BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203 Petitioner: E.I. DU PONT DE NEMOURS & COMPANY, v. Respondent: DOUGLAS COUNTY BOARD OF EQUALIZATION.	▲
Attorney or Party Without Attorney for the Petitioner: Name: A. Allen Mitro, Agent Address: P.O. Box 1039 Wilmington, DE 19899-1039 Phone Number: (302) 774-5032 E-mail: Attorney Reg. No.:	**Docket Number: 38886**

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on November 7, 2001, Debra A. Baumbach and Mark R. Linné presiding. Petitioner was represented by A. Allen Mitro, Agent. Respondent was represented by Steven J. Dawes, Esq.

PROPERTY DESCRIPTION:

Subject property is described as follows:

> **PT E1/2 5-7-68; PT S1/2S1/2 28-6-68 LYING W OF D&RG RR; PT E1/2 32-6-68; PT N1/2SW1/4 4-7-68; PT N1/2 4-7-68 LYING W OF LOUVIERS; PT W1/2 PT N1/2 33-6-68 LYING W OF D&RG RR; PT SE1/4 33-6-68 LYING N & W OF LOUVIERS**
> **(Douglas County Schedule No. R0405715)**

Petitioner is protesting the 2001 actual value of the subject property, an irregularly shaped parcel of land comprising a total of 850 acres. The property includes lower foothills land and some wooded areas adjacent to the Village of Louviers. The property includes certain improvements that were previously used for the manufacture and storage of explosives.

ISSUES:

Petitioner:

The Petitioner contends that the proper valuation technique for the subject is to utilize the value of the site as if uncontaminated, and then utilize a cost deduction for remediation costs. There are no true market sales for a property of this type.

Respondent:

The subject site has been valued utilizing the appropriate approaches to value. The subject consists of both contaminated and uncontaminated acreage. There are a total of 13 buildings on site. The Respondent has considered the contamination, and has reduced the value by 30% to accommodate remediation costs; the fact that there may be some areas that have contamination does not render the property without value.

FINDINGS OF FACT:

1. Mr. A. Allen Mitro, Property Tax Manager for Petitioner, appeared as a witness and presented the appeal on behalf of E. I. du Pont de Nemours.

2. Based on the market approach, Petitioner presented an indicated value of $315,000.00 for the subject property.

3. Mr. Mitro testified that the property is adjacent to the Village of Louviers. The Petitioner operated a plant on the site between 1908 and 1988. The plant was involved in the manufacture of explosives. The property was sold in 1988, and in 1989 the property reverted to du Pont. The company that acquired the property did not have the financial ability to fund the remediation of the contamination that had occurred in the operation of the facility.

4. The witness testified that the difficulty in appraising properties of this type is that they often continue to operate even though they are contaminated.

5. The witness testified that during the period in question, there was a lease of a small portion of the property to a third party.

6. Mr. Mitro testified that the underlying question of valuation must recognize the remediation costs to value the subject in its current condition. The question of how to take into account the condition of the property as it is today is the core issue of the appraisal.

7. The witness testified that a map was prepared that outlines the differing uses of the subject. This was done to effect the donation of the site to a conservation easement trust.

8. The witness testified that du Pont does not have any permanent employees on site.

9. Mr. Mitro testified that the current lease does not take into account any of the internal management of the property. The Colorado Department of Health and Environment closely monitors the compliance with remediation efforts on site. Du Pont contracted with URS Corporation to determine the extent/cost remediation effort.

10. The witness referenced the Low-End Cost Remediation Effort Report; this is the very lowest amount and requirements to remediate this property to an acceptable level, at an indicated price of $4,000,000.00.

11. There are many variables that will ultimately control the aggregate cost expenditures, and thus render an accurate calculating of the final cost very difficult to determine.

12. The witness testified that he had calculated a net present value for the remediation costs; these were calculated as $2,800,000.00. The witness characterized this value as conservative in nature.

13. The land value was calculated as $21,000.00. Adding in the improvements, and the additional land, the Petitioner calculates a final value of $315,000.00.

14. The witness testified that there were two important points of consideration that the courts have recognized. The first point is that each property is unique when environmental contamination is present. The second point is that the court cases clearly recognize that a recent cost to cure should be subtracted from the value as if clean.

