERCE: As you - - - it's in the
21 record that he - - - he advertised these for sale, he
22 had potential buyers - - -

23 JUDGE SMITH: What price?

24 MR. PIERCE: No - - - I don't recall, Your
25 Honor.

1 JUDGE PIGOTT: Nine million dollars for
2 fifty.

3 MR. PIERCE: Yeah, it was - - - it was in
4 the millions, yes.

5 CHIEF JUDGE LIPPMAN: Counsel, but why
6 aren't you getting the windfall here that you don't
7 fix it, you're renting it just as you always did.
8 Why - - - why, from a policy perspective, why should
9 it be lower?

10 MR. PIERCE: I asked myself that same
11 question, and - - -

12 CHIEF JUDGE LIPPMAN: What's the answer?

13 MR. PIERCE: - - - the only answer I come
14 back to is the constitutional mandate that the
15 property be valued at fair market, notwithstanding
16 even somebody - - - and my client didn't pollute
17 these properties, he didn't put the lead paint in
18 them.

19 JUDGE PIGOTT: But - - -

20 MR. PIERCE: But - - -

21 JUDGE PIGOTT: - - - there are other lead
22 paint properties in the City of Syracuse.

23 MR. PIERCE: Sure there are.

24 JUDGE PIGOTT: And isn't it - - - isn't it
25 all right for a court to say I'm rejecting this

1 manner of evaluating - - - of appraising this
2 property because I don't think it fairly rep - - -
3 reflects what the properties are worth; I would
4 prefer to have the sales comparison approach. And
5 there are flaws in it, but there are also flaws in
6 the income capitalization approach, too. And he just
7 rejected it, so how do we say he was wrong?

8 MR. PIERCE: Well, he rejected it, Your
9 Honor, because he said they're not hazardous.
10 They're not contaminated because they're not
11 hazardous because the paint is not fl - - - excuse
12 me, chipping, peeling or - - - et cetera. That's not
13 the test.

14 JUDGE PIGOTT: Well, he said that, and he
15 said there's no evidence of a hazard to the tenants.
16 The plaintiff - - - petitioner took no steps to
17 remove it, failed to give an assess - - - failed to
18 prove that the assessment was excessive. And he
19 pointed out that in your leases there's a no-
20 knowledge clause.

21 MR. PIERCE: Yes.

22 JUDGE PIGOTT: So he can't get sued - - -

23 MR. PIERCE: Yes.

24 JUDGE PIGOTT: - - - by the people who are
25 renting there when they - - - when and if they get

1 lead contaminated.

2 MR. PIERCE: And he followed federal law.
3 When he put in those leases he had no knowledge. And
4 I would point you to a case - - -

5 JUDGE PIGOTT: You've got - - - you put it
6 in if you have none.

7 MR. PIERCE: He does now.

8 JUDGE PIGOTT: You don't put it in if you
9 have knowledge.

10 MR. PIERCE: Right.

11 JUDGE PIGOTT: Well, he - - -

12 MR. PIERCE: Until it was tested in 2008,
13 for purposes of this trial, he had a general belief
14 and a general knowledge, as we all do, if it was - -
15 - these are 1930s, '40s houses, yeah, there's lead
16 paint somewhere. And there's a federal case, 612
17 F.3d 1150. If he had said, yeah, I think there's
18 lead in here, he would have been found in violation
19 of a federal statute until the - - -

20 JUDGE PIGOTT: Well, he would not be able
21 to rent it.

22 MR. PIERCE: - - - until the contamination.

23 JUDGE PIGOTT: Right, that's not a viola -
24 - - you just - - - you just can't rent it. But if
25 you put in that you don't have any knowledge then you

1 can rent it.

2 MR. PIERCE: It's a violation of the Toxic
3 Substances Control Act. In that case, a landlord was
4 fined almost 100,000 dollars.

