11 Kelley and 42 Old County Road Properties, LLC

v.

Town of Plaistow

Docket Nos.: #24974-09PT/25545-10PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" assessments of:

- 2009 - Map 31/Lot 40 ("Parcel II," 42 Old Country Road) - $311,420 (land $216,320; building $95,100), a residence on 17.50 acres and Map 31/Lot 47 ("Parcel I," 11 Kelley Road) - $587,400 (land $440,100; building $147,300), a commercial building on 21 acres; and
- 2010 - Parcel II - $175,940 (land only as residence was demolished) and Parcel I - $587,400 (land $440,100; building $147,300),

collectively, the "Property." For the reasons stated below, the appeals for abatement are granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessments were higher than the general level of assessment in the municipality. Id. The Taxpayer carried this burden.

The Taxpayer's representative argued the assessments were excessive because:

(1) the Property is severely contaminated and is listed as a federal "Superfund" site resulting from the former Beede Oil operation that ceased operating on the Property in 1994;

(2) the contamination includes extensive surface and groundwater contamination and any reuse of the Property is not possible until remediation efforts are complete, which will not likely happen until at least 2035 (see Taxpayer Exhibit No. 3) and at an expense estimated at roughly $50,000,000;

(3) although the Property consists of two parcels, reuse of either parcel is not possible as the remediation plan requires access to both parcels and development of an on-site ground water treatment system (see Taxpayer Exhibit No. 2);

(4) an appraisal report prepared by Joseph G. Fremeau of Fremeau Appraisal, Inc. (Taxpayer Exhibit No. 5, the "Fremeau Appraisal") utilized proper appraisal methodology and estimated the market value of the Property as if it were not environmentally contaminated ($810,000), then deducted the "cost to cure" ($50,000,000), and arrived at a market value estimate of $0;

(5) the remediation of the Property is currently being paid for by "performing responsible parties" ("PRPs") under a consent decree, but the Property is not marketable as any potential buyer could be liable under CERCLA[1] for those costs if the PRPs do not continue to perform; and

(6) the property taxes have not been paid in over 20 years, and the fact the Town has not taken title to the Property for the multiple years of unpaid tax liens is additional evidence the Town recognizes the potential liability any future owner of the Property may face.

[1] The Comprehensive Environmental Response, Compensation and Liability Act of 1980.

The Town argued the assessments were proper because:

(1) a map prepared by the Environmental Protection Agency ("EPA") indicated that Parcel I may be available for reuse as early as 2017 and Parcel II will be available in 2032 (see "Town of Plaistow's Hearing Memorandum," Tab B);

(2) the PRPs consist of several large, credit worthy corporations who are legally obligated to pay for the remediation and any future purchaser of the Property could be indemnified against all liability associated with the "CERCLA issues" in a purchase and sales agreement;

(3) plans to bring municipal water to the Property and surrounding residential properties are in place which removes some of the "stigma" associated with the Property and enhances its market value;

(4) a "Report/Analysis" prepared by Wil Corcoran of Corcoran Consulting Associates provides several examples of environmentally contaminated properties that sold and were redeveloped, which is evidence the Property has some market value (Municipality Exhibit E, the "Corcoran Report");

(5) the Property has some value as it will be available for reuse and the Taxpayer has not proven the Property is not marketable as it has made no attempt to sell it; and

(6) the issues in this case are similar to Appeal of Great Lakes Container Corporation,126 NH 167 (1985), the market value of the Property is more than the $0 estimated in the Fremeau Appraisal and the appeal should be denied.

The parties agree the level of assessment in the Town was 91.4% in 2009 and 93.0% in 2010, the median ratios as determined by the department of revenue administration.

Background:

The following facts are generally not disputed by the parties. The Property consists of two parcels totaling approximately 40-acres located in the Town's Medium Density Residential zone. For many years, "Beede Waste Oil Company" operated a waste-oil recycling business at the site. In the mid-1990s, the Beede operation ceased and investigation of the physical condition of the Property began (as evidenced by the extensive environmental testing and investigations detailed in the January, 2004 Record of Decision ("ROD"), Taxpayer Exhibit No. 3, pp. 25-32). The "30% Preliminary Design Report" dated December 23, 2010 details the condition of the Property and the approved remediation plan. (See Taxpayer Exhibit No. 4.)

Leaks and spills from a 140,000 gallon underground storage tank, approximately 100 above ground storage tanks (with a combined capacity of approximately 2 million gallons), 800 drums (totaling approximately 40,000 gallons) and an unlined, 1-acre "lagoon" are several of the primary sources of the extensive environmental contamination on the Property. Additionally, the Property was contaminated by a solid waste landfill (roughly 1-acre in size) and 12 "large volume soil piles." (See Taxpayer Exhibit No. 3, p. 20.) The contaminants have leached into the groundwater and the plume of groundwater contamination affects the Property, Kelly Brook to the north and a residential neighborhood to the south. The clean-up plan involves, but may not be limited to:

- construction of a road from Main Street to the Property, which will be utilized to remove approximately 85,000 cubic yards of contaminated soils from Parcel I, then trucking in "clean" soils to replace removed fill (estimated to be completed in 2017);
- treatment of remaining soils to extract vapors, which may include a thermal enhanced remediation system;

- construction of an industrial building on Parcel II to house the mechanical portion of an on-site water treatment system (which will need to operate for a minimum of 20 years after the soil extraction operation is completed, estimated to be in 2017); and
- installation of seven extraction wells included in the water treatment system on Parcel II (possibly an 8th on Parcel I), five vertical injection wells on Parcel II, a 40,000 square foot rapid infiltration basin ("RIBs") on Parcel II (with the potential necessity to construction several other RIBs on Parcel I), and monitoring wells (exact number and location of which have not been determined).

The full extent and scope of the water treatment system was not known as of the effective dates of the assessments under appeal and will not be known until it begins operating and its effectiveness can be monitored and evaluated. The Property will be impacted permanently by "institutional controls," including no drilling of wells within a "groundwater management zone" (which has not yet been defined) and permanent restriction limiting excavation to a maximum depth of 10'.

Board's Rulings:

Based on the evidence presented, the board finds the Taxpayer met its burden of proving the Property was disproportionally assessed and the appeal is therefore granted. For the reasons discussed below, the board finds the proportional assessments for Parcel I and Parcel II to be $100 each in tax years 2009 and 2010.