15. The witness testified that the most appropriate manner of determining the value of the subject site is to utilize sales of contaminated properties of a like kind; or alternately, to derive a value as if clean and then deduct the net present value of the cost of remediation. Du Pont can no longer sell properties until the contamination has been remediated.

16. Based on the previously detailed methodology, the Petitioner requested a 2001 value of $315,000.00 for the subject.

17. Under cross-examination, the witness testified that 470 acres have significant contamination; the remaining 380 acres have contamination of some type. The witness was not certain what the breakdown would be for contamination and uncontaminated land. The whole property has stigma and some element of contamination exists.

18. The witness testified that his value prior to consideration of the contamination equates to $2,400.00 per acre, while the Respondent has assigned a value of $2,600.00 per acre.

19. The witness testified that he is not remediating the cost this year but, rather, is deducting the cost over time, and assuming a net present value.

20. Mr. Mitro testified that he was not aware of any appraisal completed on a portion of the property in the recent past or as part of this appraisal.

21. The witness acknowledged through his testimony that the value per acre reflects a 30% deduction to the per-acre value of the subject.

22. The witness testified that no contaminated land is being sold for conservation easement purposes.

23. The witness testified that the consent decree is between du Pont and the State of Colorado.

24. While he admitted that he had not prepared an exhaustive listing of court citations dealing with contamination, the witness testified that most states do recognize the cost to cure as a relevant method of treating contamination. Many states have recognized that stigma and contamination are not appropriate.

25. In redirect testimony, Mr. Mitro testified that the income approach requires that all future benefits to the property must be considered. This fact is indisputable in an examination for valuation purposes.

26. The witness further testified that using the net present value of remediation cost is a recognized technique that is appropriate in the case of the subject. The costs are du Pont's responsibility.

27. Respondent's witness, Walter Marion, Colorado Certified General Appraiser, and a Commercial Appraiser with the Douglas County Assessor's Office, testified that the subject is comprised of approximately 849.7 acres.

28. The witness presented an indicated value of $2,000,836.00 for the subject property based on the market approach.

29. The witness testified that he had made a conscious effort to distinguish between contaminated and uncontaminated land. The subject consists of approximately 470 acres of contaminated property and 380 acres of uncontaminated land.

30. The witness testified that he followed Colorado Statutes in valuing the subject. He considered three approaches to value.

31. Based on the direct sales comparison analysis, the witness testified that he concluded a value for the subject of $2,000,386.00.

32. Mr. Marion testified that even properties with stigma still sell at market values. He noted that du Pont is responsible for all remediation efforts. If the property were to be sold, the purchaser would not be liable for any remediation costs. Du Pont is solely responsible for clean-up costs, and thus there is no impact on market value.

33. The witness additionally testified that there is no stigma present for the subject. As an example he cited the Albertson's sale at South Broadway and Alameda in Denver County. Even though contaminated, the sale was consummated at approximately 10% below market.

34. The witness testified that he had also conducted an income approach, using the lease on the subject as the basis, but relied on the direct sales comparison approach. He has used the direct sales comparison approach as the basis of establishing the value of this component.

35. The witness testified that it was his belief that the typical buyer for the subject would understand that they would have no liability for the cleanup of the site. He felt that the cost to cure is less of a concern in the valuation of the property, given that there is no requirement for anyone other than du Pont to remediate the contamination.

36. Mr. Marion agreed that the property suffers from contamination, and this encumbers the property. He does not agree that the cost to cure makes sense as a deduction against the unencumbered property value, given that du Pont is solely liable for the contamination remediation, and no cost will transfer to the buyer.

37. Mr. Marion testified that he applied a total deduction against the property value unencumbered to arrive at a value for the property with the contamination in place. He applied a diminution factor of 30% to accommodate various property characteristics, including the contamination issues.

38. The witness testified that his valuation conclusions resulted in a $2,600.00 per acre market value for uncontaminated land and $1,800.00 per acre for contaminated land.

39. Respondent assigned an actual value of $2,086,000.00 to the subject property for tax year 2001.

40. Mr. Marion testified under cross-examination that the primary point of disagreement between the Petitioner and Respondent in terms of value was the impact of the contamination, and what it would sell for in its contaminated condition.

