

Ad Valorem Taxation and Environmental Devaluation

Part II: Standards of Proof and Case Law Outline

This is the second of a two-part, comprehensive study of the impact of environmental laws on real property in the U.S. Part I which appeared in the Summer 1993 issue, covered such aspects as impaired valuation theory, the effect of environmental laws on market value, and policy, financial, and reporting considerations. Part II focuses on case law and standards of proof

Albert R. Wilson, Maxwell O. Ramsland, Jr.,
Thomas Wilhelmy, Esq., & Roger Groves, Esq.

NOW THAT AN impaired value has been established, what relationship is it likely to have with respect to the standards of proof required before a tribunal in an appeal process? Before discussing this issue, two major points need to be addressed briefly.

First, the cost to develop an impaired value may run into the hundreds of thousands or millions of dollars given the total cost of appraisal, environmental investigation, remediation plan selection and documentation, and the legal support needed for all of these steps. It is only rarely going to be an exercise that can be justified solely in terms of a tax appeal case. On the other hand, if the environmental work had to be performed anyway, and was properly guided by experts in the issues surrounding value impacts as opposed to those narrowly

ALBERT R. WILSON is president, Environmental Analysis & Valuation, Inc., Parker, CO. MAX-
WELL O. RAMSLAND, JR., MAI, CRE, is president, Ramsland & Vigen, Inc., Duluth, MN.
THOMAS WILHELMY, Esq., is a partner in the law firm of Fredrikson & Byron, Minneapolis,
MN. ROGER M. GROVES, Esq., is a partner in the firm of Howard & Howard, Lansing, MI.

interested in the technical aspects of remediation, then the impaired value can be obtained at relatively small incremental cost.

Second, the impaired value developed as described above can be relatively sterile with respect to the marketplace and the realities of tax tribunals, especially if the value in use and value in exchange concepts are confused or are both available under the tax code. A property can have a negative impaired value in exchange, and the idea of a negative value in exchange can be demonstrated in actual market transactions, but normally only when the property has simultaneously a positive value in use. If the value in use is not positive and the property has a negative value in exchange as measured by the impaired value, then the property is generally unmarketable and the fee owner has a negative net liability as a result of ownership. This is definitely not a traditional set of ideas, and the tribunals and courts are having a difficult time coming to grips with them. The existing standards of proof exhibit this problem, as will be shown in the case law on the subject.

Standards of Proof

Generally, the standards of proof in impaired property valuation cases to date may be summarized in four specific areas:

1. Existence of contamination
2. Unmarketability or impaired marketability of property
3. Amount of remediation cost
4. Potential problems after remediation completion.

Existence of Environmental Impairment. Proof in the form of an environmental engineering report may or may not be sufficient. Some tribunals have attempted to require that the property be listed on state and/or federal listings such as CERCLIS (Comprehensive Environmental Response, Compensation and Liability Index of Sites), or that a governing agency have issued a remediation order on the property.

In general, listing on a state or federal site list only indicates that the government has been made aware of a possible problem, and at the present time it is believed that these lists do not encompass more than 10 to 20 percent of the total number of externally impaired properties. Properties with only internal impairments are not normally included in the lists at all. The issuance of a remediation order is also not indicative, as the governing agency may or may not issue a specific order against the property (for example, in the case of asbestos in a building, or a leaking underground storage tank), and will generally only issue an order at a date long after the impairment has influenced market value.

Unmarketability of Property. Evidence of the marketability or lack of marketability is generally the most acceptable form of proof. However, with respect to environmentally impaired properties, the normal methods of demonstration of marketability — for example, the use of comparable sales analyses — may simply not be possible because sales of properties with the same or similar highest and best use may not be comparable to the subject property. On the other hand, the proof available in the form of the impaired value developed as outlined in Part I (*Journal of Property Tax Management*, Summer 1993) tends to be sterile in that it does not directly address the marketplace except during the development of the unimpaired value and in the analysis of the market for development of a stigma offset.

Proofs have been considered that involved a number of market derived items of information, such as realtor/broker listings revealing the futility for the subject or other similarly impaired properties that seem reasonably comparable or that have the same highest and best use as the subject. This can be extremely difficult data to develop because of the issue of similarity (i.e., what is similar when an impairment is involved?); and because frequently the information desired is for sales that did not occur, as opposed to ones that did occur. Alternatively, impaired properties may sell when the value in use is sufficiently great, requiring the extraction of the value in exchange from the value in use.

Lender perspectives are often helpful and may demonstrate reluctance to loan evidencing a potential purchaser's inability to obtain financing. Lenders may be prepared to finance an impaired property, but the financing may be conditioned upon a lower loan-to-value ratio, additional indemnities and warranties, completion of remediation, escrow of remediation funding, reliance upon security other than the subject property, or similar requirements that, when taken into account, alter the market value.

Potential purchaser testimony, or surveys of comparable property purchasers to determine purchaser concerns may explain why the impaired property was not worth purchasing or under what conditions the investment might be made. The indemnification of the purchaser by the seller for remediation costs is often a transaction condition that may allow the property to transfer at approximately unimpaired market value, but the indemnity has an offsetting value that must be analyzed. One of the critical features of purchaser analysis is the influence of the principle of substitution: Given a choice, would the purchaser have acquired the property? This may involve an analysis of the actual motivations of the purchasers to determine if substitute properties existed in the marketplace, in order then to determine market value. As noted, the strength of the marketplace, partially determined by the availability of substitutes, can directly influence the weight a purchaser places on the impact of an impairment.

Specific evidence that may be introduced as proof includes the foundation for an expert's opinion in the form of past experience and expertise in buying the type of property at issue

(with or without an impairment); providing a hypothetical transaction for the subject property with actual facts regarding the impairment and income stream influences; comparison of the subject with other investment alternatives to develop purchaser motivation for the subject property, if at all; and conditions or prerequisites to purchase in light of the impairment such as the discount amount and rationale, and/or assurances of remediation cost contribution from other sources.

Amount of Remediation Cost. Establishing the exact amount of remediation cost may not be necessary in certain severe situations where the unmarketability of the property can be convincingly established by other proofs. In other cases, it will be necessary to establish the costs of remediation for the subject property through engineering reports and the testimony of experienced environmental specialists either directly based on the specific and quantitatively established remediation cost for the impairment, or through the use of hearsay information based on similar situations on other properties. Again, note that the specific property information cannot generally be developed without Phase III site work, that can be extremely expensive.

If value in use is appropriate in the jurisdiction, it may be necessary to provide testimony from health risk assessment professionals to establish the basis for restrictions on use. If value in exchange is the basis, then restrictions on use may alter the highest and best use, and again the testimony of the health risk professional may be necessary to establish this fact.

Potential Problems After Completion of Remediation. As already noted in the first part of this article, the phrase "cost to control" is generally more appropriate and accurate than the phrase "cost to cure," especially if exterior impairments are involved. The implication is that a property, once impaired, may never completely return to its unimpaired value. To establish proof for the tribunal on this point requires an explanation of the possibility of the discovery of additional impairments, the contingent nature of most governmental approvals of remediation completion, the delays in holding periods that result from the need for governmental approvals, and the need to change remediation scope if the governing agencies alter criteria. In addition are the influence of pending lawsuits or contractual contingencies that can create uncertainty as to the liable party for costs already incurred, and the probable legal expenses regardless of ultimate disposition of remediation costs. Non-remediation costs may also need to be addressed for such items as relocation expenses for tenants before or during remediation, and the costs of financing remediation (as distinguished from financing the property transaction).

HOW MUCH PROOF IS ENOUGH?: A CASE LAW OUTLINE

This analysis will attempt to incorporate the case law and commentaries, which have been gathered on a national basis into a comprehensive and logically integrated analysis. Fitting the analysis into a coordinated presentation is not without difficulty. In some instances, differences may be attributed to statutory differences from one state to another and the prescribed definitions of value or other procedural areas. In other instances, inconsistencies are the consequence of judicial pronouncements that have evolved differently in other contexts from state to state. Differences may also be attributable to fiscal or policy considerations which, appropriately or not, find their way into published decisions. Lastly, in some cases different results may be attributable to the manner and extent to which issues have been prepared and presented at trial. This last issue may arise from factors as uncontrollable as a given taxpayer's budgetary and fiscal limitations or the prior disposition of the trier of fact.

Despite all of the foregoing, this section will attempt to describe the analyses that are most consistent with traditional appraisal methodology and would appear to better represent the analysis of a prudent investor in the marketplace. Nevertheless, where cases reaching contrary conclusions or where commentaries advocating distinctly different conclusions are significant and illustrative, an effort will be made to reference those contrasting views as well.

The distinctive feature of the valuation of contaminated property is the orderly process by which the appraiser or assessor investigates and resolves the series of deliberations confronting a prudent buyer during the process of purchasing such property.¹ The issues related to determining impaired value will necessarily evolve over time to reflect the attitudes and tolerances of prudent buyers in the marketplace at the date of valuation.

The practice developing in valuation circles is both based upon and constrained by the limitations of the soil, water, and other underlying engineering and toxicologic sciences involved in the remedial plan. To a large degree the actions of the prudent buyer reflect the degree of certainty and comfort provided by the environmental engineering experts. In those cases where the environmental contamination is capable of resolution and the environmental opinion is likely to be relatively clean, the environmental problem has attributes of "curable physical deterioration." Physical deterioration refers to conditions in which repairs or maintenance have been deferred, and curable adds the qualifying condition that "the cost of correcting the condition would be offset by an equal or greater increase in value."² By

1. See Ramsland, "Creating a Valuation Model," *Asbestos Issues Magazine*, Vol 3., No 4 (Apr 1990). See also, Ramsland, "Asbestos: Risk and the Remediation Process," *Appraisal Inst Symposium*, Philadelphia, PA (Oct 2-5, 1991).

