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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

R.J. Hughes Justice Complex
P.O. Box 975
Trenton, New Jersey 08625-0975
(609) 292-8108 Fax: (609) 984-0805

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Philip J. Giannuario, Esq.
Garippa, Lotz & Giannuario, P.C.
66 Park Street
Montclair, New Jersey 07042

John F. Casey, Esq.
Wolff & Samson, P.C.
One Boland Drive
West Orange, New Jersey 07052

Re: Ciba Specialty Chemicals Corp. v. Township of Dover
Docket Nos. 005635-2004; 001986-2005; 001501-2006

Ciba Specialty Chemicals Corp. v. Township of Toms River
Docket No. 003458-2007; 005340-2008; 005210-2009; 004487-2010

BASF Corp. v. Township of Toms River
Docket No. 002155-2011

Dear Counsel:

This letter constitutes the court's opinion with respect to the parties' cross-motions for partial summary judgment. These appeals challenge the local property tax assessments on a large parcel of undeveloped land contaminated by industrial activities. The parties agree that the land has development potential for a variety of uses, although the extent to which the property

can be developed and the type of uses to which it can be put remain in dispute. As they prepare for the trial of these matters, the parties seek a ruling on whether, as the municipality argues, the impact of environmental contamination and the cost of remediation on true market value is limited to those portions of the parcel that suffer from environmental damage or whether, as the taxpayer argues, the value of the entire parcel is effected by these considerations, notwithstanding the fact that portions of the property appear never to have been contaminated directly. For the reasons stated more fully below, the court concludes that the taxpayer's position comports with the holding in Inmar Assocs., Inc. v. Borough of Carlstadt, 112 N.J. 593 (1988) and the opinions interpreting that precedent.

I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law on the parties' cross-motions for partial summary judgment. The following findings of fact are based on the certifications and exhibits submitted by the parties on the cross-motions.

These appeals concern the local property tax assessments on real property in Toms River Township. The property is designated in the tax records of the township as Block 411, Lot 6 and is commonly known as 1298 Route 37 West.

The property consists of 1,200 acres on which was once situated Ciba Specialty Chemical Corp.'s industrial operations. From 1952 to 1990, Ciba manufactured dyes, pigments, resins and epoxy additives at the property. By December 1996, all commercial operations at the property ceased. Most of the manufacturing buildings were subsequently demolished. Ciba's commercial activities resulted in contamination of the property. Sludge and process wastes were disposed of in several locations on the site, including a stacked-drum disposal area originally believed to contain approximately 35,000 drums of toxic waste and a 12-acre filtercake disposal area

containing toxic waste. The commercial operations also resulted in the contamination of backfilled lagoons near the Toms River and two basins on the property. Contamination from these areas and several other areas on site leached into the groundwater.

In September 1983, the entire parcel, along with another 150 acres, was designated by the federal government as a Super Fund site and placed on the Environmental Protection Agency's National Priorities List ("NPL"). The designated boundaries of the Super Fund site are essentially delineated by the metes and bounds of the property. During the years 2004 to 2011, contamination at the property was remediated for a total cost of $110,365,000. Remediation efforts continued after 2011.

The property owner challenged the assessments on the property for tax years 2004 through 2011 through the filing of Complaints in this court. The municipality filed counterclaims in tax years 2004 and 2009 and filed Complaints challenging the assessments for tax years 2005 and 2008.[1] All of the Complaints and counterclaims, where applicable, for tax years 2004 through 2010 list a single parcel, Block 411, Lot 6. This parcel, therefore, is the only property before the court for tax years 2004 through 2010.[2]

The property owner's Complaint for tax year 2011 challenges the assessment on Block 411, Lot 6, along with three other parcels: Block 411.32, Lot 8, Block 411.34, Lot 12, and Block

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[1] During the time that these appeals have been pending the identity of both parties changed. In 2004, the property owner was Ciba Specialty Chemicals Corp. ("Ciba"). In April 2009, BASF Corp. acquired the assets and business Ciba and accepted responsibility for environmental remediation at the property. The taxpayer, however, continued to be identified as Ciba in the tax year 2010 Complaint. In the tax year 2011 Complaint, the taxpayer is identified as BASF Corp. On November 7, 2006, voters approved a referendum changing the municipality's name from Dover Township to Toms River Township.

[2] The municipality's Complaints for 2005 and 2008 were assigned Docket Nos. 004133-2005 and 000210-2008. These docket numbers were not included on the parties' moving papers. It appears, however, that the parties will apply the court's decision to the township's appeals.