As the parties well recognize, assessments must be based on market value. See RSA 75:1; and, e.g., Porter v. Town of Sanbornton, 150 N.H. 363, 368 (2003). In arriving at a proportional assessment, all relevant factors affecting market value must be considered. Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975). One of the "relevant factors" to be considered is

environmental contamination, which "can range from mild, requiring minimal cleanup costs and having little, if any, effect on value, to severe, with virtually no use of the property possible for the present or the foreseeable future and with prohibitive costs to correct the problem. The degree to which contamination affects the present and future utility of the property must be established."[2]

In making market value findings, the board applies its "experience, technical competence and specialized knowledge" to the evidence presented. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"). Further, in making findings where there is conflicting evidence, "judgment is the touchstone." See Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras, 115 N.H. at 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

The board has consistently held the effects of contamination on market value must be considered. "[T]he assessment of contaminated property should first consider the value "unencumbered" (without contamination) and then consider the costs of remediation because "some adjustment to value is likely and should be considered." (PAK 2000, Inc. v. Town of Tuftonboro, BTLA Docket No.: 21791-05PT, October 17, 2008.) "It is a generally recognized appraisal practice in estimating the value of environmentally-impacted properties (contaminated properties) to begin with the value of the property as if not contaminated and then discount that value for the effect of the contamination. To calculate the impaired value, one begins with the

[2] International Association of Assessing Officials ("IAAO"), Standard of the Valuation of Properties Affected by Environmental Contamination, Section 4 (2001).

unimpaired value and deducts the cost to remediate the site and the impact of stigma. The same phenomenon is witnessed in the analysis of a sale of **contaminated** property. The property sells to a knowledgeable buyer at an impaired price. This price generally consists of two elements: first, the buyer's estimate of the [sic] cost to remediate; second, a discount due to uncertainty (stigma). Totaling the two yields the unimpaired value." (See Carnevale v. Sutton, BTLA Docket No. 18265-99PT, May 14, 2002.)[3]

The Taxpayer presented the Fremeau Appraisal as evidence of market value, which concludes with an opinion the market value of the Property, as of both dates of assessment, was $0. Mr. Fremeau arrived at this opinion by first valuing the Property as if it were not impacted by the environmental contamination. He completed a highest and best use analysis and concluded the Property's "uncontaminated" highest and best use was for "some form of residential development, possibly a conventional subdivision or, more likely, a Planned Residential Development." (Fremeau Appraisal, p. 25.) Mr. Fremeau then completed a sales comparison approach and arrived at a value estimate of $810,000, based on the sales of six parcels purchased for residential development.

To estimate the "as is" market value of the Property, Mr. Fremeau deducted the $50 million "Cost to Cure Contamination" from his "uncontaminated" market value opinion of $810,000, and arrived at a market value conclusion of $0. (See Fremeau Appraisal, pp. 30-37.)

For its part, the Town did not present an appraisal or other market value estimate to support the assessments under appeal. Instead, it submitted the Corcoran Report which provided several examples of previously contaminated properties that have sold and have been put to

[3] See also Dana L.Haselton v. Town of Derry, BTLA Docket No. 14962-93PT (December 20, 1996); A & C Realty Trust v. Town of Londonderry, BTLA Docket No.. 15753-94PT (March 18, 1997); and Collins & Aikman Company v. Town of Farmington, BTLA Docket No. 22331-05PT (September 9, 2008).

reuse. Mr. Corcoran prepared a highest and best use analysis and determined the highest and best use of Parcel I "is for the development of duplex housing once baseline plans for remediation have been accomplished, projected for reuse in 2017, to a maximum of 17 to 19 units." Mr. Corcoran also determined Parcel II "could be used in a similar manner, perhaps incorporating recreational uses. However, given that the property is not likely to be available for reuse until 2035, the ultimate use would be highly speculative to determine at this point in time. Accordingly, it is the appraisers' opinion that for the foreseeable future, and for valuation purposes, this land is best considered 'residual land', or, 'backland' with unknown potential." (Corcoran Report, p. 17.)

Mr. Corcoran presented summary information regarding three properties that were impacted by some degree of contamination, but were remediated, resold and reused. These sales included property in Londonderry that was eventually redeveloped with a mix of residential and retail uses, a property in Gilford that was "cleaned, monitored and redeveloped at an estimated total cost of $1.7 million" and then redeveloped with a hotel, a bank and an office building, and an improved property in Newmarket that was cleaned up "at an estimated cost of $450,000" and converted to residential townhouses. Mr. Corcoran did not complete a sales comparison approach and did not arrive at a market value estimate for the Property; however, he concluded "based upon all credible evidence available… the subject properties do have potential development, with a defined timeline for remediation and reuse… and thus the properties do, in fact, have market value." (See Corcoran Report, pp. 22-27.)

The board finds the Fremeau Appraisal to be the best evidence of market value for the Property. The methodology utilized by Mr. Fremeau by first estimating the "uncontaminated" market value of the Property, then deducting a "cost to cure" was appropriate, well developed

and involved the same reasoning any potential buyer of the Property would utilize. The board concurs with Mr. Fremeau's determination the Property "would not likely be marketable… even if the PRP's indemnified the buyer… due to the liability a buyer might incur if the PRP's fail, the length of time until the site could be used, the lack of anything remarkable about the property and number of alternative properties available for residential development." (Fremeau Appraisal, p. 37.)

In this case, the estimated remediation costs for the Property ranged from $50,000,000 to $60,000,000. While the PRPs include several large, financially sound corporations, any buyer would consider the risk, even if it is a slight one, the PRPs will not continue to perform or may become insolvent at some time during the lengthy remediation period. Due to the magnitude of the remediation costs, however, even a slight risk of having to assume those costs results in a significant monetary risk. For example, if a potential buyer were to consider the PRPs were 95% likely to continue to perform under the consent decree, that potential buyer could still have a perceived exposure of $2,500,000 to $3,000,000 in risk. Weighing that level of risk for the Property against a market value estimate of $810,000 after remediation, the board concludes the Property was not marketable as of the 2009 and 2010 dates of assessment.

Additionally, the board finds it improbable any financial institution would provide financing utilizing the Property as collateral as of the 2009 and 2010 dates of assessment and the lack of financing ability has a direct impact on the Property's marketability. "Despite the Superfund legislation and the EPA's pronouncements that innocent owners of contaminated properties may not be held liable for clean-up costs, environmental problems can have a substantial impact on the use of property as collateral. Lenders express concern about both the diminution in the value of a property as collateral and also the possibility of repossessing a

property subject to the costs of an environmental clean-up. With the loss in the value of the property as collateral, the marketability of the property is also jeopardized."[4]

In the cover letter to the Corcoran Report, Mr. Corcoran states "[w]hat is known is that roughly 17.5 to 19 acres of land of (sic) Kelley Road will be ready for development in 2017, and that the balance of 21 acres of land on Old County Road will be ready for development in 2035. Also, the entities responsible for cleaning the site have been identified, and these parties are required to pay the cost for such cleanup. Thus, prospective purchasers need only wait and plan in anticipation of the eventual reuse of the site." The board disagrees because this statement a dramatic oversimplification of the facts presented for several reasons.

First, Mr. Corcoran relies on a map created by the EPA, a portion of the Property will be available for development in 2017, and the remainder in 2035, as if these dates are a certainty. In fact, the map itself includes several disclaimers that contradict Mr. Corcoran's statement including, "[e]stimated dates may change depending on progress of cleanup." Peter E. Nangeroni, Senior Project Manager with Woodward & Curran, testified those dates are a "best case scenario" and, until the remediation work has begun and the effectiveness of the treatment systems being utilized can be evaluated, no one can predict with any certainty when, or even if, the Property will be available for reuse. Mr. Nangeroni testified, for example, the planned ground water extraction and treatment systems will need to run for a minimum of 15 to 20 years after the soil extraction process is completed (currently estimated for 2017), and he "hopes it (Parcel II) will be available for reuse in my lifetime." Additionally, the number of and exact locations of rapid infiltration basins ("RIBs") and extraction wells will not be known until the

[4] The Appraisal Institute, The Appraisal of Real Estate 11th ed., p. 203 (1996)

water treatment system is installed, operational and can be tested to see its effectiveness over time.