2. Appraisal Inst, *Appraisal of Real Estate*, 10th ed (1992) at 348.

analogy, the analysis is similar to the considerations of a prudent buyer who is proceeding to purchase a property that he knows has a leaking roof.³

A similar theory was expressed in *In the Matter of Northville Industry Corp. v. Board of Assessors of the Town of Riverhead*.⁴ In *Northville Industry* the court reasoned that no otherwise willing buyer of a bulk oil storage terminal facility would buy the property unless it was brought into compliance with the county sanitary code. Moreover, the cost to bring the property into compliance with the sanitary code should have been deducted from the value for property tax purposes for each year prior to the time that compliance was achieved. The court reasoned as follows:

It is reasonable to assume that a knowledgeable buyer who desired but is not compelled to purchase a property would have been unwilling to do so unless either the work necessary to comply with the code was done or there was abatement in the purchase price.⁵

In other cases, environmental experts are not willing to provide an opinion that the property has or will ever have a clean bill of health, even if the remedial plan is fully implemented. Under such circumstances the contamination has attributes of *incurable* physical deterioration, which is defined in valuation methodology as "items of deterioration that cannot practically or economically be corrected at present."⁶

In recent years, the appraisal profession has formally and officially recognized the responsibility of a valuation professional to determine the effect on value of environmental considerations. On March 21, 1988, the American Institute of Real Estate Appraisers issued a mailing to its members and candidates on the Institute's position on hazardous materials and the use of limiting conditions. This mailing also announced the premier issue of *Environment Watch*, a newsletter devoted to environmental concerns. The tenth edition of *The Appraisal of Real Estate* includes a brief discussion of CERCLA and environmental property assessments together with a selective listing of federal environment legislation.^{7,8} While opinions may differ concerning these issues, there is substantial agreement among valuation professionals that the impact of environmental considerations on a prudent buyer must be analyzed in an informed and rational manner.

Value may also be substantially reduced because the environmental contamination makes the property unsafe or otherwise not useable for the highest and best use to which it is or

3. See, eg, *Inmar Assocs v Borough of Carlstadt*, 549 A2d 38, 42 (NJ 1988).

4. *In the Matter of Northville Industry Corp v Bd of Assessors of the Town of Riverhead*, 143 AD2d 135 (NY App. Div 1988).

5. *Id.*, at 138.

6. *Supra* note 2, at 350.

7. *Supra* note 2, at 181-183.

8. *Id.*, at 649.

may have been developed. Hazardous waste contamination and some forms of asbestos, for example, may render property unsafe for human habitation.

If the otherwise highest and best use of property is precluded by either contamination or environmental regulation which is related to contamination, then sound appraisal theory dictates that the property should not be assessed upon the basis of that use.⁹

Stigma. In any case of contaminated property, the market value of the property may be affected by what Peter J. Patchin so aptly characterizes as a stigma.

I have observed several cases in which physical cleanups were accomplished to the full limits of available technology. The toxic contaminants were removed until their presences tested under EPA minimums. Despite cleanup to the satisfaction of the EPA, potential buyers remained reluctant. This reluctance has to do with the risk and financing problems discussed above. The result is that even a cleaned up property may suffer from reduced marketability.

In one case in Minnesota, a jury awarded \$1.5 million for reduced property value after the cleanup costs had been taken into consideration.^{10,11}

Empirical data from the marketplace is being gathered for the purpose of quantifying or substantiating stigma as a separate adjustment factor.¹² This analysis is supported by market information under the comparable sales and income approaches to value, and establishes decisively the real impact of what otherwise may be difficult perceptions to quantify. As a sequel to his earlier article, Patchin has authored "Contaminated Properties—Stigma Revisited."¹³ This article discusses market data related specifically to stigma and the factors influencing the stigma phenomenon.

The most recent scholarly contribution in this area is an article written by James A. Chalmers, Ph.D, and Scott A. Roehr, entitled "Issues in the Valuation of Contaminated Property."¹⁴ The Chalmers and Roehr analysis builds upon the earlier analyses of Patchin, Mundy, and others, while focusing on the broader impact of the factors associated with stigma.

9. Miller, "Property Tax Relief for Contaminated Property," *Michigan Real Property Rev.*, Fall 1989, at 167-168. This conclusion is entirely consistent with the "all relevant factors" requirement of traditional appraisal methodology.

10. Citing *Onan Corp v Boise Cascade Corp*, Anoka Co Dist Ct File No B-46882.

11. Patchin, "Contaminated Properties—Stigma Revisited," *Appraisal J*; Apr 1991, at 12.

12. See, eg, Mundy, "Stigma and Value: the Impact of Hazardous Materials", *Appraisal Inst, Measuring the Effects of Hazardous Materials Contamination on Real Estate Values: Techniques and Applications* (1992).

13. Patchin, *supra* note 11.

14. Chalmers & Roehr; "Issues in the Valuation of Contaminated Property," *Appraisal J*, Jan 1993.

As such, stigma does not refer exclusively to the difference between the value of an uncontaminated property and the value of an otherwise identical, but once contaminated, property that is fully remediated and indemnified. Stigma is a much more general concept and refers to the discount, beyond direct costs, required to compensate investors or lenders for the risks associated with the property. Stigma can exist, therefore, at any time after contamination is discovered — before remediation, during remediation, or after remediation. Mundy argues that uncertainty, and therefore stigma, are likely to be largest soon after contamination is discovered when little may be known about its extent or the true cost of its remediation.¹⁵

An extremely thorough and interesting discussion of stigma and other issues encountered in the valuation of substantially contaminated properties appears in *Northwest Cooperaage Company, Inc. v. Ruthe Ridder*.¹⁶ In that case, the property owner purportedly argued that the property was unmarketable and had no value since the cost of the remedial plan exceeded the market value if clean and never contaminated. Although the subject property had not yet been placed on a Superfund list, it was confirmed that contamination was present and that, ultimately, some cleanup activities would be necessary. The taxpayer's appraiser factored a "stigma variable" into his valuation determinations; the assessor failed to adjust her values at all to reflect the confirmed presence of contamination on the subject property.

Although the Board of Tax Appeals noted that empirical evidence supporting the appraiser's stigma adjustments was absent, the board found that the property's future marketability might be reduced because of stigma associated with the property's existing contamination. The board then found that assessors must recognize the stigma factor, at least nominally, when determining what a prudent purchaser might pay for a similarly contaminated property.

Risks associated with ownership of contaminated property include uncertainty regarding: (1) costs of cleanup, (2) liability to the public or adjoining landowners for migrating pollution, (3) availability of financing, (4) future marketability of the property due to the stigma associated with contaminated property, and (5) imposition of even more stringent environmental standards requiring additional pollution control measures.

In *Northwest Cooperaage* the board quantified that incremental risk through a number of adjustments to the income capitalization process, including:

1. Addition of a premium to achieve a higher capitalization rate;
2. Use of a lower loan-to-value ratio in financing considerations than would otherwise be the case (65 percent instead of 75 percent); and
3. Inclusion of cleanup, monitoring, and related costs in the property's expenses.

15. *Supra* note 14, at 31. This analysis further describes the use of discounted cash flow and regression methodologies in analyzing the risk factors associated with stigma.

16. *Northwest Cooperaage Co, Inc v Ruthe Ridder*, 1990 Wash Tax Lexis 208, Wash Bd of Tax Appeals, Doc Nos 36278-36280 (July 12, 1990).

Off-Site Contamination

The preceding analysis has focused upon the scores of properties identified on federal and state Superfund priority lists and other sites afflicted with environmental considerations. However, there are also many situations in which the shadow of environmental contamination extends from those impaired sites to adjoining and neighboring properties. There are three types of such situations:

1. An impaired site has contaminated adjoining sites by virtue of airborne or surface water transference, or by the spread of an underground plume in the groundwater systems;
2. The contamination from an impaired site has not yet spread to an adjoining site, but the topological, groundwater, or subsurface geologic formations indicate that the possibility of such spread is imminent, likely, or possible; or
3. The adjoining site is not presently contaminated, and there is no significant scientific basis to predict that contamination will occur, but mere proximity to a Superfund or other contaminated site carries with it a stigma effect despite the absence of direct contamination.

It may seem that the impact of off-site environmental considerations is substantially different because, where the source or causal factor is off-site, an owner and potential buyer or lender to an adjoining site bears relatively little exposure to liability. Even if theoretically defensible, that premise may be misleading in practice.

State and federal agencies often shift to the adjoining property owner the burden of establishing that the contamination originates off-site and that there is no possibility of present or prior contamination from an on-site source. This burden can be substantial, and may have a decisively negative impact on potential buyers and their lenders. The enormity of the contamination problem facing governmental agencies, and the existence of competing cleanup priorities in the face of limited budgets and staff, results in the unfortunate reality that there is often a substantial delay before appropriate agencies act to require remediation of the off-site source. Purchasers and lenders are often unwilling to assume cleanup responsibility, and negotiations of a reduction in purchase price or the deposit of funds into escrow are generally based on a worst case scenario with a considerable comfort margin to ensure that absolutely all costs are borne by the seller, not the buyer. The possibility of no-action letters from state or federal agencies, or indemnifications from the seller or other governmental agencies, complicates both the sale negotiations and the analysis of the property's value by interjecting contractual and financial rights, obligations, and interests in addition to the real property interests properly valued in *ad valorem* tax proceedings.

More directly, it is often extremely difficult to establish the negative presumption that there has been no contribution to the contamination from any prior on-site source or use (in fact, it is scientifically impossible). The process of attempting to establish that negative can

be extremely time consuming and expensive. The process of locating the off-site source is not only exceedingly burdensome, but often requires access to the adjoining property to conduct an investigation. Generally, property owners do not have a private right of action to go upon adjoining property to conduct testing or monitoring activity. With no rights to investigate an adjoining property, the site owner is subject to the time schedule and priorities of the state or federal agency responsible for the remediation.

