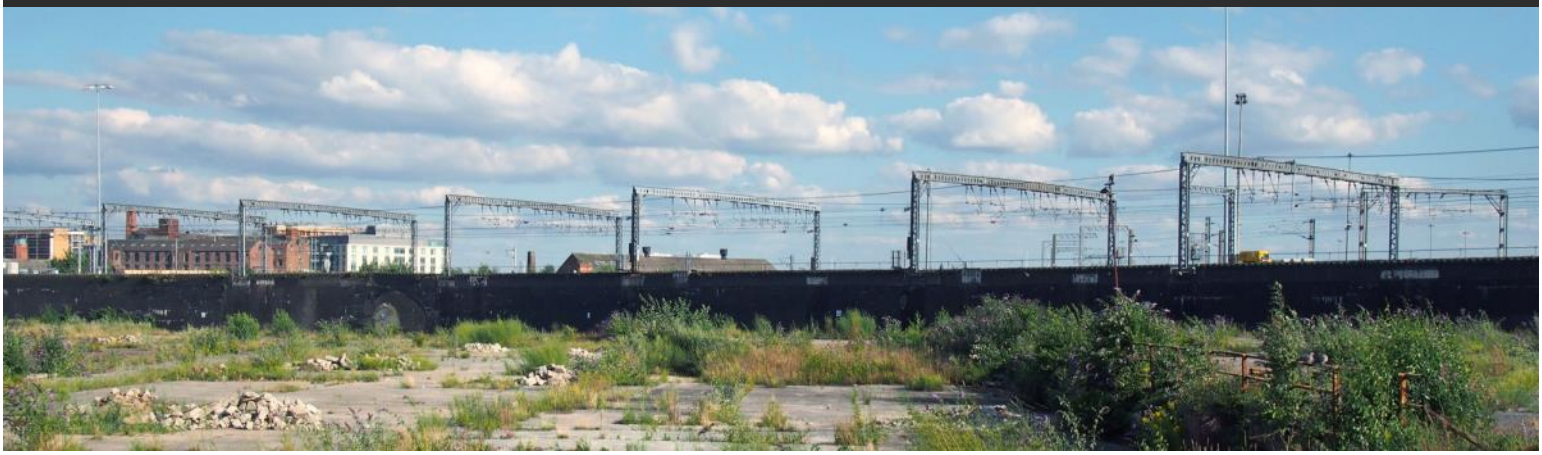
Commonwealth Court Offers Another Take on Valuing Contaminated Property



By David G. Mandelbaum | November 16, 2023 | The Legal Intelligencer

Intuitively, contamination reduces the value of property. But intuition does not count as evidence. The issues of how one proves that one ought to take a discount from a property's "clean" value for tax, eminent domain, or other valuation purposes, how big that discount ought to be, and how long it ought to last remain vexing. Last month the Commonwealth Court offered some guidance in *Tank Car Corporation of America v. Springfield Township*, No. 143 C.D. 2021 (Pa. Commw. Ct. Oct. 19, 2023).

The township sought to condemn property owned by Tank Car for use as a public park. After preliminary skirmishing, Tank Car agreed to tender the property, but the parties disputed the amount of compensation due.

The parcel had been the subject of a cleanup by the U.S. Environmental Protection Agency under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) some years prior. However, that cleanup was a "removal" action, not a permanent cleanup, known as a "remedial" action. Indeed, the property was not included on the national priorities list as a "Superfund Site," and so the EPA appears not to have selected that permanent remedy. Even so, the EPA has never sought additional work, and neither has the Pennsylvania Department of Environmental Protection.

The EPA had over $14 million in unreimbursed costs for its work, and in 2012 the EPA placed a lien on the property under Section 107(l) of CERCLA, 42 U.S.C. Section 9607(l). A Section 107(l) lien assures that

any proceeds from disposition of the property reimburse the federal past cost claim before the seller receives anything.

The township filed a declaration of taking in 2015. But the federal lien made transferring the property difficult, and Tank Car Corp. seems not to have had assets other than the real estate and certain insurance policies with which to pay the government's past costs. The United States and Tank Car Corp. entered into a consent decree in 2016 under which Tank Car Corp. assigned all its rights under its insurance and agreed to imposition of an activity and use limitation on the property. See *United States v. Tank Car Corporation of America*, No. 2:16-cv-05031-TON (E.D. Pa. entered Dec. 6, 2016). The United States agreed to grant Tank Car a covenant not to sue and contribution protection for the past costs and to release the lien. The United States reserved its rights to recover any further unreimbursed costs or additional work from any other person. Assuming one knew the value of the property "clean," by how much should one discount that clean value to reflect the environmental condition of the site?

