STATE OF NEW YORK
COUNTY OF MONROE SUPREME COURT

In the Matter of Louis Atkin,

Petitioner,

vs.

The Board of Assessors and the Board of Assessment Review of the Town of Greece, New York,

Respondents.

AMENDED
DECISION AND ORDER

Index Nos.
02/8757
03/8677,04/8407
03/8679,04/8404
03/8678,04/8405

For the reasons stated in my August 17, 2006, decision, which is fully made a part hereof, petitioner successfully rebutted by "substantial evidence" the presumptive validity of the Tax Assessments put in question by the Article 7 petitions. Matter of Niagara Mohawk Power Corp. v. Assessor Town of Geddes, 92 N.Y.2d 192, 196 (1998). Now upon full consideration of the evidence at trial, the court finds that petitioner's expert testimony should be credited.

The important points in respondent's post-trial brief are dealt with at length in the court's Decision and Order, dated August 17, 2006. Briefly they are that the decision by petitioner's appraiser to value the three contiguous parcels as a group was, in these highly unusual circumstances, permissible because the marketability of each separate tax parcel is inextricably tied to the marketability of the others by reason of the contamination in the other physically affected parcels, DEC

supervision of the entire three parcel site as a bloc, expert opinion that alienation of any single one of the three parcels, or any portion thereof, was well nigh impossible given the physical presence of the contamination and the unlikelihood of administrative segregation or severance by DEC. Decision and Order (8-17-06), at 1-6, 14-15. I would only add that the expert opinion on this subject is not rebutted and is supported by the facts established by the evidence admitted at trial.

The decision to value the three parcels as a whole thus derives from my finding that they constitute a single economic unit for purposes of their combined highest and best use, as constrained by DEC's oversight of the three parcels. General Electric v. Town of Salina, 69 N.Y.2d 730 (1986). Valuation of the three parcels as a whole resulted from the proven serious contamination of two of the parcels, the decision of the DEC to subject each parcel to regulatory oversight pursuant to the VCA as a whole unit, and the unrebutted expert opinion that the DEC would not permit alienation of one or the other parcels outside its oversight under the VCA. All three parcels are the subject of the site plan on file at DEC, although the notice of DEC interest in the site on file at the Monroe County Clerk's office only references parcel 2.1.

The only substantial impeachment of this expert opinion came from Dick's acknowledgment that two parcels, the so-called carved

out rectangular and donut hole areas, were sold in the 1970's by petitioner's father. But, as noted id. at 6, these sales well predated DEC's interest in the site by nearly 25 years, and they occurred prior to adoption of CERCLA in 1980. Accordingly, the circumstances of these two prior sales does not substantially impeach the unrebutted expert testimony that, for the purposes of arriving at value "as is" on the respective valuation dates, consideration of the cost of remediation as an adjustment of value in these circumstances permits of but one conclusion, i.e., that each parcel has a negative valuation.

In Commerce Holding, the court sanctioned a valuation methodology which first arrived at a value of the property as if not contaminated, and then subtracting from this figure for each year in question the then present value of the total cost remaining to clean up the property. Respondent concedes that this approach was approved in Commerce Holding, but contends that the court "did not mandate it," and that the court specifically disapproved of the approach "'when the property is capable of productive use, but the high clean-up costs yield a negative property value.'" Respondent's Post-Trial Brief, at 5 (quoting Commerce Holding, 88 N.Y.2d at 729). Yet, respondent fully conceded that, for each of the years in question, "the subject parcels were not used to produce an income stream." Respondent's Post-Trial Brief, at 6. None of the voluminous proposed findings

