



Quarter Notes

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“When Life Gives You Lemons: Potential Property Tax Benefits for Environmentally Contaminated Property in New Jersey”

Environmental compliance with federal laws such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (CERCLA), the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6921-6931 and state laws such as New Jersey's Spill Compensation and Control Act (the Spill Act), N.J.S.A. 58:10-23.11 et seq., and the Industrial Site Remediation Act (ISRA), N.J.S.A. 13:1K-6 et seq., is expensive and frustrating for clients. Accordingly, attorneys should seek to lessen their clients' burdens and costs during remediation whenever possible. One often overlooked legal service that attorneys can provide which can result in significant savings is seeking a reduced property assessment due to environmental contamination and remediation activities onsite.

Assessments rarely reflect the existence of environmental contamination or remediation costs. However, environmental contamination can significantly decrease property values through: (i) *cost effects*, or reductions in value due to the costs to remediate a contaminated property; (ii) *use effects*, or limitations on the highest and best use of the property while it remains contaminated; and (iii) *risk effects*, or adverse effects on value due to increased perceptions of environmental risk by relevant market participants (also known as stigma).¹ Below is an overview of how New Jersey courts address the assessment of environmentally-contaminated property.

New Jersey's constitution mandates that all property be "assessed according to the same standard of value."² Accordingly, all property should be assessed according to its "true value,"³ i.e., the price that could be paid for a property at a fair sale between a willing buyer and a willing seller.⁴ While conventional market theories such as the cost approach, income approach, and sales comparison approach are generally utilized to determine true value, they are often inapplicable to environmentally-contaminated properties due to a lack of comparable properties. Accordingly, environmentally-contaminated properties in New Jersey may be assessed as "special purpose properties," affording assessors greater flexibility when determining a property's true value.⁵

Not all environmentally contaminated properties are entitled to a reduced assessment in New Jersey. Rather, courts strictly apply the standards set forth in the state's ISRA statute to determine whether a reduction should occur.⁶ By applying ISRA,⁷ courts eliminate subjective, inconsistent determinations as to whether an assessment may be reduced due to contamination. Further, because an inherent "value in use" remains with contaminated properties that continue to be actively used by an original owner who has yet to trigger ISRA liability, a reduced assessment would constitute a windfall tax benefit upon an owner who may never incur liability "by merely avoiding changes in use or owners."⁸

Assessments enjoy a presumption of correctness in New Jersey and taxpayers have the burden to prove otherwise.⁹ Taxpayers must present "sufficient competent evidence to establish a true value for the property that differs from the assessment, which is definite, positive and certain in quality and quantity to overcome the presumption."¹⁰

Accordingly, taxpayers have the burden to establish reduced property values due to environmental contamination.

New Jersey's courts rely on appraisers to establish proper valuation techniques for contamination.¹¹ However, dollar-for-dollar deductions from the unimpaired value of contaminated property are not permitted.¹² Rather, cleanup costs are considered a depreciable capital improvement.¹³ To establish the reduced value of a contaminated property, appraisers first determine its "clean" value through a traditional cost analysis, income analysis, or comparable sales analysis. Thereafter, the present value of the remediation costs is applied by amortizing the costs of remediation over the duration of the cleanup activities.

Courts permit additional reductions due to environmental contamination, such as entrepreneurial profit and environmental stigma. Entrepreneurial profit is a market derived figure that compensates for the risk and expertise associated with development.¹⁴ It is a percentage of the total costs of investment of the entrepreneur, including the present value of remediation costs, the purchase price, and other acquisition costs. Unless otherwise shown, courts generally apply 10% as the appropriate entrepreneurial profit percentage.¹⁵

The Supreme Court of New Jersey also recognized that the stigma of environmental contamination may impact property values.¹⁶ Stigmas result from intangible fears such as possible third-party liability, health hazards, future disruption of business activities, visibility and aesthetic concerns, and other unknown risks associated with contamination.¹⁷ Because stigmas can impact rental income, occupancy, operating expenses and capitalization rates, appraisers should attempt to apply a stigma reduction when valuing contaminated property. However, quantifying the impact of a stigma is very difficult. A comprehensive market analysis must be provided comparing like properties (both in use and size) with similar environmental conditions and cleanup obligations.¹⁸ Given the highly fact sensitive nature of the inquiry and the taxpayer's burden of proof, New Jersey courts will not permit a stigma reduction if adequate proofs are not shown.¹⁹

("Quarter Notes" continues on next page)

¹ See Thomas O. Jackson, PhD, MAI, *Case Studies Analysis: Environmental Stigma and Monitored Natural Attenuation*, The Appraisal Journal (Spring 2004).

