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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BOARD OF MANAGERS  
OF FRENCH OAKS CONDOMINIUM,

Respondent,

-against-

No. 66

TOWN OF AMHERST,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 24, 2014

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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 66,  
2 Matter of Board of Managers of French Oaks  
3 Condominium.

4 Counsel, do you want any rebuttal time?

5 MR. LESLIE: Yes, Your Honor, I would like  
6 to reserve two minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Two minutes, go  
8 ahead.

9 MR. LESLIE: Thank you. May it please the  
10 court, Craig Leslie, from Phillips Lytle, on behalf  
11 of the Town of Amherst, its assessor, and its Board  
12 of Assessment Review.

13 CHIEF JUDGE LIPPMAN: Counsel, don't both  
14 assessment - - - aren't they kind of flawed in  
15 certain ways?

16 MR. LESLIE: Well, Your Honor, we would  
17 submit, no, they're not, not that - - -

18 CHIEF JUDGE LIPPMAN: That yours is not  
19 flawed, and theirs is.

20 MR. LESLIE: That is our position, Your  
21 Honor. In fact, we go back to the basic presumption  
22 of - - -

23 CHIEF JUDGE LIPPMAN: Maybe because I think  
24 you could punch holes in either one if you tried.

25 MR. LESLIE: Well - - -

1 CHIEF JUDGE LIPPMAN: I mean, your - - -  
2 your assessment really doesn't look at the local  
3 conditions; it's more - - - make comparisons  
4 nationally. I mean, there are things that are - - -  
5 that one as a - - - as a lay observer, even familiar  
6 with the law, might look at and say, gee, I would  
7 have done it a different way.

8 What it is about their assessment that  
9 doesn't meet their burden? And doesn't it at least  
10 raise, you know, some - - - you know, substantial  
11 issue as to - - - as to whether or not the Town's  
12 assessment was right?

13 MR. LESLIE: Well, Your Honor, we  
14 identified six flaws in their appraisal that we  
15 believe raise to the level - - - or rise to the level  
16 that they require, the striking of that appraisal. I  
17 think that the - - -

18 JUDGE READ: Do they - - - do they each - -  
19 - each one of them makes it insufficient as a matter  
20 of law, or it's the six together?

21 MR. LESLIE: Our position is, Your Honor,  
22 that yes, indeed, each one is sufficient reason, but  
23 realistically, we also recognize that some of them  
24 are of greater and more egregious import than others.

25 JUDGE READ: Why don't you start with the

1 most egregious?

2 MR. LESLIE: I think the most egregious  
3 goes to the cap rate analysis, that Mr. Strell used  
4 and the fact that you have an appraiser who is saying  
5 that I calculated a pure market-derived cap rate from  
6 certified information, certified sources. And then  
7 it turns out that he has two pieces of paper in his  
8 file that are limited historical expense information  
9 from which he extrapolates and forecasts financials  
10 for all of his comparables.

11 JUDGE GRAFFEO: Well, the referee didn't  
12 use Mr. Strell's exact capitalization rate. The  
13 referee made - - - the ref - - -

14 MR. LESLIE: The referee did use Mr.  
15 Strell's cap rate.

16 JUDGE GRAFFEO: Well, they made some  
17 adjustment, right?

18 MR. LESLIE: Not with respect to the - - -

19 JUDGE GRAFFEO: The referee used .123 and  
20 Strell used .127.

21 MR. LESLIE: It's a little unclear as to  
22 how that happened with the .123 versus .127. It's  
23 not clear to us what that difference comes from or  
24 where it originates.

25 JUDGE GRAFFEO: But the referee did take

1           some features from the Town's appraisal and some  
2           features from the property owner's appraisal. So - -  
3           -

4                   MR. LESLIE: That it is true. The - - -  
5           the information about the net operating income,  
6           although it was pretty close in terms of the numbers,  
7           the referee adopted Mr. Newton's - - - the Town's  
8           appraiser's - - - information for the net operating  
9           income.