5 JUDGE PIGOTT: Exactly.

6 MR. PIERCE: And here, if property that
7 actually has been polluted, like Love Canal - - - I
8 know, it's not a perfect analogy, but any property
9 that's been polluted. Let's take these properties.
10 He said at trial, have you hired any of these people
11 to do the cleanup? No, because I don't have the
12 money. If he gets the tax abatements here, he's
13 going to do it, he's going to remove the soil, he's
14 going to put - - -

15 CHIEF JUDGE LIPPMAN: But what - - -

16 MR. PIERCE: - - - siding on the houses.

17 CHIEF JUDGE LIPPMAN: - - - what impact has
18 it had on you, then?

19 MR. PIERCE: I'm sorry?

20 CHIEF JUDGE LIPPMAN: What impact has it
21 had that - - - that there's lead there, or whatever
22 it is? You're still renting the property at a, you
23 know, healthy amount. What - - -

24 MR. PIERCE: But again, Your Honor, that's
25 - - - that's not the test established by the cases in

1 New York or other states. If the - - - if the 765 kV
2 line doesn't keep the farmer from milking his cows
3 and putting them out to pasture, it doesn't mean that
4 the property isn't diminished in value because of the
5 cancerphobia. If the stigma in the Minnesota case
6 means the property is worth zero, even though it
7 generates 144,000 dollars a year in income, that's
8 what Minnesota Supreme Court - - -

9 CHIEF JUDGE LIPPMAN: Okay, counselor,
10 you'll have your rebuttal.

11 MR. PIERCE: Thank you.

12 CHIEF JUDGE LIPPMAN: Let's hear from your
13 adversary.

14 MR. CIRANDO: Thank you. May it please the
15 Court. John Cirando from Syracuse, New York, of
16 counsel to the Syracuse Corporation Counsel's office.

17 The first thing I'd like to indicate to the
18 Court is I think when we start any discussion,
19 especially on what he's trying to accomplish, we
20 should look at what the basis is, or as Harold Hall
21 (sic) used to say, you've got to know the territory.
22 The territory is lead paint hazard of flaking,
23 chipping, chalking, peeling, cracking paint. In this
24 record, there's no evidence of such lead paint
25 hazard.

1 CHIEF JUDGE LIPPMAN: What's the - - - what
2 is, then, the effect, if you just have lead paint,
3 but you don't have it chipping, flaking, whatever?
4 What - - -

5 MR. CIRANDO: There's no - - -

6 CHIEF JUDGE LIPPMAN: - - - consequence is
7 it?

8 MR. CIRANDO: There's no effect, Your
9 Honor, and there's - - -

10 JUDGE PIGOTT: Well, I think Mr. Pierce's
11 point is he's having trouble getting through to us,
12 just like he couldn't get through to Judge Greenwood,
13 the only proof is his proof. And his proof says what
14 it says, and there's nothing on the other side; how
15 do I lose? And somehow the courts have found a way
16 for him to do that on two levels, and now he's asking
17 us to fix it.

18 MR. CIRANDO: Well, I think you have to
19 look at the evidence that he had. The evidence that
20 he had, insofar as the first part of his contaminant
21 is not a contaminant under the lead paint laws of the
22 federal government - - -

23 JUDGE SMITH: Is it - - - but is it - - -

24 MR. CIRANDO: - - - nor the State of New
25 York.

1 JUDGE SMITH: I mean, you're saying that
2 lead paint that isn't peeling or chipping or
3 deteriorated can never justify a reduction in value?

4 MR. CIRANDO: Not in this case.

5 JUDGE SMITH: Well, I didn't ask about in
6 this case.

7 MR. CIRANDO: Yes.

8 JUDGE SMITH: I said never.

9 JUDGE GRAFFEO: Is he going to need - - -

10 MR. CIRANDO: I would say never.

11 JUDGE GRAFFEO: Is the owner going to need
12 to disclose this lead paint if he goes to sell these
13 properties?

14 MR. CIRANDO: He'd better.

15 JUDGE GRAFFEO: Well - - -

16 MR. CIRANDO: He has to.

17 JUDGE GRAFFEO: - - - wouldn't that - - -
18 wouldn't that mean that there's going to be some drop
19 in the market value compared to if there wasn't lead
20 paint in these buildings versus their state from - -
21 -

22 MR. CIRANDO: It's - - -

23 JUDGE GRAFFEO: - - - 2001 to 2004?

24 MR. CIRANDO: I think - - - I think you
25 would compare it to - - - when you do the sales

1 would factor into the market value. I'm sorry,
2 Judge.