409, Lot 62. The relationship of the three additional parcels to Block 411, Lot 6, the subject of the parties' cross-motions, is not clear. The court concludes that it need not address the status of the three additional parcels in the 2011 Complaint in order to resolve the parties' cross-motions concerning Block 411, Lot 6.[3]

On August 13, 2013, the municipality moved pursuant to R. 4:46-4 for partial summary judgment. The motion seeks resolution of a legal question arising from Inmar Assocs., supra, in which the Court held that environmental contamination has an impact on property valuation for local property tax purposes. In that case, the Court held that, for local property tax purposes, contaminated property should be valued "as if clean" and the court should thereafter adjust that value to account for the estimated or actual costs of remediation. The parties have stipulated that the holding in Inmar Assocs. applies to this case and that the court should use stipulated expenditures and costs associated with the remediation of the subject property when determining true market value for assessment purposes. In addition, the parties have stipulated that this court should be guided by the holding in Metuchen I, LLC v. Borough of Metuchen, 21 N.J. Tax 283 (Tax 2004), when determining the true market value of the subject property on the relevant valuation dates. In Metuchen I, the court discounted estimated remediation costs over a five-year period when adjusting the "as if clean" value of the property to account for environmental contamination.

[3] BASF Corp. also filed a Complaint challenging the tax year 2010 assessment on Block 411, Lot 107, commonly known as 1304 Route 37 West. That Complaint was assigned Docket No. 004486-2010. It is not clear from the record whether the challenge to the assessment on this property raises issues in common with the challenge to the assessment on Block 411, Lot 6. The parties' notices of motion do not list Docket No. 004486-2010. The court, therefore, does not consider Block 411, Lot 107 in this decision.

The municipality's motion is premised on the argument that there are large constituent elements of the 1,200-acre tract that are unaffected by contamination and that can be developed independently (and, perhaps, at different highest and best uses) from the portions of the property which were polluted. The municipality argues that the court should: (1) determine the highest and best use of various portions of the parcel based on the development potential of those portions of the parcel; (2) determine the "as if clean" true market value of the various portions of the parcel based on the highest and best use determinations; and (3) make an adjustment under Inmar Assocs. and Metuchen I, LLC for remediation costs only with respect to the portions of the parcel which suffered from environmental contamination, leaving unadjusted the "as if clean" true market values of those portions that the parcel that were never polluted.

The taxpayer opposes the municipality's motions and cross-moves for partial summary judgment in its favor. According to the property owner, no portion of the parcel is unaffected by environmental contamination. The taxpayer argues that by virtue of being designated as a Super Fund NPL site, the value of the entire parcel is directly or indirectly affected by environmental contamination and associated remediation costs. Thus, the taxpayer argues, any adjustment to "as if clean" true market value for remediation costs must apply to the entire parcel.

The court heard oral argument from counsel on October 11, 2013.

II. Conclusions of Law

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

The court finds that genuine issues of material fact exist with respect to the development potential of the subject property. In addition, the record is insufficient for the court to make a determination of the highest and best use for the property or whether distinct components of the property have varying highest and best uses. These factual disputes, however, do not preclude the court from granting summary judgment with respect to the legal question presented by the parties' cross-motion.

With respect to the legal question presented for review the relevant material facts about which no genuine issue exists are: (1) that Block 411, Lot 6 is an approximately 1,200-acre parcel; (2) that Block 411, Lot 6 is listed as single parcel in the tax records of the municipality; (3) that Block 411, Lot 6 during the years in question was given a single assessed value by the tax assessor; (4) that the property owner's commercial activities on Block 411, Lot 6 resulted in environmental contamination of Block 411, Lot 6; (5) that the commercial activities on Block 411, Lot 6 ceased prior to the tax year at issue; (6) that the taxpayer incurred $110,365,000 in expenses and costs associated with the remediation of the environmental contamination on Block 411, Lot 6; and (7) that all of Block 411, Lot 6 was designated by the federal government as a Super Fund NPL site in need of environmental remediation.

Based on these facts the court concludes that under the holding in Inmar Assocs. the court is required to make a determination of the true market value of Block 411, Lot 6 "as if clean" and

to make adjustments to that true market value to account for actual past and estimated future costs of remediation of environmental contamination. The court concludes that no legal authority exists for the proposition that the court limit adjustments for remediation costs to only those portions of a parcel which were directly contaminated and to ignore the impact of environmental contamination on other portions of the parcel.

In Inmar Assocs., supra, the Supreme Court held that environmental contamination on property must be considered when determining true market value for local property tax purposes. As the Court explained, where environmental contamination drives "down the value of commercial property potentially subject to cleanup costs, the effect of those market forces cannot be ignored in the assessment process simply because it would be counter to the environmental policy." 112 N.J. at 606 (footnote omitted). The exact role that contamination costs plays in the assessment valuation process, however, was not established by the Court. "Where exactly environmental cleanup cases fit in such a spectrum was not fully developed" by case law, the Court noted. Id. at 605. Justice O'Hern, writing for a unanimous Court, however, eliminated one approach:

> 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. That would reflect only the cost accounting of the current owners.
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> An owner's expenditures of cost are "never conclusive on the question of value for tax purposes;" Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 455 (Tax Ct. 1980), aff'd, 180 N.J. Super. 366, 3 N.J. Tax 1 (App. Div.) certif. denied, 88 N.J. 495 (1981)(quoting Borough of Haworth v. State Board of Tax Appeals, 132 N.J.L. 306, 308 (1945)); and "[m]ere costliness, therefore, cannot rationally be made the basis of exemption from taxation." CPC Int'l v. Borough of Engelwood Cliffs, 193 N.J.