Second, while there is evidence the PRPs are currently paying for the remediation of the Property, there is always a possibility they will not continue to meet their obligations in the future or will not be financially able to do so. On that point, the board finds the Taxpayer's arguments in their "Memorandum of Law" ("Memorandum", ¶2) persuasive and the current owner, or a future buyer, of the Property is exposed to some liability of having to assume the costs related to the clean-up of the Property. As further evidence on this point, the board considered the testimony of Sean Fitzgerald, the Town Manager, who was asked by the board why the Town did not take title to the Property as a result of the numerous years of unpaid tax liens. Mr. Fitzgerald stated, "I couldn't expose the Town to that kind of liability." Finally, the legislature saw fit to give a municipality the right to *not* take title to a property for unpaid taxes in some circumstances if that property was contaminated. "[T]he collector shall not execute a deed of the real estate to a municipality…because acceptance would subject the municipality to potential liability as an owner of property under the Comprehensive Environmental Response, Compensation and Liability Act of 1980…" (See RSA 80:76 II.)

Even if the board accepted the Town's argument any future buyer could be indemnified and held harmless from any liability related to the remediation of the Property, the board finds the Property still has only nominal value as of the dates of assessment. As a test, the board considered Mr. Fremeau's conclusion the Property's "uncontaminated" market value of $810,000, but recognized it could not be reused until 2035 at the earliest. Assuming a modest appreciation rate of 3% per year from April 1, 2009 through 2035, the market value of the Property would be approximately $1,746,000 in 2035. Discounting that market value back to

2009 using a 15% discount rate results in a present value of approximately $46,000. However, this present value estimate would require additional downward adjustments for several reasons.

First, the methodology is based on the assumption the Property can be developed to its highest and best use, which Mr. Fremeau and Mr. Corcoran both agree is a form of residential development. Based on the totality of the evidence presented, the board finds it unlikely the entire Property will ever achieve that highest and best use for several reasons. First, Mr. Fitzgerald testified at length regarding a "re-use plan" the Town had prepared, and the Town chose "Scheme D", which includes a 55 and over housing development on the southernmost portion of Parcel I, a community center in the central portion of Parcel I and recreational uses on Parcel II. In the board's experience, land acquired for municipal and recreational uses does not command the same prices as land purchased for residential development purposes.

Second, the Property will be impacted by permanent restrictions prohibiting excavation below 10 feet, which will likely limit any future development of the Property and may impact the installation of municipal water and sewer systems, road construction and excavation for foundations of residential housing units. The Property will have an additional restriction regarding the drilling of wells in a "groundwater management area" (which has not yet been defined).

Third, the Property will likely suffer from some diminution in value due to stigma. "Two sets of risks are associated with stigmatized properties. The first set of risks are real or scientifically quantifiable risks, such as the cost to cure or manage the problem. The second set consists of perceived risks, which vary with the characteristics of the contamination, (i.e., whether it can be concealed, how much it disrupts everyday activities, and what degree of peril is associated with it), the extent of media exposure, and the nature of the liability (to an individual

or entity…. Different types of hazardous and toxic materials have different stigmatic effects. Few problems are associated with contained asbestos insulation in buildings, but suspected leakage of a contaminant (plume) into the groundwater can stigmatize property greatly….”[5]

The board carefully considered the information in the Corcoran Report and the testimony of Mr. Corcoran. The board, however, is not persuaded the sales information in the Corcoran Report provided any credible indication of the market value of the Property. Regarding the Londonderry property, the remediation work began in 1994 and a portion of the site was redeveloped with a Home Depot in 2001-2002, indicating a total time frame for remediation of 7 to 8 years. The contamination of the Gilford property arose in 2002 and it was remediated and “taken off the NHDES list in 2009”, a total of approximately 7 years. Finally, the Newmarket property was cleaned-up “at an estimated cost of $450,000 not including studies and follow-up monitoring.” The board finds the Property differs significantly from those properties in terms of the severity of the contamination, the costs to remediate and the length of time estimated for the remediation.

Mr. Corcoran testified he has extensive experience in appraising and assessing properties impacted by environmental contamination and, in his experience, a property’s market value is most severely impacted the day the contamination is discovered due to the many uncertainties regarding the extent of the contamination and the unknown costs to cure. He further testified a property’s market value will begin to increase as the “number of uncertainties” decrease and those questions are answered. Regarding the Property, Mr. Corcoran indicated many of those questions have been answered, and a potential buyer would know the extent of the

[5] The Appraisal Institute, The Appraisal of Real Estate 11th ed., pp. 203-204 (1996)

contamination, the cost to cure, the PRPs are paying for the clean-up and would know when the Property would be available for reuse.

While the board agrees with Mr. Corcoran's logic, it does not agree however with Mr. Corcoran on where the Property stood on such a continuum as of the 2009 and 2010 dates of assessment, and therefore finds there are still many "unknowns," perhaps the largest of which is the most likely date of reuse. The contamination issues on the Property began to be investigated in the mid-1990s and it took more than 20 years for the ROD to be issued and the remediation plan to be approved. The major remediation work had not yet begun as of the 2009 and 2010 dates of assessment, and the soil excavation process is anticipated to begin in 2013. The actual date of reuse was not known as of the dates of assessment, is still not known as of today, and will not be known until several years after the water treatment system begins operating (in 2017 at the earliest).

For all these reasons, the board finds the Taxpayer has carried its burden to prove disproportionality and the appeal is granted. Thus, the board finds the proportional assessments for Parcel I and Parcel II to be $100 each in tax years 2009 and 2010.

If the taxes have been paid, the amount paid on the value in excess of $100 on Parcel I and $100 on Parcel II for tax years 2009 and 2010 respectively shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a. Until the Town undergoes a general reassessment or in good faith reappraises the property pursuant to RSA 75:8, the Town shall use the ordered assessment for subsequent years. RSA 76:17-c, I and II.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (collectively "rehearing motion") within thirty (30) days of the clerk's date below, <u>not the date this decision is received</u>. RSA 541:3; Tax 201.37. The rehearing motion must state with

specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(g). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial with a copy provided to the board in accordance with Supreme Court Rule 10(7).

The "Requests" received from the parties are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

a. the Request contained multiple requests for which a consistent response could not be given;

b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the Request was irrelevant; or

e. the Request is specifically addressed in the Decision.

TAXPAYER'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. The property that is the subject of this appeal is a contaminated federal Superfund site.

Granted.

