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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF
MERRY-GO-ROUND PLAYHOUSE, INC.,

Respondent,

-against-

No. 201

ASSESSOR OF CITY OF AUBURN, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
October 21, 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: We're going to start
2 with number 201, Matter of Merry Gray - - - Merry
3 Rogro - - - Merry-Go-Round Playhouse.

4 Counselor? Would you like any rebuttal
5 time, counselor?

6 MR. FUSCO: Would I - - -

7 CHIEF JUDGE LIPPMAN: Rebuttal time?

8 MR. FUSCO: Probably not.

9 CHIEF JUDGE LIPPMAN: No rebuttal time?

10 MR. FUSCO: No rebuttal.

11 CHIEF JUDGE LIPPMAN: Go ahead; you're on.

12 MR. FUSCO: Thank you very much, Your
13 Honor. If it please the court, my name is Andrew
14 Fusco. I'm here on behalf of the city of Auburn.
15 This is my son and assistant, Adam Fusco, who
16 assisted me on the brief.

17 JUDGE PIGOTT: Mr. Fusco, what's the fiscal
18 impact of this case, if - - - if they - - -

19 MR. FUSCO: The fiscal impact? This is
20 about a million dollars worth of assessed valuation.

21 JUDGE PIGOTT: But what is - - - what is -
22 - - what are the taxes?

23 MR. FUSCO: What are the taxes? The
24 present levy, I don't know per thousand.

25 JUDGE PIGOTT: I noticed in one of the - -

1 - one of the purchase agreements, it was about 5,000
2 dollars. Does that make sense?

3 MR. FUSCO: That would make - - - that
4 would make - - - no, it would actually be more than
5 that. Just from my own experience, if - - - knowing
6 what my house is worth, and it's less than a million
7 dollars, what it's assessed for. In school, county
8 and city, we're probably talking about 35 to 40,000
9 total.

10 JUDGE PIGOTT: Okay.

11 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
12 what's the issue here? What - - - why - - - why
13 isn't this arts-centered theater group that - - -
14 that has this strong summer component, why shouldn't
15 they get an exemption? What's - - - what's wrong
16 with it?

17 MR. FUSCO: Well, the rea - - - the reason
18 is, Your Honor, two-fold. There's a two-prong test
19 under Section 420 of - - -

20 CHIEF JUDGE LIPPMAN: Do you agree that
21 this is for a - - - an artistic or - - - purpose?

22 MR. FUSCO: I agree that they started life
23 that way. In 1958, when this entity was organized,
24 it was clearly an educational function.

25 CHIEF JUDGE LIPPMAN: Now they're not an

1 educational format?

2 MR. FUSCO: Now they've grown tremendously
3 and they're primary activity is presenting Broadway-
4 style plays.

5 JUDGE GRAFFEO: But they're - - - they're
6 activities are consistent with their mission
7 statement in their certificate of incorporation.

8 MR. FUSCO: I don't - - - I think the
9 activity of presenting theater, whether it's theater
10 to students and schools, or whether it's theater,
11 Broadway-style theater - - -

12 JUDGE GRAFFEO: It's still a - - -

13 MR. FUSCO: - - - is consistent with - - -
14 with - - -

15 JUDGE GRAFFEO: - - - it's still a cultural
16 activity, isn't it?

17 MR. FUSCO: - - - right - - - is consistent
18 with their - - - with their mission statement - - -

19 JUDGE GRAFFEO: It's still a cultural
20 activity.

21 MR. FUSCO: However, the ownership - - -

22 CHIEF JUDGE LIPPMAN: Counsel, the question
23 is, is it a cultural activity, Judge Graffeo is
24 asking?

25 MR. FUSCO: Is it a cultural activity?

1 CHIEF JUDGE LIPPMAN: In general, isn't it
2 cultural, and isn't that consistent with the purposes
3 of a tax-exempt group?