> Super. 261, 268 (App. Div. 1984)(quoting Turnley v. City of Elizabeth, 76 N.J.L. 42, 44 (Sup. Cit. 1908)).
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> [Id. at 605.]

The Court suggested that in the absence of evidence of market data, contaminated properties might best be treated as special purpose properties "using a measure of flexibility that will aid in the determination of" true value. Ibid. In addition, the Court noted that "the seeds of useful doctrine" were present in the suggestion that "the cost to cure the contaminated property could be treated as a capital improvement, which can be depreciated over the beneficial life of the property." Ibid.

The Court's holding in Inmar Assocs. was applied in Metuchen I, LLC, supra, where the assessment at issue concerned a parcel which was contaminated with pollutants as a result of the operation of a manufacturing facility. The industrial operations had been shut down and the property sold. Id. at 286. The new owner, who had assumed responsibility for all cleanup costs, appealed the assessment on the property, seeking a reduction in the assessed value based on cleanup costs, for which it had secured an estimate. Ibid. The parties stipulated to the value of the property clean and the "only issue for determination [was] how that value should be reduced to take into account the contamination." Ibid.

The court determined that "the appropriate way to deal with the contaminated property in this case is to discount over five years the remaining cleanup costs rather than allowing all of it to be deducted in every year once the cleanup has begun." Id. at 295. The court explained that "[t]o allow continued deductions after the money has been expended ignores the reality that after money is expended the property is worth more." Ibid. The court found that a five-year discount period was appropriate because the evidence in the record, including letters of credit, insurance

and cost estimates, established that the owner contemplated completion of the remediation process over five years.

The court agrees with the proposition that it is possible after trial to determine the true market value "as if clean" of Block 411, Lot 6 by determining the value of distinct portions of the parcel that have distinct highest and best uses. See Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 77 (Tax 1996)(holding that "[b]ecause of the multi-use, multi-building character of the subject property, and because of the unavailability of multi-use, multi-building comparable properties from which to derive relevant data, the appropriate methodology for valuing the property is on a component-by-component basis . . . ."). However, no published precedent in New Jersey stands for the proposition that once an "as if clean" value of Block 411, Lot 6 is determined an adjustment for the costs of environmental remediation can be applied only to those portions of a parcel that were directly contaminated with pollutants.

It is clear from the record that Block 411, Lot 6 is one parcel. In addition, all 1,200 acres of the parcel were designated by the federal government as a Super Fund NPL site. The record plainly demonstrates that Block 411, Lot 6 was extensively contaminated with toxic pollutants, including leaching of the contaminants into the groundwater at the property. The existence of this contamination unquestionably had a negative impact on the true market value of the entire parcel, even though portions of the parcel arguably were not directly contaminated by Ciba's commercial activities. The true market value of "clean" portions of the parcel – areas never polluted and which can be developed separately (should the court find that any such areas exist) – would be affected by the fact that the entire parcel was designated as a Super Fund NPL site and that other portions of the parcel were polluted and under-going governmentally mandated remediation. The cost of that remediation benefits both the actual physical portions of the parcel

from which pollutants are removed and those portions of the parcel which, while free from contamination, are affected by the existence of pollution elsewhere on the parcel. There is, therefore, no truly "clean" portion of a Super Fund NPL site from a market standpoint until the entire parcel has been remediated.

Nothing in the Court's decision in Inmar Assocs. suggests that an adjustment for environmental remediation should be limited to only those portions of real property that are directly polluted. Nor would the rationale of Inmar Assocs. support such an approach. The purpose of making an adjustment for remediation costs is to encourage the cleanup of contaminated property and to have assessments reflect the reality that pollution has an effect on market value. If a property owner receives a benefit from a remediation cost adjustment only for those portions of a parcel that are directly polluted and not for those portions of a parcel which are arguably "clean" without remediation, voluntary cleanups may be discouraged. In addition, and more importantly, adjusting assessed value only on portions of property that are directly polluted does not reflect the fact that inclusion of a parcel on the Super Fund NPL and the existence of extensive pollution on a parcel has an effect on the true market value of the entire parcel, even those portions that arguably could be considered never to have been polluted.

In light of the court's conclusions, the municipality's motion for partial summary judgment is denied and the taxpayer's cross-motion for partial summary judgment is granted. The court will apply the holding in Inmar Assocs. and follow the holding in Metuchen I, LLC as described in this letter opinion. The court will issue an Order effectuating its decision.

Very truly yours,

Patrick DeAlmeida, P.J.T.C.