2. The site, known as the "Beede Waste Oil Superfund Site," (the "Site") occupies approximately 40 acres in the Town of Plaistow and is comprised of two parcels, shown as Lot 47 and Lot 40 on the Town of Plaistow's Tax Map.

Granted.

3. Both Lot 47 and Lot 40 are zoned as medium density residential property.

Granted.

4. A more complete description of the property can be found in Taxpayer Exhibits 1, 2, 3, and 4.

Granted.

5. Contamination of the property resulted from the poor storage and handling of waste oil and other products as well as the unlined and uncovered storage of large contaminated soil piles. The site has been contaminated with elevated levels of PCB's, VOC's and other toxic substances, as detailed in Taxpayer Exhibits 3 and 4.

Granted.

6. The EPA-ordered remedy at the Site includes construction of an on-site groundwater extraction and treatment system, excavation and off-site treatment or disposal of contaminated surface and sub-surface soil and sediment, construction of a soil vapor extraction system to treat deep soil, establishment of activity and use restrictions to prevent excavation of the soil deeper than 10 feet beneath the ground surface, the establishment of a groundwater management zone to prevent the consumption of groundwater, implementation of a long-term groundwater monitoring program, implementation of a long-term surface water and sediment monitoring program, among other things. Taxpayer Exhibit 3.

Granted.

7. Peter Nangeroni, an engineer from Woodard & Curran in charge of the clean-up of the Site, testified that the site clean-up is estimated to cost approximately $60 million. Of that $60 million, Mr. Nangeroni testified that approximately $40 million will need to be spent on Lot 47 and the remaining $20 million will need to be spent on Lot 40. Mr. Nangeroni's expense

figures are detailed in a 30% Design Report prepared by Woodard & Curran, *See* Taxpayer Exhibit 4.

Granted.

8. Mr. Nangeroni testified that he "hopes" that the cleanup of the site will be accomplished within the next 20 years but there is no guarantee that the cleanup will be successful or that it will take 20 years. The timing of the cleanup is uncertain and cannot be precisely estimated. Nangeroni Testimony.

Granted.

9. Although Lot 40 is expected to take longer to clean up than Lot 47, Mr. Nangeroni testified that Lot 47 will be needed to support the cleanup on Lot 40. For example, the remediation plans call for a groundwater treatment facility to be located on Lot 47 for the duration of the cleanup of the groundwater on Lot 40 – likely at least 20 years. *See* Taxpayer Exhibit 2. There may also be the need for rapid infiltration basins to be located on the extreme southwest portion of Lot 47, as depicted on Taxpayer Exhibit 2, depending on factors in the cleanup that are not yet known or knowable.

Granted.

10. Thousands of trucks carrying contaminated soil to an offsite location will need to cross Lot 47. Nangeroni Testimony.

Granted.

11. In September 2012, the EPA issued a map containing a notation that reuse of Lot 47 is "currently estimated in 2017". This EPA map also states that "[r]euse not possible until cleanup construction activities are completed" and that "[e]stimated dates may change depending on progress of cleanup." At the present time, it is not known exactly when or even if Lot 47 will be available for re-use.

Granted.

12. Furthermore, the September 2012 EPA map and the information contained within it would not have been available to a potential purchaser of the property on April 1, 2009 or April 1, 2010. For that reason alone, the September 2012 EPA map is not relevant to these proceedings.

Neither granted nor denied.

13. The industrial building located on Lot 47 was in poor condition and had no value. Taxpayer Exhibit 5, page 21.

Granted.

14. It is highly unlikely that a bank would be willing to finance the purchase of the subject properties as of April 1, 2009 or April 1, 2010. Fremeau Testimony.

Granted.

15. As of April 1, 2009 and April 1, 2010, there was no source of potable water at the site to support any sort of residential development.

Granted.

16. There is nothing particularly remarkable about the location or features of this property that would have enticed a purchaser to take a very substantial risk and purchase a Superfund site, potentially exposing the purchaser to liability in several forms. Taxpayer Exhibit 5, at 29.

Granted.

17. This is not a high value commercial site close to a metropolitan area or in a location that could be considered "one of a kind". Taxpayer Exhibit 5, at 29.

Granted.

18. A purchaser wishing to develop residential housing units would have had many other non-Superfund land options to choose from on which to build residential units. Taxpayer Exhibit 5, at 29.

Neither granted nor denied.

19. In 2009 and 2010, the cleanup was still in the planning stages, and the length of time the cleanup could take was not known then and remains speculative today. Taxpayer Exhibit 5, at 29.

Granted.

20. A December 2010 estimate calls for 20 years or more of cleanup activity after construction begins. Taxpayer Exhibit 5, at 29; Nangeroni Testimony.

Granted.

21. Due to the fact that the cleanup in 2009 and 2010 was still in its planning stages, an investment in the property at that time would have been too risky for a knowledgeable investor, who could be exposed to liability in several forms. Taxpayer Exhibit 5, at 29.

Granted.

22. If the subject property had been in a clean (*i.e.* uncontaminated) condition on April 1, 2009, the market value would have been approximately $810,000. Taxpayer Exhibit 5, at 37.

Granted.

23. Because there were no material changes in the market or the contaminated condition of the property between April 1, 2009 and April 1, 2010, the market value on April 1, 2010 would have been substantially similar ($810,000) had the property not been contaminated.

Granted.

24. Subtracting the cost to cure the contamination of approximately $60 million from the market value of $810,000 yields a value of less than zero. See Taxpayer Exhibit 5, at 37 (subtracting $50 million).

Neither granted nor denied.

25. In addition, this property suffers from very substantial stigma, which also should be deducted from its value. However, because the property is already worthless, it is not necessary to value the stigma and subtract it in this case.

Neither granted nor denied.

26. The subject properties were not marketable as of April 1, 2009 or April 1, 2010. Neither property had any market value as of those dates.

Granted.

27. In addition, the Town of Plaistow has placed tax liens on the subject properties each year since 1991. Taxpayer Exhibits 6 and 7.

Granted.

28. Despite having some 20 years of tax liens on the property, the Town has chosen not to take the subject properties by tax deed.

Granted.

29. The Town Manager, Mr. Fitzgerald, admitted that the Town elects to forego taking a tax deed on the property each year because it would expose the Town to a $50 million liability. Fitzgerald Cross-Examination.

Granted.

30. At the hearing, the parties stipulated that the assessment ratio for April 1, 2009 was 91.4% and for April 1, 2010 was 93.0%.

Granted.

31. The Town's expert could not determine the value of the properties.

Neither granted nor denied.

32. The Town's expert did not apply any of the recognized approaches to value real estate, such as the sales comparison, cost approach or income approach.

Granted.

33. The Town's expert did not attempt to subtract the cost of remediation from the unimpaired value of the Property.

Granted.

34. The Town's expert presented anecdotes concerning some other contaminated properties that have changed hands, but did not attempt to draw direct meaningful comparisons between the other contaminated properties that have sold and the subject properties; for example, he did not compare the extent of contamination, the magnitude of cleanup required, the estimated timeframe of the cleanup, the cost of cleanup, the zoning (commercial, industrial or residential), the availability of water, the size of the property, the topography of the property, etc.

