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THE TAX COURT COMMITTEE ON OPINIONS

ACP PARTNERSHIP,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NOS. 009227-2010
Plaintiff,	:	002452-2011
	:	000971-2012
v.	:	001049-2013
	:	003566-2014
GARWOOD BOROUGH,	:	000431-2015
	:	
Defendant.	:	

Approved for Publication
In the New Jersey
Tax Court Reports

Decided: March 22, 2016

Kevin S. Englert for plaintiff ACP Partnership
(The Irwin Law Firm, P.A., attorneys).

Robert F. Renaud for defendant Garwood Borough
(Renaud Palumbo & DeAppolonio, LLC, attorneys).

NOVIN, J.T.C.

This constitutes the court's opinion on plaintiff's motion for partial summary judgment and defendant's cross-motion to compel plaintiff to provide discovery and a trial-ready appraisal report.

These appeals challenge the property tax assessments on improved real property which has been contaminated by years of industrial activity. By order dated September 25, 2015, the above-matters were consolidated for discovery and trial pursuant to R. 8:8-3(a). As the parties begin to prepare for trial they seek a ruling on whether, as the taxpayer argues, the environmental contamination and the costs associated with remediation of the property must be accounted for in determining the true market value of the property, or whether, as the municipality argues, the property possesses a distinct 'in use' value resulting from the taxpayer's continued operations on the property thereby requiring application of 'normal assessment techniques' in valuing the

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property. For the reasons stated more fully below, the court concludes that because the property possesses a 'value in use' to the taxpayer, 'normal assessment techniques' may be an effective tool utilized in formulating an opinion of value for the property. However, in the present matter 'normal assessment techniques' are not the exclusive device to be employed in the valuation of the taxpayer's contaminated property. Thus, the court will permit consideration of the subject property's environmental contamination in the derivation of its true market value.

I. Findings of Fact and Procedural History

Pursuant to R. 1:7-4, the court makes the following findings of fact and conclusions of law based on the certifications and exhibits submitted by the parties.

These appeals concern the local property tax assessment on real property and improvements owned by plaintiff, ACP Partnership ("plaintiff" or "taxpayer"), located at 550 South Avenue, in the Borough of Garwood, County of Union and State of New Jersey (the "subject property"). The subject property is designated on the municipal tax map of Garwood Borough ("defendant") as Block 301, Lot 1.[1]

Sanborn Maps and historical records revealed that beginning in or about 1927 Magnus Chemical Co., Inc. ("Magnus") operated a manufacturing facility producing industrial washing machines (degreasers) and formulated industrial cleaning products on portions of the subject property. Photographs and other records disclosed that Magnus maintained above-ground storage tanks ("AST"), containing ortho-dichlorobenzene and other chemicals, and five underground storage tanks ("UST"), containing fuel oil, kerosene, potassium hydroxide and cresylic acid. The AST were removed from the subject property in or about 1974-1975.

[1] Plaintiff is also the owner of real property immediately adjacent to the subject property in the Town of Westfield designated as Block 3307, Lot 3, commonly known as 461-469 South Avenue (the Westfield Parcel"). Plaintiff has not filed tax appeals challenging the tax assessments on the Westfield Parcel.

In 1928 Bell Brothers Co. acquired the subject property and in 1947 conveyed title to Bell Factory Terminal Inc. ("Bell Factory"). Magnus conducted manufacturing operations on the subject property from 1927 to 1964 pursuant to a lease agreement with Bell Factory (the "lease agreement"). In 1964, Ecolab, Inc. ("Ecolab"), previously known as Economics Laboratory, merged with Magnus and continued operations on the subject property from 1964 to 1971. In 1971, Ecolab terminated the lease agreement and vacated the subject property.

Plaintiff's predecessor, the ACP Trust, purchased the subject property from Bell Factory in March 1975, years after manufacturing operations had ceased. Because ACP Trust acquired the subject property prior to enactment of the Environmental Cleanup Responsibility Act ("ECRA"), N.J.S.A. 13:1K-6 to -14 (superseded by the Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6 to -14), no statutory environmental investigation and cleanup was required as a condition of the sale. The ACP Trust was terminated in 1990 and title to the subject property was transferred to plaintiff in October 1991.

In October 1990, in accordance with state environmental laws and under the supervision of representatives of the New Jersey Department of Environmental Protection ("NJDEP"), plaintiff undertook removal of the five abandoned UST and their contents from the subject property. Although no visible signs of leakage were detected as the UST were removed, a "pungent odor" was noted by the tank removal contractor.

In December 1998, plaintiff and NJDEP executed a Memorandum of Agreement ("MOA") to continue environmental investigative work at the subject property. The MOA was a voluntary NJDEP program for "non-priority" sites under which a property owner or tenant would agree to parameters for the investigation and remediation of environmentally contaminated

property.[2] Thereafter, plaintiff retained several environmental consulting companies to investigate the source of the "pungent odor" and to determine whether environmental contamination existed on the subject property. During the continuing environmental investigation, several Remedial Investigation Reports ("RIR") were prepared by the environmental consultants and submitted to NJDEP highlighting Areas of Concern ("AOC") identified on the subject property. In response to the RIR, the NJDEP requested additional site data and information from the environmental consultants. Ground water monitoring wells were installed and sampling results revealing the presence of chlorinated volatile organic compounds ("VOC"), including benzene, toluene, ethyl benzene and xylene exceeding NJDEP Class II-A Ground Water Quality Criteria.