41. In discussing one of the comparable sales that he utilized in his appraisal analysis, the witness testified that he could not estimate what a buyer would have paid for the property prior to the EPA-mandated cleanup. The witness concurred that the property sold for $377,000.00 because that was its market value after the expenditure of $2.2 million to clean the property up from its contaminated state. The witness also considered that the property's value was diminished because of the stigma.

42. The witness testified that despite repeated conversations with Mr. Mitro, he could not precisely determine which portions of the subject were contaminated and which portions were not contaminated. He believed that certain portions were free of contamination, but because he had limited access to the property, he could not identify these parcels.

43. The witness testified that he would totally disregard the cost to cure as a legitimate methodology for developing a value for the subject property.

CONCLUSIONS:

1. The petition presents a difficult legal issue for the Board to resolve. The law in Colorado is unsettled on the issue, namely, whether the cost of remediating contaminated property pursuant to a consent decree entered with a governmental entity must be taken into account while valuing real property for ad valorem tax purposes in Colorado. After careful study of Colorado law, the authorities cited by the parties and the law of other jurisdictions, the Board concludes that the value of the property should be reduced by the cost of remediation.

2. No authority was discovered in Colorado providing that the cost of remediation mandated by a governmental entity should not be deducted from the actual value of property for ad valorem tax purposes. In Lawrence v. Board of Equalization, 989 P.2d 232 (Colo. App. 1999), the court faced the question of whether the taxpayer's contaminated well serving her residential real property should reduce the value of the property by the cost to cure the contamination. The court affirmed the Board's holding that the cost should serve to reduce the property's value. However, the cure in that case was not governmentally mandated.

3. Here, the Petitioner offers numerous cases from other jurisdictions in support of its position that the cost to cure the contamination should be deducted from the value of property for tax assessment purposes. The Board has reviewed those cases and finds that none of them is on point. None of the cases involved a cure mandated by a governmental entity.

4. The Respondent cited two cases during closing statements in support of its position that the cost of a mandated cure should not be deducted from the subject property's value. In Inmar Associates, Inc. v. Borough of Carlstadt, 112 N.J. 593, 549 A.2d 38 (1988), the New Jersey court faced property on which hot tar used in an asphalt manufacturing process found its way into the land, contaminating it. Under the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 to –14, the property owner was required to clean it up.

5. The owner argued that the property was unmarketable in its contaminated condition. The court observed that by imposing on current and past owners and users of land the cost of restoring contaminated land, the environmental regulatory programs perhaps have shifted costs but not values. Inmar, supra, 549 A.2d at 42. Property values, the court held, are not effected by costs of curing environmental contamination that exists on the assessment date.

> The responsibility of cleanup is thus viewed as a financial obligation of the property owner; but the property itself remains within the control of its original owner and possibly subject to the cleanup lien. How then should these forces be viewed as market factors?
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> In reality, industrial property today may be seen as having an encumbered income stream. The owner has to keep the property free of pollution. In assessing property under the income approach, market reality cannot be ignored. As we have noted, the property owner can either pay now or pay later, but its management practices do not dictate what true value will be.

> "The appraisal of real property is predicated on the assumption of competent management. This assumption may not be reflected by historical operating statements." The Appraisal Of Real Estate 356-57 (Am. Inst. Of Real Estate Appraisals ed.) (7th ed.).
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> As we have noted, "competent management" by the Scientific Chemical Processing Company might have averted many of today's problems. Those annual expenditures that reflect a reduced net operating income should have correspondingly reduced the appraised value of the property as an income producer.

Inmar, supra, 549 A.2d at 43-45.

6. In the other case cited by the Respondent, Great Lakes Container Corporation, 126 N.H. 167, 489 A.2d 134 (1985), the New Hampshire court faced the issue of valuing property for tax purposes while the property was subject to federal clean-up litigation and was being cleaned up. The title was being held back pending completion of the clean up and to avoid passing any clean up liability onto a buyer. The taxpayer conceded that the property would have value when the clean up was completed.

Great Lakes Container Corporation is distinguishable on its facts from the instant case. In the instant case, the subject property is not being cleaned up. It is not even being offered for sale. Therefore, the Board does not consider the case further.

