Can the Mere Presence of Contaminants Reduce a Property’s Tax Assessment?
By Shannon M. Jones, Karen M. Richards and Patrick L. Seely, Jr.

Introduction
In 1996, the Court of Appeals held that environmental contamination must be considered in property tax assessment when it impairs market value. An extension of this holding was sought recently when the Court granted leave to hear Roth v. City of Syracuse, where the petitioner contended that the mere existence of lead paint in his properties automatically rendered their value almost worthless.2

Part I of this article explains basic concepts in property valuation and tax certiorari proceedings. Part II provides a brief summary of cases where the Court examined “costs to cure” and “stigma,” concepts revisited by the Court in Roth. Part III reviews Roth, where the Court held that the mere presence of lead paint does not overcome the validity of a property’s assessment without substantial evidence that the contaminant depressed the property’s market value.

Part I
Valuation of Property in General
Property is traditionally valued by one of three methods: comparable sales, capitalization of income, or reproduction cost less depreciation. The strict application of the traditional methods proved inadequate to analyze the impact of environmental contamination on value,3 and over time appraisers developed specialized valuation methods and techniques based upon the traditional methods to account for the effect of contamination on value.4

Burden of Proof
It is well-settled that a property valuation by a municipal tax assessor is presumptively valid.5 A petitioner challenging an assessment has the initial burden of overcoming the presumption of validity by producing substantial evidence that the assessment is erroneous.6 The substantial evidence standard “requires less than clear and convincing evidence, and less than proof by a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt.”7 A petitioner need only “demonstrate the existence of a valid and credible dispute regarding valuation.”8 Substantial evidence at this juncture is whether the petitioner’s evidence “is based on ‘sound theory and objective data’ rather than on mere wishful thinking.”9 The burden of rebutting the presumption of validity may be met by testimonial evidence and “the submission of a detailed competent appraisal, based on standard, accepted appraisal techniques and prepared by a qualified appraiser, demonstrating the existence of a genuine dispute concerning valuation.”10 “The ultimate strength, credibility or persuasiveness of [the] petitioner’s arguments are not germane during this threshold inquiry.”11

If the petitioner rebuts the presumption of validity, “a court must weigh the entire record, including evidence of claimed deficiencies in the assessment to determine whether [the] petitioner has established by a preponderance of the evidence that [the] property has been overvalued.”12

Part II
Valuation of Contaminated Property in New York State
The concepts of stigma and clean-up costs, which were examined in Roth v. City of Syracuse, arose in cases decided previously by the Court of Appeals. Stigma was recognized in Allied Corporation v. Town of Camillus and was an integral part of the issue in Criscuola v. Power Authority of State of New York, while cleanup costs figured heavily in valuing the property in Commerce Holding Corp. v. Assessors of Town of Babylon.

In Allied, the property, consisting of more than 1,000 acres of waste-beds, settling lagoons, and buffer zones, had been used for many years to receive waste material from an industrial process.13 Although the waste material was not classified as hazardous and there was no evidence of contamination,14 the Court noted that “many of the same economic considerations are present, most notably the ‘stigma’ attached to environmentally damaged land in the eyes of any potential buyers, the risk that undetected or currently unclassified hazardous materials will be identified, and the costs of clean-up and rehabilitation.”15 The Allied Court thus recognized that stigma can attach to a site perceived to be, but not actually, contaminated.

The year following Allied, the Court of Appeals confronted the concept of stigma in an eminent domain proceeding.16 In Criscuola v. Power Authority of State of New York, the claimants asserted their property was valueless due to cancerphobia and the stigma associated with the public’s perception of health hazards from high-voltage power lines built across the claimants’ property.17 The only issue before the Court was whether the claimants were required to show the reasonableness of the public’s fear in order to recover consequential damages for the taking.18 The Court held they were not required to prove reasonableness as a separate, additional component of diminished market value because market value may be adversely affected even if the public’s fear is unreasonable.19 Still, the claimants had to prove the value of the property was diminished “in
much the same manner that any other adverse market effects are shown, e.g., by proffering evidence that the market value of the property across which power lines have been built has been negatively affected in relation to comparable properties across which no power lines have been built.”20