² N.J. Const. of 1947 art. VIII, sec. 1, para. 1.

³ N.J.S.A. 54:4-2.25.

⁴ *Ford Motor Co. v. Edison Tp.*, 127 N.J. 290, 604 A.2d 580 (1992).

⁵ *Inmar Associates, Inc. v. Carlstadt*, 112 N.J. 593, 606, 549 A.2d 388 (1988).

⁶ See e.g., *Pan Chemical Corp. v. Hawthorne Borough*, 404 N.J. Super. 401, 961 A.2d 1219 (App. Div. 2009).

⁷ N.J.S.A. 13:1K-9 requires remediation efforts to immediately commence once an "Industrial Establishment" is closed or there is an ownership transfer.

⁸ *University Plaza Realty Corp. v. City of Hackensack*, 264 N.J. Super. 353, 624 A.2d 1000 (App. Div. 1993).

⁹ *Aetna Life Ins. Co. v. Newark*, 10 N.J. 99, 104-105, 89 A.2d 385 (1952).

¹⁰ *Id.*

¹¹ *Inmar Associates, Inc. v. Carlstadt*, 112 N.J. at 607-608.

¹² *Id.*

¹³ *Id.*

¹⁴ *B.F. Goodrich Co. v. Oldmans Twp.*, 17 N.J. Tax 114, 112 (Tax 1997), aff'd 323 N.J. Super. 550, 733 A.2d 1204 (App. Div. 1999).

¹⁵ *Metuchen I, LLC v. Borough of Metuchen*, 21 N.J. Tax 283, 293 (N.J. Tax 2004).

¹⁶ *Inmar Assoc., Inc. v. Carlstadt*, 112 N.J. 593 at 609.

¹⁷ *In re Custom Distribution Services Inc. v. City of Pert Amboy*, 216 B.R. 136, 154 (Bankr.D.N.J. 1997, aff'd in part, rev'd in part on other grounds, 224 F.3d 235 (3d Cir. 2000)) (citing Bill Mundy, *Stigma and Value*, The Appraisal Journal, 10 (Jan 1992)).

¹⁸ *Id.*

¹⁹ See e.g., *Metuchen I, LLC v. Borough of Metuchen*, 21 N.J. Tax 283 at 291.

(“Enterprise-Level Networks in Homes” continued from page 13)

Wireless network visibility is just as important. The most crucial aspect of the wireless network in a CE integration environment is the ability to support wireless touchpanels in charge of controlling the home. Wireless spectrum usage, the quantity of access points, and the proper placement of access points are all things that affect the performance, reliability and even the battery life of a wireless touchpanel. WLAN visibility can solve a wide range of issues, from finding which wireless devices use a certain wireless spectrum to encryption errors generated due to some devices not being WPA/WPA2 encryption compatible.

(“Quarter Notes” continued)

The use of ISRA constitutes a bright-line rule for attorneys to identify properties that are potentially eligible for a reduced assessments due to environmental contamination. Tax appeals constitute a creative means for attorneys to mitigate their clients’ operating costs as they navigate through the burdensome, expensive, and often lengthy remediation process. If you believe that an appeal may be warranted, it would be advisable to contact a local commercial appraiser to assist with determining an estimated property value before contacting the local tax assessor.

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(“Remodelers Council Rap!” continued from page 16)

3. Education – I said earlier that I like doing this to make money! I credit educational classes taken and taught (I teach now all over the country), teaching me how to do what I do in a manner that allows me to make good money doing what I love doing. If you haven’t taken a class, do it.

The length of this article limits me in continuing, but I will wrap up shortly and via a message that some may find a bit offensive. Here goes. “You are part of one of the most important industries in this country; you will never amount to anything for your family, your community or yourself, just skating by. You must invest time and money into your profession to make money or frankly any other strides or legacies. It is time to get up, get out and get involved. Your association is NOT there to take care of you! It is there to give you the tools for you to use in taking care of those around you, which will in turn naturally benefit you.” I believe a famous president once said, “Think not what your country can do for you, but what you can do for your country.” Also applies here!

Thanks again for allowing me to visit your great area! I have a whole new and positive perspective of your beautiful state and its people! I appreciate you all and hope that we will all continue to work together to move this great industry forward. Contact me any time. My email is: rpeterson@abd-ltd.com and my cell phone is 970-420-0301.

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