of fact submitted by respondent addressed any alleged income produced at the three parcels. Instead, respondent asserts that the parcels "were developable, salable and subdividable, and that the DEC might actually encourage development for industrial use." Id. at 6 (emphasis in original). Yet no expert opinion evidence was adduced to support this claim, respondent having failed to submit any proof at all at trial, and I find that respondent's effort to elicit such proof on cross-examination of petitioner's witness was ultimately unsuccessful in establishing developability, saleability, or that the property could generate substantial income.[1] Given the concession that the parcels were not income producing, the reference to Commerce Holding's "disfavor[ing]" of the valuation methodology used in that case, and in this one, when the property in question is income producing, which calls to mind the "value-in-use" methodology approved in Garvey Elevators, Inc. v. Adams County Board of Ed., 621 N.W.2d 518 (Neb. 2001) and Schmidt v. Utah State Tax Comm., 980 P.2d 690 (Utah 1999), does not aid respondent. In Schmidt, the court valued the contaminated land at zero and determined

[1] In particular, respondent attempted to show at trial that the property could be subdivided via town planning board and SEQRA approval, and that other contaminated sites were approved by the town board for subdivision. But none of the evidence concerned sites subject to a VCA or other DEC or EPA administrative oversight mechanisms suggesting a possible listing as a Class 2 contaminated parcel. Trial minutes at 514-21.

value-in-use based upon the value of improvements. Because respondent concedes that the property was not income producing for any of the years in question, see also, Mola Dev. Corp. v. Orange Co. Ass. App. Bd. No. 2, 80 Cal. App. 4th 309, 311 n.1 (Ct. App. 4th Dept. 2000)("a large income stream"), respondent's attempt to invoke the above quoted caveat in Commerce Holding is unavailing in this case.

Contrary to respondent's further argument, the valuation methodology used here and in Commerce Holding accords with standard appraisal techniques. The Appraisal Institute mandates compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), published by the Advisory Standards Board (ASB), which "is the broadest and most far-reaching statement of standards, rules, and guidance for the valuation of real property." Thomas O. Jackson, Appraisal Standards and Contaminated Property Valuation *The Appraisal Journal* (April 2003) at 129. In particular, ASB Advisory Opinion 9 (AO-9) as revised in 2003 provides an accepted formula geared to an "estimate of two values: the unimpaired value and the impaired." Taken together, the formula "derived" from AO-9 provides: "Property Value Diminution = Cost Effects (Remediation and Related Costs) + Use Effects (Effects on Site Usability) + Risk Effects (Environmental Risk/Stigma)." Jackson, supra, *The Appraisal Journal* (April 2003), at 132. In other words,

"Impaired Value = Unimpaired Value - Cost Effects (remediation and related costs) - Use Effects (Effects on Site Usability) - Risk Effects (Environmental Risk/Stigma)." Id. at 132. To the same effect is The Appraisal Institute, Appraising Industrial Properties at 66-70 (2005). See Commerce Holding, 88 N.Y.2d at 732 (approving calculation of premium "amount attributable to stigma").

Petitioner's appraiser only sought to make a deduction from unimpaired value for cost effects. He did not attempt a further deduction for use effects or risk effects. Accordingly, he cannot be faulted for having failed to include in his market or sales comparison comparables contaminated sites that had been sold, or adjustments for the environmental condition of the comparables that were sold. Nor can he be faulted for having failed to adjust for delays in the completion of the VCA schedule, inasmuch as these delays and uncertainty would properly have been reflected in a risk effect premium if one had been calculated and, in any event under Commerce Holding delay in remediation cost outlay would only skew the cost effect estimate upward because it is the remaining cost of cleanup each year that is factored into the annual present value analysis. As well stated by a pre-eminent scholar in the contaminated property valuation field, and the principal author of AO-9,

> In measuring the three potential effects on value (cost, use, and risk), cost effects are derived from remediation costs, which typically are estimated by environmental specialists. Assuming the market recognizes these costs, the appraiser can usually deduct them as a lump sum from the unimpaired value on a similar manner to a capital expenditure for deferred maintenance. . . . Uncertainty regarding cost estimates, projection, and timing would be reflected in the environmental risk premium added to the unimpaired property or equity yield rate (risk effect).