Only a few years after deciding Criscuola and Allied, the Court of Appeals heard Commerce Holding Corp. v. Assessors of Town of Babylon.21 Considered by many to be the leading case in New York on environmental contamination and tax assessment, the Court clearly held that to the extent it impairs market value, “contamination must be considered in property tax assessment.”22

The industrial property in Commerce Holding was severely contaminated by metal plating operations performed by a former tenant of the property.23 As a result of the contamination, the property was designated a Superfund site, making Commerce the owner of the property strictly liable for cleanup costs, and Commerce entered into a consent order with the Environmental Protection Agency to remediate the site.24

The Town argued that the trial court erred in reducing the property’s value by factoring in the costs to remediate the contamination dollar-for-dollar and urged the Court “to adopt a per se rule barring any assessment reduction for environmental contamination.”25 The Court of Appeals rejected this argument because the State Constitution mandates that property cannot be assessed at more than its full value, a concept typically equated with market value, and “[i]n view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property’s marketability.”26 “It follows that when environmental contamination is shown to depress a property’s value, the contamination must be considered in property tax assessment.”27

Recognizing that traditional valuation methods were “inevitably hampered to some extent by the lack of available market data,” the Court endorsed a flexible approach to valuing contaminated property.28 While not prescribing any one valuation method, it listed certain factors—present use of the property, Superfund site status, extent of the contamination, ability to obtain financing and indemnification in connection with the purchase of the property, potential liability for third parties, estimated cleanup costs, and stigma remaining after cleanup—that should be considered to assess the effects of environmental contamination.29 Based on the contamination and market factors present in Commerce Holding, the Court concluded that “cleanup costs [were] an acceptable, if imperfect, surrogate to quantify environmental damage and provide a sound measure of the reduced amount a buyer would be willing to pay for the contaminated property.”30

Part III

Roth v. City of Syracuse

After Commerce Holding, the Court remained silent on the issue of environmental contamination and tax assessment until it decided Roth v. City of Syracuse.31 Petitioner in Roth commenced a Real Property Tax Law Article 7 proceeding, alleging the assessor’s valuations did not account for the adverse effect that the presence of lead paint had upon the market value of the properties.32

The properties were five former single-family homes, located near three major universities, which had long been converted to income-producing student housing.33 During trial, the City’s expert determined the properties’ market values by using both a sales comparison approach and an income capitalization method and “concluded that the mere presence of lead paint, without more, did not diminish the market value of the five properties.”34 On Petitioner’s motion, the trial court excluded the appraisal reports because the City’s expert failed to include the data upon which he relied in developing his opinion of the properties’ values.35 Remaining in evidence was testimony from local property owners and brokers that indicated “lead-based paint would have no adverse effect upon either the sales of the properties or their continued profitable use as student housing rental.”36

Conversely, Petitioner’s expert concluded the market values of the properties were negatively impacted by the mere presence of lead-based contaminants. In utilizing an income capitalization method that determined market value based upon a property’s ability to generate income,37 Petitioner’s expert first determined the hypothetical non-contaminated market value of each of the properties, reduced the value by their respective cost to cure figures,38 and concluded that each of the five properties had a market value of one dollar.39

The properties, however, continued to generate income, and Petitioner did not incur any costs to cure because he had not taken any steps to remove the lead paint and restore the properties.40 In addition, there was no legal requirement to abate the lead paint from the properties.41

On the merits, the trial court held that Petitioner failed to meet his burden of proof that the properties were overvalued or that the assessments were incorrect.42 The appellate court unanimously affirmed.43

Before the Court of Appeals, Petitioner relied heavily on Commerce Holding to support his position that “even if a property owner is not required by law, or has not agreed by contract, to remediate contamination, the cost to cure contamination should be considered in valuing the property for tax assessment.”44 He argued that Commerce Holding stood for the propositions that “it is the calculated cost to cure, not the amount actually
expended by the property owner to cure the contamination, that must be deducted from the ‘uncontaminated’ value to get a proper assessment for tax purposes’ and that the calculated cost to cure ‘does not depend on a legal mandate to actually remediate the pollution.’ He further contended that stigma depressed the properties’ market values. In other words, the mere existence of lead paint automatically diminished the market value of each of the properties.