3 JUDGE PIGOTT: That's all right. When you
4 look at the sales comparison approach, which is what
5 I think the judge wanted in this case, and which most
6 people think should apply, when you're selling
7 properties that are right next to another property
8 that's full of college kids, I mean, I would think
9 you could use that in terms of an appraisal as a
10 factor and say no one's going to live in this place
11 unless they're attending Syracuse University, drink a
12 lot of beer and make a lot of noise. That would be a
13 factor, right?

14 MR. CIRANDO: Um-hum.

15 JUDGE PIGOTT: So the income - - - my point
16 is the income capitalization approach makes sense
17 when you're dealing with these almost fungible
18 properties in and around a major university.

19 MR. CIRANDO: Well, I think what Judge
20 Greenwood, insofar as the three comparison costs and
21 capitalization, what he said was you're supposed to
22 analy - - - use all three analysis and then indicate
23 either a blend of the three or why you're not using
24 the other ones.

25 JUDGE PIGOTT: Is that your understanding

1 of the law with respect to challenges to assessment,
2 that you've got to use all three?

3 MR. CIRANDO: The appraiser.

4 JUDGE PIGOTT: Yeah.

5 MR. CIRANDO: The appraiser should, yes.

6 The - - - the handbook that the Bar puts - - - the
7 Bar Association puts out, that I think the judge
8 cited, and then maybe you blend them together or you
9 - - -

10 JUDGE SMITH: But didn't - - -

11 MR. CIRANDO: - - - to come up with a fair
12 value.

13 JUDGE SMITH: Didn't this - - - didn't this
14 appraiser say that the sales comparison isn't going
15 to work here because you're not going to get close
16 enough comparisons?

17 MR. CIRANDO: I think - - - I think the
18 methodology is to run that - - - the methodology is
19 to run that appraisal in that manner, run the other
20 appraisals - - -

21 JUDGE PIGOTT: Why would you do that - - -

22 JUDGE SMITH: Well, what if you have no
23 comparables, how are you going to run it?

24 MR. CIRANDO: You can always find - - -

25 JUDGE PIGOTT: Let's assume you get a res -

1 - - Mr. Cirando, you get a residence, you've got to
2 use an income capitalization approach and blend it
3 with comparables when there's no income ever?

4 MR. CIRANDO: No - - - no, Judge.

5 JUDGE PIGOTT: So you can pick your - - -
6 you can pick your - - -

7 MR. CIRANDO: You can pick - - - you're
8 saying you can pick your spots. I say that the judge
9 says I want - - - in this situation I wanted to see
10 all three, and then - - -

11 JUDGE PIGOTT: But he doesn't get to pick
12 his evidence, does he?

13 MR. CIRANDO: No, no, no, but then you can
14 see why - - - why they don't work, rather than just
15 saying well, this isn't going to work for this
16 reason, this isn't going to work for that reason. I
17 don't think that's - - - but when we get to the
18 income capitalization approach that the appraiser for
19 the taxpayer used in this case, the judge indicated
20 that the basis of it was inappropriate and not
21 supported because of the assumptions he made and the
22 - - - the expenses were - - -

23 JUDGE SMITH: Was it inappropriate - - -
24 apart from the - - - I mean, I can under - - - I can
25 see the problem some of our questions suggested with

1 doing the income capitalization approach and then
2 subtracting a huge number for this - - - for the - -
3 - for this lead impairment. But before you get to
4 the lead impairment, what's wrong with his - - - his
5 capitaliza - - - I mean, why shouldn't the court have
6 bought his numbers, forgetting about the so-called
7 lead impairment?

8 MR. CIRANDO: Because the expenses that he
9 used were, in many cases, double counted, the judge
10 said. The judge said that the management costs were
11 inappropriate.

12 JUDGE SMITH: And you say the record
13 supports that?

14 MR. CIRANDO: Yes, and there was no
15 indication that the - - - that some of the things
16 that he claimed capital weren't ordinary repairs,
17 that the statements weren't audited.

18 JUDGE SMITH: So you're - - - going back to
19 Judge Pigott's original question, it sounds like what
20 you're saying is he tossed out the city's appraisal,
21 then he looked at the taxpayer's appraisal and says
22 this has all these flaws either, so we're left with
23 nothing. And if it's nothing, the guy with the
24 burden of proof loses and the City wins. Does that
25 sum it up?

1 MR. CIRANDO: That's - - - that's correct.
2 Basically he determined the credibility and the - - -
3 and the facts and - - - and he felt that they - - -
4 that they were not properly listed as the expenses.