10                   JUDGE SMITH: Which was actually more  
11           favorable to the taxpayer, than his own.

12                   MR. LESLIE: That is true, slightly more  
13           favorable, yes.

14                   CHIEF JUDGE LIPPMAN: But, again, when  
15           taken in totality, why isn't there substantial  
16           evidence to - - - to, you know, contradict - - -

17                   MR. LESLIE: Well, again, going back - - -

18                   CHIEF JUDGE LIPPMAN: - - - you know, your  
19           - - - your assessment. What - - - as a whole, I  
20           understand that you're saying that there are - - -  
21           that's what I was talking about, about punching holes  
22           in the different assessment. And I understand that  
23           you could look at parts of it and say, gee, maybe you  
24           should have done it that way or this way.

25                   But as a whole, you don't think that it - -

1 - there's at least substantial evidence to counter  
2 what - - - what the original assessment?

3 MR. LESLIE: Respectfully, no, because you  
4 have a cascading series of problems with the Strell  
5 appraisal.

6 JUDGE SMITH: Well, can we - - - can we go  
7 back to the first in the cascade, which is you say  
8 the inadequate documentation for the - - - the  
9 expenses of the comparables, which - - - which are -  
10 - - or which led to the cap rate. Well, can you tell  
11 - - - tell me more about that? You say there were  
12 only two pieces of paper in his file?

13 MR. LESLIE: Yes, it's not just the - - -  
14 the inadequate information about the expenses, but  
15 when you turn to the expenses, there were four  
16 comparables considered for the cap rate analysis.  
17 For those, two of those, there was no information,  
18 either in the appraiser or the file to substantiate  
19 the numbers for the expenses or the income.

20 JUDGE SMITH: Is this - - - I mean, is this  
21 - - - is this something you - - - you brought to the  
22 referee's attention? You said where's the  
23 documentation?

24 MR. LESLIE: Yes, Your Honor, we did.

25 JUDGE SMITH: So - - - so as I - - - as I

1 understand it, you're telling us, not just that you  
2 didn't get the backup, but that there isn't any?

3 MR. LESLIE: That there is not any; that's  
4 correct.

5 JUDGE SMITH: And what - - - what in the  
6 record establishes that?

7 MR. LESLIE: If you look at the record at  
8 1073 and 1076, when I refer to the two pieces of  
9 paper, these are - - - one of them is a limited  
10 amount of expense information taken from a prior  
11 appraisal it appears that Mr. Strell did. The other  
12 is a profit and loss statement for Stony Brook  
13 Apartments.

14 And when Mr. Strell testified at the  
15 hearing, he admitted then, that in fact, he did not  
16 have certified sources, and that these were the only  
17 two pieces of paper or information that he had on the  
18 expenses of these two comparables out of the four.

19 JUDGE SMITH: What about - - - what about  
20 the other two?

21 MR. LESLIE: The other two he admitted he  
22 didn't have any financial information in his file.

23 JUDGE SMITH: So he was - - - so he said -  
24 - - so he was going by recollection when he - - -

25 MR. LESLIE: He said he was going by

1 recollection. In the Appellate Division, the dissent  
2 noted that it's one thing to say, I have an opinion  
3 about the cap rate or I have an opinion about  
4 expenses. You still have to have factual support for  
5 that opinion. You still have to prove those facts.

6 And here, he says, well, I've been involved  
7 with these properties in the past; it's my  
8 recollection. And yet he has dollar amounts down to  
9 the individual dollar that he puts forth in his  
10 appraisal report that are not supported anywhere in  
11 the appraisal or in his file.

12 CHIEF JUDGE LIPPMAN: Counsel, what's the -  
13 - - what's the second most egregious - - -

14 MR. LESLIE: I think it's the absence of -  
15 - -

16 CHIEF JUDGE LIPPMAN: - - - mistake?

17 MR. LESLIE: - - - adjustments with respect  
18 to comparables, Your Honor, in two respects. The  
19 absent of adjustments with respect to when he has  
20 looking at comparables to come up with a projected  
21 rental income for these units, and the failure to  
22 adjust the comparables when he did his cap rate  
23 analysis. He made - - -

24 JUDGE GRAFFEO: Do you mean he had - - -  
25 you have to have photographs of the interior of every

1 apartment when you're dealing with multiple  
2 dwellings?