Thomas O. Jackson, Methods and Techniques for Contaminated Property Valuation, *The Appraisal Journal* (October 2003) 300, at 314 (emphasis supplied). This is what AO-9 means when it says that the simple deduction for the cost of remediation may not fully reflect the additional premiums that may be necessary because of additional use effects and risk effects of contamination above the cost effect figure above. Thus, the present value in each year of the cost estimate provided by the environmental specialist may be deducted in a lump sum to arrive at the cost effects of contamination without regard to the more sophisticated methods of determining use and environmental risk premiums using "paired sales analysis," "relative comparison analysis," "case studies" (where there are no paired or relative sales in the same market area as the subject property), and "multiple regression analysis." Id. at 314-18. Because petitioner's appraiser did not attempt to deduct a premium for

either use effects or risk effects, he cannot be faulted for not utilizing these "more sophisticated and less direct techniques" which would be relevant only to the determination of those premiums.[2]

The costs associated with remediating the property, as identified by Dick, were stated in his professional opinion to be necessary to achieve regulatory compliance, and thus are costs "recognized by the market" as set forth in AO-9 (Line 173). See Jackson, supra *The Appraisal Journal* (April 2003) at 133 (recognizing that "costs for remediation beyond regulatory requirements would not be recognized by typical market participants"); The Appraisal Institute, Appraising Industrial Properties, at 75. Accordingly, Loson's insistence that the professional standards for appraisers permit reliance on a qualified contamination remediation cost expert is fully supported by the standards quoted above. I find that his approach, which only purported to address the cost effect without adding any premium for use or environmental risk effects, is fully consonant with AO-9 and the standards otherwise applicable to his report.

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[2] Petitioner's appraiser did refer in his report to a case study (at pp. 101-02), but only to provide precedent for his "concept of negative value."

Respondent also objects to the cost estimates on the ground that (1) the property is not subject to an administrative or court order requiring cleanup, (2) there is no assurance that, if petitioner abandoned the VCA the DEC would list the site, and (3) the Corporation which signed on to the VCA is not petitioner himself. It is not inappropriate for an appraiser to consider such "institutional controls" as might be devised by USEPA or state regulatory agencies such as the DEC in forming an opinion on value, including "environmental agency-issued . . . agreements concerning cleanup[,] . . . [i.e.,] agreements entered into by or between an environmental agency and a property owner." Thomas O. Jackson & J. Michael Sowinster, Institutional Controls and Contaminated Property Valuation, *The Appraisal Journal* (Fall 2006) 328, at 329. For this, and other reasons discussed in the court's August 17, 2006, Decision and Order (at pp. 13-14)(except that the citation to Commerce Holding on p. 14 should read: 88 N.Y.2d at 732-33), the fact that no court or administrative order exists is not determinative under Commerce Holding's multi factor analysis, especially in view of its citation of an Appellate Division decision in which no regulatory or court order was present (see id.), the existence of the VCA, the unrebutted expert opinion based on close examination of the DEC file that, if petitioner had not executed the VCA, DEC would almost certainly have listed the three parcels now covered by the VCA as

a Category or Class 2 contaminated site posing a "significant threat" to public health requiring remedial action, and his similar expert opinion that, if petitioner or any potential buyer attempted premature exit from the VCA, a similar listing would almost certainly occur (albeit it would not be mandated).

Nor does respondent succeed in impugning petitioner for signing the VCA on behalf of his Corporation instead of individually. No effort was made by petitioner to show that, under the current DEC regulations pertaining to the VCA, the Corporation was not a proper party to the clean-up agreement, nor did respondent even colorably suggest that, in the event the Corporation defaults under the VCA, the DEC would ultimately look to petitioner himself as the owner of the land for satisfaction under plainly applicable law. Petitioner's expert opined as much, and I credit his testimony on the subject.