Granted.

35. The Town's expert's analysis relies on a legal conclusion that he is avowedly not qualified to make -- namely, that a potential purchaser of the property would not incur liability for the cleanup costs upon purchase under the federal Superfund law (CERCLA).

Granted.

36. The Town's expert admitted that the analysis underlying his opinion would fail if a purchaser had potential liability for the cleanup costs.

Granted.

CONCLUSIONS OF LAW

1. The process of determining whether … assessments [against contaminated property] are proper is to 1) estimate the Property's market value without contamination; 2) estimate the contamination effect (reduction of market value); and 3) equalize the resulting market value finding by the Town's … level of assessment. See *Carnevale v. Town of Sutton*, No. 18265-99PT (May 14, 2002).

Granted.

2. It is a generally recognized appraisal practice in estimating the value of environmentally-impacted properties (contaminated properties) to begin with the value of the property as if not contaminated and then discount that value for the effect of contamination. *Id.*

Granted.

3. To calculate the impaired value, one begins with the unimpaired value and deducts the cost to remediate the site and the impact of stigma. The same phenomenon is witnessed in the analysis of a sale of contaminated property. The property sells to a knowledgeable buyer at an impaired price. This price generally consists of two elements:

- First, the buyer's estimate of the [sic] cost to remediate
- Second, a discount due to uncertainty (stigma)

Totaling the two yields the unimpaired value. *Id.*

Granted.

4. Many other courts have recognized and approved of this generally-accepted methodology. For example, in *Redevelopment Agency of the City of Oakland v. Martin*, 2003 WL 1032305 (Cal. App. 1st. Dist. 2003), the Court explained:

> Environmentally contaminated properties are routinely valued by subtracting the cost of remediation from the hypothetical market value of the property in a "clean" state, an approach that has been widely accepted by the courts. Experts on both sides used the "cost-to-cure" approach to value a contaminated service station in *Redevelopment Agency v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 5 Cal.Rptr.2d 687 (*Thrifty Oil*), a condemnation case. (*Id.* at pp. 473-474, 5 Cal.Rptr.2d 687.) The approach was also approved in the property tax context for determining the fair market value of contaminated property in *Mola Development Corp. v. Orange County Assessment Appeals Bd. No. 2* (2000) 80 Cal.App.4th 309, 95 Cal.Rptr.2d 546 (*Mola Development*).
>
> Consistent with these authorities, the leading treatise on eminent domain law specifically approves of deriving the value of environmentally impaired property by deducting remediation costs from the hypothetical value of the property in an undamaged condition: "Appraisers often calculate the value of contaminated property by discounting. In essence,

the appraiser calculates the market value of the contaminated property as if it were uncontaminated and then subtracts the estimated costs of remediation. This method is relatively simple if accurate estimates of the remediation costs exist. Further, this method is quite realistic and defensible." (8 Nichols on Eminent Domain (3d ed. 2002) § 14C.06[3][a], p. 14C-57.) [FN9]

FN9. Other jurisdictions also follow this approach. (See, e.g., *Westling v. County of Mille Lacs* (Minn.1996) 543 N.W.2d 91 [both sides' experts determined market value of contaminated industrial land and improvements by subtracting cost-to-cure from the value the property would have if unimpaired]; *Boekeloo v. Board of Review of City of Clinton* (Iowa 1995) 529 N.W.2d 275, 280 [deducting clean-up costs from replacement cost is simplest method of valuing contaminated commercial property].) Tax appraisal guidelines adopted in the State of Oregon specifically authorize the valuation of contaminated property based on deducting the cost-to-cure from hypothetical cost- or market-determined values for the property in an uncontaminated condition. (See Or. Admin. Rules, rule 150-308.205-(E).)

The same valuation principle was followed by the Minnesota Supreme Court in Westling v. County of Mille Lacs, 543 N.W. 2d 91 (Mn. 1996). In that case, the methodology of calculating the value as if uncontaminated and subtracting cost to cure or remediate and stigma was accepted by the Minnesota Supreme Court. The resulting property tax value, as we find in this case, was held to be zero. The Court explained:

The tax court accepted [an expert witness's] cost-to-cure figures because they were based on the environmental engineer's current cost estimates, and because neither appraiser suggested that the market value of the property, unimpaired by contamination, was greater than the $2,800,000 cost to cure, the tax court directed the reduction of the assessor's estimated market value to $0 as at January 2, 1992 and January 2, 1993.

Although we can understand the frustration of the County over the paradox posed by attaching a zero market value to 13.06 acres of improved real estate which generates $114,000 in annual rent, the evidence before the tax court concerning stigma discount and the cost of cleaning up the contamination amply support its order directing reduction of the assessor's estimated market value to $0 as at January 2, 1992 and January 2, 1993.

Neither granted nor denied.

5. In this case, we find that the unimpaired value of lots 40 and 47 is $810,000 based on the analysis contained in the Fremeau Appraisal Report. Taxpayer Exhibit 5. The $810,000 is also supported by the assessed values of the properties for April 1, 2009, which totaled $763,340. Although the Fremeau Appraisal Report relates to the April 1, 2009 tax year, there was no material change for the April 1, 2010 tax year.

Granted.

6. In this case the, the cost to remediate the properties is estimated to be $60 million (approximately $40 million on lot 47 and $20 million on lot 40).

Neither granted nor denied.

7. Accordingly, subtracting the cost to remediate from the unimpaired value yields a market value that is less than zero for April 1, 2009 and April 1, 2010 tax years.

Neither granted nor denied.

8. Subtracting stigma from these figures would further reduce the value, however since the value is already less than zero after subtracting the cost of remediation, it is not necessary for the Board to further reduce the value by subtracting stigma.

Neither granted nor denied.

9. Accordingly, we find that Lots 40 and 47 had zero market value for the April 1, 2009 and April 1, 2010 tax years.

Neither granted nor denied.

10. The Town's argument relies almost entirely on *Appeal of Great Lakes Container Corporation*, 126 N.H. 167 (1985). The Town's reliance on *Great Lakes Contained* is misplaced. *Great Lakes Container* is not on point. *Great Lakes Container* did not reject the above methodology and did not hold that a property cannot have a value of zero for tax purposes. That case boiled down to the Taxpayer's failure to prove its case. In the words of the Court:

> In this case, GLCC could meet [its] burden only if it presented sufficient evidence to establish the true value of the land with reasonable certainty. The board held that it had failed to do this, and we will overturn such a ruling only when it is erroneous as a matter of law."

Neither granted nor denied.

11. In fact, the Board's decision in *Great Lakes Container* makes clear that the taxpayer's appraiser in *Great Lakes* failed to employ any appraisal methodology whatsoever and merely provided an unsupported "judgment call." "No formula or theory was used which would lead to any value conclusion between zero and the 1982 assessment." *Great Lakes v. Kingston*, No. 2069-82 (BTLA March 19, 1984).

Granted.

12. That is plainly not true in this case. *See* Fremeau Report. Here, the Taxpayer followed the Board's stated methodology for valuing contaminated properties and proved that the subject properties had no value under the Board's prescribed methodology.