3 MR. LESLIE: What our point was with  
4 respect to the lack of information about the subject  
5 properties is the start of the appraisal process is  
6 you have to understand what you're appraising. If  
7 you don't have information about the amenities, the  
8 build outs, the layouts - - -

9 JUDGE GRAFFEO: I understand, but I'm  
10 asking about the photographs, because that was an  
11 issue raised in your brief. I mean - - -

12 MR. LESLIE: We identify - - -

13 JUDGE GRAFFEO: - - - if you had a 4- or  
14 500 unit - - -

15 MR. LESLIE: Right.

16 JUDGE GRAFFEO: - - - apartment complex, do  
17 you really have to go in and try to get 500 tenants  
18 to give you access to take photos of their  
19 apartments?

20 MR. LESLIE: Mr. Newton got one for all of  
21 the condo units that were here. He went into each  
22 one and he took individual photographs.

23 JUDGE GRAFFEO: But we're talking about a  
24 general - - - a general rule that would apply to more  
25 than a thirty-nine unit facility.

1                   MR. LESLIE: I won't suggest that it - - -  
2 I believe that it is a mandate that you get a picture  
3 of every unit, but you have to have information in  
4 your appraisal about what you're evaluating.

5                   JUDGE GRAFFEO: He made some adjustments,  
6 though, didn't he?

7                   MR. LESLIE: With respect to - - -

8                   JUDGE GRAFFEO: He did indicate the square  
9 footage - - -

10                  MR. LESLIE: He made some adjustments when  
11 he looked at the comparable rentals. He made no  
12 adjustments when he was working - - -

13                  JUDGE SMITH: Because all - - - all this  
14 had no - - -

15                  MR. LESLIE: - - - with the comparables for  
16 cap rate.

17                  JUDGE SMITH: All this had no impact,  
18 though, because the - - - the only - - - the only  
19 significant difference between the two appraisals is  
20 the cap rate. And the - - - the photo - - - the cap  
21 rate doesn't depend on photographs of the interior,  
22 does it?

23                  MR. LESLIE: What our position was and what  
24 our position is, is that this cascading series of  
25 failures rose to the level that the appraisal should

1 have been stricken, and therefore - - -

2 JUDGE SMITH: Is there anything - - - is  
3 there anything - - -

4 MR. LESLIE: - - - the presumption would  
5 have stayed in effect.

6 JUDGE SMITH: - - - except the cap rate,  
7 that has any practical impact on how this case comes  
8 out?

9 MR. LESLIE: I think that because of the  
10 way that the court treated it, and concluded that  
11 they had passed their initial threshold, the answer  
12 to that question is no. Whether they should have  
13 gotten to that initial threshold is a separate  
14 question, a separate inquiry. Because the referee  
15 denied the motion to dismiss and had trial proofs - -  
16 -

17 JUDGE SMITH: But suppose - - - suppose - -  
18 - suppose they had come in, instead - - - instead - -  
19 - instead of having all these flaws that you point  
20 out, there are no photographs, or they didn't divide  
21 up the square footage, or whatever it is. They had  
22 just said, okay, we're going to - - - we - - - we  
23 accept everything in Mr. Newton's report except the  
24 cap rate, and - - - and - - - and here's our - - -  
25 here's my view on the cap rate. Is that a sufficient

1 appraisal?

2 MR. LESLIE: I think that - - - is it a  
3 sufficient appraisal? Is it a sufficient appraisal  
4 to substantiate what the referee did? I guess I'm a  
5 little confused, Your Honor.

