

# ADMINISTRATIVE WATCH

## ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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### Pennsylvania Supreme Court Addresses the Impact of Environmental Contamination and Remediation on Real Estate Tax Valuation

The Pennsylvania Supreme Court recently handed down its opinion in *Harley-Davidson Motor Co. v. Springettsbury Twp.*, --- A.3d --- (2015), in which the Court discusses the impact of environmental contamination on a property's value for real estate taxation purposes, when the current owner is a party to an agreement with the government to remediate the contamination. The site's current owner, Harley-Davidson Motor Company (HD), is a party to an agreement with the United States government (including the Department of Defense and Navy) to share in cleanup costs of a former weapons manufacturing plant and is participating in the EPA's "One Cleanup" program, under which HD's cleanup of the property is governed by Pennsylvania's brownfields remediation statute (Act 2). The cleanup has not been completed.

In a tax assessment appeal, the primary question to be answered is, "what would a willing but not obligated buyer pay for the property from a willing but not obligated seller?" In the opinion, the Pennsylvania Supreme Court reiterates that "all relevant factors" having a bearing on the fair market value must be considered. Under well-established Pennsylvania assessment law, the price that the current owner would pay for the property if it were a hypothetical purchaser is not to be considered when evaluating the assessable market value. This is significant in this instance because it led the Court to correctly consider what a subsequent hypothetical purchaser would face with respect to environmental contamination in light of HD's agreement with the government, rather than HD's current position.

In support of a higher assessment, an interested taxing jurisdiction that intervened in the assessment appeal noted that any prospective purchaser would consider that the property is subject to an agreement where either the United States DOD/ Navy or HD is required to pay to remediate the property, and that a remediation fund has been established for this purpose. Furthermore, Act 2 contemplates a model buyer-seller agreement, which can be used to facilitate the purchase/sale of property while remediation of property is ongoing, through which the prospective purchaser can obtain protection from potential environmental liability. In support of a lower assessment, HD responded by noting, among other things, that there is no evidence that the site will meet all the criteria to release such liability. The agreement does not limit future claims of any environmental regulator. Any cleanup expenditure is contingent upon availability of appropriated funds. There is no provision as to what will occur if HD goes out of business and/or files for bankruptcy. Moreover, any purchaser would be responsible for maintaining engineering controls on the property, and if there was damage to a contaminated area, the prospective purchaser would be responsible for repair and remediation. The Court also suggests that Act 2's conditions could include limitations on the use of the property only for commercial/industrial purposes and/or prohibitions against disturbing subsurface areas.

In short, the Pennsylvania Supreme Court states that "the potential impact of a settlement agreement regarding environmental remediation and ongoing limitations and maintenance as a by-product thereof . . . are relevant factors that must be taken into account." It concludes that the trial court "is to determine the effect of possible remediation liability and environmental restrictions and maintenance responsibilities upon a potential purchaser of the property upon its fair market value" and remanded the case for this purpose.

The Court also addresses whether it was improper for an appraiser to make a five percent reduction of value on the basis of "stigma" with scant evidence of the expert witnesses' foundation for this assertion. While referring it to as a "close call" from an evidentiary perspective, and in consideration of "the inherently imprecise nature of environmental stigma," the Court concludes that the appraiser's opinion of the impact of stigma was not "pure conjecture"; the appraiser's testimony "suggests that it is standard practice in the appraisal community to apply a five percent reduction in the contest of commercial/industrial property."

This case serves as a reminder that environmental contamination of a property undoubtedly impacts its value for tax assessment purposes. This is true even if the property is the subject of Act 2 or otherwise the subject of a remediation plan, as long as a subsequent hypothetical purchaser may nonetheless be exposed to liability, costs associated with remediation/monitoring, or limitations on the property's use. Furthermore, regardless of the status of cleanup, the stigma associated with historical environmental contamination may well impact the property's value even if a plan is in place to remediate it (and indeed, even after cleanup has occurred).

If you have questions regarding this decision, or Pennsylvania commercial or industrial property tax assessments in general, please contact Peter H. Schnore at (412) 394-5692 or [pschnore@babstcalland.com](mailto:pschnore@babstcalland.com), or Lindsay P. Howard at (412) 394-5444 or [lhoward@babstcalland.com](mailto:lhoward@babstcalland.com).