Neither granted nor denied.

13. *Great Lakes Container* is also distinguishable on its facts. First, in *Great Lakes Container*, the Taxpayer had purchased the property for some $399,000 a few years before the tax year, and had offered it for sale one year prior to the tax year for $350,000. The Taxpayer in this case purchased the property in 2008 for zero consideration. (Fremeau Report at 5).

Neither granted nor denied.

14. In *Great Lakes Container*, the Board asked the question in its decision: "why don't the owners simply abandon the property and let the town take it for the taxes owed," if it in fact has no value. *Great Lakes v. Kingston*, No. 2069-82 (BTLA March 19, 1984). That is a pertinent question, and this case presents just the opposite facts. In this case, the Town has issued tax liens against the property each and every year since 1991. And each and every year, the Town elected not to take the property by tax deed. This was undoubtedly due to the environmental liability that the Town would be subjected to. The Town Manager, Mr. Fitzgerald, conceded that this was the case at the hearing. This fact confirms that the property has no value.

Neither granted nor denied.

15. *Great Lakes Container* does not appear to be a CERCLA or "Superfund" case and did not involve a clearly identified $60 million cleanup cost.

Neither granted nor denied.

16. A further impediment to value results from the fact a purchaser of the properties would be exposed to substantial liability.

Granted.

17. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607, imposes "strict liability for environmental contamination" upon four classes of potentially responsible parties. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608-609 (2009). CERCLA liability is joint and several, meaning that a responsible party will be held liable for the entire cost of cleanup even where other parties contributed to the contamination. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir. 2002).

Granted.

18. The category of potentially responsible parties at issue in this case is "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607 (a) (1). This category has been interpreted to refer to "current" owners or operators. *See United States v. Capital Tax Corp.*, 545 F.3d 525, 530 (7th Cir. 2008); *ITT Indus., Inc. v. Borg Warner, Inc.*, 506 F.3d 452, 456 (6th Cir. 2007).

Neither granted nor denied.

19. While the statute is silent on the question of the date by which current ownership is measured, case law makes clear that, in the context of CERCLA liability, current ownership is measured at the time that cleanup is being undertaken, as opposed to either at the time of contamination or at a time after the completion of cleanup when a recovery suit is filed. *See California Dept. of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 914 (9th Cir. 2010), *see also Elementis Chems., Inc. v. T. H. Agric. & Nutrition L.L.C.*, 373 F.Supp.2d 257, 268-89 (S.D.N.Y. 2005).

Neither granted nor denied.

20. Undertaking a comprehensive analysis, the Ninth Circuit in *Hearthside* looked to "the statutory context and CERCLA's purposes to determine how Congress intended ownership to be measured." *Hearthside*, 613 F.3d.at 914. First, because CERCLA "encourages responsible parties to remediate hazardous activities without delay," the court declared that measuring ownership as of the time of cleanup is prudent because "a landowner that knows it will ultimately be responsible for the cleanup costs has no incentive to delay the completion of that process once it has begun." *Id.* at 915. Second, the court stated that "because the owner at the time of cleanup can help determine the scope of the cleanup and select from among reasonably effective remedial alternatives, it follows that the same owner should be responsible for the cost of the remediation program that it had the opportunity to influence." *Id.* at 915-916. Summing up its analysis, the court held that a party who is the owner of property "at all times relevant to the remediation of contamination" (the cleanup) is a current owner for the purposes of CERCLA liability. *Id*.

Neither granted nor denied.

21. Therefore, any buyer of property will become a current owner and thus be exposed to potential CERCLA liability.

Neither granted nor denied.

22. Accordingly, the fundamental premise of Mr. Corcoran's analysis – that a purchaser of the property would not be exposed to liability -- is simply not correct as a matter of law.

Neither granted nor denied.

TOWN'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. The Taxpayer in this case is 11 Kelly and 42 Old County Road Properties, LLC ("Taxpayer") with an address of 450 Mont Brook Lane, Knoxville, Tennessee 37901. The origination of this LLC arises from two lawsuits, 1) United State of America, Plaintiff v. Exxon Mobil Corporation, et al, Defendants, (civil action No. 1:07-cv-00060-PB), and, 2) State of New Hampshire, Plaintiff v. Exxon Mobil Corporation, et al, Defendants, (civil action No. 1:07-cv-00080-PB).

Neither granted nor denied.

2. The Property consists of two contiguous parcels, "Parcel 1" and "Parcel 2", totaling 40.6 acres according to EPA records and 38.5 acres according to the Plaistow tax map, known as the Beede Waste Oil Superfund Site RD/RA.

Granted.

3. The Property is the subject of a Consent Decree wherein 27 "performing settling defendants" (including Exxon, Mobil Corporation, the Boston and Maine Corporation, Coca Cola Enterprises, and, Cumberland Farms Inc.) have assumed responsibility for its cleanup to the satisfaction of the Environmental Protection Agency ("EPA") and the New Hampshire Department of Environmental Services ("DES"). The "Taxpayer" and "27 performing settling defendants" are mirror images of each other. The property was conveyed to the Taxpayer in a non-arms length transaction.

Neither granted nor denied.

4. That Parcel 1, reflected on the 100% complete plan approved by the EPA, will be disturbed to the extent that 85,000 cubic yards of contaminated material is to be removed from it. The completion of the removal and replacement with clean soil requirements will occur in or within two years of its commencement, on or about 2013.

Neither granted nor denied.

5. That a Class V road to be used by trucks removing the 85,000 cubic yards of material and an improved intersection at Route 121A have been built. The improved intersection includes installation of traffic lights, costing between ($200,000 and $300,000) that were approved by the NH DOT. Access from Kelly Road over Parcel 1 to Parcel 2 can be reserved by easement with a limited impact on Parcel 1.

Neither granted nor denied.

6. That the thermal water treatment system improvement is located entirely on Parcel 2.

Neither granted nor denied.

7. That the Class V road built over Parcel 1 for the purpose of removing 85,000 cubic yards of material will not be required or used once the contaminated soil removal process is completed.

Neither granted nor denied.

8. That the only physical impact on Parcel 1 after the removal of the contaminated material is the easement access to Parcel 2 over Parcel 1 from Kelly Road, and, monitoring wells on Parcel 1 to help determine the effectiveness of the ground water contamination removal process conducted on Parcel 2. The EPA has concluded that Parcel 1 will be reusable by 2017.

Denied.

9. That the majority of the 50 to 60 million dollar cost of cleanup will be expended on Parcel 1.

Granted.

10. That the Town of Plaistow has been working on a reuse plan for the Property since 2003 with a specific report outlining the proposed reuse plan that was paid for by the EPA and supports the clean up standards contained in the Record of Decision specific to the property.

Neither granted nor denied.

