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## Contaminated Property and the Attached Stigma: Polluter's Tax Incentives? Dealers Manufacturing, Co. v. County of Anoka

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## CASENOTE

### CONTAMINATED PROPERTY AND THE ATTACHED STIGMA: POLLUTER'S TAX INCENTIVES?

*Dealers Manufacturing, Co. v. County of Anoka.*<sup>1</sup>

#### I. INTRODUCTION

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980 to address the risks that contaminated property poses to the environment and public health.<sup>2</sup> The goal of these types of laws is to ensure that the contaminated properties are cleaned up, as well as to force liability for the clean up costs on those individuals who benefit from or are involved in the use of the hazardous substances. The polluter or landowner, not the public, should bear the costs of the clean up.

Additional problems occur when it comes time for the contaminated property to be assessed taxes based on its market value. A Minnesota statute allows for a reduction in the market value of property for the contamination value of the property.<sup>3</sup> The contamination value, according to the statute, is limited by the cost of the response action plan.<sup>4</sup> When property is also encumbered by stigma from the contamination, a problem exists as to whether the market value of the property may be further reduced for that stigma.

#### II. FACTS AND HOLDING

Dealers Manufacturing, Co. ("Dealers") owned a manufacturing plant site in Anoka County, Minnesota.<sup>5</sup> Dealers used solvents at the manufacturing plant and discovered contamination from these solvents in the groundwater and soil at the site in 1988, at which time the Minnesota Pollution Control Agency ("MPCA") placed the property on the state Superfund list.<sup>6</sup> After discovering the contamination, Dealers implemented a response action plan in 1995, approved by the MPCA.<sup>7</sup> The response action plan had a total projected cost to Dealers of \$560,000, and by 1998, Dealers had spent \$350,000 on the clean up effort, though contaminants were still present.<sup>8</sup>

In 1997, Dealers sought and obtained an appraisal, conducted by Alan Leirness.<sup>9</sup> Leirness determined that the property value of the land would be subject to a stigma devaluation factor "due to the risk of liability for clean-up costs, fear of liability to the public arising from the contamination, and possible lack of mortgageability."<sup>10</sup> The stigma might have an impact on the land exceeding \$500,000, in Leirness' opinion.<sup>11</sup> In 1997, the county of Anoka also assessed the market value of the property at \$1,336,600.<sup>12</sup>

After the determination by the county of the market value of the property, Dealers filed a petition in the tax court in 1998, making two arguments.<sup>13</sup> First, Dealers challenged the county's assessment of the market value of the property

<sup>1</sup> *Dealers Manufacturing, Co. v. County of Anoka.*, 615 N.W.2d 76 (Minn. 2000).

<sup>2</sup> 42 U.S.C. §§9601-9675 (2000).

<sup>3</sup> Minn. Stat. §270.11, subd. 17 (1998).

<sup>4</sup> *Id.*

<sup>5</sup> *Dealers*, 615 N.W.2d at 76.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The response action plan required Dealers to install a ground water pumping system and a UVB source area system. *Dealers Manufacturing Co. v. County of Anoka*, 1999 WL 717228, at \*1 (Minn. Tax Ct. Sept. 8, 1999).

<sup>8</sup> *Dealers*, 615 N.W.2d at 76.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Minn. Stat. §278.01, subd. 1 (1998) provides a statutory remedy for taxpayers whose property is assessed in excess of market value. *Id.* at 78, n.2. The statute states: "Any person having personal property...who claims that such property...has been assessed at a valuation greater than its real or actual value...may have the validity of the claim, defense, or objection determined by the district court...or the tax court." *Id.*

claiming that the assessment exceeded the property's actual market value.<sup>14</sup> Second, Dealers argued that the property was not assessed equally when compared with other property, thus violating Dealers' constitutional rights to equal protection and uniform taxation.<sup>15</sup> Anoka County responded that the market value reduction due to the contamination may include the stigma factor though the total reduction is limited to the reasonable cost of the response action plan by Subdivision 17 of the contamination tax statute.<sup>16</sup> Dealers refuted this line of reasoning and claimed that the Contaminated Tax Provision<sup>17</sup> and Subdivision 17<sup>18</sup> did not apply to reductions in market value due to stigma.<sup>19</sup>

Based on these arguments, the parties filed cross-motions for partial summary judgment as to whether Minnesota law limits reduction in market value for stigma relating to contamination.<sup>20</sup> The Tax Court granted Dealers' motion, concluding that stigma is separate and distinct from contamination and clean up costs.<sup>21</sup> The Tax Court never addressed Dealers' Constitutional claims, and ordered a trial to determine the value of the property as of January 2, 1997.<sup>22</sup> The Supreme Court of Minnesota reviewed the appeal in the interests of judicial economy stating that their "grant of discretionary review will be cautiously exercised."<sup>23</sup>

The Supreme Court of Minnesota affirmed the decision of the Tax Court.<sup>24</sup> It held that a stigma factor might attach to property when contaminants are present or after the contaminants have been removed.<sup>25</sup> After examining the actual language of Subdivision 17, the Court determined that the statute applied only to property that actually was contaminated, and did not include a stigma factor, as a stigma may be present even though no contaminants remain on the property.<sup>26</sup> Dealers was therefore entitled to partial summary judgment as a matter of law.<sup>27</sup>