The township argued for two discounts from the clean value. First, the township argued that the "cost to cure" the contamination ought to be deducted. Then, the township argued that the value should be reduced a further 20% to reflect the "stigma" or market resistance to the site given its history and condition.

While cost-to-cure seems intuitively obvious as a way of discounting the clean value, it can prove remarkably slippery in contamination cases. Unlike a leaking roof or failed HVAC system, the existence of contamination often does not affect substantially the ability of anyone to use a property. To be sure, contaminated soils may inhibit one's ability to excavate or to regrade. Contaminated groundwater may be unusable for process purposes or may require special measures to protect building spaces from vapor intrusion.

But, often, the impact of contamination derives from the obligation of an owner or occupier of the land to clean up. That has implications for use if the cleanup requires excavation or construction, at least during the time of the project. If the cleanup requires placement and maintenance of a cap or other structure, future uses must accommodate that engineering control. And, of course, ownership or occupation of the property may render one liable for the costs of the cleanup. So, cost-to-cure in the environmental context often means the cost to satisfy regulators that the site has been cleaned up.

In *Tank Car*, one of the pertinent regulators—the EPA—had conducted a cleanup. It had made no recent demand for more. Neither had any agency of the commonwealth. Moreover, the EPA had arranged to recover its costs from Tank Car Corp.'s insurance proceeds and had agreed to remove its lien from the property. Accordingly, one might argue that cost-to-cure would be zero for this site.

The November 2013 column in this series discussed *Harley-Davidson Motor v. Springettsbury Township*, 124 A.3d 270 (Pa. 2015). In that tax valuation case, the taxpayer's property had not been completely cleaned up, but parties other than the taxpayer—including the United States— had committed to do so. Therefore, one could say with confidence that neither the taxpayer nor anyone who bought from the taxpayer would have any financial responsibility for contamination on the property. The Supreme Court endorsed ignoring the cleanup cost as the cost-to-cure, because it would not be relevant to the valuation of the property.

The Commonwealth Court in *Tank Car*, however, held that *Harley-Davidson* had not disapproved cost-to-cure generally as a measure of the diminution in value from contamination. But, of course, the cost to cure the Tank Car site is unclear. What would one do other than what the EPA had already done to clean it up?

The township offered an expert appraiser who testified that "no 'buyer in his right mind' would buy the property without getting Act 2 clearance." The expert apparently meant that any reasonable buyer would insist upon completing the process and demonstrating achievement of some remediation standard under the Land Recycling and Environmental Remediation Standards Act (Act 2). One can reasonably question whether that is true. The EPA, after all, had conducted its removal action (to be sure, not denominated a permanent "remedial" action) and had not sought additional work for a long time. The DEP had not asked for more work under any of its authorities. An Act 2 final report only confers environmental liability protection for conditions disclosed in the report, so an implicit reopener always exists for new information. Would every reasonable buyer insist on going through that process, or might at least some stand on the federal process already completed?

In the event, the Commonwealth Court credited the township's expert and allowed a deduction from the property's clean value of an estimate of the costs of compliance with Act 2. Note that the estimate used was less than $300,000, so clearly no one anticipated an aggressive further cleanup.

The second deduction for "stigma" or "market resistance" was the subject of *Harley-Davidson*. An expert there testified that notwithstanding the obligation of other creditworthy parties to conduct the required cleanup, the existence of contamination justified a 5% reduction from the clean value. A contaminated and cleaned-up property may just not be as valuable as the very same property that has never been contaminated.

The township's appraiser in *Tank Car* testified based upon comparison with other contaminated sites that a 20% downward adjustment to value would be appropriate after deducting the cost to cure. The trial court did not credit that opinion because the expert had only a small sample of contaminated sites upon which he based his 20% opinion. Moreover, those sites were not particularly comparable.

Whatever one thinks of a 20% deduction, the evidentiary standard for an expert opinion on this sort of discount cannot call for a large sample size of similar properties contaminated similarly. Properties have unique characteristics, as does contamination. And most parties have no good incentive to make a record of any price discounts they may have negotiated in market transactions in contaminated real estate. There are some data, but not a great many. So, what will be good enough proof remains to be seen.

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