Neither does respondent succeed in casting doubt on petitioner's experts on the ground that, conceivably, petitioner might obtain contribution/indemnification from third parties for clean-up costs. This argument was authoritatively dispatched in Mola Dev. Corp. v. Orange County Ass. App. Bd. No. 2, 80 Cal. App. 4th at 324-27, which fully accords with the economic realities of the situation and which, I find, is consistent with comparable aspects of New York Law. "The idea that prudent buyers might be willing to lessen the discount that they would

demand on sale of the property in light of the fact that parties other than the seller might also have to contribute to clean-up costs simply does not accord with market reality, because of one unassailable fact: from the hypothetical buyer's point of view, the peculiar circumstances of the seller, such as its ability to recoup costs for which it is already liable, is irrelevant." Id. 80 Cal. App. 4th at 325 (emphasis in original).

So too has the Mola Dev. Corp. case authoritively rejected the public policy rationale which animates much of respondent's discussion both in pre-trial, trial and the post-trial submissions. Id. 80 Cal. App.4th at 316-17; Commerce Holding, supra.

Accordingly, the court is quite comfortable in adopting petitioner's proposed findings of fact, which are hereafter set forth in full. The foregoing portion of this decision has dealt with respondent's proposed findings, conclusions of law and its post-trial brief. For whatever reason, respondent chose not to obtain expert proof on the contamination issue and failed to introduce any appraisal testimony at trial. The respondent in Commerce Holding (88 N.Y.2d at 728) did. For the reasons stated above, respondent's concerted effort to attack petitioner's proof has been found to be without merit. The balance of this decision deals with petitioner's proposed findings, which are adopted as follows:

FINDINGS OF FACT

4777 Dewey Avenue is located in the Town of Greece, New York. (Ex. 13, p.5). At all times pertinent, 4777 Dewey Avenue has consisted of three tax account parcels, 046.01-1-2.1 (hereinafter "parcel 2.1"), 046.01-1-2.2 (hereinafter "parcel 2.2") and 046.01-1-3 (hereinafter "parcel 3"). (Ex. 13, p. 4, 47-48). All buildings at 4777 Dewey Avenue are located on 2.1. (Trial Transcript, hereinafter "Tr.," p. 349). In tax year 2002, the Town of Greece Assessor assessed 2.1 at $835,000. In tax year 2003, the Town of Greece Assessor assessed the parcels as follows:

Parcel 2.1	$ 835,000
Parcel 2.2	$ 22,000
Parcel 3	$ 425,500

In tax year 2004, the Town of Greece Assessor assessed the respective parcels as follows:

Parcel 2.1	$ 835,000
Parcel 2.2	$ 22,000
Parcel 3	$ 425,500

In tax year 2005, the Town of Greece Assessor assessed the respective parcels as follows:

Parcel 2.1	$ 500,000
Parcel 2.2	$ 22,000
Parcel 3	$ 425,500

Petitioner timely and properly protested the assessments set forth above in paragraphs 5 through 8 by filing grievances with the Town of Greece Board of Assessment Review. (Tr., p. 464). After being denied the relief requested in such grievances, Petitioner timely and properly commenced actions under article 7 of the Real Property Tax Law seeking review of such assessments.

Between two extensions of parcel 2.1 fronting on Dewey Avenue is a parcel formerly used by Flower City Printing and titled to a different taxpayer (hereinafter "the carve out frontage"). (Id., Tr., p. 85, Ex. 3, p. 5 of 31). Petitioner's father conveyed the carve out frontage to a different owner in the late 1970s, before adoption of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. (Tr., p. 459). Immediately to the west of the carve out frontage is a small, landlocked parcel formerly used by Flower City Printing and titled to a different owner (hereinafter "the donut hole"). (Tr., p. 459). Petitioner's father conveyed the donut hole to a purchaser in the late 1970s, before adoption of CERCLA in 1980. (Id.). Petitioner's father's conveyances of the carve out frontage and the donut hole occurred at about the time the federal government adopted the Resource

Conservation and Recovery Act of 1976 (hereinafter "RCRA"), 42 U.S.C. Chapter 82. (Id.).