### III. LEGAL BACKGROUND

Owners of contaminated property have a number of issues to consider when they receive their tax bills and assessments. A major problem facing owners of contaminated property today is the effect that stigma will have on their property. The Minnesota Supreme Court examined the issue of stigma in the *Westling* cases in 1994.<sup>28</sup> After the Minnesota Tax Court's first determination of the *Westling* case, the Minnesota legislature enacted the contamination tax.<sup>29</sup> To determine one's liability for the contamination tax, it is necessary to first determine the market value of the contaminated property, which is not a simple task.

#### A. Inputs of the Market Valuation

There are a number of inputs that must be considered when determining the correct market value of property that is contaminated. There is a basic approach to valuing property, which includes a number of different methods. There are also newly emerging components that are becoming more prevalent and must also be considered, such as the costs to cure and the stigma.

<sup>14</sup> *Id.* Minn. Stat. §273.11, subd. 1 (1998) states: "Except as provided in this section...all property shall be valued at its market value." *Id.*

<sup>15</sup> *Id.* Dealers cited to the U.S. Const. amend. XIV, §1 and Minn. Const. art. X, §1. *Id.* at 78 n. 4.

<sup>16</sup> *Id.* Minn. Stat. §273.11, subd. 17 (1998) states: "In determining the market value of property containing contaminants, the assessor shall reduce the market value of the property by the contamination value of the property. The contamination value is the amount of the market value reduction that results from the presence of contaminants, but it may not exceed the cost of a reasonable response action plan..." *Id.*

<sup>17</sup> Minn. Stat. §270.91 (1998).

<sup>18</sup> Minn. Stat. §273.11, subd. 17 (1998).

<sup>19</sup> *Dealers*, 615 N.W.2d at 77.

<sup>20</sup> *Id.*

<sup>21</sup> *Dealers*, 1999 WL 717228, at 4. The Tax Court reasoned that by accepting Anoka's argument, the court would have to add the words "and stigma" to the wording of Subdivision 17 and the contamination tax provision. The Court concluded that if the legislature did not provide this language, the court would not add it. *Id.*

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 78 n. 7.

<sup>24</sup> *Id.* at 77.

<sup>25</sup> *Id.* at 79.

<sup>26</sup> *Id.* at 79-80.

<sup>27</sup> *Id.* at 81.

<sup>28</sup> *Westling v. County of Mille Lacs*, 512 N.W.2d 863 (Minn. 1994).

<sup>29</sup> Minn. Stat. §270.91-.98 (1998).

### 1. Basic Approach

The Supreme Court of Minnesota, as well as many professionals, recognizes three basic approaches in determining the market value of real property.<sup>30</sup> The market comparison approach requires finding sales of similarly situated property with similar characteristics to the property at issue.<sup>31</sup> The assessors will then make adjustments to the sales price to account for the differences in the actual physical characteristics of the property, as well as the rights conveyed or the financing terms available.<sup>32</sup> This approach is appropriate when the property is of a type that is sold often, and courts consider it reliable because it is based on actual market data.<sup>33</sup>

The cost approach values the underlying land using sales of similar parcels, then adds the cost of replacing the structures on the present piece of land reduced by depreciation taken on the structures and improvements.<sup>34</sup> Problems occur when there is no clearly ascertainable market and no comparable sales of similar parcels.<sup>35</sup> This method should be limited to use for unique properties such as church, libraries, or hospitals.<sup>36</sup> This approach has been accepted as a check on the two other options of valuation.<sup>37</sup>

The income approach is usually used for income producing properties such as office buildings, shopping centers, or apartments.<sup>38</sup> The appraiser will take the income that will be derived from the property into consideration with any other factor affecting the property such as rent control or the length of the lease.<sup>39</sup> The property value is based on the present value of the future benefits that may be derived from the property.<sup>40</sup> The net income figure is then capitalized.<sup>41</sup> The Supreme Court has said that the income approach is based on logic because the value of property is usually based on its productiveness.<sup>42</sup> The income approach is based on two assumptions: (1) a "property's value can be shown by the income that can be realized from it," and (2) "[v]alue can be established by determining the income flow from the property and determining the capital necessary to produce that income."<sup>43</sup>

Appraisers should attempt to apply at least two of the approaches when possible because "the alternative value indications derived can serve as useful checks on each other."<sup>44</sup> However, the final determination may require that greater emphasis be given to one approach over the others.<sup>45</sup> Minnesota law requires assessors to consider all the relevant factors and considerations and give due weight to each element that goes into the determination of the market value.<sup>46</sup>

### 2. Costs to Cure

A main factor to consider is the costs incurred to remedy contamination on property, usually referred to as the costs to cure.<sup>47</sup> There are six general remediation options including "[r]epair, isolation, encapsulation, enclosure, removal and disposal."<sup>48</sup> The costs to cure may include the costs of any of the options as well as the management services required to perform these options.<sup>49</sup> In addition to the actual cost of the clean up plan, there may be costs attributed to a liability to a third party or a restriction on the land use.<sup>50</sup> After these costs are estimated, they are converted to present value, then

<sup>30</sup> *Equitable Life Assurance Soc. of the U.S. v. County of Ramsey*, 530 N.S.2d 544, 552 (Minn. 1995).