On February 1, 2006, a Remedial Investigation Report Addendum and Remedial Action Workplan ("RAW") was prepared by plaintiff's environmental consultant and submitted to the NJDEP for approval.[3] The RAW addressed the AOC identified during investigation of the soil and ground water impacted by the VOC, the effect on public health posed by the contamination and proposed two "synergistic remedial technologies" involving the use of injections of chemical oxidation compounds and bioremediation to attempt to remedy the environmental contamination. The RAW estimated the initial costs associated with the remedial action to be $545,000. Plaintiff applied for and received a 50% innocent party grant from the Hazardous Discharge Site Remediation Fund ("HDSRF") to perform the remediation activities.[4]

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[2] In 2009, with the enactment of the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq., the voluntary MOA cleanup program was discontinued.

[3] The record before the court does not disclose whether the RAW was approved by the NJDEP.

[4] The HDSRF was established in July 1993 to provide a source of grant and loan funding to qualifying public entities, private entities and non-profit organizations performing environmental remediation activities under NJDEP's Site Remediation Program. N.J.S.A. 58:10B-4. To qualify for an innocent party grant under the HDSRF, an applicant must demonstrate that it acquired the property prior to December 31, 1983; the hazardous substance or waste that was discharged at the property was not used by the applicant at that site; and the applicant must certify that he/she did not discharge any hazardous substances or hazardous wastes on the property. N.J.S.A. 58:10B-6(a)(4).

On December 21, 2009, a Remedial Action Progress Report ("RAPR") was prepared by plaintiff's environmental consultant and submitted to the NJDEP. The RAPR disclosed that between 2006 and 2009 six injections of chemical oxidation compounds and aerobic enhanced in-situ bioremediation were undertaken on the subject property with mixed results. Thus, the RAPR recommended continuing denitrification-based bioremediation treatment of the property.

On January 10, 2010, the NJDEP approved the scope of remediation activities to be continued on the subject property. However, during treatment of the subject property, plaintiff's environmental consultant identified four new AOC on the subject property.

Accordingly, on April 29, 2010, plaintiff's environmental consultant submitted a request to the NJDEP for a Permit-by-Rule, authorization to install additional temporary groundwater monitoring wells and perform additional in-situ bioremediation treatment activities on the subject property. Plaintiff's environmental consultant estimated that the additional costs associated with such activities would be $148,500.

On September 10, 2010, plaintiff's New Jersey licensed site remediation professional ("LSRP") presented the site investigation results to the NJDEP with respect to the four new AOC. Plaintiff's environmental consultant concluded that, based upon preliminary soil and groundwater sampling results, a remedial investigation must be performed of the four new AOC. Plaintiff's LSRP outlined a proposed remedial investigation work plan including vapor intrusion sampling, installation of ground water monitoring wells, soil sampling and membrane interface probe borings. The LSRP estimated that the additional costs associated with the site investigation of the four new AOC's would be $155,600.

All of the testing and remedial investigative work performed on the subject property ultimately revealed soil contaminated with bromomethane, methyl acetate, acetone, dichloroethene, dioxane, toluene, ethyl benzene, xylene, dichlorobenzene and naphthalene in

levels exceeding NJDEP criteria. As a result, the subject property was placed on the NJDEP's Known Contaminated Sites List.

In or about December 2013, plaintiff's LSRP conducted sampling intended to delineate the extent of the contamination surrounding the site of the former AST. However, the sampling revealed additional contamination beneath the site of Magnus' former mixing building. Further investigation has revealed potential contamination down to the bedrock beneath the subject property. This further investigative work has resulted in more than double the previously estimated contaminant mass size.

On or about December 4, 2012, plaintiff filed an Amended Complaint against Ecolab in the United States District Court for the District of New Jersey seeking payment for "past, present and future investigation and remediation costs that plaintiff incurred and will continue to incur" for the subject property, together with costs and attorney's fees. On December 18, 2012, Ecolab filed an Answer to plaintiff's Complaint. The litigation between plaintiff and Ecolab is ongoing.

Despite the presence of extensive soil and groundwater contamination, the subject property continues to operate as a multi-tenanted, and multi-structured industrial and warehouse complex containing approximately 230,000 square feet of improvements. Plaintiff leases the subject property to tenants utilizing it for various warehouse and industrial uses. Plaintiff occupies a small portion of the improvements for self-storage.

Plaintiff filed tax appeals contesting the local property tax assessment on the subject property for the 2010, 2011, 2012, 2013, 2014 and 2015 tax years (the "applicable tax years"). For the applicable tax years, the subject property was assessed by Garwood Borough as follows:

Land:	$1,536,500
Improvement:	$2,613,500
Total:	$4,150,000

On May 16, 2014, plaintiff furnished defendant with an appraisal report for the subject property for the 2010, 2011 and 2012 tax years.