The effects of off-site contamination may also be dependent upon the nature of any immediate, short-term, and long-term uses intended for the adjoining parcel of property. The encroachment of contamination from an adjoining site onto a parking lot of an industrial facility will have a far lesser impact than the potential encroachment of contamination onto land where the short-term or long-term uses are residential in nature. Where the adjoining site is contaminated or the potential for contamination is significant, the adjoining site may be exposed to significant immediate costs and potential liabilities. These costs and liabilities may include loss of use or property or liability damage due to actual or potential concerns regarding toxic fumes, combustibility, or other physical contact.

These costs may also include substantially increased construction costs in connection with any new improvements or additions to existing facilities on the adjoining site. For example, the foundation, subfoundations, and mechanical systems may need to be modified to disperse or treat contaminated water or air before it enters a facility through the capillary transfer of substances from the ground into the building structure. Not to be overlooked is loss of income and business interruption due to immediate and projected remedial actions which, in and of themselves, may interfere with the business conducted upon the adjoining site and consume substantial amounts of management, administration, and professional consultation expense. An excellent discussion into some of the preceding issues appears in an article authored by Daniel K. Sloan.¹⁷

In this regard, the impact of proximity to a contaminated site includes complicated and rapidly developing issues concerning whether a compensatory taking has occurred to an adjoining site due to regulatory or temporary physical occupation by federal and state agencies in dealing with the contaminated site. Such a situation is presented in *Hendler v. US*.¹⁸ In *Hendler*, the Environmental Protection Agency (EPA) enlisted the adjoining property, without the consent of the owner, for use in monitoring wells and other testing activities, and denied any compensation for the imposition. Hendler owned property adjoining the Stringfellow Acid Pits in California, a major hazardous waste site. The EPA went upon Hendler's property and installed a series of at least 18 monitoring wells. The discussion in *Hendler* chronicles the extreme litigation costs and expense to which an adjoining property

17. Sloan, "Real Estate Contaminated by Off-Site Sources"; ABA Real Property, Probate & Trust Law; Sept/Oct 1990, 28 to 31.

18. *Hendler v US*, 952 Fed 2d 1364 (Fed Cir 1991).

owner may be exposed even if the property owner ultimately prevails and establishes a compensable taking, either under a claim of temporary physical occupation or a claim of regulatory taking.

Lastly, such an analysis must be mindful that the impact on market value is not measured solely by the immediate financial impact upon the present owner of the adjoining land. Instead, in the majority of states where the assessable value is directly or indirectly derived from the definition of market value, the analysis must proceed further and evaluate the response of purchasers and lenders in the future. Perception may in fact determine reality in the marketplace. Purchasers and lenders, without present capital investment rendering them captive to a site, may have substantially different thresholds and standards for assumption and allocation of risk and financial adjustment than an existing owner. The principle of substitution, and the availability of unimpaired sites, provides strong theoretical underpinnings upon which to develop the valuation analysis of the adjoining site as impaired.

Early decisions involving proximity to contaminated sites have reached conclusions consistent with the preceding summary of issues. In *Salk v. Metamora Township*, a group of homeowners sought reductions in their assessed value due to proximity to a landfill site.¹⁹ The landfill had been closed, and was highly ranked on the Superfund list due to its high priority toxic contaminants, although no groundwater contamination was known at the time. The assessor had refused to reduce market value on the basis that he had no sales data for properties in the immediate vicinity of the landfill from which to make an objective adjustment. Although the conclusions of the Salk tribunal are expressly limited to their facts, the conclusions are nevertheless thoughtful and instructive.

The tribunal concluded that the absence of sales demonstrated that asking prices have exceeded market expectations due, at least in part, to publicity associated with the landfill. (In this regard the level of due diligence associated with the purchase of commercial and industrial sites, as contrasted to the more limited prepurchase investigations of a buyer of a homestead, may supplant the role of publicity in such an analysis.) In concluding that the market value was negatively impacted on a descending scale based upon relative proximity to the landfill, but not reduced to zero, the tribunal formed a subjective determination based upon the conclusions of a "reasonable person" absent objective market data.

In *Richter v. Macomb Township*, a similar result was reached for residential property within one mile of a closed landfill site.²⁰ The primary distinguishing factor in the circumstances and conclusions in Richter is that a "red ooze" had been leaching onto adjoining properties, contamination of water wells and soil had been certified, and residents had resorted to the use of bottled water.²¹

19. *Salk v Metamora Township*, MTT Doc No 89167 (Nov 5, 1985), 1985 WL 15497 (Mich Tax Trib).

20. *Richter v Macomb Township*, MTT Doc No 87090 (Nov 19, 1985), 1985 WL 19456 (Mich Tax Trib).

21. See also *Pitre v Town of Farmington*, 1992 AH Tax Lexis 103 (Mar 5, 1992).

Asbestos — Environmental Issues Within Improvements

A number of substances commonly found within buildings just a few years ago are now recognized as posing potential risks to the environment and public health and safety. The long list of these materials includes asbestos, urea formaldehyde, polychlorinated biphenyls (PCBs), fluorocarbons, and others. The concerns of a prudent buyer with respect to such substances, which have been found to be hazardous, toxic, or otherwise environmentally sensitive, is readily observed. The reaction of prudent buyers is accentuated by cases such as *Layne v. United States Mineral Products Co.*, which raised the issue of whether a building occupant may recover from a commercial building owner under principles of strict liability.²² Under the concepts proposed in *Layne*, a commercial building owner may be held liable for damages as a result of asbestos containing materials (ACMs) if steps are not taken to communicate to users, workers, and occupants that the building is contaminated by asbestos. This duty of notification may be a continuing one unless adequate communication is made to those at risk. Although not accepted in *Layne*, subsequent evolution in this area renders the possibility of such liability a considerable risk.

Substantial discussion has occurred in the last decade concerning the appropriate course of conduct when asbestos is present, such as removal, encapsulation, or maintenance. The EPA has published a report, "Managing Asbestos in Place," that recognizes asbestos fibers as hazardous, but concludes that the risk of asbestos-related disease depends on exposure to airborne asbestos fibers. This report suggests that an asbestos operation and maintenance program can be an appropriate asbestos control strategy and may be the method of choice in dealing with asbestos concerns rather than removal. The report states the EPA policy, which only requires asbestos removal in order to prevent significant public exposure to airborne asbestos fibers during building demolition or renovation activities.

It is important to emphasize that the issue in valuating the impact of asbestos on market value is not necessarily one of legal obligation. Instead, the impact of market value is a manifestation of the reaction of prudent buyers to the real and perceived risks and liabilities associated with the presence of the asbestos. A study of members of The Appraisal Institute indicated that buyers of properties frequently demand that asbestos be removed prior to purchase or that the purchase price be reduced by an amount equal to or greater than the cost to remove all ACMs from the structure:

This survey indicated that the adjustments most frequently made by appraisers are those to reduce the property value by the direct or indirect costs of asbestos removal. Operating expenses are often adjusted and adjustments are sometimes made to the rental income, cap rate and discount rate. When changing the discount property rate, an average increase of 1.5 percent to 2.0 percent was cited.

22. *Layne v US Mineral Prods Co*, 537 NE2d 252 (Ohio 1988).

It should be noted that respondents thought that reducing the value of property with ACMs for the total cost of removal, including rent loss until asbestos is completely removed, sufficiently captures all of the adverse effects of asbestos on property values.²³

While the survey indicated that potential purchasers do not necessarily exclude buildings with asbestos, transaction costs and selling time appear to be higher, purchase price adjustments seem to be the rule, and difficulties are commonplace in obtaining financing.

The survey indicated that lenders usually require an indemnification guarantee, although they often simply refuse to lend on buildings with ACMs. The effective interest rate was thought to be 50 to 73 basis points higher for a property with ACMs. It was noted that lender actions depend on the type of lender as well as the amount and condition of the ACM's in the building.²⁴

Lastly, the study indicated a statistically significant difference in rental rates for buildings affected by ACMs. "In general, office buildings seem to suffer higher reduction in rental rates than industrial buildings."²⁵

The earliest case which has been discovered concerning the impact of asbestos on value is the decision in *Trizec Western, Inc. v. Schultz*.²⁶ That decision involved the impact of asbestos on the market value of a regional shopping center that challenged its 1986 property tax assessment. The *Trizec* court recognized the negative impact of asbestos on market value, but denied a reduction in value on the grounds that in 1986, at the time of the assessment, lenders, insurers, and investors had not yet recognized the negative impacts of asbestos on market value.

Another early decision that involved the impact of asbestos on the value of a shopping center is *Fashion Center v. Paramus Borough*.²⁷ In *Fashion Center*, the court denied a reduction in value because of the presence of asbestos, while commenting *in dicta* that a reduction would be appropriate with an adequate evidentiary basis.

Taxpayer's expert has testified that the structural steel in the subject building is fireproofed with an asbestos covering and that the taxpayer has begun a program of asbestos removal which will be performed over the period 1987 to 1999...there is no testimony of the condition of the asbestos or their quality tests. There is no evidence of the condition or who will remove the asbestos or of the cost of asbestos removal, and no evidence as to how the cost figures through 1999 were derived. Because of the absence of evidence that asbestos is friable and the absence of evidence of the cost of removal and the speculative nature of the costs over the period ending

23. See Fisher, J, Lentz, G, & Tse, K.S., "Effects of Asbestos on Commercial Real Estate: A Survey of MAI Appraisers."

24. *Id.*

25. *Id.*

26. *Trizec Western, Inc v Schultz*, Case No 87, 3863-15, Pinellas Co, FL (1988).