<sup>31</sup> Vincent D'Elia & Catherine Ward, *The Valuation of Contaminated Property*, 111 Banking L. J. 350, 361 (1994).

<sup>32</sup> Bonnie Keen, Student Author, *Tax Assessment of Contaminated Property: Tax Breaks for Polluters?*, 19 B.C. Envtl. Aff. L. Rev. 885, 890 (1992).

<sup>33</sup> *Id.*

<sup>34</sup> Vincent D'Elia, *supra* n. 31, at 362.

<sup>35</sup> *Id.*

<sup>36</sup> James Arnold, *The Impact of Environmental Law on Real Estate and Other Commercial Transactions*, SD21 ALI-ABA 909, 916 (1998).

<sup>37</sup> *Id.*

<sup>38</sup> D'Elia, *supra* n. 31, at 361.

<sup>39</sup> *Id.*

<sup>40</sup> Keen, *supra* n. 32, at 891.

<sup>41</sup> D'Elia, *supra* n. 31, at 361.

<sup>42</sup> Arnold, *supra* n. 36, at 915.

<sup>43</sup> *Id.*

<sup>44</sup> *Equitable Life*, 530 N.W.2d at 553.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 554.

<sup>47</sup> Karina Thomas & David Clayton, *Challenging Valuations of Contaminated Property*, 26 Colo. Law. 71, 71 (Apr. 1997)

<sup>48</sup> Arnold, *supra* n. 36, at 918.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 918-19.

subtracted from the assessed value of the property.<sup>51</sup> The actual cost to cure may include considerations such as “the nature of current uses, strength of rental earnings, availability of financing, need for insurance, duration of cleanup.”<sup>52</sup> The costs to cure adjustments to the property value are always temporary and will be eliminated once the contamination is gone.<sup>53</sup> Once the property is clean, the true assessed value should once again apply unless there is a remaining stigma.<sup>54</sup>

### 3. *Stigma*

A second important factor to consider is stigma. There are a number of definitions of stigma in use today, though it is common to define stigma as the “discount that is necessary to compensate buyers and prospective lenders for the risks of contamination.”<sup>55</sup> Stigma exists due to the uncertainties and risks associated with contamination such as public health hazards, financing obstacles, hidden clean up costs, and market conditions.<sup>56</sup> Risk associated with stigma is highest when the remediation efforts are just beginning, then it gradually decreases as the clean up is conducted.<sup>57</sup> The perception of risk may continue even after the property is certified to be clean, which presents the problem of stigma.<sup>58</sup> The measurement of the risk will require objective data, such as the number of sales of similar property, as well as subjective data, such as the opinions of neighbors.<sup>59</sup> Stigma is extremely difficult to measure as it can occur before, during, or after a property is cleaned of contamination.<sup>60</sup> Also, the decrease in value associated with stigma is not consistent and may vary from parcel to parcel.<sup>61</sup>

#### B. *The Westling Decisions*

The Minnesota Tax Court first dealt with the Westlings (“*Westling P*”) in 1993.<sup>62</sup> The Tax Court determined that the market value of the Westling’s property should be reduced from \$974,200 to \$100 as the property had only nominal value and no market for sale.<sup>63</sup> The property was two contiguous parcels of land owned by John and Sharolyn Westling.<sup>64</sup> In the fall of 1990, the Westling property was included on Minnesota’s Superfund Permanent List of Priorities due to concerns with groundwater contamination by heavy metals and volatile organic compounds.<sup>65</sup> An environmental engineer examined the property and testified that there was contamination, but additional testing was needed.<sup>66</sup>

While Mr. Westling argued that the property was not marketable due to the contamination, the County of Mille Lacs (“Mille Lacs”) presented two counter arguments.<sup>67</sup> First, Mille Lacs pointed to previous purchases of the land in 1987 and 1989 as proof that the property was marketable.<sup>68</sup> The Tax Court rejected this argument because not only did Mr. Westling not know of the contamination, but he also purchased the property from his father, which the court did not view to be a market purchase.<sup>69</sup> Second, Mille Lacs argued that its expert witness was correct when he valued the property at \$880,000 as he utilized the cost, market, and income capitalization approaches to valuation, then deducted the present value of the cost to cure (evidenced through the response plan) and a 20% stigma discount.<sup>70</sup> The Court also rejected this argument because the expert admitted he was not aware of any sales of contaminated properties, and his

<sup>51</sup> Thomas. *supra* n.47. at 71.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Arnold. *supra* n. 36. at 920.

<sup>56</sup> Thomas. *supra* n. 47. at 71.

<sup>57</sup> D’Elia. *supra* n. 31. at 360.

<sup>58</sup> *Id.* at 360-61.

<sup>59</sup> *Id.* at 361.

