

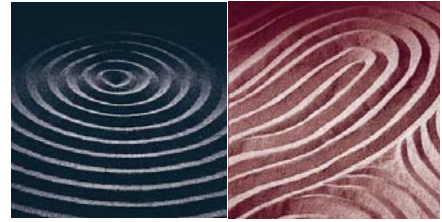
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Getting a Break on Your Property Taxes for Contaminated Land - What You Need to Know: Valuation and Property Tax Implications

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January 2007

GETTING A BREAK ON YOUR PROPERTY TAXES FOR CONTAMINATED LAND

WHAT YOU NEED TO KNOW:

VALUATION AND PROPERTY TAX IMPLICATIONS

By Peter Milligan (Toronto) and Sarah Hansen (Vancouver)

INTRODUCTION

Most people's reaction to contamination found on their property is negative and represents yet another cost and liability that must be dealt with. However, there may be some silver lining in this discovery in that this same contamination may lead to a reduction in property taxes, thereby offering the owner tax savings.

THE BASICS

Various assessment legislation in force throughout Canada provides for an annual assessment roll for the purpose of levying property taxes by local governments and other taxing jurisdictions in the following calendar year. Assessors in each jurisdiction are required to establish the assessment roll by assessing land and improvements at their actual value as at a fixed date and in their condition based on the preceding year. Classes of real property are prescribed which attract a different rate of tax, namely whether they be residential, utility, major or light industry, business or commercial, managed forest land, recreational, non-profit organizations or farm properties.

In brief, there is a two-level appeal process. Ordinarily, the first level is to a Property Assessment Review Panel (the "Panel"). The second level is to a Property Assessment Appeal Board (the "Board"). All appeals must be filed before a set date specified in the applicable statute. In British Columbia, for example, all appeals must be filed on or before January 31st, 2007. Panels hear complaints from early February to March 15th in each year providing a filter for complaints that eventually flow through to the Board. Appeals to the Board from Panel decisions must be filed by April 30th of each year. An appeal of a Board decision is to the Supreme Court of British Columbia.

CONTAMINATED LANDS

So where does the valuation of contaminated land enter into the assessment realm? The answer is that various parties have been successful in obtaining a reduction in property value thereby lowering the amount of property tax paid for a given property. The number of Board decisions is growing. Examples of circumstances where reductions in assessment value has occurred include the presence of metals, contaminated ground water, “lusts” (leaking underground storage tanks), decommissioned service stations, petroleum hydrocarbons, landfills and more generally, proximity to the same. There has also been recognition of UFFI, radioactive waste, asbestos and issues of stigma. To a certain extent, U.S. decisions have set the framework for appeals of assessments of contaminated lands.

Legislation provides that assessors must determine the actual value of land and improvements and enter the actual value on the assessment roll. Most use a mass appraisal approach, collecting and analysing market data generated through computer programs and various other databases to estimate value before applying that data to individual properties. In Ontario, valuation of land is assessed based on “current value”, meaning the amount of money the fee simple interest if unencumbered would realize if sold at arm’s length by a willing seller to a willing buyer.

In British Columbia, valuations are assessed based on “actual value” meaning the market value of the fee simple interest in land and improvements, where “market value” is the price the property might reasonably be expected to realize when sold by a willing vendor to a willing purchaser. Present use, location, original cost, replacement cost, revenue or rental value, selling price of the land and improvements and comparable land and improvements, economic and functional obsolescence, and any other circumstances affecting the value of the land and improvements are all considered within this definition.

VALUATION PRINCIPLES

The three traditional approaches to calculate value include replacement cost, income approach and market data. There are several issues raised when valuing contaminated land that warrant a reduction in property value as follows:

- lack of marketability;

- liability for clean-up;
- impairment of use;
- lack of availability of typical financing;
- quantification of costs to cure; and
- stigma.

So what are assessors saying and why are their decisions being challenged? Typically, assessors treat all taxpayers in a similar fashion the end result of which is to ignore contamination. Alternatively, assessors take the view that contaminated property should not be “rewarded” with lower assessments and that no reduction should be made where no expenditure has been affected to remediate the contamination. Finally, the level and extent of the impact, impairment and costs are often either overstated or understated, or unproven. The onus of proof is on the taxpayer seeking relief.

Counsel have been able to successfully appeal assessor decisions resulting in a reduction of assessment value often through detailed evidence and the use of expert testimony. Various direct evidence including testing, environmental and other reports, financial information and analysis, appraisals, insurability, marketability, and financing, or lack thereof, is sometimes required. Despite the upfront investment, the overall reduction in assessment value and tax represents a potential long-term savings for a contaminated property and may be a means of redirecting funds towards the eventual remediation of the site.

CASE IN POINT

One example of a case in British Columbia where an Appellant was able to reduce the assessed value of a contaminated property is the *Vancouver Chinatown Merchants Association v. Assessor of Area # 09 – Vancouver* [2002] BCSC 721 case. The case concerned the assessed value of Chinatown Plaza; a mixed-use commercial development. The site was previously used as a coal gasification plant between the late 1800s and early 1950s, and, as a result, significant quantities of hazardous wastes were generated, and either spilled or disposed of at the site. One

of the issues raised on appeal was whether the actual value should be adjusted to account for contamination. While there were evidentiary and other issues raised in the case, in the end, the Board applied an adjustment rate to the value of the land and improvements to recognize the contamination. Accordingly, the case stands for the proposition that the Board may adjust the capitalization rate upwards due to contamination to reflect the risk and lack of marketability associated with such properties.

WHEN SHOULD A TAXPAYER PURSUE PROPERTY ASSESSMENT/TAX RELIEF?

An appeal should be considered if you have a contaminated property that you think has been assessed at a value that does not reflect the fact that it is contaminated. Miller Thomson LLP is a leading firm in Environmental Law with offices across Canada. We also have expertise in buying, selling and developing contaminated land generally, including:

- Environmental Due Diligence;
- Addressing environmental issues in Purchase and Sale Agreements;
- Planning and Development Issues;
- Dealing with Environmental Consultants; and
- Valuation of Contaminated Land: Property Tax Implications.

Any one of our legal experts would be pleased to assist you. For further information on our services, or if you need help in appealing a valuation of a contaminated site, please contact Mr. Peter Milligan in our Toronto office or Ms. Sarah Hansen in our Vancouver office.