

| | |
|--|---------------------------------|
| <p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>MICROSEMI CORP OF COLORADO/FMC CORPORATION,</p> <p>v.</p> <p>Respondent:</p> <p>BROOMFIELD COUNTY BOARD OF EQUALIZATION.</p> | <p>Docket No.: 45035</p> |
| <p>ORDER</p> | |

THIS MATTER was heard by the Board of Assessment Appeals on August 30, 2007, as a continuation from April 23, 2007. Debra A. Baumbach, MaryKay Kelley, and Sondra W. Mercier presiding. Petitioner was represented by William A. McLain, Esq. Respondent was represented by Tami Yellico, Esq. Petitioner is protesting the 2005 actual value of the subject property.

PROPERTY DESCRIPTION:

The subject property is described as follows:

**800 Hoyt Street, Broomfield, Colorado
(Broomfield County Schedule No. R1067574)**

The subject property is a 112,128-square-foot manufacturing facility on 14.39 acres of land. The building was completed in 1975 and currently is occupied by the owner.

Petitioner’s witness testified that chemical solvents released from a surface-type spill caused groundwater contamination on the subject property. Both a boundary control pump-and-treat system that targets chemicals in the ground and vapor extraction of chemicals present in the subsurface are used to treat this type of contamination.

The subject property and an adjacent parcel, 802 Hoyt, both suffer from some form of contamination. Petitioner's witness testified that the subject property requires 65% to 75% of the total remediation costs for both parcels, suggesting 70% as a benchmark. However, under a Settlement Agreement dated July 8, 1998, Petitioner is responsible for 50% of the remediation costs.

Neither party provided any evidence of diminishment of use of the manufacturing facility, as all of the remediation is associated with a vacant portion of the subject along with the adjacent site. Both parties were in agreement as to the annual remediation costs, both including a 3% annual inflation factor.

Petitioner is requesting a 2005 actual value of \$301,067.00 for the subject property. Petitioner's actual value is based on an unencumbered market value of \$3,420,000; less 70% of the discounted cost to cure or \$2,949,829; less 70% of the discounted capital cost or \$169,104.00 resulting in a value of \$301,067.00. Petitioner's total cost to cure was calculated using an inflation rate of 3% and a discount rate equal to the Department of Property Taxation safe rate of 4.62%.

Respondent presented an indicated value for the subject property of \$3,300,000.00. Respondent's value is based on an income analysis at a net rental rate of \$5.00 per square foot less vacancy and collection loss of 11%, with expenses for reserves for replacement of 3%, expenses not itemized of 5%, and an additional expense deduction of \$127,575.00, equal to 50% of the discounted annual cost of remediation. The net operating income of \$331,362.00 is then capitalized at 10.0%, amounting to an actual value of \$3,313,624.00. The capitalization rate was increased slightly to reflect the potential for stigma associated with the contamination. Respondent's remediation expense deduction is based on a cleanup cost of \$240,500.00 for 2005 with a 3% inflation rate applied. This amount is equal to that shown by Petitioner for 2005. Respondent provided a second income analysis indicating a total capitalized value of \$4,590,000.00 prior to any adjustment for remediation, less 50% of the total discounted cost to cure estimated at \$1,316,800.00, resulting in a value for the subject of \$3,273,200.00. Respondent calculated total discounted costs of remediation using a 4.62% safe rate plus risk rate of 4.75%, resulting in a total discount of 9.5%, rounded.

Respondent assigned an actual value of \$3,388,000.00 to the subject property for tax year 2005. Respondent has indicated that a value of \$3,300,000.00 be considered by the Board based on a recalculation of value including 50% of the remediation costs.

Petitioner contends that despite the Settlement Agreement assigning 50% of the cost of remediation to Petitioner, 70% of the actual costs incurred relate to the subject property. Petitioner further contends that Respondent incorrectly applied a risk rate of 4.75% in addition to the safe rate of 4.62%, resulting in excessive discounting of remediation costs.