4777 Dewey Avenue was used for the manufacture of ocean-going ships and cranes during and immediately after the Second World War, and for the manufacture of B-52 aircraft parts and Talos ground handling equipment during the 1950s (Ex. 3, p. 1 of 31). During this interval, the United States Department of Defense either owned or leased facilities situated on approximately 44 acres of land located at 4777 Dewey Avenue. (Id.). The property is known locally as the former Odenbach Shipyard and former Air Force Plant 51. (Ex. 13, p. 5). On September 24, 1959, the site was declared excess to the needs of the U.S. Air Force, and care and custody of the site was transferred to the General Services Administration. (Ex. 3, p. 1 of 31). The US Army Corps of Engineers (hereinafter "USACE") conducted a site visit to 4777 Dewey Avenue in 1991 to determine whether the property was eligible for the Defense Environmental Restoration Program – Formerly Used Defense Sites due to the potential for contamination remaining when the Air Force left the property in 1959. The Air Force determined that the site was eligible. (Ex. 3, p. 3 of 31).

Shortly thereafter, 4800 Dewey Avenue Enterprise retained Day Engineering, P.C. ("Day") to perform services

including: review of site records and historical information, review of aerial photographs, site inspection, and review of available Freedom of Information Act information obtained from the United States Department of Defense. (Ex. 3, pp. 12-13 of 31). Based on the information that Day reviewed from its investigation, it prepared a Preliminary Scope of Work report which recommended that USACE's investigation incorporate 15 tasks listed for further evaluation (Ex. 3, page 13 of 31). Day shared its findings concerning 4777 Dewey Avenue with the New York State Department of Environmental Conservation ("DEC") in November 2000. (Id.)

Among the information reflected in the Day report shared with DEC were significantly elevated concentrations of trichloroethene (TCE) and cis, 1-2 dichloroethene (DCE), metal concentrations significantly exceeding Lowest Level Effect, Severe Effect Level criteria by as much as four orders of magnitude, surface water concentrations of identified organic and inorganic contaminants exceeding drinking water and wildlife protection criteria, in some cases by several orders of magnitude. (Id. at pages 14-15 of 31). Such contaminants appeared in various locations from around the buildings on parcel 2.1, along disposal routes leading from the buildings to Round Pond, and in

sediments in Round Pond, and specifically encompassing sites on parcel 3. (Id.).

Following its review of the array of information gathered and collated by USACE and Day, DEC sought to induce Petitioner to undertake detailed investigation of its property and of Round Pond, and to take such remedial measures, on an interim or permanent basis, as information might warrant. (Tr., pp. 67-70). DEC wrote to the Petitioner's attorney on November 13, 2000 confirming its receipt of environmental data from Day and announcing its tentative determination that the property would qualify for listing on the New York State Registry of Inactive Hazardous Waste Disposal Sites under Environmental Conservation Law §27-2305 (hereinafter "the Registry") as a Class 2 Site. (Ex. 15). The November 13, 2000 letter announced DEC's willingness to permit Petitioner to execute an agreement under DEC's Voluntary Cleanup Program and advised Petitioner that it had 15 days within which to file an application and an additional 30 days within which to execute a formal agreement. (Ex. 15). Under ordinary DEC operating procedure at the time, failure of the Petitioner to enter into the Voluntary Cleanup Program would have resulted in listing of the site on the Registry. (Tr., p. 72). Based on the information then available concerning contaminants

known to be present, DEC would have listed this site as a Class 2 site. (Ex. 15). Under New York law, a site listed on the Registry as a Class 2 site by definition poses a significant threat to the public health or environment with remedial action required. Environmental Conservation Law §27-1305(2)(b)(1). Under then existing DEC procedure, a person could avoid listing of a site on the Registry by entering into a voluntary cleanup agreement under the DEC's Voluntary Cleanup Program. (Tr., p. 72).