The Court decided that Petitioner’s reliance on Commerce Holding, however, was misplaced. Commerce Holding did not support his position that the costs to cure the lead paint must be deducted from the uncontaminated value of the properties, even though Petitioner was not required by law or by contract to remediate the lead paint. The Court found that:

[the nature of the contamination and market factors in this case further distinguish petitioner from the property owner in Commerce Holding. The property in Commerce Holding was a designated Superfund site, and the property owner was strictly liable pursuant to CERCLA and a consent order with the Environmental Protection Agency to remediate the site. Thus, we concluded that ‘cleanup costs are an acceptable, if imperfect, surrogate to quantify the environmental damage and provide a sound measure of the reduced amount a buyer would be willing to pay for the contaminated property.’ Here, in contrast, there was no evidence that a ‘buyer of the properties would have demanded an abatement in the purchase price to account for the contamination.’ Petitioner admits there was no immediate legal requirement to abate the lead paint from the properties, and the ubiquitous nature of lead paint in residential properties, unlike the unique contamination of the Superfund site in Commerce Holding, undermines petitioner’s unsupported contention that there is a lead paint ‘stigma’ depressing market value. Thus, petitioner’s proposed remediation costs are not an appropriate factor to be considered in evaluating the tax assessments of these properties.

Petitioner’s argument that a finding in his favor was required because the trial court struck the City’s appraisal reports also failed. Petitioner bears the ultimate burden to rebut the presumption of validity accorded to the tax assessments issued by the City. To carry his burden, petitioner must show that the market value of the properties was diminished by the presence of lead paint, not its mere existence. To hold otherwise would permit a taxpayer to avoid his or her fair share of the tax burden, while, as in petitioner’s case, reaping the benefits of a rental market that is unaffected by the presence of the contaminant without having incurred any costs to remediate or abate the lead-based conditions.

Petitioner continued to profit from the rental income generated by the properties, and he did not otherwise demonstrate that the presence of lead paint impaired their market value. Accordingly, the Court found Petitioner “failed to meet his burden and there is no basis to disturb the presumption of validity in the City’s favor.”

Conclusion

While the petitioner’s efforts in Roth to extend Commerce Holding did not succeed, there are a few lessons to be learned. First, continuing to collect market rents without an obligation to incur any remediation costs does not result in a decrease in a property’s valuation merely because contaminants are present. Second, it is difficult to factor cleanup costs when valuing property where much of the market contains the same common contaminants, such as the property in Roth, particularly where there is no legal obligation to remediate, as compared to factoring cleanup costs in property containing unique contaminants, such as the property in Commerce Holding, where there is a legal obligation to remediate. Finally, and most importantly, whether the alleged diminution in property valuation stems from cleanup costs, stigma, market perception, the extent of contamination, or the property’s status as a Superfund site, a property owner must demonstrate the factor that depressed the market value of the property or the assessment is upheld as presumptively valid.

Endnotes

2. Roth v. City of Syracuse, 21 N.Y.3d 411 (2013). The petitioners-appellants also included several single member limited liability companies that engage in the ownership of real estate. In this article, all are referred to as “Petitioner.”
3. Commerce Holding, 88 N.Y.2d at 731 (recognizing that traditional valuation methods were hampered by the lack of available market data and endorsing a flexible approach to valuing contaminated property).
4. An in-depth discussion of the methods of valuing property is beyond the scope of this article. See Thomas O. Jackson, Methods and Techniques for Contaminated Property Valuation, THE APPRAISAL JOURNAL (Oct. 2003) for a discussion on valuing contaminated property.
6. Roth, 21 N.Y.3d at 417.
7. FMC Corp., 92 N.Y.2d at 188.
8. Id.