6 JUDGE SMITH: Well, no, no. Can you strike  
7 - - - suppose - - -

8 MR. LESLIE: I apologize.

9 JUDGE SMITH: Suppose - - - suppose a  
10 taxpayer's appraisal comes - - - an appraiser comes  
11 in and says I agree with everything the municipality  
12 said, except X. Is that appraisal subject to being  
13 stricken because he didn't go through A, B, C, D, E?

14 MR. LESLIE: I think, Your Honor, although  
15 not this case, 202.59 would require that that  
16 appraiser at least say, I've looked at all of the  
17 facts and figures that the Town has provided, and I  
18 agree with them except for the capitalization rate.  
19 So I think there is a process that they would still  
20 have to follow.

21 JUDGE SMITH: So - - - so you have to pay  
22 an appraiser to duplicate everything the Town does,  
23 even if you have no problem with it?

24 MR. LESLIE: No, Your Honor, I - - - but I  
25 believe that, again, remember the burden of proof

1 here is that there's a presumption of validity that  
2 the Town's assessment is valid, and it is up to the  
3 taxpayer to challenge that with legally competent and  
4 admissible evidence. And to the extent 202.59 has  
5 certain requirements, you ignore those at your peril.

6 CHIEF JUDGE LIPPMAN: Okay, counsel.  
7 You'll have rebuttal time.

8 MR. LESLIE: Thank you.

9 CHIEF JUDGE LIPPMAN: Let's hear from your  
10 adversary.

11 MR. OLIVERIO: Good afternoon, may it  
12 please the court, B. P. Oliverio, on behalf of the  
13 condominium.

14 CHIEF JUDGE LIPPMAN: Counsel, tell us how  
15 you met the initial burden that you have to - - - to  
16 come forward with substantial evidence to contradict  
17 the - - -

18 MR. OLIVERIO: I'm glad you asked that  
19 question, Your Honor, because I am of the opinion  
20 that that issue is not before this court today. The  
21 - - -

22 CHIEF JUDGE LIPPMAN: What is before this  
23 court?

24 MR. OLIVERIO: The only issue before the  
25 court today is whether the Town or the taxpayer

1 prevailed by a preponderance of the evidence.

2 CHIEF JUDGE LIPPMAN: Don't you have an  
3 initial - - - an initial burden to have - - -

4 MR. OLIVERIO: Yes.

5 CHIEF JUDGE LIPPMAN: - - - substantial  
6 evidence to - - -

7 MR. OLIVERIO: But it - - -

8 CHIEF JUDGE LIPPMAN: - - - counter what  
9 the assessment - - -

10 MR. OLIVERIO: But the question is, is the  
11 jurisdiction of this court under CPLR 5601, is only  
12 if there's a two-judge dissent on a question of law.  
13 Clearly the majority opinion in this case expressly  
14 rejected the Town's claim that the appraisal of the  
15 taxpayer did not constitute substantial - - -

16 CHIEF JUDGE LIPPMAN: So you're saying  
17 that's already determined, that issue.

18 MR. OLIVERIO: And the dissent, in its  
19 dissent, says that "In our view, the conclusion of  
20 petitioner's appraiser with respect to its  
21 capitalization rate is legally and factually flawed,  
22 and each flaw is independently fatal to petitioner's  
23 case. We thus conclude the petitioner failed to meet  
24 its ultimate burden."

25 JUDGE SMITH: Assume - - - assume that



1           you - - - finding a cap rate from comparables - - -

2                   JUDGE SMITH: For starters, is that what he  
3           said? Is - - - I mean, as I - - - as he - - -

4                   MR. OLIVERIO: I don't recall the exact  
5           words, but it was to that effect; he did not have  
6           data on the - - - he did not have data available that  
7           we could produce in discovery regarding the income of  
8           the properties on which he considered to be  
9           comparable sales.

10                   Now, the issue there is that appraisers are  
11           experts. Their evidence - - - they're allowed to  
12           introduce opinion evidence, and it's competent if  
13           it's based on their experience. And I briefed that  
14           point rather excessively.