27. *Fashion Center v Paramus Borough*, NJ Tax Ct, Doc No 02-46-0278-87D & CC (1989).

in 1990 (sic), I conclude that a deduction for the cost of removal of asbestos is not supported by the proof.²⁸

These questions of proof and evidentiary basis were reportedly satisfied in a more recent decision involving the issues raised in the valuation of an office building with a significant amount of asbestos. In *Bass v. Tax Commission of the City of New York*, the court determined that the building's market value could not accurately be determined without also analyzing and calculating the expenses associated with the asbestos problem.²⁹ Because any prudent buyer would factor the asbestos contamination into his or her purchase decision, the court concluded that the property's market value must accordingly be reduced to reflect this contamination problem. The *Bass* court characterized the presence of asbestos as constituting a "significant physical and functional impairment," concluding that:

[I]t is reasonable to assume that a knowledgeable buyer would demand some abatement in the purchase price to compensate for the sums that will have to be expended to correct the building's physical and asbestos problems.³⁰

The *Bass* court reviewed the taxpayer's discounted cash flow analysis, which considered expenses associated with a long-range program of asbestos abatement to be performed at the termination of existing leases or in conjunction with planned renovation of tenant spaces. The *Bass* court confirmed that the ongoing use and occupancy of a structure despite the presence of asbestos was not inconsistent with reductions in the market value of the property, and that reductions in value are not limited to those areas deemed severely damaged or presenting an immediate potential hazard to building occupants requiring immediate abatement.

Ultimately, the *Bass* court found the value of the property had not increased over the time period under review, and substantial increases in the taxes were effectively rolled back. The court found that petitioner's evidence was "the only evidence worthy of consideration in this record as to the value." However, the court had reservations about the discounted cash flow method employed by petitioner's appraiser as "not particularly suited for valuation of this property for tax purposes."

The reality is that the value of this property will increase tremendously just as soon as its problems are corrected. That potential is understated in petitioner's analysis.³¹

28. *Id.*

29. *Bass v Tax Comm of the City of NY*, Index Nos 56969/84, 56418/85, 57750/86, 56435/87, 57371/88, 58847/89 (NY Sup Ct Jan 22, 1991).

30. *Id.*

31. *Id.*

In sum, despite the reservations expressed by the court *in dicta* concerning the potential inaccuracy (or manipulation) of discounted cash flow analyses, the *Bass* decision presents significant precedent and important guidance in the preparation and presentation of these cases.

Contrasting reasoning in circumstances that include the presence of asbestos in industrial facilities are found in the *Firestone* and the *Inmar* decisions (see p. 57).

Soil and Groundwater Contamination

The Early Cases. The very earliest decisions involving the impact of soil and groundwater contamination and value tended to be sites in which the cleanup costs exceeded the unimpaired value of the property. The distinguishing factor of the early decisions tends to be the varying impacts of public policy concerns in determining whether evidence of the cost to clean up the site, in and of itself, was sufficient to support a taxpayer's efforts to reduce the market value.

In *Community Consultants, Inc. v. Bedford Township*, the court concluded that a property substantially polluted with highly toxic contaminants had a nominal value of \$100.³² The tribunal found that there were no market comparables, and no knowledgeable person would purchase the property because the estimated cleanup costs exceeded the unimpaired value.

A contrary result was reached in *Great Lakes Container Corporation*.³³ In that case, the New Hampshire court considered the value of a barrel reconditioning plant closed due to environmental lawsuits commenced by the federal and state governments. The courts held that the taxpayer had failed to meet its burden of proof and therefore refused to recognize that the property had a zero value based on the extensive contamination and pending litigation. Several policy analyses appear significant in the court's holding. The court places some emphasis on the fact that the taxpayer had not forfeited or vacated the land, and somehow concluded that this constituted an admission or other evidence of future benefits or value anticipated by the taxpayer that had not been valued by the taxpayer's evidence in the case. The court also notes that the taxpayer had offered the property for sale after the environmental lawsuits had been commenced for a purchase price in excess of the assessed value, and observed that nothing prevented the taxpayer from selling the property while simultaneously retaining liability to clean up the property. This decision seems to ignore the physical condition of the property and the concepts of market value recognized by the valuation professions, apparently focusing not on market value but upon New Hampshire's basis for taxation, which is the property's "sale value."

32. *Community Consultants, Inc v Bedford Township*, MTT Doc No 86388 (Mich 1985).

33. *Great Lakes Container Corp*, 489 A2d 134 (NH 1985).

The third of these early decisions is *Inmar Associates, Inc. v. Borough of Carlstadt*.³⁴ This New Jersey case involved two consolidated cases, the second being *GAF Corporation v. Borough of South Bound Brook*. The GAF Corporation case involved an asphalt siding plant. GAF planned to close down this facility and sell the land. The Inmar property had been leased for industrial solvent recovery operations. The Inmar site was on the federal Superfund list and subject to a cleanup order under CERCLA. The New Jersey court affirmed the assessments. In the *GAF* case, the assessments were affirmed on the basis that there was no quantification of the effect on market value of the legally obligated cleanup costs under applicable New Jersey statutes. In the *Inmar* case, the New Jersey tax court affirmed the assessments on the basis that there was no firm or fixed obligation to do the cleanup work.

The New Jersey appellate court affirmed the decision of the tax court. The reasons cited for doing so included the public policy argument that environmental protection would be thwarted if property owners' cleanup costs were in effect subsidized by reduction in tax assessments. The appellate court also agreed with the *Great Lakes* analysis that there would be future value after the properties had been cleaned up.

The New Jersey Supreme Court affirmed the *GAF* case, but remanded the *Inmar* case for further action. The New Jersey Supreme Court clearly stated that there would be "no avoiding the economic effect" of environmental laws, which will "undoubtedly affect the true value of real property." The New Jersey Supreme Court rejected the lower courts' notion that public policy arguments authorized the assessment process to disregard the clear effects of environmental contamination on market value.

Even when the salutary public concern includes as laudable a policy as preservation of farmlands, we are not free to balance that policy against a constitutional demand that property be assessed at true value [citation omitted].³⁵

However, the New Jersey Supreme Court observed that neither taxpayer had provided the court with sufficient evidence as to how value was affected, focusing instead on the cost of cleanup. The court rejected the notion that the impact of environmental contamination on value could be determined merely by deducting the cost to cure from the unimpaired value.

One thing is certain; the methodology for resolving the question is not simply to deduct the cost of the cleanup from a putative value of the property.³⁶

34. *Inmar Assocs, Inc v Borough of Carlstadt*, 112 NJ 593 (1989), *Aff'd in part and Rev'g in part*, 214 NJ Super 256 (1986).

35. *Id.*

36. *Id.*

There are a number of intriguing aspects to the *Inmar* decision. The New Jersey courts contemplated only those cases where the contamination is curable and gave no guidance to those cases where the contamination is not curable, particularly in an economic sense. Second, the court suggested that appraisers view contaminated properties as "special purpose properties" due to the lack of market data. The growing body of empirical data concerning the sales prices of properties that are or had been contaminated may resolve the court's inquiry. Nevertheless, the court did not reconcile its concept of a special purpose treatment with the accepted definitions of market value, nor provide any guidance as to formulating the response of a prudent buyer to the presence of contamination. Third, the court's dicta suggests that property may have a value in use that may be determined under valuation techniques even if it has no value in exchange due to the presence of the contamination.

The Northwest Cooperage Decision. Many of the proof issues observed in the early decisions appear to have been addressed in the Washington decision involving *Northwest Cooperage*. The *Northwest Cooperage* decision states that it is limited to the evidence and testimony presented. Unfortunately, the decision does not authoritatively decide whether it is proper to deduct the present value of the cost of cleanup in arriving at the market value of contaminated property because the property owner reportedly did not raise this issue. The *Northwest Cooperage* decision compiles a series of significant conclusions, including:

1. It is improper to ignore the impact of federal and state environmental laws on the market value of real property contaminated with hazardous waste.
2. It is improper to value the property on the basis of comparable sales of uncontaminated properties without adjustment; comparisons based upon sales of other contaminated properties must be adjusted to achieve comparability to the subject.
3. The inability to quantify the effect of contamination on value with any degree of precision (because of the absence of a significant body of sales of contaminated properties) does not excuse the appraiser or assessor from attempting to do so.
4. Uncertainties involving the parties responsible for cleanup costs generate a level of risk, which is a factor affecting the value of the property in exchange.
5. The availability of insurance does not have any bearing on the "value in exchange," even if it may have some bearing on the value to the owner.
6. Pollution control, monitoring, and cleanup costs, including engineering and legal costs, are fixed expenses that run with the land and must be considered in valuing contaminated property under the income approach.

The Firestone Decision. In *Firestone Tire & Rubber Co. v. City of Monterey*,³⁷ the California court held that the cost of pollution cleanup may form the basis for reduction of the property's assessed value, but its ruling allowed no reduction of value based upon its finding that the weight of the evidence supported the conclusion that a purchaser of the property would have been unaware of the contamination at the assessment date.

The *Firestone* decision involved an industrial facility that was shut down shortly after the assessment date in question. The assessment appeals board had rejected Firestone's contention that the cost of hazardous waste cleanup at the site, estimated to be nearly \$6 million, should be deducted from the property value for property tax purposes. The board found that the cost of cleanup was a cost of doing business that should be borne by the shareholders and the polluting taxpayer, not indirectly by other taxpayers in the form of a reduced tax basis for the property.