Petitioner took the opportunity to avoid listing of 4777 Dewey Avenue on the Registry by entering into a Voluntary Cleanup Agreement (hereinafter the "VCA") dated April 10, 2001. (Exs. 1-2). In connection with the entry into the VCA, and in accordance with standard DEC procedure, Petitioner, through its environmental consultants, negotiated a plan to address contaminants located at 4777 Dewey Avenue. (Tr., pp. 71-73, Ex. 2). That work plan was under negotiation prior to the signing of the VCA (Tr., pp. 75-78), and the general nature of the constituent parts of the Work Plan was understood before the end of calendar 2001. (Tr., pp. 82-83). The Work Plan ultimately agreed to by DEC and the Petitioner calls for phased investigation and necessary Interim Remedial Measures over a term of many years ending in 2015. (Ex. 3, p. 23, App. C).

Petitioner has conducted investigation and interim remediation measures over the interval from 2002 through 2004 (and beyond). (Tr., pp. 104-105, Ex. 3, p. 1 of 11). DEC's Region 8 office in Avon has voluminous file materials regarding the property at 4777 Dewey Avenue and the circumstances of that property. (Tr., pp. 68-69).

All three parcels constituting 4777 Dewey Avenue are zoned industrial and are currently committed to use as an industrial property. (Ex. 13, p. 45). For a number of years, since the 1990s, transactions involving industrial properties have involved review of potential environmental issues regarding such properties. (Ex. 13, pp. 96-97). Such environmental due diligence is conducted both by prospective purchasers and prospective lenders (Id.). Environmental due diligence in the acquisition and financing of real property is driven by owners' and potential purchasers'/financiers' concerns of liability, under federal and state law, for environmentally contaminated property. (Tr., pp. 75-82). Typical transactional due diligence of an industrial property involves review of records maintained at the DEC office having jurisdiction of the property. (Id. at pp. 81-82). Such due diligence also can involve inquiry with the property owner. (Id. at pp. 81-83). Such due diligence can involve sampling and laboratory analysis.

(Id.). Transactional due diligence on 4777 Dewey Avenue from the end of 2001 through 2004 would have brought to the attention of any environmental consultant the materials maintained in the DEC Region 8 offices. (Id. at pp. 84-86). These materials would have included, among other items, copies of communications between DEC and the USACE concerning the property, including the severe contamination on and emanating from it (id. at pp. 67-70); that the USACE undertook certain studies involving wildlife in Round Pond and remedial measures at the plating lagoon, which studies and measures were not part of the projected costs and expenses an environmental consultant would have generated over the interval from late 2001 through 2004, (id.); that the DEC was dissatisfied with the work performed by USACE at the plating pond and has insisted that the Petitioner, as owner of the property, undertake additional corrective work (id., at pp. 78-83); that USACE has advised the Petitioner that it has no funds to undertake additional work at 4777 Dewey Avenue and that it does not foresee having funds for any additional activity for the foreseeable future (id., at pp. 104-107); that investigative and remedial measures on Petitioner's property have totaled approximately $1,179,678 from the beginning of 2002 through June, 2006 (Ex. 13, p. 98, Sched. 13); that these expenses were paid by AIG