11. "EPA is working with communities and other partners in considering future use opportunities and integrating appropriate reuse options into the cleanup process. EPA's goal is to make sure that at every cleanup site, EPA and its partners have an effective process and the necessary tools and information to fully explore future use before the cleanup remedy is implemented. This gives EPA the best chance of making its remedies consistent with the likely future use of a site. In turn, EPA gives communities the best opportunity to use sites productively following cleanup." *"Revitalizing Contaminated Sites: Addressing Liability Concerns, The Revitalization Handbook*, March 2011, U.S. Environmental Protection Agency, Office of Site Remediation Enforcement, p. 36.

Neither granted nor denied.

12. That the EPA approved reuse plan allows the Property to be reused for cluster housing and open space, establishing a cleanup protocol consistent with the use of the Property which is zoned medium density residential.

Neither granted nor denied

13. "As of the end of FY 2007, EPA has finished remedial assessment work at over 47,000 sites, conducted more that 9,600 removals, and completed construction at 1030 of 1,569 sites on the NPL ("National Priorities List") in an effort to protect human health and the environment. Final remedies have been selected at more than 1,263 sites, and design and implementation of the remedies is underway." "*Superfund Program Implementation Manual FY 11*," p. I-4.

Neither granted nor denied.

14. That a "Projected Timeframe for Potential Reuse Beede Waste Oil Superfund Site" reflects that Parcel 1 "reuse not possible until cleanup construction activities are completed (currently estimated in 2017)".

Neither granted nor denied.

15. That the same plan reflects that Parcel 2 is "reuse encumbered until ground water cleanup goals have been achieved (currently estimated in 2031)". That the plan further shows the planned ground water treatment building, infiltration basins, and injection wells all located on Parcel 2.

Neither granted nor denied.

16. That the "Projected Time Frame for Potential Reuse Beede Waste Oil Superfund" plan ("EPA Plan") prepared by the EPA reflects that the access road is "temporary". Timing of the cleanup process is in the control of the taxpayer, with approval of the EPA.

Neither granted nor denied.

17. "The Superfund program addresses contamination from uncontrolled releases at Superfund hazardous waste sites that threaten human health and the environment…The overarching goals of the Superfund program are ensuring the protection of human health and the environment, and maximizing the involvement of potentially responsible parties (PRP's) in conducting cleanup at sites, also known as 'enforcement first'". "*Superfund Program Implementation Manual FY 11*," p. I-2.

Neither granted nor denied.

18. "To protect human health and the environment and address potential barriers to redevelopment, EPA works...to...promote reuse and development of sites being addressed under Superfund Authority." "*Superfund Program Implementation Manual FY 11*," p. I-2.

Neither granted nor denied.

19. "At every site being addressed through CERCLA authority, regions should work with its partners to fully explore and consider future land use assumptions in cleanup decisions. While cleaning up sites and making them protective of human health and the environment, regions should continue to employ processes, tools, and information systems that better enable communities to communicate their future land use preferences and plans. Integrating realistic assumptions of future land use into Superfund response actions is an important step toward facilitating the beneficial reuse and revitalization of sites following cleanup." "*Superfund Program Implementation Manual FY 11*," p. I-5.

Neither granted nor denied.

20. Joseph G. Fremeau of Fremeau Appraisal, Inc. prepared a "Real Estate Appraisal Report of the Beede Waste Oil Site Map 31, Lot 40 (Old County Road) & Map 31, Lot 47 (11 Kelley Road) Plaistow, New Hampshire" describing the property type as a "federal superfund site" for the LLC states at page 38 of his report:
"It is our opinion that the retrospective market value of the fee simple interest in the Beede Waste Oil Site (Map 30; lots 40 and 47) property at 42 Old County Road and 11 Kelley Road, Plaistow, New Hampshire, and the appropriate assessed value, as of April 1, 2009 is shown below.

DATE OF VALUATION	ESTIMATED MARKET VALUE	EQUALIZATION RATIO-*MEDIAN*	APPROPRIATE ASSESSED VALUE
April 1, 2009	- 0 -	91.4%	- 0 –

Granted.

21. In his report, Mr. Fremeau acknowledges the EPA cleanup plan which details "the nearly $50 million cleanup with result in the property meeting EPA's residential reuse standards, which are the agency's most stringent cleanup standards. Also…the comprehensive cleanup is expected to start in 2011. Aside from the groundwater component, the soil and sediment cleanup is slated to conclude in 2013." Fremeau report, p. 24.

Granted.

22. The Town's assessor, Wil Corcoran, of Corcoran Consulting Associates, Inc. prepared a report specifically designed to address the unique legal and factual issues raised by this case and opines that the subject Property, as of the relevant dates, has value based on his research of the market for contaminated or once contaminated lands and concludes that "yes, the properties in question did, and continue to have value to a prospective purchaser in anticipation of a future use." According to the EPA Plan, "roughly 17.5 to 19 acres of land of Kelley Road will be ready for development in 2017, and that the balance of 21 acres of land on Old County Road will be ready for development in 2035. Also, the entities responsible for cleaning the site have been identified, and these parties are required to pay the cost for such cleanup. Thus, prospective purchasers need only wait and plan in anticipation of the eventual reuse of the site."

Neither granted nor denied.

23. In his report, Mr. Corcoran references 3 comparably contaminated properties that have gone through the remediation process, or are still going through the remediation process, and then successfully marketed. Corcoran Report, pp. 22-27.

Denied.

24. Appeal of Great Lakes Container Corporation is the law of the case. Appeal of Great Lakes Container Corporation, 126 NH 167 (1985).

Neither granted nor denied.

25. That in the Appeal of Great Lakes Container the taxpayer's appraiser "concluded that traditional methods of appraising fair market value were inapplicable to the property, due to its then unusable condition and the pending federal litigation" and concluded that the property had a fair market value of "**zero**." Appeal of Great Lakes Container Corporation, *Id*.

Granted.

26. That in Great Lakes Container, the taxpayer argued "the site would be cleaned up as a result of the federal litigation, and that this 'probably' meant that the land would have sale value in the future." Appeal of Great Lakes Container Corporation, *Id*.

Granted.

27. Similarly, Mr. Fremeau concludes in his report that "**it is our opinion that the subject property is an unmarketable property with no utility and no value**…due to the level of estimated value and the cost of cleanup, the property is not marketable at this time." Fremeau report, p. 37, 38. Mr. Fremeau testified that traditional methods of appraising the Property were inapplicable due to its "un-marketability."

Neither granted nor denied.

28. In Great Lakes Container, the Board rejected the appraiser's report and pointed to the taxpayer's refusal to forfeit the land as an indication that "there must be future benefit to the taxpayer after litigation determines liability for contamination and cleanup." Appeal of Great Lakes Container Corporation, *Id*.

Neither granted nor denied.

29. That in the instant case, liability for the contamination and cleanup has been established by Consent Decree requiring the Taxpayer (27 "performing settling defendants") to clean the contamination on the Property to the satisfaction of the EPA.

Neither granted nor denied.

30. That in Great Lakes Container the taxpayer "presented nothing to indicate what 'the present value of that future benefit' might be, and the Board held that the taxpayer had failed to meet its burden of proof." Appeal of Great Lakes Container Corporation, *Id*.