11. FMC Corp., 92 N.Y.2d at 188.

12. Id.


14. Id. at 359 (Allied’s appraiser stated: “Today there is nothing known to exist in those wastebeds except for the asbestos deposited in specific locations that would indicate that any of the material would be hazardous or toxic, but that doesn’t eliminate the possibility that some time in the future that could occur.”).

15. Id. at 356 (stating “[t]he particularized conditions of such properties make valuation difficult. In most instances, the comparable sales method is inappropriate, as it is in this case. We conclude that on the record the property should have been valued as a specialty.”).


17. Id. The City of Syracuse questioned the applicability of Criscuola in a tax certiorari case. In Roth v. City of Syracuse, Criscuola was referenced in the following context:

“However, we also made clear that the effect of environmental contamination or hazards should be considered only if the “environmental contamination is shown to depress a property’s value” (id. [Commerce Holding] at 729, 649 N.Y.S.2d 932, 673 N.E.2d 127; see also Criscuola v. Power Authority of State of New York, 81 N.Y.2d 649, 602 N.Y.S.2d 588, 621 N.E.2d 1195 [1993]).

Fourteen years before the Court decided Criscuola, the Love Canal disaster brought attention to the role environmental contamination could play in health and also the role it could play in property values. Love Canal was a neighborhood in the City of Niagara Falls where homes and schools were built on a site used to bury toxic waste. It was described as “an environmental time bomb gone off” and “what may very well be the first of a new and sinister breed of environmental disasters.” Robert P. Whalen, M.D., Commissioner of Health, Love Canal – Public Health Time Bomb: A Special Report to the Governor and Legislature (Sept. 1978). The pervasive and severe presence of hazardous waste in the soil caused the Legislature to declare the properties in Love Canal were in a “state of great and imminent peril to the health of the general public.” 9 Op. Counsel SBEA No. 58 (N.Y. Bd. Equal. & Asss.), 1989 WL 362672 (citing RTPL § 1700). There was a “planned exodus of 235 families” from Love Canal. Robert P. Whalen, M.D., Commissioner of Health, Love Canal – Public Health Time Bomb: A Special Report to the Governor and Legislature (Sept. 1978). Legislation was passed to purchase Love Canal properties “at their market value without any consideration to any deleterious effects of the discovery of the danger to the general health on the market value of those properties.” 9 Op. Counsel SBEA No. 58.

18. Criscuola, 81 N.Y.2d at 651.

19. Id. at 652.

20. Id.


22. Id. at 729. The Town also argued the property’s market value would be unaffected by the presence of contamination because Commerce, by consent order, agreed to pay the cleanup costs even if it sold the property. Id. at 730. This argument was “belied by the reality that a purchaser of the site, on notice of the environmental contamination, would nevertheless be liable for the cleanup costs under CERCLA” and would demand “an abatement in the purchase price to account for the contamination notwithstanding the existence of the consent order.” Id. The Town also argued that providing a reduction in assessment would shift “the cost of environmental cleanup to the innocent taxing public in contravention of the public policy of imposing remediation costs on polluting property owners and their successors in title.” Id. at 727. The Town’s “attempt to frame its policy argument in terms of environmental culpability—the guilty polluter versus the innocent tax paying public” failed to take into account that CERCLA is a strict liability statute that imposes liability on property owners without regard to fault. Id. at 729 n.3.

23. Id. at 728.

24. Id. Designation as a Superfund site was pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980. The Court noted that CERCLA is a strict liability statute that imposes liability on property owners without regard to fault. Id. at 729 n.3, (citing 42 U.S.C. § 9607[a] [responsible party and owner are liable]).

