

LEGAL AND APPRAISAL IMPLICATIONS OF CONTAMINATED PROPERTIES

**BURLINGTON COUNTY ASSOCIATION
OF MUNICIPAL ASSESSORS**

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PRESENTED BY:

JAMES M. TURTELTAUB, ESQ.

Carlin and Ward, P.C.

25A Vreeland Road

P.O. Box 751

Florham Park, New Jersey 07932-0751

Telephone: (973) 377-3350

Fax (973) 3767-5626

E-Mail: jturteltaub@carlinandwardpc.com

and

WILLIAM H. STEINHART, MAI, CRE, CTA

Appraisal Consultants Corp.

293 Eisenhower Parkway, Suite 200

Livingston, New Jersey 07039-1711

Telephone: (973) 994-7400 Ext. 101

Fax: (973) 994-3493

E-Mail: whs@appcon.com

LEGAL AND APPRAISAL IMPLICATIONS OF CONTAMINATED PROPERTIES

- I. INTRODUCTION

- II. GENERAL OVERVIEW OF ENVIRONMENTAL CONDITIONS/LIMITATIONS ONE MIGHT ENCOUNTER DURING AN APPRAISAL ASSIGNMENT
 - A. Wetlands
 - B. Floodplains
 - C. CAFRA
 - D. Soils Contamination
 - E. Ground Water Contamination
 - F. Asbestos
 - G. Mold

- III. OVERVIEW OF VALUATION ISSUES PRESENTED BY ENVIRONMENTAL CONDITIONS
 - A. Identify the appraisal problem
 - i. Real property taxation in NJ
 - ii. Eminent domain
 - iii. Environmental litigation
 - iv. Mortgage or buy/sell
 - v. IRS
 - vi. Asset Allocations
 - vii. Estates
 - viii. Other litigation

 - B. Gather information regarding the property
 - i. Visual inspection
 - ii. Current use
 - iii. Improvements
 - iv. Condition
 - v. Land area
 - vi. Property history
 - vii. Zoning
 - viii. Approvals
 - ix. Engineering reports
 - x. Environmental reports

1. Are there any on-site conditions?
 - a. Where were the contaminants detected?
 - i. Is it surficial?
 - ii. Is it groundwater?
 - b. What contaminants were detected?
 - c. Does it impact the current use of the property?
 - d. Where is the building located in relation to an on site problem?
 - e. Do the contaminants impact other legally permissible or potentially permissible uses of the property?
 - f. What is the status of the contamination (has it been completely identified, is it undergoing clean up, how long will it take)?
 - g. Has the problem been addressed with the DEP?
 - i. Has it been completely identified?
 - ii. Is it undergoing clean up?
 - iii. How long will it take?
 2. Are there any off-site problems?
 - a. Where were the contaminants detected?
 - i. Is it surficial?
 - ii. Is it groundwater?
 - b. What contaminants were detected?
 - c. Does it impact the current use of the property?
 - d. Where is the building located in relation to an on site problem?
 - e. Do the contaminants impact other legally permissible or potentially permissible uses of the property?
 - f. What is the status of the contamination (has it been completely identified, is it undergoing clean up, how long will it take)?
 - g. Has the problem been addressed with the DEP?
 - i. Has it been completely identified?
 - ii. Is it undergoing clean up?
 - iii. How long will it take?
- C. Does the assignment dictate the determination of highest and best use or is it limited to a specific use such as current use?

- i. Market considerations
 - ii. Mitigation/remediation considerations
 - 1. Highest and best use
 - 2. Existing use
 - 3. Condemnation problem
 - 4. Real property tax complication of business value
 - 5. Stigma considerations
- D. Strengths and weaknesses of the three valuation approaches
- i. Cost Approach
 - 1. Usually cannot provide an independent conclusion since it relies on the other two approaches for measurement of diminution factors.
 - ii. Sales Comparison Approach
 - 1. No two contamination situations are ever identical and even if they were there is a reluctance in the market place to share detailed information. The level of knowledge required to evaluate a particular comparable rises to that which must be known about the subject.
 - 2. Demonstrates how the market actually responds to specific situations
 - iii. Income Approach
 - 1. Measuring rental loss
 - 2. Measuring vacancy loss
 - 3. Measuring expenses
 - 4. Yield capitalization (DCF) including risk considerations
 - 5. Direct capitalization including risk considerations
 - iv. Appraisal issues related to environmental contamination
 - 1. Value in use
 - 2. Value in anticipated use
 - 3. Highest and best use
 - 4. Dollar for dollar v. NPV of costs v. market impact

5. Double-Dipping
6. Proofs of impact
7. Stigma
8. Value as clean v. Value as remediated
9. Is a cleaned property worth more than a property that was not cleaned?

v. Traps

1. Are comparables contaminated.
 - a. If so, how was the sale impacted
 - b. Are rents for existing use impacted

E. Problems with alleging environmental contamination

1. Burden of Proof
2. Sources of information concerning comparable sales
 - a. Building department
 - b. Planning Board/Zoning Board
 - c. NJDEP
 - d. Contracts
 - e. Time between contract date and date of sale
 - f. Look at current use versus previous use
 - g. Look at improvements/demolition/renovations since sale
 - h. USE COMMON SENSE

IV. OVERVIEW OF CASE LAW

A. Housing Authority of the City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2 (2003)

i. Court's Ruling

1. Separate Claims
2. Hold potential claims in trust
3. Value as cleaned in condemnation
4. Deposit full amount of cleaned value on deposit
5. Cost Recovery/Environmental Liability action

ii. Issues which still need to be addressed

1. What costs are recovered in environmental action
2. What procedures to follow in developing claims
 - a. Problems with private interests
3. What claims are environmental claims and what are value claims

B. New Jersey Transit v. Cat in the Hat, 177 N.J. 29 (2003)

i. Reservation clause ok since environmental no longer part of valuation case

C. Other cases of interest

Aetna Life v. Newark, 10 N.J. 99 (1952)

BF Goodrich v. Oldmans Twp., 17 N.J. Tax 114, 122 (1997), aff'd, 323 N.J.Super. 550 (App.Div.1999)

Badische (BASF) v. Kearny, 288 N.J. Super 171 (App Div. 1996) and on remand 17 N.J. Tax 594 (App. Div. 1998)

American Stores v. Kearny, 14 N.J. Tax 186 (Tax Ct 1994)

Jablin v. Borough of Northvale, 12 N.J. Tax 103 (App. Div. 1991)

First Republic v. City of Newark, 17 N.J. Tax 531 (App.Div.1998)

University Plaza v. Hackensack, 264 N.J. Super. 353 (App. Div. 1993) affirming 12 N.J. Tax 354 (Tax Ct 1992)

In Re Custom Distribution Services, Inc., 224 F 3d 235 (3rd Cir. N.J. 2000).

Wellington Belleville LLC v. Bellville, 20 NJ Tax 331 (Tax Ct 2002)

V. SPECIAL ASSUMPTIONS AND LIMITING CONDITIONS - USPAP

VI. QUESTIONS