Neither granted nor denied.

31. That CERCLA issues can be addressed in a purchase and sales agreement indemnifying a potential buyer in light of the fact that the extent of contamination is known, and, a legal obligation exists under the consent decree requiring the Taxpayers to clean the Property to the satisfaction of the EPA. No additional exposure is created for a buyer under CERCLA if the purchase and sales agreement provides for indemnification to the buyer from the CERCLA liability.

Denied.

32. That the Brownfield's program, RSA 147-F, establishes, and makes special provisions to encourage development of properties that have been subject to environmental contamination. This public policy reflects the public interest supporting the reuse of contaminated property to include contractual safeguards to a potential buyer/developer.

Granted.

33. The Taxpayer did not attempt to sell the Property for less than the assessed value.

Granted.

34. The Taxpayer has not indicated an intent to "forfeit the Property" and, in fact, its vigorous objection to the real estate assessments reflect an intent to benefit from the value of the Property after cleanup, offsetting this value from the cleanup costs, and indicating that there must be future benefit to the Taxpayer.

Neither granted nor denied.

35. That the Pennichuck Water Company has extended its franchise to include the Property, which will be hooked up to its water system, expected to be completed in December 2012, with other, affected homes in the neighborhood. The entire Property and the potential development of the Property will not depend on ground water but will be part of the Pennichuck franchise area, accelerating and supporting the current and future usability of the Property when analyzed with the EPA letter of September 18, 2012 and accompanying plan.

Neither granted nor denied.

36. That the availability of a public water supply, in the near future and unrelated to ground water on the Property, enhances its reusability and value. Mr. Fremeau's presumption that a public water supply is not and will never be available to the Property is incorrect.

Neither granted nor denied.

37. The prospect of "future benefit" gives the Property some sale value. Because the Taxpayer has presented **nothing** to indicate what "'the present value of that future benefit' might be, it fails to meet its burden of proof." Appeal of Great Lakes Container Corporation, *Id.*

Neither granted nor denied.

38. Nothing prevents the Taxpayer from agreeing to sell the Property with transfer of title deferred until after completion of any court mandated cleanup, freeing a purchaser from any possible liability due to the contamination. Appeal of Great Lakes Container Corporation, *Id.*

Neither granted nor denied.

39. Mr. Corcoran's presumptions that the Property during cleanup has value to a prospective purchaser in anticipation of a future use; that clean water supply will be available at the Property; and, that a substantial portion will be available for reuse in 2017 (a timeframe dependant upon the progress of the Taxpayer controlled cleanup) are correct.

Denied.

40. The value should reflect the "present value of that future benefit", i.e. reusing a substantial portion of the Property (Parcel 1) by 2017.

Denied.

41. The Taxpayer's appraisal reflecting a value of **zero**, fails to meet its burden of presenting sufficient evidence to establish the value with reasonable certainty.

Neither granted nor denied.

42. "Taxing authorities may argue that reductions in the assessed value of contaminated property that reflect cleanup costs, effectively enable property owners responsible for cleanup to shift the cost of their cleanup obligation to other taxpayers, contrary to the intent of environmental liability statutes to make polluters and other private parties - and not the community - pay for cleanup. In cases where taxpayers seek a nominal or zero tax assessment, which effectively prevents them from taxation, such a result seems perverse, since contaminated property likely poses increased risks to public health as well as an added burden on a taxing authority's pubic safety resources, such as fire, police, emergency planning and response, and environmental services. Such assessment reductions could be viewed as a reward to owners of contaminated property, some of whom may have caused the contamination. Assessment reduction may also be viewed as a penalty to the public forced to bear these additional burdens. They especially penalize those taxpayers who take responsible measures and make investments to keep their property free from contamination." "*Toxic Tax Assessment: The Ad Valorem Taxation of Contaminated Property*" by Robert P. Carver, Esq. & Anthony W. Crowell, Esq., Real Estate Issues, Fall, 1999.

Neither granted nor denied.

43. The "high court of New Hampshire and the Washington Board of Tax Appeals, have held that when, as a practical matter, the cost of environmental cleanup would not run with the land, a deduction of the cost to cure from value would be unwarranted. These tribunals have upheld assessments that approximated the present value of the contaminated property's value upon remediation by the parties that would pay for the remediation." "*Toxic Tax Assessment: The Ad Valorem Taxation of Contaminated Property*" by Robert P. Carver, Esq. & Anthony W. Crowell, Esq., Real Estate Issues, Fall, 1999.

Neither granted nor denied.

44. The Taxpayer, to show that an abatement is justified, must prove by a preponderance of the evidence that the assessment placed on its property was disproportionately higher in relation to its true value then as to other property in general in the taxing district. Appeal of Great Lakes Container Corporation, *Id*.

Granted.

45. That in Great Lakes Container the Supreme Court concluded "nothing prevented the taxpayer from agreeing to sell the land with transfer of title deferred until after completion of any court mandated cleanup, thus freeing the buyer from any possible liability due to the contamination."

Granted.

46. In Great Lakes Container, the Court concluded that the property had some value. The Supreme Court opined in Great Lake Container that, if the taxpayer had made a good faith attempt in 1982 to sell the property for less than its assessed value, and had received no response, the result in this case might be different; but no such attempt was made. Under these circumstances, it was reasonable for the Board to conclude that the taxpayer had failed to meet its burden of proof.

Granted.

47. The Taxpayer can only meet its burden if it first presents sufficient evidence to establish the true value of the Property with reasonable certainty. The Taxpayer fails to meet its burden as it has presented nothing to indicate the value of "the present value of that future benefit". Appeal of Great Lakes Container Corporation, *Id.*

Denied.

48. The Taxpayer, by virtue of its decision to seek and abatement, has left the record open to all facts available to the Board of Tax and Land Appeals ("BTLA") at the point when the value of the Property is litigated. The availability and solicitation of information available to the BTLA is relevant to value and fairly considered in determining the merits of an abatement application.

Neither granted nor denied.

49. The Taxpayer has failed to meet its burden of proof and the BTLA should deny the abatement application causing the value to default to the values reflected on the Town's tax bills for the two years in question, 2009 and 2010.

Denied.

50. For these reasons the Town of Plaistow requests that the BTLA deny this appeal for abatement.

Denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Michele E. LeBrun, Chair

_____
Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Jonathan A. Block, Esq., Pierce Atwood LLP, Merrill's Wharf, 254 Commercial Street, Portland, ME 04101 and Lawrence M. Edelman, Esq., Pierce Atwood, LLP, One New Hampshire Avenue - Suite 350, Portsmouth, NH 03801, counsel for the Taxpayer; Chairman, Board of Assessors, Town of Plaistow, 145 Main Street, Plaistow, NH 03865; Sumner F. Kalman, Esq., 147 Main Street - Box 988, Plaistow, NH 03865, counsel for the Town; and Corcoran Consulting Associates, Inc., Bayside Village, PO Box 1175, Wolfeboro Falls, NH 03896, Contracted Assessing Firm.

Date: 4/1/13

_____
Anne M. Stelmach, Clerk