4 MR. FUSCO: Not necessarily. This court -
5 - -

6 CHIEF JUDGE LIPPMAN: Why not? Why not?

7 MR. FUSCO: This court - - - this court
8 specifically addressed that question in the Symphony
9 Space case back in 1983. And in the Symphony Space
10 case, you said that Symphony Space Theater is exempt
11 because it does not compete commercially with other
12 theaters. In other words, as Supreme Court found,
13 the mere act of theater is, in itself, not an exempt
14 activity.

15 But certain - - - obviously many of the
16 theaters on Broadway - - -

17 CHIEF JUDGE LIPPMAN: Are they making
18 money? Is it a money-make - - -

19 MR. FUSCO: - - - are not exempt from
20 taxation, most of them.

21 CHIEF JUDGE LIPPMAN: Is it a money-making
22 enterprise?

23 MR. FUSCO: It is a money-making
24 enterprise. You've got their financial data before
25 you.

1 JUDGE SMITH: It's a not - - - it's a not -
2 - - it's not-for-profit, but they - - -

3 MR. FUSCO: They are a not-for-profit
4 entity - - -

5 JUDGE GRAFFEO: So not for profit - - -

6 MR. FUSCO: - - - but they do run in the
7 black.

8 JUDGE GRAFFEO: And they've - - - well,
9 they're run in - - - they've run a deficit at some
10 time in the past.

11 MR. FUSCO: They have had deficits at - - -
12 at some times.

13 JUDGE GRAFFEO: But they still have a
14 fairly extensive educational component to their
15 activities.

16 MR. FUSCO: Yes, and - - - and I - - - the
17 City concedes that the activities that they conduct
18 in the wintertime, going to schools, teaching
19 theatrical arts to students, putting on shows for
20 young students, is - - -

21 CHIEF JUDGE LIPPMAN: Isn't that intimately
22 - - -

23 MR. FUSCO: - - - is an exempt activity.

24 CHIEF JUDGE LIPPMAN: Counsel, but isn't
25 that intimately connected with what they do in the

1 summer?

2 MR. FUSCO: I think the two are totally
3 disconnected.

4 CHIEF JUDGE LIPPMAN: You think the summer
5 - - - summer is a commercial enterprise - - -

6 MR. FUSCO: Correct, Your Honor.

7 CHIEF JUDGE LIPPMAN: - - - as opposed to
8 what they do?

9 MR. FUSCO: Correct, Your Honor.

10 CHIEF JUDGE LIPPMAN: Even though they're a
11 not-for-profit?

12 MR. FUSCO: Correct, Your Honor.

13 JUDGE SMITH: So even - - -

14 JUDGE GRAFFEO: So - - - so what would be
15 the rule you want us to say? It sounds like you want
16 us to come up with something more definitive than the
17 two-prong test.

18 MR. FUSCO: Well, the - - - the - - - I - -
19 - I don't think that this particular organization
20 satisfies either of the two prongs. We've already
21 discussed the fact that I don't think that - - - that
22 - - - because they compete with commercial theaters,
23 that's uncontroverted. Mr. Sayles said that in his
24 affidavit. We need this housing in other - - - in
25 order to compete with for-profit theaters.

1 JUDGE PIGOTT: At one point in your summary
2 - - - Mr. Fusco, one point - - -

3 MR. FUSCO: They don't satisfy that
4 particular test, but they don't satisfy the second
5 prong.

6 CHIEF JUDGE LIPPMAN: Judge Pigott's asking
7 you a question.

8 JUDGE PIGOTT: In one - - - at one point in
9 your - - - in your opposition to the motion for
10 summary judgment, you said it's uncontested that
11 petitioner satisfies the first prong.

12 MR. FUSCO: At the time of their formation.
13 However, as - - - as the theater group has grown
14 since 1958, they're doing a number act - - - of
15 activities that are very commercial in nature, and
16 they admit in the papers - - -

17 CHIEF JUDGE LIPPMAN: Explain - - - explain
18 to me the difference between commercial in nature and
19 cultural in nature?