<sup>60</sup> Thomas. *supra* n. 47. at 71.

<sup>61</sup> *Id.*

<sup>62</sup> *Westling v. County of Mille Lacs*. 1993 WL 35155 (Minn. Tax Ct. Feb. 10. 1993).

<sup>63</sup> *Id.* at \*1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

valuation approaches all assumed that the property was not contaminated on the assessment date, including the income capitalization approach that he relied on in his final opinion of value.<sup>71</sup> The Tax Court therefore concluded that due to the contamination, no market existed for the property, and thus it had only a nominal value of \$100.<sup>72</sup>

After the Tax Court's decision in *Westling I*, the Minnesota legislature enacted a new tax, which imposes an annual tax on the "contamination value" of taxable real property in Minnesota (discussed in detail *infra*).<sup>73</sup> The Westlings' subsequent litigation dealt with this tax. In the next case ("*Westling II*"), Mille Lacs appealed the nominal value placed on the property by the Tax Court.<sup>74</sup> In *Westling II*, the Westlings presented testimony concerning the stigma of the land.<sup>75</sup> The Westlings argued: (1) that contaminated properties in general were hard to sell because of the stigma; (2) that the Minnesota real estate market was depressed; (3) that even unpolluted properties similar to the Westling property were not selling rapidly; and (4) that it would be very difficult for anyone to obtain financing to buy contaminated property due to the stigma.<sup>76</sup>

The Minnesota Supreme Court rejected these arguments, as well as the conclusion of the Tax Court that the property had only nominal value.<sup>77</sup> The Minnesota Supreme Court reasoned that the Tax Court had not held the Westlings to their burden of proof when the Tax Court ignored or failed to consider many undisputed facts.<sup>78</sup> The Minnesota Supreme Court noted the fact that the Westlings had recently added buildings to the property, were able to secure a loan, and were able to use the property as a commercial enterprise generating \$94,000 of income annually.<sup>79</sup> The Minnesota Supreme Court concluded that the traditional valuation techniques, when modified for the contamination, would be adequate to value the property; therefore, the Court remanded the case to the Tax Court for reconsideration.<sup>80</sup>

The Tax Court, on remand, once again determined that the property had zero market value.<sup>81</sup> Mille Lacs appealed that determination, but that time the Minnesota Supreme Court affirmed the Tax Court decision without a published opinion.<sup>82</sup> After that determination, Mille Lacs and the Westlings were back in front of the Minnesota Supreme Court to determine the value of the property ("*Westling III*").<sup>83</sup> In *Westling III*, the Minnesota Supreme Court again looked at the determination of the Tax Court and affirmed the Tax Court's determination that the stigma discount of the property and the cost of clean up supported valuing the property at zero.<sup>84</sup> The Westlings' appraiser, Peter J. Patchin, testified that if the property were not contaminated it would have a market value of \$1,350,000 both on January 2, 1992, and 1993.<sup>85</sup> However, with the contamination, stigma, and costs to clean up, Patchin valued the property at -\$2,835,000 on January 2, 1992, and -\$2,760,000 on January 2, 1993.<sup>86</sup> Mille Lacs' appraiser, Charles R. Glassing, using the traditional valuation approaches, as he had done in *Westling I* and *II*, determined that the property had a value of \$930,000 on January 2, 1992, and \$900,000 on January 2, 1993.<sup>87</sup>

The Minnesota Supreme Court found that the Tax Court approved of the valuation methods employed by each appraiser, and attributed the significant difference between the values to the stigma discount and the cost to cure.<sup>88</sup> The Tax Court had concluded that Patchin's evaluation was more reliable for two reasons. First, Patchin based the stigma discount on a study of 14 other properties sold after cleaning up the contamination, while Glassing based the stigma discount on published studies.<sup>89</sup> Second, Patchin's cost to cure figures were based on environmental engineer's current

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*3.

<sup>73</sup> Minn. Stat. §§ 270.91-.98 (1998).

<sup>74</sup> *Westling v. County of Mille Lacs*, 512 N.W.2d 863 (Minn. 1994).

<sup>75</sup> *Id.* at 865.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 866.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Westling v. County of Mille Lacs*, 1995 WL 128511 (Minn. Tax Ct. Mar. 17, 1995).

<sup>82</sup> *Westling v. County of Mille Lacs*, 531 N.W.2d 848 (Minn. 1995).

<sup>83</sup> *Westling v. County of Mille Lacs*, 543 N.W.2d 91 (Minn. 1996).

<sup>84</sup> *Id.* at 92.