On October 2, 2015, plaintiff moved under R. 4:46-1 for partial summary judgment. Plaintiff's motion requests the court to resolve a legal question left open by our Supreme Court in Inmar Associates, Inc. v. Borough of Carlstadt, 112 N.J. 593 (1988), namely whether a property's "in use" status precludes any consideration of environmental contamination in both assessing practices and in establishing true market value.

Plaintiff's motion is premised upon the argument that property must be valued at true market value and although a dollar-for-dollar remediation cost adjustment is wholly inappropriate, our state's Constitution requires some consideration of a property's environmental condition, even if the property is 'in use'.

Defendant opposes plaintiff's motion and cross-moves for plaintiff to provide additional discovery on the scope of the environmental contamination, along with a trial-ready appraisal report. According to defendant, the subject property's 'in use' status dictates that only 'normal assessing techniques' must be applied and consequently, a reduction in the local property tax assessment is unwarranted. Defendant maintains that because plaintiff leases and occupies the subject property, no consideration should be given to its environmental contamination in establishing its true market value.

The court heard oral argument from counsel on February 19, 2016.

I. Conclusions of Law

A. Summary Judgment

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the [moving] party is entitled to a

judgment or order as a matter of law." Alpha I, Inc. v. Director, Div. of Taxation, 19 N.J. Tax 53, 56 (Tax 2000) (citing R. 4:46-2). R. 4:46-2 outlines the circumstances under which a motion for summary judgment should be granted:

> if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In Brill v. Guardian Life Insurance Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. E.d. 2d 202, 214 (1986)), our Supreme Court adopted the federal approach to resolving motions for summary judgment, in which "the essence of the inquiry [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In conducting this inquiry, the trial court must engage in a "kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Ibid. The standard established by our Supreme Court in Brill is as follows:

> [W]hen deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Id. at 563.]

In considering all of the material evidence before it with which to determine if there is a genuine issue of material fact, the court must view most favorably those items presented to it by the party opposing the motion and all doubts are to be resolved against the movant. Ruvolo v. American Casualty Co., 39 N.J. 490, 491 (1963). The moving party bears the burden "to exclude any reasonable doubt as to the existence of any genuine issue of material fact" with respect to the

claims being asserted. United Advertising Corp. v. Borough of Metuchen, 35 N.J. 193, 196 (1961). "By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where a party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, supra, 142 N.J. at 529. When the party opposing the motion merely presents "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious," then an otherwise meritorious application for summary judgment should not be defeated. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954). Hence, "when the evidence is so one-sided that one party must prevail as a matter of law…the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. E.d. 2d at 214.).

In applying these standards to plaintiff's motion, the court concludes that genuine issues of material fact exist regarding the scope of the environmental contamination, the costs associated with its cleanup, and how both the contamination and cleanup costs impact and influence its true market value. However, these factual issues do not preclude the court from addressing plaintiff's motion for partial summary judgment with respect to the legal question presented. Moreover, the discovery issues raised in defendant's cross-motion, are within the sound purview and discretion of the court and therefore, are fit to be addressed herein.

With respect to the legal question presented, the court concludes that the following material facts, about which no genuine issue exist, are: (a) Block 301, Lot 1 is approximately 9.8 acres; (b) during the 6 years at issue, the subject property bore a total local property tax assessment of $4,150,000; (c) although the extent of the contamination mass discovered on the subject property has recently expanded, the contamination and preliminary estimates to remediate the contamination were known to plaintiff as of the applicable valuation dates herein; (d) to qualify

for the innocent party grant under the HDSRF, plaintiff was required to certify that it did not discharge any hazardous substances on the property and that the hazardous substances discovered in the soil and ground water on the property were not used by plaintiff and/or its tenants; (e) despite the presence of contamination, the subject property has and continues to be occupied by tenants and thus, utilized by plaintiff for income producing activities during the applicable tax years; and (f) the subject property was designated on NJDEP's Active Sites with Confirmed Contamination.

B. Environmental Contamination

Contamination is a factor critical to the derivation of a property's true market value. Our Supreme Court concluded that a property's environmental contamination must be considered when determining true market value for local property tax purposes. Inmar Associates, Inc., supra, 112 N.J. 593. Although public policy considerations exhibit contempt for polluters, the New Jersey Constitution affords "no discretion to balance" those interests against the constitutional mandate that all property be assessed at true value. Inmar Associates, Inc., supra, 112 N.J. at 601 (citing Switz v. Township of Middletown, 23 N.J. 580, 592-93 (1957)).

In Inmar Associates, Inc., supra, 112 N.J. 593, our Supreme Court considered appeals of local property tax assessments by two owners of contaminated industrial properties. In one case, the property was being operated as an asphalt siding plant on the relevant dates of valuation. The owner considered removing the plant from service and selling the property, however, under the recently enacted ECRA, the owner recognized that it would be required to clean up the property prior to its sale. Id. at 596. During trial the taxpayer's director of real estate estimated the costs necessary to comply with ECRA and the taxpayer sought a "direct deduction from the stipulated tax assessment" for the estimated cleanup costs. Id. at 597. The trial court concluded that the

taxpayer presented "no evidence of a cleanup plan approved by the Department of Environmental Protection" and denied the relief sought by the taxpayer. Ibid.