25. Commerce Holding, 88 N.Y.2d at 725, 729. The Town also unsuccessfully argued, alternatively, that if Commerce could “reduce its property value by the cost to cure, then the cost must be projected and discounted to reflect the reality that cleanup would be done in stages.” Id.

26. Id. at 729 (citing N.Y. Const. Art. XVI, § 2 (“The concept of ‘full value’ is equated with market value, or what ‘a seller under no compulsion to sell and a buyer under no compulsion to buy’ would agree to as the subject property’s price.”)).

27. Commerce Holding, 88 N.Y.2d at 729.

28. Id. at 731.

29. Id. at 732.

30. Id. at 725 (the market factors were the property’s designation as a Superfund site, Commerce’s strict liability for cleanup costs pursuant to CERCLA, and a consent order being in place).

Commerce’s property was valued by the use of the income capitalization approach (the property was income-producing) to determine its value in an uncontaminated state, combined with a downward environmental adjustment in the amount of outstanding cleanup costs. While the Court could not say the methodology was erroneous as a matter of law, it was “cognizant of the potential of this valuation method to overstate the effects of environmental contamination.” Id.

In Bass v. Tax Commission of City of New York, a case cited by both the petitioner and respondent in Roth, a contaminant was present, but it was the extent of contamination that was a critical factor in assessing its effects on the property’s value. 179 A.D.2d 387 (1st Dep’t 1992), leave to appeal denied, 80 N.Y.2d 751 (1992). The basis of the petitioner’s overvaluation claim was the assessor’s failure to consider the impact the presence of asbestos had on the value of a large office building. Transcript of the Record at 33-34, 731-38, 753, 867-72, 1949-50, Bass, 179 A.D.2d 387 (at trial, the respondent conceded that asbestos permeated 2,500,000 square feet of space). Although many buildings constructed in the same era contained asbestos, the extent of asbestos in the Bass office building was unlike that in other buildings—asbestos permeated the structure, making it essentially “a fifty-layer asbestos cake.” Id. at 1357, 2126. Its presence in the building was causing such physical and functional impairments that it economically impacted the building. For example, flaking and delaminating asbestos created the risk of exposure through circulation in the air conditioning system, and the asbestos caused dramatically higher maintenance costs. Id. at 35-39, 142-43, 151-52, 738, 1126, 1751, 1753, 1950 (the cost to repair a sewer trap typically cost $3,000, but in this asbestos-laden property, it cost $100,000 to repair). In order to achieve market rental rates, the asbestos had to be removed, which the owner voluntarily undertook. Id. at 33-34, 731-38, 753, 863, 867-69, 871-73, 879, 1949-50. The appellate court concluded the trial court properly arrived at a value by using an approach that reflected a pragmatic adjustment to the economic.
When the properties were purchased, the sellers did not disclose the existence of lead. Petitioner claimed that 42 of his properties were overvalued. The parties agreed to proceed to trial on five of the properties as a test case that would guide the disposition of the remaining 37 properties by Supplemental Order of the trial court. Following the Appellate Division affirmation [78 A.D.3d 1590 (4th Dept. 2010)] of the trial court’s decision, the remaining 37 properties were discontinued with prejudice.

33. See Roth, 21 N.Y.3d at 414-15; see also Transcript of the Record at 10-12, 187, 430-31, Roth, 21 N.Y.3d 411. The universities are Le Moyne College, Syracuse University and the State University of New York College of Environmental Science and Forestry. The properties are also located near a medical college, a nursing college, and two major hospital complexes. They were purchased by Petitioner between 1977 and 1979.

When the properties were purchased, the sellers did not disclose the existence of lead, and Petitioner did not have any tests performed for the presence of lead before purchasing them. See Roth, 21 N.Y.3d at 415; see also Transcript of the Record at 12-13, 188, Roth, 21 N.Y.3d 411. In May 2008, after grieving the assessments, testing revealed the presence of lead-based contaminants. See Roth, 21 N.Y.3d at 415. Prior to the test results, however, Petitioner believed, given the age of the rental properties, that lead paint was present in the houses. Transcript of the Record at 79, 185, Roth, 21 N.Y.3d 411.