20 MR. FUSCO: I think there is a difference,
21 Your Honor.

22 CHIEF JUDGE LIPPMAN: What's the
23 difference?

24 MR. FUSCO: And - - - and I think that this
25 court drew that line in the Symphony Space case.

1 JUDGE ABDUS-SALAAM: Well, counsel, if - -
2 - if Symphony Space did compete with off-off
3 Broadway, which it is itself - - -

4 MR. FUSCO: Right.

5 JUDGE ABDUS-SALAAM: - - - are you saying
6 that their theater wouldn't be tax exempt?

7 MR. FUSCO: If the theater competes with
8 commercial activities, it is not an exempt
9 organization.

10 JUDGE SMITH: Well, it does - - - even if
11 it's - - - even if it's cultural - - - I mean,
12 culture isn't in the statute, as I understand it.
13 It's got to be educational or improvement. Or is
14 culture in there?

15 MR. FUSCO: Well, the - - - the Appellate
16 Division found the educational component - - -

17 JUDGE SMITH: Okay, I guess - - - I guess -
18 - - I guess what I'm saying is - - -

19 MR. FUSCO: - - - and the moral improvement
20 of man - - -

21 JUDGE SMITH: - - - isn't - - - can't you
22 have a culture - - - is every cultural organization
23 necessarily educational?

24 MR. FUSCO: Possibly, but not every
25 cultural organization is exempt.

1 CHIEF JUDGE LIPPMAN: Well, okay. I get -
2 - - let me - - - I'm going to switch to a different
3 question. Is - - - is this record really adequate
4 for us to - - - to say the facts are clear either way
5 as to whether this is a - - - an educational or - - -
6 I guess, educational is the test?

7 MR. FUSCO: I think it is, Your Honor. I -
8 - -

9 JUDGE SMITH: That's clear your way, but I
10 mean, how - - - you - - - with - - - there isn't that
11 much in the record about exactly what they do.

12 MR. FUSCO: Well, and - - - and that may
13 well be true from your perspective. I, living in
14 Auburn - - -

15 JUDGE SMITH: Yeah, but we don't - - - yeah
16 - - -

17 MR. FUSCO: - - - are intimately familiar
18 with what they do.

19 JUDGE SMITH: But it's got to be - - - it's
20 got to be in the record - - -

21 MR. FUSCO: And I think - - - and I think
22 Supreme Court - - -

23 JUDGE SMITH: - - - I mean, living in
24 Auburn doesn't do it.

25 MR. FUSCO: Yeah, and I think, Supreme

1 Court Judge Fandrich explained perfectly well in
2 finding facts in this case - - -

3 JUDGE SMITH: Yeah, but they don't - - -

4 MR. FUSCO: - - - exactly what this theater
5 does and why he didn't consider it - - -

6 JUDGE SMITH: But don't - - - but doesn't -
7 - - doesn't it have to be in the record what they do?
8 We can't go on the fact that he lives in Auburn and
9 he knows what they do.

10 MR. FUSCO: Well, his decision is in the
11 record. And he did make a number of findings of fact
12 regarding what this entity does. The facts really
13 aren't in dispute, Your Honor.

14 JUDGE SMITH: He - - - you - - - whether
15 the - - - he - - - he granted you a motion to dismiss
16 by you.

17 MR. FUSCO: He - - - I made a motion to
18 dismiss on movant's answer. He converted it to
19 summary judgment - - -

20 JUDGE SMITH: So he gave you some - - -

21 MR. FUSCO: - - - and granted it - - -

22 JUDGE SMITH: He gave you summary judgment,
23 and the Appellate Division gave them summary
24 judgment. I guess my question is, does either party
25 really meet the summary judgment burden on this

1 record? Isn't - - - couldn't - - - just if you - - -
2 if you - - - if you're just stuck with the record,
3 and don't have the benefit of living - - - of living
4 in Auburn, it's hard to know whether they're an
5 educational institution or not.