5 JUDGE PIGOTT: Now, the City's appraiser,
6 did - - - did that appraiser use the - - - the sales
7 comparison approach? I realize it was thrown out
8 because it was a summary and didn't have the backup -
9 - -

10 MR. CIRANDO: I don't know, Judge.

11 JUDGE PIGOTT: Okay.

12 MR. CIRANDO: I never saw it.

13 JUDGE PIGOTT: It's not - - -

14 MR. CIRANDO: I started with the record
15 after it was stipulated.

16 The key here, there's no diminution in
17 value, the rents are not affected. The Minnesota
18 case that counsel keeps referring to was a superfund
19 site. The stigmas that he's talking about, and I
20 think he talked about in his brief, were Solvay
21 Process waste beds which are somewhat unique.

22 JUDGE PIGOTT: But unfortunately, I mean,
23 doesn't Commerce Holding say what Mr. Pierce says,
24 that you must consider any facts - - - any factors
25 affecting property marketability?

1 MR. CIRANDO: But then the court says in
2 footnote 5 that, you know, this - - - all of this
3 analysis and this subtracting and all of this doesn't
4 really apply if the property has - - - and I think
5 the key - - - the key language was if the property is
6 capable of productive use. And here we have a star
7 property that's capable of productive use and - - -

8 JUDGE SMITH: Well, what if you have a
9 property that's capable of productive use, but
10 because it has this huge environmental problems no
11 buyer will touch it because it's Typhoid Mary. Why -
12 - - why can't you take the - - - does the productive
13 use mean you ignore the fact that it's unmarketable?

14 MR. CIRANDO: I think you have to determine
15 first if it's unmarketable. I think that's - - -

16 JUDGE SMITH: He says it is; he's got an
17 appraiser who says the worth is zero. You may notice
18 there was a little skepticism from some of us on
19 that, but that's what he says. Nobody else has given
20 it another value. What refutes the value of zero
21 that his appraiser gives it?

22 MR. CIRANDO: The - - - the presumptively
23 valid appraisal from the City which was not rebutted
24 by substantial evidence. I think that's - that's - -
25 -

1 CHIEF JUDGE LIPPMAN: That all there is to
2 this case? He doesn't rebut it; it stands.

3 MR. CIRANDO: He's dead. He doesn't rebut
4 it, yeah. His proof - - - the judge felt that his
5 proof was not sufficient to rebut it, was not
6 substantial evidence to rebut it and that - - - that
7 would be enough.

8 I think he's trying to paint a detailed
9 type of portrait with a paint roller, and I think - -
10 - I don't think that's appropriate to get his
11 assessment lowered. I've never seen, since 19 - - -
12 wherever that - - - I've never seen a - - - an
13 apprais - - - or I'm sorry, a lead paint notification
14 that has been checked "yes" in any residential
15 closing. So you know, I think that everybody knows
16 it's there.

17 But the other side of the coin is when
18 everybody gets into a new house the first thing you
19 do is paint it. And most of the - - - most of the
20 encapsulation in this record could be done by
21 painting, not by taking a sledgehammer and knocking
22 out the plaster walls and re - - - putting up new
23 walls in the house. So I think his - - - even if we
24 get into that part of it, that's a little far-
25 fetched, some of his costs.

1 JUDGE RIVERA: Didn't he have - - -

2 MR. CIRANDO: And I think - - -

3 JUDGE RIVERA: Didn't he have his experts
4 provide testimony and documentary evidence that
5 encapsulation alone is, at best, a temporary fix,
6 because - - -

7 MR. CIRANDO: It's - - -

8 JUDGE RIVERA: - - - eventually the paint
9 wears away and there's always the problem of the
10 dust.

11 MR. CIRANDO: They didn't test - - -

12 JUDGE RIVERA: You can't cure it; the only
13 way to cure it is actually to remove it all.

14 MR. CIRANDO: They didn't test for the
15 dust. That's - - -

16 JUDGE RIVERA: I know they didn't test for
17 the dust.

18 MR. CIRANDO: I think that's important - -
19 -

20 JUDGE RIVERA: I know that.

21 MR. CIRANDO: - - - that's important.

22 Number two, I think the - - - the fact of paint
23 itself is not a problem. And the - - - I think the
24 City witness, Mori - - - Mokrzycki, indicated that
25 unless it's chipping, peeling, flaking or - - - it's

1 not a hazard. And there was no evidence that it was
2 a hazard in '01, '02, '03 and '04, so - - -

3 JUDGE SMITH: Well, what about - - - what
4 if it's not a hazard but the marketplace wrongly
5 things it is? Wouldn't that impair market value?

