

## Calculating Worth

### Environmental Law: Even Contaminated Land Invariably Has Some Value

By Gail L. Wurtzler

The question of valuing contaminated land arises in a number of situations. Among them are real estate transactions, bankruptcy or probate proceedings, property tax appeals and litigation. Case law, appraisal and valuation standards and commentators address the issues regarding valuation of contaminated land.

Reviewing these materials, three conclusions are apparent. As a practical matter, land almost new has a zero or negative value. A universal answer responds to the query, "How much is a contaminated parcel worth?" The answer depends on the facts of each situation. And no universal approach answers that query. The approach depends on the circumstances.

#### Value Exists

First, that contaminated land almost always has value is evident in the responses given to property owners who claim that contamination has reduced the value of their land to zero or, including cleanup costs, a negative value. Such claims produce a great deal of skepticism. They are contrary to the common wisdom that land always has some value if only because land is finite. These claims of worthlessness are particularly suspect when contamination does not change the property owner's land use. If some use exists, presumably value must also exist.

The concept of "value-in-use" is reflected in, among other sources, the "Standard on the Valuation of Property Affected by Environmental Contamination," published by the International Association of Assessing Officers. Value-in-use routinely applies in those situations still using contaminated property for its intended purpose.

For example, in *Schmidt v. Utah State Tax Com'n.*, 980 P2d 690 (Utah 1999), the property owner sought a zero valuation for his 2.7-acre parcel and 7,000-square-foot house because part of the property contained mine wastes. The tax commission rejected his argument because his family lived in the house and grew and consumed vegetables from a garden on the property. Moreover, no government agency had required any cleanup or even evaluated the property for contamination or cleanup. The property had substantial value-in-use.

The same concept applies to commercial property. If the property, like the Liberty Tavern in *Boekeloo v. Board of Review of City of Clinton*, 529 N.W.2d 275 (Iowa 1995), continues to be used for its intended purpose and the use is unaffected by the contamination, the property is valued according to its value-in-use.

## Evaluate Each Case

Second, that no universal answer responds to a query regarding contaminated land's value is supported by the wide range of answers to that query. Sometimes value decreases, and sometimes it doesn't. For example, the presence of mine wastes and the designation as a Superfund site had no effect on property values in Aspen, Colo., but the presence of the same type of waste and the designation as a Superfund site had an effect on property values in Midvale, Utah. See Mangone, Nancy A., "The Effect of a Superfund Site Designation on RW" Values - Smuggler Mountain, Aspen, Colorado: A Case Study," 70 Denv. U.L Rev. 511 (1993).

Similarly, the presence of ground-water contamination may or may not affect adversely the prices of homes located over the contaminated aquifer. See, e.g., Mark Dotzour, "Groundwater Contamination and Residential Property Values," *The Appraisal Journal*, July 1997, at 279 (no effect in Wichita, Kansas); Alan Reichert, "Impact of a Toxic Waste Superfund Site on Property Values," *The Appraisal Journal*, October 1997, at 381 (adverse effect in Uniontown, Ohio).

The facts of each situation require independent evaluation to determine whether contamination has adversely affected value and, if so, what the loss in value is. As the New York Court of Appeals noted, "The difficulty in assessing a polluted parcel of property stems from the uniqueness of environmental contamination ... [and each] is as unique as a fingerprint" *Commerce Holding Corp. v. Bd. Of Assessors*, 673 N.E.2d 127,130 (N.Y. 1996). Among the factors requiring consideration are the following:

- The nature of the contamination.
- Whether the level of contamination exceeds government health-based standards.
- Whether provision of alternate water supplies, for example, can prevent exposure.
- Whether any government agency has mandated a cleanup.
- The status of any cleanup efforts.
- Cleanup cost.
- Whether responsible parties have been identified and are able and willing to pay for cleanup.
- Potential liability to third parties.
- Present use of the property.
- Strength of the real-estate market in which the property is located.
- Potential future uses for the property either as contaminated or after remediation.

Given the potential for variation among these factors for different parcels of property, one cannot reliably generalize as to the fact of loss or the amount of any loss.

## Various Appraisal Methods

Third, that no universally applicable approach applies to valuing contaminated land is clear by the variety of methods employed by appraisers, property owners, tax assessors, courts and others. Traditional appraisal methods such as comparable sales, income capitalization and reproduction cost may apply to the valuation of contaminated land, but they are often imperfect fits. See, e.g., *Commerce*

*Holding*, 673 N.E2d at 130.

For these reasons, variations on these traditional methods have developed. One of these variations is using cleanup cost to adjust the uncontaminated values obtained under either the comparable-sales or income-capitalization method and thereby to obtain a value for the contaminated land. However, in this context courts have imposed stringent requirements to verify the reliability of the cleanup costs and the applicability of cleanup costs to a particular property. Typically, cleanup costs are site-specific. See, e.g., *Badische Corp. (BASF) v. Town of Kearny*, 14 N.J. Tax 219, 228 (1994), aff'd in part and rev'd in part, 672 A.2d 186 (N.J. Super.A.D. 1996).

In addition, the existence of such costs must be certain. The presence of contamination alone is insufficient to support a cleanup-cost deduction. Without proof that a cleanup will occur, the costs cannot be deducted from uncontaminated value. See, e.g., *Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701 (Minn. 1997). Proof that cleanup will occur implies a cleanup in progress or a government requirement that one commence. *Id.* Without such proof, many courts will not allow the property owner to adjust the land's uncontaminated value for the claimed cost of cleanup. See, e.g., *Sines & Sons, Inc. v. Shell Oil Co.*, 1998 WL 683938, \*1-2 (Ohio App. Sept. 18, 1998).

Moreover, no single accepted approach exists for using cleanup cost to adjust uncontaminated value. The Uniform Standards of Professional Appraisal Practice state in Advisory Opinion AO-9 that the value of "contaminated real estate may not be measurable by simply deducting the remediation or compliance cost estimate from the estimated value as if unaffected.

Occasionally, courts simply deduct the cost of mm from the uncontaminated value to determine the contaminated land's value. In *Lawrence v. Board of Equalization*, 1999 WL 460043 (Colo. App. July 8, 1999) (petition for cert pending), all of the costs of installing a cistern and ongoing purchases of water were deducted. Other courts refuse to follow such an approach because cleanup cost does not invariably reflect an equivalent change in value. Deduction of the entire amount would reflect only the cost accounting practices of the current owners" *Inmar*, 549 A.2d at 43.

Some of these courts treat cleanup costs like any other repair or maintenance costs which a property owner pays and reduce the income stream generated by the property by an annual expense for cleanup. The income as adjusted then goes to value the property under the income-capitalization method. *In re Custom Distribution Services Inc.*, 216 B.R. 136, 153-54 (Bkrtcy. D.N.J. 1997). Appraisers have also suggested treating cleanup costs as a capital improvement that may be amortized. *Inmar*, 549 A.2d at 46.

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