6 MR. FUSCO: Well, let - - - let's talk
7 about - - - about this, Your Honor. Let's talk about
8 whether housing is an exempt activity.

9 JUDGE ABDUS-SALAAM: Well, why isn't it,
10 counsel?

11 JUDGE GRAFFEO: Well, why isn't the housing
12 here similar to our yeshiva case, the summer camp
13 case?

14 MR. FUSCO: Why is it not similar to - - -

15 JUDGE GRAFFEO: Why - - - why isn't it
16 similar to that summer camp case?

17 JUDGE ABDUS-SALAAM: Or even St. Luke's
18 Hospital?

19 MR. FUSCO: I'm sorry, which case?

20 JUDGE GRAFFEO: Yeshiva.

21 MR. FUSCO: Oh, okay, Yeshi - - - I think
22 the reason it's not similar to Yeshiva - - -

23 JUDGE GRAFFEO: Or as the Judge said our
24 St. Luke's case.

25 JUDGE ABDUS-SALAAM: Or St. Luke's

1 Hospital.

2 MR. FUSCO: Well, St. Luke's - - - and St.
3 - - - by the way, I accept St. Luke's and I accept
4 St. Joseph's. In those situations, as we know,
5 common sense dictates that doctors and nurses are
6 often on call 24/7. The fact that the housing for
7 the doctor and the nurse is across the street from
8 the hospital in St. Luke's, and next door to the
9 hospital in - - -

10 CHIEF JUDGE LIPPMAN: Do you not accept
11 Yeshiva?

12 MR. FUSCO: Yeah, and I'll get to Yeshiva.

13 CHIEF JUDGE LIPPMAN: No, but I'm asking
14 you. Do you not accept that or you accept that too?

15 MR. FUSCO: I accept Yeshiva. And in
16 Yeshiva, the serious undermine test that this court
17 articulated isn't met by this set of facts.

18 CHIEF JUDGE LIPPMAN: Why is it a different
19 prong - - -

20 MR. FUSCO: The Merry-Go-Round Theater - -
21 -

22 CHIEF JUDGE LIPPMAN: Why is it different
23 than here?

24 MR. FUSCO: The Merry-Go-Round Theater - -
25 -

1 CHIEF JUDGE LIPPMAN: Why is it different
2 from here? Summer housing?

3 MR. FUSCO: Be - - - because the Merry-Go-
4 Round Theater went on well for decades and decades
5 and decades renting from local landlords who paid
6 taxes. They got into the - - -

7 JUDGE RIVERA: They say - - - but they say
8 that - - -

9 MR. FUSCO: They got into the apartment
10 business for pure convenience, because they got - - -
11 they didn't want the - - -

12 JUDGE RIVERA: Well, they say it's more
13 than inconvenience. They say they - - - they cannot
14 financially continue that prior model.

15 MR. FUSCO: Well, I - - - I respectfully
16 disagree. What - - - what Mr. Sayles says in the - -
17 - in the affidavit is that it was time consuming and
18 took a lot of effort to deal - - -

19 CHIEF JUDGE LIPPMAN: Let me ask you a
20 question.

21 MR. FUSCO: - - - with all these landlords.

22 CHIEF JUDGE LIPPMAN: Because it's
23 convenient, it precludes an exemption?

24 MR. FUSCO: Correct.

25 CHIEF JUDGE LIPPMAN: Why - - - where - - -

1 where does it - - -

2 MR. FUSCO: Mere convenience - - -

3 CHIEF JUDGE LIPPMAN: - - - where does it
4 say that?

5 MR. FUSCO: Mere convenience is not
6 seriously undermining the activity, the exempt
7 activity.

8 JUDGE SMITH: Is seriously undermine really
9 a test as it says in Yeshiva, or is it just words we
10 use in one sentence than a test?