Petitioner presented sufficient probative evidence and testimony to prove that the tax year 2005 valuation of the subject property was incorrect.

The Colorado constitution requires that property be assessed at its actual value based on appropriate consideration to the cost, market, and income approaches to value. Colo. Const. art. X, § 3(1)(a). In *E.I. Du Pont v. Douglas County Board of Equalization*, 75 P.3d 1129 (Colo. Ct. App. 2003), the Court of Appeals grappled with the issue of how to value contaminated property where none of the three methods of valuation provided a clear basis for determining actual value. In *E.I. Dupont*, the Court of Appeals held that the Board properly concluded that the costs to cure a property required by a government remediation order should be deducted from the value of property as if clean to determine the actual value of property for ad valorem purposes. 75 P.3d at 1132. See also *Lawrence v. Board of Equalization*, 989 P.2d 232 (Colo. Ct. App. 1999) (upholding Board decision reducing value of contaminated well by cost to cure the contamination.).

The Board believes that this methodology is appropriate in this case. The next question to be determined is whether in deducting the costs of remediation, the Board should consider the sources of payment for the remediation, as set forth in the Settlement Agreement. The Board holds that the total actual cost to remediate should be deducted from the subject property's value if clean, without regard to the source of payment for the cost of remediation. Although this issue is one of first impression before the Board, we have addressed analogous cases where properties are damaged in ways other than contamination. For example, in determining the price of a residential house with a foundation crack, the market value of the house would be the price of the house in good condition minus the cost to repair the foundation damage. This would be true regardless of whether or not the property owner had a contract with the developer to indemnify the owner for some or all of the repairs.

In *MolaDevelopment Corp. v. Orange County Assessment Appeals Board No. 2*, 80 Cal. App. 4th 309 (2000), the California Court of Appeals held that the proper valuation of contaminated real property for tax purposes is the fair market value of unpolluted property less cleanup costs, without regard to other expected contributions from prior owners. In discussing what price a willing buyer and willing seller would consummate an open market sale of the property considering the polluted condition of the property, the California Court of Appeals stated that “[i]t makes no difference to the buyer whether the seller pays the costs of cleanup, or whether the seller *and* some third parties pay them.” 80 Cal. App. 4th at 326.

The Board is convinced that 70% of the total remediation costs should be applied to the subject property, and not the percentage applicable to Petitioner under the Settlement Agreement. The Board finds that the Settlement Agreement represents an intangible asset to the subject property that is not taxable under Colorado's ad valorem property tax scheme.

The Board further finds that an annual expense deduction, at 70% of the annual remediation costs, is reasonable, as the cost of remediation on the subject property is ongoing, creating annual costs, and not just a one time expense. Use of prior expense amounts as suggested by Petitioner is inappropriate, as this amount reflects capital expenditures, not expected annual expenses towards remediation.

The value of the subject is recalculated to include 70% of the \$255,146.00 annual cost of remediation for 2005, as shown by both Petitioner and Respondent, equal to an expense deduction of \$178,602. This results in net operating income of \$280,335, capitalized at 10%, resulting in an adjusted value of \$2,803,352.00.

The Board concludes that the 2005 actual value of the subject property should be reduced to \$2,803,352.00.

ORDER:

Respondent is ordered to reduce the 2005 actual value of the subject property to \$2,803,352.00.

The Broomfield County Assessor is directed to change his/her records accordingly.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Colorado Revised Statutes (“CRS”) section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the Respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of CRS section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the Respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Colo. Rev. Stat. § 39-8-108(2) (2007).

DATED and MAILED this 31st day of December 2007.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach
Debra A. Baumbach

MaryKay Kelley
MaryKay Kelley

Sondra W. Mercier
Sondra W. Mercier

This decision was put on the record

DEC 31 2007

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

Heather Heinlein
Heather Heinlein