The second case before the Court in Inmar Associates, Inc., supra, 112 N.J. 593, involved a taxpayer who owned a parcel of real estate in the Hackensack Meadowlands area that it leased to a tenant engaged in industrial solvent recovery operations. After the NJDEP revoked the tenant's authority to operate its business as a result of regulatory violations, the tenant abandoned the property, leaving sixty-seven leaking stationary tanks and tank wagons containing various chemical wastes and solvents. Id. at 598. The NJDEP instituted suit against the property owner and the tenant seeking to compel remediation of the contamination on the property. The NJDEP assumed custody of the property and imposed a lien upon the assets of the property owner for the estimated cleanup costs. Id. at 599. During trial, the taxpayer was "unable to ascertain the full extent of the cleanup costs at the assessment date because neither the exact degree of contamination nor the level to which the contamination would have to be cleaned up on the site had been determined by any government agency." Id. at 598-599. The taxpayer argued the property was "unmarketable and therefore should be regarded as having no value". Id. at 599.

Recognizing the bedrock principle that "all real property dedicated to municipal tax purposes must be 'assessed according to the same standard of value'", the Court concluded that the effect market forces have on property with environmental cleanup burdens "cannot be ignored in the assessment process simply because it would be counter to the environmental policy." Id. at 606 (footnote omitted). "Where exactly environmental cleanup cases fit in such a spectrum was not fully developed" by applicable case law at that time. Id. at 605. Although the Court expressed uncertainty with the role environmental remediation costs should play in the assessment valuation process, the Court was unwavering in its conviction that "the methodology for resolving the

question is not simply to deduct the cost of the cleanup from a putative value of the property. That would reflect only the cost accounting of the current owners." Ibid.

In writing for the unanimous Court, Justice O'Hern observed that had the tenant engaged in "'competent management' many of today's [environmental contamination] problems" might have been averted." Id. at 608. Making "annual expenditures [to maintain a property free from pollution would] reflect a reduced net operating income [and] correspondingly reduce[] the appraised value of the property as an income producer." Ibid. The Court posited that in the absence of comparable market data on contaminated properties "it may be helpful for appraisers to view these properties as they do special purpose properties using a measure of flexibility that will aid in the determination of the 'true value' of contaminated properties." Id. at 606. The Court recognized that strict application of the "'three classic approaches to value used in the appraisal of real estate [cost, market data, and income]" would suffer from "severe limitations when applied to special-purpose properties due to the absence of adequate market data. Id. at 607 (quoting J. Eaton, Real Estate Valuation in Litigation, 171 (1982)). Thus, the Court concluded that "the seeds of [a] useful doctrine" were present in the proposal that "the cost to cure the contaminated property could be treated as a capital improvement, which can be depreciated over the beneficial life of the property." Id. at 607.

Finally, the Court observed that a contaminated property for which there is no market may nonetheless have "a distinct 'value in use' to the owner so long as the owner continues to operate the facility." Ibid. Thus, the Court concluded, when a "property is in use, normal assessment techniques will remain an appropriate tool in the appraisal process." Ibid. However, reaching the conclusion that "normal assessment techniques" remain "an appropriate tool in the appraisal process" for "in use" properties, our Supreme Court did not decree that they are the only tools available in the vast valuation and appraisal toolbox to value contaminated property. Instead, the

Court instructed trial courts and experts in the field of property valuation to fashion a flexible approach to "aid in the determination of the 'true value' of contaminated properties." Id. at 606.

Following our Supreme Court's decision in Inmar Associates, Inc., the reported cases involving the valuation of environmentally contaminated property could be classified into two categories: (1) those where the property owner/manufacturer continued "in use" operations to avoid triggering costly statutorily mandated environmental cleanup obligations; and (2) those where the manufacturing operations that caused or contributed to the environmental contamination had ceased and the property owner, manufacturer or bona fide contract purchaser was engaged in an investigation and remediation of the environmental contamination.

In the latter category of cases, Badische Corp. (BASF) v. Town of Kearny, 288 N.J. Super. 171 (App. Div. 1996); Metuchen I, LLC v. Borough of Metuchen, 21 N.J. Tax 283 (Tax 2004); Orient Way Corp. v. Township of Lyndhurst, 27 N.J. Tax 361 (Tax 2013), aff'd, 28 N.J. Tax 272 (App. Div. 2014), certif. denied, 220 N.J. 574 (2015); and Methode Electronics, Inc. v. Township of Willingboro, 28 N.J. Tax 289 (Tax 2015), the courts have considered the impact that environmental contamination has on the true value of the property. Conversely, in the former category of cases, Pan Chemical Corp. v. Borough of Hawthorne, 404 N.J. Super. 401 (App. Div. 2009), certif. denied, 198 N.J. 473 (2009), the court declined to consider the influence environmental contamination had upon an "in use" property.