11 MR. FUSCO: I think it's a test. I - - - I
12 - - - I think in Yeshiva - - -

13 JUDGE SMITH: In not serious - - - in St.
14 Luke's, there's nothing about seriously undermining.
15 As I read St. Luke's, it just says it advances their
16 purpose, so that's all there is to it.

17 MR. FUSCO: Correct. But again, I would
18 just restrict St. Luke's and St. Joseph's to the
19 facts. Doctors who are on call 24/7, living is part
20 of working - - -

21 JUDGE SMITH: Okay, well, you would - - -
22 you're asking - - -

23 MR. FUSCO: - - - if you're a doctor and a
24 nurse.

25 JUDGE SMITH: You're asking us to do that,

1 but then you're - - - then you're really saying we
2 would - - - we would narrow their rationale
3 considerably over what we actually said in those - -
4 - in that ca - - - at least in St. Luke's. In other
5 words, you - - -

6 MR. FUSCO: Yes.

7 JUDGE SMITH: - - - you say limit it to its
8 facts. We wrote an opinion that's a little broader
9 than the facts, but you say we should walk away from
10 the opinion and stick to the facts?

11 MR. FUSCO: No, not walk away from it.
12 Doctors and nurses are on call working around the
13 clock.

14 CHIEF JUDGE LIPPMAN: Yeah, but the - - -
15 but the - - - but - - -

16 MR. FUSCO: Actors work at 8 o'clock at
17 night.

18 CHIEF JUDGE LIPPMAN: Counselor - - -
19 counselor, what we're saying, the language in the
20 decision is much broader than that particular set of
21 facts. You want us to stand back from our decision
22 in that case, and narrow what seemed to be the
23 holding in the language in the case? Is that what
24 you're asking us to do?

25 MR. FUSCO: Yes.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. FUSCO: I - - - I - - -

3 CHIEF JUDGE LIPPMAN: Let's - - -

4 MR. FUSCO: I think - - - I think St.
5 Joseph's and St. Luke's go no further than the facts.

6 CHIEF JUDGE LIPPMAN: Okay. Let's - - -
7 let's hear from your adversary.

8 MR. FUSCO: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks.

10 MR. LYNCH: Good afternoon, Your Honors.
11 My name is Charles Lynch for the respondent, Merry-
12 Go-Round Playhouse, Inc. This is Mr. Michael
13 Ciaccio, who is my associate, actually for the second
14 day. He just joined us yesterday, so.

15 CHIEF JUDGE LIPPMAN: Counsel, what's the -
16 - - what's the purpose behind this group? What do -
17 - - what do they do? Is it broadly educational in -
18 - - in your perspective - - - I mean, including play
19 into that your adversary's discussion of were they
20 competing with other theaters - - -

21 MR. LYNCH: It is - - -

22 CHIEF JUDGE LIPPMAN: - - - commercial
23 theaters.

24 MR. LYNCH: Well, it is broadly
25 educational. It's - - -

1 CHIEF JUDGE LIPPMAN: Does it matter that
2 you compete, if you do, with other theaters?

3 MR. LYNCH: It matters a great deal in that
4 this is a not-for-profit corporation. It's a
5 seasonal theater. In order to attract the talent and
6 staff that it needs - - -

7 JUDGE PIGOTT: What's your income per year?

8 MR. LYNCH: Pardon me?

9 JUDGE PIGOTT: What's your income per year?

10 MR. LYNCH: I do not - - -

11 JUDGE PIGOTT: Gross?

12 MR. LYNCH: I do not know the gross income
13 per year.

14 JUDGE PIGOTT: Can you speculate?

15 MR. LYNCH: I can't even speculate.

16 JUDGE PIGOTT: There's some place in here
17 that said 1.5 million dollars. I was wondering if
18 that was right.

19 JUDGE READ: Does the commercial activity
20 subsidize the educational activity?

21 MR. LYNCH: Yes, it's all - - - it's all
22 part of one organization and one area.

23 JUDGE SMITH: Is it - - - is it your
24 position that any - - - any - - - any non-profit that
25 puts on plays or that - - - that, I mean, puts on

1 cultural shows is - - - is within the statute?