6 MR. CIRANDO: I think I get back to my
7 prior answer to your question, Judge Smith, of we've
8 got to determine that there is a problem before we go
9 to the value.

10 JUDGE SMITH: Well - - -

11 MR. CIRANDO: Or determine the value first.

12 JUDGE SMITH: - - - can't - - - I mean, in
13 theory - - - I can understand your problems with this
14 case, but in theory, couldn't a purely imaginary
15 problem - - - a house is known to be haunted and
16 nobody - - - in some communities no one will buy it,
17 doesn't - - - in reality, doesn't that mean the house
18 is worth less?

19 MR. CIRANDO: No. I don't see - - - no.

20 JUDGE SMITH: I mean, you've got to
21 appraise the house without - - - free of ghosts - - -

22 MR. CIRANDO: Free of ghosts.

23 JUDGE SMITH: - - - even though the whole
24 community believes that the ghosts are there and
25 won't buy the house?

1 MR. CIRANDO: Somebody's going to come in
2 and buy the house eventually.

3 JUDGE SMITH: Yeah, but he's going to get
4 it cheaper because of the - - - the house has a bad
5 reputation.

6 MR. CIRANDO: Well, then he could - - - you
7 know, you get the Ghostbusters to take the ghost out
8 very publicly and then you sell the house for more.

9 JUDGE RIVERA: Is the comparison other
10 houses with ghosts?

11 MR. CIRANDO: With ghosts, yes. You'd - -
12 -

13 JUDGE RIVERA: So if he came in - - - if he
14 found other houses where they admitted they had lead
15 paint, and somehow was able to give some idea of the
16 price of those other - - - is that what you're
17 saying, that's what he would have needed to do, to
18 show other houses that it is known they have lead
19 paint?

20 MR. CIRANDO: On this record - - -

21 JUDGE RIVERA: Yeah.

22 MR. CIRANDO: - - - he would have had to
23 show that there was a hazard in the taxable years,
24 and he didn't show that there was a hazard in the
25 taxable years. That's his first - - -

1 JUDGE SMITH: Suppose instead of doing
2 that, he showed that he'd done a reasonable marketing
3 program for six months and got no bids on the houses.
4 Wouldn't that be relevant?

5 MR. CIRANDO: I think it's more relevant
6 that he listed - - - the City had these, what, for -
7 - - assessed for about 75,000 dollars. He listed
8 them on the market in The New York Times and LoopNet
9 for at least 150,000 dollars a unit, 160,000 dollars
10 a unit. So - - -

11 JUDGE SMITH: That's a reasonable point,
12 but if - - - but hypothetically, if he'd listed them
13 at 50,000 and couldn't sell them, that would suggest
14 the City was a - - - was a little high.

15 MR. CIRANDO: And hypothetically - - -

16 JUDGE SMITH: Yes.

17 MR. CIRANDO: - - - he listed them at 160
18 and he didn't sell them, so maybe he's a little high,
19 too. So you know, I think if he listed them - - - I
20 think he'd have a stronger position if he listed them
21 for what the City assessed them for and said I can't
22 sell them.

23 JUDGE SMITH: Yeah, or even - - - yeah, or
24 even if he listed them for what he - - - for what he
25 assessed them for. I bet you they'd go at that

1 price.

2 MR. CIRANDO: He'd have to disclose the
3 lead paint if I bought them.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. CIRANDO: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you, counselor.
7 Counselor, rebuttal?

8 MR. PIERCE: Yes, thank you. I think the
9 fundamental problem is exactly that, that Mr. Cirando
10 says there has to be a hazard. There's not a case in
11 New York that says there has to be a hazard before
12 you get a change in value. They all say
13 contamination. You said so, this court said so in
14 Commerce Holding. And I would point to the "non-
15 friable asbestos" cases in my brief.