<sup>85</sup> *Id.* at 93.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* One of the articles that Glassing relied on was written by Patchin. *Id.*

cost estimates, while Glassing's cost to cure figures were based on a letter between Mr. Westling and his environmental engineer, detailing the engineer's market valuation of the property. Finding these reasons proper, the Minnesota Supreme Court affirmed the Tax Court's determination of a market value of zero on the property.<sup>90</sup>

The final *Westling* decision ("*Westling IV*") dealt with the imposition of a tax on the contamination value of the property.<sup>91</sup> The Westlings had challenged the constitutionality of the contamination tax<sup>92</sup> to the Tax Court in *Westling I*, but the Tax Court found no constitutional infirmity in the tax at that time.<sup>93</sup> The Minnesota Supreme Court discussed the various arguments against constitutionality but ultimately affirmed the Tax Court's implementation of the contamination tax, finding that the tax did not violate the Constitutions of Minnesota or the United States.<sup>94</sup>

### C. The Statutes

Shortly after the decision in *Westling I*, the Minnesota legislature enacted a new contamination tax, effective beginning with 1994 taxes and payable in 1995.<sup>95</sup> The act imposed an annual tax on the contamination value of taxable real property.<sup>96</sup> The "contamination value" of land is "the market value reduction, if any, that is granted for general ad valorem property tax purposes for the assessment year because of the presence of contaminants."<sup>97</sup> The contamination value cannot be greater than the estimated cost of implementing a "reasonable response action plan."<sup>98</sup> The tax applies whether the reduction in value was granted by a court, a board of review, or by the county assessor, but is not imposed if the reduction in market value is less than \$10,000.<sup>99</sup> Also, if the reduction is granted by the county assessor it is only included if the assessor reduced the property's market value for the contaminants by using appraisal methods meant to adjust for the presence of contaminants.<sup>100</sup>

The contamination tax is payable at the same time and in the same manner as the regular ad valorem property tax, and is subject to the same penalty, interest, lien, and forfeiture provisions.<sup>101</sup> The contamination tax may not apply if all the requirements of a response action plan have been satisfied.<sup>102</sup> To qualify for the exemption, the property owner must provide the assessor with a copy of the determination of the commissioner that all the requirements have been met and the action plan has been completed.<sup>103</sup>

After determining that a contamination tax may be imposed on the market value reduction, it is necessary to determine the correct value of the contaminated property. All property is to be valued at its market value.<sup>104</sup> To determine the market value of contaminated property, the assessor shall reduce the market value by the contamination value of the property.<sup>105</sup> The contamination value as defined in Subdivision 17 is basically the same as that defined in the contamination tax statute.<sup>106</sup> Subdivision 17 states that the "contamination value is the amount of the market value reduction that results from the presence of the contaminants, but it may not exceed the cost of a reasonable response action plan..."<sup>107</sup>

<sup>90</sup> *Id.*

<sup>91</sup> *Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998).

<sup>92</sup> Minn. Stat. §§ 270.91-98. This statute is discussed further below.

<sup>93</sup> *Westling*, 581 N.W.2d at 817. The Westlings argued that (1) the contamination tax violated the uniformity clause of the Minnesota Constitution and the equal protection clause of the U.S. Constitution, (2) it was a violation through the governmental taking without due process violating the "takings" clause of the Minnesota constitution and the Fifth Amendment of the U.S. Constitution. *Id.*

<sup>94</sup> *Id.* at 823-824.

<sup>95</sup> *Id.* at 818.

<sup>96</sup> Minn. Stat. § 270.91, subd. 1 (1998).

<sup>97</sup> Minn. Stat. § 270.93 (1998).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Minn. Stat. § 270.95 (1998).

<sup>102</sup> Minn. Stat. § 270.94(a) (1998).

<sup>103</sup> *Id.*

<sup>104</sup> Minn. Stat. § 273.11, subd. 1 (1998).

<sup>105</sup> Minn. Stat. § 273.11, subd. 17 (1998).

<sup>106</sup> Minn. Stat. § 270.93.

<sup>107</sup> Minn. Stat. § 273.11, subd. 17 (1998).

## D. Other Approaches in Assessing Value of Contaminated Property

Iowa is similar to Minnesota in the way it treats assessments of property that has been contaminated as evidenced in *Boekeloo v. Board of Review of the City of Clinton*.<sup>108</sup> In this case, the Boekeloos discovered groundwater contamination of their property when they listed it for sale.<sup>109</sup> The city assessor assessed the property using a cost approach.<sup>110</sup> The Boekeloos claimed that the value of the property was actually zero due to the contamination, and therefore, the city assessor had assessed the property in excess of the value authorized by law.<sup>111</sup> The Iowa Code states “all property subject to taxation must be ‘valued at its actual value.’”<sup>112</sup> Iowa forces the appealing property owner to bear the burden of proving that the assessment is excessive, as well as establishing “what the correct valuation should be.”<sup>113</sup>

In *Boekeloo*, the Iowa Supreme Court found that in a typical case, there would be adverse effects on property value when contamination is found.<sup>114</sup> The Court also admitted that a tax assessor must consider all the factors that affect market value in assessing property.<sup>115</sup> However, the Court did not find that the Boekeloo property had a value of zero, because the Boekeloos were still able to use the property for its intended purpose of a tavern.<sup>116</sup>