2 MR. LYNCH: No. No, that's not my position
3 at all.

4 JUDGE SMITH: Okay, so what - - - what in
5 this record shows that the - - - that your activity -
6 - - and particularly the summer theater is what I'm
7 asking about - - - what - - - what shows that it's an
8 educational activity within the meaning of the
9 statute?

10 MR. LYNCH: I think the Appellate Division
11 found that it not only was a - - -

12 JUDGE SMITH: I'm not - - - I didn't ask
13 about the - - - what they - - - what they found.
14 What in the record shows it? He - - - he's appealing
15 from what they found.

16 MR. LYNCH: I would say that the - - - I
17 would say that if - - - asking me, I would say that
18 the summer theater more lends itself to the moral or
19 mental improvement of men, women and children.

20 JUDGE PIGOTT: Then why did you say at
21 record 185 that the housing accommodations allows it
22 to compete with successful for-profit theater
23 companies?

24 MR. LYNCH: Because in order to operate - -
25 -

1 JUDGE PIGOTT: You're competing with for-
2 pro - - -

3 MR. LYNCH: - - - with these talented staff
4 - - -

5 JUDGE PIGOTT: You're saying - - - you're
6 saying we need a tax exemption, because these for-
7 profits who do not have a tax exemption are beating
8 us, and so we want to be able to compete with them on
9 a commercial level, and to do that, we want to take
10 tax money from Auburn.

11 MR. LYNCH: No, that's not what we're
12 saying. We're saying that we provide housing to our
13 actors and staff - - -

14 JUDGE PIGOTT: No, no, no. It says the
15 housing accommodations allowed it to compete with
16 successful for-profit theater companies. Is that a
17 true statement?

18 MR. LYNCH: Off - - - the ability to house
19 offer - - - housing, not these particular housings.
20 We offered housing for the last forty years.

21 JUDGE SMITH: Well, I mean, I gather that's
22 really you're way of saying that it's necessary to
23 achieve your charitable purpose?

24 MR. LYNCH: Absolutely.

25 JUDGE SMITH: But - - - but I - - - I'm - -

1 - I'm still hung up on how - - - first of all, I'm a
2 little - - - I'm a little puzzled about, does the
3 record show who - - - I mean, are there times when no
4 theater is being put on? When the theaters are dark?

5 MR. LYNCH: Well, yes, there are.

6 JUDGE SMITH: And so who lives in the
7 houses then?

8 MR. LYNCH: Well, it's - - - at those
9 times, there can be nobody living in the houses.
10 There - - -

11 JUDGE SMITH: You mean - - - you mean they
12 stand there empty?

13 MR. LYNCH: There can be full-time staff.
14 It's not just actors and actresses who live in these
15 houses - - - in these apartments - - - there's full-
16 time staff.

17 JUDGE SMITH: I mean, how - - - how do we
18 know even - - - is even that - - - even what you're
19 saying now in the record?

20 MR. LYNCH: Well, it's - - - the record
21 consists primarily and almost exclusively of the
22 affidavit of the director Ed Sayles.

23 JUDGE SMITH: Yeah, that's - - - that's
24 what bothers me. I mean, it does - - - it doesn't
25 tell us all that much about what's really going on.

1 MR. LYNCH: Well, it does say that the - -
2 - the youth theater is very active across the state
3 of New York in schools throughout the state - - -

4 JUDGE PIGOTT: Yeah, but for - - - for this
5 purpose, he says he spends significant amount of time
6 and energy in finding short-term rental apartments in
7 the local community, coordinating lease agreements
8 with various landlords, a process that - - - that has
9 become "cumbersome and difficult". Is that how we
10 base tax exemptions, because somebody says it's hard
11 for me to go through the newspaper and get - - - and
12 get rental properties?