Although the California Court of Appeals upheld the assessor's valuation for the reasons noted above, it held as a matter of law that cleanup costs form the basis for a reduction in fair market value and hence a reduced assessment. The California Court of Appeals dealt with a number of arguments by the county in reaching its conclusion that contamination does affect the property's fair market value, including the following:

- "Pollution is not akin to private deed restrictions." Despite the fact that legal obligations are the result of prior corporate conduct, if contamination affects fair market value such costs must be considered as part of the "fee simple unencumbered rights" which are valued for property tax purposes.
- It is not relevant to property tax valuation analyses to consider whether liability for cleanup costs belongs to the pollution generators or runs with the land.

STATE-BY-STATE REVIEW OF DECISIONS

CALIFORNIA

Firestone Tire and Rubber Company v. County of Monterey.³⁸ This was a case concerning toxic waste contamination at a tire manufacturing plant. The cost of pollution cleanup reduces the fair market value of property even if the property is not on the Superfund list. There was no evidence that the assessor knew, or should have known, of the contamination at the assessment date. Evidence that a prudent buyer would have inspected for contamination, discovered the contamination, and reduced the sale price if the contamination had been found, was held not sufficient to establish that the contamination had come to light on the assessment date.

37. *Firestone Tire & Rubber Co v City of Monterey*, 90 CDOS 6510 (Cal 6th App Dist Aug 13, 1990).

38. *Firestone Tire & Rubber Co v Co of Monterey*, 223 Cal App 3d 382, 272 Cal Rptr 745 (1990).

*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.*³⁹ An eminent domain decision involving the value of a gasoline-contaminated parcel used for 23 years as a gasoline station; the court-appointed expert valued the property at \$225,000, and then deducted \$100,000 for remediation of the contamination. The jury arrived at a value of \$136,000 for the fair market value of the land. The owner's expert had claimed the property was worth \$950,000 (\$1,000,000 less \$50,000 for remediation; the city's expert had claimed the property was worth \$5,000 after remediation costs.

COLORADO

*Department of Health v. Hecla Min. Co.*⁴⁰ This condemnation case involved property that had previously been used as a mill to process uranium ore for sale to the U.S. Government. The state presented expert testimony that the property had zero value on the date of taking because of radioactive contamination and the lack of any beneficial use in its present condition. The owner presented expert testimony that the property had a market value of \$3.5 million, based upon the assumption that the uranium tailings had been cleaned up and removed, and the property was stabilized and ready to be dealt to the highest best use. The court held that the owner's appraisal was not based on the use and adaptability of the property in its impaired condition, and therefore failed to reflect the fair market value of the property at the time of the taking.

MASSACHUSETTS

*Reliable Electronic Finishing Co., Inc. v. Board of Assessors.*⁴¹ The taxpayer presented no reliable evidence of the cost of cleaning up the facility, or of the condition of the site or the anticipated costs of cleaning up the contamination on the assessment date. An attorney who was treasurer of the taxpayer's parent was not qualified to give an opinion on future costs of cleanup. There was no evidence showing the impact of "the cost to cure a present defect on the value of the property to a potential buyer." The decision cites *in dicta* that Massachusetts' law obligates the recognition of proven environmental damage on the fair cash value of property, whether or not the landowner was subject to court-mandated cleanup costs.

39. *Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.*, Cal Ct App 2d App Dist, No B046338 (Mar 19, 1992), cited in *Real Estate/Environmental Liability News*, Vol 3, No 13, Apr 24, 1992, at 5.

40. *Dept of Health v Hecla Min Co*, 781 P2d 122 (Colo App 1989).

41. *Reliable Electronic Finishing Co, Inc v Bd of Assessors*, 573 NE2d 959 (1991).

MICHIGAN

Comerica Bank-Detroit v. Metamora Township.⁴² This case involved agricultural land, part of a preserve acreage used for a hunt club. Portions of the property are former toxic waste disposal sites (more than 3,000 barrels of PCBs and other toxic substances). The contaminated barrels were apparently removed, but groundwater contamination and soil contamination remained. Department of Natural Resources (DNR) officials had projected that liability could run into the millions of dollars, with treatment procedures potentially spanning a 10 to 15 year period. The assessor apparently "abdicated" from analyzing the valuation at the time and the parcels were given a nominal value of \$100 each. Case cites *Dodds v. Kean Township*.⁴³ *Dodds* involved a multi-acre residential parcel built upon a tract formerly used for online disposal seepage for liquid industrial waste products, including cyanide and heavy metals. In *Dodds*, the property was reduced to a nominal value on the reasoning that even though the well water on the residential site had drinking water standards, the property would not be marketable until a full environmental claim is accomplished and documented through proper sampling techniques.

Community Consultants, Inc. v. Bedford Township.⁴⁴ The subject, commonly known as the Stevens Landfill, accepted domestic refuse and barrels of industrial manufacturing waste, but was now zoned as professional office building or single-family residential. Michigan Department of Natural Resources (MDNR) testing indicated the presence of cyanide, PCBs, and leads, but no groundwater contamination was found in the test wells. The tribunal found the costs of cleanup exceeded the value in an unimpaired state, and the subject was given a nominal value of \$100 while the property remains contaminated and not usable for any lawful purpose. The court expressly did not rule on whether hazardous waste disposable sites in current lawful operation have a value other than a nominal value.

Wildie Richter v. Macomb Township,⁴⁵ *Salk v. Metamora Township*.⁴⁶ These two decisions involve residential sites and adjoining landfill operations. In *Salk*, the nominal value was found because of mere proximity to the contaminated site. In *Richter*, water wells and soils have been contaminated, forcing residents to use bottled water, and leachate from the landfill had been observed, as well as odors. The properties were reduced to approximately 50 percent of the value if not impaired by the adjoining landfill.

42. *Comerica Bank-Detroit v. Metamora Township*, MTT Doc No 103325, 110482, & 112529, 1989 WL 56531 (Mich Tax Tribunal) (May 12, 1989).

43. *Dodds v. Kean Township*, MTT Doc No 113090, (Feb 13, 1989).

44. *Community Consultants, Inc v Bedford Township*, MTT Doc No 86388 (July 3, 1985), 1985 WL 17404 (Mich Tax Tribunal).

45. *Wildie Richter v Macomb Township*, MTT Doc No 07090 Nov 19, 1985), 1985 WL 15496 (Mich Tax Tribunal).

46. *Salk v Metamora Township*, MTT Doc No 09167 (Nov 5, 1985), 1985 WL 15497 (Mich Tax Tribunal).

MINNESOTA

*Houdaille Holdings Corporation v. Wabasha County.*⁴⁷ The subject was a large, industrial building that was vacant and unsuccessfully marketed for some time. The taxpayer's appraiser reduced his opinion of value to reflect environmental cleanup work that had been mandated by the state and performed prior to the assessment dates. There is no discussion of the court's analysis of environmental issues, but the court characterized the taxpayer's appraiser as "having performed a thorough and well researched analysis" while reaching a result somewhat higher than the taxpayer's appraisal (\$450,000 v. \$300,000), but far below the value testified to by the assessor (\$1 million).

*MICO, Inc. v. Nicollet County.*⁴⁸ The court granted petitioner's motion for a new trial relating to the issue of the effect of contamination by hazardous wastes on the subject property. Affidavits presented indicate that the taxpayer learned of the possibility of hazardous wastes under the structure approximately one month before trial, but the actual facts were not sufficiently known to be introduced into evidence at the original trial. The assessor argued that if the existence of the hazardous wastes was not known on the assessment dates, any effect was irrelevant. The court held that the existence of the pit was known at the assessment dates, and any prudent buyer would have been on notice to check further, as the taxpayer did after trial, to determine the exact contents of the pit.

*Nicollet Restoration, Inc. v. Hennepin County.*⁴⁹ The taxpayer had purchased the property based upon the commitment of a "quasi-governmental" agency to assume all of the responsibility for the costs of corrective action, which consisted of pumping and monitoring for one year after the assessment date.

The court cites the "method often used by appraisers in determining the effect of contamination is to value the property as if uncontaminated and deduct therefrom the present value of the cost of the corrective action." A reduction is denied based upon a finding that there is no evidence showing the cost of the monitoring, there is no evidence showing the effect on value of the inability to obtain financing, and there was no notification of the effect of the contamination (prior or existing) on value.

MONTANA

*Shank v. Department of Revenue of the State of Montana.*⁵⁰ Taxpayers presented evidence that cadmium and lead were measured in their residence at elevated levels. The appeals

47. *Houdaille Holdings Corporation v. Wabasha Co.*, Minn Tax Ct File Nos C-89-661, C-89-782, & C5-90-313 (Feb 5, 1991).

48. *MICO, Inc v Nicollet Co.*, Minn Tax Ct File Nos C6-89-284 & C8-89-285 (Dec 11, 1990, amending original decision dated Sept 28, 1990).

49. *Nicollet Restoration, Inc v Hennepin Co.*, Minn Tax Ct File No TC-12361 (June 24, 1992).

50. *Shank v Dept of Revenue of the State of Montana*, Tax Appeal Bd No PT-1990-112, 1991 Mont Tax Lexis 1 (Jan 2, 1991).

board found that levels of chlorinated pesticides were in the normal range, and the Shank's symptoms were not consistent with this type of exposure. The appeals board held that, although contamination and deterioration may exist, the taxpayer did not produce probative evidence to support a further reduction in the value of the property.

*Epping v. Department of Revenue of the State of Montana.*⁵¹ The taxpayer sought a reduction in value due to the fact that the city allowed the presence of a large storage unit for live garbage at a garbage dump located 100 yards from the taxpayer's residence. The board determined that such a practice was commenced several years after the assessment date and suggested that, if the taxpayer filed an appropriate form for review with the Department of Revenue, the Department would be able to determine the economic impact of the proximity to the garbage dump and make an appropriate valuation adjustment at some future date.