15                   JUDGE SMITH: Isn't there - - - isn't there  
16           some limit somewhere. I mean, can an expert come in  
17           and say, well, I'm - - - I'm - - - I've been around  
18           this community a long time and I can tell you that -  
19           - - that people are delighted to get a three percent  
20           return on their real estate investments, and I don't  
21           happen to have any documents that - - - that show  
22           that, but that's my experience.

23                   MR. OLIVERIO: I believe he could say that,  
24           and that would be competent evidence, but he would be  
25           subject to a rather severe cross-examination to try

1 to justify that. And that's how the process works.

2 JUDGE GRAFFEO: Well, you have to rebut  
3 their presumption of validity. So - - -

4 MR. OLIVERIO: And - - - and we did.

5 JUDGE GRAFFEO: - - - shouldn't there be  
6 some data, some factual basis to the expert's opinion  
7 as to why the capitalization rate - - -

8 MR. OLIVERIO: His factual basis was - - -

9 JUDGE GRAFFEO: - - - should differ from  
10 what the Town has proposed?

11 MR. OLIVERIO: He was - - - he was - - -  
12 because he participated in sales of the comparables  
13 he selected, he was familiar with their net operating  
14 income. And he - - -

15 JUDGE ABDUS-SALAAM: But how would - - -  
16 how would the Town be able to cross-examine him? You  
17 said it would be subject to severe cross-examine - -  
18 - cross-examination. How would the Town be able to  
19 cross-examine him, if there's no data that he's  
20 relying on other than his memory of some transactions  
21 he was involved in or had knowledge about?

22 MR. OLIVERIO: Well, I don't know how the  
23 Town would do it, but I certainly would ask him to  
24 explain the basis for his three percent. Was it a  
25 conversation with a banker? Was it a conversation

1 with a - - - investors? Was it familiarity with  
2 other transactions?

3 JUDGE ABDUS-SALAAM: But isn't that his  
4 burden to show what he based it on?

5 MR. OLIVERIO: But I think if you look at  
6 the law on opinion evidence by experts, it talks  
7 about - - - and again, I've cited extensively in my  
8 brief, it talks about information based upon their  
9 experience and not necessarily educational  
10 credentials - - -

11 CHIEF JUDGE LIPPMAN: But there's got to be  
12 something harder than that, doesn't there? You can't  
13 just walk in and say, look, my opinion is, you know -  
14 - -

15 MR. OLIVERIO: But that's not - - -

16 CHIEF JUDGE LIPPMAN: - - - how do you  
17 know? Well - - -

18 MR. OLIVERIO: That's not the case before -  
19 - -

20 CHIEF JUDGE LIPPMAN: - - - you know, it's  
21 been a - - - I had a lifetime in this business; I  
22 know. You got to say something, right?

23 JUDGE GRAFFEO: This is a statistical  
24 formula.

25 MR. OLIVERIO: But that's not the case

1 before us. The hypothetical is not the case that's  
2 before us today. The case before us today is that he  
3 did have some backup information. He did have  
4 experience with - - -

5 CHIEF JUDGE LIPPMAN: So where do you draw  
6 the line? How much backup information was there?

7 MR. OLIVERIO: Well - - - the trier of  
8 fact, the referee, and the Fourth Department drew the  
9 line on the base - - - on the - - - and concluded  
10 that substantial evidence of a credible dispute was -  
11 - - that standard was met. And if you look at your  
12 case, FMC v. Unmack, that's a very, very low  
13 standard.

14 JUDGE SMITH: How - - - I mean, I guess I'm  
15 - - - I'm just puzzled by - - - by how he did it. I  
16 mean, it seems like almost a miracle. He has no  
17 pieces of paper, and he's com - - - he's got these  
18 expenses in - - - in rather - - - in rather complete  
19 detail.

20 MR. OLIVERIO: If he was aware of the net  
21 operating income of the sales that he selected as  
22 comparable sales for purposes of determining a  
23 capitalization rate, he also knew the selling price,  
24 because that was that - - - that's public  
25 information. He could ballpark or come up with a - -

1 - a cap rate.