Missouri courts have not directly faced the issue of stigma and valuing contaminated property; however, the Missouri State Tax Commission has looked at the issue.<sup>117</sup> In *Wright v. Hill*, the Wrights appealed the assessed valuation of their property due to toxic contamination on the property.<sup>118</sup> In Missouri, to obtain a reduction in the assessed valuation of property based on overvaluation, the property owner must prove what the true value of the property is.<sup>119</sup> The Missouri statute also requires assessors to “assess all real property at its true value in money,” with “true value in money” being defined as “... an estimate of the fair market value on the valuation date.”<sup>120</sup> In *Wright*, the Wrights were able to prove that the property was overvalued, by examining an arm’s length sale of the property, and therefore received a reduction in the assessed value.<sup>121</sup>

In *Cohen v. Morton*, the Tax Commission again looked at the value of property that was contaminated.<sup>122</sup> The Cohens proved that the property was subject to contamination due to a gasoline spill on the property.<sup>123</sup> The Cohens also provided evidence of the cost to clean up the contamination.<sup>124</sup> The Commission found that the contamination would have a negative impact on the market value of the property, and that the impact should be accounted for in the appraisal.<sup>125</sup> The property owners provided testimony from an expert that the gasoline spill would cause a stigma on the property that would result in a reduced value.<sup>126</sup> The Commission set aside the assessment of the county of St. Louis and ordered a much lesser property assessment.<sup>127</sup>

<sup>108</sup> *Boekeloo v. Board of Review of the City of Clinton, Iowa*, 529 N.W.2d 275 (Iowa 1995).

<sup>109</sup> *Boekeloo*, 529 N.W.2d at 276.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing Iowa Code §441.21(1)(a) (1993)).

<sup>113</sup> *Id.* at 276-277.

<sup>114</sup> *Id.* at 278.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Wright v. Hill, Assessor for the City of St. Louis, Missouri*, 1994 WL 242338 (Mo. St. Tax. Com.); *Cohen v. Morton, Assessor, St. Louis County, Missouri*, 1998 WL 49148 (Mo. St. Tax. Com).

<sup>118</sup> *Wright*, 1994 WL 242338 at \*2.

<sup>119</sup> *Id.* (citing *Hermel, Inc. v. State Tax Commission*, 564 S.W.2d 888, 897 (Mo. Banc 1978)).

<sup>120</sup> *Id.* at \*3. (citing §137.115.1, R.S.Mo. Supp. 1993 & *Hermel*).

<sup>121</sup> *Id.* at \*6.

<sup>122</sup> *Cohen*, 1998 WL 49148.

<sup>123</sup> *Id.* at \*1.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*3.

<sup>126</sup> *Id.* at \*5.

<sup>127</sup> *Id.*



## IV. INSTANT DECISION

A. *The Majority Opinion*

In the instant decision, the Court began by stating that it had dealt with the issues of clean-up costs and stigma devaluation factors in determining the market value of contaminated properties in the case of *Westling v. County of Mille Lacs (Westling III)*.<sup>128</sup> In *Westling III*, the court allowed a market valuation of zero due to estimated clean-up costs and the stigma discount.<sup>129</sup> The Court examined Anoka County's argument that Subdivision 17 placed a cap on the reduction of a property's value due to contamination at the cost of the reasonable response plan.<sup>130</sup> Anoka attempted to present examples of the application of Subdivision 17, all of which the court rejected.<sup>131</sup>

The Court determined that Anoka County's argument failed for a number of reasons.<sup>132</sup> First, the Court reasoned that a stigma factor may apply to property whether contaminants are present or not.<sup>133</sup> The Court gave the example that if the property had been successfully cleaned of all contamination, the property as well as neighboring property may still have the burden of a stigma of having been contaminated in the past.<sup>134</sup> Second, the majority and dissent agreed that the plain language of Subdivision 17 applied only to contaminated property, from which the majority reasoned that the language does not include a stigma factor because a stigma may be present on property that is not itself contaminated.<sup>135</sup> Third, the Court examined Anoka's attempt to provide an application of the statute in various situations and concluded that the scenarios had no basis in the language of the statute.<sup>136</sup> Fourth, the *Westling III* decision is cited for the court's recognition that separate bases for reductions in market value exist for clean-up costs apart from the stigma discount.<sup>137</sup> The Court reasoned that if the legislature intended to include stigma in the contamination value, the distinction between the two factors would be skewed.<sup>138</sup>

The Court also noted that the legislative history did not support Anoka County's position.<sup>139</sup> There was evidence that the legislature examined stigma devaluation<sup>140</sup> yet it was not specifically included in contamination value, leading the Court to conclude that the legislature did not intend for stigma to be part of the contamination valuation.<sup>141</sup> Finally, the Court determined that Anoka County's interpretation of the statute was inconsistent with the property tax scheme for the state, whereby all property was to be valued at market value with limited exceptions.<sup>142</sup> Anoka argued that Subdivision 17 was one of the specific exceptions; however, the Court concluded that Subdivision 17 allows for an exception by permitting a reduction of market value not authorizing a valuation greater than the market value, which would be the result if stigma were not accounted for.<sup>143</sup> Furthermore, the court stated that the tax assessor must consider all elements that may affect the market value of the property including "environmental factors in the vicinity of the property," which clearly would apply to stigma.<sup>144</sup>