13 MR. LYNCH: As this organization has grown
14 and the need for more and more people has grown with
15 it, it's been very difficult for them to find
16 adequate housing - - -

17 JUDGE PIGOTT: But that's not - - -

18 MR. LYNCH: - - - especially when you're
19 dealing with a landlord who said, well, they're only
20 going to be here a month.

21 JUDGE PIGOTT: Can you buy a restaurant?
22 Can you - - - can, at some point, you say, you know,
23 it's - - - it's hard for these people to have who
24 have to walk out and find their own place to eat, so
25 we want to buy the downtown restaurant in Auburn and

1 use it for our cafeteria and that should be tax
2 exempt, too. Can you do that?

3 MR. LYNCH: The - - - the thing - - -

4 JUDGE PIGOTT: Your answer may be yes. I -
5 - - I'm - - -

6 MR. LYNCH: Well, again, Your Honor, the
7 focus should be on the use to which this property is
8 put.

9 JUDGE PIGOTT: That's why I say, if you - -
10 - if you buy the restaurant and say we're going to
11 use it, you know, for our thespians, therefore it
12 ought to be tax exempt, is that okay?

13 MR. LYNCH: I can't answer that question
14 and be speculating. I really don't know.

15 CHIEF JUDGE LIPPMAN: It's hypothetical.

16 MR. LYNCH: I suppose it's possible - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. LYNCH: - - - but I don't know.

19 JUDGE SMITH: If - - - if you make - - - I
20 suppose if you have an office cafeteria in the
21 building, that would be exempt, so maybe - - - maybe
22 that's your answer to Judge Pigott, just - - - just
23 sort of an off - - - off-premises cafeteria.

24 MR. LYNCH: Well, I know a lot of the cases
25 that we've cited have - - - even the Yeshiva case - -

1 - has a ritual bath, ten acres of woods for hiking -
2 - -

3 CHIEF JUDGE LIPPMAN: Is the Yeshiva case
4 analogous to yours?

5 MR. LYNCH: In some respects, it is.

6 CHIEF JUDGE LIPPMAN: It's a good case for
7 you?

8 MR. LYNCH: I believe it - - - I believe
9 it's supportive of our position, yes.

10 JUDGE GRAFFEO: If they were to rent these
11 apartments during the year when there's not actors or
12 staff or whoever that are related to their
13 productions, would - - - would that change the
14 equation here?

15 MR. LYNCH: It might. But the problem is
16 the apartments - - - some of their staff is full
17 time, because it works on both the summer theater and
18 the youth - - -

19 JUDGE GRAFFEO: I'm - - - I'm just asking,
20 if they had rental income, would that change what you
21 would expect our analysis to be?

22 MR. LYNCH: It may, but there are many
23 cases where rental income is derived that does not
24 defeat the tax exempt status.

25 JUDGE GRAFFEO: Are they deriving any

1 rental income here?

2 MR. LYNCH: No, they are not.

3 JUDGE ABDUS-SALAAM: You keep using - - -

4 MR. LYNCH: They're deriving no rental
5 income. As a matter of fact, they re - - - they rely
6 on charitable donations to make ends meet with these
7 two properties.

8 JUDGE ABDUS-SALAAM: And you - - - the
9 properties are not just for living space, correct?
10 There - - - there are other things going on there in
11 connection with the charitable purposes of the
12 organization. Isn't that true?

13 MR. LYNCH: Well, they don't just sleep
14 there. They spend time there. Contrary to what my
15 opponent said, the - - - the actor's day doesn't
16 start at 8 o'clock at night. They start in the
17 morning, and they're rehearsing and they're running
18 lines, and they're - - - they're working on all kinds
19 of things having to do with a performance. That's
20 for the summer theater.

21 JUDGE ABDUS-SALAAM: Do they - - - do they
22 make sets there, or do they do other wood - - - you
23 know, wood-working or shopping?