2 JUDGE SMITH: But actually, he didn't - - -  
3 he didn't say - - - I mean, the part I'm looking at,  
4 he didn't say he ballparked. He says, "I even had  
5 the expense analysis available. I believe the data  
6 was very strong and very good. It came from  
7 certified sources." And then he - - - and they're  
8 not there.

9 MR. OLIVERIO: Your Honor, if the referee -  
10 - - well, I don't want to conflate the preponderance  
11 of the evidence with the substantial evidence  
12 standard. But clearly, there was substantial  
13 evidence of a dispute in this case, based upon the  
14 comparables that the appraiser used for comparable  
15 sales, and the - - - the basis for his information  
16 for the cap rate was there. It was certainly capable  
17 of being - - - given the appropriate weight by the  
18 trier of fact and the Fourth Department.

19 To turn that question of fact into a  
20 question of law is somewhat startling to me at this  
21 point, because it - - - all of the case law says  
22 that's a question - - -

23 CHIEF JUDGE LIPPMAN: Counsel, assuming you  
24 met your - - - your burden, what's wrong with their  
25 assessment? Why is yours better than theirs?

1                   MR. OLIVERIO: Well, Mr. Newton, who's a  
2 wonderful gentleman, used a leveraged - - - a tran -  
3 - - used an approach to capitalize the income that I  
4 would describe as a leveraged transaction. He  
5 posited with almost no basis, a ten percent equity  
6 yield rate, which is equivalent to the nine and a  
7 half percent that the taxpayer's appraiser came up  
8 with. It's a straight cap rate.

9                   Then, Mr. Newton says, but I'm going to  
10 presume that this is a leveraged transaction, and  
11 that the putative buyer could borrow seventy-five  
12 percent of the purchase price - - -

13                   JUDGE SMITH: Is it unusual for real estate  
14 transactions to be leveraged?

15                   MR. OLIVERIO: It is not unusual, sir,  
16 however, if you're appraising property, and you're  
17 the buyer, you don't give the seller the benefit of  
18 your ability to finance it. You keep that to  
19 yourself.

20                   So the correct analysis was by the  
21 taxpayer's assessor or appraiser when he did a  
22 straight, cash-on-cash rate of return requirement.  
23 The reason the leveraging - - -

24                   JUDGE SMITH: You're - - - you're saying  
25 that - - - that the - - - that even though they are,

1 in fact, leveraged, generally people bid as though it  
2 was all equity?

3 MR. OLIVERIO: Well, sure, why would I - -  
4 - would I give the seller the benefit of my financing  
5 or ability to finance it. That makes no sense to me,  
6 and that's what Mr. Newton did. And if you take away  
7 the leveraging, if you - - -

8 JUDGE SMITH: The answer, why would you do  
9 it, is because someone else who does it, can bid a  
10 little higher than you.

11 MR. OLIVERIO: Well, that's the bidding  
12 process, sir, that's not part the appraiser - - -

13 JUDGE SMITH: Yeah, but isn't that what  
14 appraisers are supposed to be worrying about?

15 MR. OLIVERIO: If I - - - if I have to  
16 throw in a little to get the deal, and I like it, I  
17 would do it, but I wouldn't immediately toss all of  
18 my financing gain or benefit to the - - - to the  
19 seller. The leveraging technique is very  
20 questionable because it tends to lower the cap rate,  
21 which results in a higher value.

22 Now, if the Town would like us to take Mr.  
23 Newton's cap rate of ten percent, which we really  
24 don't know how he came up with that, there's  
25 absolutely nothing there, the taxpayer would be

1           pleased to take the ten percent on a straight cap - -  
2           - cash-on-cash return which would lower the price to  
3           probably about 300,000 less than the amount  
4           determined by the referee.

5                        So I think that once we move to the  
6           preponderance, the - - - Mr. Newton's equity yield  
7           method, which was basically a leveraged transaction,  
8           cannot be supported, and he was - - - at the cross-  
9           examination, he had no idea why he was doing it or  
10          what he was doing.