16 JUDGE PIGOTT: Yeah, you say that they're
17 conflating the two, right?

18 MR. PIERCE: Yes.

19 JUDGE PIGOTT: Environmental and - - -

20 MR. PIERCE: And my example of lifting my
21 windowsill in my garage; I don't have chipping,
22 peeling paint, but I'm getting lead dust.

23 JUDGE PIGOTT: But you see what you're
24 doing? In other words, I don't know how many houses
25 there are around Syracuse University, you know,

1 rented to students, but I'm going to bet there's more
2 than five. I don't - - - and maybe the judge
3 couldn't understand why there aren't comparables;
4 that would be much easier, because even though
5 everybody knows about lead, as everybody's now
6 pointing out, it depends on its condition and who's
7 living there and things like that, none of which, at
8 least in this judge's view, came to his - - - you
9 know, seemed to be relevant to this case.

10 MR. PIERCE: Right. I know you asked the
11 question what's the effect of the lead paint. Let me
12 give you a couple of examples. I think one of the
13 judges said it, potential - - - now he knows it's
14 these five properties, he's got to list - - - he's
15 got to say I know there's lead paint; in fact here's
16 the report, here's how much there is.

17 JUDGE SMITH: But in fact, that was not
18 true during the tax years at issue. He did not have
19 to and didn't disclose.

20 MR. PIERCE: Correct.

21 JUDGE SMITH: So why - - -

22 MR. PIERCE: At that time.

23 JUDGE SMITH: - - - why isn't your argument
24 addressed to 2008 going forward, not to - - - not to
25 2001 to 4.

1 MR. PIERCE: Well, it is - - - it is. But
2 other things, disclosure to tenants and buyers, more
3 costly repairs. There's more costly repairs. We
4 recited - - - we cited you to the new - - - the EPA
5 renovation - - -

6 JUDGE SMITH: Was there evidence that he
7 either had made or was committed to making those
8 repairs back in 2001 or 2004?

9 MR. PIERCE: Well, his testimony at trial
10 was, when he asked why haven't you hired any of these
11 people: I don't have the money; if I got the change
12 in assessment I would do it.

13 JUDGE RIVERA: Right, but that's
14 prospective. I think the point is that you're asking
15 for prior years, and so the question is was there any
16 money put out to deal with any of the repairs. I
17 would assume your answer's going to be no, because he
18 says I didn't know. I didn't know.

19 MR. PIERCE: He didn't know the extent of
20 it. And in fact, in Commerce Holding, this court
21 said you don't look at what the land - - - what the
22 property owner is paying for remediation; you look at
23 what the cost to cure is. And this court
24 specifically rejected the town's argument there that
25 you look to what was being spent. Insurance, he

1 doesn't have any liability insurance. In Chap - - -
2 under Chapman, he's got potential exposure.

3 And I know, Judge Pigott, you asked me the
4 college students. A lot of them are graduates, law
5 school, medical. He doesn't know if he's got kids in
6 there or not; he can't ask. He can't ask do you have
7 kids.

8 JUDGE PIGOTT: Well - - -

9 MR. PIERCE: So there might be kids in
10 there.

11 JUDGE PIGOTT: On the flip side, I mean, a
12 retired couple who just decides they want to move to
13 Syracuse and be near that educational monument might
14 say this would be a perfect house for us, you know,
15 and we don't care about lead, we're not going to chew
16 on the windowsills.

17 MR. PIERCE: It could be.

18 I want to correct one - - - about the
19 listing - - -

20 CHIEF JUDGE LIPPMAN: Yes, counselor, yes.

21 MR. PIERCE: The last thing, the listing of
22 properties. The City wants you to ignore the fact
23 that when he listed these properties - - - and you'll
24 see it in the record - - - it was not just these
25 properties. There were commercial properties. He's

1 got restaurants. He's got a business up in the
2 Westcott Street area. They were all part of this.
3 His listing of these properties that they say was a
4 hun - - - if you divide it all out it comes to 150
5 apiece, it does not, because it's not just these
6 properties.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thanks, counselor.

9 MR. PIERCE: Thank you very much, Your
10 Honors.

11 CHIEF JUDGE LIPPMAN: Thank you both.
12 Appreciate it.

13 (Court is adjourned)

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of NORMAN E. ROTH, et al. v. THE CITY OF SYRACUSE, NEW YORK, et al., No. 110 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

Date: May 9, 2013