NEW HAMPSHIRE

*Appeal of Great Lakes Container Corp.*⁵² The subject was a barrel reconditioning plant operated until closed due to a lawsuit filed by federal and state environmental agencies. It was conceded that the property was already contaminated with hazardous waste materials. The taxpayer had argued that the property had a fair market value of zero because of the contamination and the lawsuit, but probably would have a sale value in the future after cleanup. The appeals board rejected the taxpayer's appraisal, pointing out that the taxpayer refused to forfeit the land which was characterized as an admission of future benefits after the litigation to determine liability for contamination cleanup. There is some indication that most of the contamination was a result of the action of taxpayer's predecessors-in-title, and not taxpayer. The appellate court upheld the board's rejection of the zero value claim, stating that the taxpayer could sell the land with transfer of title deferred until after completion of any court-mandated cleanup, freeing the buyer from any liability due to contamination.

*Pitre v. Town of Farmington.*⁵³ The taxpayer owned property across the street from a known and documented hazardous waste dump, but introduced no evidence that the property had been contaminated or that proximity had an adverse effect on market value. The appeals board held that "certainly, the property's proximity to the hazardous waste dump and the landfill must be considered and some adjustment made. To ignore these factors would require total abandonment of judgment and common sense." As a matter of "informed

51. *Epping v. Dept of Revenue of the State of Montana*, State Tax Appeal Bd No PT-1990-105, 1991 Mont Tax Lexis 24 (Feb 19, 1991).

52. *Appeal of Great Lakes Container Corp.*, 489 A2d 134 (NH 1985).

53. *Pitre v Town of Farmington*, NH Bd of Dis App Doc No 7089-896, Mar 5, 1992, 1992 NH Tax Lexis 103.

judgment and experienced opinion," and not scientific evidence, the board chose a 30 percent adjustment.

NEW JERSEY

*Inmar Associates, Inc. v. Borough of Carlstadt, GAF Corporation v. Borough of South Bound Brook.*⁵⁴ The GAF parcel was an asphalt siding plant polluted by residues of hot tar used in the process; the facility also included asbestos. The Inmar facility was contaminated by various chemical wastes and solvents. The court held that the impaired value of land is not determined by simply deducting required cleanup costs of the unimpaired value of land, basing the decision on a number of evidentiary and policy reasons.

NEW YORK

*Bass v. The Tax Commission of the City of NY.*⁵⁵ The subject property was an office building in downtown New York. The taxpayer established "to the court's satisfaction" that the property had significant physical and functional impairment with impact upon its market value due to the presence of asbestos and relatively minor problems on the foundation, roofing, and windows.

OHIO

*CECOS International, Inc. v. Clermont County.*⁵⁶ The subject property contains a sanitary landfill that was closed, together with improvements used for storage of hazardous waste materials. The subject's operating permit was rejected and the site closed as a hazardous waste facility. The taxpayer's appraiser opined that the property had an unimpaired value of \$2,150,000, with environmentally related liabilities (EPA compliance and cleanup costs) of \$44,200,000, for a negative value of \$42,050,000. The board was openly critical of the time and experience brought to the analysis by the county's expert witness. Nevertheless, the board found deductions for cleanup costs to be "speculative, premature, and improper," and valued the property at the unimpaired value of the taxpayer's expert.

*Chem-Masters v. Geauga County Board.*⁵⁷ The parties stipulated that the costs of remediating chemical contamination, both on and off the property, in an amount of approximately 200 percent of the unimpaired value of the property. Neither party submitted an appraisal under the three traditional approaches of value, and instead limited their arguments

54. *Inmar Assocs, Inc v Borough of Carlstadt, GAF Corp v Borough of South Bound Brook*, 112 NJ 593 (1988).

55. *Bass v Tax Comm of the City of NY*, 1991 Misc Lexis 89 (Jan 22, 1991).

56. *CECOS Intl, Inc v Clermont Co*, Case No 88-G-1175, Bd of Tax App, 1992 Ohio Tax Lexis 643 (June 12, 1992).

57. *Chem-Masters v Geauga Co Bd*, Case No 88-J-994, Bd of Tax App, 1990 Ohio Tax Lexis 1067 (Dec 21, 1990).

to the weight to be afforded to an environmental lien based upon the contamination. The court held that "it cannot be reasonably argued that the environmental condition has no effect upon the value of the property." However, the board held that the taxpayer failed to prove how the damage affected the market value since no appraisal as impaired was submitted, and granted no reduction.

PENNSYLVANIA

*Monroe County Board of Assessment Appeals v. Miller.*⁵⁸ The subject property was impacted by benzene contamination. The lower court had determined that the lots were valueless and worth \$1 each due to contamination. The appellate court found the lower court findings as to valuation to be supported by substantial evidence, noting that no rebuttal evidence had been presented by the board, and the taxpayer presented an expert appraisal and further testimony that the taxpayer had been forced to abandon her residence. On one of the parcels, she had been unable to sell or rent the property over a lengthy period of time, and the biggest commercial firm in the area expressed no interest in listing the prop-

erties because of contamination.

WASHINGTON

*Camille Fjeland.*⁵⁹ Taxpayer's property was a former woodwaste fill site, not in use, contaminated with arsenic and on the Superfund list. The board held that the assessor had property valued the site using a 90 percent downward adjustment from the unimpaired value in order to reflect diminished utility and marketability because of the contamination, but the owner failed to establish that the site had zero value. The board affirmed the application of the principle of anticipation, and also stated that an assessor must consider the presence of confirmed hazardous substances and required cleanup costs. The board cites *S&A Services of Indiana, Inc. v. Thomas*, for the statement "it seems beyond dispute that designation of property as having a problem serious enough to warrant EPA and Superfund cleanup will mark that property as an unmarketable pariah for years to come."⁶⁰

*Lake Union Drydock Company.*⁶¹ Of the owner's drydock and boat repair facility, 98 percent was submerged lakeside property contaminated with heavy metals. There was no court-ordered cleanup of the lake, nor was any cleanup contemplated. The property owner had no environmental engineering analysis of the "as yet unknown environmental requirements," and it was not established that the taxpayer was obligated for the cleanup. The

58. *Monroe Co Bd of Assessment Appeals v Miller*, 570 A29 1386 (PA 1990).

59. *Camille Fjeland Wash Bd of Tax Appeals*, Doc No 37533, 1990 Wash Tax Lexis (June 5, 1990).

60. *S&A Services of Indiana, Inc v Thomas*, 634 FSupp. 1355, 1364 (ND Ind 1986).

61. *Lake Union Drydock Company, Wash Bd of Tax Appeals*, Doc No 37655, 1990 Wash Tax Lexis 451 (Dec 11, 1990).

appeals board ordered no further reduction, and since the property continued to be used for its originally intended purpose, it was proper to consider the use value to the owner as the exchange value.

*Murray Pacific Corporation.*⁶² The subject is an office building impacted by heavy metals and listed on the Superfund list. The taxpayer was deemed by the EPA to be a potentially responsible party (PRP). The assessor and county board had valued the property at 50 percent of its unimpaired value "to reflect the effects of site contamination" and the uncertainty over the future remedial actions required by the EPA. The board recognized the negative impact of hazardous waste contamination on market value as a matter of intuition, requiring the assessor to consider the presence of confirmed hazardous substances and required cleanup costs. The board found that the taxpayer had failed to carry the burden of showing by clear, cogent, and convincing evidence that the value of this property is nearly zero. While the court concluded that the unimpaired value must be adjusted for the landowner's cost to cure the contamination under both the sales comparison and income approaches to value, the board concluded that some or all of the costs may be borne by another party. Therefore, although the taxpayer had shown that the actual cleanup costs are likely to exceed the value of the property in a clean condition, the taxpayer's ultimate liability as a PRP was highly uncertain as of the assessment date. The case includes a concurring opinion based upon the view that the taxpayer's liability for cleanup costs is irrelevant to the issue of the property's market value. The concurring opinion relies upon the conclusion that there is no such thing as a willing buyer of contaminated property, thus where the cleanup is certain, it is improper to deduct the costs of cleanup from the unimpaired value of the property.

*Northwest Cooperaage Company, Inc.*⁶³ The subject property was an industrial drum cleaning and recycling facility, and the soils (but apparently not the groundwater) were contaminated with heavy metals, vinyl chloride, ethylene, and petroleum derivative compounds. The assessor was aware of the contamination but made no adjustments since the EPA had not taken a position on whether cleanup would be required. The assessor also contended that contamination does not directly affect the value of land. The subject was not a Superfund site, but was on the state agency's list of confirmed hazardous waste sites. The assessor argued that lending institutions would make loans for the purchase of contaminated property, but the board intuitively agreed with the taxpayer's view of the current attitude of the lenders. The court found that pollution control, monitoring, and cleanup costs are ordinary business expenses chargeable against the land. The board found the proper basis for valuing the subject was its current use and intended uses. The board valued the property, in the absence of market comparables of similarly impaired sites, based upon an

62. *Murray Pacific Corp.*, Wash Bd of Tax Appeals, Doc No 38037, 1990 Wash Tax Lexis 397 (Nov 9, 1990).

63. *Northwest Cooperaage Co, Inc* Wash Bd of Tax Appeals, Doc No 36278-36280, 1990 Wash Tax Lexis 208 (July 12, 1990).

income approach in which each step was given special consideration and adjustments due to the contamination.