<sup>128</sup> *Dealers*, 615 N.W.2d at 79. *Westling v. County of Mille Lacs*, 543 N.W.2d 91 (Minn. 1996).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Anoka contended that even if the statute did not use the word "stigma," the presence of contaminants is defined as "the release or threatened release... of contaminants on the property," and that because property which has a stigma is subject to the release or threatened release of contaminants, then Subdivision 17 should apply. Anoka applied this reasoning and claimed that if a taxpayer had not begun the clean up, the contamination value would equal the cost of the clean up plan. If the clean up had begun but was not finished, the contamination value would be the remaining cost of the clean up plan. And as the clean up neared completion, the reduction for clean up would decrease and the reduction for stigma would increase, though never exceeding the total cost of the clean up plan. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 80.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> In explaining the tax issues associated with implementing the contamination tax, the committee chair referred to the *Westling* decisions. The chair discussed *Westling* in that the properties were assessed a very high tax value but actually had a very low market value. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 81.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

B. *The Dissent*

Chief Justice Blatz delivered the dissenting opinion.<sup>145</sup> Chief Justice Blatz reasoned that Subdivision 17 contemplated reductions in the market value of property due to contamination, and stigma is one of the types of reductions anticipated.<sup>146</sup> While Justice Blatz agreed with the majority that the plain language of the statute applied only to contaminated property, he argued that stigma was one of the factors included in contaminated property valuation.<sup>147</sup> The majority held that stigma was excluded from the statute since it was not specifically mentioned; Justice Blatz argued that stigma was included, since the statute did not specifically exclude it.<sup>148</sup>

Justice Blatz first examined the meaning of “contamination value” within the meaning of the statute.<sup>149</sup> He reasoned that contamination value does not equate to clean-up costs just because the legislature limited contamination value to the costs of the response plan.<sup>150</sup> Subdivision 17 stated only that the contamination value “may not exceed” the costs of a reasonable response plan.<sup>151</sup> Therefore, if the contamination value was the same as the costs to clean up the property, as the majority argued, then the language “may not exceed” is superfluous.<sup>152</sup> Justice Blatz argued that the language of Subdivision 17 makes it clear that the legislature understood that the costs to clean the property would contribute to a reduction in market value but contamination value and clean up costs are not synonymous.<sup>153</sup>

Justice Blatz then examined the contamination tax provisions at Minn. Stat. §§270.91-.98 to support his position that contamination value is not synonymous with clean up costs.<sup>154</sup> He cited §270.93 specifically for the language that the contamination value of property “may be no greater than” the reasonable response plan. From this wording, Justice Blatz argued that the legislature recognized that it is possible that no contamination value may attach to property from the presence of contaminants.<sup>155</sup> The dissent also examined the legislative history of Subdivision 17; however, Chief Justice Blatz reached the opposite conclusion of the majority and reasoned that stigma is included in contamination value as the legislature was aware of *Westling* and used broad language in the statute.<sup>156</sup> He felt the broad language showed legislative intent to include stigma.<sup>157</sup>

Finally, Chief Justice Blatz presented his concurrence with the majority in the view that Subdivision 17 applies only to contaminated property, and that stigma could attach to property that was not contaminated.<sup>158</sup> He argued, however, that the two conclusions did not have to be mutually exclusive because even if “stigma may attach to uncontaminated or formerly contaminated properties does not mean that stigma was not included” in the statute as part of the contamination valuation.<sup>159</sup> For these reasons, Chief Justice Blatz would reverse the tax court’s decisions and hold that Subdivision 17 does apply to stigma, and therefore, all reductions to market value, including stigma, are limited to the cost of the clean-up response plan.<sup>160</sup> Further, Chief Justice Blatz would hold that the statute does not violate the Minnesota Constitution or the Equal Protection Clause of the United States Constitution.<sup>161</sup>

## V. COMMENT

More and more, courts have to deal with the problem of valuing property that has been contaminated. One of the major challenges to the valuation is stigma. The concept of stigma was addressed by the Minnesota Tax Court in *Westling*

<sup>145</sup> *Id.*<sup>146</sup> *Id.*<sup>147</sup> *Id.* at 82.<sup>148</sup> *Id.*<sup>149</sup> *Id.*<sup>150</sup> *Id.*<sup>151</sup> *Id.*<sup>152</sup> *Id.* at 82-83.<sup>153</sup> *Id.* at 83.<sup>154</sup> *Id.* at 83.<sup>155</sup> *Id.*<sup>156</sup> *Id.*<sup>157</sup> *Id.*<sup>158</sup> *Id.*<sup>159</sup> *Id.* at 83-84.<sup>160</sup> *Id.* at 81.<sup>161</sup> *Id.* at 84.