34. Roth, 21 N.Y.3d at 415.

35. Id.; see 22 N.Y.C.R.R. § 202.59(g). The City’s expert was permitted to provide testimony critiquing the report of Petitioner’s expert.

36. Id. at 416. Petitioner had not taken any steps to have the lead paint removed and restore the properties. He also was not required by Federal (15 U.S.C. §§ 2681-92) or State law (Public Health Law §§ 1370-76-a) to remove the lead and the lead-based paint from the properties. Brief of the Respondents’-Respondents’, at 39-40, Roth, 21 N.Y.2d 411.

37. Petitioner’s appraiser wholly adopted the income and expenses as reported by Petitioner without any independent analysis of the reasonableness, explaining that this adoption was based on the belief that due to Petitioner’s large property holdings, he essentially set the market in the area. Transcript of the Record at 258-59, 334-35, 337, 339, 349-51, 377-78, 386-87, 392-94, Roth, 21 N.Y.3d 411. There was no separate analysis by an accountant testifying to the legitimate nature of the expenses. Id. at 15a, 18a-19a. The trial court concluded Petitioner’s appraiser failed to consider and analyze all of the approaches to valuation. Id. at 20a. He only used the direct income capitalization approach. Id. at 270-71, 275, 280-81, 378.

38. Roth, 21 N.Y.3d at 415. The cost to cure figures included adoption of the actual cost to conduct the testing, the proposed cost of removing the lead-based paint and restoring the properties to their original conditions prior to the deconstruction proposed to remove the lead paint. The cost of removing the lead was based on intensive labor and maintaining the architectural components of these decorative properties.

39. Id. at 415 n.2 (noting that the expert’s “calculations actually resulted in negative market values for each of the five properties because the ‘cost to cure’ exceeded the market value of the properties in a non-contaminated state. Relying on the concept of residual value, [Petitioner’s expert] consequently assigned each property a market value of one dollar under the theory that a theoretical buyer would purchase property for one dollar.”).

40. Id. at 416.

41. He was not required by Federal (15 U.S.C. §§ 2681-92) or State law (Public Health Law §§ 1370-76-a) to remove the lead and the lead-based paint from the properties. Brief of Respondents’-Respondents’, at 39-40, Roth, 21 N.Y.2d 411.

42. Roth, 21 N.Y.3d at 416.

43. Roth v. City of Syracuse, 78 A.D.3d 1590 (4th Dept. 2010) (affirming for the reasons stated in the trial court’s decision).

44. Brief of the Petitioners-Appellants at 43-44, Roth, 21 N.Y.3d 411.

45. Id. at 44. These arguments failed to take into account that the Court’s decision in Commerce Holding was “[b]ased on the record.” Commerce Holding, 88 N.Y.2d at 731 (where the property was a Superfund site and Commerce had entered into a consent order with the Environmental Protection Agency). The Town’s “contention is belied by the reality that a purchaser of the site, on notice of the environmental contamination, nevertheless would be liable for the cleanup costs under CERCLA.” Id. at 730. “As Commerce’s expert opined, a buyer of the property would have demanded an abatement of the purchase price to account for the contamination notwithstanding the existence of the consent order.” Id. No such facts were present in Roth.

46. Brief of the Petitioners-Appellants at 19, 40-42, 44, Roth, 21 N.Y.2d 411.

47. Although despite the fact that Petitioner’s appraiser admitted that Petitioner had purchased additional properties in the same area recently and paid more than one dollar. Transcript of the Record at 342, 401, Roth, 21 N.Y.2d 411.

48. Roth, 21 N.Y.3d at 418 n.2 (citations omitted). Although Petitioner’s expert opined that stigma attached to the properties, his report did not account for stigma in the opined value because the cost to cure had already resulted in negative values for each of the five properties.

49. Id. at 418.

50. Id.

51. Id.

52. Id.

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