*Vanourek.*⁶⁴ The subject property was severely contaminated with nitrates, ammonia, heavy metals, pesticides, and herbicides. Contamination affected both surface waters and groundwaters. Operation of the fertilizer business had ceased since the owner had insufficient assets to incur the costs of cleanup, and the bank had obtained a judgment of foreclosure but had not caused the property to be sold due to the environmental contamination. The costs of cleanup far exceeded the assessor's value. The board found that the market-ability of the subject may be extremely diminished, but the site was not totally valueless. A prospective purchaser would not be responsible for the cost of cleanup under an agreement between the bank and the state environmental agency, and the property has value "if at some time in the foreseeable future, ownership of the property would provide benefits." The parties had stipulated the unimpaired value as of 1989. The board assumed that the property would be unimpaired in 1995 and would have the same value. Applying a discount rate of 12 percent, the board calculated the present value of the site under the stated assumptions, relying heavily upon the principle of anticipation.

*Wyckoff Company.*⁶⁵ The subject was a pole-peeling and wood treating operation, and the site was contaminated with creosote, fuel oil, and pentachlorophenol. The court assigned a nominal value of \$1,000 to the property, based upon a showing that the property was unmarketable, had no use to the taxpayer in the foreseeable future, and the total cost to cure the contamination exceeded the unimpaired value of the property. The board notes that the property had no use and no longer produced income, distinguishing the *Wyckoff* case from the *Northwest Cooperaage* case, which calculated a form of value in use. The board states *in dicta* that cost recovery from a third party may create a mitigating adjustment in the valuation analysis, but no other PRPs were identified in this case.

THEORETICAL ISSUES RELATED TO ENVIRONMENTAL CONSIDERATIONS IN THE AD VALOREM TAX PROCEEDING

Discovery of Contamination: Would Environmental Concerns Have Affected the Purchase Price Paid by a Prudent Purchaser at the Assessment Date?

Two recent decisions have fully addressed the timing of discovery of the environmental concern. The issue, succinctly stated, is: What effect does an environmental problem have on value if it was not fully known at the assessment date in question, but facts were known which would put a prudent purchaser on notice, and reasonable due diligence would have led to discovery of the environmental concern? Although the two decisions reach apparently

⁶⁴ *Vanourek*, Wash Bd of Dist Appeals, Doc No 35315-35318, 1990 Wash Tax Lexis 240 (June 13, 1990).
⁶⁵ *Wyckoff Co*, Wash Bd of Tax Appeals, Doc No 39107, 1991 Wash Tax Lexis 688, (Oct 17, 1991).

inconsistent results, the courts reportedly applied consistent reasoning, and the difference may be attributable to the record before the court.

The Minnesota Approach: The MICO Decision. The Minnesota court found that full and explicit knowledge of the environmental concern at the date of valuation is not necessary in order for the property's market value to have been impaired.

The respondent [Nicollet County] argued that the existence of the hazardous waste was not known on the assessment dates at issue in this trial, and is therefore irrelevant. However, the existence of the pit was known at those times and any prudent purchaser would have been on notice to check further, as the petitioner has now done, to determine the exact contents of that pit.⁶⁶

The reasoning underlying this approach is in full accord with the definitions of market value, which incorporate the concept of a prudent purchaser who is well informed or well advised. The extent of actual knowledge on the assessment date by the property owner or the assessor would appear an irrelevant inquiry. Even if the nature and extent of the environmental considerations was not fully known on the date of valuation, if the statutorily prescribed "prudent purchaser" would have discovered their presence in the exercise of an appropriate level of "due diligence," then it would appear that the impact of the environmental concerns must be taken into account in determining the market value of the property.

The California Approach: The Firestone Decision A different conclusion is reached in *Firestone, supra*. The assessment in the *Firestone* case was made as of March 1, 1980. Subsequent evidence indicated that:

contamination occurred over a period of years beginning in 1964 as the product of a number of spillages of chemical materials and it was a gradual accumulation. The well test, of which there have been hundreds, shows that contamination has percolated, that the percolation rates establish that it has been a long continuing event. The costs of cleaning up the toxic waste pollution, at the time, was estimated to be over \$5,500,000.⁶⁷

The California Court of Appeals ruled as follows:

The evidence presented by *Firestone* was that a knowledgeable buyer would have inspected for contamination, and that the sale price of the property would have been reduced if contamination had been found. There was no evidence presented to the board that the contamination had come to light on the 1980 lien date, however.

We have reviewed the entire record and find the weight of the evidence supports the conclusion that as of March 1, 1980, a potential purchaser would not have been aware of the contamination,

66. *MICO v Co of Nicollet*, Minn Tax Ct File Nos C6-89-284 & C8-89-285 (Sept 28, 1990, amended Dec 11, 1990).

67. See *Firestone, supra* notes 37 & 38.

to gain the innocent landowner exemption. The purchaser claimed that although it did have knowledge of contaminated slag piles on the site prior to purchase, it had been led to believe that this was not a hazardous waste situation. The California court ruled against the purchaser, and held that its conduct did not constitute due diligence as defined under SARA.

Another noteworthy decision is *BCW Associates, Ltd. v. Occidental Chemical Corp.*⁷¹ In that case, both the purchaser and its potential tenant hired environmental assessment companies to examine the property for environmental problems. The purchaser and potential tenant were told by the environmental consultants that no apparent problems existed on the site. Subsequently, the warehouse on the site was found to be contaminated with lead dust. The court ruled that the purchaser's actions did not satisfy the due diligence requirements under SARA, because the potential tenant had grounds to suspect that environmental problems were present at the site, and the new owner had purchased the property "as is" at a discount and so benefited financially from the suspected environmental problems.

Basis of Valuation: Value in Use or Value in Exchange

The most difficult issues in this area arise in those circumstances in which the cost of the remedial action plan exceeds the market value of the subject property if clean and never contaminated. It is widely recognized that "seriously contaminated properties are generally unmarketable."⁷² However, such properties may have value to the present property owner that is able to continue to productively use the property in its trade or business despite the environmental contamination (i.e., value in use).

The issue is whether its value in use to the property owner is an appropriate value when there is convincing evidence that the property has no value in exchange, since no prudent purchaser would purchase it with its attendant liabilities. The courts of other jurisdictions have interpreted statutory frameworks similar to Minnesota's and decided that such properties have no or nominal value because of the effects of contamination upon its marketability.⁷³

An interesting discussion of this issue is presented in *Hecla Mining Company v. State of Colorado*.⁷⁴ *Hecla* presented a condemnation case in which the government presented expert testimony that the property had zero value because of the contamination. The property owner sought to increase the condemnation award and introduced expert testimony that

71. *BCW Assocs, Ltd v Occidental Chemical Corp*, ED Pa Civ No 86-5947 (Sept 30, 1988).

72. See, eg, Patchin, *supra* note 11, at 9.

73. See, for example, *Community Consultants, Inc v Bedford Township*, MTT Doc No 86388 (Mich 1985); *Comerica Bank v Metamora Township*, MTT Doc Nos 103325, 110482, & 112529 (Mich, 1989); and *Monroe Co Bd of Assessment Appeals v Miller*, 570 A2d 1386 (Penn, 1990); *contra* *Northwest Cooperage*, *supra* note 63 [but note limitations on issues and evidence presented]. See, also, *Murray Pacific Corp v Brown*, Wash Bd of Tax Appeals, Docket No 38037 (Nov 9, 1990); *Lake Union Drydock Co v Ridder*, Wash Bd of Tax Appeals, Docket No 37655 (Dec 11, 1990).

74. *Hecla Mining Co v State of Colorado*, 781 P2d 122 (Colo 1989).

explicitly assumed that the contamination had been cleaned up and the property was stabilized and ready to be developed to its highest and best use. In *Hecta*, the court did not accept the property owner's argument seeking to value the property as if clean, and declared that the valuation analysis "failed to reflect the fair market value of the property at the time of the taking" unless the analysis of the market value "considers its use, condition, improvements, surroundings, and capabilities."

The Minnesota courts have affirmed that a property's value in exchange is the controlling analysis regardless of its current or former use.

Intrinsic value, also called value-in-use, is the value of property to its present user. It is comparable to replacement cost to the present user. [Citations omitted.] The value-in-use of property is a proper consideration for an assessor. [Citation omitted.] But it still remains true that (i) the sale value, not the actual value, is what must control; [Citation omitted.]

* * *

In other words, one may consider the present use of the property only to the extent such present case reflects the property's value to buyers in the marketplace.⁷⁵ [Emphasis supplied.]

The *Space Center* decision discusses two Minnesota cases as authoritative: *State v. Russell-Miller Milling Co.*, in which the court held that the taxable value is not its intrinsic worth or value in use, but its sale value, under facts which established the lack of any market for a property because of lack of business and the property's deterioration,⁷⁶ and *Village of Burnsville v. Commissioner of Taxation*, in which the court affirmed that the taxable value of property must be measured relative to its market value in sale, not the special value to the taxpayer from using the property in its manufacturing processes.⁷⁷

CONCLUSION - PREPARATION AND BURDENS OF PROOF

Documentation of the Type and Scope of Contamination

Although it may be intuitively clear that an impaired property is worth less than an unimpaired property, the type and scope of the existing or potential environmental contamination must be thoroughly documented. In some cases, much of the preliminary environmental tests and reports have been conducted (and paid for) as a consequence of the actions that led to discovery of the problem. In those cases the assembly of a remedial action plan is considerably less expensive and less time-consuming than may otherwise be the case. Regardless, the failure to adequately prepare and document the environmental analysis

75. *Space Center, Inc v Co of Hennepin*, 302 NW2d 17, 21 (Minn 1981).

76. *State v Russell-Miller Milling Co* 235 NW2d 22 (1931).

77. *Village of Burnsville v Comm of Taxation*, 202 NW2d 653 (Minn 1972).