In Badische Corp. (BASF) v. Town of Kearny, supra, the court reviewed a challenge to a local property tax assessment on contaminated industrial property. Prior to the valuation date the taxpayer decided "to close the plant", triggering the taxpayer's statutory cleanup obligations under ECRA. The taxpayer filed a General Information Notice and a Site Evaluation Submission with the NJDEP communicating its intent to cease operations, and delineating a soil and groundwater sampling plan to ascertain the scope of the environmental contamination. 288 N.J. Super. at 179.

During trial, the taxpayer's site remediation manager provided testimony regarding the estimated costs to remediate the soil and groundwater contamination based upon initial sampling results. Id. at 179-180. Although the taxpayer's representative acknowledged that the estimated cleanup costs were subject to change based on negotiations with the NJDEP, the Appellate Division concluded that the taxpayer presented "proofs at least equal, if not surpass, those submitted by Inmar and…sufficient to warrant demand." Id. at 183. The court explained:

> [a]s of the assessment date, BASF had submitted a detailed [report] to the DEP documenting the environmental history of the subject property. A sampling plan setting forth the method of testing to determine the extent of contamination was submitted and approved by the DEP. Soil and groundwater testing were substantially complete, and some results were available enabling BASF to estimate the amount of contamination and the cost of cleanup at $10 million. BASF established a $10 million reserve to cover these costs. These proofs at least equal, if not surpass, those submitted by Inmar and found by the New Jersey Supreme Court sufficient to warrant remand. We therefore remand to the Tax Court to adjust the value of the subject property due to environmental contamination.
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> [Ibid.]

Thus, the court remanded the matter to the Tax Court to exercise its "specialized knowledge and expertise" in the "formulation of a proper method for determining the effect of cleanup costs on the value of environmentally contaminated land." Id. at 184.

In Metuchen I, LLC v. Borough of Metuchen, supra, the taxpayer purchased property that had been contaminated by industrial pollutants during decades of manufacturing activities. All manufacturing operations ceased approximately nine years prior to the sale of the property. As a condition of the sale, the purchaser assumed all environmental cleanup costs associated with the property. 21 N.J. Tax at 286. The purchaser filed a tax appeal seeking a reduction in the local property tax assessment based on estimated cleanup costs, entrepreneurial profit and stigma. Ibid. The parties stipulated to the unimpaired value of the property and the environmental cleanup costs

thus, the "only issue for determination [by the court was] how that value should be reduced to take into account the contamination." Ibid.

Observing that the value of "uncontaminated land is worth more than contaminated land," the court recognized that "as contaminated land is cleaned up, the value of the land increases." Id. at 294. Hence, the court viewed "the appropriate way to deal with the contaminated property…is to discount over five years the remaining cleanup costs rather than allowing all of it to be deducted in every year once the cleanup has begun." Id. at 295. The court observed that had it allowed the purchaser continued reductions in the local property tax assessment "after the [cleanup] money has been expended [would ignore] the reality that after money is expended the property is worth more." Ibid.

In Orient Way Corp., supra, the court departed from the traditional "discounting-of-remediation-costs approach" and adopted a market driven approach to valuing an environmentally contaminated property. The property's former owner, Benedict Miller, Inc. ("BMI"), became obligated to undertake cleanup of the property under ISRA. Rather than engaging in the cleanup of the property, BMI sold the property to Red Roc Realty, LLC ("Red Roc"), who assumed responsibility for the cleanup, subject to NJDEP approval of its remediation plan. Despite Red Roc's good faith efforts, it was unable to secure approval of a remediation plan from the NJDEP. Accordingly, Red Roc sold the property, in an arms-length transaction, for $2,400,000 and the purchaser assumed responsibility for the costs associated with environmental remediation. Thereafter, the purchaser filed a tax appeal challenging the local property tax assessment on the property. Although the parties stipulated the fair market value of the property in its uncontaminated state, they were unable to agree on the fair market value of the property in its contaminated state. The purchaser maintained that the scope of contamination, the statutory obligation to clean up the property, and the estimated costs associated with cleaning up the property

were known by the property owner, as a willing seller, and the purchaser, as a willing buyer. Thus, the purchaser argued that the negotiated sales price represented the true market value of the property as of the valuation date. 27 N.J. Tax at 377.

The court concluded that discounting the estimated costs associated with environmental cleanup, was not the most appropriate method for determining the true market value of that property. Instead, the court observed that when a sophisticated seller and buyer, both aware of the contamination and the estimated cleanup costs, having freely negotiated the sales price of the property, the most suitable approach to determining the true market value was to utilize the sale of the subject property. As the court explained "[t]here is no need to resort to the discounting of estimated remediation costs or similar measures to determine the effect on value of the subject property's contamination in this case. Here, the market has performed that task." Id. at 390-91. Thus, the court adopted the contract sales price as the measure of the true market value of the property.