Insurance, which has not commenced a subrogation or any other kind of action against the federal government to recover its costs (Tr., pp. 470-471); that any environmental consultant performing environmental due diligence on 4777 Dewey Avenue over the interval from late 2001 through 2004 would have known that DEC had secured the VCA from the Petitioner (Ex. 2, pp. 68-70); that an environmental consultant performing environmental due diligence on 4777 Dewey Avenue over the interval from 2002 through 2004 would realize from the nature of the file materials contained at Region 8 that DEC views all three parcels as subject to the VCA and not just parcel 2.1 (Tr., pp. 85-86, 175, Ex. 2); that any environmental consultant performing environmental due diligence on 4777 Dewey Avenue over the interval from 2002 through 2004 would conclude that failure of the Petitioner to proceed with the VCA would result in the property being listed on the Registry (Tr., p. 72); that any environmental consultant would conclude from the materials maintained at Region 8 and from the letter of November 13, 2000 that in the event that work under the VCA stopped, DEC ultimately would list all three parcels on the Registry. (Id. at pp. 72, 85-86, 175); that anticipated costs of investigation and remediation were and are unknown and unknowable because the location of contaminants in the

ground makes it impossible to foretell exactly what investigation will be necessary and exactly the scope of remediation (id. at pp. 188-192); that any environmental consultant performing due diligence of 4777 Dewey Avenue over the interval from late 2001 through 2004 could, and in the ordinary course of advising a client would, generate a rough estimate of anticipated investigatory costs from the Work Plan to which DEC and the Petitioner had agreed and costs of remediation of those contaminants revealed by prior testing. (Id.).

Over the interval from the end of 2001 through 2004, conservative estimation by an environmental consultant of the anticipated costs of required investigation and known need to remediate at 4777 Dewey Avenue, without factoring into such estimate any future increases in costs due to inflation, would generate anticipated costs of $3.39 million and $3.54 million, including a 25% factor for contingencies associated with the fact that additional investigation might well reveal additional contamination or that the extent of documented contamination is more extensive than initially thought (id.); that suc consultant reviewing the materials at DEC's Region 8 offices over the interval from mid 2002 through 2004 would have found attached to the Work Plan the Master Schedule to which the DEC and the Petitioner agreed

(id. at pp. 104-109; Ex. 5); that such consultant reviewing the status of 4777 Dewey Avenue at DEC's Region 8 offices in late 2001 would have found the Work Plan under discussion and review and would have been able to gather an approximate idea of the anticipated actions as of the end of 2001 (Tr., pp. 110-126).

Much of the work anticipated by the Master Schedule was deferred as a result of the need for both interim remedial measures (measures that addressed contaminants found on the property in the course of additional investigation), and as a result of the conduct of investigation not initially contemplated (id. at pp. 179-192). Much of the environmental investigation and interim remedial measures required at 4777 Dewey Avenue over the interval from 2002 through 2006 was recognized as necessary well before it actually was taken, and costs associated with it were incurred, (id. at pp. 104-128). During calendar years 2002 through 2004, expenses of the investigation conducted and interim remedial measures taken at 4777 Dewey Avenue were Seven Hundred Seventeen Thousand, Five Hundred-Fourteen Dollars ($717,514) (Ex. 13, p. 98, Sched. 13). Substantial portions of such efforts during that interval would have constituted expenses under the "contingency" designation in an estimate of future expenses generated by an environmental

consultant based on information available in the beginning of calendar 2002 (Tr., pp. 188-192).

Property expenses for investigation and remediation known to be required at 4777 Dewey Avenue and known cash outlays for "contingency" items, conservatively estimated, reflect environmental costs for the property of approximately Three Million, Four Hundred Thousand Dollars ($3,400,000) (id. at pp. 188-191, Ex. 7). The present value of these costs on a discounted cash flow basis, is approximately Two Million, Eighty-Thousand, Six Hundred Eighty-Nine Dollars ($2,080,689) (Ex. 13, p. 98, Sched. 13).

Although Petitioner secured a policy of environmental insurance, such policy indemnifies the Petitioner for expenses incurred and would not indemnify a purchaser of the property (Tr., pp. 457-458). An environmental consultant from late 2001 through 2004 would have advised a prospective purchaser that acquisition of all or any portion of parcels 2.1, 2.2 and 3 without an agreement from DEC limiting liability for environmental contingencies affecting the property would potentially expose the purchaser to the expense of investigation and remediation and that in the event that the DEC were required to undertake the necessary investigation and remediation, it would place a lien on the

property in order to recover associated costs (id. at pp. 175, 201. *See generally,* Tr., pp. 162-192).