11                      CHIEF JUDGE LIPPMAN:   Okay, counsel,  
12          thanks.   Let's hear from your adversary.

13                      MR. LESLIE:   Two things, I think, to  
14          address.   One, the characterization of what Mr.  
15          Newton did is not accurate.   If you look at the  
16          record at 381 to 385, he used three different  
17          methods.   He did not take a ten percent cap rate.   He  
18          calculated a cap rate.

19                      The equity yield rate was a starting point  
20          for one of his three analyses.   He did look at a  
21          market-derived rate, based on a comparable sale,  
22          which he properly adjusted.   He also looked at a  
23          national survey, with respect to apartment-type  
24          properties and capitalization rates, and he did a  
25          mortgage equity technique, which looked at mortgage

1 lending and the issue of what - - -

2 JUDGE SMITH: So, your - - - your - - -

3 MR. LESLIE: - - - those rates were.

4 JUDGE SMITH: - - - your position is it  
5 doesn't matter what Newton did, because Strell didn't  
6 - - - didn't meet the threshold. You didn't even  
7 have to come in with an appraiser.

8 MR. LESLIE: No, I simply wanted to clean  
9 up that part of the - - - the record quickly. And  
10 then the second part is, getting back to what Mr.  
11 Strell did, you heard the term "ballpark". You heard  
12 that term ballpark, and that really is in essence  
13 what Mr. Strell did. And it makes a difference. The  
14 difference between .123 and .104 is 700,000-plus  
15 dollars of assessed value. It's not something that  
16 should be ballparked. And it's not something that is  
17 permissible to ballpark.

18 JUDGE SMITH: He's - - - he's saying that  
19 what - - - what it's really attributable to, is  
20 you're assuming a leveraged transaction and he's  
21 assuming all equity.

22 MR. LESLIE: Well, that's - - -  
23 respectfully, Your Honor, no, it's not. It's because  
24 you have here a gentleman who took very limited,  
25 incomplete expense information. He said, I had this;



1           202.59. If you're going to look at comparables, you  
2           have to provide details about the transactions you're  
3           comparing to. So in this case, you have to provide  
4           details, factual data, about what are the income and  
5           expenses that you're looking at for those  
6           comparables.

7                         And you have to provide a statement of all  
8           of the facts that you intend to prove with respect to  
9           your comparables. It's right there in 202.59(g)(2).  
10          It - - - there's nothing else to be added. It says,  
11          you have to show your work. And that should be the  
12          rule; you have to show your work. It - - -

13                         JUDGE GRAFFEO: And the - - - the court  
14          cases that they have said, substantial compliance  
15          with that statute.

16                         MR. LESLIE: They've also - - -

17                         JUDGE GRAFFEO: That's a little bit less  
18          than what you're saying.

19                         MR. LESLIE: Well, this court has said in  
20          that FMC court case, for example, that when you rebut  
21          the - - - when you come up with substantial evidence,  
22          it's typically a competent appraisal, based upon  
23          objective and verifiable data. And regardless of  
24          whether you credit that, they met that substantial  
25          evidence standard or not, we believe that is the

1 standard that you do have to have objective  
2 verifiable data.

3 And with respect to the result here, if you  
4 look at their capitalization rate analysis and it's  
5 rejected, because you have the Appellate Division  
6 dissenter saying that should be given no weight, the  
7 question then becomes, what does this court do? Same  
8 thing that the Appellate Division dissenter said  
9 should be done. The result that comports more nearly  
10 with the weight of the evidence is the 5,000 - - -  
11 the 5,080,000 dollar valuation in the allocation that  
12 the Town had.

13 CHIEF JUDGE LIPPMAN: Okay, thanks,  
14 counsel,

15 MR. LESLIE: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you both,  
17 appreciate it.

18 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Board of Managers of French Oaks Condominium v Town of Amherst, No. 66, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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