In Methode Electronics, Inc. v. Township of Willingboro, supra, the court declined to apply the "discounting-of-remediation-costs approach" as a result of the chasm which existed in having to assume the property contamination could be remedied. In that case, the taxpayer conducted decades of manufacturing operations on the property during which time the soil and groundwater became contaminated with volatile organic compounds. The taxpayer ceased manufacturing operations on the property triggering the taxpayer's statutory obligation under ISRA to remediate the contamination. Environmental investigation revealed that the environmental contaminants on the property posed a risk of emitting toxic vapors into the air and structures on the property. Thus, under the remediation plan, the taxpayer demolished the manufacturing facility but left its concrete slab floor and adjacent paved parking lot in place to serve as a cap, preventing off-gassing of the toxic vapors. Prior to the valuation dates, the

taxpayer incurred remediation expenses of $6 million; as of the year following the valuation dates, incurred additional remediation expenses of $2.5 million, and expected to incur additional remediation expenses between $2,386,000 to $3,714,000. Moreover, as of the valuation dates the taxpayer estimated that it would incur an additional expense between $120,000 and $150,000 per year to maintain well monitoring equipment on the property for an indefinite period of time. The taxpayer filed a challenge to the local property tax assessment arguing that as a result of the extensive environmental contamination the property cannot presently, nor in the "foreseeable future" be developed, and thus has only a nominal value.

The court recognized that the approach of discounting the environmental cleanup costs which was adopted by the courts in Inmar, Badische Corp., and Metuchen I would not be useful because of the inherent difficulty in valuing the property as if clean. The court observed that determining a "value for the subject property as if clean…would require an assumption…that the property could be cleaned at some point in the foreseeable future." 28 N.J. Tax at 306. However, the evidence presented during trial "established that the pollution at the subject property is of a type and concentration that the identification of an end date for the remediation process is elusive, if not impossible." Ibid. Additionally, the court discerned that employing the "discounting-of-remediation-costs approach…would require [the] court to presume that the ultimate cleanup of the property would include removal of the remediation wells, monitoring wells and concrete cap", however the record was devoid of evidence that the NJDEP envisioned "removal of those features at any identifiable point." Id. at 307. Thus, the court concluded that the property was subject to environmental restrictions, limitations and regulations that effectively rendered the property "an ongoing financial liability" and assigned it only a nominal true market value. Id. at 308.

Conversely, in Pan Chemical Corp., supra, the Court addressed application of Inmar Associates, Inc. to a property contaminated by years of manufacturing operations involving industrial coatings, color dispersions, inks and nail polish. Although the taxpayer had relocated the bulk of its manufacturing operations and employees to a new location, the taxpayer purposely and intentionally continued minor manufacturing operations on the site, leaving "three employees on the subject property" to "avoid or postpone costly environmental clean-up" costs associated with its legal obligations under ISRA. The taxpayer argued that the continued site operations were "irrelevant" and urged the court to deem the property as "not in use" so that it could "claim a reduced tax liability." 404 N.J. Super. at 411. In reversing the trial court's decision to treat the property a non-operating facility, the Appellate Division concluded that the statutory definition of "closed down" under ISRA should apply. Thus, where the taxpayer sought to avoid or postpone triggering its environmental cleanup responsibilities and obligations by maintaining insignificant operations on the property "it is not unfair that [the property] be treated as a continuing operation, that is, not closed for tax assessment purposes." Id. at 413. Otherwise, the court observed there would be a "'windfall tax benefit to the very persons responsible for toxic conditions, even though no actual clean-up costs are incurred.'" Ibid. (quoting University Plaza Realty Corp. v. Hackensack City, 264 N.J. Super. 353, 358 (App. Div. 1993)).

However, the current case presents an anomaly, as the facts materially differ from those exhibited in the precedents cited above. Here, the taxpayer purchased the subject property prior to enactment of ECRA and ISRA. Thus, upon plaintiff's acquisition of the property no statutory cleanup obligation was triggered for the former owner. Following its acquisition of the subject property, the taxpayer undertook removal of five abandoned UST, including their toxic contents, seemingly left by Magnus and/or its successors. After discovering the presence of environmental

contaminates on the subject property, the taxpayer entered into a voluntary MOA with the NJDEP to investigate the contamination source and implement remediation efforts. Moreover, the taxpayer has sought to hold the party or parties who allegedly caused and/or contributed to the environmental contamination responsible for its cleanup by instituting and prosecuting litigation against them for damages.

Here, the taxpayer has not avoided or shirked its legal obligation to investigate and commence cleanup of the environmental contamination on the subject property, rather it has embraced it. Moreover, the record is devoid of any evidence intimating that plaintiff caused, contributed or exacerbated the environmental contamination on the subject property. In fact, plaintiff was required to certify, as a condition precedent to receiving its 50% innocent party grant from the HDSRF, that no hazardous substance or waste discharged at the property was used by plaintiff; and that plaintiff did not discharge any hazardous substances or hazardous wastes on the property. N.J.S.A. 58:10B-6(a)(4). Thus, no "'windfall tax benefit'" would be bestowed on plaintiff if the court were to recognize the effect environmental contamination on the true market value of the property. Pan Chemical Corp., supra, 404 N.J. Super. at 413 (quoting University Plaza Realty Corp., supra, 264 N.J. Super. at 358).