24 MR. LYNCH: I would imagine part of that is
25 done there. I really - - - I really don't know to

1 that extent. But - - -

2 CHIEF JUDGE LIPPMAN: It's convenient for
3 you to have this housing, right?

4 MR. LYNCH: It's more than convenient - - -

5 CHIEF JUDGE LIPPMAN: But - - - but it is
6 convenient.

7 MR. LYNCH: It certainly is convenient, but
8 - - -

9 CHIEF JUDGE LIPPMAN: And is that - - - is
10 that - - - I asked the same question of your
11 adversary. Does that matter in terms of the
12 exemption?

13 MR. LYNCH: Of course not. Convenience is
14 not a bar to tax exempt status.

15 JUDGE SMITH: Why - - - I'm - - - how, if
16 at all, does the summer theater differ from any off-
17 Broadway theater that might be a non-profit?

18 MR. LYNCH: Well, I'm in - - - I'm not sure
19 that it does. I don't - - - I would have to know
20 what - - -

21 JUDGE SMITH: So you - - - so you - - - so
22 you would say that any off-Broadway theater might be
23 tax exempt.

24 MR. LYNCH: I'm just saying it's possible
25 they could be tax exempt. I would have to know more

1 about the one you're referring to.

2 JUDGE SMITH: Yeah, well, I guess that's
3 sort of my problem with yours. I feel as though I
4 have to know more about it. I mean, all you've got
5 is a rather short affidavit saying we put on summer
6 theater.

7 MR. LYNCH: Well, with all due respect,
8 Your Honor, I think it does go farther than that.

9 JUDGE SMITH: Yeah, I - - - I grant you,
10 but not a whole lot farther.

11 JUDGE PIGOTT: For example, do you have - -
12 - do you have a mortgage on these?

13 MR. LYNCH: I believe there is a mortgage.
14 I did not handle the closing, but I - - - I really -
15 - - I really - - - I believe there is.

16 JUDGE PIGOTT: Looking at the cost benefit,
17 I was wondering if the cost of the mortgage is more
18 than the rent. I - - - I just didn't know. The
19 mortgage looked like it's substantial with respect to
20 - - - to 230 Genesee.

21 MR. LYNCH: Well, I think - - - I think the
22 organization did a balancing test and said, you know,
23 we have to negotiate individual leases with a myriad
24 of landlords at various times throughout the year.
25 There's a cost to that. Or we could acquire these

1 two properties. We have them. Our people can come
2 and go from these properties. They're always
3 available. That's an issue we don't have anymore.
4 There's a cost to that, too.

5 So they did a cost-benefit analysis
6 obviously, but they do rely, as Mr. Sayles said in
7 his affidavit, on charitable donations to make ends
8 meet with these properties.

9 JUDGE ABDUS-SALAAM: Does the proximity of
10 the buildings to wherever the productions are - - -
11 are going on, does that make any difference? If - -
12 - if they were way across town, as opposed to close
13 by the theater, would that make a difference here?

14 MR. LYNCH: Your Honor, in - - - in Auburn,
15 there's really little that's way across town. It's a
16 very small community.

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. LYNCH: But I don't believe it does,
19 and I think there's cases which have said that that's
20 not a - - - that geographical location is not
21 necessarily - - -

22 JUDGE GRAFFEO: So what's your strongest
23 case? What precedent would you ask us to follow here
24 that you think is a close parallel to your situation?

25 MR. LYNCH: Well, I think for various

1 reasons, the Yeshiva case is a very - - - is a very
2 appropriate case. St. Luke's Hospital - - - I think
3 the whole line of cases that allow for full tax
4 exempt status, I mean, in cases that are really more
5 tenuous than what we've got here. Yeshiva, for
6 example, a wooded ten-acre parcel? I don't know. I
7 think we'd run into some problems if we tried to
8 claim something like that was tax exempt.

9 CHIEF JUDGE LIPPMAN: Okay, counsel,
10 thanks.

11 MR. LYNCH: Thank you, Your Honors.

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

14 (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 Merry-Go-Round Playhouse, Inc. v. Assessor of City of Auburn, No. 201, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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