CONCLUSIONS OF LAW

The value of the three parcels "as clean" in their current configuration and assuming their current use for each of the tax years in question was as follows:

2002	$1,250,000
2003	$1,250,000
2004	$1,250,000
2005	$1,250,000.

Ex. 13, pp. 91-93.

Petitioner's proof - including the only environmental expert in this case, Haley & Aldrich Senior Associate/Vice President Vincent B. Dick - establishes that environmental contamination of the property significantly diminishes its marketability.

Contamination must be considered in valuing real property. Commerce Holding Corp. v. Bd. of Assessors, 88 N.Y.2d 724, 727, 649 N.Y.S.2d 932, 933 (1996). A prospective purchaser of all or any portion of 4777 Dewey Avenue would take into consideration anticipated costs of environmental investigation and remediation to which such purchaser would become exposed by virtue of acquiring all or a portion of this property. In considering whether to make an offer for all or any portion of the property, a

prospective purchaser would have considered the entire value of the property and the discounted present cash value of expected environmental costs and other liabilities.

Respondents contend, through their counsel's cross-examination of Mr. Dick, that there are no areas of concern ("AOC") on parcel 2.2, and that this parcel could thus be sold separately, allegedly without significant diminution in value for environmental contamination (Tr., pp. 233-234). This argument is unavailing for several reasons. First, the only proof on the unified nature of the three subject parcels came from Petitioner's expert witnesses. For example, Mr. Dick testified that his observation of the site revealed "no clear boundaries that indicated an operation on one property was distinguished from use of another parcel." (Tr., p. 85). Even more important is Mr. Dick's uncontested expert opinion that the DEC considers the parcels to be part of the same, unified whole, as evidenced by the VCA (Tr., p. 175). According to Dick, based on the information actually available from late 2001 through the end of 2004, a prospective purchaser (assuming that one existed) could not have negotiated with DEC to take title to any portion of 4777 Dewey Avenue with a release from further liability as to the other parcels. Indeed, the fact that AIG - a sophisticated insurance company - has not pursued the

federal government to recover AIG's substantial expenditures, indicates that any such action would be unavailing.

Even assuming, *arguendo* that the parcels were separable, Mr. Dick's total environmental cost estimates remain uncontested, and confirm that the value of the parcels at issue does not exceed zero (Tr., pp. 188-191, Ex. 7. *See also* Ex. 13, pp. 96-102). The fair market value of the property at 4777 Dewey Avenue over the interval from late 2001 through 2004 at no time exceeded $0, and in fact had a substantial negative value through that interval (id.). The market value of the individual parcels constituting 4777 Dewey Avenue over the interval from late 2001 through 2004 never exceeded $0 (id.). To the extent that the Respondents assessed any of the parcels in the tax years in question for more than $0, such assessments are unlawful as excessive.

Petitioner therefore is entitled to an Order:

> setting aside such assessments;
>
> fixing the assessments at Zero Dollars ($0.00) for each of the subject years, and for three additional years, prospectively, in accordance with RPTL §727; and directing the Respondents to refund to the Petitioner the following principal

amounts of real property taxes paid by the Petitioner, together with interest, since the dates on which Petitioner paid such amounts, including the following:

Tax	Principal Amount Paid
2002 School Tax	$18,415.75
2003 Town/County Tax	$23,080.61
2003 School Tax	$28,875.93
2004 Town/County Tax	$26,071.85
2004 School Tax	$29,947.95
2005 Town/County Tax	$28,641.50
2005 School Tax	$23,355.93.

Ex. 13, p. 47.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 21, 2007
Rochester, New York