It is a well-settled principle that "uncontaminated land is worth more than contaminated land." Metuchen I, LLC, supra, 21 N.J. Tax at 294. A "diminution in value" is the difference between the "unimpaired and impaired" land values due to the increased risks or costs "attributable to the property's environmental condition." Appraisal Institute, The Appraisal of Real Estate, 226 (13th ed. 2008). In determining the value of 'in use' contaminated property our Supreme Court stated that 'normal assessment techniques' should be applied "so long as the owner continues to operate the facility." Inmar Associates, Inc., supra, 112 N.J. at 607. Thus, a manufacturing or industrial facility property owner, ground lessee or tenant whose operations

have caused, exacerbated or contributed to the contamination of the property, and who continues operations on the property, as defined under ISRA, should be precluded from asserting the property is devalued due to contamination. A "windfall tax benefit [should not be accorded] to the very persons responsible for toxic conditions." Pan Chemical Corp., supra, 404 N.J. Super. at 413 (citing University Plaza Realty Corp., supra, 264 N.J. Super. at 358). Here however, the manufacturing operations, which allegedly caused the contamination on the property, ceased in or about 1971 when title was in the hands of its former owner, Bell Factory. The taxpayer has not and does not operate the property as a manufacturing facility. Instead, the taxpayer converted the manufacturing facilities into a multi-tenanted and multi-structured industrial and warehouse complex. Thus, the subject property should "be valued for tax purposes in the actual condition in which the owner holds it." University Plaza Realty Corp., supra, 12 N.J. Tax at 370 (citing Hackensack Water Co. v. Borough of Old Tappan, 77 N.J. 208 (1978)).

Moreover, neither party disputes that as of the applicable valuation dates, the property was an "in use" income-producing warehouse and industrial property, subject to an ongoing environmental investigation and cleanup. Thus, application of "normal assessment techniques" remains an appropriate tool in the valuation process. Inmar Associates, Inc., supra, 112 N.J. at 607. However, 'normal assessment techniques' need not be the only tool employed in valuing an 'in use' environmentally contaminated property. As Justice O'Hern posited, one approach may be that "the cost of neglected cure might prudently be spread out by 'competent management' over a number of years." Id. at 608. Thus, despite a property's potential gross income producing prowess, it may not be altogether inappropriate to assume a "hypothetical annual expense" consisting of the costs associated with an environmental cleanup. Ibid.

Based on the facts presented, the court concludes that under the holding in Inmar Associates, Inc., the court is required to take into consideration the environmental condition of

the subject property. The court must endeavor to reach a conclusion of the true market value of the subject property "as if clean." Embarking on that journey, the court must consider the potential gross income which will be derived from the continued income producing occupancy of the subject property and evaluate the proposed methodologies to be employed to account for the past and future estimated costs associated with cleanup of the environmental contamination. Thus, use of 'normal assessment techniques' cannot be wholly ignored in attempting to determine the true value of the subject property based upon its 'in use' status. However, such techniques must be tempered by the costs encountered by the taxpayer in addressing the environmental condition of the property. Without competent and qualified testimony from environmental and property valuation experts, it would be premature at this time for the court to offer a methodology to account for the effect contamination has on the true market value of the subject property. Instead, the "sound measure of that adjustment" should be left to "the competence of the appraisal community." Inmar Associates, Inc., supra, 112 N.J. at 608.

The court finds unavailing defendant's argument that, because no NJDEP approved environmental cleanup plan has been adopted, the court is precluded from considering the effect contamination has on the true value of the property. A "government-approved cleanup plan is not a necessary predicate for an adjustment to assessed value for environmental contamination." Orient Way Corp., supra, 27 N.J. Tax at 374. See also Inmar Associates, Inc., supra, 112 N.J. at 610 (remanding to the Tax Court for a determination of the effect contamination has on value despite the lack of government approved plan); Badische, supra, 288 N.J. Super. at 180, 184-85 (remanding to the Tax Court for a determination of the effect contamination has on value despite the taxpayer having not submitted a cleanup plan).

Finally, defendant argues that plaintiff's motion is premature because of the possible presence of third parties who may bear responsibility for some or all costs associated with the

environmental cleanup. However, an "owner's expenditures of cost are 'never conclusive on the question of value for tax purposes.'" Inmar Associates, Inc., supra, 112 N.J. at 605 (quoting Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 455 (Tax), aff'd, 180 N.J. Super. 366, 3 N.J. Tax 1 (App. Div. 1980), certif. denied, 88 N.J. 495 (1981)). The debt service expense incurred by a property owner does not reduce the property's true market value. For instance, if a property owner "borrowed the funds to clean up [the property] before the October 1 assessment date, and did clean [it] up, that debt would not reduce the value of the property." Ibid. Consideration of such expenditures and who bears primary responsibility for same could improperly understate a property's fair market value. "Simply because cleanup costs will affect the owner's profits does not…automatically require a reduction in the tax assessment." Inmar Associates, Inc., supra, 112 N.J. at 605. Thus, the costs to be incurred during an environmental cleanup and the party bearing responsibility for those cleanup costs plays no role in determining a property's true market value. Rather, if a property is rendered "unmarketable because of its condition, consideration must be given to the realistic likelihood that the owner will be able to cure the condition." Ibid.