*v. County of Mille Lacs*<sup>162</sup> and its subsequent litigation. Shortly after the decision in *Westling*, the Minnesota legislature enacted the contamination tax.<sup>163</sup> It can be argued that the purpose of the legislation creating the contamination tax was to recoup the tax revenues that were lost on account of reducing the valuation of contaminated properties. However, since stigma was not specifically delineated in the statute, the contamination value is not said to include a reduction for stigma.<sup>164</sup>

Even without considering stigma, the valuation of contaminated property is very difficult when consideration is given for the costs to cure. It is quite possible that the costs to cure could exceed the market value of the property if it were not contaminated, regardless of the valuation method used. If the property is producing income and using municipal services, it can be argued that the owner should not be allowed to enjoy any reduction in the tax burden. Also, if owners receive assistance in conducting the clean up procedures, either through private funds, public subsidies, or indemnities, should the amount of assistance be considered in calculating the tax liability? The enticement of a reduced or eliminated property tax may also lead to inattentive monitoring of the clean up procedures, in effect working against the purpose of the environmental legislation to lessen the hazardous waste released.<sup>165</sup>

As discussed in *Westling I*, Oregon has developed a valuation method that attempts to resolve a number of problems and create a clear methodology to use.<sup>166</sup> Under the Oregon approach, appraisers will consider all three of the basic valuation approaches.<sup>167</sup> Oregon also requires the income approach to be slightly modified.<sup>168</sup> The income stream is first adjusted to reflect the estimated cost of the clean up procedures to the specific years when the costs are incurred.<sup>169</sup> These annual clean up costs might include "the cost of environmental audits, surety bonds, insurance, monitoring costs [sic], and engineering and legal fees."<sup>170</sup> Next, if the contamination rate is derived from uncontaminated properties, adjustments should be considered to reflect the risks associated with owning contaminated property.<sup>171</sup> If, however, a capitalization rate from similarly contaminated properties is used, no adjustment is necessary.<sup>172</sup> In the alternative, the income stream may be estimated as if the property was environmentally clean and then cost to cure is deducted.<sup>173</sup> This is only one of the approaches that may be utilized to develop a more realistic valuation for property that has been contaminated.

In *Dealers Manufacturing, Co. v. County of Anoka*, the court decided that the plain language of the contamination tax statute is that it applied only to property that is actually contaminated. Because the term "contamination value" is defined as the reduction in market value resulting from the presence of contaminants, the court said, it does not include a stigma factor, since stigma may attach to a property that is not itself contaminated. This creates further problems, not addressed by this case, such as how stigma is valued for the properties not actually contaminated, such as neighboring properties. If the property value of the contaminated property is reduced for stigma so that the tax assessment is lower, shouldn't also the non-contaminated property (which also has stigma) be allowed a reduction in its tax assessment? This seems reasonable, yet the *Dealers* court determined that the contamination value would not apply to the property that is not contaminated; therefore, no reduction for stigma can be allowed if no actual contamination damage exists.

In Missouri, the courts have not directly dealt with the issue of stigma on contaminated property or the effects thereof. The Missouri State Tax Commission has reviewed a number of cases wherein the parties disputed the tax assessment on the property due to contamination of the property and the resulting stigma.<sup>174</sup> The Tax Commission found that a stigma could result to property after it is contaminated, but required the party seeking the reduction to prove such a

<sup>162</sup> *Westling*, 512 N.W.2d 863 (Minn. 1994).

<sup>163</sup> Minn. Stat. §270.91. Hearings on the bill were held on March 26, 1993. *Id.*

<sup>164</sup> *Dealers*, 615 N.W.2d 76 (Minn. 2000).

<sup>165</sup> Reed Cornia, Student Author, *Westling v. County of Mille Lacs: Property Values, CERCLA, and Contamination Taxes*, 7 Wis. Envtl. L.J. 197, 890 (1992).

<sup>166</sup> *Westling*, 512 N.W.2d at 867 (Keith, C.J., & Simonett, J., concurring specially).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Wright v. Hill, Assessor for the City of St. Louis*, Missouri, 1994 WL 242338 (Mo. St. Tax. Com.); *Cohen v. Morton, Assessor, St. Louis County, Missouri*, 1998 WL 49148 (Mo. St. Tax. Com).

stigma exists in order to reduce the tax assessment. In continuing with this standard, Missouri courts should follow the application provided by *Dealers* in their treatment of contaminated property and the attached stigma.

Absent the problems associated with non-contaminated property, the *Dealers* court can only be viewed as correct in their decision. The Court determined that Subdivision 17 does not apply to reductions in the market value of the property due to stigma. This has to be the answer after reasoning through the language of the statute and the meaning of stigma. Since stigma may continue to exist after the contamination is removed, such as through people's "fear" of the property, the contamination value cannot include stigma due to the very definition of contamination value.<sup>175</sup> Therefore, it is only fair that property affected by contaminants be allowed a reduction in its tax assessment due not only to the contamination value and costs to cure, but also due to the stigma.

## VI. CONCLUSION

It appears that the *Dealers* court interpreted Subdivision 17 and the contamination tax provision correctly. There is neither a mention of stigma in the language of the statute, nor any other discernible phrasing that could be attributed to the idea of stigma attaching to contaminated property. However, as a result of the decision, it is possible that piece of property will have its assessed tax reduced to zero, yet still be a profitable and valuable piece of property.

M. KATHERINE FREED

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<sup>175</sup> Contamination value is defined as the reduction in market value resulting from the presence of contaminants.