7. The Board has considered cases from other jurisdictions that have analyzed Inmar. California is one such jurisdiction and it is not kind. In Mola Development Corporation v. Orange County Assessment Appeals, 80 Cal.App.4th 309, 95 Cal.Rptr.2d 546 (2001), the appellate court reviewed a trial court judgment that reversed the county assessment board's finding that the value of certain contaminated commercial real property should not be adjusted for the cost of cleanup. The appellate court affirmed, holding that the proper assessed valuation was the price at which a willing buyer and a willing seller would consummate an open market sale of the property considering the polluted condition of the property.

8. The Mola court stated that under any standard pegged to what buyers and sellers do in an open market, it is almost impossible to imagine prudent buyers not demanding at least a dollar-for-dollar deduction of cure costs-reduced, of course, to present value. Mola, supra, 80 Cal.App.4th at 321.

9. When addressing the peculiar problem the Board faces today, the mandatory nature of the cleanup, the Mola court stated:

> Of course, if we may be forgiven for kibitzing about New Jersey common law, the University Plaza court's reliance on the difference between voluntary and mandatory cleanups is hardly a persuasive way of distinguishing Inmar. If anything, a mandatory cleanup leaves even less room for anything but a cost-of-cure deduction approach. The point is, when an unworkable doctrine is announced (in Inmar, a rejection of deduction of costs to cure), lower courts sometimes twist like Houdini to get around it. Well, at least in New Jersey.

Mola, supra, 80 Cal.App.4th at 323 n. 14, emphasis in original.

10. Of particularly persuasive value is the distinction made by the Mola court between the New Jersey and California tax scheme. In New Jersey, the scheme is driven by a statute requiring that the property's "true value" be determined. That value, the court observed, could be revealed by its value to the owner of the property and not necessarily the value established between a willing seller and a willing buyer in an arm's-length sales transaction. Mola, supra, 80 Cal. App.4th at 320-321. In California, by contrast, the scheme is driven by the constitution, which requires that the property's fair market value be determined. Mola, supra, 80 Cal. App.4th at 321.

11. In Colorado, like California, the Constitution governs the property tax scheme. However, unlike in California, in Colorado, the Board is required to determine the "actual value" of the property by giving appropriate consideration to each of three methods of valuation, the cost approach, the income approach, and the market approach. Colo. Const. Art. X, § 3(1)(a); subsection 39-1-103(5)(a), C.R.S. (2001). In this case, as the Board has already determined after considering all three approaches, the market approach should be given the most weight. Board of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc., 797 P.2d 27, 34-35 (Colo. 1990) ("appropriate consideration" implies that not all approaches may be applicable to particular property).

12. By giving the market approach the most weight when valuing the subject property, the Board is persuaded that the Mola valuation analysis should be adopted in Colorado. In Colorado, as in California, the market value is "what a willing buyer would pay a willing seller under normal economic conditions." May Stores Shopping Centers, Inc. v. Shoemaker, 151 Colo. 100, 110, 376 P.2d 679, 683 (1962). The property is to be valued in its condition as of the assessment date. Subparagraph 39-1-103(14)(b), C.R.S. (2001).

13. Under the market approach, the fact finder must take its cue from the behavior of the hypothetical buyer and not the peculiar circumstances of the seller. Here, a deal would likely be structured so that the buyer pays a higher price for the land requiring either the seller to clean up the property or requiring the buyer to assume that responsibility. See Compliance Order on Consent at paragraph 52 (parties to consent decree agree that it may be assigned). If at some future date the seller cleans up the

property for sale, its price will rise correspondingly. If the seller does not clean up the property but instead transfers it in its contaminated condition with the buyer assuming clean-up responsibilities, the price will fall correspondingly. Either way, the price would be affected by the cost to clean up the property.

14. The Board is satisfied that in the hypothetical sale of the subject property under the market approach, the subject property's value would be reduced by the cost to cure the contamination. Here, the Board concludes that given its contaminated state the subject property's actual value is $315,000.00.

ORDER:

Respondent is ordered to reduce the 2001 actual value of the subject property to $315,000.00.

The Douglas County Assessor is directed to change her records accordingly.

APPEAL:

Petitioner may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If Respondent alleges procedural errors or errors of law by this Board, Respondent may petition the Court of Appeals for judicial review within 30 days from the date of this decision.

DATED and MAILED this 17th day of January, 2002.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach

Mark R. Linné

This decision was put on the record

JAN 16 2002

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Diane Von Dollen

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