C. Discovery

Defendant maintains in its cross-motion to compel discovery that "[s]ince a December 2009 Remedial Action Progress Report, Plaintiff has not submitted a remedial action work plan on which Garwood Borough can accurately assess the costs associated with related cleanups." Thus, defendant seeks an order from the court compelling plaintiff to "provide its final environmental and appraisal reports and any outstanding discovery" by a certain date.

The rules of discovery are to be liberally construed, favoring litigants' rights to "broad pretrial discovery." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997) (citing Jenkins v. Rainner, 69 N.J. 50, 56 (1976)). Our court system has long favored the view that

"essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins, supra, 69 N.J. at 56. Nonetheless, "the scope of discovery is not infinite." K.S. v. ABC Professional Corp., 330 N.J. Super. 288, 291 (App. Div. 2000), motion for leave to appeal denied, 174 N.J. 409 (2000). Rather, discovery is limited by R. 4:10-2(a), affording litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…" R. 4:10-2(a). The relevancy of the discovery material is not predicated upon its admissibility at trial, instead it is founded upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause of action or its defense." Pressler & Verniero, Current New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Thus, documents which bear even a remote relevance to the subject matter of the cause of action are discoverable, but can be withheld by a demonstration of privilege. Payton, supra, 148 N.J. at 539.

Motions to compel discovery are found under the umbrella of R. 4:23. Specifically, R. 4:23-1(a), provides, in part, that:

> If a deponent fails to answer a question propounded or submitted under R. 4:14 or 4:15, or a corporation or other entity fails to make a designation under R. 4:14-2(c) or 4:15-1, the discovering party may move for an order compelling an answer or designation in accordance with the request.

In its letter brief in opposition to defendant's motion, plaintiff acknowledged that it was awaiting receipt of a final environmental report and argued that a date cannot presently be set for production of the report because it is currently being prepared. However, during oral argument, plaintiff's counsel estimated that the final environmental report should be completed by the beginning of March 2016.

Here, the discovery sought by defendant are the final environmental reports identifying the extent of the contamination on the subject property, including the estimates for its cleanup and

plaintiff's trial-ready appraisal report. As a threshold matter, the information sought by defendant is undoubtedly discoverable under R. 4:10-2, as it has a direct probative value concerning plaintiff's cause of action and defendant's defense.

Plaintiff's counsel concedes that defendant is entitled to plaintiff's "appraisal" and "production of a final trial appraisal" report, as contemplated under R. 8:6-1(b)(1), prior to trial. However, plaintiff asserts that as no date has been fixed for trial, defendant has "no grounds upon which to complain." Moreover, plaintiff contends that the court cannot set a date for the production of its final environmental report because "a final report from [the environmental consultant] delineating all of the contamination at the subject property is still forthcoming." However, our court rules do not allow parties to unilaterally select when and what discovery they will produce and in what order. Allowing the parties to dictate and "manipulate the discovery process by withholding certain discovery in an effort to obtain a strategic advantage" would fundamentally alter the underlying goals and objectives of pretrial discovery. Herrick v. Wilson, 429 N.J. Super. 402, 406 (Law Div. 2011). Our rules of discovery "were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990). As Justice Douglas expressed, "[m]odern instruments of discovery serve a useful purpose. They together with pretrial procedures make a trial less a game of blindman's [sic] bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States of America v. Proctor & Gamble Co., 356 U.S. 677, 682, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077, 1082 (1958) (citation omitted)). Thus, if plaintiff, any witness of plaintiff and/or plaintiff's property valuation expert(s) intends to rely upon any environmental investigations, correspondence, communications, studies, reports, analysis, proposals or estimates

with respect to the subject property, all of the aforesaid information must be supplied to defendant's counsel within sixty days of the date hereof.

Although plaintiff has furnished defendant with an appraisal report for the subject property on May 16, 2014, presumably under R. 8:6-8, plaintiff's and defendant's obligation to mutually produce and exchange their final trial-ready appraisal reports has not arisen under R. 8:6-1(b)(1). R. 8:6-1(b)(1) provides, in part, that "[a] party intending to rely upon the testimony of any person testifying as a valuation expert must furnish an expert report containing the information in R. 8:6-1(b)(2)" thirty days prior to the trial date. Because no trial date has been scheduled by the court for these matters, defendant's motion seeking to compel production of plaintiff's final trial-ready appraisal report under R. 8:6-1(b)(1) is premature. Therefore, the court declines to compel plaintiff to produce its final trial-ready appraisal report in these matters at this time.

II. Conclusion

The taxpayer's motion for partial summary judgment is granted and defendant's cross-motion for discovery is granted, in part, and denied, in part. The court will apply the holding in Inmar Associates, Inc. to the subject property thereby permitting consideration of its contamination in the derivation of its true market value. The court will issue an Order effectuating its decision.