(including the remedial action plan) will substantially prejudice any negotiations and the likelihood of success at trial. Early decisions with otherwise surprising results (i.e., denying any reduction in value due to environmental considerations) underscore the critical importance of preparing and introducing credible evidence.⁷⁸

A decision coming out of Ohio has affirmed the taxpayer's obligation to establish a negative impact of environmental considerations on value. In the *Chem Masters Corporation v. Geauga County Board of Revision*,⁷⁹ the parties stipulated to the value of the property if unimpaired. The taxpayer then attempted to further reduce the value of the property based solely upon the costs of cleanup, which in that case exceeded the value of the property if unimpaired. The Ohio decision denied a reduction on the basis that the taxpayer failed to establish the impact of environmental considerations on value. While agreeing intuitively that the cost of cleanup would not be ignored by a prudent buyer, the court found that the taxpayer had provided no authority for the proposition that the unimpaired value should be reduced dollar for dollar by the amount of the cleanup costs, and the taxpayer did not submit an appraisal that could have provided an evidentiary foundation in the form of expert testimony concerning the effect the environmental consideration had on the property's market value.

The importance of a carefully prepared and presented case was also emphasized in a recent Minnesota decision, *Nicollet Restoration, Inc. v. Hennepin County*.⁸⁰ In this case the petitioner acquired property in which the corrective action had been substantially completed as of the assessment date, with only monitoring for one year remaining. The Minnesota court recognized that a "method often used by appraisers in determining the effect of contamination is to value the property as if uncontaminated and deduct therefrom the present value of the cost of the corrective action." However, the court denied any reduction for environmental issues, pointing out that the taxpayer "introduced no evidence showing the effect on value, if any, of the inability to borrow money in the property," and that "the effect on value was not quantified."

Steps in the Development of the Contamination Issue for Negotiation or Trial

The appraisal communities are developing generally consistent procedures or guidelines designed to assimilate the analysis of a prudent purchaser. The major components of this evolving methodology are briefly set forth below.

1. The first step is to review the environmental or engineering reports identifying the environmental consideration. Oftentimes the original report will not fully identify the problem;

78. For example, see *In re Great Lakes Container Corp.*, supra note 52; *Inmar v Borough of Carlstadt*, supra note 54; *Fashion Center v Paramus Borough*, supra note 27.

79. *Chem Masters Corp v Geauga Co Bd of Revision*, Ohio BTA Case No 88-J-994 (Dec 21, 1990).

80. *Nicollet Restoration, Inc v Hennepin Co*, Minn Tax Ct File No 12361 (June 24, 1992).

supplemental or additional engineering and environmental analyses may be necessary to document in detail the nature and extent of the environmental problem presented.

2. A detailed remedial action plan should be formulated to remedy the environmental condition consistent with the limits of existing technology. The plan which is formulated should reasonably represent the analysis of a prudent purchaser proceeding to purchase the property in a cash transaction. The plan may involve cleanup over a period of years, maintenance and containment, or a number of other solutions depending on the specifics of the case. An insightful analysis of these issues appears in Measuring the Effects of Hazardous Materials Contamination on Real Estate Values, "Environmental Valuation: A Team Approach to a Balance Sheet Presentation,"⁸¹

3. A detailed cost and expense analysis of the proposed remedial action plan must be assembled. This analysis should include a line-by-line identification of each cost and expense, preferably based on the quantity of affected soil or water to be treated, and a cost per unit for each item. For example, in the case of a leaking underground tank, one line would include the number of cubic yards of affected soil, and separately the representative costs for excavating, hauling, and treating each cubic yard through each step in the remedial process. Each such step in the remedial process must be identified, calculated, and individually substantiated.

4. Careful attention should be given to ensure that the remedial action plan includes all of the costs and expenses that a prudent purchaser would consider in transforming the subject property into a physical condition and usefulness had the environmental problem not existed. These costs include engineering analysis, testing, and reports; any demolition or site preparation work which may be necessary to the remedial plan; the costs of curing the contamination, including excavation or removal, loading, hauling, and transportation; any long-term treatment or containment costs for the contaminated materials; costs of permits, approval, and licenses; costs of rebuilding or restoring the property to its condition prior to the remedial plan; any ongoing monitoring and testing that may be necessary; any related correction or treatment of off-site locations if the contamination has spread from a source on the subject property; and, invariably, the legal, auditing, construction management, supervising, and other professional expenses inherent in establishing, bidding, contracting, and properly implementing the remedial plan. In many, if not all, cases, the engineering and administrative expenses, which may be necessary, especially in the case of rental property. If the remedial plan displaces an existing tenant or an existing use by the owner, that space will not generate the normal revenues for that period. This results in lost revenues or generates the expense of substitute space.

5. The timing and present value of the detailed costs and expense analysis should then be considered. The engineering firms assembling the remedial plan should identify all remedial costs based upon demonstrated market costs. However those costs are anticipated to increase (or decrease) over time, those adjustments should be scheduled in a chronological fashion, and the elements of the remedial plan should be scheduled in a chronological fashion, and the projected expenses discounted to present value from the year to be incurred to the date of valuation.
6. The appraiser or assessor must then reconsider the risk components of his or her valuation upon the stigma associate with environmental concerns of the type and extent involved in the case at hand.

81. Wilson, A. R.; *Measuring the Effects of Hazardous Materials Contamination on Real Estate Values*, "Environmental Valuation: A Team Approach to a Balance Sheet Presentation"; Appraisal Institute Technical Rep; Appraisal Inst., Chicago, IL, 1992.

Market Sales and Indemnifications

Appraisers and assessors customarily endeavor to base their analyses on market indications. The development of market data to support and refine the evolving methodology has been impaired by the fact that significantly contaminated properties do not regularly sell because of the contamination involved. However, databases of market transactions are being assembled.

Many of the transactions that do take place are not arm's-length market transactions, and it is important that this fact be recognized in any data gathering process. In some of these market transactions, governmental development agencies acquire property for the express purpose of preserving jobs, encouraging redevelopment, and preventing the problems of urban blight. Many of these transactions are instigated by potential purchasers who had refused to consummate purchase transactions because of the environmental problems affecting the site. The governmental agency then intervenes in the transaction, acquires fee title, and transfers or leases the property to a user who will bring jobs and benefits to the community. In this process there are often indemnifications or guarantees to hold harmless (or other inducements) from the seller or a governmental agency in favor of a user who would not purchase the property outright because of the environmental problems.

Two critical elements should be recognized in such transactions. First, there is a presumption that acquisitions by governmental agencies may not constitute market transactions.⁸² The motivations of a governmental agency are usually inconsistent with and not reliable market indicators of the actions of an arm's-length purchaser. Second, whenever a transaction bears with it indemnifications or guarantees, the purchase price must be analyzed to determine what portion of the purchase price is properly allocated to the taxable real property, and that portion allocated to the indemnification or guarantee rights, which constitute distinct contractual assets but not real property. In such transactions it readily appears that not only is real property being purchased, but a business and jobs are being subsidized by governmental involvement for the general benefit of the community. Under such circumstances, allocations of value among real property and other assets may be difficult if not impossible, and in many instances market value may not be ascertainable from the transaction. (*Contra, Lefevre v. Vanourek*.⁸³)

In *Lefevre*, the board determined the market value of property contaminated with substantial amounts of fertilizers and pesticides. There was an agreement between the Washington State Department of Ecology (WSDOE) and People's National Bank (a foreclosing lender), under which the WSDOE would clean up the property on or before 1995, after which the property would be sold; a purchaser of the property after clean would receive a

82. See, e.g., Intl Assn of Assessing Officers, *Improving Real Property Assessment* (1978), at § 4.4.1, p 106.

83. *Contra, Lefevre v Vanourek*, 1990 Wash Tax Lexis 240, Wash Bd of Tax Appeals Doc Nos 35313-35318 (June 13, 1990).

release from the WSDOE from any subsequent claim arising out of the continued presence of contamination on the property; and the board assumed that the value in a clean condition in 1995 would be the same as its value as if clean in 1989, and discounted that value to present value as of the date of the assessments. This analysis places substantial reliance upon the WSDOE determination that the property will be clean in the eyes of prudent purchasers in the future. This reliance and the weight afforded the WSDOE release are based upon the valuation principle of anticipation. However, this decision does not appear to have given any consideration to whether the value of the WSDOE release agreement is attributable to the real property; the WSDOE involvement impairs the existence of an arm's-length sale of real property in the market place; and whether prudent purchasers in 1995 will perceive any stigma to be associated with the contamination or any change in law or technology not presently considered.

This issue was raised but not resolved in two decisions coming out of Massachusetts and Minnesota, respectively. *Reliable Electronic Finishing Company, Inc., v. Canton*,⁸⁴ and *Nicollet Restoration, supra*.⁸⁵ In *Reliable Electronic Finishing Company*, the court stated that no evidence had been introduced to support the contention that indemnification by the seller affected the appraiser's calculations. In *Nicollet Restoration*, the subject had been purchased contemporaneously with the assessment date. Petitioner was aware of the prior contamination and the ongoing pumping and monitoring required to complete the corrective action, but the court's description of the facts recite that petitioner agreed to pay a price "in an arm's-length sale based upon the commitment of the (Metropolitan Transit Commission) to assume all of the responsibility for the costs of the corrective action."⁸⁶ While no reduction due to contamination was ordered by the court, the issue was made moot by the court's comment that no evidence was introduced concerning the effect of the contamination on market value. It may be noteworthy, however, that the purchase price contemporaneous with the assessment date was \$830,000, while the assessor's opinion of value, which was adopted by the court, was \$800,000.

EPILOGUE

The authors' efforts to assemble and integrate the analyses of relevant case law (board, trial court, or appellate levels) are ongoing. If you are aware of any overlooked or new decisions, particularly if not widely discussed in advance sheets, we would appreciate your bringing these decisions to our attention.

84. *Reliable Electronic Finishing Company, Inc., v. Canton*, Mass App Tax Bd, Docket No 158325 (Aug 9, 1990).

85. *Supra*, note 80.

86. *Supra*, note 80.